

CANADA / JUDGMENT

Parmar v. Rikhia

2024 BCCA 268

COURT

British Columbia Court of Appeal

DECIDED

13 June 2024

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2024 BCCA 268 Parmar v. Rikhia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Parmar v. Rikhia,

2024 BCCA 268

Date: 20240613

Docket: CA48632

Between:

Neelam Parmar also known as Neelam Kaur Parmar

Appellant

(Respondent)

And

Nidhan Rikhia also known as Nidhan Singh Alam Rikhia

Respondent

(Claimant)

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Harris

The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated

September 22, 2022 (Rikhia v. Parmar, New Westminster Docket E46535).

Oral Reasons for Judgment

Counsel for the Appellant:

K. Iacono

Counsel for the Respondent:

A.L. Colpitts

Place and Date of Hearing:

Vancouver, British Columbia

June 12, 2024

Place and Date of Judgment:

Vancouver, British Columbia

June 13, 2024

Summary:

Following a trial, the parties were ordered to contribute to certain s. 7 expenses under the Federal Child Support Guidelines. The respondent subsequently applied to vary the order, seeking the removal of tuition and daycare expenses and the addition of tutoring, musical instrument and cricket expenses. The judge granted the application, varied the order and ordered that the appellant pay the expenses retroactive to January 2019. The appellant appeals, arguing that there was no material change in circumstances to justify varying the order and that the judge erred in ordering that the s. 7 expenses be payable retroactively.

Held: Appeal allowed in part. The judge's reasons and the underlying facts demonstrate that the judge made no error in finding a material change necessary to vary the order. The judge also committed no reviewable error in determining that a retroactive award was appropriate. However, the effective date for the retroactive award was unsupported. It is appropriate to substitute the date the respondent filed his notice of application as the effective date for the retroactive award.

[1] SKOLROOD J.A.: This appeal arises in the context of long running family litigation between the appellant, Ms. Parmar, and the respondent, Mr. Rikhia. Specifically, the appellant appeals from the order of Justice Harvey dated September 22, 2022 varying her obligation to contribute to expenses for the parties' children.

- [2] The parties were married on June 17, 2007, separated in May 2014 and were divorced pursuant to the order of Justice Fleming, then of the Supreme Court (the "Fleming Order"), issued following a three week trial in June of 2018. Justice Fleming's reasons for judgment are indexed at 2018 BCSC 2318.
- [3] The parties have two children who are both in their early teens.
- [4] The Fleming Order dealt with numerous issues between the parties including spousal and child support, extraordinary expenses under s. 7 of the Federal Child Support Guidelines, SOR/97-175 and the division of family property and debt. While the order was intended to be final, the parties have continued to bring applications and make appearances in the Supreme Court.
- [5] The current dispute involves s. 7 expenses. In her reasons for judgment, Justice Fleming made the following findings with respect to s. 7 expenses:
- [213] Regarding s. 7 expenses for December 2017 onward, based on Mr. R's line 150 income in his 2017 income tax return, I find his guideline income to be \$65,096. The parties will contribute to the cost of ongoing s. 7 expenses in proportion to those incomes. Ms. P will pay Mr. R her proportionate share, which will continue to include school tuition, daycare expenses and medical and dental expenses as provided for in s. 7, in addition to other expenses agreed upon by the parties in writing, within 14 days of him providing her with a receipt showing proof of payment.
- [6] Justice Fleming's findings were then reflected in paras. 25 and 26 of the Fleming Order. The appellant's proportionate share of the expenses was based on an imputed income of \$35,000 per year. In addition to finding that the appellant was required to contribute to s. 7 expenses from December 2017 forward, Fleming J. also ordered that she pay the respondent \$6,163.58 in s. 7 arrears.
- [7] The respondent filed a notice of application on December 9, 2021 seeking to vary Fleming J.'s order. Specifically, he sought the following relief:

That the respondent shall pay her proportionate share for the special and extraordinary expenses for the children as specified by the Section 7 of Federal Child Support Guidelines which will consist of the following:

- (i) School tuition
- (ii) Daycare expenses
- (iii) Medical and dental
- (iv) Tutoring
- (v) Expenses related to the children's extracurricular activities such as cricket, swimming, Karate and other activities in which children were engaged in pre and post separation

(vi) Any other expenses agreed to by the parties, with such agreement not to be unreasonably withheld. If the parties are unable to reach an agreement, then the claimant will have the final say.

- [8] The respondent also sought an order for arrears of s. 7 expenses. The appellant filed an application on May 24, 2022 in which she sought production of documents and records from various third parties.
- [9] Both applications were heard by Harvey J. on August 18 and 25, 2022. Justice Harvey gave oral reasons for judgment on September 22, 2022 (*Rikhia v. Parmar* (22 September 2022), New Westminster E46535 [RFJ]). This appeal is limited to Harvey J.'s decision in connection with the respondent's application.
- [10] Justice Harvey characterized the application as seeking "a restructuring of the children's extraordinary expenses due to the passage of time and their changing needs" (RFJ at para. 84). The judge noted that two of the s. 7 expenses ordered by Fleming J.--private school and daycare expenses--were no longer applicable. However, since the date of the Fleming Order, it had become apparent that one of the children has educational needs that require outside tutoring. Further, both children were playing cricket at a high level, and the respondent sought to have the appellant contribute to registration and equipment costs, as well as the costs of additional specialized training.
- [11] Justice Harvey granted the application to vary the required s. 7 expenses, with the exception of the special training. Justice Harvey said:
- [99] Here, I conclude that the expenses claimed are reasonable and allowable, save for the special training for cricket claimed by the claimant. I do not find he has established a need for it or that there was an historical agreement by the respondent such as to make it necessary. To be clear, I allow the claim for tutoring, the associated fees for the enrolment of both boys in cricket, including equipment, also instrument rental while both the boys are required to participate in music classes.
- [100] So accordingly, I will modify the order of Justice Fleming by adding those items to the payable s. 7 expenses and deleting the need for private school and/or daycare.
- [12] Justice Harvey noted the appellant's failure to pay previously ordered amounts and he therefore, on his own motion, ordered that the appellant pay \$250 per month on account of s. 7 expenses, with semi annual reconciliations (RFJ at para. 102). Additionally, Harvey J. ordered that the appellant pay the s. 7 expenses retroactive to 2019 (RFJ at paras. 104-108).

Issues on Appeal

- [13] The appellant submits that the judge erred in:
- failing to properly apply the test for determining whether there was a material change in circumstances that would warrant varying the Fleming Order in respect of s. 7 expenses;

- b) failing to consider Ms. Parmar's subjective belief that the Fleming Order was valid and that she was making child support payments in accordance with that order; and
- c) ordering s. 7 expenses payable retroactively from 2019.

Standard of Review

[14] The decision to vary a child support order, including an order for s. 7 expenses, involves the exercise of the judge's discretion and, as such, is entitled to a high degree of deference. In *Hickey v. Hickey*, [1999] 2 SCR 518 at para. 12, the Supreme Court of Canada said:

There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family litigation and recognizes the importance of the appreciation of the facts by the trial judge.

See also: *Barendregt v. Grebliunas*, 2022 SCC 22 at paras. 100-104.

Discussion

[15] The parties agree that in order to vary a child support order, including an order for s. 7 expenses, the court must be satisfied that there has been a material change in circumstances.

[16] In *Williamson v. Williamson*, 2016 BCCA 87, this Court cited the leading decision of *Gordon v. Goertz*, [1996] 2 SCR 27 at para. 13 where the Supreme Court said:

It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[17] While *Gordon* was concerned with a custody order, the same principles apply to the variation of a support order. This Court has also held that these principles govern whether the variation application is brought under the BC Family Law Act, S.B.C. 2011, c. 25 or the federal Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.): *Williamson* at paras. 30-31.

[18] The judge here did not expressly cite the 'material change' test, however, it is apparent from reading his reasons as a whole, that he was fully aware of the test. Indeed, his analysis focusses on the needs and circumstances of the children, specifically, the change in their circumstances since the date of the Fleming Order. For example, at para. 85 of his reasons, the judge notes that the children are no longer enrolled in the private school and no longer require daycare expenses. At para. 86 of his reasons, the judge noted that it has become

apparent that one of the children has educational needs requiring outside tutorial assistance.

- [19] With respect to the tutoring, the appellant submits that the issue of the child's educational needs was considered by Fleming J., thus it does not amount to a material change. I disagree. While there was evidence before Fleming J. that the child was encountering some issues at school, the evidence also established that both children were performing at grade level (Fleming J. Reasons at paras. 101-103). In contrast, there was evidence before the judge here that the educational needs of the youngest child had changed to the point where additional assistance was required. In my view, there was a sufficient evidentiary foundation upon which the judge found a material change in that child's needs and circumstances. The appellant has not established that the judge committed a palpable and overriding error in reaching this conclusion: *D.L.T. v. K.K.M.*, 2019 BCCA 212 at para. 33.
- [20] I come to a similar conclusion with respect to the other s. 7 expenses ordered by the judge, specifically the cricket and music instrument expenses. Again, there was evidence before the judge supporting a finding that there was a material change in circumstances relating to these expenses. The appellant has not established that the judge committed a palpable and overriding error in so concluding.
- [21] I would add that contrary to the submission of the appellant, the fact that a particular expense was considered by the judge in a previous order does not necessarily lead to the conclusion that the circumstance subsequently said to constitute a material change could have been foreseen or contemplated by the original judge. The needs and circumstances of children are not static, but will often change as the children age, and the material change test is intended to address such changes. The school and daycare expenses originally ordered by Fleming J. are good examples of this.
- [22] It follows from my finding that a material change has been established that I do not accept the appellant's argument that the variation application was, in effect, an improper appeal of the Fleming Order.
- [23] Turning to the second error alleged by the appellant concerning the judge's order for retroactive s. 7 expenses, I am similarly of the view that the judge did not err in making the order that he did.
- [24] The judge referred to the leading decision of *D.B.S. v. S.R.G.*, 2006 SCC 37 where the Court set out a number of factors to be considered when determining whether a retroactive award is appropriate:
- a) Is there a reasonable excuse why support was not sought earlier?
 - b) The conduct of the payor parent;
 - c) The circumstances of the child, including the child's needs at the time the increased support ought to have been paid; and

- d) Any hardship that would be occasioned by a retroactive award.
- [25] The appellant focusses on the second factor and argues that the judge erred in finding that her conduct was blameworthy. She submits that the judge erred in not considering her subjective belief that the Fleming Order was a final order governing her support obligations.
- [26] I would not accede to this argument. As submitted by the respondent, the appellant did not point to any evidence of her subjective understanding of the Fleming Order. In contrast, there was evidence, cited by the judge, that the respondent had been seeking payment for certain of the expenses since 2018. The judge noted that despite her professed concern for the children's well-being, the appellant had not paid her share of tuition expenses and had not volunteered to pay anything for tutoring (RFJ at para. 107).
- [27] In the circumstances, the appellant has not demonstrated that the judge made a palpable and overriding error in ordering retroactive s. 7 expenses.
- [28] The final ground of appeal advanced by the appellant is that the judge erred in setting the effective date for retroactive payments of January 2019. The appellant characterizes that date as arbitrary. In my respectful view, there is some force to this argument.
- [29] The start date of January 2019 is not well explained by the judge, although it coincides with emails sent by the respondent to the appellant asking her to contribute to certain additional expenses. Notably, the first email, dated January 11, 2019, identifies tutoring as one of the expenses, as well as the extra cricket coaching, but it does not refer to the cricket enrolment fees or the musical instrument costs. The cricket fees were subsequently raised in an email from the respondent dated May 25, 2019 and the music costs were first raised by the respondent in October 2020.
- [30] The Fleming Order contemplated that, in addition to the s. 7 expenses ordered, it was open to the parties to agree on additional expenses towards which the appellant would contribute. The emails set out in the record appear to be attempts by the respondent to obtain the appellant's agreement to the additional expenses. However, no notice was given to the appellant of the respondent's intention to seek an order for those expenses until he filed his notice of application on December 9, 2021.
- [31] Further, while the judge found a material change in circumstances warranting a variation of the s. 7 award, nowhere in his reasons does he identify the date on which the material change arose in connection with the additional expenses. As the material change is the trigger for varying the s. 7 expenses, the date of the change is a key factor in determining the effective date for a retroactive award.
- [32] Given the absence of a clear finding to that effect and the judge's failure to explain the January 2019 effective date, it is my view that that date cannot stand. Rather, I would substitute the date of December 9, 2021, the date the respondent filed his notice of application, as the effective date for the retroactive award.

Conclusion

[33] For the reasons stated, I would therefore allow the appeal only to the extent of varying the order below to substitute December 9, 2021 as the effective date for the payment of retroactive s. 7 expenses.

[34] GROBERMAN J.A.: I agree.

[35] HARRIS J.A.: I agree.

[36] GROBERMAN J.A.: The appeal is allowed but only to the extent of varying the order below to substitute December 9, 2021 as the effective date for payment of retroactive s. 7 expenses.

"The Honourable Justice Skolrood"

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Prepared on 29 October 2026 · Esheria