

CANADA / JUDGMENT

Hurford v. Mills

2009 BCSC 859

COURT

Supreme Court of British Columbia

DECIDED

29 June 2009

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2009 BCSC 859 Hurford v. Mills

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hurford v. Mills,

2009 BCSC 859

Date: 20090629

Docket: E052660

Registry: Vancouver

Between:

David Thomas Hurford

Plaintiff

And

Alissa Genevieve Mills

Defendant

Before: Registrar Blok

Reasons for Decision

Appearing on his own behalf:

D. Hurford

Counsel for the Defendant:

H. MacDonald

Place and Date of Hearing:

Vancouver, B.C.

March 4 and May 26, 2009

Place and Date of Judgment:

Vancouver, B.C.

June 26, 2009

[1] This is a reference in a family law matter, conducted pursuant to an order made by Mr. Justice Truscott on September 23, 2008.

[2] The relevant portion of Truscott J.'s order reads as follows:

That the issue of net costs for child care and other section 7 special and extraordinary expenses that are set out in paragraph 12 of the Order of the Ontario Superior Court of Justice dated May 14, 2004 be referred to the Registrar of the Vancouver Registry of the Supreme Court of British Columbia for certification under Rule 32(2) as to an accounting between the parties which certificate will be binding on the parties.

[3] The May 14, 2004 order of the Ontario Superior Court of Justice (the "Ontario Order"), referred to above, reads in part as follows (Ms. Mills being the Applicant in the Ontario proceedings and Mr. Hurford the Respondent):

11. Beginning September 15, 2003 and on the 15th day of each month thereafter, the Respondent shall pay to the Applicant child support, for the one child of the marriage, in the sum of \$1,200.00, being the table amount of \$572.00 plus a contribution of \$628.00 towards his proportionate share of section 7 expenses based on the Respondent's current income of \$70,000.00.
12. A review of the Respondent's contribution towards the section 7 expenses will occur on a semi-annual basis, with the first review to be held on or before July 1st, 2004. The Applicant shall provide proof of actual net costs for child care and other section 7 expenses. The Respondent shall provide proof of actual out of pocket travel expenses relating to the exercising of his care periods. The parties will reconcile these expenses retroactive to September 15, 2003 and each subsequent 6 month period thereafter in order to determine if there is an over or under payment by the Respondent. If the Respondent owes the Applicant money, this shall be paid within 30 days of the reconciliation. If the Respondent has overpaid money to the Applicant, he will be entitled to repayment within 30 days. In the event of any disagreement between the Husband and the Wife on any of these matters, the matter shall be referred to a mediator or such other family counsellor within 15 days as they may designate from time to time.

13. The parties will only contribute to the child's special or extraordinary expense in excess of \$150.00 per annum, save and except the child's current section 7 expenses, if the parties consent to the expense in advance, in writing. Neither party will unreasonably withhold consent.
14. Medical expenses not covered by either party's extended health insurance are special or extraordinary expenses and will be paid in accordance to paragraph 15.
15. The Applicant will pay 46.20% and the Respondent will pay 53.80% of the child's medical expense not covered by either party's extended health insurance. A party incurring a non-emergency medical expense will obtain the other's consent in advance, in writing. Neither party will unreasonably withhold consent.
- [4] By way of brief background, the parties were married on September 24, 1999 and divorced on May 11, 2004. They are the parents of a girl, Kennedy, who was born on June 19, 2000.
- [5] The Ontario Order was a consent order granting various family law relief. At the time of their agreement Mr. Hurford was living in Ottawa and Ms. Mills wished to move from Montréal to Vancouver. The terms of the order excerpted above were designed, in part at least, to deal with the additional expense that Mr. Hurford would incur in exercising access. Mr. Hurford later moved to Winnipeg, but he still had to travel to Vancouver for his access visits. Still later, Mr. Hurford moved to Vancouver.
- [6] Mr. Hurford incurred considerable expense in order to exercise access. He said he economized early on by combining business travel with his access visits, and he does not claim for these trips. His ability to do this ended in December 2003.
- [7] From December 2003 to February 2007 Mr. Hurford paid for (by my count) 47 flights, and he also incurred some other charges for flight changes and car rental. The total amount claimed for air transportation is \$16,757.45 and the total amount claimed for car rental is \$2,597.38. Mr. Hurford said that he incurred travel expenses in addition to those listed but that he has chosen not to claim them.
- [8] Through her counsel Ms. Mills confirmed that she did not challenge the amount of the access visit expenses claimed by Mr. Hurford.
- [9] As for child support payments, Mr. Hurford said that he paid the full required amount (\$1,200) from August 15, 2003 through to February 15, 2005. He said that Ms. Mills failed to provide receipts for child care expenses and so he stopped paying the \$628 each month that was designated for child care expenses. Later, he said that he stopped these payments because it had come to his attention that child care providers were not being paid. He also said, however, that he paid \$628 for two more months (in June and July 2005) and that he also made three payments of \$360 each directly to a child care facility in September, November and December, 2006. He continued to pay the required child support amount (\$572 per month) throughout.

- [10] Mr. Hurford calculated that the total amount he has paid for "child care" is \$12,924.00. I would note, however, that there is an adding error on his list insofar as the figures he lists add up to \$12,384.00.
- [11] At the resumption of this hearing on May 26, 2009 Mr. Hurford added that he had also paid Ms. Mills \$1,400 by wire transfer in April 2005 because "she requested money as an advance for child care and support".
- [12] Ms. Mills testified. It is apparent that she has had some recent difficulties in life. She lost her employment in 2007 because of the time she had to spend with Kennedy, who was having health issues and was in and out of hospital. She currently lives with her parents and described her situation as "devastated" and "broke". She said that she has filed an assignment in bankruptcy; evidently this was done in November 2008.
- [13] Ms. Mills said that in February 2005 she hired a nanny ("Maria") but had to let her go in May 2005 because she could not afford her services any more, Mr. Hurford having made the unilateral decision to halt his child care payments. Ms. Mills thereafter used the services of an on-call babysitter ("Julia"), but this also became beyond her ability to pay and the babysitter's services were unsatisfactory in any event. Instead, she turned to family and friends for child-minding assistance. Kennedy was by this point in kindergarten and so was in school in the afternoons.
- [14] Ms. Mills said that she paid Maria a salary that was net of room and board. She also provided a bus pass, and taxis as needed, at a cost of \$100 per month. The salary cost varied because Ms. Mills travelled out of town on two occasions and this meant an increased nanny cost at those times. The actual amount paid varied between \$250 and \$450 each week (later, she said \$150 to \$300 per week), with a minimum monthly cost of about \$600.00.
- [15] Julia was paid \$150 to \$200 for the few weeks she worked, and Ms. Mills also provided her with a bus pass. She was paid in cash.
- [16] Ms. Mills produced receipts for Kennedy's medication expenses, which totalled \$272.13. She said she also paid for extracurricular activities (swimming, tennis and soccer), the receipts for which totalled \$371.00.
- [17] Ms. Mills had no receipts or documents evidencing her child care expenses. She said that her records were in a storage locker but that her financial difficulties have resulted in unpaid storage facility fees and the facility refuses to allow her access. Following a direction made on the first day of this hearing Ms. Mills sought records from her bank and until the day before the resumed hearing understood she would be getting copies of her cheques. She said that at the last minute the bank told her that she would not be getting copies of cheques. She did, however, produce a printout of her account history from October 2006 to January 2009, which identifies debits by payee in some detail.

- [18] Ms. Mills said that the two child care payments listed by Mr. Hurford for mid-2005 were not actually made. He provided the cheques to Ms. Mills but he asked her not to cash them. Much later she presented them for payment through her bank but the cheques were not honoured.

Positions of the Parties

- [19] Mr. Hurford submitted that he had been reasonable in requiring receipts and in ceasing child care payments when receipts were not provided and when it appeared that his payments were not being used for their intended purpose.
- [20] Mr. Hurford calculated that he had paid a total of \$32,278.83 by way of access visit expenses and child care payments - and the sum of \$1,400 paid in April 2005 was in addition to that - and Ms. Mills had provided no proof of any expenses she had incurred. He therefore sought a certificate in his favour of \$33,678.83.
- [21] Ms. Mills argued that it was Mr. Hurford's failure to make the required child care payments that resulted in her inability to afford outside child care. Mr. Hurford failed to make 51 monthly payments of \$628, for a total of \$32,048, and the only payments he made during that time were three payments of \$360 (\$1,080 in total) paid to directly to a child care facility, thus meaning he underpaid his support obligations by a total of \$30,948.00.
- [22] According to Ms. Mills, what Mr. Hurford is attempting to do is to offset expenses against payments that he never made. She argued that I should certify that Mr. Hurford has underpaid support in the amount of \$30,948.00.
- [23] Ms. Mills also submitted that Mr. Hurford had failed to provide evidence of his income as required for apportionment purposes (s. 7 of the Guidelines), nor had he provided the required evidence of hardship that would support a consideration of his travel expenses (s. 10 of the Guidelines) but I have concluded that this is effectively a challenge to the Ontario Order, a challenge that I cannot entertain.

Discussion

- [24] To some extent, the argument of Ms. Mills centred on what ought to have happened. She argued that Mr. Hurford ought to have made the monthly child care payments and that the absence of these payments prevented her from engaging outside child care. For his part, Mr. Hurford said he ceased making these payments because he was not given child care receipts. The parties could not resolve these differences between themselves and neither party sought relief from the court, as really they ought to have.

- [25] I am satisfied, however, that the task before me is to address the state of accounts between the parties as matters actually happened, not as they ought to have happened. What was actually paid by Ms. Mills for child care and other section 7 expenses for child care must therefore be tallied, and in the words of the Ontario Order, "reconciled", against the travel expenses incurred by Mr. Hurford for his access visits, to determine whether Mr. Hurford has overpaid or underpaid section 7 expenses.
- [26] I observe that, in any event, the result is no different than if the approach suggested by Ms. Mills is used. Certainly Mr. Hurford ought to have made the payments required of him, but certainly, as well, under the terms of the Ontario Order s. 7 expense receipts ought to have been provided and reconciliations of the payments and expenses ought to have been made every six months. To conclude, at this stage, that Mr. Hurford owes a further \$30,948 for section 7 payments would simply result in a greater overpayment - the exact same amount - due back to him.
- [27] To the extent that there may be unfairness insofar as the situation contemplated by the Ontario Order never really came about (and as to whether there is unfairness I express no opinion) there may be orders the court could make to remedy it. But on the figures themselves the disputes are relatively few.
- [28] As for Mr. Hurford, I am satisfied that his access expenses are what he says they are, being in total \$19,354.83, and that they are reasonable. As for the amount he paid to Ms. Mills for section 7 expenses, the bank records seem to confirm that two of the payments were not honoured and thus these must come off the total. Put another way, I am not satisfied that Mr. Hurford has met the burden of showing that these payments were, in fact, made. I also would not include the additional payment of \$1,400 made in April 2005, as this was described as an advance on both child support and child care (section 7) expenses and on this evidence I am unable to conclude it was entirely for section 7 expenses or, if some amount was for section 7 expenses, what amount ought to be apportioned for that purpose.
- [29] I therefore fix the total amount paid by Mr. Hurford for section 7 expenses at \$11,128.00. When this is added to his access expenses the total is \$30,482.83.
- [30] Ms. Mills' expenses are less certain insofar as she lacks documents to support her claims. I am satisfied, however, that there is an explanation for their absence. In the case of the nanny, it was Mr. Hurford himself who at this hearing introduced documents evidencing the sponsorship or immigration application for Maria and who referred to a claim from a nanny agency for unpaid placement fees, and both of these support Ms. Mills' evidence that Maria was, in fact, engaged. On the evidence I am satisfied that no less than \$2,800 (\$600, plus \$100 for transportation, each month, for four months) was spent or incurred by Ms. Mills on the nanny.

- [31] I also accept Ms. Mills' evidence that Julia was paid \$150 to \$200 for the time she worked and that she was provided with a bus pass. I would allow this cost at \$200. I would also allow the medical expenses of \$272.13. I would not allow the costs of Kennedy's activities, however, because I am not satisfied they are "extraordinary" (see section 7 of the Guidelines) in either character or amount (\$371 in total), given the circumstances of the parties.
- [32] The total of the expenses allowed for Ms. Mills is therefore \$3,272.13.
- [33] The difference between the amounts paid by the parties is \$27,210.70. Mr. Hurford is entitled to a certificate in that amount.
- [34] Upon a consideration of the wording for the certificate I have concluded that it ought to recite a date up to which these amounts have been calculated. This date is not obvious on the evidence. I therefore ask that the parties each make a brief written submission on this issue within 10 days of the date of these reasons.

"District Registrar Blok"

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Prepared on 27 October 2026 · Esheria