
CANADA / JUDGMENT

Mohamed v. Martone

2019 BCSC 38

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Supreme Court of British Columbia

DECIDED

15 January 2019

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2019 BCSC 38 Mohamed v. Martone

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mohamed v. Martone,

2019 BCSC 38

Date: 20190115

Docket: E77616

Registry: Kelowna

Between:

Curtis Randall Mohamed

Claimant

And

Gina Martone

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for Claimant:

B. Hardwick

Counsel for Respondent:

B. Coyne

Place and Date of Hearing:

Kelowna, B.C.

November 6, 2018

Place and Date of Judgment:

Kelowna, B.C.

January, 15, 2019

Introduction

[1] These are reasons on an application for the following three orders relating to the claimant's obligation to pay child support for the parties' only child, E.M., born May 5, 1999:

1. that the claimant's obligation to pay basic child support cease effective September 1, 2018 and remain suspended while the child is attending university in another province;
2. in the event that E.M. returns home during the summer break and resides primarily with the claimant or in a shared parenting arrangement, that the claimant pay child support at the rate of \$2,800 per month or in an amount determined by this court; and
3. that the claimant's obligation to pay child support during the summer months shall terminate upon E.M. completing her undergraduate degree.

[2] The parties have agreed to an order for further review of child support in the following terms:

The basic child support for [E.M.] provided for in this Order shall be reviewed in the event of the earlier of:

- a. [E.M.]'s RESP [registered education savings plan] being exhausted;
- b. [E.M.] having successfully completed her undergraduate studies; or
- c. Prior to [E.M.] completing her undergraduate studies, confirmation of her enrolment in postgraduate studies.

[3] As a result of the agreement of the parties set out in the foregoing paragraph, it is unnecessary to comment further on the future review of child support.

Background Facts

- [4] The claimant and respondent were married on August 2, 1997. They separated in February 2007 and were divorced in September 2010. E.M. turned 19 years of age on May 5, 2018. From the time of separation until approximately September 2017, E.M. resided with the parties equally in a shared parenting arrangement. In September 2017, E.M. moved to Ontario to attend undergraduate studies at a university there. She is studying kinesiology. Following this undergraduate degree, she anticipates attending medical school.
- [5] The claimant is a nuclear medicine physician. The respondent is currently unemployed. She was formerly employed, but in December 2017 was involved in an incident at her workplace where she was assaulted but then subsequently terminated. The matter is presently being investigated by WorkSafeBC, and the respondent has commenced a civil action regarding that matter. Currently, the respondent is receiving unemployment insurance. That will expire in December 2018. The respondent is seeking employment.
- [6] The claimant and respondent entered into a settlement agreement arising from the breakdown of the marriage at a judicial settlement conference in February 2009. That agreement was incorporated into an order of the court made February 13, 2009, and subsequently entered on July 8, 2009 (the "Order"). The terms of the Order regarding support were:
- a. the claimant was to pay basic child support for E.M. of \$2,240 per month plus 75% of special and extraordinary expenses under s. 7 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines];
 - b. the quantum of child support and proportional sharing of special and extraordinary expenses was reviewable annually commencing in 2010;
 - c. the claimant was to pay spousal support of \$9,700 per month; and
 - d. spousal support was reviewable after February 1, 2014.
- [7] On or about April 30, 2014, the parties entered into a "spousal and child support settlement agreement" which varied the terms of the Order regarding child and spousal support (the "Agreement"). The relevant terms of that Agreement are as follows:
- a. the claimant is to pay basic child support for E.M. of \$2,800 per month until E.M. reaches 19 years of age or is no longer a dependent "child of the marriage" as defined by the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.);
 - b. if E.M. remains a dependent "child of the marriage" as defined by the Divorce Act, the issue of child support is reviewable on or after May 5, 2018 (E.M.'s 19th birthday);
 - c. the claimant is to continue to pay spousal support in the amount of \$9,700 per month until June 30, 2017;

- d. the claimant is to pay spousal support in the amount of \$7,500 per month from July 1, 2017 until June 30, 2018;
 - e. the claimant is to pay spousal support in the amount of \$5,000 per month from July 1, 2018 until June 30, 2020; and
 - f. effective June 30, 2020, the claimant's spousal support obligation to the respondent terminates.
- [8] The Agreement also provided that if E.M. remains a dependent child of the marriage after attaining the age of majority, "the issue of child support shall be reviewable on or after May 6, 2018", that is, E.M.'s 19th birthday.
- [9] The claimant has made all required support payments for child or spousal support and there are no arrears pursuant to the Order or the Agreement.

E.M.'s Circumstances

- [10] E.M. graduated from high school in June 2017.
- [11] In September 2017, E.M. commenced her undergraduate studies at a university in Ontario.
- [12] E.M. has finished her first year of university and returned to the same university for her second-year studies, commencing in September 2018. E.M. travelled to Vernon at the conclusion of her 2017-2018 academic year and lived in Vernon, in the respondent's home, for the summer break. E.M. worked at two or three jobs in Vernon during the summer to maximize her employment income, often working six days per week. Previously, E.M. had worked as a life-guard, at a lower rate of pay, prior to attending university.
- [13] While she lived in Vernon in the summer of 2018, E.M. resided primarily with the respondent and stayed with the claimant on occasional weekends. When E.M. commenced university initially, there was approximately \$80,000 in an RESP for E.M.'s benefit. On a proportional basis over a number of preceding years, the claimant and respondent jointly contributed to and managed this RESP. The oral agreement between the parties regarding the use of the RESP monies is that the parties will withdraw \$20,000 for each academic year to pay E.M.'s expenses. It is anticipated that the RESP will be exhausted at the end of her current four-year undergraduate degree program, if not before. E.M. received \$6,500 in scholarship funds and those scholarship funds will be used to pay a contribution towards E.M.'s university costs and living expenses.
- [14] At the end of the 2018 academic year, E.M. had approximately \$14,000 in her bank account comprising the remainder of what was left from her scholarship and RESP funds allocated for that year, together with monies which she had earned during the summer vacation. A further \$20,000 from the RESP will be allocated to E.M. for the 2018-2019 academic year, which means that at the beginning of that year she will have approximately \$34,000 available to her at that time.

- [15] The parties agreed that the cost of E.M.'s travel to and from university in the 2017-2018 academic year at the beginning of the year, at the Christmas vacation, and upon return to Vernon, are proper academic expenses which may be deducted from the RESP and/or scholarship funds. To date, these travel expenses have been paid by the respondent and she is entitled to be reimbursed as aforesaid. The claimant agreed with this reimbursement payable forthwith to the respondent from the RESP.
- [16] The claimant also agreed that any other appropriate university-related expenses paid from whatever source for E.M. during the last or current academic year would be a proper charge against the available RESP funds.
- [17] The claimant provided evidence that he has created the Curtis Mohamed (2017) Family Trust (the "Trust") and the purpose of the Trust is to provide the balance of any shortfall between the amount of money available from the RESP employment income or scholarships received by E.M. and E.M.'s university expenses. The evidence of the claimant and the evidence of Cheryl J. Schmidt, accountant for the Trust, was that the claimant and E.M. are beneficiaries of the trust. The evidence was that in 2017 a dividend in the amount of \$70,010 was declared payable to the trust. Ms. Schmidt deposed:

The dividend was declared from the retained earnings of the Company and was not additional income to the Claimant. Rather, it came from the post-tax income of the Company that had been retained in the Company in previous years.

- [18] The company referred to above is "Dr. Curtis Mohamed M.D. Inc.", the company which runs the practice of Dr. Mohamed. In his capacity as trustee of the Trust, the claimant can make available those funds to E.M. to cover any shortfall in the funds available for university expenses.
- [19] The claimant has continued to pay basic child support of \$2,800 per month to the respondent during E.M.'s first year at university because she was under 19 years of age. The claimant also purchased a car for E.M. when she turned 16 years of age. All of the insurance, and the majority of maintenance costs for the vehicle, have been paid by the claimant. E.M. used the car prior to attending university and used the car during the summer of 2018. She did not take the car with her to university and the claimant does have the use of the vehicle while she is attending university. The claimant has also paid the cost of E.M.'s cell phone and continues to do so.

The Claimant's Income and Financial Disclosure

- [20] By way of background, the claimant is a high-income earner. He has paid spousal support as provided in a court order and an agreement and will continue to do so until June 2020. The claimant filed an updated Form 8 financial statement on June 25, 2018. That Form 8 included his 2017 T1 personal income tax return and corporate financial statements for Dr. Curtis Mohamed M.D. Inc. for the year ending April 30, 2018. The line 150 income of the claimant for the 2017 tax year was \$385,737.62.
- [21] The claimant also pays child support for another child born in 2016. The current quantum of that child support is \$2,330 per month plus a proportionate share of unreimbursed medical and dental expenses, as well as a contribution to an RESP.

The Respondent's Income

- [22] The respondent, although temporarily unemployed, expects to receive an income of approximately \$31,012 inclusive of employment benefits. The respondent is actively seeking employment, which she expects to increase her future income. The respondent has assets including a \$625,000 equity in her home subject to a mortgage of \$200,000 approximately. In addition, she has savings in unregistered forms totalling approximately \$290,000 and registered savings in RRSPs and similar instruments totalling \$516,000.

Current Situation

- [23] On September 27, 2018, the parties entered into a consent order whereby the claimant shall pay the respondent on an interim and without prejudice basis child support for E.M. of \$1,500 per month pending the determination of this application.
- [24] As of September 28, 2018, the RESP for E.M. has a balance of \$42,333.45.

Statutory Framework

- [25] The parties agree that the applicable sections of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the Federal Child Support Guidelines, SOR/97-175 [Guidelines] apply. Section 15.1 of the Divorce Act provides that this court may make an order "requiring a spouse to pay for the support of any or all children of the marriage". There is no dispute in this case that, despite E.M. being over the age of majority, she continues to be a "child of the marriage" as defined in s. 2(1) of the Divorce Act.
- [26] Section 15.1(3) of the Divorce Act provides that a child support order must be made in accordance with the Guidelines. In this case, s. 3(2) of the Guidelines applies because E.M. is the age of majority or over. Section 3(2) reads:
- (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.
- [27] Section 4 of the Guidelines is also relevant. That section provides that where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of child support is the amount determined under s. 3 of the Guidelines unless the court considers that amount "inappropriate".
- [28] Finally, s. 7 of the Guidelines provides that in making a child support order the court may provide for an amount to cover all or any portion of a child's "special or extraordinary expenses" as defined in s. 7.

Analysis

- [29] "A review of a support order is distinct from the statutory right to a variation of a support order": *Jordan v. Jordan*, 2011 BCCA 518 at para. 28. Since the Agreement explicitly provided for a review of child support upon E.M. reaching the age of 19, the claimant need not establish a material change in circumstances before the court may consider child support. This is not a variation application; it is a review application.
- [30] Claimant's counsel referred to *Wesemann v. Wesemann*, [1999] B.C.J. No. 1387 at para. 6, which describes a four-step procedure to determine child support for a child over the age of majority. Counsel acknowledged that the *Wesemann* test has been largely overtaken by subsequent cases so that the second step is no longer necessary and that there need not be a party challenging the application of s. 3(2)(a) of the Guidelines in order for the court to apply s. 3(2)(b).
- [31] The proper approach to determining whether s. 3(2)(a) or s. 3(2)(b) of the Guidelines applies is set out in *McClement v. McClement*, 2017 BCCA 416 at para. 12, as follows:
- [12] In sum, the choice between the two sections is discretionary and determined by the particular circumstances of each case and there is no specific requirement formally to challenge relying on s. 3(2)(a) before a judge can consider whether it is inappropriate to apply that subsection rather than s. 3(2)(b) and or vice versa. The view taken by this Court is that the burden of proof rests with each party in the ordinary manner to persuade the court which of the two sections is the appropriate one to apply in the particular circumstances before the court. There are of course factors that tend to support the appropriateness of relying on one section rather than another and which guide the exercise of a judge's discretion. For example, the more closely the circumstances of the adult child resemble those of a minor child living at home, the less likely it is that the approach found in s. 3(2)(a) will be determined to be inappropriate. Each case will depend on its facts.

- [32] Having regard to the particular facts of the case at bar, I conclude that s. 3(2)(b) of the Guidelines applies (in conjunction with s. 4). Generally, s. 3(2)(b) applies in the case of "an adult child attending a post-secondary institution and living away from home": *M.(P.R.) v. M.(B.J.)*, 2012 BCSC 1795 at para. 120 [P.R.M.], *aff'd* 2013 BCCA 327; *W.P.N. v. B.J.N.*, 2005 BCCA 7 at para. 42 [W.P.N.]; see also *De Beck v. De Beck*, 2012 BCCA 465 at paras. 55 and 56. Those are the circumstances here. E.M.'s circumstances do not resemble those of a minor child living at home. To apply s. 3(2)(a) of the Guidelines would thus be "inappropriate" in the circumstances.
- [33] Accordingly, child support is to be determined according 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". This includes consideration of the child's potential contribution, "which is an important factor in considering the amount of support a student requires": *W.P.N.* at para. 42.
- [34] The claimant submits that child support should be suspended while E.M. is away from home attending university and, when E.M. returns home, child support should return to the \$2,800 per month, which is the basic amount of child support set pursuant to s. 4(b) of the Guidelines. Counsel suggested that the summer payments for the months of May, June, July and August could be combined on an annual basis for total of \$11,200 or \$933 per month, which would commence September 1, 2018, subject to a credit of loan payment since September 1, 2018.
- [35] Counsel for the respondent took the position firstly that s. 7 expenses must be considered because this is a *de novo* hearing where entitlement, quantum, and duration are all at issue and the matter of expenses has been subject to comment by Dr. Mohamed in his affidavit material.
- [36] The respondent submits that the claimant should be paying more. It was argued that the claimant is paying no s. 7 expenses. However, clearly those items, in particular, tuition, books, travel and the like are being paid from the RESP, which was created by a prior proportionate contribution by both parties.
- [37] The respondent takes the position that Dr. Mohamed's line 150 income is \$397,000 so that the payment should not be \$2,800 per month, but rather \$3,290 per month. Counsel agreed that there should be a reduction of four months while E.M. is at school but that the reduction should be small.
- [38] An issue was raised by the respondent that the actual costs of tuition and other university expenses was \$31,200 per year, so there was a shortfall over the RESP amount of \$11,200 of which \$6,700 was contributed by E.M. The respondent believes the RESP will be exhausted more quickly than previously believed. The answer to this issue was provided by the claimant to the effect that if there is any shortfall, the dividend declared in favour of the Trust will provide sufficient funds to cover any shortfall.

- [39] The respondent also asked that reference be made to a report of the Roemi Plummer accounting firm discussing guideline incomes. The claimant properly objected to this expert report as none of the procedural requirements relating to the admission of expert reports into evidence were complied with by the respondent. In the circumstances, I will not consider the contents of that document in the determination of this application.
- [40] Counsel for the respondent referred the court to a number of authorities including: *Steward v. Ferguson*, 2018 BCCA 158; *Hathaway v. Hathaway*, 2014 BCCA 310; *Kemp v. Kemp*, 2018 BCSC 381, and *Glenn v. Glenn*, 2018 BCSC 2. These were all instructive but did not relate to the issue of child support payable while a child of the marriage is attending university far from home for eight months of each year. As a result, those cases do not provide much assistance in deciding this case.
- [41] In determining the child support payable, I find guidance in the decision of Mr. Justice Weatherill in *Hamilton v. Popp*, 2014 BCSC 506 [Hamilton]. In that case, the payor of child support for a child of the marriage, who lived in B.C. and was attending university in Nova Scotia, was required to continue to pay that support while the child was attending university. In addition to child support, the payor was paying a proportionate share of the child's university expenses. An RESP was created over a number of years, which in 2014 totalled approximately \$45,000.00.
- [42] At para. 22 of *Hamilton*, the court noted that the main point of contention was child support and the court made a finding that the student in that case continued to be a child of the marriage while attending university. Reference was then made to s. 3(2) of the Guidelines. The court noted at para. 26 that the term "inappropriate" in the context of s. 3(2)(b) means "unsuitable" rather than merely "inadequate": citing *Francis v. Baker*, [1999] 3 S.C.R. 250. As a result, the court may exercise a broad discretion to accept or reject the prescribed amount of child support in each case involving children and age of majority issues.
- [43] At para. 31 of *Hamilton*, after reviewing the relationship between section 3(2)(a) and section 3(2)(b) of the Guidelines, the Court stated:
- [31] In *L.H.M.K. v. Brown J.* accepted the proposition that where s. 3(2)(b) of the Guidelines is applied to an adult child attending post-secondary schooling who is living away from home, courts generally suspend child support for that child when the child is away from home. In turn, courts order each party to pay their proportionate share of the child's education expenses.
- [44] The court also noted that s. 7 of the Guidelines also becomes relevant in determining child support because it provides that a child support order may include a provision for special and extraordinary expenses, including, for example, post-secondary education costs: *Hamilton* at para. 27. In *L.H.M.K. v. B.P.K.*, 2012 BCSC 435 [L.H.M.K.], Mr. Justice Brown stated at para. 170:

- [170] There is a certain amount of interplay between s. 3(2) and s. 7(1)(e) of the Guidelines. Attendance at a post-secondary institution may entitle a child of or over the age of majority to child support under s. 3(2), but that same child may not receive an additional award for "expenses for post-secondary education" under s. 7(1)(e) if the means of the spouses and the earnings of the child are of a certain level. In *M.H. v. W.D.H.*, 2003 BCSC 838, Dorgan J. explained the relationship between the two provisions as follows:
- [18] With respect to the quantum of support, the court has a flexibility under section 3(2) of the Guidelines that it does not have under section 3(1). Section 3(2)(b) allows the court to award an amount the court considers "appropriate" if the court considers that the application of the Guidelines under section 3(2)(a) would be inappropriate in the circumstances, and to consider the circumstances of the child as well as the circumstances of the parent in making such an award. The onus is on the party seeking to exclude the application of s. 3(2)(a) to establish that the application of this section is inappropriate: *Glen v. Glen*, (1997), 34 R.F.L. (4th) 13 (B.C.S.C.).
- [19] Even where section 3(2)(a) applies, however, the court may refuse to award s. 7 expenses based on the means of the spouses and the earnings of the child. In *Glen*, supra, the court held that there was insufficient evidence to exclude the application of section 3(2)(a), but denied post-secondary expenses on the basis that the adult child in question was capable of paying her own expenses through her earnings. Similarly, in *von Sturmer v. von Sturmer*, [1998] Civ. L.D. 656 (B.C.S.C.), the court denied post-secondary expenses where the child had part-time earnings and scholarship funds, and the payor spouse had made previous contributions to an education fund. In *Giebelhaus v. Bell*, [1998] Civ. L.D. 263 (B.C.S.C.), the court denied post-secondary expenses on the basis that the payor spouse did not have the means to pay them.
- [45] At para. 174 of *L.H.M.K.*, the court recites the submissions of the husband in that case relying on *W.P.N.* and then at para. 176 the following appears:
- [176] In the circumstances, while R. is at university and thus away from home, the husband shall reduce child support payments to the wife from 3 to 2 children to reflect the number of children living at home. Based on R.'s university schedule thus far, it appears that this will have the effect of requiring the husband to pay for two children 8 months of the year and for three children four months of the year.
- [46] In the case of *P.R.M.*, Madam Justice Arnold-Bailey faced a similar situation involving adult children attending post-secondary schooling away from home.
- [47] Having reviewed the condition, means, needs and circumstances of E.M., there is an expectation that she will work in the summer of 2019 as she did in the summer of 2018. Based on the parties' financial circumstances discussed and the authorities cited above, I am satisfied on a balance of probabilities the amount of child support that the claimant should be paying during the months E.M. is not residing with the respondent should be reduced.

- [48] As noted by Mr. Justice Weatherill in Hamilton at para. 42:
- [42] It is, however, reasonable that the respondent pays for some of the claimant's household expenses to allow Nicholas to live with her during the summer, Christmas and term breaks. It is also reasonable that the respondent contribute to some of Nicholas's miscellaneous expenses while attending university.
- [49] The same applies in the case at bar. The child support payable by the claimant to the respondent shall be reduced from twelve months to four months per annum.

Variation of Child Support

- [50] While there is no present application before the court to vary the quantum of child support payable by the claimant to the respondent, that is obviously the application by the respondent that will follow this order. I am satisfied that there is sufficient evidence before this Court to allow this Court to fairly assess the change in circumstances created by the increase in the claimant's income and the reduction of child support overall. The subsequent application would come at an unnecessary cost to the parties.
- [51] A significant change in child support payable by a party is, based on clear authority, a material change in circumstance that provides a basis for variation in child support. In *Goodkey v. Goodkey*, 2015 ABCA 394, the court stated at para. 21 that "it is clear that the termination of child support would have constituted a change of circumstance in this case."
- [52] In this case, the claimant now earns a significantly higher income than he did at the time of the Agreement and the Order.
- [53] The order made above results in a significant reduction in child support payable by the claimant.
- [54] The measure of child support can be led by a review of the Guidelines which is, in the case at bar, defined by the line 150 incomes of the parties. At the time of this application as set out in paragraph 18 above, the 2017 line 150 income of the claimant was \$397,000. The respondent's line 150 income for 2017 will be at least \$31,202. The child support payable on a comparison of those numbers is approximately \$3,200 per month.

Conclusion

- [55] As aforesaid, applying the discretion referred to in the quote at para. 44 above, it is ordered that the child support payable in this case shall be \$3,000 per month payable for the months of May, June, July, and August for a total of \$12,000 per annum which shall be paid at the rate of \$1,000 per month, commencing on the 1st day of September, 2018. There will be a credit to the claimant for any overpayment since that date, the credit to be allocated at the rate of 10% of the total credit for each of the following ten months.
- [56] There shall also be an order in the terms set forth in para. 2 above.

[57] The claimant is entitled to his costs payable by the respondent. Assessment of costs on Appendix B shall be as a half-day application of ordinary difficulty.

"Ball J."

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