
CANADA / JUDGMENT

L.D.R. v. S.D.R.

2010 BCSC 1633

COURT

Supreme Court of British Columbia

DECIDED

18 November 2010

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.D.R. v. S.D.R.,

2010 BCSC 1633

Date: 20101118

Docket: 81700

Registry: Kelowna

Between:

L.D.R. also known as L.D.M.

Plaintiff

And

S.D.R.

Defendant

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiff:

J.S. Grewal

Appearing on his own behalf:

S.D.R.

Place and Date of Trial/Hearing:

Kelowna, B.C.

November 3, 2010

Place and Date of Judgment:

Kelowna, B.C.

November 18, 2010

Introduction

- [1] This is a summary trial of the property and support issues in a family proceeding. The main bones of contention between the parties are whether the respondent should pay retroactive child support and ongoing spousal support.

The Facts

- [2] The parties were married on June 23, 1990. They separated on August 17, 2008. The parties have not yet divorced and no triggering event pursuant to s. 57 of the Family Relations Act has occurred.
- [3] The parties have four children. They are: C, born October 28, 1992; B, born January 1, 1995; T, born January 1, 1995; and K, born April 22, 1996.
- [4] The claimant is 37 years old. The claimant has a history of working outside the home. While the parties lived on Vancouver Island in the 1990s, the claimant worked part-time for the British Columbia Ambulance Service as a paramedic. The claimant has also worked as a dispatcher for the RCMP and as a taxi dispatcher. Finally, around the time of the parties' separation, the claimant was working as a manager of a rental car agency in Kelowna. The claimant left the workforce due to various psychological and emotional problems that she experienced in 2008. Approximately a year after the separation, the claimant undertook training to become a licensed practical nurse (LPN). In October 2010, the claimant obtained her qualification as an LPN.
- [5] The respondent is 40 years old. In the 1990s he worked at a pulp mill and part-time as a paramedic for the British Columbia Ambulance Service. With the claimant's support and encouragement, the respondent undertook training to become a registered nurse. He obtained that qualification in or about 2004. The respondent has worked as a registered nurse since then. He is currently employed at the Kelowna General Hospital. The respondent has entered into a new romantic relationship. He lives with his new partner. His new partner is an LPN. Her income is on the order of \$50,000 per year.

- [6] After the separation, the claimant and the parties' four children remained in the former family home. In October 2008, the children were temporarily taken into the custody of the Ministry of Children and Family Development. The Ministry placed the children in the care of their paternal grandparents. The Ministry retained custody of the children until the beginning of June 2009. At that time, the children resumed primary residence with the claimant. In October 2009, the parties' child T left the claimant's home and took up residence elsewhere. The parties agree that for the purposes of the summary trial T has not been a child of the marriage since October 2009.
- [7] Earlier in 2009, the claimant delivered to the respondent notice of her intention to obtain an order requiring him to pay spousal and child support. On July 24, 2009, the parties attended at court and consented to an interim order. That order provided that the claimant should have interim sole custody of the four children, that the parties have joint custody of the children, and that the children primarily reside with the claimant. The respondent consented to pay \$1,605 commencing June 1, 2009 for child support and \$400 per month for spousal support. The parties agreed that spousal support should be reviewed in six months' time.
- [8] The record before me is unclear as to whether the claimant had asked the respondent to disclose his then current income as of the parties' court appearance and if she did, whether he complied. The child support amount to which the parties agreed indicates that the parties believed that the respondent's annual income was on the order of \$68,500.
- [9] The respondent worked considerable overtime hours in 2008, 2009 and up to August 2010. In August 2008 the respondent's physician proscribed overtime work. The respondent has complied with his doctor's order and no longer works overtime.
- [10] The claimant's income since the parties' separation has been from social assistance and hospital shifts as a student LPN. The claimant has not filed income tax returns for 2008 or 2009. The claimant anticipates that her annual income in each of those years will be \$18,000 to \$19,000. The claimant will begin to seek work as an LPN commencing November 2010. The claimant is pessimistic about finding work. The respondent has countered her pessimism with evidence of numerous job postings for LPN positions in the Kelowna area. Those positions pay \$24 to \$25 per hour.
- [11] The claimant wishes to accumulate 1,700 hours as an LPN. She believes that she will then qualify for a course of on-line study at the Athabasca University leading to qualification as a registered nurse. The claimant believes that if she is an R.N., she will be economically self sufficient. She anticipates that this course of study and retraining will consume a further six years.
- [12] Doing the best I can with the incomplete and to some degree contradictory evidence, I find that the parties' incomes for the period 2006 to the present are:

Year

Claimant

Respondent Total

Respondent Base

Respondent Overtime

2006

\$27,596

\$27,761

2007

\$28,916

\$78,278

2008

\$19,000

\$67,740

\$57,568

\$10,942

2009

\$19,000

\$101,365

\$77,111

\$24,254

2010 Estimated

\$19,000

\$91,000

\$78,021

\$12,978

[13] The respondent contributes to a municipal pension plan through his employment as an R.N. He began contributing to the plan on December 31, 2001. I assume that the parties have also contributed to the Canada Pension Plan.

- [14] When the parties separated, they owned three vehicles: a 1994 Mazda pickup truck; a 2003 Ford mini-van; and a 2008 Harley Davidson motorcycle. The Mazda truck was worth approximately \$4,000. The claimant retained possession of the pickup truck and has since disposed of it for \$1,500. The parties had no equity in either of the mini-van or the motorcycle. The respondent surrendered those vehicles to their charge-holders.
- [15] The parties have largely divided their household goods between themselves. The claimant maintains that the respondent has retained several items, including a canoe, a car top carrier, motorcycle gear, and lawn furniture. The respondent maintains that the claimant has retained several other items, including a camper, fly-fishing boats, backpacking tent and a digital camera.
- [16] Shortly before the parties separated, the claimant was working as the manager of an Avis car rental outlet in Kelowna. The claimant was unable to cover the business's expenses. The respondent borrowed \$7,900 and gave the loan proceeds to the claimant. The claimant used those funds to cover the shortfall at her rental outlet. The claimant denies that the shortfall arose, as the respondent alleges, by her mismanagement of the rental business. The claimant maintains that the business revenues were simply less than expenses. I would have been inclined to accept that explanation if there were evidence that the claimant owned the outlet franchise. If, however, she was simply an employee (as appears to be the case) she would not have been responsible to make up pure business losses out of her own pocket. I find that the respondent's history of the proceeds of the \$7,900 loan is accurate.

Discussion

Declaration

- [17] Pursuant to s. 57 of the Family Relations Act, I declare that there is no reasonable prospect of reconciliation between the parties.

Division of Family Assets

- [18] The parties agree that their family assets should be divided equally between them. As noted above, the parties have disposed of their vehicles. Each has retained certain of the family's household items and recreational equipment. Neither party adduced evidence as to the fair market value of those assets. The claimant asserts that the material in the respondent's possession is worth \$6,500. That assessment is nothing more than the claimant's guess and I give it no weight. The respondent made no guesses as to the value of the items the claimant kept.
- [19] Given the lack of evidence as to the value of the items in dispute, and given that the parties have retained roughly the same number of items as the other, I conclude that the family assets have been fully and equally divided between the parties. There is no need to order one party to recompense the other for this element of the case.

- [20] The respondent maintains that he has shouldered the burden of the family debts. Those debts include the \$7,900 to bail the claimant out of her mess at the car rental outlet and the balance of the money owing on the mini-van and the motorcycle. The respondent puts the current balance of that loan at \$10,000. I accept that figure. The respondent wishes for the court to allocate half of that debt to the claimant. Unfortunately for the respondent, family debt can only be taken into account when reapportioning assets - family debt cannot be divided between the parties in the absence of something of value against which it can be set-off: *W. (J.) v. W. (M.H.)*, 2007 BCSC 1075.
- [21] The parties' pension entitlements are the last item that must be divided. Those entitlements are comprised of the respondent's municipal pension and their CPP benefits. Those pensions are family assets and must be divided in accord with the relevant legislation.
- [22] The entitlement date for division of the respondent's municipal pension is the date of the declaration just made pursuant to s. 57 of the Family Relations Act. The entitlement period will be December 31, 2001 to the entitlement date. The respondent's municipal pension accrued during the entitlement period will be divided equally between the parties.
- [23] The parties' respective CPP pension entitlements will also be divided in accord with the relevant legislation. The entitlement period will be from the date of marriage on June 30, 1990 to the date of separation on August 17, 2008.

Custody, Guardianship and Access

- [24] The parties agree that the claimant should have custody of the children and that they should share joint guardianship on the same terms as set out in the July 2009 interim order. The parties also agree that the children should continue to reside with the claimant and that the respondent should have reasonable and generous access to the children. An order will go accordingly.

Child Support Going Forward

- [25] The starting point for payment of child support is the payor's income. Normally, the payor's income will be the income he or she reported on line 150 of their most recently filed income tax return. In the present case, for the respondent that number would be the \$101,365 he reported on his 2009 tax return. I find, however, that it would be unjust to employ that figure. That is because the respondent has shown that in recent years his income has been increased by overtime work, and he has proven that for health reasons he is now not permitted to work overtime. I find that the respondent's income going forward will be restricted to his base salary and will not be augmented by overtime. It would be manifestly unfair to saddle the respondent with child support payments geared to a level of income that, on doctor's orders, he cannot earn. For the purposes of child support going forward, then, I find that the respondent's annual income is \$78,021.

- [26] There are currently three children of the marriage who primarily reside with the claimant. The respondent's obligation to pay child support to the claimant will be fixed at \$1,509 per month commencing November 1, 2010.
- [27] The parties will be obliged to exchange copies of their income tax returns and all support documents not later than May 1, 2011, and on May 1 of every year thereafter for so long as there are children of the marriage pursuant to the Divorce Act.

Section 7 Expenses Going Forward

- [28] For the purposes of s. 7 expenses, I find that the claimant's annual income is \$19,000. The parties will share the children's s. 7 expenses in the proportion that their incomes bear to one another. Presently, that ratio is 20 percent to the claimant and 80 percent to the respondent. The children's s. 7 expenses include the premiums paid for extended health and dental insurance, and health and dental expenses less the \$100 annual deduction prescribed by s. 7(1)(c) of the Guidelines.

Spousal Support Going Forward

- [29] The parties' history shows that while the claimant did work outside the home while the parties were together, the respondent's career nevertheless took precedence over the claimant's aspirations. I find that the claimant was economically disadvantaged by the marriage. I also find that the claimant currently has a need for spousal support and that the respondent has the capacity to pay support. That said, the claimant has acted responsibly by completing her LPN training. An LPN earns \$24 to \$25 per hour. If full-time work equates to 1,800 hours per year, upon finding full-time work as an LPN the claimant's annual income will be \$43,000 to \$45,000. I find that the claimant will shortly be economically self-sufficient.
- [30] The claimant's desire to continue her education and become an R.N. is laudable, but in the context of this case it is not a program that the respondent should be obliged to underwrite.
- [31] The Spousal Support Advisory Guidelines are a useful tool in assisting the court to assess the amount and duration of spousal support. On the parties' data, the Spousal Support Advisory Guidelines suggest that the respondent should pay spousal support in the range of \$91 to \$522 per month. The Spousal Support Advisory Guidelines suggest that the duration of payment be infinite.
- [32] In my view, the mid-range for spousal support is the correct number for this case. The respondent will, therefore, pay spousal support of \$287 per month commencing November 1, 2010. The duration of those payments will not, however, be infinite. The claimant is entitled to receive spousal support for a reasonable period during which she may seek and find employment as an LPN. I find that period is one year. The respondent's obligation to pay spousal support will, therefore, terminate on October 31, 2011.

Retroactive Support

- [33] The principles governing the making of an order for retroactive child support have been laid down by the Supreme Court of Canada in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.*; *Henry v. Henry*; and *Hiemstra v. Hiemstra*, 2006 SCC 37.
- [34] When assessing an application for retroactive support, the court must consider all the relevant circumstances. Those circumstances include four factors: reasonable excuse for delay, conduct of the payor spouse, circumstances of the child, and hardship. None of the factors is determinative. The Supreme Court of Canada has said, for example, that retroactive support could be ordered where there was no blameworthy conduct on the part of the payor parent. The court also said that an order for retroactive support should not be viewed as unusual. As to the span of the retroactive period, the court opined that the date on which notice of the request was made would normally be the minimum commencement, and that orders ordinarily ought not to go further than three years beyond that.

Reasonable Excuse for Delay

- [35] The claimant's right to claim spouse and child support arose when the parties separated in August 2008. Her claim for child support was arguably suspended while the children were in the Ministry's custody. The claimant commenced these proceedings in January or February 2009. The claimant's entitlement to child support was revived when children returned to live with claimant in or about June 2009. In July 2009 the parties consented to an interim order which, among other things, required the respondent to pay spouse and child support.
- [36] On these facts, it does not appear that the claimant has delayed pursuit of her claims for support. This factor does not weigh against a retroactive award.

Conduct of the Payor

- [37] Two aspects of the payor's conduct are relevant in applications for retroactive support. They are whether, on the one hand, the payor made a reasonable and bona fide effort to comply with his support obligations, and on the other, whether the payor knowingly evaded or was wilfully blind to changes that the payor ought to have made to the support payments. The former behaviour works to tip the balance against a retroactive order. The latter is blameworthy conduct and weighs in favour of a retroactive order.
- [38] In July 2009 the respondent agreed to pay child support based upon his 2007 income. By July 2009 the respondent must have known how much he had earned in 2008. By the same token, the claimant, who has had legal representation throughout, agreed to support geared to the 2007 income. The claimant did not explain why she did not take the simple step of determining how much money the respondent had reported on line 150 of his previous year's income tax form. The claimant now wishes to retroactively regularize the support issue.

- [39] Neither party offered a reason for their decision in the summer of 2009 to agree to fix child support based on year-old income data. The evidence demonstrated that the respondent has not tried to hide his income from the claimant. In my view the logical inference to be drawn from these circumstances is that the parties anticipated that the respondent's 2008 income would not be substantially different from his 2007 income and they agreed, as a matter of expediency, to employ the latter for child support purposes. The difference between the respondent's income in those two years was only about \$4,000, or roughly 5 percent of the total. In my opinion, it was reasonable for the respondent to have relied upon the parties' agreement through to April 2010 when he filed his income tax return. I therefore do not find that the respondent acted in a blameworthy manner between July 2009 and the end of April 2010.
- [40] However, as of May 2010, the respondent was aware that his 2009 line 150 income was \$101,365. That figure is substantially higher than either his 2007 or his 2008 incomes. In my view, it was incumbent on the respondent to adjust his child support obligation to account for his higher income between May 1, 2010 and the end of August 2010.
- [41] It was in August 2010 that the respondent's physician instructed him to not work any more overtime. The respondent cannot be blamed for following his physician's advice. Accordingly, I find that it was not blameworthy for the respondent to continue to pay child support as he did between September 1 and October 31, 2010.
- [42] Furthermore, I note that despite the fact that only three children have been in the claimant's care between October 2009 and the present, the respondent has nevertheless paid support for four children. That is to the respondent's credit.
- [43] Overall, I find that any blameworthy behaviour by the respondent is balanced by his responsible behaviour. I find that any difference between what he ought to have paid between May and the end of August 2010 on his 2009 income would be off-set by his overpayment by one child between October 2009 and the present.
- [44] In the end, I do not find that the respondent has behaved in a blameworthy manner. This factor does not militate in favour of a retroactive award.

Circumstances of the Child

- [45] The children could, no doubt, have benefited by increased child support paid to the claimant. On the other hand, between October 2009 and the present, three children benefitted from child support intended to be adequate for four children. Again, I find that these facts tend to cancel out the application of this element of the D.B.S. test for retroactive support.

Hardship

[46] The respondent did not demonstrate that having to pay retroactive support would work a hardship on him. This factor does not weigh against a retroactive order.

Retroactive Support: Conclusion

[47] I find that the circumstances of this case are such that a retroactive order for child support should not be made. This element of the claimant's case is dismissed.

Costs

[48] The parties took this case to trial over two main issues: ongoing spousal support and retroactive child support. The claimant succeeded on the former while the respondent succeeded on the latter. Having achieved divided success, the appropriate costs order is to require the parties to bear their own costs.

"P.J. Rogers J"

The Honourable Mr. Justice Rogers

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