
CANADA / JUDGMENT

K.M.M. v. D.R.M.

2017 BCSC 732

COURT

Supreme Court of British Columbia

DECIDED

3 May 2017

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2017 BCSC 732 K.M.M. v. D.R.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.M.M. v. D.R.M.,

2017 BCSC 732

Date: 20170503

Docket: E1650508

Registry: Prince George

Between:

K.M.M.

Claimant

And

D.R.M.

Respondent

Before: The Honourable Mr. Justice Tindale

Reasons for Judgment

In Chambers

The Claimant, K.M.M.

In Person

The Respondent, D.R.M.

In Person

Place and Date of Hearing:

Prince George, B.C.

November 3, 2016

December 1, 2016

January 19, 2017

Place and Date of Judgment:

Prince George, B.C.

May 3, 2017

- [1] The respondent D.R.M. seeks a variety of relief in his notice of application filed September 2, 2016. In particular, he seeks a variation of an interim child support order pronounced by Master Taylor on June 25, 2013, and retroactive and prospective child support from the claimant.
- [2] The claimant K.M.M. is opposed to this relief.
- [3] This matter was heard on November 3 and December 1, 2016. The respondent sought to re-open the application on January 19, 2017 to introduce further affidavit material.

Background

- [4] The parties were married on September 7, 1991, and separated on or about December 27, 2012.

- [5] The parties have two children namely:

S.M., born May 16, 1999

K.M., born November 8, 2000

(collectively, the "Children")

- [6] The respondent is a successful businessman who is a shareholder, director and/or an officer in a number of different companies which include but are not necessarily limited to:

(i) CMC;

(ii) CBC;

(iii) CCC; and

(iv) CRC.

(collectively, the "Companies")

- [7] The claimant is an accountant and businesswoman.
- [8] Both parties referred to this litigation as "high conflict". There has been a plethora of court orders made in this proceeding.
- [9] Master Taylor, on June 25, 2013, ordered that the respondent pay to the claimant monthly child support of \$1811. This order was based on the respondent's Guidelines income of \$126,000 per year.
- [10] On January 21, 22 and 24, 2014 I heard two applications. The first was the respondent's application that sought sole interim custody of the Children and secondly, an application for interim sole parenting responsibilities for the Children brought by the claimant.
- [11] I dismissed the respondent's application and ordered, among other things, that the claimant assume all interim parenting responsibilities for the Children pursuant to section 41 of the Family Law Act, S.B.C. 2011, c. 25. Those reasons were pronounced on April 3, 2014 and are indexed at K.M.M. v. D.R.M., 2014 BCSC 569.
- [12] After a 26-day trial on the issues of custody, guardianship, parental responsibilities and parenting time for the Children, I ordered, among other things, that the claimant have sole custody of the child K.M. and that the parties share joint custody of the child S.M. on a one week on, one week off basis. Those reasons are indexed at K.M.M. v. D.R.M., 2015 BCSC 1126.
- [13] It should be noted that, by agreement, the parties adjourned a number of issues in their matrimonial action including property division and child support.

Position of the Parties

Respondent

- [14] The respondent argues that the June 25, 2013 order was predicated on the Children living in the sole custody of the claimant. The respondent argues that S.M. has been living in a shared or sole custody regime with him for 37 months. In particular, the respondent argues that from November 1, 2013 until April 30, 2014 he had parenting time with S.M. more than 60% of the time and any interim child support should reflect this.
- [15] The respondent submits that his time with the child S.M. decreased after the order of April 3, 2014, but that he had S.M. in his care at least 40% of the time and since June 30, 2015 he has had S.M. in his care 50% of the time.
- [16] The respondent complains that the claimant has only provided her 2012 - 2014 income tax returns. To this point, he advances that he was prejudiced by not being allowed to bring on this application sooner, as I directed that the issues relating to disclosure which were immediately before the court be completed first.

[17] The respondent has provided his income tax returns for the years 2012 - 2015 on this application. The respondent did not provide any financial documents for the Companies in his initial application materials. The respondent's Line 150 income is as follows:

2012: \$126,532.84

2013: \$301,653.20

2014: \$132,969.25

2015: \$162,039.43

[18] The respondent argues that there should be deductions from his income for capital gains as well as a substantial dividend he received in 2013 in any calculation for child support.

[19] The respondent states that the claimant's Line 150 income for the years 2012 - 2014 are as follows:

2012: \$112,407.90

2013: \$106,641.60

2014: \$112,075.13

[20] The respondent argues that the claimant's 2015 Line 150 income would be approximately \$300,000 based on her estimated employment income of \$117,000 and some RRSPs that she cashed in with an approximate value of \$182,000.

[21] The respondent argues that, because the claimant's income is not known for 2015, any prospective child support should be based on the 2012 incomes of the parties and seeks a retroactive child support order based on the time the child S.M. has been with him since November 1, 2013.

[22] It is the respondent's position that in the July 8, 2016 reasons, indexed at K.M.M. v. D.R.M. 2016 BCSC 1263, I stated that the parties had similar incomes based on the evidence before me. It should be noted that the issue being decided in that judgment was an application the claimant filed seeking money for counseling for the children and other relief related to the parties' property.

Claimant

[23] The claimant argues that it is not clear what the respondent's actual income is because he has not filed the appropriate documentation for the Companies and that using the respondent's 2012 income for any child support calculation would be using the respondent's lowest income since the parties separated. The claimant argues that the respondent's reported income does not "add up" and he has not provided the appropriate documentation to determine his actual income.

- [24] The claimant argues that the respondent took a substantial dividend in 2013 after the June 25, 2013 order was pronounced.
- [25] The claimant posits that the respondent's income since the June 25, 2013 order is significantly higher than when the order was made and that any capital gains or dividends paid to him should be included in the respondent's income calculation.
- [26] The claimant agrees that the child support order should be changed because S.M. is currently living 50% of the time with the respondent but does not agree that S.M. was in the respondent's care over 40% of the time other than from January 2015 going forward. Further, this Court should not make a retroactive child support order because parental responsibilities and custody of the children have already been determined by this Court on two separate occasions.

Respondent's Application to Re-open

- [27] On January 19, 2017 the respondent made an application requesting that I consider the materials provided in his 59th affidavit, filed on December 5, 2016, that address three points:
1. Any capital gains reflected in his income tax returns have not been realized as they are only 'paper gains' from appreciation on matrimonial assets;
 2. the 2013 dividend that he received was a one-time occurrence; and,
 3. the carrying-cost for interest on loans should be deducted from the respondent's 2012 - 2015 income tax returns.
- [28] The claimant opposes this Court considering the respondent's 59th affidavit, stating that the respondent could have made these arguments during the initial hearing.
- [29] The respondent's 59th affidavit contains evidence which assists in understanding his financial position. The majority of this information has been disclosed to the claimant previously. The evidence is relevant and I have considered the respondent's 59th affidavit on this application. The evidence includes the 2013 financial statements of CBC.

Decision

- [30] The respondent seeks a variation of the interim order of Master Taylor, pronounced June 25, 2013, because my order of June 30, 2015 changed the custodial status of the Children. At present, the child K.M. is in the sole custody of the claimant and the respondent and claimant share custody of the child S.M.
- [31] In addition, the respondent seeks retroactive child support commencing November 2013 for S.M. based on his argument that S.M. was in his custody for not less than 40 percent of the time. This is despite the fact that, on April 3, 2014, I dismissed his application for sole custody of the Children.

[32] There are a number of applicable sections of the Federal Child Support Guidelines SOR/97-175 ("Guidelines"). Sections 8 and 9 read as follows:

8. Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.
9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[33] The British Columbia Court of Appeal in *Dyck v. Bell* 2015 BCCA 520 considered the analysis required for child support in a shared custody situation stated the following at para. 27:

[27] The error arose because the trial judge should have adopted what is referred to as the "economies of scale" approach: see *E.G.P. v. S.L.P.*, 2009 BCSC 1221 at paras. 18-23, and *R.B. v. L.M.L.* 2014 BCSC 134 at paras. 44-47. On that approach, the starting point of the analysis would be a payment based on the table amount of Mr. Bell for two children, less the table amount of Ms. Dyck for one child. This would amount to \$976 per month based on the Guideline incomes used by the chambers judge. The court would then be required to consider the application of s. 9 of the Guidelines in accordance with the principles set out in *Contino*.

[34] The Court in *Dyck* then went on to summarize some of the applicable principles set out in *Contino v. Leonelli-Contino*, 2005 SCC 63, at para. 29:

[29] In *Contino*, the Supreme Court explained that s. 9 requires an exercise of the court's discretion, based on the factors set out in the section, and not simply the application of a mathematical formula

27 The three factors structure the exercise of the discretion. These criteria are conjunctive: none of them should prevail (see *Wensley*, at p. 90; *Payne and Payne*, at p. 254; *Jamieson v. Jamieson*, [2003] N.B.J. No. 67 (QL), 2003 NBQB 74, at para. 24). Consideration should be given to the overall situation of shared custody and the costs related to the arrangement while paying attention to the needs, resources and situation of parents and any child. This will allow sufficient flexibility to ensure that the economic reality and particular circumstances of each family are properly accounted for. It is meant to ensure a fair level of child support.

[35] As I noted earlier in this decision, the respondent has not filed any of the financial statements of any of the Companies except the 2013 financial statements for CBC. In my view it is impossible to determine his actual income without all of these documents. Section 21 (1) (f) of the Guidelines places the following obligation on the respondent:

21 (1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

- (f) where the spouse controls a corporation, for its three most recent taxation years
- (i) the financial statements of the corporation and its subsidiaries, and
- (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;

[36] The respondent has not provided this basic information although he is required to do so. This Court, without that information, cannot determine any child support, prospective or retroactive. The respondent has a complicated financial situation which is not adequately described by his income tax returns alone.

[37] Illustrative of this point, the respondent agreed to an order for child support in June of 2013 based on an income of \$126,000 when in fact his income for that year was over \$300,000.

[38] Before making any prospective or retroactive child support order, this Court must be able to assess the means of the parents and the needs of the Children. The information before this Court at this time does not enable me to do that.

[39] The parties have considerable assets and liabilities which have not yet been determined at trial. The only way to properly assess the respondent's income will be during a trial with full disclosure and discovery, and, in particular, greater information about the various companies that he controls.

[40] The respondent has not provided even the basic information to grant the order he seeks. This matter needs to be heard with the trial for the division of family property so a full picture of the economic reality and circumstances of the parties can be considered.

[41] The declarations that the respondent seeks have been previously considered and ruled on by the Court. In any event the declarations are only relevant to the calculation of prospective and retroactive child support which cannot be calculated based on the information provided on this application.

Conclusion

[42] The respondent's application is dismissed except for the issue of child support.

[43] I order that the issue of child support be heard with the trial for the division of family property.

[44] The issue of costs of this application will be determined by the trial judge.

"The Honourable Mr. Justice Tindale"

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