

CANADA / JUDGMENT

Penny v. Kovacs

2023 BCSC 1966

COURT

Supreme Court of British Columbia

DECIDED

21 September 2023

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2023 BCSC 1966 Penny v Kovacs

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Penny v Kovacs,

2023 BCSC 1966

Date: 20230921

Docket: E 232655

Registry: Victoria

Between:

Jason Joseph Penny

Claimant

And

Laurie-Ann Leslie Kovacs

Respondent

Before: The Honourable Mr. Justice Brongers

Oral Reasons for Judgment

In Chambers

For the Claimant:

No appearance

Appearing on her own behalf:

L. Kovacs

Counsel appearing as Amicus Curiae for the Ministry of the Attorney General of British Columbia by videoconference:

P.J. Reimer

Place and Date of Trial/Hearing:

Victoria, B.C.

September 14, 2023

Place and Date of Judgment:

Victoria, B.C.

September 21, 2023

Introduction

- [1] THE COURT: This is an interjurisdictional application by Jason Penny ("Mr. Penny") for a variation of his support obligations payable to Laurie-Ann Kovacs ("Ms. Kovacs").
- [2] Those obligations were established further to a divorce order of the Alberta Court of Queens Bench dated May 26, 2014 (the "2014 Divorce Order").
- [3] According to its terms, Mr. Penny is to pay Ms. Kovacs \$909 per month in child support commencing retroactively on April 1, 2013. This amount was calculated on the basis that there are two children of the marriage and that Mr. Penny has an imputed Guideline income of \$64,000 per year.
- [4] Mr. Penny now seeks two changes to this order, as well as some consequential relief.
- [5] The first change Mr. Penny wants is that his child support obligation be reduced to \$226 per month retroactive to January 1, 2016. He argues that there has been a material change in circumstances in two respects. First, he now earns less income than he used to. Second, there is now only one remaining child of the marriage since the elder child has reached the age of majority. Mr. Penny also asks for a consequential adjustment in the amount of his unpaid support arrears such that they be fixed at \$12,793.07 as of March 1, 2023.
- [6] The second change to the 2014 Divorce Order that Mr. Penny requests relates to a provision that requires him to pay for a one-way flight to or from New Brunswick for the children of the marriage every year. Mr. Penny wants the stipulated destination to be changed to Newfoundland instead.
- [7] Finally, Mr. Penny seeks an order for future periodic disclosure of financial information, as appropriate.

- [8] Ms. Kovacs is opposed to Mr. Penny's requests. She says that she has been shouldering almost all of the burden of supporting the children of the marriage since the separation, and feels it is unfair for Mr. Penny to now seek a reduction in his child support obligations, particularly with respect to arrears. As for the proposed change to the flight destination, Ms. Kovacs argues that Mr. Penny's request is an improper attempt to indirectly avoid his obligation to partially fund the cost of sending the children to visit family in New Brunswick.
- [9] Having reviewed the material filed, I am of the view that a reduction in Mr. Penny's child support obligations is warranted to reflect two material changes in circumstances: (1) Mr. Penny's lower level of earnings; and (2) the fact that there is now only one child of the marriage. I will therefore order that Mr. Penny's monthly child support payable be reduced. The other relief Mr. Penny seeks will be denied.
- [10] I will now explain my reasons for reaching these conclusions, after which I will set out the specific terms of my order.

Background

- [11] The parties were married on July 9, 2000. They have two children together. The first was born on July 18, 2000, and is now 23 years old. The second was born on November 2, 2007, and is now 15 years old.
- [12] As has already been noted, the parties divorced in 2014. At the time they were living in Alberta. The 2014 Divorce Order provides that the children are to reside primarily with Ms. Kovacs. Accordingly, Ms. Kovacs has been the recipient of child support payable by Mr. Penny further to this order.
- [13] In or around 2017, both parties relocated from Alberta. Mr. Penny moved to Newfoundland and Labrador. Ms. Kovacs moved to British Columbia.
- [14] On March 23, 2023, Mr. Penny produced the present interjurisdictional support variation application under ss. 17 and 18.1 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Notice of the application was provided to Ms. Kovacs in accordance with the legislation on August 22, 2023. She filed her response to the application on September 12, 2023.
- [15] The application was made returnable before this Court on September 14, 2023. An amicus curiae, Paul Reimer, was given permission to appear to assist the Court with the application. The hearing took place before me, and was attended by Ms. Kovacs and Mr. Reimer. Mr. Penny did not make a request to appear and therefore was not present.

Issues

- [16] Mr. Penny's application raises four issues:
- (1) Should Mr. Penny's child support obligation as set out in the 2014 Divorce Order be varied?
 - (2) Should Mr. Penny's unpaid support arrears owing under the 2014 Divorce Order be fixed?

- (3) Should Mr. Penny's obligation to pay for a one-way flight to or from New Brunswick under the 2014 Divorce Order be modified?
- (4) Should the parties be ordered to disclose financial information?
- [17] I will address these issues in turn.

Issue #1 - Mr. Penny's Child Support Obligation

- [18] The principles that apply to retroactive applications to vary child support orders such as the one brought by Mr. Penny in this case are comprehensively set out in the Supreme Court of Canada's decision in *Colucci v. Colucci*, 2021 SCC 24.
- [19] Generally speaking, a payor who brings such an application must first demonstrate a material change of circumstances that would justify such an award. An example is where there has been a change in a payor's income that is significant, continuous and involuntary. Another is where a child's circumstances have changed such that the child no longer falls within the definition of "children of the marriage" under the Divorce Act.
- [20] Once the payor establishes a material change of circumstances, there is a presumption that retroactive relief will be granted back to the date that notice of the change was given to the payee. That will be the date of formal notice, unless the court is satisfied that effective notice was given earlier, up to three years prior to the date of formal notice. In order for there to be effective notice, the payor must provide sufficient information to enable the payee to independently assess the situation and respond appropriately. The court does, however, retain discretion to depart from these presumptive dates of retroactivity in order to avoid unfairness.
- [21] Finally, once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified in accordance with the Federal Child Support Guidelines (the "Guidelines").
- [22] Applying these principles to the case at bar, I am satisfied that Mr. Penny has demonstrated two material changes of circumstances: (1) a significant decrease in Mr. Penny's income; and (2) a reduction in the number of children of the marriage as defined by the Divorce Act.
- [23] Most importantly, I find that Mr. Penny has experienced a large reduction in earnings since the 2014 divorce order when his Guideline income was imputed to be \$64,000. I accept that this figure was based on Mr. Penny's earnings from his previous employment in Alberta prior to his 2016 layoff. Since Mr. Penny moved to Newfoundland in 2017, he has worked various low income jobs and his earnings as shown on his Canada Revenue Agency ("CRA") tax assessments from 2017 to 2021 are as follows:

2017: \$30,891

2018: \$29,692

2019: \$29,706

2020: \$28,387

2021: \$26,696

- [24] As for 2022, I accept Mr. Penny's assertion that he earned \$24,078 based on a T4 slip that shows income received from a particular employer in an amount slightly lower than that. I also accept Mr. Penny's estimate that his 2023 income will be \$29,000 based on his Form I financial information document that he submitted in support of his application.
- [25] The evidence tendered by Mr. Penny satisfies me that his decrease in income since the 2014 divorce order has been significant, continuous, and involuntary. It therefore constitutes a material change in circumstances. In reaching this conclusion, I acknowledge Ms. Kovacs' submission that Mr. Penny has earned cash income which he has not declared to the CRA in the past. However, Ms. Kovacs has not lived with Mr. Penny for many years and I am not prepared to reject Mr. Penny's evidence based solely on Ms. Kovacs' speculation that Mr. Penny is also earning income "under the table".
- [26] With respect to the second material change of circumstances, there is no dispute that the parties' eldest child reached the age of majority upon their 19th birthday, which took place on July 18, 2019. Furthermore, there is no evidence to show that this child is unable by reason of illness, disability, or other cause, to withdraw from the parents' charge or to obtain the necessities of life. Accordingly, only the parties' youngest child remains a child of the marriage.
- [27] I turn now to the issue of the date to which Mr. Penny's support should be retroactively decreased. Mr. Penny submits that it should be January 1, 2016. He does not clearly articulate the basis for this request beyond asserting that he has made multiple attempts to vary the 2014 Divorce Order to no avail. While he has tendered some letters in support of this assertion from provincial government agencies in British Columbia, Alberta, and Newfoundland and Labrador, at best they show that Mr. Penny has made past inquiries and submitted some incomplete support variation applications prior to the present one. However, there is no evidence that Mr. Penny actually communicated with Ms. Kovacs about this issue, either directly or indirectly, at any time.
- [28] In the circumstances, I do not find that effective notice of Mr. Penny's desire to modify his child support obligation was provided to Ms. Kovacs to enable her to independently assess the situation and respond appropriately until she was given formal notice of this application on August 22, 2023. Accordingly, that will be the date following which Mr. Penny's child support obligation will be decreased.
- [29] The final analytical step to be performed is a quantification of the reduction in Mr. Penny's child support obligation. According to Mr. Penny, that obligation should be reduced to \$226, apparently based on his present annual income of \$29,000. However, I am informed by the amicus curiae, Mr. Reimer, that the table amount established by the Guidelines for child

support payable in respect of one child by a payor who resides in Newfoundland and Labrador whose imputed income is \$29,000 is actually \$220. I accept that this is the correct figure that ought to be used for the quantification.

- [30] In sum, I will order that Mr. Penny's child support obligation be set at \$220 per month, effective August 22, 2023.

Issue #2 - Mr. Penny's Unpaid Support Arrears

- [31] According to the documentary evidence tendered, Mr. Penny's unpaid support arrears payable to Ms. Kovacs totalled \$43,872.07 as of March 8, 2023.
- [32] Mr. Penny asks that this amount be "fixed" or set at \$12,793.07 as of March 1, 2023. I understand that he makes this request on the basis that it would reflect an adjustment of his child support obligations if they were changed retroactively to reflect his reduced income as of January 1, 2016, and the fact that the parties have had only one child of the marriage since July 18, 2019.
- [33] However, this request cannot be accepted given my conclusion that Mr. Penny's child support obligation should only be amended effective August 22, 2023, the date notice was given to Ms. Kovacs.
- [34] That said, I trust that the appropriate family maintenance enforcement authority will ensure that the necessary recalculation of arrears will be made to give effect to my order in this matter.
- [35] I also acknowledge that I may have misunderstood the basis for Mr. Penny's request for relief in that perhaps he is also seeking a partial rescission of his arrears on the basis of an alleged inability to pay. If this is the case, however, I am not satisfied that Mr. Penny has presented the necessary evidence to overcome the high threshold for obtaining such relief, as noted in Colucci at paragraphs 133 to 141. In particular, Mr. Penny has not established on a balance of probabilities that - even with a flexible payment plan - he cannot and will not ever be able to pay the child support arrears he owes Ms. Kovacs. In any event, this request for relief is dismissed.

Issue #3 - Mr. Penny's Obligation to Pay for Air Travel

- [36] Paragraph 6 of the 2014 Divorce Order includes a provision that Mr. Penny is to pay 100% for a "one-way flight (to or from) New Brunswick per year" in respect of the children of the marriage.
- [37] In his application for a support variation order, Mr. Penny asked for "Other" relief as follows:
I ask for a change to the flight destination from New Brunswick to Newfoundland.
- [38] The basis for Mr. Penny's request is set out in his application as follows:

As stated on the front of form A.4, section 2A under other specify, I have stated that I would like to request the flight destination be changed from New Brunswick to Newfoundland. This is since my current and recent income can not afford flights at this time. And if I can find a way to pay for a flight it would be great if it was for [the youngest child] to come here to Newfoundland.

These flights were meant to be for the girls to go to NB to visit family and friends. For some years now (see letter provided by my family) they have not been going to visit my family at all and only visit Ms. Kovacs friends without even letting my family know they are in the province. As such if Ms. Kovacs wants [the youngest child] to visit Ms. Kovacs friends only then she should pay for the flights to NB 100% both ways.

[39] I am not satisfied that there has been a material change in circumstances that would justify a variation of this aspect of the 2014 Divorce Order in the manner Mr. Penny has requested, which is to modify the flight destination and not to cancel this particular support obligation.

[40] In particular, both parties have agreed that the purpose of the provision is to facilitate visits by the children of the marriage with family and relatives who live in New Brunswick. That purpose will not be achieved by modifying Mr. Penny's obligation to pay for such air travel only if it is made to Newfoundland.

[41] Furthermore, even if Mr. Penny had framed his request for relief in terms of an order cancelling his obligation to pay for such air travel, I find that he has not demonstrated an entitlement to such relief, any more than he is entitled to a rescission of his unpaid arrears.

[42] This request for relief is therefore denied.

Issue #4 - Further Periodic Financial Information Disclosure

[43] Mr. Penny has not articulated a reason why Ms. Kovacs should now be required to provide him with future financial disclosure. Furthermore, the utility of such an order is not apparent given that the 2014 Divorce Order only requires payment of child support, and not spousal support.

[44] Accordingly, this request for relief is also denied.

Disposition

[45] In summary, I order that Mr. Penny's obligation to pay child support to Ms. Kovacs as set out in paragraph 5 of the 2014 Divorce Order is varied to read as follows:

The Defendant Jason Penny shall pay to the Plaintiff Laurie-Ann Kovacs the sum of \$220 per month for support of the children of the marriage, payable on the first day of each month, effective August 22, 2023.

[46] Mr. Penny's application is otherwise dismissed.

[47] With respect to costs, in light of their divided success, it is my view that each party should bear their own.

[DISCUSSION RE ORDERING OF TRANSCRIPT AND REFINING OF ORDER]

[48] So I am going to slightly change the wording of the order. So I order that Mr. Penny's obligation to pay child support to Ms. Kovacs as set out in paragraph 5 of the 2014 Divorce Order is varied to read as follows:

The Defendant Jason Penny shall pay to the Plaintiff Laurie-Ann Kovacs the sum of \$220 per month for support of the child of the marriage, payable on the first day of each month, effective August 22, 2023, such obligation to reflect an imputed income of \$29,000 per year, that there is one child of the marriage, and that Mr. Penny is a resident of Newfoundland and Labrador.

"Brongers J."

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