
CANADA / JUDGMENT

M.F.B. v. M.G.B.

2014 BCSC 88

COURT

Supreme Court of British Columbia

DECIDED

21 January 2014

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2014 BCSC 88 M.F.B. v. M.G.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.F.B. v. M.G.B.,

2014 BCSC 88

Date: 20140121

Docket: E29514

Registry: New Westminster

Between:

M.F.B.

Claimant

And

M.G.B.

Respondent

Corrected Judgment: The whole of these reasons have been amended for publication purposes, to anonymize the names and personal information of the parties, and to redact any other information which could identify the parties in any way.

Before: The Honourable Mr. Justice Williams

Reasons for Judgment

Counsel for Claimant:

A.L.B. Kaario

Counsel for Respondent:

A.R.S. Gangji

Place and Date of Hearing:

New Westminster, B.C.

June 21, 2013

Place and Date of Judgment:

New Westminster, B.C.

January 21, 2014

- [1] These reasons for judgment are with respect to two applications, one brought by the claimant, Ms. B. and one by the respondent, Mr. B.
- [2] The parties were married on May 8, 1999 and separated on November 11, 2007. They divorced on March 29, 2009.
- [3] There are two children of the marriage, T.G.B. born July 20, 2000 and P.A.W.B. born January 25, 2005.
- [4] In her application, Ms. B. seeks retroactive child support and special expenses, and fixing of arrears; she also seeks an order for child support going forward. Additionally, she seeks an order of the Court requiring financial disclosure by Mr. B. in setting a date for annual disclosure.
- [5] Mr. B.'s application is with respect to parenting time and the conditions attached to that.

Parenting time

- [6] As of the date of hearing, Mr. B.'s parenting time was as set by an order of Master Caldwell dated May 29, 2008, made in the context of a Judicial Case Conference.
- [7] There was a subsequent order made by Madam Justice Ker on March 30, 2009 at the conclusion of a trial, and in part with the consent of the parties, dealing with a number of issues including child custody and guardianship and support.
- [8] The relevant conditions established by the extant orders are as follows:
 - 1. The parties have joint custody of the children.
 - 2. Primary residency of the children is with Ms. B.
 - 3. The parties share joint guardianship of the children in accordance with the Joyce Model.
 - 4. Mr. B.'s access is limited to each Saturday between 8:00 a.m. and 4:00 p.m.

5. Mr. B.'s access includes entitling him to attend at the soccer and hockey games and practices of the two boys.
6. Mr. B. is required to take a Breathalyzer test at the end of each visit, if so requested by Ms. B. Further, he is not to drink alcohol 12 hours before or during the access or smoke in the presence of the children.
7. Mr. B. is not to drive with the children in his automobile.
- [9] The order of Madam Justice Ker permitted either party to apply to vary the Court's order, any time after November 1, 2010.
- [10] By his application, Mr. B. seeks an order varying the current order. He asks to have the driving restriction deleted; he also seeks weekend access from Friday at 7:00 p.m. to Sunday at 7:00 p.m. as well as weekday access each Wednesday from 6:00 to 8:00 p.m. In addition, he seeks an order of the Court granting him access on major holidays including the birthdays, Easter, Christmas and Halloween. Finally, he seeks an order permitting him to have the children in his company for one month during the summer vacation when he would be allowed to travel with the children to Ontario or other places in Canada.
- [11] Ms. B. is essentially opposed to any significant increase in access. She specifically opposes overnight access and as well is of the view that the no-driving provision ought to remain. The basis for her position is that Mr. B. is, in her view, an individual with a lengthy history of alcohol abuse and she considers that permitting him to drive with the children in his vehicle is a dangerous situation.
- [12] The parties have obtained a "Views of the Child" report from Dr. Elterman and that is in evidence. The report addresses only the circumstances of T., the elder of the boys.
- [13] The evidence concerning the parenting issue is comprised of a number of affidavits adduced by both Mr. B. and those who support him and Ms. B. and those who support her view. There is substantial conflict between the evidence of one camp and the other. Reconciliation of the content of those affidavits is quite impossible.
- [14] There is a complicating factor as well. The younger son appears to have a number of psychological difficulties. Based upon a thorough assessment which is contained within the material, it is evident that he is struggling very significantly in his educational endeavours. The material would indicate that many of his core skills are at the low end of the spectrum that one would expect to find in a child of his age. He is, in effect, probably fairly described as a "special needs" child.
- [15] The conclusions that I have reached, having considered the evidence with some care, are as follows:

A. I am unable to accept the general thrust of the evidence adduced by Ms. B. that Mr. B. is a substantially deficient parent in whose care the children ought not to be placed in any meaningful way because of concerns for their safety.

At one point in the course of the hearing, counsel made reference to this being a high conflict matter. That is an accurate characterization. I am concerned that the view that Ms. B. has as to Mr. B.'s qualities, views which are endorsed by those persons who support Ms. B. and who have provided affidavits, it is an exaggerated picture.

I do not find a basis to continue the imposition of the condition that Mr. B. is not to be permitted to drive with the children in his automobile. He has adduced a body of evidence that satisfies me that there is not a proper basis for that order to continue. At the conclusion of the hearing, pending the release of these reasons, I made an interim order that Mr. B. would be relieved of that condition.

B. The "Views of the Child" report prepared by Dr. Elterman deal only with the eldest child T. Based upon the material, T. appears to be a bright, thoughtful and well-adjusted boy. He has managed to develop and maintain a relationship with his father, notwithstanding the restrictive conditions of access which have been imposed. Insofar as further and expanded access is concerned, he indicated that he was quite content that there would be no overnight access. In his words, he is happy sleeping in his own bed. Notwithstanding that, I am also satisfied that Mr. B.'s time with T. can be increased, subject to T.'s own view on the matter.

C. There is substantial reason to be concerned with respect to the circumstances of the younger child P. Specifically, I refer to the findings which I noted earlier. There is of course no "Views of the Child" information with respect to him. The sense that emerges from the evidence generally is that, because of his special needs, he is a child who requires a significant level of supervision. That has application both with respect to how his time is spent and help he will need with regard to educational endeavours.

[16] Also at the conclusion of the oral hearing, I made an interim order that the children would be permitted to spend 21 consecutive days with Mr. B. over the summer vacation.

[17] As is apparent, it is my view that the principal relief sought by Mr. B., relief from the driving restriction is warranted and the order I made at the hearing shall stand.

[18] I also order that Mr. B. shall have two summer parenting times with the boys, one of 21 days duration and another for seven days.

[19] In addition, Mr. B. shall have the boys in his care for a four day period over the spring break and for half the Christmas vacation.

[20] The specifics of the arrangements for those parenting times will be left for the parties to discuss and find agreement. In the event that cannot be achieved, the matter should be brought back before me.

- [221] Apart from these specific times of access, I do not intend at this time to make any order as to other overnight visits. I do so on the basis that the elder son has made his views known and they deserve to be respected. As for the younger son, my current view is that he is dealing with substantial challenge at this time and that an order making significant changes in his arrangements would likely have a disruptive effect.
- [222] All that said, as I indicated at the time of the hearing, the parties simply must make a concerted effort to discuss these matters and find ways to work with some degree of cooperation. That is in the interests of all, most notably the children.

Child support

- [223] Ms. B. applies for orders respecting child support. Specifically,
1. She asks the Court to quantify Mr. B.'s obligation to pay for special expenses, namely child care expenses, for a portion of 2010 through to the date of hearing.
 2. She asks the Court to establish Mr. B.'s Guideline income and to make orders for 2009 through to the date of hearing, requiring him to pay child support in accordance with that Guideline income, and going forward.

Discussion

Child care expenses

- [244] The order of Madam Justice Ker required Mr. B., effective April 1, 2009, to pay 55% of the net daycare costs incurred by Ms. B. That rate was to be in effect until November 1, 2009. After that date, Mr. B. was obligated to pay 65% of Ms. B.'s net daycare costs.
- [251] Mr. B. paid in accordance with that obligation through March 2010. Evidently the net cost of daycare was in the order of \$300 per month; as I understand there were no difficulties in that initial period.
- [261] After March 2010, there were disagreements between the parties as to what Mr. B. was required to pay. He contacted Family Maintenance Enforcement Program (FMEP) with a view to having the payment supervised by that agency. In fact, FMEP indicated that they were not prepared to do so because there was no specific sum but rather a formula. Mr. B. has not made payment with respect to daycare costs since that date.
- [271] Ms. B. now seeks an order establishing what the sums owing will be and requiring payment of those accumulated arrears.
- [281] It is on this front that the positions of the parties are in quite stark dispute.
- [291] Ms. B. submits that her expenses and Mr. B.'s obligation flowing from those are as follows:
- 2010 - Amount of costs \$17,100; Mr. B.'s share \$11,115;
- 2011 - Amount of costs \$7,800; Mr. B.'s share \$5,070;

2012 - Amount of costs \$11,106; Mr. B.'s share \$7,218.90;

2013 (through June 30) - Amount of costs \$4,400; Mr. B.'s share \$2,860.

- [30] Mr. B. quite vigorously challenges these figures. In his submission, the amounts claimed are excessive and are simply not supported by reliable evidence. He says that those persons who are alleged to have been paid for the child care are friends and relatives of Ms. B.; he says that there is a paucity of evidence that payment was actually made. Additionally, he relies upon the evidence of his eldest son (from an earlier relationship, not one of the children mentioned earlier) casting significant doubt upon the proposition that these amounts were paid.
- [31] Mr. B. has also sought to adduce the report of a hand-writing examiner, the essential conclusion of which is that a number of the receipts which have been proffered as proof of these expenses are copies of one original. There are some original parts of these documents but the signatures are identical in the sense that they are copies of the same signature. In short, it is the examiner's opinion that there is a significant irregularity about these documents.
- [32] An issue that arose in the course of the hearing was whether or not the evidence of the hand-writing analyst, that is his report, should be received as an exhibit and what its effect would be. Mr. B.'s position is that it should be received and considered by the Court; Ms. B. took the view that there had not been appropriate notice provided. In the final analysis, in order to facilitate a decision, Ms. B. agreed that the receipts which were subject of the report would be withdrawn and no claim based upon them would be advanced.
- [33] To be clear, for the purposes of these reasons, the opinion is not evidence to be considered.
- [34] Mr. B. also disputes these claims on the basis that he says he has repeatedly advised Ms. B. that he wishes to make himself available to provide back-up childcare, both as a means of keeping expenses within reason and in the interest of having time with his children. He says that Ms. B. has been quite adamantly opposed to his efforts with the result that expenses have been incurred unnecessarily and unreasonably. She in turn says that Mr. B. is not a reliable resource in that regard.
- [35] The child care aspect of Ms. B.'s claim is quite troubling. On the one hand, there is no question that Mr. B. has an obligation and that he has not made any payment. On the other hand, there is the matter of determining what is an appropriately proven quantum of costs upon which an order can be made.
- [36] I am deeply concerned with what seems to be a strikingly large claim, coupled with the fact that these expenses were incurred for the services of friends and relatives and also an individual who is residing in a trailer on Ms. B.'s property. That individual's affidavit is in evidence. I have serious reservations as to its reliability in light of certain of its content and the very partisan position that the affiant has taken in the proceeding. My concern is also based upon the fact that there is no evidence of actual payment that would satisfactorily

prove the substantial sums that are claimed.

[37] My view is also informed by the reality that when the original order was made, daycare costs were in the order of \$300 per month.

[38] In the result, and bearing in mind that the onus of proving the claim rests with Ms. B., I have concluded that the amounts claimed have not been proven and thus cannot be sustained. Instead, based upon the evidence before the Court, I am left in a position where the best result at which I can arrive is to arbitrarily establish amounts that are reasonable in the totality of the circumstances as disclosed by the evidence. That will be as follows:

2010 - There are nine months at issue. It is my conclusion that an appropriate sum for daycare is \$400 per month; that will be increased to \$600 per month for the two summer months when school is not in session and different daycare needs apply. In the result, the amount of daycare expense for which Mr. B. will be responsible to share is \$4,000.

2011 - Daycare and after school costs will be compensable at a rate of \$400 per month. For the two summer months, when the children are not in school, that will be increased to \$600 per month. In the result, the total sum for which Mr. B. will be responsible to share is \$5,200.

2012 - Daycare and after school costs will be compensable at a rate of \$400 per month. For the two summer months, when the children are not in school, that will be increased to \$600 per month. In the result, the total sum for which Mr. B. will be responsible to share is \$5,200.

2013 - Daycare and after school costs will be compensable at a rate of \$400 per month. In the result, the total sum for which Mr. B. will be responsible to share is \$2,400.

[39] On that basis, the total amount of daycare expense for which Mr. B. is required to pay his share is \$16,800; his share is 65% of that, which is calculated to be \$10,920.

[40] Submissions were made demonstrating that Mr. B.'s financial circumstances are strained, and I will take that into account in terms of how those arrears are to be paid.

Monthly Child Support Payments

[41] Master Caldwell's order required Mr. B. to pay Ms. B. child support in the amount of \$900 per month. That sum was stipulated to be without prejudice.

[42] Madam Justice Ker's order of March 30, 2009 continued that obligation. It also provided that the parties would be at liberty to apply to vary the order any time after November 1, 2009.

[43] Ms. B. seeks to vary that order. As regards the fact that the application to vary is brought some considerable time after the first opportunity for such an application, she contends that she made real and significant efforts to have Mr. B. provide the necessary financial information but that information was not forthcoming. It was only in early 2013 that the information did become available.

[44] I am satisfied that she made real efforts to obtain the material from Mr. B. and that her application was brought in an acceptably timely way and should be considered by the Court.

[45] With respect to the actual quantum of the child support, her submission is as follows:

2009 - Ms. B. says that the evidence shows that Mr. B.'s Guideline income for 2009 was \$70,669.12. The Child Support Guidelines require a monthly payment of \$1,022.17 for that income. The difference between the amount paid (\$900) and the Guideline payment is \$122.17 per month. She seeks an order requiring Mr. B. to pay that sum for two months, a total of \$244.34 for the calendar year 2009.

2010 - Ms. B. says that the evidence shows that Mr. B.'s Guideline income for 2010 was \$72,713.43. The Child Support Guidelines require a monthly payment of \$1,102.70 for that income. The difference between the amount paid (\$900) and the Guideline payment is \$202.70 per month. She seeks an order requiring Mr. B. to pay that sum for twelve months, a total of \$2,432.40 for the calendar year 2010.

2011 - Ms. B. says that the evidence shows that Mr. B.'s Guideline income for 2011 was \$77,809.46. The Child Support Guidelines require a monthly payment of \$1,177.14 for that income. The difference between the amount paid (\$900) and the Guideline payment is \$277.14 per month. She seeks an order requiring Mr. B. to pay that sum for twelve months, a total of \$3,325.68 for the calendar year 2011.

2012 - Ms. B. says that Mr. B.'s Guideline income for 2012 was \$75,812. The Child Support Guidelines require a monthly payment of \$1,147.54 for that income. The difference between the amount paid (\$900) and the Guideline payment is \$247.54 per month. She seeks an order requiring Mr. B. to pay that sum for twelve months, a total of \$2,970.48 for the calendar year 2012.

[46] In addition, Ms. B. says that there are two bases upon which the Court should impute a greater income to Mr. B.

[47] The first is with respect to the mortgage interest on his home. Since 2010, Mr. B. has had a suite in his home which he rents to a tenant. As a consequence of that, he receives rental income. Also as a consequence of that, he is entitled by the CRA (the taxing authority) to write-off a number of expenses associated with his ownership of the home. Those expenses include the interest which he pays on his mortgage. Specifically, he is permitted to write off 50% of his mortgage expense and his tax filings indicate that he has done so.

[48] In Ms. B.'s submission, that situation permits Mr. B. to artificially reduce his actual income in a way that does not reflect his actual after tax financial circumstances. She submits that the Court ought to impute to Mr. B. income equal to the amount of the interest write-off.

[49] In my view, there is some merit to that position. The reality is that Mr. B. is incurring the same expenses as he was prior to implementing this arrangement, but the write-off provides a real tax advantage to him. I consider that the determination of his income for child support should reflect that state of affairs, but I do not agree that the entire sum should be

imputed to him. In my view, and this is an arbitrary determination, 40% of the sum written off with respect to interest expense should be imputed to him and his child support obligation should be adjusted accordingly.

- [50] For example, in his 2010 tax return, the amount written off is \$8,654.50. The sum of \$3461.80 should be imputed to him in this regard, increasing his Guideline income accordingly. The same adjustment must be made for the subsequent years, so long as the rental/write-off arrangement is in place.
- [51] Ms. B. also submits that there is a further basis to impute a greater income to Mr. B. She says that is with respect to a development that occurred in the taxation year 2012.
- [52] The circumstances are these. Mr. B. is employed as a property use inspector with the City of Vancouver. As a condition of employment, he is required to use his own automobile for work purposes, and he does so. For the purposes of calculating his income tax, he is permitted to write off some costs related to the acquisition and operating costs of that vehicle. Generally, no issue is taken with that. Prior to the tax year 2012, Mr. B. had a leased automobile and wrote off the lease fees. He subsequently purchased a vehicle and that is what he now uses. Since the taxation year 2012, Mr. B. has been permitted, by virtue of CRA rules, to write-off 30% of the value of his automobile as a capital cost allowance. In Ms. B.'s submission, the 30% that he is permitted to claim does not accurately reflect the reality of the situation. She says the automobile will not depreciate at that rate and so Mr. B. is thus put in a position where he is able to understate his real income.
- [53] I am satisfied that he is required to have and use his automobile as part of his employment and that there are substantial costs associated with having that automobile. Those costs include the fact that his automobile will depreciate.
- [54] Ms. B. was able to refer this Court to a decision of the British Columbia Court of Appeal, *Egan v. Egan*, 2002 BCCA 275, where the issue was discussed at some length. In *Egan*, the Court ultimately upheld the legitimacy of the write-off, but noted that the automobile in question was subject to real and quite harsh use. It is Ms. B.'s submission that the circumstances here are not the same, and that the Court ought to recognize that by imputing further income to Mr. B. that will reflect the reality that his vehicle is not depreciating at that rate.
- [55] I have given careful thought to this matter and the *Egan* decision. I conclude that there is no basis upon which I could properly determine that Mr. B.'s depreciation is not occurring at that rate nor is there a basis upon which this Court would be able to determine a more appropriate rate of depreciation.

- [56] I accept that this Court is not necessarily obliged to accept all of the income calculations that CRA allows. The matter of the mortgage interest write-off with respect to Mr. B.'s residence is an example where a court will intervene to act in the interest of fairness. I am not persuaded that the matter of the automobile depreciation is an appropriate circumstance for this Court to impute further income to Mr. B. and I decline to do so.
- [57] In the course of his submissions with respect to the support obligation, Mr. B. has urged this Court to consider a conclusion that his is a case which falls within the hardship category which the Child Support Guidelines provide. The Guidelines provide for a payor to claim undue hardship in the context of his child support obligations and his circumstances at large. In *Chong v. Chong* (1999), 47 R.F.L. (4th) 301, [1999] B.C.J. No. 743, a decision of the British Columbia Supreme Court, Madam Justice D. Smith (as she then was), provided a very helpful description of the process to be applied in determining whether an undue hardship claim can succeed:

18 The application of the undue hardship test is a two-stage process. First, the Court must determine if the spouse applying for relief under s. 10 has proved that payment of the Table amounts would cause the payor, or a child in respect of whom the request is made, undue hardship. Second, only after the Court has made a finding that such a payment would cause the payor or a child of the marriage undue hardship, does the Court undertake a comparative analysis of the parties' standards of living pursuant to s. 10(3) in order to determine if the Table amount of child support should be varied: *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.). At this second stage, the Court has the discretion to deny the application even if it determines that the payor's standard of living is lower than that of the recipient spouse.

19 The threshold for establishing undue hardship has been described as "tough": *Swift v. Swift* [1998] O.J. No 501 (Ont. G.D.); *Messier v. Baines* (1997), 161 Sask. R. 132 (Sask. Q.B.). These authorities clearly establish that while the assumption of new family obligations may create hardship and a lower standard of living, those factors do not automatically establish undue hardship.

- [58] Having examined the circumstances in the matter at bar, and taking into account the factors that relate to such a claim, I am unable to conclude that Mr. B.'s situation warrants a finding that the undue hardship provisions can be found to apply to him. In order for an undue hardship claim to be sustained and to permit a finding that the payor should be granted some relief from the statutory responsibilities that the Guidelines impose, the situation has to be exceptional. While Mr. B.'s financial obligations are undoubtedly challenging, they are not such as to properly bring him within that category. Accordingly, there will be no relief on that basis.

Conclusion

- [59] The order of Master Caldwell prohibiting Mr. B. from driving in his automobile with his children is deleted.

- [60] Mr. B. shall have two summer parenting times with the boys, one of 21 days duration and another for seven days. In addition, Mr. B. shall have the boys in his care for a four day period over the spring break and for half the Christmas vacation.
- [61] The specifics of the arrangements for those parenting times will be left for the parties to discuss and find agreement. In the event that cannot be achieved, the matter should be brought back before me.
- [62] As for the child support claim, Mr. B. is obliged to pay the sum of \$16,800 with respect to child care expenses incurred by Ms. B. through the end of June 2013.
- [63] Going forward from that date, the reasonable cost of child care will be shared by the parties in proportion to their income.
- [64] Ms. B. is obliged to apprise Mr. B. by email of the arrangements she has for child care. Reasonable efforts should be made to have Mr. B. provide child care where that can be done in a way that is not inconvenient.
- [65] It is apparent that extraordinary measures are likely to be necessitated in light of the special needs of the younger son. Given the obligations that arise under the guardianship order that applies, there will have to be meaningful efforts made by Ms. B. to ensure that Mr. B. is apprised of the situation and the special expenses that may be required. Such necessary expenses will be shared by the parties in proportion to their incomes.
- [66] With respect to monthly child support, the obligation will have to be calculated based upon the imputations which I have found to be warranted.
- [67] As for the accumulated arrears that this order requires Mr. B. to pay, those will be paid at a rate of \$400 per month until the amount is retired.
- [68] Going forward, effective July 1, 2013, Mr. B. is required to pay child support in accordance with the Guidelines, based upon his income as reported and with the added imputation of a part of the mortgage interest write-off, as set out in these reasons.
- [69] Finally, there will be an order that Mr. B. provide, no later than June 1 of each calendar year, a copy of his filed income tax return for the preceding year so long as there are children of the marriage as defined by the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), the Family Relations Act, R.S.B.C. 1996, c. 128 or the Family Law Act, S.B.C. 2011, c. 25. He is also to provide copies of any Notices of Assessment or Reassessment from his filed income tax returns within 15 days of those being provided to him by CRA. That obligation applies to his 2012 tax year filing and all subsequent years.

"The Honourable Mr. Justice Williams"

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