
CANADA / JUDGMENT

Lu v. Hargreaves

2015 BCSC 2159

COURT

Supreme Court of British Columbia

DECIDED

24 November 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCSC 2159 Lu v. Hargreaves

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lu v. Hargreaves,

2015 BCSC 2159

Date: 20151124

Docket: F950631

Registry: Vancouver

Between:

Katherine Ling Ling Lu

Claimant

And

Tommy Reuben Hargreaves

Respondent

Before: Master Muir

Reasons for Judgment

Counsel for Claimant:

Z. Si

Counsel for Respondent:

L.W.O. Smeets

Place and Date of Hearing:

Vancouver, B.C.

October 21, 2015

Place and Date of Judgment:

Vancouver, B.C.

November 24, 2015

introduction

- [1] These applications deal with child support.
- [2] The parties met in 1993, were married on June 15, 1995 in Hawaii, and were divorced December 7, 1995.
- [3] There are two children, Thom James Hargreaves born December 26, 1994 ("Thom") and Alycia Emily Hargreaves, born December 10, 1995 ("Alycia").
- [4] The respondent seeks:
 - a) to have an age limit imposed on child support for Thom;
 - b) to have child support for Alycia discontinued as of August 2014; and
 - c) to have child support paid for Alycia since August 2014 returned to him.
- [5] The claimant seeks:
 - a) to have child support for Thom continue until he completes his post-secondary education;
 - b) to have child support for Alycia continue until she completes her post-secondary education; and
 - c) for a retroactive increase in child support payments.
- [6] The claimant's application for production of financial information from the respondent was not pursued as the respondent produced a Form F8 Financial Statement, which, although incomplete, was sufficient to argue the motions.

Background

History of Child Support

- [7] The claimant started proceedings in this court in 1995 seeking child support. By an order of this court dated December 20, 1995, the respondent was ordered to pay \$100 per month per child commencing January 1, 1996. The order was provided to the Family Maintenance Enforcement Program ("FMEP") in July 1998, which has been collecting support from the respondent regularly since that time.
- [8] The claimant says that this amount of child support was significantly less than what the respondent should have been paying, and that her divorce lawyer told her at the time that the child support should be \$250 per month per child. The claimant says that she agreed to a lesser amount because the respondent said he could not afford more due to his student loans.
- [9] The respondent says that in 2004 he was able to secure a better paying job and approached the claimant and offered to increase child support. He says that the parties agreed to increase child support to \$300 per month per child commencing October 1, 2004. The claimant filed the resultant agreement with the court and provided it to FMEP.
- [10] The evidence of the parties differs on the basis for the agreed amount of child support.
- [11] The respondent says that he offered to increase child support to \$800 per month for both children but the claimant did not want to receive more than \$600 per month, as she was afraid of losing her low income status and low income housing.
- [12] The claimant, on the other hand, says that she lost her job in 2004 and accordingly, sought help from legal aid in seeking an increase in child support from the respondent. She says her legal aid lawyer contacted the respondent and told him that he should be paying child support of \$775 per month for both children. The claimant says that the respondent got very angry and contacted her saying he could not afford to pay \$775 per month. She says she did not want to cause trouble. According to the claimant, the respondent was verbally abusive during this conversation, and had a history of being so. She, therefore, agreed to be paid \$600 per month for child support.
- [13] The respondent flatly denies that he has ever been verbally abusive to the claimant.
- [14] Other than the adjustment in 2004, the claimant has never requested a review or increase in child support, nor has she ever requested verification of the respondent's annual income. She says she has not done so because the respondent gets upset with her when she seeks financial support. She says, "I just did not want to deal with it and wanted to keep the peace so I did not pursue more support."

- [15] The claimant's evidence is inconsistent in that she says she knew that the amounts of child support she had agreed to were less than what the respondent should have paid, and yet she deposes that she did not realize that the respondent was underpaying child support until she spoke to duty counsel in 2015.
- [16] To my mind, the claimant was clearly aware that the amounts of child support agreed to by the parties were less than what could have been claimed, and I conclude she was also undoubtedly aware that the respondent's income had increased over the years. I do not believe that it was a lack of understanding that prevented the claimant from seeking increased child support, rather, I believe that, as she deposed, she did not want to deal with it.
- [17] The respondent has been unemployed since August 2013 and is living on his disability benefits and pension income. His past employment was with the U.S. military. He is presently married and has been for 17 years. His wife is employed but has had significant health issues. There is no assertion that he is responsible for additional children.
- [18] After becoming unemployed in August 2013, the respondent says he had discussions with the claimant about reducing child support and that she agreed to a reduction to \$150 per month per child effective January 1, 2014. The respondent deposes that, as a result, he reduced his child support payments accordingly. His evidence initially was that there was a signed agreement to that effect, but says that he did not have a copy of it as it was sent to the claimant and he never received a signed copy back from her.
- [19] The claimant initially denied ever entering into, or even seeing such an agreement.
- [20] In response, the respondent provided a receipt from the postal service evidencing the mailing of the agreement to the claimant, as well as emails from January 2014 between the respondent and Thom, where Thom says he found the agreement on the counter and read it. In one of the emails, Thom wrote:
- For some reason, mom wants me to be the middle man. I asked her to sign the form, but she says she won't unless you make out the next check for the December month. Apparently, if you don't, welfare won't help us for the month of January.
- [21] In response, the claimant says she searched and located the agreement, still in its original envelope. She says she never signed it and had forgotten about it. Further, she says she never verbally agreed to a reduction in child support.
- [22] The respondent learned that the claimant had not signed the agreement in late 2014. At that time, he had learned that Alycia had moved in with her boyfriend and was no longer attending school. He made inquiries of FMEP about his obligation for child support in the circumstances. Whether it was prompted by that inquiry or not, he was advised by FMEP that his child support payments were in arrears.

[23] From the evidence, I conclude that the claimant and respondent did discuss this reduction in child support, but the claimant had second thoughts, and thus, did not follow through. I conclude that there was no effective variation of child support at this time.

The Respondent's Income

[24] The respondent's incomes for 2012, 2013 and 2014, according to the filed Form F8 Financial Statement, were as follows:

Year

Income

(in U.S. dollars)

Average Exchange Rates

Income (in Canadian dollars)

2012

\$92,534.40

0.9995

\$92,488.13

2013

\$102,214.01

1.0299

\$105,270.20

2014

\$62,247.72

1.0446

\$65,023.97

[25] It is obvious that the respondent was not paying child support in the amount contemplated by the Federal Child Support Guidelines, SOR/97-175 ("Guidelines"). The Guidelines would have provided for child support for two children of over \$1,371 per month in 2012, \$1,542 per month in 2013, and \$986 per month in 2014. I do not have the current exchange rates in evidence and, hence, will base the respondent's present income on the 2014 exchange rate that is before me.

[26] The respondent says he is unable to pay child support of anything approaching the Guideline amounts, and could not support any retroactive award. He claims annual expenses of almost \$70,000, which include mortgage and vehicle loan payments. He does not, however, advance a hardship claim as contemplated by the Guidelines.

The claimant's income

[27] The claimant's financial situation is a stark contrast to the respondent's. She has resided in subsidized housing for more than 18 years. She says she is presently unemployed and is expecting to receive social assistance. She has held various clerical type positions on and off since 1986. Her 2012, 2013 and 2014 incomes were as follows:

Year

Income

2012

\$21,909

2013

\$16,191

2014

\$21,303

[28] The claimant's evidence is that, as a result of her low income and the respondent's failure to pay appropriate child support, the children were deprived of many opportunities, particularly in the last two years of high school.

[29] She says this also placed an unreasonable financial burden on her and after paying for the necessities of life, there was nothing left for her enjoyment of life - which she sacrificed for her children. There are no specifics, however, of what the children were or might have been deprived of.

The Children

[30] As to the children, Thom has attended Kwantlen Polytechnic University in an Advanced Technology Management program since 2012. He is not expected to graduate until August 2017 due to the delay caused by the requirement that he participate in a co-op program. He is a good student. He has amassed \$23,455 in student loans and received various awards that help pay for his education. He lives with the claimant.

[31] Thom is employed by Environment Canada during the fall 2015 semester as part of the co-op program. He is working 37.5 hours per week at \$13.68 per hour for a gross salary of \$513 per week.

- [32] There is no evidence from Thom, but the claimant says that while Thom is in the co-op program, he intends to assist her with expenses to a certain extent, but will put the majority of his earnings towards his tuition.
- [33] Alycia finished school in June 2014. She moved in with her boyfriend in August 2014 to look after him after he was injured in a car accident. She then permanently moved in with him on November 30, 2014. She turned 19 years old on December 10, 2014.
- [34] The respondent submits that Alycia voluntarily removed herself from her parents' charge in August 2014, and thus, is not entitled to child support after that time.
- [35] There is no evidence from Alycia. The claimant says that since leaving school, Alycia has only worked part-time and has never been financially independent. The claimant says she has been subsidizing her by approximately \$200 per month. Further, the evidence is that Alycia has returned to school as of September 2015 to pursue a program in deaf studies and sign language. She anticipates receiving student loans to assist with her school expenses and is expected to complete the program in June 2016.
- [36] The claimant instructed FMEP to stop collecting child support for Alycia commencing May 1, 2015. She has reinstated the child support obligation effective September 1, 2015. The claimant, through her counsel, conceded that there should not be child support payable for Alycia from December 1, 2014 to August 31, 2015.

Analysis

[37] The three issues that need to be decided are:

- 1) As the children are over the age of majority, are they entitled to child support?
 - 2) If they are entitled to child support, what is the appropriate quantum? If not, are there arrears to be forgiven?
 - 3) Should a retroactive award of child support be ordered?
- 1) Are the children entitled to child support?

[38] The parties argued the applications under both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). As the parties were divorced in Hawaii before any proceedings were commenced in British Columbia, I am of the view that this is not a divorce proceeding and hence the Divorce Act is not applicable. I conclude that the matters should be determined in accordance with the provisions of the FLA.

[39] The relevant provisions of the FLA are:

146 In this Part and section 247 [regulations respecting child support]:

"child" includes a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of his or her parents or guardians;

147(1) Each parent and guardian of a child has a duty to provide support for the child, unless the child

- (a) is a spouse, or
 - (b) is under 19 years of age and has voluntarily withdrawn from his or her parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were, considered objectively, intolerable.
- (2) If a child referred to in subsection (1) (b) returns to his or her parents' or guardians' charge, their duty to provide support for the child resumes.

148 (1) An agreement respecting child support is binding only if the agreement is made

- (a) after separation, or
 - (b) when the parties are about to separate, for the purpose of being effective on separation.
- (2) A written agreement respecting child support that is filed in the court is enforceable under this Act and the Family Maintenance Enforcement Act as if it were an order of the court.
- (3) On application by a party, the court may set aside or replace with an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150 [determining child support].

150 (1) If a court makes an order respecting child support, the amount of child support must be determined in accordance with the child support guidelines.

- (2) Despite subsection (1), a court may order child support in an amount different from that required by the child support guidelines if
- (a) the parties consent under section 219 [persons may consent to order being made] or have an agreement respecting child support, and
 - (b) the court is satisfied that reasonable arrangements have been made for the support of the child.
- (3) The court must consider the child support guidelines for the purposes of subsection (2), but must not consider arrangements made for the support of the child to be unreasonable only because the amount required under the child support guidelines differs from those arrangements.
- (4) Despite subsection (1), a court may order child support in an amount different from that required by the child support guidelines if satisfied that

- (a) an agreement or order respecting the financial duties of the parents or guardians or the division or transfer of property, other than an agreement respecting child support, benefits the child directly or indirectly, or that special provisions have otherwise been made for the benefit of the child, and
 - (b) applying the child support guidelines would be inequitable on consideration of the agreement, order or special provisions.
- (5) If a court makes an order respecting child support in an amount different from that required under the child support guidelines, it must give reasons for doing so.

152 (1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
- (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

[40] The Guidelines deal with children over the age of majority at s. 3(2):

- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
 - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

Thom

[41] Thom is over the age of majority, in a course of studies and living at home. Counsel for both parties referred me to cases discussing the factors applicable in such circumstances. They are well summarized in *Matwichuk v. Stephenson*, 2007 BCSC 1589 as follows:

[25] The pursuit of education necessary to equip a child with a career qualifies as an "other cause" for the continuing dependence of an adult child: *Martin v. Martin* (1988), 1988 CanLII 2837 (BC CA), 26 B.C.L.R. (2d) 390 at 393 (B.C. C.A.), affirmed in *N(W.P.)* at para. 18. In determining whether a child is unable to withdraw from the charge of his or her parents, all of the circumstances should be assessed. Mere attendance at an educational institution is

not sufficient to prove that the child cannot withdraw from the parents or obtain the necessities of life: *Ciardullo v. Ciardullo* (1995), 1995 CanLII 304 (BC SC), 15 R.F.L. (4th) 121 (B.C.S.C), affirmed in *N(W.P.)* at para. 18.

[26] The surrounding circumstances that should be addressed in determining whether an adult child is a "child of the marriage" were outlined by Master Joyce (as he was then) in *Farden v. Farden* (1993), 1993 CanLII 2570 (BC SC), 48 R.F.L. (3d) 60, approved in *Darlington v. Darlington* (1997), 1997 CanLII 3893 (BC CA), 32 R.F.L. (4th) 406 (B.C.C.A.) and approved more recently in *N(W.P.)*. The Farden factors in determining whether a child remains dependent are:

- (i) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
- (ii) whether or not the child has applied for or is eligible for student loans or other financial assistance;
- (iii) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
- (iv) the ability of the child to contribute to his own support through part-time employment;
- (v) the age of the child;
- (vi) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
- (vii) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (viii) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

[42] As noted, Thom is in a full-time course of studies, but presently on a co-op term. He is a good student and has availed himself of awards and student loans to assist in paying for his education.

[43] There is no evidence from Thom himself, only that of the claimant. There is little evidence as to his potential career path or plans or his ability to work part-time other than while on the co-op term. To my mind, however, the very fact of the co-op term is a factor I can consider relevant to his future employment in his field of study.

[44] He still maintains a relationship with the respondent, albeit a distant one.

[45] If it was not for the co-op term, I would have no hesitation in determining that Thom was a child of the marriage and should be entitled to child support to the completion of his first degree. Thom certainly was entitled to support prior to the fall 2015 semester and the respondent does not dispute that.

[46] Given Thom's earnings at Environment Canada as a result of the co-op program, I conclude that, while he is employed on the co-op term, he is entitled only to one half of the support normally payable, but that full entitlement resumes at the end of this semester, that is, January 1, 2016. Thom's entitlement to support will continue until August 30, 2017, when he is expected to complete his first degree. There is liberty to apply should circumstances change.

Alycia

[47] Alycia has been living with her boyfriend for approximately one year. The claimant says that, despite that, she remains a child of the marriage as she is unable to obtain the necessities of life without assistance.

[48] It is the obligation of the applicant to bring to the court evidence sufficient to prove that support is required for a child who has reached the age of majority. Here, although there is evidence that Alycia has returned to a full-time program at school, there is no evidence of Alycia's financial circumstances other than the claimant's assertion that she is not financially independent and her evidence that she provides Alycia with \$200 per month to assist with her expenses.

[49] There is no evidence of what Alycia is capable of earning part-time, nor is there evidence of her expenses, and how much support she is receiving from her boyfriend.

[50] The respondent referred me to the reasons of Mr. Justice Truscott in *Innes v. Innes*, 2011 BCSC 722:

[27] I find myself unable to order continuance of the child support order for the fourth child in any amount beyond the respondent's last payment in November 2010, without any evidence of what that child can contribute himself towards his expenses.

[28] Without this evidence it would be unfair to the respondent in my view to impose any further obligation on him when the appropriate amount of any ongoing child support is to be determined on consideration of the "child's" efforts to contribute to his own support.

[51] Here, too, I am not satisfied on the evidence that Alycia remains a child and dependent on support from her parents. I, therefore, conclude that Alycia ceased to be a child within the definition of the FLA on November 30, 2013, and that the respondent's obligation to provide child support therefore ceased on that date, and I so order.

2) Appropriate quantum of child support for Thom

[52] The Guidelines amount for one child on an income of \$65,023 is approximately \$605 per month.

[53] Although the respondent claims to be unable to pay that amount, in my view, his circumstances are such that he should be able to accommodate it. I see no reason to deviate from the Guidelines amount in the circumstances, and I order child support for Thom in the amount of \$605 per month based on a Guideline income for the respondent of \$65,023. This amount is payable monthly, on the first of each month until August 30, 2017.

3) Should a retroactive award of child support be ordered?

[54] The claimant says that the respondent has withheld evidence of his income and that he had an obligation to advise her of his increasing income over the years. She argues that his failure to do so is "blameworthy behaviour", as that phrase is used in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37, and is sufficient to warrant a retroactive award of child support commencing in 2012.

[55] I am of the view that the respondent had some justification in believing that the child support amounts being paid were agreed to, and as they had been made the subject of court orders, they were sufficient. He was obviously aware, however, of his changed circumstances and knew of the children's need.

[56] As the majority noted in *D.B.S.*:

63 The immediate concern with such retroactive awards is that they disturb the certainty that a payor parent has come to expect: see *Andries v. Andries* (1998), 1998 CanLII 14093 (MB CA), 126 Man. R. (2d) 189 (C.A.), at para. 48. A payor parent who diligently follows the instructions of a court order may expect that (s)he would not be confronted with a claim that (s)he was deficient in meeting his/her obligations. After all, until it is varied, a court order is legally binding. It provides comfort and security to the recipient parent, but it also provides predictability to the payor parent. Put most simply, the payor parent's interest in certainty appears to be most compelling where (s)he has been following a court order.

64 On the other hand, parents should not have the impression that child support orders are set in stone. Even where an order does not provide for automatic disclosure, variation or review, parents must understand that it is based upon a specific snapshot of circumstances which existed at the time the order was made. For this reason, there is always the possibility that orders may be varied when these underlying circumstances change: see s. 17 of the Divorce Act; s. 18(2) of the Parentage and Maintenance Act. But even if the parents choose not to seek variation of an order, depending on why (and how freely) this choice was made, the child may still have the right to receive support in the amount that should have been payable. The certainty offered by a court order does not absolve parents of their responsibility to continually ensure that their children receive the appropriate amount of support.

[57] There was, in my view, blameworthy behaviour on the part of both parties in not ensuring that the children's support was adequate.

- [58] There is evidence that the children were deprived as a result, but nothing concrete is brought forward. There is no evidence that a significant retroactive award would ameliorate any of those alleged deprivations.
- [59] Further, the respondent's circumstances have now changed resulting in a dramatic reduction in his income. A significant retroactive award would, in my view, cause substantial hardship to him at this point in his life.
- [60] Again, as noted in D.B.S.:

95 It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.

- [61] Later in that decision, the court holds that, generally speaking, the date to which an award should be retroactive is the date effective notice was given to the payor parent. The court defines effective notice in D.B.S. broadly:

121 Choosing the date of effective notice as a default option avoids this pitfall. By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the status quo is fair, and his/her interest in certainty becomes less compelling.

- [62] Here, formal notice was given when the application was brought. In my view, however, the respondent had effective notice that there was an issue regarding child support when he learned from FMEP that he had amassed arrears. That should have put him on inquiry.
- [63] There is no specific date referred to in the respondent's evidence, but it appears he was advised of this by FMEP in early 2015.
- [64] In all of the circumstances, I consider it appropriate to award child support retroactive to January 1, 2015. That, of course, only impacts the award for Thom, as the obligation for Alycia terminated before that date.
- [65] These orders will obviously impact the calculation of arrears that FMEP has prepared. If there is difficulty establishing the financial impact, there is liberty to apply.

Conclusion

- [66] Thus, my orders are as follows:

- a) The agreement dated August 28, 2004 and filed with this court on September 30, 2004 (the "Child Support Agreement") is varied such that the obligation to pay support for Alycia terminated on November 30, 2014.
- b) The Child Support Agreement is varied such that child support is payable for Thom in the amount of \$605 per month, based on a Guideline income for the respondent of \$65,023, retroactive to January 1, 2015 and payable on the first of each month thereafter until August 30, 2017, with the exception of September 1 to December 31, 2015 when Thom is on his co-op term and his support is one half of the normal amount, or \$302.50 per month.
- c) There is liberty to apply to vary or set aside this order should there be a change in circumstances.
- d) There is liberty to apply if the parties are not able to agree on the financial impact of these orders on the amount of arrears owing by the respondent.

"Master Muir"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/15/21/2015BCSC2159.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/lu-v-hargreaves-2015>

Prepared on 26 October 2026 · Esheria