
CANADA / JUDGMENT

Kubota v. Kubota

2020 BCSC 774

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 774 Kubota v. Kubota

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kubota v. Kubota,

2020 BCSC 774

Date: 20200525

Docket: E160800

Registry: Vancouver

Between:

Bradley Douglas Kubota

Claimant

And

Wendy Lynn Kubota

Respondent

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for Claimant:

K. Beazer

Counsel for Respondent:

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Place and Date of Hearing:

Vancouver, B.C.

March 10, 2020

Supplementary Written Material and Submissions:

Place and Date of Judgment:

Vancouver, B.C.

May 5, 11, 12, 2020

Vancouver, B.C.

May 25, 2020

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Introduction

- [1] Before me are cross applications addressing a package of parenting and support issues. The applications are triggered by the fact that the parties' three daughters have not lived where it was assumed they would live when the parties agreed to a final order.

The Final Order

- [2] Following the parties' agreement to minutes of settlement on August 17, 2016 (the "Minutes"), a final consent order in this family litigation was entered on March 9, 2017 (the "Consent Order"). The Consent Order provided in material respects that:

- a) The oldest child, D, would reside primarily with the claimant;
- b) The two youngest children, C and N, would be in a shared custody arrangement;
- c) Child support would be calculated based on the respondent paying child support to the claimant on account of D, and there would be an offsetting calculation for C and N. The net result yielded \$1230 payable monthly by the claimant to the respondent;
- d) Either party could request a review of child support annually;
- e) In the case of a child's residency change, the child support payable for the affected child would be reviewed and adjusted to reflect the circumstances. Any adjustment to child support resulting from a child's residency change would take effect "as of the date of the permanent residency change";
- f) The parties would share special and extraordinary expenses equally;
- g) The parties would share the costs of a nanny, whose duties would "include driving the children to and from the claimant's office as required under the parenting plan from time to time";
- h) Spousal support would be paid by the claimant to the respondent in the sum of \$3,540 per month. Neither party would seek to vary spousal support unless there was a material change in circumstances that affected the needs or abilities of either party;
- i) Pending the sale of the family home, the parties would share the property taxes and insurance on the family home equally.

The Issues

- [3] The respondent advanced two applications and the claimant advanced a third, all seeking a range of remedies regarding parenting time, support, and accounting for expenses. To the parties' credit, several aspects of the motions were resolved during the hearing, and consent orders issued.
- [4] Even within the remaining issues, the factual disputes narrowed substantially over the course of the hearing. In particular, there is no longer any dispute as to the following:
 - a) The parties have already completed the alternative dispute resolution process contemplated by the Consent Order, such that the remaining disputes were properly before the Court;
 - b) The three children remain children of the marriage, given the oldest daughter's pursuit of post-secondary education;
 - c) The youngest daughter, N, resided in a shared parenting arrangement throughout the material period;
 - d) The middle daughter, C, resided in a shared parenting arrangement through to at least September 2017;

- e) The oldest daughter, D, resided primarily with the claimant until June 2017; in a shared parenting arrangement from July-August 2017; and primarily with the respondent from August 2017 until at least May 2019;
 - f) The parents' incomes for the purposes of support are \$278,979 for the claimant and \$121,509 for the respondent for 2018, and \$284,256 for the claimant and \$124,386 for the respondent for 2019;
 - g) The determination of support for 2020 would await the findings made in this judgment;
 - h) The claimant owes the respondent \$7,200 on account of past nanny expenses;
 - i) The claimant owes the respondent her share of his annual bonuses in the amount of \$36,998 (subject to certain expense adjustments sought by the claimant, which are addressed below).
- [5] These agreements left the court in a position where it was only necessary to determine:
- a) When C began to reside primarily with the respondent after September 2017;
 - b) Whether D returned to shared custody after May 2019;
 - c) Whether the changes from the originally contemplated residency justify a child support arrears award;
 - d) Whether the changes from the originally contemplated residency justify a variation of going forward child support;
 - e) Whether the Consent Order should be amended to provide that the nanny will no longer be required to drive;
 - f) Whether the Consent Order should be amended to reflect that C has not been living in a shared custody arrangement;
 - g) Whether the claimant was entitled to take as an offset, from the share of his bonuses payable to the respondent, certain expenses said to be payable by the respondent under the Consent Order.
 - h) If the child support amount payable changed, whether there should also be an adjustment to spousal support.
- [6] At the conclusion of the hearing, the parties agreed that it would be advisable for both parties to submit updated F8 Financial Statements to the court, which statements have now been provided, along with certain supplementary argument.

Analysis

Child Support Arrears

- [7] The respondent seeks payment of child support arrears arising from the fact that there were changes in the residency of the children from those contemplated in the Consent Order. The claimant argues that there should be no reassessment of child support as there has been no material change. I disagree. The Consent Order itself contemplates a re-evaluation of support "as of the date of the permanent residency change" of a child. There is in fact no need to apply a material change test; rather it is sufficient to simply apply the terms of the Consent Order.
- [8] The claimant argues that there was no "permanent residency change" on the part of D or C. I disagree. Under the governing regime of the Child Support Guidelines, SOR/97-175, it would have been clear to the parties and the court, at the time of the Consent Order, that a change in residency would arise if any child moved from either:
- a) one home to the other;
 - b) one home to a shared arrangement; or
 - c) a shared arrangement to a situation where more than 60% of the child's time was spent with one parent.
- [9] The claimant seeks an amendment to the Consent Order to specify the exact amount of time before a change qualifies as "permanent". I do not find it necessary or appropriate for the court to provide such direction at this time, as any changes that occurred during the periods at issue were clearly permanent.
- [10] The claimant argues that D returned to a shared custody arrangement as of May 2019. However, I find that there is insufficient evidence to support such a finding. Indeed, the claimant's own limited records suggest that D spent less than 40% of her time with the claimant after that date.
- [11] The claimant argues that C only began to reside primarily with the respondent in April 2018. The respondent says that this change occurred in September 2017, but was prepared to accept January 2018 for purposes of calculating arrears. I find that, based on the limited evidence provided by the parties, it is reasonable to set the date as January 2018.
- [12] The respondent seeks an assessment of arrears back to the initial change in the children's residency in July 2017 (when D changed to shared custody). I find that the recalculation should be allowed back to that date. The respondent first sought a review by letter dated April 5, 2018, which noted the change in the children's residency. July 2017 is well within the three-year period discussed in *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 123.

Changing the Nanny Order

- [13] In oral argument, the respondent sought to amend the Consent Order to remove the requirement that the nanny drive to the claimant's office, as the claimant has moved much closer to the respondent's home. The claimant argued that this was a fundamental term of his agreement to pay for a nanny.
- [14] Even if this issue had been properly framed by the respondent's application, I find that there is an insufficient evidentiary basis to consider a change to the Consent Order at this time. The respondent is presently out of work, and hence there is no nanny employed.

Changing the Order in relation to C

- [15] C suffers from certain emotional difficulties. There was a report prepared by Dr. Elterman which suggested that N serves as a helpful emotional support for C and that, "on paper", they should continue to share the same parenting structure, but that C should in fact be allowed to decide whether or not to go when N stays with the claimant. Based on this advice, I see no basis to change the Consent Order's contemplation of a shared custody arrangement for both C and N, even though C's actual living arrangement has not followed this course more recently.

Going Forward Child Support

- [16] With respect to child support on a going forward basis, the calculation should be based on D residing primarily with the respondent, and C and N being in a shared parenting arrangement. The parties' 2019 incomes should be used as Guideline incomes for 2020 support. I agree with the claimant that the parties should be governed by their past practice of using the prior year's income to set the child support levels. In the respondent's supplemental F8 Financial Statement it was revealed that she had lost her job in February 2020. It is too soon to say that this interruption in her employment will be for a sufficient period to justify a change to the support levels. There may also be severance or other payments that will mitigate any loss.

The Offsets to the Bonus Payment

- [17] The claimant sought offsets from his bonus payment to the respondent flowing from a series of expenses he incurred which he says were properly payable by the respondent:
- a) Children's cell phone expenses: The Consent Order does not contemplate that phone expenses incurred by either party would be charged back to the other. I find that the contemplation must have been that these expenses would simply be covered by the broader child support amounts payable. Hence, they are not an appropriate deduction.

- b) Property taxes and insurance: I agree with the claimant that para. 39 of the Consent Order does provide that such expenses would be shared equally pending the sale of the family home. Fifty percent of any such expenses incurred are an appropriate offset.
- c) 2016 Tax Liability related to spousal support payments: The claimant says that he incurred an additional tax liability due to the respondent's failure to properly claim the spousal support paid to her as income on her 2016 income tax return. The Consent Order contemplated that she would claim this amount. It appears that this problem should now largely be addressed by the respondent filing her overdue tax returns that claim these amounts. This should allow the claimant to now seek proper tax treatment. However, I do order that the respondent cooperate in completing any further documentation required to allow the claimant to obtain a deduction for these amounts paid. Subject to this term being satisfied, there is no need to apply an offset to reflect this issue. However, the claimant is given leave to apply for further direction in the event the Canada Revenue Agency refuses to reconsider or reassess the parties' respective incomes for the years in question.
- d) 2016 Tax Liability related to nanny expenses: The claimant says that he was unable to claim \$10,000 in nanny expenses on his 2016 income taxes as the respondent did not provide him with proper receipts showing his name. In supplemental submissions the respondent acknowledges this fact and agrees to allow a \$4,500 offset to reflect the extra tax paid by the claimant on the disallowed nanny expenses. The claimant did not dispute this position in his reply. Given the top marginal tax rate is generally consistent with this approach, I find that \$4,500 is an appropriate offset.
- e) Dog care: I agree with the claimant that expenses for dog care paid by him are properly offset given that the respondent is responsible for all costs and care of the dogs under para. 54 of the Consent Order.
- f) Section 7 expenses including gymnastics, D's eye care and orthodontic costs: I agree with the claimant that these are to be shared 50-50 pursuant to paragraphs 20 and 22 of the Consent Order, and offsetting the respondent's share of same is reasonable.
- g) D's non-s. 7 expenses (clothes, art supplies, trip to Mexico, grad expenses and taxis): These expenses were paid by the claimant between the date of the Minutes and issuance of the Consent Order. The Minutes did not contemplate the charge-back of such expenses between the parties. There was a provision in relation to clothing, but based on the evidence before me, I do not see that the expenses were incurred through the system contemplated in the Minutes. These expenses are not an appropriate offset.
- h) Home service: Under para. 39 of the Consent Order the parties were to share the costs of any repairs to the family home over \$500. 50% of such expenses over \$500 are reasonably offset.

- i) Respondent's April 2016 to June 2017 Car Insurance: In Schedule A of the Minutes the parties agreed to take full ownership of their respective vehicles. The claimant continued to pay for the respondent's car insurance until June 2017. I find that car insurance premiums paid by the claimant from the date of the Minutes to June 2017 are reasonably offset. Premiums paid prior to the Minutes are not appropriately offset.
- j) American Express purchases August to October 2016: The claimant paid the joint American Express card purchases for 3 billing cycles after the Minutes were signed. The Minutes contemplated that joint credit cards would be cancelled. The only purchases recorded for these 3 billing cycles were charged to the card bearing the respondent's name. The claimant seeks an offset for half the value of these expenses. I agree that is reasonable.
- k) Costs of iMac replacement: The claimant conceded in oral argument that this expense should not be offset.

Spousal Support

- [18] Paragraph 36 of the Consent Order provides that neither party may seek to vary spousal support unless there is a material change in circumstances that affects the financial needs or abilities of either party. The claimant argued that if child support were adjusted, he should be entitled to seek an adjustment to spousal support. However, I do not see that there has been a material change justifying a change to spousal support. His child support payments will increase somewhat, but only because he has not had to bear the full extent of child-related expenses contemplated under the previous support arrangement as a result of the children's residency changes noted above.
- [19] The respondent argued that, if anything, spousal support should increase given the increase in the claimant's income. Given the lack of a formal application by the respondent for a variation, I take this position as more of a defensive position than a proper application. Obviously the respondent remains at liberty to advance such an application on a full and proper record.

Conclusion

- [20] Beyond the consent orders already agreed to by the parties, I order that:
- a) child support arrears shall be paid to the respondent by the claimant calculated consistent with these reasons, specifically (1) the residency determinations set out above, and (2) the agreed income levels;
 - b) the determination of 2020 support shall be adjourned pending the parties making efforts to agree to the amount in a manner consistent with these reasons;
 - c) the respondent will be paid \$36,998 by the claimant on account of the claimant's bonus payments, less the amounts properly offset in accordance with these reasons;

- d) the respondent will provide all necessary documentation to ensure that the claimant is able to secure a tax deduction for the spousal support paid; and
- e) no other amendment will be made to the Consent Order.

[21] If there is any dispute about the final calculations required by these reasons, I direct that there be a reference to the Registrar for the purpose of a determination of same. The Registrar shall certify his or her findings and the registrar's certificate shall be binding without further order of this court. If requested by either party or the Registrar, the parties shall attend a pre-hearing conference in advance of the hearing of the reference.

[22] As to costs, unless there were settlement discussions of which I am unaware, both parties shall bear their own costs. Success was divided, and many terms were agreed to by the parties over the course of the hearing.

"Branch J."

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