
CANADA / JUDGMENT

L.B. v. B.C.B.

2003 BCSC 1564

COURT

Supreme Court of British Columbia

DECIDED

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2003BCSC1564

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.B. v. B.C.B.,

2003 BCSC 1564

Date: 20031014

Docket: D110366

Registry: Vancouver

Between:

L.B.

Plaintiff

And

B.C.B.

Defendant

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for plaintiff

D. Gradley

Defendant

Acting on his own behalf

Date and Place of Hearing:

September 15, 2003

Vancouver, B.C.

- [1] This is an application for an order for divorce and corollary relief brought under Rule 18A.
- [2] The corollary relief sought is:
1. an order granting the plaintiff sole custody of the children of the marriage, G.K.B.B. and J.S.B. who are 15 and 8 years of age, respectively;
 2. an order that the defendant pay child maintenance to the plaintiff in respect of G.K.B.B. and J.S.B., pursuant to Section 15.1 of the Divorce Act, including Section 7 Guidelines extraordinary expenses;
 3. a declaration that there are arrears of child support owing in the sum of \$11,715.00 as of July 1, 2003;
 4. an order pursuant to Section 92(1) of the Family Relations Act, imposing a penalty up to \$5,000.00 for failure to provide financial disclosure in accordance with Rule 60(D);
 5. an order that each party retain the assets currently in his or her possession in full and final satisfaction of all claims by either party against the other;
 6. an order that the defendant pay to the plaintiff, spousal support in the amount of \$1.00 per month;
 7. costs.
- [3] The defendant does not oppose the granting of an order for divorce or of the order sought respecting the division of family assets. The plaintiff sought to adjourn the application for spousal support generally. The defendant did not oppose that.
- [4] With respect to the arrears of maintenance, the defendant's position was that the declaration of arrears owing should be \$10,308.00, not \$11,715.00. He sought cancellation or reduction of the arrears on the basis of a hardship claim.
- [5] The defendant did not oppose an order granting the plaintiff sole custody of G.K.B.B. with reasonable access to him, subject to G.K.B.B.'s own wishes.
- [6] Insofar as J.S.B. is concerned, although the defendant opposed sole custody to the plaintiff, it appeared from his submissions that, at present, his primary concern was in ensuring he had reasonable access to her.
- [7] There is a third child of the marriage, R.H.B., who will turn 19 years of age on [], 2003, who only recently began living with the plaintiff. No application for custody or maintenance was made in respect of him.

- [8] The plaintiff, L.B. and the defendant B.C.B. were married on September 4, 1982. R.H.B., G.K.B.B. and J.S.B. were born on [], 1984, [], 1988 and [], 1995 respectively.
- [9] The parties separated on September 12, 1998 and on October 29, 1998 Master Bolton made an interim order which included granting custody of G.K.B.B. and J.S.B. to the plaintiff and R.H.B. to the defendant, by consent. Master Bolton awarded child support in the amount of \$814.00 per month, based on a \$60,000.00 per annum income for the defendant, and a \$20,000.00 per annum income for the plaintiff. A portion of the \$814.00 payable by the Defendant related to extraordinary expenses.
- [10] In January of 1999, the defendant and R.H.B. moved to Ontario. Some time in the early part of 2002, R.H.B. moved out on his own and only recently has returned to Vancouver and is living with the plaintiff.
- [11] It appears that the defendant and G.K.B.B. do not currently have much contact. The defendant maintains contact with J.S.B. by telephone and via the internet during the school year and has had access with her in the summer time when she travels to Ontario to visit with him. In relation to J.S.B., the plaintiff proposes the following terms of access:
- (a) four to six weeks during the summer holiday;
 - (b) one week at Christmas, including Christmas Day in alternate years;
 - (c) Spring Break in alternate years;
 - (d) telephone access three times per week;
 - (e) such further and other access as may be agreed by the parties.
- [12] In his affidavit sworn in September of 2003 the defendant agreed with (a)(b)(c) and (e) above, but indicated he wanted "open access on the phone and internet within a reasonable number of days, but not to limit the access due to control".
- [13] The concern expressed by the plaintiff as to telephone access, was that the defendant would phone frequently, up to four to five times per day and at inopportune times, such as at dinner. The defendant's concern was that he would often phone and find J.S.B. unavailable or only available for a short time and he would have to telephone back to finish his visit with her.
- [14] Insofar as custody is concerned, it appears that the two girls, G.K.B.B. and J.S.B., have lived with their mother continuously since the separation in 1998. According to both the plaintiff and defendant, communications between them have from time to time become strained and difficult. The plaintiff deposed to several unsuccessful attempts to contact the defendant to discuss health issues of the girls with him; the defendant described occasions when their discussions have deteriorated to the point of not being productive. The defendant provided no evidence that any of the decisions taken by the plaintiff regarding the girls were unsatisfactory to him, and indeed, it appears he does not contest the decisions which she

has made.

- [15] In my view, given some of the difficulties in communication between the parties, including the defendant's occasional inaccessibility due to work and to his residence in Ontario, and given the lack of issue between the parties as to the plaintiff's decision making to date, it is appropriate to award sole custody to the plaintiff. It is appropriate, however, and I order, that he be granted the right to receive access to such information from third parties in relation to G.K.B.B. and J.S.B., that will facilitate his involvement with their development and upbringing.
- [16] Insofar as access is concerned, it is clear that the parties agree that it is appropriate to order reasonable access to G.K.B.B., subject to her own wishes, and I so order.
- [17] With respect to J.S.B., there is substantial agreement between the parties and I order access in the following terms:
- (a) four to six weeks during the summer holiday; if the parties are unable to agree on duration, then five weeks;
 - (b) one week each Christmas, that week to include Christmas Day in alternate years;
 - (c) Spring Break in alternate years;
 - (d) telephone access up to four days per week. Calls between the defendant and J.S.B. should be scheduled when she is available to talk for a reasonable period of time and should not result in more than one call per day. Such calls should not be unreasonably shortened or impeded by the plaintiff.
 - (e) such further and other access as may be agreed to by the parties.
- [18] The defendant has expressed an intention to return to Vancouver. I will make no order in anticipation of that occurring, as there is no assurance as to when that will happen or what the circumstances will be when and if it does happen. The defendant will have liberty to apply with respect to the issue of custody and access in the event of his return to Vancouver.
- [19] There is an issue between the parties in relation to the plaintiff providing the defendant with written authority to take J.S.B. across the border when she is with him for access visits. The plaintiff in her affidavit expressed an unwillingness to provide a "blanket" letter giving him permission to take J.S.B. across the border without knowing in advance when, where, and for how long the defendant planned to be out of the country with J.S.B.. The defendant on the other hand deposed that he occasionally would take J.S.B. across the border to go shopping and didn't wish to be required to obtain a separate letter of authority each time he did so.

- [20] In my view, the proper disposition of this issue is for the plaintiff to provide the defendant with a letter authorizing him to take J.S.B. across the border for day trips only. Any longer period should be the subject of prior discussion between the plaintiff and defendant and their agreement. The plaintiff should not withhold her agreement for such trips unreasonably.
- [21] Insofar as the issue of disclosure is concerned, it arose after, on September 3, 2002, counsel for the plaintiff served the defendant's counsel with notice to file an updated financial statement together with a notice to proceed. This application was originally set down for hearing on August 25, 2003, even though as of that date, the defendant had not provided all of the updated financial statements sought by the notice of September 3, 2002. It appears that between the time the notice was sent and the application was set down, the defendant filed a notice of his intention to act on his own behalf.
- [22] This application was adjourned from August 25, 2003 to September 15, 2003 on a condition that the defendant would provide the required material by September 8, 2003. On September 8, 2003 the defendant's financial statement and copies of his income tax returns for 2000 and 2001, together with a copy of his income tax return for 2002 marked "draft" were forwarded to the plaintiff.
- [23] According to the material provided by the defendant, he earned \$85,096.05 in 2000, \$83,490.00 in 2001, \$42,086.37 in 2002, and he will earn \$25,128.19 in 2003 from a combination of employment income and employment insurance benefits. In his affidavit and submissions, the defendant attributed the reduction in his income in the downturn in the information technology industry in which he worked and on his lack of formal certification for some of the work he had been performing. He deposed that he is now attempting to secure that certification through retraining under the auspices of the Human Resources Department while he is receiving employment insurance.
- [24] In his financial statement, the defendant also reported a debt of \$31,337.00 and total annual expenses of \$31,635.24. He seeks relief from the enforcement of his arrears on the basis of a hardship claim due to his reduced circumstances, high debt load and the expenses associated with access visits with the children, which he calculates as amounting to \$18,058.00. He also relies on extra payment which he made to the plaintiff in 1999 amounting to some \$7,862.00.
- [25] It appears that the debt which the defendant is currently serving was acquired after the separation and does not represent him taking care of a family debt. It also appears that some of the access expenditures which at least in part were made necessary by the defendant's decision to move to Ontario and have his access with the children of the marriage there, involve some one time costs and, in any event, will be lessened by the terms of access respecting G.K.B.B..

- [26] As far as the defendant's future employment is concerned, in his financial statement, he estimated the range of income he would likely obtain would be between \$30,000.00 and \$60,000.00 per annum. In submissions however, he did not disagree with the prospect of income between \$75,000.00 and \$80,000.00 if the information technology market recovers and he did not disagree he might earn \$60,000.00 to \$70,000.00 in the present circumstances, although that is of course contingent on him getting employment. In that regard, he thought obtaining his certification would assist him in doing so.
- [27] There was some evidence that the defendant did some work for the plaintiff's brother's firm in 2003. He acknowledged he had, but through an oversight neglected to provide his up to date payroll records. It apparently amounted to a little over \$9,200.00.
- [28] Insofar as the plaintiff's financial circumstances are concerned, her financial statement reveals Guidelines income to determine special expenses at \$48,995.16. With the notional payment of child support, her income amounts to \$59,313.96. Her expenses, the most significant of which are a monthly mortgage payment of \$1,307.48, transportation costs of \$880.00 (including \$680.00 for the lease of a car) and expenses related to the children amounting to \$1,485.67, amount to \$7,947.59 monthly, or \$95,371.08 annually.
- [29] As mentioned, the plaintiff has not proceeded with her application for spousal support.
- [30] Dealing with the question of the defendant's Guidelines income, the evidence clearly establishes that the defendant has demonstrated a capacity to earn a significant income in the range of \$80,000.00 to \$85,000.00. On the evidence, it appears he has encountered a set back in his business with the reduction of work in his field, but is hopeful of securing employment by upgrading his formal certification to match his skill-set. There is no evidence before me of specifically what efforts he has made to acquire ongoing employment. There is some evidence that he has had an offer from the plaintiff's brother to work, which he has not accepted. There is also some evidence that he did some work for the plaintiff's brother's firm in 2003, but did not initially account for that in his financial statement.
- [31] The financial information from the defendant was received late, and was not fully complete, as it did not provide the Notice of Assessment for the past three taxation years and it only provided a draft return for the year 2002. In these respects, the defendant's present financial circumstances are not fully illuminated.
- [32] In my view, this is a situation in which on the basis that his capacity to earn is greater than what he is currently earning and that his present circumstances ought not to be taken as determinative of what his Guidelines income should be set at. This is a situation where the court does not have the complete picture of the defendant's financial circumstances before it: there is some evidence that he has turned down some employment (although the circumstances of that are not fully established by the evidence); there is evidence that he did not report some earnings he had from employment with the plaintiff's brother in his financial statements and there is evidence that he is capable of earning significantly more

than he presently is, although it may be that the formal certification he is seeking is helpful in securing employment in the information technology field, where his capacity to earn significant income is greatest.

[33] Section 16 of the Table of Provisions, Federal Child Support Guidelines reads as follows:

16. Subject to sections 17 - 20, a spouse's annual income is determined using the sources of income set out under the heading "Total Income" in the T1 general form issued by Revenue Canada and is adjusted in accordance with Schedule III.

Section 17(1) of the provisions reads as follows:

17. If the court is of the opinion that the determination of a spouse's annual income under Section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation of income, or receipt of nonrecurring amount during those years.
- [34] In my view, having regard for the defendant's income over the last three years, and the circumstances rendering his current financial picture uncertain, determination of his annual income under Section 16 would not be the fairest determination. Accordingly, having regard to his last three years income, it seems to me that the amount that is most fair and reasonable to fix the defendant's Guidelines income at is \$60,000.00 per year. In that circumstance, the amount of child support payable under the Guidelines is \$816.00 per month.
- [35] Insofar as the extraordinary expenses are concerned, the plaintiff gave evidence that child care costs for J.S.B., who is 8 years old is \$315.00 per month on average and horseback riding for G.K.B.B. is \$854.00 per month. The plaintiff, however, submits that only one-half of the horseback riding costs should be considered an extraordinary expense and thus in total, the extraordinary expenses amount to approximately \$730.00 per month, to be shared by the parties in proportion to their respective Guidelines income.
- [36] In my view that is appropriate and I order that the extraordinary expenses in the amount of \$730.00 per month be divided between the plaintiff and the defendant in proportion to their respective Guidelines income.
- [37] Insofar as the defendant's claim in hardship, seeking cancellation or a reduction of arrears and a departure from the Child Support Guidelines is concerned, in my view it would not be appropriate to give effect to the defendant's application.
- [38] Dealing first with the issue of reduction or cancellation of arrears of child support, the basic principle governing such an application is set forth in *Earle v. Earle* [1999] B.C.J. No. 383, [1999] Civ. L.D. 213 (B.C.S.C.). In that case, Martinson J. described the basic principles at para. 46 as follows:

- (a) There is a heavy duty on the person asking you for a reduction or cancellation of arrears to show that there has been a significant and long lasting change in circumstances. Arrears will not be reduced or cancelled unless it is grossly unfair not to do so.
- (b) If arrears are not reduced or cancelled, the court can order a payment plan over time if convinced the arrears cannot be paid right away.
- [39] In her judgment, Martinson J. provided some examples in which cancellation or reduction of arrears might be considered (*ibid.*):
- (a) arrears will only be cancelled if the person is unable to pay now and will be unable to pay in the future;
- (b) a reduction or cancellation requires detailed and full financial disclosure, under oath, (usually in the form of an affidavit) but at the time the payments were to be made,
1. the change was significant and long lasting; and
 2. the change was real and not one of choice; and
 3. every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.
- [40] In the present case, it appears that while the defendant has undergone some change in his circumstances, the evidence falls short of demonstrating that the change was "significant and long lasting" and that every effort was made to earn money (or more money) during the time in question and that those efforts were not successful. Further, there is no evidence that the defendant will be unable to pay in the future, on the contrary, it appears that once he finishes his course, he will be in a better position to resume employment in his field and approach his potential earning capacity. In all the circumstances, including the fact that for the year 2000 and 2001, the defendant was making significantly in excess of the Guidelines income upon which his child support payments were based, I would not give effect to his application to reduce or cancel the arrears.
- [41] Insofar as the composition of arrears is concerned, it appears that some of the payments made by the defendant to the plaintiff and claimed by him to off-set the arrears owing, were paid after July 1, 2003, which is the date to which the arrears claimed are calculated. Insofar as the other amounts claimed are concerned, it appears that the \$500.00 paid by the defendant on March 2, 2001 is not accounted for by the plaintiff and accordingly I would fix the arrears owing at \$11,215.00 rather than the \$11,715.00 claimed by the plaintiff.
- [42] Insofar as the defendant's claim of undue hardship in connection with the ongoing payment of child support is concerned, that is governed by Section 10(1) and (2) of the Guidelines provisions. These sections read as follows:

- (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of Sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.
 - (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:
 - (a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
 - (b) the spouse has unusually high expenses in relation to exercising access to a child;
- [43] In my view, the conditions as set forth in the defendant's affidavit in connection with his claim of undue hardship, does not engage the provisions of Section 10. In particular, the debt that he relies on in support of his claim of undue hardship was not a debt incurred to support the spouses and their children prior to the separation or to earn a living during that period.
- [44] While there are some expenses associated to the exercise of access, as indicated, some of the costs identified are one time costs, and others will be reduced in light of the access provisions respecting G.K.B.B.. In *Earle v. Earle*, (ibid.) Martinson J. also addressed and summarized some basic principles in connection with the payment of maintenance:
1. Maintenance Generally
 - (a) Parents have a joint and ongoing legal obligation to support their children;
 - (b) It is the child, not the other parent, who has the right to maintenance;
 - (c) The payment of maintenance is based on not just what a parent does earn, but what a parent can earn.
 2. Variation
 - (a) There has to be a material change of circumstances, a change that is significant and long lasting;
 - (b) A change to the Guidelines amount is not automatic.
- [45] Given my determination that the change in the defendant's earning capacity is not permanent or likely to be significant and long lasting, I conclude it would not be appropriate to give effect to his claim of undue hardship under Section 10 of the Child Support Guidelines provisions.
- [46] In the result, there will be an order for divorce, the divorce to take effect on the 31st day after the date of this order. There will be an order granting the plaintiff sole custody of the children of the marriage, G.K.B.B. and J.S.B.. There will be an order that the defendant pay child maintenance to the plaintiff in respect of G.K.B.B. and J.S.B. in the amount of \$816.00

including his proportionate share of Section 10 extraordinary expenses totalling \$730.00. There will be a declaration that there are arrears of child support owing in the sum of \$11,215.00 as of July 1, 2003. There will be an order that each party retain the assets currently in his or her possession in full and final satisfaction of all claims by either party against the other. There will be an order granting the defendant reasonable access to the child G.K.B.B., subject to her own wishes and to J.S.B. on the following terms:

- (a) Four to six weeks during the summer holiday; if the parties are unable to agree on the duration, then five weeks;
 - (b) One week at Christmas, including Christmas Day in alternate years;
 - (c) Spring Break in alternate years;
 - (d) Telephone access up to four times per week, with the provision that the parties should attempt to schedule the calls between the defendant and J.S.B. when she is available to talk for a reasonable period of time and should not generally result in more than one call per day. Such calls should not be unreasonably shortened or impeded by the plaintiff;
 - (e) such further and other access as may be agreed to by the parties.
- [47] There will be an order that each party retain the assets currently in his or her possession in full and final satisfaction of all claims by either party against the other.
- [48] I decline to make an order pursuant to Section 92(1) of the Family Relations Act, imposing a penalty on the defendant for failing to provide financial disclosure in accordance with Rule 60(D). While I have found that the disclosure provided by the defendant is deficient, I have not in the result been impeded from arriving at a Guidelines income for him that I consider to be fair and reasonable.

"A.F. Cullen, J."

The Honourable Mr. Justice A.F. Cullen

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