
CANADA / JUDGMENT

Owen v. Owen

2012 BCSC 680

COURT

Supreme Court of British Columbia

DECIDED

11 May 2012

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2012 BCSC 680 Owen v. Owen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Owen v. Owen,

2012 BCSC 680

Date: 20120511

Docket: 45273

Registry: Vernon

Between:

Pamela Marianne Owen

Claimant

And

Corey Russel Owen

Respondent

Before: Master Young

Reasons for Judgment

Counsel for the Claimant:

P.A. Dyck

Counsel for the Respondent:

E. Woolley

Place and Date of Trial/Hearing:

Vernon, B.C.

April 10, 2012

Place and Date of Judgment:

Vernon, B.C.

May 11, 2012

- [1] The parties have reached an agreement that Mr. Owen will pay child support for Evan, born December 10, 1997 and Keegan, born August 14, 2003, in the amount of \$638 per month based on his Guideline income of \$41,800. They did not agree on the commencement date of this child support. These reasons deal with the claimant's claim for retroactive child support backdated to November 2009. On April 4, 2012, I gave reasons on Mr. Owen's variation of parenting plan application.
- [2] The claimant is a mortgage specialist and was earning a substantially higher income than the respondent throughout their marriage. The respondent says for that reason, it was agreed between them that he would stay home and take care of the children. As a result, he earned a modest income for many years.
- [3] On October 30, 2009, the respondent assaulted the claimant, and as a result of that assault, she was unable to work for several months. In the aftermath of the assault, the claimant was diagnosed with Crohn's disease and was hospitalized 13 times between May 2010 and July 2010, and had to undergo significant abdominal surgery related to her Crohn's disease. She remained off work until December 5, 2010, and received \$75,237 of disability benefits. She also received a commission of \$31,000 minus \$14,641 in expenses, and she received a vacation indemnity of \$3,307.
- [4] During the time the claimant was on disability, the real estate market slowed down dramatically and her business slowed down as well. Her 2009 net income had been \$158,560. Her 2010 net income was \$94,331. In 2011, her income dropped significantly to \$54,501.
- [5] The respondent is employed by Accenture BusServUtil BC LLP, Overwaitea and Canada Post. His income in 2009 was \$19,312. In 2010, his income was \$33,284, and in 2011, he claims his income was \$42,298 (union dues were subtracted from this amount to arrive at the agreed to Guideline income of \$41,800).
- [6] The child Evan is diabetic and, as a result, has health related expenses of approximately \$4,200 per year after deduction from insurance.
- [7] For seven months post separation because of a no-contact order, the respondent did not see the children. In 2010, he started seeing the children again and took them overnight once per week. According to the claimant, the respondent demanded that she provide food for the

children during the visits with him. I recite this fact because if it is true, it does say something about what the respondent's understanding of the parties' financial obligations was at that time. When the claimant had surgery for her Crohn's disease and the respondent had the children with him, he again asked for money from the claimant.

- [8] The claimant did not pursue child support for over two years. It was initially the respondent's position that he was eligible for spousal support given the role he played during the marriage. He did suffer a financial detriment as a result of the breakdown of the marriage. The claimant amended her pleadings to claim damages for assault. At some stage in the proceedings, the parties reached an agreement that the claimant would not pursue damages for the assault and the respondent would not pursue spousal support.
- [9] The claimant deposes that the reason why she did not pursue child support was because she was fearful of the respondent. She and the children were trying to heal from the assault. She says that the respondent had been verbally abusive toward her since the separation, and the children were deeply affected by the conflict between the parties. Therefore, she tried to keep things amicable between herself and the respondent. In other words, she feared some form of retaliation from the respondent if she pursued her claim for child support.

- [10] At paragraph 24 of her Affidavit #3, the claimant says:

I will always fear for my safety around the Respondent, and I refuse to be anywhere alone with him. As stated earlier he has been verbally abusive to me in the presence of the children and later when we are on our own. Last month he angrily approached me because of my application for child support. I withdrew from him fearing for my safety as I have done since the separation if the Respondent's behavior escalates. He told me, on many occasions since assaulting me, that I should have asked the police to leave after the assault, that it was my fault the marriage broke down, that he is not an alcoholic, and that I was lucky that he did not change the locks when I was in the hospital while he looked after the children for a week.

- [11] The respondent says that the evidence does not support the claimant's assertion that she did not pursue support because she was afraid of him. The claimant never applied for a restraining order against the respondent. In the criminal proceedings, there was a no-contact order initially, but the claimant requested that it be lifted in June 2010 so that the children could start seeing their father again. The claimant invited the respondent into the family home on a number of occasions to complete repairs in the home.
- [12] The respondent says that he really struggled financially to get re-established after their separation. He had not been employed full-time and had to get more work. There were times when he could not afford to take the children because he had no money for food. He had to borrow money from the claimant to make a damage deposit on his apartment. The parties lost money on the sale of the home, so there was no asset division from which he could re-establish a home.

[13] The respondent says that there was an agreement between counsel that the claimant would cover the cost of the house and the children's expenses in the interim, and the respondent would not bring his spousal support application.

[14] The claimant says at paragraph 27 of Affidavit #3:

I am unaware of any oral agreement...with respect to child support and spousal support as alleged. I simply asked to be repaid the money he took from me while I was in the hospital. I tried on many occasions to get an agreement regarding costs, and he refused...

[15] I believe when the claimant refers to "costs" that she means costs associated with the matrimonial home because she is responding to Mr. Owen's paragraph 20 where he uses the word "costs" to describe matrimonial home costs.

[16] The parties entered into a written agreement which the respondent begged the claimant to sign while she was in hospital and very ill. It was an acknowledgement that she was paying household costs and the line of credit. This acknowledgement was required by the respondent's Visa lender before they would increase his credit limit. The claimant also lent the respondent \$650 and a further \$1,300 around that time so that he could feed and care for the children.

[17] The leading authority dealing with retroactive child support is the Supreme Court of Canada case of *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, [2006] S.C.J. No. 37. The factors to determine whether retroactive child support should be ordered are set out between paragraphs 94 and 116 of that decision.

[95] It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.

[18] The court sets out factors to consider in exercising discretion to order or not order retroactive support.

Factor 1:

5.3.1 Reasonable Excuse for Why Support Was Not Sought Earlier

...

- [101] Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family...
- [19] The claimant says that she was justified in delaying her application because of her fear of the respondent. I have some trouble accepting that explanation. It appears to me that the claimant held off applying for spousal support because her income was significantly higher than the respondent's. Had her income not dropped she might never have brought this application. During the time of delay, she was aware that the respondent was suffering financial hardship, yet he was not applying for spousal support. I think this was the real reason for the delay.
- [20] The claimant may also have had concerns about the reaction of the respondent, but his reactions have not changed and she has now brought the application. What did change was her income. Now she is in need of this money and she is applying for it.
- [21] I accept Mr. Wooley's submission that there was a discussion between counsel about the pending application for spousal support and child support prior to Mr. Dyck getting on the record and adding the tort claim for damages to the mix.

Factor 2:

5.3.2 Conduct of the Payor Parent

- [105] This factor approaches the same concerns as the last one from the opposite perspective. Just as the payor parent's interest in certainty is most compelling where the recipient parent delayed unreasonably in seeking an award, the payor parent's interest in certainty is least compelling where (s)he engaged in blameworthy conduct. Put differently, this factor combined with the last establish that each parent's behaviour should be considered in determining the appropriate balance between certainty and flexibility in a given case.
- [22] Counsel for the claimant submits that the assault constitutes the blameworthy conduct of the respondent, and because he assaulted the plaintiff, he should have to pay retroactive support. Counsel for the respondent says the blameworthy conduct has to be linked to the financial issue. He gives examples such as threats being made of retaliation if support is pursued or misleading the applicant regarding the payor's income.
- [23] I agree with the respondent's counsel's submission. I think that the assault needs to be linked to the child support obligation. At paragraph 106 of D.B.S., Justice Bastarache says when referring to blameworthy conduct:
- [106] Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would

characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A similar approach was taken by the Ontario Court of Appeal in *Horner v. Horner* (2004), 72 O.R. (3d) 561, at para. 85, where children's broad "interests" -- rather than their "right to an appropriate amount of support" -- were said to require precedence; however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments: see *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Ct. (Gen. Div.)); *Whitton v. Shippelt* (2001), 293 A.R. 317, 2001 ABCA 307; S. (L.). A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support: see *Dahl v. Dahl* (1995), 178 A.R. 119 (C.A.). And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.

(emphasis added)

- [24] In not accepting the assault as relevant blameworthy conduct, I recognize that I am not taking an expansive view of what constitutes blameworthy conduct. I do so because the respondent has already been penalized for the assault.
- [25] The respondent pleaded guilty to the assault. He was given a suspended sentence. He was not allowed to see his children for seven months and then the contact was fairly limited. I have dismissed his shared custody application because of his anger management issues. He has agreed to forego his spousal support obligations as a set-off against the damages suffered by the claimant as a result of the assault.
- [26] I do find that the assault is directly linked to the issues of custody but not so much to the support obligations. I do not find it reasonable to use the assault as ammunition to further financially penalize the respondent.

Factor 3:

5.3.3 Circumstances of the Child

- [110] A retroactive award is a poor substitute for an obligation that was unfulfilled at an earlier time. Parents must endeavour to ensure that their children receive the support they deserve when they need it most. But because this will not always be the case with a retroactive award, courts should consider the present circumstances of the child -- as well as the past circumstances of the child -- in deciding whether such an award is justified.

...

- [112] Consideration of the child's present circumstances remains consistent with the statutory scheme. While Parliament has moved away from a need-based perspective in child support, it has still generally retained need as a relevant consideration in circumstances where a court's discretion is being exercised: see ss. 3(2)(b), 4(b)(ii) and 9(c) of the Guidelines...

- [27] As a result of her illness and then the downturn of the real estate market, the claimant has suffered a dramatic drop in her income. In the early stages of the separation, she did receive income of approximately \$95,000, and I have to conclude that the children's needs were being met. In 2010, the respondent's income rose to \$33,000.
- [28] It was in November 2011 that the claimant's income dropped quite significantly due to a restructuring of commissions at her employer company. Her 2011 income dropped to \$54,000. The house sold in December 2011 at a loss and so there was no fund of money from which to pay family debt. By this time, I would say the children were suffering need and having to do without.

Factor 3:

5.3.4 Hardship Occasioned by a Retroactive Award

- [114] While the Guidelines already detail the role of undue hardship in determining the quantum of a child support award, a broad consideration of hardship is also appropriate in determining whether a retroactive award is justified.
- [115] There are various reasons why retroactive awards could lead to hardship in circumstances where a prospective award would not. For instance, the quantum of retroactive awards is usually based on past income rather than present income; in other words, unlike prospective awards, the calculation of retroactive awards is not intrinsically linked to what the payor parent can currently afford. As well, payor parents may have new families, along with new family obligations to meet. On this point, courts should recognize that hardship considerations in this context are not limited to the payor parent: it is difficult to justify a retroactive award on the basis of a "children first" policy where it would cause hardship for the payor parent's other children. In short, retroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not. Courts should be attentive to this fact.
- [116] I agree with Paperny J.A., who stated in D.B.S. that courts should attempt to craft the retroactive award in a way that minimizes hardship (paras. 104 and 106). Statutory regimes may provide judges with the option of ordering the retroactive award as a lump sum, a series of periodic payments, or a combination of the two: see, e.g., s. 11 of the Guidelines. But I also recognize that it will not always be possible to avoid hardship. While hardship for the payor parent is much less of a concern where it is the product of his/her own blameworthy conduct, it remains a strong one where this is not the case.
- [29] The respondent has the ability to pay prospective support. He has no assets to draw from to pay a retroactive award and no access to credit. He has little spare income after his basic expenses and the child support. A large retroactive award will cause him significant hardship. One way to mitigate against some of the hardship is to order that an amount be added to the monthly award until the retroactive amount is paid off.

Decision

- [30] Considering all of the factors, I find that it would be unfair to impose a 2.5-year retroactive child support award on the respondent when the children's needs were being met for some of that time and when the parties had an understanding that the respondent would not pursue support for himself and the claimant would cover the children's costs and the household costs from her substantially higher income.
- [31] This arrangement needed to be reviewed once the claimant's income dropped and the respondent's income started to increase. I find that this significant shift occurred around the time the commission structure changed and the house sold at a loss.
- [32] I will therefore order retroactive support commencing on December 1, 2011. The respondent's income is now known to me so there is no rationale for using the 2010 income to fix quantum. That approach is only used when the actual income is unknown.
- [33] Therefore, I will order child support at \$638 per month commencing December 1, 2011.
- [34] I will fix arrears as at April 17th at \$3,190, and I order that the respondent pay an additional \$100 per month until the arrears are paid in full. He is, of course, able to pay it sooner if he chooses.
- [35] Special and extraordinary expenses will be shared between the parties from December 1, 2011, in proportion to their incomes. The respondent is responsible for 44 percent of special and extraordinary expenses after taking extended medical insurance into account. The special and extraordinary expenses are medical costs (net of insurance coverage) and swimming lessons. If the children are to be enrolled in any other extracurricular activities, the respondent is to be consulted about the time of the activity and the cost prior to being expected to contribute to those costs.

Costs of the Application

- [36] There has been a much divided result on this retroactive child support application. I order that the parties each pay their own costs of this application.
- [37] The respondent was unsuccessful in his motion to vary parenting time and, in my mind, was quite premature in bringing that application. I will award costs to the claimant for that application.

"B.M. Young"

Master Barbara M. Young

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Prepared on 29 October 2026 · Esheria