
CANADA / JUDGMENT

Murtack v. Murtack

2020 BCSC 1677

COURT

Supreme Court of British Columbia

DECIDED

23 October 2020

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2020 BCSC 1677 Murtack v. Murtack

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Murtack v. Murtack,

2020 BCSC 1677

Date: 20201023

Docket: E-182222

Registry: Vancouver

Between:

Sheri Judy Doris Murtack

Claimant

And

Myles Montgomery Murtack

Respondent

Before: Master Elwood

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant appearing by teleconference:

B.J. Ingram

Counsel for the Respondent appearing by teleconference:

W. Shields

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 19, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 23, 2020

Introduction

- [1] THE COURT: The claimant, Sheri Murtack, applies for an order requiring the respondent, Myles Murtack, to pay special or extraordinary expenses pursuant to the Divorce Act and s. 7 of the Federal Child Support Guidelines. Ms. Murtack seeks reimbursement for a share of the expenses she has paid for three children of the marriage since January 1, 2019. Ms. Murtack also seeks a lump sum or a monthly amount payable prospectively for those expenses from now until a trial that is currently scheduled to commence on June 28, 2021.

Background

- [2] The parties began living together in 2001. They were married in 2011. They separated in 2018. There are five children of the marriage. The eldest child, Kaiya, is Mr. Murtack's stepdaughter, but lived with him at all times in a parental relationship.
- [3] Ms. Murtack lives in Florida with Kaiya, Paris, and Ava. Kaiya is a full-time student at a university in Florida. Paris and Ava attend private school in Florida.
- [4] Mr. Murtack lives in Cranbrook, British Columbia, with Mason and Beckett.
- [5] Mr. and Ms. Murtack are each 50-percent shareholders in M & S Murtack Holdings Ltd., a holding company that pays dividends to them. With some interruptions and delays, Mr. Murtack deposits dividends of at least \$10,000 per month in Ms. Murtack's bank account. Beginning in December 2018, Mr. Murtack also began paying Ms. Murtack \$4,000 per month in child support based on an interim, without prejudice order entered into at a judicial case conference.
- [6] In March 2019, Ms. Murtack applied for interim child support for the children who lived with her and interim spousal support in the form of a lump sum plus monthly payments. The evidence before the court included the following statement by Ms. Murtack at paragraph 28 of an affidavit sworn March 1, 2019:

28. . . . My estimated monthly expenses as set out in my Form F8 Financial Statement total \$14,297 Cdn. including \$3,600 per month for the schooling of the three daughters. After taking into account the fact that the respondent and Kaiya have covered schooling expenses for Kaiya for this year, the monthly expense estimate is properly reduced by \$1,650 per month to \$12,650 per month including schooling expenses of \$1,667 per month for the two youngest daughters. . . .
- [7] In written reasons for judgment indexed at 2019 BCSC 487, Master Muir declined to make an interim award of spousal support:
- [53] As to spousal support, I cannot find any basis for an award of interim spousal support so long as the claimant is receiving dividends from M & S of at least \$10,000 per month. With that and the \$4,000 child support per month being paid, the claimant's declared expenses are more than covered.
- [54] Thus, the application for interim, lump sum spousal support is denied. Should the claimant not receive dividends from M & S of at least \$10,000 per month on a regular monthly basis, there is liberty to apply. Of course, there is liberty to argue at trial that the claimant should be entitled to ongoing or lump sum spousal support.
- [55] As to retroactive support, given my conclusions and the dispute about when support was first claimed, this is an issue best left for trial.
- [8] Master Muir affirmed the JCC order for interim child support:
- [58] Given that the respondent appeared to concede that point, in my view, the order should stand. The respondent will, therefore, pay interim child support of \$4,000 per month for the two children in the claimant's care, on the first day of each month until agreement or further [court] order.
- [59] The issue of retroactive child support is adjourned to the trial of this matter.
- [9] Master Muir went on to order an interim distribution of family property to Ms. Murtack in the amount of \$200,000 pursuant to s. 89 of the Family Law Act.
- [10] In a more recent F8 financial statement dated April 20, 2020, Ms. Murtack listed special or extraordinary expenses for three children in her care totalling \$3,582 US, which converts to \$4,782 CDN, per month.
- [11] In her most recent affidavit dated October 8, 2020, Ms. Murtack deposes that she incurs average monthly special and extraordinary expenses totalling \$5,051 CDN.
- [12] The reasons for the increases in the special and extraordinary expenses Ms. Murtack says she incurs are not entirely clear to me from the materials, but a good share the current amount appears to be attributable to additional expenses over and above the private school expenses for the two younger daughters set out in Ms. Murtack's March 2019 affidavit.

- [13] In her most recent affidavit, Ms. Murtack deposes that she cannot cover her own expenses and those of her daughters on the \$14,000 per month she receives from Mr. Murtack.
- [14] The special and extraordinary expenses for which Ms. Murtack seeks reimbursement to June 2020, when this application was filed, are set out in an affidavit by a paralegal employed by Ms. Murtack's counsel. The paralegal deposes that she was informed by Ms. Murtack that Ms. Murtack incurred s. 7 expenses totalling a set of six annual or monthly amounts. The affidavit attaches approximately 250 pages of exhibits. The majority of the expenses claimed, approximately \$58,000 CDN, are 2019 and 2020 expenses for Kaiya. The paralegal states that most of these expenses relate to academics and accommodation, healthcare, food and accommodation, and transportation. She does not say what the other expenses relate to.
- [15] The supporting documents are bank account statements from Kaiya's bank account. It appears that Kaiya provided a colour coding of her expenses. But it is impossible to tell from the affidavit and the copies of the exhibits what was paid by Ms. Murtack for which expenses identified by Kaiya.
- [16] Kaiya is on a partial scholarship. Her tuition and books are paid for during the regular school year. Housing and food are billed through her sorority, which serves food Monday to Friday. For at least part of 2020, however, Kaiya lived at home due to the pandemic. She is now back living on campus, and incurring expenses for food and accommodation.
- [17] Ms. Murtack deposes in her October 6 affidavit that she has incurred a further \$10,000 US for the three daughters since school resumed in August 2020. Ms. Murtack sets out a table breaking down the current one-time and monthly expenses. The table includes health insurance for Kaiya for the current school year, monthly housing and food, along with other items such as car repairs. The table also includes private school tuition for the two younger daughters, along with other items such as a bathing suit, a prescription, school supplies, an iPad fee, and hair care.
- [18] Based on these materials, Ms. Murtack seeks a lump sum of \$72,400 CDN being 75% of the total of \$96,531 CDN she says she has incurred since January 1, 2019, reflecting Mr. Murtack's share based on the parties' respective incomes.
- [19] On a prospective basis, Ms. Murtack seeks \$42,552 CDN, being \$4,728 for each of the nine months between now and trial, although it seems to me that that claim should be 75% of those amounts based on the parties' respective incomes.
- [20] Opposing this application, Mr. Murtack argues that Ms. Murtack's claim to special or extraordinary expenses should be adjourned to trial when there can be a full determination of whether the amounts claimed are properly s. 7 expenses and an accounting made for the child support and s. 7 expenses to which Mr. Murtack says he is entitled from Ms. Murtack.

Analysis

- [21] I have two difficulties with Ms. Murtack's application for s. 7 expenses. First, the current application is, at least to some extent, at odds with Master Muir's decision in April of 2019. Master Muir found that the \$10,000 monthly dividend and the \$4,000 in child support Ms. Murtack receives more than covered Ms. Murtack's declared expenses. Those declared expenses included the private school expenses for the two youngest daughters.
- [22] An expense that a parent can reasonably cover, taking into account the parent's income and the child support they receive, is not an extraordinary expense within the definition under s. 7(1.1) of the Guidelines: see *J.T. v. C.T.*, 2013 BCSC 28 at para. 39.
- [23] Master Muir found that Ms. Murtack could reasonably cover the schooling expenses for the two younger daughters. In the interests of consistency of results, I should not come to a different conclusion. A more fulsome analysis of Ms. Murtack's needs and expenses is better left to trial, rather than sequential interim applications.
- [24] Ms. Murtack's declared expenses as at April 2019 and Master Muir's decision did not include Kaiya's education expenses because Ms. Murtack said in her affidavit that Mr. Murtack and Kaiya had covered those expenses for the year. Ms. Murtack now claims reimbursement of significant expenses for Kaiya for 2019 and 2020, as well as additional expenses for Paris and Ava.
- [25] This brings me to the second difficulty I have with the current application, which is the materials in support of the reimbursement claim. While hearsay may be admissible on an interim application, the affidavit by the paralegal does not provide enough information or breakdown to determine whether the expenses Ms. Murtack informed the paralegal she had incurred justify an order under s. 7 of the Guidelines.
- [26] To qualify for a s. 7 order, an expense related to education or extracurricular activities must be extraordinary. It must also be necessary as defined in relation to the child's best interests and reasonable as measured against the financial means of the parents and, if appropriate, the child herself: see *Clarke v. Clarke*, 2014 BCSC 824 at paragraphs 47 to 54.
- [27] Some of Kaiya's expenses qualify as s. 7 expenses, but some do not. Health insurance and housing on campus seem necessary and reasonable in Kaiya's circumstances, but weekend food, drink, and transportation are not normally s. 7 expenses, nor are car repairs or cellphone bills. In Kaiya's case, as an adult child, it is also necessary to consider whether, in addition to her scholarship, Kaiya could reasonably cover some of her expenses with her own employment income, if any, as well as the means and ability of her biological father to contribute to those expenses.
- [28] As for Paris and Ava, some of their expenses over and above the schooling expenses addressed by Master Muir are s. 7 expenses, but some are not. For example, a bathing suit and haircare are not normally s. 7 expenses.

- [29] The materials on this application are not sufficient for the court to make the necessary assessment and calculation. Further, it is generally preferable that former spouses consult with one another on s. 7 expenses before they incur the expense: see *Lee v. Chung*, 2011 BCSC 404 at paragraph 35-36. Delivering an affidavit after the fact attaching bank account statements is not, in my view, a substitute for consultation.
- [30] Ms. Murtack submits that, for the purposes of this interim application, "rough justice" can be achieved by ordering Mr. Murtack to pay the full amount claimed, subject to an adjustment at trial. I reject this approach for two reasons. First, it will only add to the work of the parties and the judge at the trial. Second, an order of the court, even an interim order, should be based on adequate evidence.
- [31] Sometimes it is necessary to defer disputed facts to trial, but in this case all the necessary information for the reimbursement claim is in Ms. Murtack's possession and could be presented by way of affidavit evidence and more detailed calculations and breakdowns.
- [32] Having said this, there is a core aspect of Ms. Murtack's application that is properly the subject of a s. 7 claim. Ms. Murtack deposes that the dividends and child support she receives do not fully cover the expenses for all three children living with her. It would not be in the interests of the children if they lost the educational opportunities they have earned, and came to expect during the marriage, because their mother could no longer continue to cover those expenses. Accordingly, some order is justified to cover special and extraordinary expenses until trial.
- [33] In my view, the rough justice of which Ms. Murtack speaks is best accomplished by:
- a) an order adjourning the application for the reimbursement of past expenses until Ms. Murtack provides Mr. Murtack with full particulars of the expenses and information on any other sources of funding that may cover Kaiya's expenses; and
 - b) an interim order to address the current school year and the ongoing monthly expenses that are, in my view, properly s. 7 expenses.
- [34] I note Mr. Murtack's argument that the notice of application does not include an application for prospective s. 7 expenses. However, Ms. Murtack's most recent affidavit makes it clear she is seeking prospective s. 7 expenses. It would not be in the interests of either party, or the children, in my view, to require a further hearing on amended application materials.
- [35] For the reasons I have discussed, it is difficult to assess the appropriate amount of s. 7 expenses for the current school year. Doing the best I can with the existing materials, I find that Ms. Murtack is currently incurring s. 7 expenses of approximately \$2,760 CDN per month. I have arrived at this amount by taking Ms. Murtack's claim of \$4,728, subtracting the \$1,667 that Master Muir found Ms. Murtack could reasonably cover, and then subtracting a further \$300 as my estimate of the claimed expenses that are not s. 7 expenses.

- [36] Based on the parties' incomes, I will order Mr. Murtack to pay 75% of the allowed s. 7 expenses, which is \$2,070 per month.
- [37] Ms. Murtack says she began incurring school-related expenses for this school year three months ago in August. There are eight months remaining until the trial. I will therefore order a lump-sum payment for 11 months, which equals \$22,770 CDN.
- [38] In my view, a lump-sum payment is appropriate, given that funds are available following the recent decision on another application in this proceeding by Master Vos.

Conclusion

- [39] Mr. Murtack must pay Ms. Murtack \$22,770 as special or extraordinary expenses under s. 7 of the Federal Child Support Guidelines for the period of August 1, 2020, to June 28, 2021.
- [40] This order is without prejudice to a subsequent accounting of the s. 7 expenses incurred by both parties between August 1, 2020, and June 28, 2021.
- [41] Mr. Murtack may access the funds held in trust from the sale of properties for the purpose of the payment to Ms. Murtack under this order.
- [42] Ms. Murtack's claim for reimbursement of s. 7 expenses from January 1, 2019, to July 31, 2020, is adjourned.
- [43] Given their divided success, the parties will bear their own costs of this application.

"Master Elwood"

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