
CANADA / JUDGMENT

Onstein v. Onstein

2020 BCSC 2

COURT

Supreme Court of British Columbia

DECIDED

2 January 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 2 Onstein v. Onstein

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Onstein v. Onstein,

2020 BCSC 2

Date: 20200102

Docket: E6620

Registry: Prince Rupert

Between:

Fiona Onstein

Claimant

And

Robert Onstein

Respondent

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Claimant:

W. MacGregor

A. Lax

Counsel for the Respondent:

T. Summers

Place and Dates of Hearing:

Terrace, B.C.

November 6, 7, and

December 12, 2019

Place and Date of Judgment:

Prince Rupert, B.C.

January 2, 2020

1. INTRODUCTION

- [1] On March 12, 2008, the parties entered into a well-crafted separation agreement (the "SA"), which, among other matters, addresses child support. The parties each had counsel.
- [2] On August 29, 2017, the claimant filed the SA with the Court. The claimant now applies to enforce the SA: Family Law Act, S.B.C. 2011, c. 25 [FLA], s. 148(2); Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR], R. 2-1 and R. 10-5(1).
- [3] On September 21, 2018, the claimant filed an application seeking a retroactive increase in child support from July 2009 to August 2017. As of July 1, 2009, the parties' three children were 10, 11 and 13 years old. After August 2017, there was either no longer a duty to provide child support or child support was provided to the claimant's satisfaction.
- [4] Over the relevant years, the parties lived within a block of each other in single family houses and co-operated in the raising of each of the children.
- [5] Each of the children is now well-positioned for the future. Each enjoyed an emotionally and financially supportive environment.
- [6] For the reasons that follow, the claimant's application is dismissed.

2. THE SEPARATION AGREEMENT

- [7] Under the SA, the parties were to remain joint guardians, put the best interests of the children before their own interests, exchange information regularly about the children, and consult about important decisions including education and recreational activities: SA, sections 4 and 6.
 - [8] Section 7 of the SA further provides (in part):
7. (1) Rob [the respondent] shall pay to Fiona [the claimant] for the support and maintenance of the Children the sum of \$700.00 per month commencing the 1st day of January, 2008 and the 1st day each month thereafter.

- (2) Rob shall pay the following extraordinary expenses for the Children:
- (a) the tuition fees for the Children to attend Veritas School in Terrace, BC;
 - (b) the Children's current extracurricular activities, being Scouting and dance and such other extracurricular activities as the parties may agree, provided however, that if the cost of such extracurricular activities increases, the parties shall revisit responsibility for payment of the same;
 - (c) for so long as coverage for the Children through his employment, the medical and dental insurance premiums attributable to the Children and any uncovered amount for medical and dental expenses for the Children.
- (5) The parties agree that the quantum of child support payable by Rob takes into account:
- (i) the amounts set out in the Federal Child Support Guidelines payable by each parent to the other, for the Children;
 - (ii) the increased costs of the shared custody arrangement; and
 - (iii) the condition, means, needs other circumstances of each spouse and of the Children;
- (8) If a Child, after attaining the age of 19 years, continues to be a child of the marriage as a result of pursuing full time education,
- (i) the parties will review and determine child support for that Child, by reference to the Child's actual and reasonable needs and expenses, less the amount which, the Child can be expected to contribute to the Child's own support, and scholarships, bursaries or tax credits;
 - (ii) if a Child lives away from home to attend a post-secondary educational institution the parties will review the amount of support payable in order to take into account reduced food, housing and other costs for the Child when he or she is away at university and the cost of tuition and residency.
- [9] Under section 8 of the SA, child support shall be reviewed annually. Section 8 reads:
8. (1) By July 1st of each year, commencing in 2009, child support shall be reviewed. In order to accomplish such review, each of the parties shall provide
- (a) the documents required in section 21(1) of the Federal Child Support Guidelines;
 - (b) current information about the Children's special or extraordinary expenses;
 - (c) details of Child Tax Benefit or other Child Benefits received in the previous year and anticipated in the coming year.

- (2) Unless support is adjusted by an amending agreement in writing, or court order, Rob will continue to pay child support in accordance [with] the parties' most recent written agreement or court order.

[10] Under section 31 of the SA, dispute resolution is addressed. Section 31 reads:

31. (1) If a dispute arises concerning parenting of the Children or payment of child support under this Agreement, the parties will try and resolve the dispute through mediation.
- (2) If Rob or Fiona seeks a change in paragraph 4 with respect to parenting or paragraph 7 with respect to support, he or she will give the other notice in writing:
- (a) notice of the proposed change;
 - (b) evidence supporting the proposed change; and
 - (c) any requests for information from the other necessary to determine the issue.
- (3) A request under section (2) will be answered within fourteen (14) days.
- (4) After exchanging any information required by this agreement, Fiona and Rob will meet personally or through their personal representatives to resolve the issues in dispute.
- (5) If they come to an agreement, Rob and Fiona will enter into an amending agreement in writing signed before witnesses.
- (6) If the parties are unable to come to an agreement with respect to a dispute, the parties shall retain the services of a mediator and each party will be responsible for payment of one-half of the mediation costs.
- (7) If, notwithstanding their best efforts through use of a mediator, the parties are unable to come to an agreement with respect to a dispute either party may apply to a court or competent jurisdiction to resolve the matter.

[11] Two further general sections of relevance to the case at bar read:

35. The parties may vary this Agreement only by written agreement executed in the same manner as this Agreement.
36. Rob and Fiona will each do everything reasonably necessary to give full effect to this Agreement.

[12] Finally, under section 42 of the SA, the parties acknowledge:

- (a) each of them relies on this Agreement to be enforced according to its terms; and
- (b) neither of them would have entered into this Agreement or continued their relationship [on] the basis of it, had it been anticipated that the other would ever apply to vary the Agreement.

3. SECTION 21(1) OF THE FEDERAL CHILD SUPPORT GUIDELINES

[13] As noted, section 8 of the SA refers to documents requested under s. 21(1) of the Federal Child Support Guidelines, SOR/97-175 [FCSG]. Section 21(1) of the FCSG reads:

Obligation of applicant

21 (1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

- (a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
- (b) a copy of every notice of assessment and reassessment issued to the spouse for each of the three most recent taxation years;
- (c) where the spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the spouse's employer setting out that information including the spouse's rate of annual salary or remuneration;
- (d) where the spouse is self-employed, for the three most recent taxation years
 - (i) the financial statements of the spouse's business or professional practice, other than a partnership, and
 - (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;
- (e) where the spouse is a partner in a partnership, confirmation of the spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;
- (f) where the spouse controls a corporation, for its three most recent taxation years
 - (i) the financial statements of the corporation and its subsidiaries, and
 - (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;
- (g) where the spouse is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements; and
- (h) in addition to any income information that must be included under paragraphs (c) to (g), where the spouse receives income from employment insurance, social assistance, a pension, workers compensation, disability payments or any other source, the most recent statement of income indicating the total amount of income from the applicable source during the current year, or if such a statement is not provided, a letter from the appropriate authority stating the required information.

4. FACTS

- [14] The respondent paid all expenses under s. 7 of the FCSG, including many of the children's post-secondary expenses (tuition, books, flights, and set-up costs).
- [15] The respondent has also paid for other expenses for the children beyond s. 7 expenses.
- [16] Each child enjoyed living in a single family house and was able to engage in activities consistent with the best interests of the child. As noted, the parties lived close by in a single family home neighbourhood. Until May 2017, the parties enjoyed a co-operative parenting relationship, including adjusting child support as a child switched residences.
- [17] Between 2009 and 2016, several changes were made to the monthly child support the respondent paid as a result of the changing living arrangements of one or more of the children. The changes were by agreement following conversations between the parties. A formal review under section 31 of the SA was not engaged. The changes were not documented by the parties.
- [18] Neither party produced annually the documents required under section 8(1) of the SA, including "the documents required under s. 21(1) of the Federal Child Support Guidelines".
- [19] On August 29, 2017, the claimant filed an application for an order that the respondent provide his financial information from 2009 onwards in accordance with section 8 of the SA.
- [20] By August 31, 2017, the respondent had provided many of the documents he was required to provide under section 8(1)(a) of the SA. The claimant's initial request made on or about June 22, 2017 was for "the last two years".
- [21] On September 21, 2018, the claimant filed the current application seeking retroactive child support. On November 14, 2018, the respondent provided additional documents. The claimant is not seeking further financial documents from the respondent in relation to section 8(1)(a) of the SA.
- [22] For the scheduled November 2019 assize hearing, the claimant did not provide all of the documents she was required to produce under section 8(1)(a) of the SA (with reference to s. 21(1) of the FCSG).
- [23] On December 5, 2019, the claimant applied to have the two-day assize hearing, which concluded November 7, 2019, re-opened in order to enter into evidence her 2009, 2014, 2015, and 2016 income tax returns. A 9 a.m. 55-minute hearing was held December 12, 2019. At this hearing, claimant's counsel stated that the tax returns for the other relevant years would also be provided. In the claimant's application to re-open, the claimant states that "due to error or oversight" of her counsel (Mr. MacGregor, for the November 6 and 7, 2019 hearing), the income tax returns were not provided to respondent's counsel or entered into evidence. For the November 6 and 7, 2019 hearing, income tax summaries (not the complete returns) were provided.

- [24] Under the SA, the income tax returns were required to have been produced.
- [25] At the November 6 and 7, 2019 hearing, respondent's counsel had sought greater detail. The income tax returns provide some of this detail but not necessarily all of the sought detail. The respondent's counsel wishes to cross-examine the claimant on her income tax returns if "anything turns on it". In light of my overall conclusion, the claimant's income tax returns are not determinative of the matter at bar.
- [26] I will allow the claimant's relevant income tax returns to be included in the evidence at this time. The income tax returns are source documents for the income tax summaries.
- [27] The claimant acknowledges that after August 2017, no child support is owing. Either a child was not a child of the marriage or the respondent paid support under section 7(8) of the SA.
- [28] In bringing her application, the claimant has not followed the dispute resolution procedure in section 31 of the SA with respect to her claim for child support.

5. ANALYSIS

- [29] The claimant says that the respondent's failure to provide annually the requisite documents under section 8(1) of the SA is blameworthy conduct by him. It lies ill in the mouth for the claimant to make this argument where she did not provide the documents required of her under section 8(1) of the SA.
- [30] If the claimant had wished to seek an adjustment in child support, section 31 of the SA provided a practical way to do so without incurring from the outset litigation costs for both parties.
- [31] Under section 31 of the SA, the claimant was required to provide written notice. The written notice needed to state, for example, that she wished to increase child support based on the FCSG income of each party. As evidence supporting the proposed change, the claimant could have provided her relevant income tax returns (and other information under section 8 of the SA) and to the extent the respondent had not provided requisite information (such as his tax returns) to request such. The matter would then be resolved by the parties, or failing agreement, through mediation, and if mediation failed, by recourse to the Court.
- [32] The claimant is now seeking to enforce the SA despite not having complied with the dispute resolution process set forth in the SA.
- [33] The claimant does not provide a reasonable explanation for not providing her financial information or seeking the respondent's financial information before 2017.
- [34] In her second affidavit, filed July 18, 2018, the claimant says:

Because Rob has never provided me with financial information, and because he has never requested financial information from me except in response to my requests for such information, I have not provided him with financial information.

[35] The claimant does not explain the reason she did not follow the procedure the parties agreed to under the SA for dispute resolution.

6. DISMISSAL OF THE CLAIMANT'S APPLICATION

[36] I will dismiss the claimant's application on the basis that she has not followed the SA's dispute resolution procedures. These procedures were designed to facilitate the timely and conciliatory resolution of any proposed change in child support with recourse to the Court as the last resort. The claimant is asking the Court to enforce the SA she filed with the Court, despite not following its dispute resolution procedure.

[37] Absent a good reason, courts recognize separation agreements, because, among other matters, they provide certainty, reduce costs, and serve to avoid litigation.

[38] In the case at bar, the law of contract applies. Recourse to the principles of estoppel is not necessary: B. MacDougall, *Estoppel* (2nd ed) LexisNexis Canada Inc., 2019, at para. 2:23.

[39] In dismissing the claimant's application, I am mindful that child support is the right of the child.

[40] If the claimant had in any particular year thought the children's needs were not sufficiently funded, she could have given notice under section 31(2) of the SA. As noted, the claimant and the respondent were living in separate nearby houses with a co-operative parenting relationship, including adjusting child support as a child switched residences. Each child was raised in a supportive environment.

[41] With respect to a supportive environment, I note that when one of the children was 16 years of age and had a particularly serious problem that caused the claimant to be justifiably upset with the child, the respondent helped by having the child live with him. Similarly, when one of the other children wished to live with the claimant full-time as a result of a curfew dispute with the respondent, the child lived with the claimant.

[42] In *M.A.M. v. D.L.L.*, 2018 BCSC 2114, Justice Ker summarized the court's discretion to make a retroactive child support order. Justice Ker stated:

[90] The discretion to make an order of retroactive child support is found in ss. 15.1 and 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and ss. 152 or 170(b) of the FLA (depending on whether it is a variation order or not). The circumstances in which retroactive child support may be awarded were addressed in *[D.B.S. v. S.R.G., 2006 SCC 7]*. The Supreme Court of Canada directed trial judges to adopt a broad and holistic approach in the application of four factors, summarized at para. 133, none of which is determinative on its own:

- Is there a reasonable excuse for why support was not sought earlier?
- Was there any blameworthy conduct on the part of the payor parent?
- Is a retroactive award appropriate in light of the child's past and present circumstances?

· Will a retroactive award cause hardship to the payor parent or to his or her other children?

[43] The claimant does not have a reasonable excuse for not seeking increased child support sooner. She had before her the SA which provided a cost-conscious dispute resolution procedure.

[44] With the SA dispute resolution procedure available to the claimant and with the needs of each of the parties' children apparently addressed as the years passed, I do not find the respondent to be blameworthy.

[45] With respect to the past and present circumstances of each child, I do not see a particular reason for retroactive child support. Each child was raised in an emotionally and financially supportive environment and each is currently well-positioned for the future.

[46] Finally, although a retroactive award would not necessarily cause hardship to the respondent, I am satisfied there is prejudice. Individuals need certainty in planning their financial affairs. A retroactive award undermines that certainty. Further, in the case at bar, the respondent paid all of the children's s. 7 expenses. It would be difficult for him to now show all of the past s. 7 expenditures he has made since July 2009. Accordingly, the respondent is not readily in a position to prove all of the s. 7 expenditures he has made in order to be in a position to defend against an award of child support for past years.

7. CONCLUSION

[47] The claimant's application is dismissed.

8. COSTS

[48] The respondent is the successful party on the application. He is awarded his reasonable costs and disbursements for a matter of ordinary difficulty.

"Funt J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/00/2020BCSC0002.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/onstein-v-onstein-2020>

Prepared on 25 October 2026 · Esheria