

CANADA / JUDGMENT

Milley v. Milley

2023 BCSC 1239

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1239 Milley v. Milley IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Milley v. Milley, 2023 BCSC 1239 Date: 20230719 Docket: E18013 Registry: Quesnel Between: Tara-Lee Milley Claimant And Jean-Paul Michael Milley Respondent Before: The Honourable Justice C. Ross Reasons for Judgment Counsel for the Claimant: P.L. Schmit, K.C. Counsel for the Respondent: K. Parker Place and Date of Trial/Hearing: Quesnel, B.C. June 16, 2023 Place and Date of Judgment: Quesnel, B.C. July 19, 2023 Table of Contents Introduction.. 3 Background. 3 Has the respondent breached paragraph 25 of the Agreement by failing to disclose his annual income and by failing to review and vary child support?. 5 Should paragraph 14 of the Agreement be cancelled?. 6 Does T.C. remain a child of the marriage?. 8 What child support should have been paid?. 9 Should the court make an order for retroactive support?. 12 Child Support going forward. 13 Costs.. 14

Introduction

- [1] This is an application brought by the complainant, Tara-Lee Milley, seeking orders, amending the separation agreement made November 27, 2019 and filed November 26, 2020 in action no. 18013, Quesnel Registry (the "Agreement") with respect to child support and parenting time to reflect:
- a) a retroactive adjustment of child support based upon the income of the parties for purposes of the Federal Child Support Guidelines, SOR/97-175 [Guidelines] support as reflected in the financial records of the parties;
 - b) the change of residence of E.A. to residing full-time with the claimant as of September 2020; and
 - c) T.C. reaching the age of majority as of July 10, 2021 and being no longer a child of the marriage.
- [2] She also seeks a declaration that the respondent, Jean-Paul Milley has breached the Agreement by failing to comply with the obligation to disclose his annual income and to review and vary child support.

- [3] The respondent seeks to have the application dismissed on the basis that the record is not adequate to permit an analysis of the best interests of the children, whether T.C. remains a child of the marriage and whether an order for retroactive support is justified.

Background

- [4] The complainant and the respondent were married on May 27, 2000. They have two children T.C., who was born in July 2002 and E.A., who was born in July 2006. T.C. turned 19 on July 2021.
- [5] The parties separated on November 1, 2018. As noted above, they entered into the Agreement which resolved all issues arising from the breakdown of their marriage, save for the divorce. They were divorced on April 24, 2020.
- [6] In the Agreement, the parties agreed to share parenting time with the children on an alternating week basis. With respect to child support, the Agreement provided that the parties would, by May 31 of each year, exchange financial information including T-1 tax returns and all relevant attachments and any documents prescribed by the Guidelines. There was to be a yearly review of child support on or before July 1 with support to be based upon the parties' incomes for the previous year.
- [7] Despite the provisions of the Agreement, the respondent did not produce his income information. The initial child support stipulated in the Agreement was based upon imputed income for the respondent of \$102,000 resulting in a payment obligation of \$1,548 per month. The claimant's guideline income as stipulated in the Agreement to be \$90,000, which resulted in a payment obligation of \$1,388 per month. Setting off the two obligations resulted in \$160 per month payable by the respondent to the claimant.
- [8] Thereafter, despite requests by the claimant, the respondent did not produce his financial information as required by the Agreement until 2023 when claimant's counsel became involved. As a consequence, the yearly review of child support obligations did not occur. The claimant had provided her financial information as required by the Agreement.
- [9] In the summer of 2020, E.A., then age 14, decided that she wished to reside full-time with the claimant and this living arrangement commenced in September 2020. The claimant again asked the respondent to produce his financial information so that child support could be recalculated based on E.A.'s change of residence but he failed to do so and child support continued as before.
- [10] T.C. has been diagnosed with Autism Spectrum Disorder. The Ministry of Social Development and Poverty Reduction approved T.C.'s designation as a Person with Disabilities ("PWD"), effective September 1, 2020, entitled to receive PWD benefits, which he has applied for and is receiving. T.C. attended the Foundation Level Carpentry Program at the College of New Caledonia between February and August 2021. T.C. has been employed since 2021, at least part-time.

- [11] Commencing in November 2020, the respondent began charging T.C. rent. He deposes that in September, 2021, T.C. purchased a car and is responsible for his own fuel, insurance and cell phone bill.
- [12] There is a difference in the affidavits with respect to T.C.'s residence commencing January 2021. The claimant deposes that T.C. continued to reside with both parties. The respondent deposes that T.C. resided exclusively with him from January 2021, until he moved into his own apartment in early 2023. This is consistent with the affidavit of Kathy Beauvillier, a support worker who has worked with T.C. She described attending a family meeting in January 2021 with T.C. and his parents, where T.C. expressed his wish to have a permanent base and live with his father. I find that between January 2021 and January 2023, T.C.'s primary residence was with his father, the respondent. Has the respondent breached paragraph 25 of the Agreement by failing to disclose his annual income and by failing to review and vary child support?
- [13] Paragraph 25 provides:
- a. The provision for child support payable for the children of the marriage will be reviewed by the parties annually on or before July 1 in each year, commencing in 2020 at which time the child support shall be increased or decreased, as the case may be, according to the Federal Child Support Guidelines based upon the parties' incomes in the previous year.
 - b. For the purpose of determining child support in each year, commencing July 1, 2020 and the parties' proportionate share of the children's special or extraordinary the parties shall, not later than May 31 in each year, exchange T-1 income tax returns for that year, and all relevant attachments, and in addition, all documents prescribed by s. 21 of the Federal Child Support Guidelines, and if applicable, any current information, in writing, about the circumstances relied upon by the party in a determination of undue hardship, in accordance with the requirements of s. 25 of the Guidelines adopted pursuant to the Child Support Guidelines Regulation, B.C. Reg. 61/98.
 - c. The parties shall negotiate in June of each year commencing 2020 regarding variation of the quantum of child support payable pursuant to rite Child Support Guidelines and shall come to an agreement not later than July 1, in each year commencing 2020 concerning the amount to be paid for child support; if no agreement has been reached, either party shall be at liberty to apply to vary the quantum of child support, upon notice pursuant to the applicable Rules of Court.
- [14] The claimant has deposed that she provided her financial disclosure, but the respondent did not provide disclosure until January 2023, despite her frequent requests and that there was no review of child support, again despite her requests. These assertions are uncontradicted.
- [15] I am satisfied that the respondent has breached paragraph 25 of the Agreement by failing to disclose his financial information and failing to review and vary child support on an annual basis. Should paragraph 14 of the Agreement be cancelled?

- [16] Paragraph 14 of the Agreement provides: The Husband and the Wife will share joint parenting time with the children:
- a. in alternate weeks and each of them will have primary day-to-day care, control and supervision of the children during their respective weeks; and
 - b. at such other times as mutually agreed to by the parties.
- [17] It is common ground that E.A. has resided with the claimant since September 2020. The claimant deposes that this was E.A.'s choice. Although the application response refers to wrongful conduct frustrating an agreement or order citing K.R. v. J.W., 2016 BCSC 225 at paras. 56-65, there is no evidence of such wrongful conduct in the materials. Moreover, there is no evidence that E.A. is estranged from her father, she continues to see him at times that are mutually agreeable. There is no evidence that the current arrangement is not in her best interests.
- [18] There is no evidence that the respondent did anything but acquiesce to the situation. There is no evidence of objection. He has brought no application to enforce the Agreement. While counsel submits that there should be a s. 211 report, there was no application for such a report or for a Views of the Child Report.
- [19] With respect to T.C., I have found that he chose to live with his father from January 2021 until January 2023, when he moved out to his own apartment. There is no suggestion that either party objected to this arrangement. In both cases, this acceptance of the children's decision is not unreasonable given the children's ages.
- [20] This action was brought under the provisions of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp). Section 5 provides as follows with respect to the variation of parenting orders: Factors for parenting order or contact order
- (5) Before the court makes a variation order in respect of a parenting order or contact order, the court shall satisfy itself that there has been a change in the circumstances of the child since the making of the order or the last variation order made in respect of the order, or of an order made under subsection 16.5(9).
- [21] The Agreement was filed in this court. Rule 2-1(3) of the Supreme Court Family Court Rules, B.C. Reg. 16/2009 provides:
- (3) Without limiting any other power the court may have to enforce an agreement filed under this rule, the court may make an order for that purpose on an application and, for that purpose, Part 10 of these Supreme Court Family Rules applies.

- [22] Paragraph 28 of the Agreement permits either party to apply for a variation of child support by an application under the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Section 148(3) of the FLA provides: 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].
- [23] Section 150 of the FLA provides in part: 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.
- [24] I am satisfied that E.A.'s new living arrangement constitutes a material change in circumstance that warrants a variation. In the circumstances, given the age of the children, the parent's acceptance of the new arrangements, the absence of any evidence of misconduct or denial of parenting time, or that the situation was in any way problematic and the absence of an application to enforce paragraph 14 of the Agreement. I am satisfied that paragraph 14 no longer reflects the situation and that it is appropriate to cancel it.
- [25] In substitution, I make the following orders to reflect the arrangement:
- a) commencing September 2020, the claimant will have primary parenting time with E.A.; and
- b) the respondent will pay guideline child support to the claimant for E.A. pursuant to the respondent's imputed income for the period from October 1, 2020 to March 1, 2023. Does T.C. remain a child of the marriage?
- [26] The position of the claimant is that T.C. ceased to be a child of the marriage when he reached the age of majority. She notes that he is working and in receipt of PWD benefits, commencing at age 18. She notes further that the respondent commenced charging T.C. rent in 2020. It is her position that if the respondent says that T.C. remains a child of the marriage, it is his onus to bring an application. He has not done so.
- [27] The respondent submits that the claimant's application, based in part on the submission that T.C. ceased to be a child of the marriage upon attaining the age of majority must be dismissed because there is not sufficient evidence in the record for the court to determine whether or not T.C. remains a child of the marriage.

- [28] I agree with the claimant that the onus is on the respondent, as the party seeking support, to establish that T.C. remains a child of the marriage, see *Dring v. Gheyle*, 2018 BCCA 435 at para. 49 and *D.C.A. v. R.D.M.*, 2021 BCSC 385 at para. 51. I find that on the evidence before me, he has failed to discharge this onus and that T.C. ceased to be a child of the marriage when he reached the age of majority on July 10, 2021. What child support should have been paid?
- [29] I find the respondent to have the following guideline income:
- a) for child support purposes for the period commencing July 1, 2020 to June 1, 2021 \$108,597.47 (2019 guideline income);
 - b) for child support purposes for the period commencing July 1, 2021 to June 1, 2022 \$106,300.93 (2020 guideline income);
 - c) for child support purposes for the period commencing July 1, 2022 to June 1, 2023 \$112,308.22 (2021 guideline income); and
 - d) for child support purposes for the period commencing July 1, 2023 to June 1, 2024 \$101,700.63 (2022 guideline income).
- [30] I find the claimant to have the following guideline income:
- a) July 2020 to June 2021 - \$99,742;
 - b) July 2021 to June 2022 - \$84,694;
 - c) July 2022 to June 2023 - \$86,381.47; and
 - d) July 2023 to June 2024 - \$98,887.77.
- [31] The child support should have reflected:
- a) A shared arrangement for both children from November 1, 2019 to August 31, 2020.
 - b) From September 1, 2020 until December 31, 2020, the support should have been based upon a shared arrangement for T.C. and E.A. living with the claimant.
 - c) From January 1, 2021 until July 10, 2021, the support should have been based upon T.C. living with the respondent and E.A. living with the claimant.
 - d) From July 10, 2021 onward, the support should have been paid by the respondent to the claimant for E.A.
- [32] Using the information provided to me by the claimant and the respondent, I have created a chart which details the child support owing by the respondent to the claimant. Year Claimant's Income Respondent's Income Child Support Payable Child Support Paid by the Respondent Overpaid or Owed Location of E.A. and T.C. Nov 2019 to June 2020 90,000 102,000 \$160/month payable by respondent to claimant Respondent paid claimant \$160/month \$0 Shared arrangement for both E.A. and T.C. July 2020 to Aug 2020 100,634.09 minus

union dues 892.06= 99,742 108,597 \$117/month payable by respondent to claimant Respondent paid claimant \$160/month Respondent overpaid by \$85 (320-235) Shared arrangement for both E.A. and T.C. Sept 2020 to Dec 2020 100,634.09 minus union dues 892.06= 99,742 108,597 \$691/month payable by the respondent to claimant Respondent paid claimant \$160/month Respondent owes \$2124 (2764-640) E.A. living with claimant Shared arrangement for T.C. Jan 2021 to June 2021 99,742 108,597 \$75/month payable by respondent to claimant (6x75/month = 450) Respondent paid claimant \$160 in Jan 2021 Respondent paid claimant \$103/month from Feb 2021-June 2021 Total = 160 + 515 \$675 Respondent overpaid by \$225 (675-450) T.C. living with respondent E.A. living with claimant July 2021 84,694 106,301 \$190/month payable by respondent to claimant Respondent paid claimant \$103 Respondent overpaid by \$87 T.C. living with respondent E.A. living with claimant Aug 2021 to June 2022 84,694 106,301 \$1000/month payable by respondent to claimant Respondent paid claimant \$103/month x 11 months \$1,133 Respondent owes \$9867 (11,000-1133) T.C. is no longer a child E.A. living with claimant July 2022 to March 2023 86,323.66 112,308 \$1049/month payable by respondent to claimant Respondent paid claimant \$102/month x 9 \$918 Respondent owes \$8,523 (9441-918) T.C. is no longer a child E.A. living with claimant Total Respondent owes claimant \$20,117 Should the court make an order for retroactive support?

[33] The respondent submits that the record is not sufficient to justify an order for retroactive support. I have concluded that the record is sufficient to justify the order sought. In particular, I note:

- a) there was an agreement, filed with the court, that stipulated that support would be based upon guideline income, that there was an obligation for yearly disclosure of income and a yearly review of support based upon that disclosure. The respondent clearly had notice of his obligations and of the expectation for support to be reviewed;
- b) the respondent did not comply with the requirements for disclosure and review, despite repeated requests from the claimant. I find this to have been blameworthy conduct;
- c) the respondent has not provided any explanation for his failure to comply;
- d) I find there has been no unreasonable delay in bringing this application given the frequent requests made to the respondent by the claimant; and
- e) the respondent has provided no evidence that payment of an order for retroactive support would amount to undue hardship.

[34] Accordingly, I find that the arrears owing by the respondent to the claimant as of the end of March 2023 are \$20,117 and the respondent shall pay to the claimant the sum of \$20,117 forthwith. Child Support going forward

[35] The respondent will pay child support to the claimant for the child of the marriage, E.A., born July 2006, the sum of \$961/month commencing April 1, 2023 and continuing on the 1st day of each month thereafter until the child support is reviewed and varied as follows:

- a) For the purpose of determining child support and the parties' proportionate share of the child's special or extraordinary expenses the parties shall, not later than May 31 in each year, exchange T-1 income tax returns for the previous year, and all relevant attachments, and in addition, all documents prescribed by s. 21 of the Guidelines, and if applicable, any current information, in writing, about the circumstances relied upon by the party in a determination of undue hardship, in accordance with the requirements of s. 25 of the Guidelines adopted pursuant to the Child Support Guidelines Regulation.
- b) The provision for child support payable for the child of the marriage E.A. will be reviewed by the parties annually in each year, commencing on July 1, 2023, at which time the child support shall be increased or decreased, commencing July 1, 2023 and continuing the 1st day of each month thereafter until varied the following year in the manner set out. Child support will be the monthly amount according to the Guidelines based upon the parties' incomes in the previous year. Costs

[36] The claimant will have her costs of this application. "C. Ross J."

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