
CANADA / JUDGMENT

L.R.D. v. M.L.F.

2005 BCSC 692

COURT

Supreme Court of British Columbia

DECIDED

9 May 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

L.R.D. v. M.L.F.,

2005 BCSC 692

Date: 20050509

Docket: 36095

Registry: Kamloops

Between:

L.R.D.

Appellant

And

M.L.B. aka M.L.F.

Respondent

Before: The Honourable Mr. Justice Blair

Reasons for Judgment

Counsel for the Appellant

D. McBain

Counsel for the Respondent

R.G. Kasian

Date and Place of Trial/Hearing:

April 28, 2005

Kamloops, B.C.

- [1] The appellant, L.R.D., appeals the May 12, 2004 decision of His Honour Judge W.A. Blair of the Provincial Court of B.C. relating to issues of access, child support, income, and arrears of child support.
- [2] Mr. L.R.D. and the respondent, M.L.F., were in a relationship between 1991 and 1997 and have two children, J.D.D., born [], 1993, and P.R.D., born [], 1995. Ms. M.L.F. has custody of both children and the family resides in R.[] where Ms. M.L.F. and her new partner work for a water supply company. Mr. L.R.D. is unemployable, having suffered a serious industrial injury in 1988. He receives a pension and care allowances from the Workers' Compensation Board ("the WCB") and a pension from the Canada Pension Plan ("the CPP"). He has lived in Abbotsford for approximately seven years.
- [3] The hearing before Judge Blair took four days, January 29 and 30, March 25, and April 26, 2004, at the conclusion of which the trial judge adjourned to May 12, 2004 to consider his decision which he then delivered in his 27-page Reasons for Judgment.
- [4] L'Heureux-Dubé J. described the standard of review applicable on appeals such as this in *Hickey v. Hickey*, [1999] 2 S.C.R. 518 in which she wrote at ¶10 and 12:

[Trial judge] must balance the objectives and factors set out in the Divorce Act or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.

There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

- [5] In *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, a custody decision, the court again approved the standard of review found in *Hickey*, supra, and it is that standard which I will apply in this appeal.

ACCESS

- [6] The appellant submits that the trial judge erred in varying the parties' previous access arrangements in a fashion which he contends reduces the amount of time he will have with his children, and that neither he nor Ms. M.L.F. had sought the changes made by the trial judge. Counsel for the appellant further submitted that the trial judge failed to indicate which of the factors found at s. 24 of the Family Relations Act, RSBC 1996, c. 228 ("the FRA"), he considered when making his access ruling.
- [7] The appellant placed the issue of access before the trial judge who delivered a comprehensive access arrangement which took into account that Mr. L.R.D. resided in Abbotsford and the children resided with Ms. M.L.F. in R. [], a distance of approximately 350 kilometres. In his Reasons the trial judge provided that weekend access would differ during the winter because of his concern for the children having to travel roads made treacherous by difficult winter weather. He included other provisions which addressed concerns as to the children's well-being and the maintenance of their relationship with both parents.
- [8] The trial judge is an experienced, senior member of the Provincial Court of B.C. Although he did not refer specifically to s. 24 of the FRA, I accept that he was aware of the s.24 provisions of the FRA and bore them in mind when reaching his conclusions. A considerable body of evidence related to access which the trial judge noted in his Reasons when he referred to the children's activities, needs, and education.
- [9] The trial judge at ¶5 of his Reasons stated the paramount consideration when addressing access:

The access portion of this hearing is about what is in their (the children's) best interest, not what is best for Mr. L.R.D. or Ms. M.L.F..

- [10] The appellant submits that I ought to vary the access order made by the trial judge. I see no error or misapprehension by the trial judge as to the circumstances or to the law in reaching his conclusions regarding access. The scope of appellate review does not permit interference with the trial judge's determinations involving access.

CHILD SUPPORT AND IMPUTATION OF INCOME

- [11] The appellant submits that the trial judge erred in determining his income under the Federal Child Support Guidelines ("the Guidelines"). The trial judge found that Mr. L.R.D. receives a CPP pension of \$5,702.02 annually, a WCB pension of \$35,098.32 annually, plus a care allowance from the WCB of \$11,262.24 annually, none of which attracted income tax in Mr. L.R.D.'s hands. The trial judge determined that both the CPP and WCB pensions should be grossed up to include an income tax factor when determining Mr. L.R.D.'s Guideline income for the purpose of ascertaining his child support obligation. However, the trial judge declined to gross up the care allowance of \$11,262.24, finding that Mr. L.R.D. used a portion of the allowance for expenses relating to his injuries. The trial judge stated at ¶36 of his

Reasons:

The care (allowance) expenses Mr. L.R.D. receives takes care of his day-to-day care. Some of the expenses are beyond regular household expenses, but most do not appear to be spent for extraordinary items.

[12] He concluded that Mr. L.R.D.'s Guideline income would consist of the grossed up CPP and WCB pensions, together with his care allowance of \$11,262.24, would form part of his income, but the care allowance would not be grossed up.

[13] The trial judge left the grossing up of the pensions for counsel to calculate, with liberty to apply for directions should there be difficulty determining this calculation. The order prepared by counsel found Mr. L.R.D. had a Guideline income of \$66,362 based on grossing up the WCB and CPP pensions and including the annual \$11,262.24 care allowance. That Guideline income obliged Mr. L.R.D. to pay support obligation of \$881 a month for the two children commencing April 1, 2004.

[14] Section 19 of the Guidelines gives the trial judge discretion to impute income to Mr. L.R.D. when it states in part:

19.(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(b) the spouse is exempt from paying federal or provincial income tax;

[15] The appellant submits that the trial judge erred both in imputing income by grossing up the CPP and WCB pensions and by including in his income the \$11,262.24 received as a care allowance pursuant to s. 21 of the Workers Compensation Act, RSBC 1996, c. 492. Counsel for the appellant cited decisions of this Court, including *Hayden v. Barrass*, [2004] B.C.J. No. 2659 (BCSC), *Primrose v. Hanlon*, [2000] B.C.J. No. 82 and *McLachlan v. McLachlan*, [2002] B.C.J. No. 386 (BCSC), in which the Courts declined to impute income to persons receiving tax free income from disability payments. Counsel submitted that the trial judge ought to have followed those decisions and refuse to impute an income to Mr. L.R.D. based on an income tax gross up. In *Hayden*, supra, Mr. Justice Lamperson included the defendant's WCB's home care, personal care and clothing allowances when determining his Guideline income. Judge Blair considered the decision in *Primrose*, supra, but followed the decision in *Walgren v. Walgren*, [2002] B.C.J. No. 881, a case cited by the respondent, in which McEwan J. imputed an income to the defendant father by grossing up his tax free disability insurance payments.

- [16] The Guidelines at s. 19 provide that the learned trial judge "may" impute income to a spouse as they consider appropriate. That is a discretion which lies with the trial judge and its exercise depends on the circumstances of the case. The trial judge in this case considered the appellant's income and expenses and concluded that he should impute an income to Mr. L.R.D. by grossing up two pensions, but not the care allowance. Those conclusions were fact driven and do not, I find, constitute an error or misapprehension either in fact or in law.

UNDUE HARDSHIP

- [17] The appellant further submits that the trial judge erred in failing to reduce child support payments to reflect what he submitted were unusually high expenses incurred in exercising access. Section 10(1) and (2)(b) of the Guidelines provide for such a reduction if the trial judge finds the payor is incurring unusually high access expenses, although s. 10(3) provides that where the trial judge finds such an undue hardship the court must then consider the living standards of both spouses.
- [18] The trial judge in his Reasons at ¶34 examined Mr. L.R.D.'s expenses incurred in exercising access, noting that during the spring, summer and fall the exchange point for the two children was in Kamloops, requiring travel by Ms. M.L.F. from R.[] and Mr. L.R.D. from Abbotsford. During the winter months, Mr. L.R.D. has to travel to R.[] where his parents reside. The trial judge acknowledged that Mr. L.R.D. has to drive further than Ms. M.L.F. but concluded that it was not so much more as to establish a hardship claim. Having held that Mr. L.R.D.'s travel expenses were not so unusually high as to attract a reduction as provided by s. 10 of the Guidelines, he had no need to explore the living standards of the parties' households.
- [19] The appellant's counsel further submitted that the trial judge, in determining whether there was an undue hardship, failed to consider that the appellant also bore alone the substantial costs incurred in the children's participation in go-kart racing when they were with him in Abbotsford, noting that the karts cost \$3,000 each and he also paid for racing outfits and helmets. The trial judge referred to the kart racing participation in ¶8 and 14 of his Reasons.
- [20] The trial judge exercised his discretion based on the evidence before him in denying the appellant's claim that he suffered an undue hardship. I can find no error in fact or in law that would justify this Court interfering with his decision.

ARREARS OF CHILD SUPPORT

- [21] The appellant submits that the trial judge erred in failing to reduce the child support payable during the period May 1998 to June 2000, when he alleges the parties' two children spent at least 70 percent of the time in his care. The trial judge addresses this claim in ¶34 of his Reasons, stating:

I have been asked to consider past maintenance that was paid to Ms. M.L.F. when Mr. L.R.D. was looking after the children. I do not intend to vary any past maintenance orders retroactively or to cancel any arrears that might have been accrued. The order was dealt with then and is not something the court should now deal with.

- [22] On April 29, 1998, Judge Blair ordered Mr. L.R.D. to pay child support for the two children of \$469 a month commencing May 1, 1998. In the subsequent months, Mr. L.R.D., for various reasons, had the children with him for more time than he had before, although the extent of that time is not clear on Mr. L.R.D.'s evidence which is disputed by Ms. M.L.F.. The evidence before the trial judge included the Family Maintenance and Enforcement Program record filed as document 8 which showed that Mr. L.R.D. made child support payments directly to Ms. M.L.F. for the period August 31, 1998 to January 1, 1999, a period he now submits when the children were spending most of their time with him. I note that any child support arrears which accumulated commencing in May 1998 have since been paid by Mr. L.R.D..
- [23] On July 11, 2000, Mr. L.R.D., through counsel, applied for an order that he be granted custody of the parties' two children and in that application the appellant claimed that he had adopted the role of the children's primary care giver. Mr. L.R.D. did not apply for retroactive cancellation of arrears of child support, although he sought child support from Ms. M.L.F.. The matter came before His Honour Judge Hoy of the Provincial Court of B.C. on September 20, 2000, who ordered that Ms. M.L.F. have sole custody of the children and set out a schedule for Mr. L.R.D. to access the children. No mention is made of child support or arrears of child support in Judge Hoy's order. The parties sought various orders in other provincial court proceedings between September 20, 2000 and January 29, 2004, when the hearing of this matter came before His Honour Judge Blair. It appears that only with the most recent hearing did the issue of child support arrears arise as an issue. Mr. L.R.D. has been represented by counsel throughout this action, including during 2000.
- [24] In making his application to have child support arrears cancelled or reduced, Mr. L.R.D. sought to review a period commencing in 1998, some five years before. Judge Blair refused to consider arrears, having before him the history of the applications and orders made both by himself and other judges of the Provincial Court between 1998 and January 2004. The trial judge concluded that the matter of support and arrears had been dealt with or the opportunity to deal with the issues had been afforded the appellant. Implicit within that conclusion is that Mr. L.R.D. brought the issue too late for the court to properly consider. Mr. L.R.D. also failed to provide an adequate explanation for the delay in bringing the application to reduce or vary the arrears. There is no basis upon which Judge Blair's decision regarding arrears ought to be varied.

SUMMARY

- [25] I dismiss the appeal. The respondent will have her costs at scale 3.

"R.M. Blair, J."

The Honourable Mr. Justice R.M. Blair

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