
CANADA / JUDGMENT

N.M. v. G.M.

2015 BCSC 1732

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1732 N.M. v. G.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.M. v. G.M.,

2015 BCSC 1732

Date: 20150924

Docket: E133510

Registry: Vancouver

Between:

N.M.

Claimant

And

G.M.M.

Respondent

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

Appearing on his own behalf:

N.M.

Appearing on her own behalf:

G.M.

Place and Date of Hearing:

Vancouver, B.C.

April 2, 2015

Written Submissions of the Respondent:

May 7, 2015

Written Submissions of the Claimant:

May 22, 2015

Place and Date of Judgment:

Vancouver, B.C.

September 24, 2015

I. Introduction

- [1] This is an application by the claimant N.M. to end the child support that he is required to pay pursuant to a separation agreement and to cancel the arrears of support that have accumulated under it. The respondent G.M. opposes his applications, arguing that two of their children continue to require support and that his claim that his ability to pay support has been reduced is not credible.
- [2] Both Mr. M. and Ms. M. represented themselves in this application. After the hearing, I asked them to provide supplementary affidavits on the question of whether their oldest remains a child of the marriage for support purposes due to her disabilities, despite the fact that she is over the age of majority.

II. Evidence

A. Background

- [3] Mr. M. is 61 years old. Ms. M. is 54. He is a financial advisor and she is a nurse. They were married in 1985 and entered into the separation agreement in 2011. The names and current ages of their children are: Am. (25), N. (23), B. (21) and Al. (20).
- [4] At the time that it was entered into it was agreed that all of the children were still "children of the marriage" for support purposes, pursuant to the Divorce Act. The oldest two attended Capilano University and lived mainly at home, and the youngest two were still in high school.
- [5] According to the financial statements appended to the agreement, Mr. M.'s income at the time was \$166,646 and Ms. M.'s was \$45,000.

- [6] Under the agreement he agreed to pay \$1,500 per month in child support. As part of their separation arrangements, he also transferred his interest in the family home to her and she assumed responsibility for the mortgage on it. In the recitals to the agreement, they specified that she needed to receive this amount of support in order to qualify to assume the mortgage.
- [7] They agreed to share equally in half the cost of the tuition and books for the older children, on the basis that these children were contributing the other half themselves, and to engage in the same sharing if the younger ones pursued post-secondary education. In his second affidavit Mr. M. set out his compliance with this requirement to contribute to these educational costs, until the point that each child no longer required it.
- [8] Mr. M. and Ms. M. also agreed to share the children's special and extraordinary expenses equally, including some specified expenses. Mr. M. was to be responsible for the children's cell phones and transit expenses.
- [9] The agreement provided that the amount of child support and the sharing of post-secondary expenses could be reviewed in the spring of 2013, when their youngest child Al. would be graduating from high school, without the need to show a material change in circumstances.

B. Mr. M.'s evidence

- [10] Mr. M. deposes that the amount of support in the separation agreement was based on his income from 2010, which included a one-time capital gain. His income in subsequent years did not approach that figure. He paid the agreed-upon child support until the end of June 2013, at which point he and Ms. M. renegotiated the amount down to \$1,000, in light of his reduced earnings. Ms. M.'s position is that her agreement to this reduction was pursuant to the review provision in the agreement, and that it coincided with Al.'s graduation from high school.
- [11] Mr. M. says that his financial circumstances led him to cease making the payments entirely in October of that year. The Family Maintenance Enforcement Program ("FMEP") then began to pursue him for the arrears that accumulated.
- [12] He advised in oral submissions that recently Ms. M. had agreed to accept \$500 per month in support from him. Ms. M. confirmed in her submissions that she made this concession in February of this year.
- [13] As of February, his arrears and interest totalled \$15,127.56. He claimed that the FMEP has continued to calculate and enforce the arrears as though his monthly payment was still \$1,000, but Ms. M. has provided correspondence from that agency showing that as of April 1st it was pursuing the lower amount. Since March of 2014 the only "payments" to reduce his arrears have consisted of deductions by the FMEP from amounts owed to him by the federal government.

- [14] According to the tax returns attached to his most recent financial statement, his Line 150 income was \$24,499 for 2011, \$10,759 for 2012 and \$57,592 for 2013. He explains that his higher income in 2013 was because he cashed out his RRSP and a life insurance policy. In a spreadsheet attached to his second affidavit he described earning gross income of \$35,273 in 2014, but it is not clear whether his claimed Line 150 income for that year will be lower than his gross income, as the Line 150 incomes from 2011-13 seem to have been.
- [15] He lists his current net income as \$35,273 but says that when legitimate deductions for his payment to maintain his membership in his firm and his operating expenses are applied, he actually has a negative income for support purposes. He has recently had to borrow \$20,000 from his mother to meet expenses.
- [16] In response to questions from me during submissions, he said that his income has declined since the separation because the amount of assets he has under management has declined. He maintains his partnership because his gross income would decline substantially if he were only a financial advisor. As of the date of the hearing, he was not making his monthly contribution towards the partnership and was facing a decision about whether it is viable to continue attempting to make them.
- [17] The spreadsheet setting out his income also shows that Ms. M.'s income has actually exceeded his in the years since the agreement. He points out that she has re-partnered and has a household income of \$120,000, which she supplements by taking in international students as boarders.
- [18] His more fundamental concern is that the children have now all ceased to be children of the marriage for support purposes and so his obligation should have terminated on that basis, at the point that each of them reached that stage.
- [19] He has appended an additional spreadsheet that purports to show when each child completed or ceased their post-secondary education and then gained employment or embarked on extended travel.
- [20] According to that information, Am. completed her business degree in 2014 and has been working since. N. left university in May of 2014 and is still travelling. After working in 2014, B. completed BCIT earlier this year before embarking on a three-month trip. Al. worked from January to September 2014, attended Columbia Bible College and is now working full-time. To attend the college, Al. obtained a \$6,000 student loan and used about \$3,000 of his own money.
- [21] Finally, Mr. M. advises that B. and Al. continue to live with him 50% of the time.

C. Ms. M.'s Evidence

- [22] Ms. M. maintains that the oldest child Am. and the youngest child Al. remain children of the marriage for support purposes.

- [23] As of the date of her first affidavit Al., then still 19, was living with her for 20 days out of each month, the other 10 of which he spent with Mr. M. He was on a waiting list for a program at BCIT. She did not address his employment situation.
- [24] According to Ms. M., Am. deals with some serious challenges in her life. She has attention deficit disorder, obsessive compulsive disorder and mild oppositional defiance disorder. These hinder her ability to "function independently and responsibly on a daily basis." Ms. M. attached as an exhibit to her affidavit the report of the psychiatrist who diagnosed Am. with ADHD and ODD when she was 13. Impulsivity was a particular concern flagged by the psychiatrist.
- [25] Ms. M. says that Am.'s disabilities have delayed her maturation to adulthood. Her immaturity and lack of sensitivity to social cues have made her very vulnerable. She became anorexic after returning from Europe and revealed that she had been sexually assaulted while travelling there. She has since embarked on a variety of health treatments, including alternative health therapies, in an attempt to "purify herself". As an example of her self-purification, she has stopped taking contraception, against the advice of her physician, on the belief that she can prevent pregnancy through "ovulation prediction".
- [26] Despite having earned a business degree, Am. does not want to work in that field. Instead she wishes to pursue her interest in "holistic health". To that end, she began to attend a massage therapy school in May. The cost of this course will be approximately \$30,000. She applied for a student loan to cover her school fees. If all goes as planned, she will complete her training in December of 2016.
- [27] Ms. M. has co-signed a bank loan to assist Am. to address \$7,700 in credit card debt, which Am. plans to pay off by working two days per week. Am. continues to live with her and is dependent on her for support while she attends school.
- [28] Ms. M. also questions the legitimacy of Mr. M.'s claims of financial difficulties, pointing out that he pays as much as \$48,000 per year to remain a partner of his financial advice firm, which seems illogical in light of his consistently low sales earnings in recent years. She points out that he is a co-founder of this branch of the firm.

D. Mr. M.'s reply

- [29] Mr. M. takes issue with Ms. M.'s portrayal of Am. as delayed in her maturity and unable to cope in society. He acknowledges her ADHD diagnosis as a teenager, but describes her as "a very capable and intelligent young adult." He points to her ability to complete a business degree and her strong performance in courses that interest her. She is capable of employment and has held a part-time job as a waitress at a local pub, both before and after her period of extended travel. She certainly has no problem dealing with other adults in a social setting.

- [30] As an example of Am.'s diligence in employment matters, Mr. M. notes that she was able to pay him back the \$6,500 that he had loaned her to buy a car (in addition to the \$4,000 that he and Ms. M. contributed between them towards the purchase) in seven months, by working two jobs.
- [31] He also deposes that while Am.'s permanent residence is with Ms. M. she often stays with her boyfriend, who lives closer to her school.
- [32] With respect to the amount of child support provided for in the separation agreement, Mr. M. says that the figure was not intended to reflect the Federal Child Support Guidelines, the situation of shared parenting, or his income. It was based on what Ms. M. "felt she needed."

III. Discussion

- [33] There have not yet been any divorce proceedings. The separation agreement was filed with the Court, so it can be treated as an order for the purposes of this application by virtue of s. 148 (2) of the Family Law Act, [FLA].
- [34] Although he has not referred to a specific legislative provision in his notice of application, it seems clear that in seeking to "review, reduce or eliminate" his arrears of child support and his ongoing obligation to pay it, Mr. M. is seeking a retroactive variation of the child support requirement in the separation agreement pursuant to s. 152 of the FLA, on the basis of material changes in circumstances that have occurred since he entered into it -- specifically his decline in income and his assertion that none of the children are any longer children of the marriage for the purposes of support.
- [35] The Supreme Court of Canada dealt comprehensively with application to retroactively vary support orders in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, [2006] 2 S.C.R. 231 [D.B.S.]. Although D.B.S. dealt with applications by a recipient parent to retroactively increase the amount of support being paid, our Court of Appeal has made it clear that the same analysis applies to an application by a payor to reduce support: *G.M.W. v. D.P.W.*, 2014 BCCA 282 at paras. 40-44. In *G.M.W.* Madam Justice Smith summarized the relevant considerations when applying D.B.S. to such a situation:
- [42] The Court [in D.B.S.] went on to identify four factors to be considered in determining the appropriateness of such an order: (i) the circumstances surrounding the delay in bringing the application; (ii) the payor parent's conduct; (iii) the children's circumstances; and (iv) any hardship caused by a retroactive child support order.
- [43] A finding of unreasonable delay will militate against a retroactive child support award (para. 104). Similarly, a payor parent's blameworthy conduct, defined as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support" will also militate against a retroactive order (paras. 106-109). The circumstances of the children are also relevant in order to ensure that they receive the benefit of a support order to which they are entitled, in a timely manner (paras. 110-113). Lastly, consideration of

the hardship that may be occasioned by a retroactive order is not limited to the payor parent (paras. 114-116).

- [36] D.B.S. dealt with cases both under the Divorce Act and under provincial legislation, so its principles are applicable to Mr. M.'s situation.
- [37] Although a retroactive variation would have the effect of reducing Mr. M.'s arrears, such an application can be distinguished from an application to reduce or cancel his arrears "as they stand" (that is, without any finding that the amounts that he was required to pay in the past should have been lower), pursuant to s. 174 of the FLA. In that situation there can be no reduction or cancellation unless it would be "grossly unfair" not to do so: *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453 at paras. 233-237. There has been some uncertainty on this point, with decisions suggesting that all retroactive reductions of support must fall within the regime of applications to reduce or cancel arrears (see for example *Luney v. Luney*, 2007 BCCA 567 at para. 47 and *Semancik v. Saunders*, 2011 BCCA 264 at para. 33), but I think that the decision in *G.M.W.* has resolved it in favour of the distinction I have described.
- [38] I think it will be most helpful first to determine which children, if any of them, continue to be entitled to support and when those who are no longer children of the marriage ceased to meet that definition. The burden of proving that any of them continue to meet this definition falls on the parent who asserts it, in this case Ms. M.
- [39] The definition of child in s. 146 of the FLA includes "a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of his or her parents."
- [40] A helpful but non-exhaustive list of factors to consider when the reason for the child's inability to withdraw from their parents' care is post-secondary education is found in *Farden v. Farden*, 1993 CanLII 2570, 48 R.F.L. (3d) 60 (B.C.S.C.) at pp. 64-65:
- (1) whether the child is in fact enrolled in a course of studies and whether it is a full time or part time course of studies;
 - (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
 - (3) the career plans of the child, i.e., whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
 - (4) the ability of the child to contribute to his own support through part-time employment;
 - (5) the age of the child;
 - (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;

- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.
- [41] A parent does not have to lead evidence on each of these factors to discharge their burden of proof: *Darlington v. Darlington* (1997), 99 B.C.A.C. 134, 32 R.F.L. (4th) 406 (C.A.).
- [42] In principle, support for an adult child who is entitled to child support because of his or her attendance at a post-secondary institution generally should be determined under s. 3(2)(b) -- the amount that the Court 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", rather than by the straight Guidelines amounts. This preference for s. 3(2)(b) includes situations where the child lives at home but is able to make some contribution to their own expenses: *Neufeld v. Neufeld*, 2005 BCCA 7.
- [43] Of course as he candidly indicated, the amount of child support that Mr. M. originally agreed to pay was not connected to the Guidelines amount for his income, or to any modified version of that amount based on s. 3(2)(b) for the children who were then over the age of majority. The figure had as much to do with Ms. M.'s need to qualify to assume the mortgage as it did with the specific needs of the children.
- [44] Ms. M. does not suggest that N. and B. are still children of the marriage. Doing the best I can with the evidence available, I would say that N.'s status ended in May of 2014, when she left school and began travelling. Given that B. earned more than \$20,000 in 2014 and received a \$1,500 scholarship, I conclude that he ceased to be a child of the marriage at the end of 2013, despite resuming his studies at BCIT later that year.
- [45] Although it is common ground that Al. is on a waiting list to be admitted to BCIT, the evidence is that he is now working, and that he previously obtained a substantial student loan and contributed about \$3,000 of his own money to attend bible college. In the absence of a more detailed understanding of his finances, I think the circumstances fall short of showing that he is unable to withdraw from his parents' care due to his post-secondary commitments, so I cannot find that he continues to be a child of the marriage at this point. I conclude that he ceased to be so at the end of December of 2014, when he concluded his time at bible college. There can always be a further application by Ms. M. to reinstate his status as a child of the marriage if his educational circumstances and resulting degree of dependency change.
- [46] Am.'s situation is different. Her parents clearly have opposing views of the level of her disability and current functioning. I found Ms. M.'s affidavit on this issue more persuasive, filled as it was with idiosyncratic details that illustrated Am.'s particular fixations and vulnerabilities, than Mr. M.'s general assertions of her competence. I am satisfied that the

pursuit of massage therapy school is a viable and appropriate course of study for her at this stage of her life, especially given her focus on holistic health, but that she will need some continuing financial assistance of her parents before she is able to complete it and attain independence. Her ability to work part-time and reside part-time with her boyfriend does not undermine her overall situation of vulnerability and dependency, which I think Mr. M. tends to minimize somewhat, but it may affect the amount of support that is required. I find that she remains a child of the marriage until the completion of that course in December of 2016, unless there is some intervening material change of circumstances.

- [47] The question then becomes whether Mr. M.'s required payments since he entered into the separation agreement should be retroactively reduced to reflect the various points at which three of the children ceased to be entitled to support. Fairness suggests that it should be, but the amount of any reduction then depends upon what I make of his evidence that his income was never what he represented it to be in the first place and has fallen off sharply since then.
- [48] First, I am rather skeptical that Mr. M. would have provided a financial statement when entering the separation agreement that represented his income for support purposes as including a significant one-time capital gain, without ensuring that he was not held to that figure as an indication of at least the general range of his ongoing income. It is hard to accept that he would not have understood the future consequences of such a representation. I also find it perplexing that he would continue to make such extensive payments towards maintaining his stake in his firm, most years in an amount substantially exceeding his net income after business deductions, when that position produced such relatively meagre actual earnings. I can see no logical reason for doing that unless he either had, or expected to return to, higher earnings than he has claimed. I add to these concerns the absence of any persuasive explanation for this precipitous overall decline in his fortunes. Most fundamentally, Mr. M. had a responsibility to the children for whom he was required to pay support not to pursue unreasonable employment goals at the cost of that support.
- [49] While an assessment of appropriate support pursuant to s. 3(2)(b) is the preferred approach for the parts of the retroactive period after each of the children reached the age of majority, I think it would still be useful to work through an analysis of the likely Guidelines amounts that would have been awarded, both to address those children who were under that age during parts of those years, and to provide a helpful reality check of the tentative results produced by an application of s. 3(2)(b).
- [50] In light of my concerns about Mr. M.'s financial situation, I conclude that it would have been appropriate, when considering the years for which he seeks a variation, to impute income to him pursuant to s. 19(1)(g) of the Guidelines, on the basis that he had unreasonably deducted the expense of maintaining his status in his firm. This would be achieved by adding \$36,000, representing the lowest amount that he has claimed for that purpose since he entered into the agreement, to his represented income for each ensuing year.

- [51] Based on the same concerns I would also have declined to reduce the initial income for child support purposes that he represented in his financial statement at the time of the agreement.
- [52] His four-year average income once this fee is added back in is around \$68,000. His Guidelines income for child support for four children at that income would then have been \$1,609 per month, higher than his payments under the agreement.
- [53] However, because he would have been in a situation of shared parenting with respect to B. and Al., Ms. M.'s financial circumstances would also have been relevant in determining an appropriate figure pursuant to s. 9 of the Guidelines, and could have included a set-off of the respective amounts of support that were payable at their incomes.
- [54] Unfortunately I only have her current financial statement and the one attached to the separation agreement, plus Mr. M.'s assertions of her income in the intervening years. Ms. M. concedes that she has a new partner, and describes some of her significant ongoing household expenses to show that she is not living in luxurious circumstances despite that relationship, but it is not possible to perform any meaningful analysis under s. 9 of her overall needs, means and circumstances on the evidence we have, so as to adjust the amounts payable by Mr. M. based on shared parenting in the intervening years. As I will discuss however, I think her agreement to accept less than the agreed-to amount of support from him over time goes a long way towards compensating for any moderation of his obligations that would have taken place on an application of s. 9.
- [55] If his firm fees were added back to the income in his current financial statement, the total is about \$71,000, which would have made it fair to expect him to earn \$70,000 per year going forward. Therefore, on a straightforward Guidelines analysis I would impute that as his income for ongoing child support purposes.
- [56] As I have said however, complicating factors -- namely that the agreed support was never Guidelines-based and that for significant portions of the retroactive period some of the children were over the age of majority and attending school -- make a straightforward retroactive application of the Guidelines to these revised income figures inappropriate, and require a different analysis of the children's support needs.
- [57] Considering the D.B.S. factors, Mr. M.'s delay in making this application is at least partially explained by his ongoing efforts to renegotiate the amount of support with Ms. M. Despite my concerns about his claim of a lower income at the time of the separation agreement than in his financial statement and his ongoing payment of a substantial partnership fee despite his low earnings, there is no evidence of actual blameworthy conduct, in terms of his actively diverting income to his own benefit in deliberate preference to the payment of child support. Ms. M. appears to have supplemented any shortfalls in meeting the children's needs that would otherwise have resulted from his deficient support, a situation that can be remedied by his eventual payment of the amount of arrears to which she is properly entitled. Finally, I would not say that hardship is a factor in either party's favour. Since

support is in arrears, a retroactive reduction would not require any repayment of support by Ms. M. and at the income that I would have imputed to him, payment by Mr. M. of the proper amount of arrears will not be unmanageable.

[58] Ultimately I think the fairest way to resolve this difficult situation for both parties is to vary the amount of support required by the separation agreement to reflect the agreements to reduce it that he and Ms. M. reached over time, and then prorate it to correspond to the dates on which three of the children achieved sufficient independence to withdraw from their care. This will have the incidental effect of reducing his arrears somewhat. In this particular case I think the result would be the same even if s. 174 of the FLA were to be applied, in that declining to reduce that portion of his arrears that exceeded the amounts that Ms. M. agreed to accept from time to time, or that related to children who no longer met the threshold to receive support, would also be grossly unfair.

[59] As a result, Mr. M.'s support requirements will be varied to:

- June 1 - December 31 2013: \$1,000 per month (all four children are still children of the marriage);
- January 1 - April 30 2014: \$750 per month (B. is no longer a child of the marriage);
- May 1 - December 31, 2014: \$500 per month (N. is no longer a child of the marriage); and
- January 2015 - December 2016: \$400 per month.

[60] I will rely on the FMEP to recalculate the arrears on this basis. There can be a reference to the Registrar by the parties if there is any difficulty in agreeing on the figure.

[61] Although \$400 is less than the amount of support that would normally be payable for the income that I have imputed to Mr. M., it still exceeds the proportional reductions that I have made to the agreed-upon \$1,000 per month when each child ceased to be a child of the marriage. I consider that it reflects Am.'s needs as jointly borne by her parents; balanced by her ability to earn some part-time income for herself, her pending application for student loans and the opportunity that she has to stay occasionally with her boyfriend.

[62] Mr. M. has not sought to vary the provision of the separation agreement that required him to share equally with Ms. M. in 50% of Am.'s tuition and book costs. To avoid the parties having to return to court to address this issue, I will vary it to provide that Mr. M. will pay 50% of any of Am.'s tuition and book costs for her current program that have actually been paid by Ms. M. and that are documented by receipts showing Ms. M.'s payment of them.

[63] Success in this application has been divided, so the parties will each bear their own costs.

The Honourable Mr. Justice T.A. Schultes

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