

CANADA / JUDGMENT

P.S.P. v. N.L.P.

2004 BCSC 1393

COURT

Supreme Court of British Columbia

DECIDED

28 October 2004

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To the to to the of of the if were aware will IN THE SUPREME COURT OF BRITISH COLUMBIA IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: P.S.P. v. N.L.P., 2004 BCSC 1393 Date: 20041028 Docket: D110932 Registry: Vancouver Between: P.S.P. Plaintiff And N.L.P. Defendant Before: The Honourable Madam Justice Ross Reasons for Judgment Counsel for the Plaintiff Kristin M.J. Rongve Counsel for the Defendant Mary E.B. Wood Date and Place of Hearing October 7, 2004 Vancouver, B.C.

- [1] This is an application for judgment pursuant to Rule 18A in family proceedings. Both parties agree that the matter is suitable for summary disposition. The following relief is sought:
- (a) both parties seek an order for divorce;
 - (b) the plaintiff, P.S.P., seeks an order for joint custody of the children with their primary residence being with the defendant, N.L.P., and for reasonable and generous access to Mr. P.S.P.. Ms. N.L.P. seeks an order for sole custody of the children;
 - (c) Mr. P.S.P. seeks an order for joint guardianship of the children;
 - (d) Mr. P.S.P. seeks certain terms with respect to the travel arrangements during access visits;
 - (e) Mr. P.S.P. seeks an order cancelling arrears with respect to child maintenance and an order varying the child maintenance obligation. Ms. N.L.P. seeks an order for child maintenance for \$978 per month based upon imputed income and an order that the parties share extraordinary and special expenses in proportion to their respective incomes. Ms. N.L.P. also seeks an order that Mr. P.S.P. maintain the children on medical, dental, and extended health benefit plans; and
 - (f) Mr. P.S.P. seeks an equal division of the remaining family assets. Ms. N.L.P. seeks an order for reapportionment in her favour.

FACTS

- [2] Mr. P.S.P. was born on [], 1965. Ms. N.L.P. was born on [], 1968. The parties were married on August 5, 1995. They have three children:

- (a) K.A., born [], 1993;
 - (b) T.B., born [], 1997; and
 - (c) K.D., born [], 2000.
- [3] The parties separated for the first time in November, 1997. At that time, they signed a separation agreement which provided for shared parenting of the two children. The shared parenting contemplated the children remaining in the same residence and the parties moving in and out on a weekly basis. The shared parenting regime ended shortly after it began when Ms. N.L.P. refused to vacate the residence, which was a suite in a home owned by her parents.
- [4] The parties commenced a joint action for divorce in 1998. However, they continued a relationship during the separation and eventually reconciled in early 1999.
- [5] In December, 2001, the parties purchased a house located at S.[], R.[] for \$250,000. Ms. N.L.P. provided the \$16,000 down payment. The balance of the purchase price was financed by a mortgage. Mr. P.S.P. contributed to the purchase and maintenance of the property prior to the final separation. The property has been rented to tenants since it was purchased. Since separation, Ms. N.L.P. has maintained the property and incurred expenses.
- [6] The parties separated for the final time in May, 2002. At the time of separation, the parties worked for the same employer, in the same office. Mr. P.S.P. had a guideline income of \$54,000.
- [7] The separation appears to have been relatively amicable until some point in mid 2002 at which point relations between the parties deteriorated. There were disputes with respect to access to the children and child support. Ms. N.L.P. asserts that Mr. P.S.P. refused to pay any child support. Mr. P.S.P. asserts that Ms. N.L.P. was undermining his relationship with the children and limiting his access.
- [8] On December 5, 2002, Master Scarth made an order providing for the following:
- a. A section 57 declaration;
 - b. The Plaintiff and Defendant were to have joint custody of the children with their primary residence being with the Defendant;
 - c. The Plaintiff was to have reasonable access to the children;
 - d. The Plaintiff was to pay \$978.00 per month for child support commencing on November 1, 2002;
 - e. The Plaintiff and Defendant were to pay proportionate shares of the children's extra ordinary expenses;
 - f. The Plaintiff was to maintain the children on his medical and dental coverage; and,

- g. The Plaintiff was restrained from disposing of any assets.
- [9] The terms with respect to custody, residence and access were by consent.
- [10] In January, 2003, Mr. P.S.P. resigned his position because of the conflicts with Ms. N.L.P.. The General Manager at the workplace confirmed the destructive situation between the parties. Mr. P.S.P.'s family doctor recommended that he leave the workplace.
- [11] Mr. P.S.P. began receiving Employment Insurance benefits at a rate of \$413 per week, receiving \$21,476 over the next year. In July, 2003, he unilaterally reduced his child maintenance payments. Mr. P.S.P. moved to Nanaimo where he is in a new relationship. He began working at S.[] Services in March, 2004 and has a present income of \$22,935.
- DIVORCE
- [12] The order for divorce is granted. CUSTODY, GUARDIANSHIP, ACCESS
- [13] Ms. N.L.P. swore four affidavits; Mr. P.S.P., two. As is usual in such cases, each party has recited numerous grievances concerning the conduct of the other and each largely contradicts the version given by the other. It is evident from a review of this evidence that relations have remained acrimonious and that the acrimony has involved the children.
- [14] I find that Mr. P.S.P. has been an active parent and wishes to remain involved with his children to the fullest extent possible. It is, in my view, in the best interest of the children that they maintain a strong relationship with both parents.
- [15] Given the level of animosity between the parties, the question arises whether the relations between the parties is inconsistent with an order for joint custody and guardianship. It would clearly be in the children's best interests if the parties could overcome their animosities or at least put them aside where the parenting of the children is at issue. However, to date that has not occurred.
- [16] I conclude that while the animosity and lack of cooperation is clearly a factor to be considered, it is not a bar to an order for joint custody; see *Pullman v. Pullman*, 2000 BCSC 1654. The sole test is what is in the best interest of the children.
- [17] I have concluded that an order for joint custody and guardianship is in the best interest of the children. In particular, I am concerned that were I to award sole custody and guardianship to Ms. N.L.P., the children's relationship with their father would deteriorate. I therefore order joint custody and guardianship on the Joyce model. The children's primary residence will continue to be with Ms. N.L.P.. Mr. P.S.P. will have reasonable and generous access including, but not limited to, every second weekend from Friday at 5:30 pm until Sunday evening.

- [18] At the beginning of each weekend access visit, Ms. N.L.P. shall deliver the children into Mr. P.S.P.'s care at the ferry terminal at H.[] and shall receive the children back into her care at the ferry terminal at H.[]. Mr. P.S.P. shall provide 24 hours notice to Ms. N.L.P. of the time for pick-up and drop-off. CANCELLATION OF ARREARS
- [19] The principles to be applied with respect to an application to cancel arrears of child maintenance were summarized by Martinson J. in *Earle v. Earle*, [1999] BCJ No. 383 at para. 46:
1. Maintenance Generally
 - a. Parents have a joint and ongoing legal obligation to support their children.
 - b. It is the child, not the other parent, who has the right to maintenance.
 - c. The payment of maintenance is based on not just what a parent does earn but what a parent can earn.
 2. Variation
 - a. There has to be a material change of circumstances, a change that is significant and long lasting.
 - b. A change to the Guideline amount is not automatic.
 3. Arrears Basic Principles
 - a. There is a heavy duty on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances. Arrears will not be reduced or cancelled unless it is grossly unfair not to do so.
 - b. If arrears are not reduced or cancelled, the court can order a payment plan over time if convinced the arrears cannot be paid right away. Examples
 - a. Arrears will only be cancelled if the person is unable to pay now and will be unable to pay in the future.
 - b. A reduction or a cancellation requires detailed and full financial disclosure, under oath (usually in the form of an affidavit) that at the time the payments were to be made: i the change was significant and long lasting and ii the change was real and not one of choice and iii every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.
- [20] In the case at bar, Mr. P.S.P. bases his application upon the fact that he did not leave his employment of his own choice. Rather, the situation was intolerable and he left on medical advice. Following, that he was unemployed and receiving only Employment Insurance. His new income is substantially less than his previous salary.

- [21] However, Mr. P.S.P. has not made the necessary detailed and full financial disclosure. In particular, there is a paucity of evidence concerning efforts made to earn more money and secure employment from the time Mr. P.S.P. left his position in 2003. In the circumstances, I have concluded that Mr. P.S.P. has not established that it would be grossly unfair not to cancel arrears. Accordingly, the application to cancel arrears is dismissed. MAINTENANCE
- [22] Ms. N.L.P. seeks to have the court impute a Guideline Income of \$54,000 per annum, Mr. P.S.P.'s salary at his previous position, and to fix Mr. P.S.P.'s maintenance obligations on that basis. It was her submission that Mr. P.S.P. left his position in order to avoid his maintenance obligations. I have concluded that this is not so. I find that Mr. P.S.P. left his position because the nature of their relations made it impossible for him to continue working in the same office.
- [23] Mr. P.S.P.'s disclosure of his efforts to obtain employment is deficient. However, there is not sufficient evidence before me to justify an exercise of discretion to impute income based upon an ability to earn. In my view, the fact that he earned a higher salary at his previous employment is not sufficient in itself to warrant an imputation of income. While maintenance obligations are premised on the ability to earn income, there must be a sufficient evidentiary basis to support an imputation of income. Accordingly, I find that Mr. P.S.P. has a Guideline Income of \$22,935. Mr. P.S.P. will pay \$456 per month maintenance, commencing November 1, 2004 and 39% of the extraordinary and special expenses. Mr. P.S.P. will include the children on any medical, dental or extended health plans he obtains.
- [24] The parties will exchange income tax returns within 30 days of filing each year. DIVISION OF ASSETS
- [25] The sole asset at issue is the R.[] property. In my view, the property is a family asset and there will be a declaration to that effect. I am satisfied that this property was acquired for a family purpose and that each party, until separation, contributed to the acquisition and maintenance of the property. Since separation, Ms. N.L.P. has chosen to exclude Mr. P.S.P. from contribution to the maintenance of the asset.
- [26] Ms. N.L.P. seeks to have the property re-apportioned 100% in her favour. I have concluded that an equal division would be unfair having regard to the significant expenditures made by Ms. N.L.P. to preserve and maintain the property since separation. Accordingly, I re-apportion the property 60% in her favour.
- [27] Success has been divided and there will be no order for costs. "C. Ross, J." The Honourable Madam Justice C. Ross November 4, 2004 - Revised Judgment Corrigendum to the Reasons for Judgment dated November 4, 2004 is issued to advise that the Court Registry name should be Vancouver.

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