

CANADA / JUDGMENT

M.J.B. v. P.L.

2015 BCSC 141

COURT

Supreme Court of British Columbia

DECIDED

30 January 2015

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2015 BCSC 141 M.J.B. v. P.L. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: M.J.B. v. P.L., 2015 BCSC 141 Date: 20150130 Docket: E132690 Registry: Vancouver Between: M.J.B. Claimant And P.L. Respondent Before: The Honourable Mr. Justice Sigurdson Reasons for Judgment - Costs Counsel for Claimant: Claimant in person Counsel for the Respondent: George W. Gordon Submissions of the Respondent: dated August 15, 2014 Further Submissions of the Respondent: dated October 31, 2014 Submissions of the Claimant x 2: dated November 12, 2014 Reply Submissions of the Respondent: dated November 18, 2014 Place and Date of Judgment: Vancouver, B.C. January 30, 2015

Introduction

- [1] Following my reasons for judgment released on July 25, 2014 (2014 BCSC 1410) the parties were given liberty to speak to the issue of costs. Costs
- [2] The respondent Ms. L. seeks costs. She submits that she was wholly successful in obtaining an order permitting her to move their child to Toronto, obtaining an order for joint custody and joint guardianship with primary residence to her and generous access to the child to the claimant and obtaining an order for child support.
- [3] The claimant submits that there should be no order for costs. Mr. B says that he is without funds and unable to pay costs. He submits that the respondent, rather than mediating, retained senior counsel and chose to litigate at significant expense to himself.
- [4] Both parties face financial challenges. Although financial hardship is one factor to consider, as I have, the general rule is that costs should follow the event unless a court otherwise orders: *Gold v. Gold* (1993), 49 R.F.L. (3d) 56 (B.C.C.A.). Here I do not think there are reasons to depart from the usual rule. In this case the respondent was wholly successful. To the extent that the claimant's offer to mediate is relevant to the issue of costs, the proposal was not without significant conditions and the respondent herself had offered to mediate. In all of the circumstances the usual rule should apply and the respondent is awarded costs on Scale B pursuant to s. 1(1) of Appendix B "Costs" of the Supreme Court Family Rules. Child Support

- [5] Insofar as child support is concerned my reasons for judgment at para. 102 of the decision stated: I direct that Mr. B. pay his proportionate share of daycare expenses and pay child support to Ms. L. from September 2013. I direct that, for the purposes of child support and sharing daycare expenses, the parties use Mr. B.'s taxable income for the last year, and Ms. L.'s taxable income for last year as well.
- [6] With Mr. B.'s taxable income of \$16,030 and Ms. L.'s income of \$55,076 the proportionate share of childcare expenses for the claimant is 22.3%. As Ms. L. paid \$6,350.01 in childcare expenses from September 2013 to May 9, 2014, Mr. B.'s share is \$1,417.83. For the period of all of May 2014 to August 2014, she paid a further \$953.28 of which Mr. B.'s share is \$212.58. In total, Mr. B's share from September 2013 to August 2014 is \$1,630.41. For the period from September 2013 to August 2014 Mr. B.'s basic child support obligation based on his 2013 income of \$16,030 is \$1,392 based on \$160 per month which is the amount of his ongoing obligation.
- [7] Mr. B. asks the Court to reduce his child support. He asks the Court to consider his high access costs including round-trip air tickets costing upward of \$700 and accommodation costs between \$80 and \$135 per night. He submits that he has visited his son in September and intended to visit again for five days in November when he will incur costs in this range again. His plan, he says, is to visit roughly 10 times per calendar year until he and his son reside again in the same area. He said that he also incurred increased rent to accommodate his proposed living arrangement with his son. Mr. B. argues for all of those reasons that child support be eliminated until he resides in the same area as his son. Mr. B. also requests the Court eliminate the childcare costs because he opposed his son's attendance at daycare and offered to care for him, because he says the respondent had told him she would not make a request for daycare expenses, and because he does not have the financial capability to pay them in any event. Mr. B. says that the retroactive basic child support should be forgiven because it is a great financial hardship.
- [8] The respondent says that Mr. B. is simply re-arguing the order already made concerning child support and daycare costs. As to hardship, her counsel Mr. Gordon points out that the respondent is a full-time student who obtained a student loan in 2014 and now has only minimal income from teaching. Her debt, at over \$140,000, is substantial and she has no property of any significant value.
- [9] Section 10 of the Guidelines provides the court with the discretion to award an amount of child support different from the table amount where there is undue hardship:
- (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

- (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:
 - (a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
 - (b) the spouse has unusually high expenses in relation to exercising access to a child;
 - (c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
 - (d) the spouse has a legal duty to support a child, other than a child of the marriage, who is
 - (i) under the age of majority, or
 - (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessities of life; and
 - (e) the spouse has a legal duty to support any person who is unable to obtain the necessities of life due to an illness or disability.
 - (3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.
 - (4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.
 - (5) Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.
 - (6) Where the court makes a child support order in a different amount under this section, it must record its reasons for doing so.
- [10] In *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, the Court of Appeal discussed the undue hardship test:
45. The undue hardship test under s. 10 is two-fold. The spouse applying for relief under this section must prove that payment of the table amounts would cause undue hardship under s. 10(1) having regard to the criteria in s. 10(2). If this test is met, the applicant must go on to establish that, if required to pay the amount of maintenance otherwise payable under the [Guidelines] table, the standard of living of his or her household would be lower than that of the household of the other spouse. If this dual test is met, the court has a discretion to award a different amount of maintenance than that otherwise required under the Guidelines.

- [64] The Court in Van Gool went on to describe the test at para. 51: Although s. 10 can be used by either the payor or the payee spouse to seek a level of maintenance other than that provided under the basic [Guidelines] table, thus far the applications have been almost entirely by payors for a reduction in the table amount. Since the basic tables were designed to be a "floor" for the amount of maintenance payable, rather than a ceiling, it is not surprising that the authorities have held that the threshold for a finding of undue hardship is high. Hardship is not sufficient; the hardship must be "undue", that is, "exceptional", "excessive" or "disproportionate" in all of the circumstances. The onus is on the party applying under s. 10 to establish undue hardship; it will not be presumed simply because the applicant has the legal responsibility for another child or children and/or because the standard of living of the applicant's household is lower than that of the other spouse. The applicant must lead cogent evidence to establish why the table amount would cause undue hardship.
- [11] In the circumstances I am mindful of the financial difficulty of the claimant but the respondent also has significant financial difficulties. The claimant has not lead cogent evidence of undue hardship in the circumstances. I decline to reduce child support below the Guidelines amount and I decline to vary the order that I made at trial. I direct payment in accordance with my reasons for judgment in the particular amounts that I have set out above. "The Honourable Mr. Justice J.S. Sigurdson"

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