
CANADA / JUDGMENT

Pozzolo v. Pozzolo

2020 BCCA 281

COURT

British Columbia Court of Appeal

DECIDED

8 October 2020

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2020 BCCA 281 Pozzolo v. Pozzolo

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Pozzolo v. Pozzolo,

2020 BCCA 281

Date: 20201008

Docket: CA46620

Between:

Brian Gregory Pozzolo

Respondent

(Claimant)

And

Diana Elaine Pozzolo

Appellant

(Respondent)

Before:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Fisher

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated December 10, 2019 (Pozzolo v. Pozzolo, Vancouver Docket E123607).

Oral Reasons for Judgment

Counsel for the Appellant:

H.M. DeJong

The Respondent, appearing in person:

B.G. Pozzolo

Place and Date of Hearing:

Vancouver, British Columbia

October 8, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 8, 2020

Summary:

The appellant mother appeals from an order reducing the respondent father's child support obligation. This followed an application by the father to review an existing child support order. Held: Appeal allowed and order set aside. The judge erred in concluding that the father's child support obligation was reduced by half because one of two children reached age 19. The child who reached the age of majority, a daughter, had been living with the father since separation and he had not been paying child support for her. Rather, the mother had a notional child support obligation with respect to the daughter that ended when the daughter turned 19. The parents were following a split parenting arrangement and child support was based on a set-off of each parent's obligations pursuant to s. 8 of the Child Support Guidelines. Because the father had a much greater income, he was paying a net amount to the mother. The father's obligation to pay child support was with respect to the son living with the mother, a situation that continued until the end of July 2019.

- [1] GRIFFIN J.A.: This appeal arises from an order made December 10, 2019, varying the respondent father's child support obligations, reducing child support from \$1,000 per month to \$500 per month.
- [2] The appellant mother appeals on the basis that the judge misapprehended the true circumstances of the parties' existing child support regime and parenting arrangements and by failing to apply the Child Support Guidelines, SOR/97-175, in making the order for child support.
- [3] For the reasons that follow, I agree that the judge so erred.

Background

- [4] The parties are parents of a girl born in 1999 and a boy born in 2001. Following a breakdown of their relationship, a family claim was commenced by the respondent. A judicial settlement conference was held over a series of three days in 2014, and the parties then entered into a final consent order as of July 2, 2014 (the "Consent Order").
- [5] The Consent Order stated in the preamble that the daughter resided primarily with the father and the son resided primarily with the mother.
- [6] In respect of child support, the Consent Order stated:
2. By consent, the shared parenting provisions of the Federal Child Support Guidelines - British Columbia ("the Guidelines") apply in this case and the Claimant's Guideline income is attributed at \$116,428 and the Respondent's Guideline income is attributed at \$11,234 for the purposes of this Order;
 3. By consent, the Claimant shall pay to the Respondent for the support of the Children:
 - a. the applicable table amount for the Children pursuant to the shared custody provisions of the Guidelines for British Columbia at his Guideline income; and
 - b. the Claimant's share of the special or extraordinary expenses of the Children as determined in accordance with the Guidelines and this Order. As of the date of this Order, the Claimant's proportionate share is 90% and the Respondent's proportionate share is 10% ("the Child Support");
 4. By consent, as at the date of this Order, the amount the Claimant is required to pay under s. 9 of the Guidelines is the sum of \$1,000 per month ("the Table Amount"). The Respondent will pay to the Claimant by electronic transfer the Table Amount commencing on the 1st day of March, 2014 and continue on the first day of each month thereafter until reviewed or ended as provided in this Order;
- [7] The Consent Order further provided that child support would be reviewable:
6. By consent, the child support to be paid for the benefit of the Children is reviewable as follows:
 - a. the parties may, by notice in writing to the other, require the review of child support and, if necessary, adjust it to ensure that it accords with the requirements of the Guidelines, not earlier than June 1st each year with the first review being in 2015;
 - b. if the parties have not reached agreement within 30 days after the notice provided for in paragraph 7(a) of this Order, the parties are at liberty to make application to the Court for a determination of the Child Support issue;

- c. not later than 30 days after a request for review of the Child Support in accordance with this paragraph 7, the parties will each provide the other with the income information required by s. 21 of the Guidelines; and
 - d. any adjustment under subparagraph 7(a) will commence on July 1st of the review year and shall not apply retroactively prior to that date;
- [8] The Consent Order also had terms addressing special expenses and ongoing financial disclosure.
- [9] The Consent Order provided that child support would cease in certain circumstances, including: when the child ceased to be a child as defined in the Family Law Act, S.B.C. 2011, c. 25; no longer resided with one of the parties; or turned 19, unless not able to become self-supporting.
- [10] On September 24, 2019, the respondent applied to review the amount of child support he was required to pay pursuant to the Consent Order. His affidavit in support of his application stated that the daughter had turned 19 in September 2018, so child support no longer applied in relation to her pursuant to the Consent Order; and that the son, who had been living with the appellant mother, began living primarily with him as of September 2018. He sought to reduce his child support obligation.
- [11] The father also claimed to have suffered a reduction in income, but did not pursue this in submissions when the matter came before the judge.
- [12] After an earlier adjournment, the application was heard on December 10, 2019. Both parties were self-represented.
- [13] At the time of his application, the father was in substantial arrears in respect of his child support obligations, as he had unilaterally ceased to pay support as of May 2018. The mother had consequently enrolled with the Family Maintenance Enforcement Program.
- [14] The mother's affidavit evidence set out that after the Consent Order, the parties followed a split parenting schedule, with the son living primarily with her and the daughter living primarily with the father. She filed evidence as to the father being in arrears since May 2018. None of this was contested. She also filed evidence contesting the father's claim to have suffered a decrease in income.
- [15] The mother made submissions before the judge opposing any reduction in child support. She explained that the \$1,000 child support the father was ordered to pay in the Consent Order was based on a set-off of the parties' respective child support obligations taking into account the disparity in the parties' incomes.
- [16] The mother's submissions were consistent with the applicable Child Support Guidelines in respect of the appropriate child support payable, based on each parent's income and a parenting arrangement whereby one child lived with each parent. The father's much greater income meant he would have to pay considerably more child support to the mother in

respect of the child living with her than the mother would have to pay in respect of the child living with the father. Roughly, the father's obligation to pay child support was \$1,056 per month and the mother's obligation was \$28 per month at the time of the Consent Order. The Consent Order rounded down the net obligation of the father to \$1,000 per month.

- [17] The Consent Order used an incorrect phrase to describe the actual parenting arrangement, describing it as "shared parenting" and referring to s. 9 of the Child Support Guidelines. This type of arrangement is one whereby the children live with both parents, and each parent has at least 40% of the parenting time with the children.
- [18] The correct terminology that applies to these parties' arrangement is split custody, where each spouse has custody of one or more children. In split custody, the amount of a child support order is determined by a straight set-off, as set out in s. 8 of the Child Support Guidelines:

Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

- [19] Regardless of the wrong terminology in the Consent Order, the facts are uncontested that from the date they separated, the parents were in a split custody arrangement. This was the case at the time of the Consent Order and thereafter. The child support payable had been determined as a set-off of their respective obligations under a split parenting arrangement, not under s. 9 of the Child Support Guidelines.
- [20] As mentioned, the preamble to the Consent Order refers to the split parenting arrangement.
- [21] In her submissions before the judge, the mother focused on the real issue raised by the father's submissions, which was whether or not the child that lived with her, the son, had ceased living with her in September 2018 and had instead been living with the father. The mother disputed this fact. She claimed that the child had continued living with her until July 2019, when he moved out.
- [22] It was clear from the transcript of proceedings that both parties agreed that the daughter had turned 19 and so there was no child support payable in respect of her. Although it was raised as a factor in the father's application, this fact was not relevant to the child support that the father was paying.
- [23] After hearing from the parties, the judge decided the one factual issue between the parties in the mother's favour. She concluded that the father had not proven that the son ceased to reside with the mother in September 2018. She concluded that the father's obligation to pay child support to the mother for the son continued until the son moved out, which was said to be until July 30, 2019.

- [24] The judge misunderstood the relevance of the daughter turning 19. The judge found that the father's obligation to pay child support ended when the daughter turned 19 in September 2018. Based on this, the judge held that the father was only obliged to pay \$500 in child support after the daughter turned 19. The judge concluded that the father's arrears of child support should be reduced to reflect this fact.
- [25] The father submits on appeal that the fact the Consent Order refers to shared parenting means that the judge did not err in reducing child support after the daughter turned 19. I do not find any support for that submission, factually or legally. There is no doubt that the parties had a split parenting arrangement and that the amount of support in the Consent Order that the father had to pay was based on the son living with the mother and the daughter living with the father.
- [26] Had there been a shared custody arrangement, the amount of child support the father would have been required to pay pursuant to the Child Support Guidelines would likely have been much greater. According to the appellant's calculations, the father's child support obligation would have been \$1,606 per month. Likewise, had both children been living with the mother, the father's child support obligations would have been even greater at the time of the Consent Order.
- [27] The father also points to the fact that when questioned by the judge, the mother agreed with the judge's proposition that the father's child support obligation in respect of the daughter ended when the daughter turned 19. It is clear that the mother misunderstood the judge's question. The mother knew that the Consent Order provided that there was no child support payable for a child who turned 19. She did not suggest that the father had ever paid child support for the daughter.
- [28] The judge clearly misapprehended the facts and erred in reducing the father's arrears and child support obligations. The daughter's circumstances were irrelevant to the father's child support obligations. The daughter had been living with the father and he was not paying child support to the mother in respect of the daughter.
- [29] If anything, the fact that the daughter turned 19 meant the mother had no child support obligations, and this meant that the father's obligation to pay child support for the one child should have increased pursuant to the Child Support Guidelines by another approximately \$80 per month, above the \$1,000 he was required to pay. There would be no set-off reducing the father's continuing child support obligations. However, the mother did not seek to increase the father's child support obligations in her application response, affidavit, or submissions. The father submits that had she done so, he would have pressed on with his position that he had a reduced income and so his child support obligation should be reduced.

- [30] Given the time period at issue, October 2018 to July 2019, and the relatively small increase in the father's child support payable that would be affected by the fact that there was no longer any set-off required due to the cessation of the mother's obligation, the amount at issue was relatively minor, although I appreciate not insignificant to the mother given her financial situation.
- [31] On appeal, the mother now has counsel and seeks to increase the father's child support obligations. I do not consider that her remedy should be entertained at first instance on appeal, given that she did not advance this position below and the possible prejudice to the father.
- [32] I would set aside the judge's order. This means that the Consent Order continues in force, with the father's child support obligations continuing at \$1,000 per month until the agreed date of July 30, 2019.
- [33] DICKSON J.A.: I agree.
- [34] FISHER J.A.: I agree.
- [35] DICKSON J.A.: The appeal is allowed and the order below is set aside.
- [Discussion with counsel and respondent re: dispensing with respondent's signature as to form of the order]
- [36] DICKSON J.A.: We are not going to dispense with the need for Mr. Pozzolo to sign the order; however, if he has not signed it within a week of today's date, then the need for him to sign will be dispensed with.
- [Submissions re: costs]
- [37] GRIFFIN J.A.: The ordinary rule as to costs applies, which means the appellant is entitled to her costs in this Court and below. Further, the respondent brought a cross-appeal but later abandoned it. The appellant is entitled to her costs of the abandoned cross-appeal to the date of abandonment.
- [38] DICKSON J.A.: I agree.
- [39] FISHER J.A.: I agree.
- [40] DICKSON J.A.: Costs are ordered as described by Justice Griffin.

"The Honourable Madam Justice Griffin"

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Prepared on 26 October 2026 · Esheria