CANADA / JUDGMENT

Morris v. Morris

2001 BCSC 1148

COURT	DECIDED
Supreme Court of British Columbia	2 August 2001

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Citation: Morris v. Morris Date: 20010802
2001 BCSC 1148 Docket:
21632
Registry: Prince George
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	KIRK ISAAC DAVID MORRIS ALSO KNOWN AS KIRK ISSAC DAVID MORRIS PLAINTIFF
AND:	MICHELE LORRAINE MORRIS DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MEIKLEM

(IN CHAMBERS)

Counsel for the Plaintiff: R. Tyo

Counsel for the Defendant: No Appearance

Date and Place of Hearing: May 28, 2001

Prince George, BC

[1] The plaintiff has applied to vary the child support and child access provisions contained in a divorce order made the 14th of April, 1992.

[2] The defendant former wife has relocated in Winnipeg, Manitoba, as contemplated in the access provisions of the divorce order. Counsel in Manitoba has corresponded with the court and provided copies of correspondence directed to counsel for Mr. Morris informing him that the former Ms. Morris (now known as Ms. Dohler) does not wish to attorn to the jurisdiction of the Supreme Court of British Columbia. Ms. Dohler's Manitoba counsel suggests that the variations sought can only be made by provisional orders pursuant to s.18 of the Divorce Act.

[3] In respect of the application to vary child support I find that s. 18(2) of the Divorce Act is applicable and this court is limited in jurisdiction and can make a provisional variation only. In respect of varying the defined access, s. 18 of the Divorce Act has no application. Section 6(3) of the Divorce Act provides this court with the discretion to transfer an application for a variation order in respect of custody to another province if the application is opposed and the children in respect of whom the variation order is sought are most substantially connected with another province. Section 6(3) of the Divorce Act reads as follows:

Where application for a variation order in respect of a custody order is made in a variation proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the variation order is sought is most substantially connected with another province, the court may, on application by a former spouse or on its own motion, transfer the variation proceeding to a court in that other province.

[4] The variations in defined access that are sought in the application before the court constitute relatively minor adjustments. The variations sought would increase summer access from four weeks to five weeks each year and would seek to define the access within specific dates each year, whereas the original order provided for four consecutive weeks to be specified by Mr. Morris in written notice to be provided to Ms. Dohler before the first day of February in each year. He also applies for access during the school spring break in each year rather than alternative years. He seeks to specify hours of telephone access and to delete the requirement for mutual agreement on ad hoc visits in Winnipeg. Mr. Morris also seeks orders assuring him information in respect of the children regarding their school reports and medical care.

[5] In my view transferring exclusive jurisdiction in respect of this application to the courts in Manitoba is not necessary when considering either the best interests of the children or the interests of justice. Such a transfer would probably increase the costs for both parties. Furthermore, from the correspondence that Ms. Dohler's counsel has provided to the court it would appear that the application in respect of the variation of access terms is not as contentious as the child support issue. I note also that Mr. Morris' March 5, 2001 affidavit in support of the application is not particularly detailed in respect of factual matters and can be readily answered with an affidavit from Ms. Dohler and written submissions from her Manitoba counsel so that this matter need not be unnecessarily protracted.

[6] Turning to the child support issue, I indicated to Mr. Tyo that I was somewhat skeptical about the forthrightness of Mr. Morris' financial disclosure, particularly in respect of his proprietorship and his profit-sharing motel employment. I note that according to the information set out in paragraph 11 of his March 5th, 2001 affidavit, his annual income from 1992 to 2000 averages $5,077. He asserts that he has paid his child support totalling $6,000 per year through the financial assistance of a female friend that he formerly co-habited with.

[7] Mr. Morris' affidavit asserts that he was laid off from his job as an automotive mechanic shortly after the separation, and due to a combination of factors, including the emotional loss associated with his divorce, his loss of employment, a burn suffered in a house fire, and his limited education, he has failed to regain equally remunerative employment. Mr. Morris' March 6, 2001 financial statement asserts that he has an annual gross self-employment income of $28,770, and a net income of $11,530 at the present time. He asserts that he has resided since 1992 in a motel room in a motel owned by his parents, and he now manages the motel for 25% of the net income on a monthly basis. The rest of his income comes from his contracting proprietorship which is engaged in snow plowing, renovations, grass cutting and other odd jobs.

[8] The evidence before me on this application does not indicate what his annual income was at the time of the divorce order and I note that that order preceded the Child Support Guidelines regime by a number of years.

[9] Although I am skeptical about Mr. Morris' motivation to earn a more substantial income, he is apparently not in arrears on his child support and it is difficult to conclude that he has deliberately depressed his income for nine years to avoid his child support obligation.

[10] Although the divorce order and the order itself does not specify what findings were made at trial were in respect of his income, I note that the trial record contains a property and financial statement sworn on May 30th, 1991 claiming monthly income of $3,740, being $3,440 from employment and $300 per month from self-employment. This suggests that the child support ordered was more or less commensurate with the order that would have been made if the Child Support Guidelines had been in effect then, since $500 per month for two children would correspond to a guideline income of $34,550.

[11] I am satisfied that there has been a material change in Mr. Morris' income. I also infer that there is an element of intentional under-employment and under s. 19 of the Guidelines and I think it is appropriate to impute to Mr. Morris an income for the purpose of the Guidelines of $30,000 per year. Mr. Morris is an able-bodied 40-year old man who was at age 30 working as an automotive mechanic. The evidence provided simply provides no reasonable basis for concluding that his earning capacity is limited to less than $1,000 per month.

[12] I therefore make a provisional order varying the child support payments to $446.00 per month commencing August 1, 2001.

[13] In respect of the application to vary the access provisions, Ms. Dohler is at liberty to provide affidavit material if she so chooses within 30 days of the release date of these reasons. Mr. Morris will have 15 days following the receipt of any affidavit material from Ms. Dohler to provide further affidavit evidence in reply. Both parties are at liberty within the next 60 days to provide any further written submissions that they wish to make on the access issue. The parties will bear their own costs.

"I.C. Meiklem, J."

The Honourable Mr. Justice I.C. Meiklem

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