
CANADA / JUDGMENT

R.B.O. v. D.R.E.

2012 BCSC 1442

COURT

Supreme Court of British Columbia

DECIDED

28 September 2012

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2012 BCSC 1442 R.B.O. v. D.R.E.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.B.O. v. D.R.E.,

2012 BCSC 1442

Date: 20120928

Docket: 42056

Registry: Kamloops

Between:

R.B.O.

Claimant

And

D.R.E.

Respondent

Before: Master McDiarmid

Reasons for Judgment

R.B.O. appeared on his own behalf and with his agent, A.F:

A.F.

Counsel for the Respondent:

M.P. O'Neill

Place and Date of Hearing:

Kamloops, B.C.

August 29, 2012

Place and Date of Judgment:

Kamloops, B.C.

September 28, 2012

[1] By notice of application filed July 12, 2012, the claimant seeks:

1. Full custody and guardianship of H.O.;
2. Cancel of child support to respondent;
3. Cancel child support in arrears;
4. Return \$1,270.00 for over-payment of ortho costs;
5. Receive \$2,424.50 for MSP BC premiums;
6. Return of \$2,206.00 as per CRA appeal for CCTB money;
7. Respondent to get landline at her home; and
8. Request child support for H.O.

[2] In her response filed July 19, 2012, the respondent opposed all of the orders sought.

[3] The submissions at the hearing before me on behalf of the claimant were made by A.F., who resides with the claimant in what is commonly referred to as a "common law" relationship. Mr. O'Neill, on behalf of the respondent, consented to A.F. making submissions in support of the claimant's application, and I agreed that she could do so.

[4] At the commencement of the hearing I was advised that one of the children of the marriage, H.B.O. ("H."), born January 7, 1997, is now living at his grandparent's farm, and in the circumstances the orders sought in paragraphs 1, 2, and 7 of the notice of application:

1. Full custody and guardianship of H.B.O.;
2. Cancel of child support to respondent;

...

7. Respondent to get landline at her home;

are being abandoned. However, as the hearing progressed, it was clear to me that the issue of child support to be paid to the respondent was not abandoned, and #8, child support for H., was abandoned.

- [5] On September 7, 2010, Mr. Justice Grauer made a final order entered October 8, 2010, which, amongst other things, granted the parties a divorce.
- [6] At that time, the court was advised that there were three children of the marriage as follows:
- T.R.O. ("T."), born June 21, 1994;
- H.B.O. ("H."), born January 7, 1997; and
- C.J.O. ("C."), born June 22, 2001
- [7] I was advised that T. was primarily resident with the claimant until she ceased to be a child of the marriage.
- [8] C., presently aged 11, continues to reside with his mother, the respondent.
- [9] In the final order granted by Mr. Justice Grauer, his Lordship found that the claimant had a Federal Child Support Guidelines (the "Guidelines") income of \$27,000.00, and the respondent had a Guideline income of nil.
- [10] Grauer J. made orders, including an order requiring the claimant to pay to the respondent the sum of \$150.00 per month for the support of H. and C., commencing on the 1st day of September, 2010 and continuing on the 1st day of each and every month thereafter.
- [11] Grauer J. also ordered that the claimant pay to the respondent the sum of \$112.00 per month for the special expenses of all three children, and made an order that the claimant and respondent shall share future dental expenses and other special expenses of the children equally with some proviso set out in that order.
- [12] Then, by consent, there were two other orders made. The first order by consent is as follows:
1. The claimant and respondent shall share joint custody and joint guardianship of the children of the marriage as follows:
 - a. T. shall reside with the claimant and the respondent shall have reasonable and generous access;
 - b. H. and C. shall reside with the respondent and the claimant shall have reasonable and generous access to include but not be limited to three weekends per month;
 - c. The parents are to be the joint guardians of the estate of the child;
- [13] There followed seven additional subparagraphs which largely incorporated what are commonly referred to as "Master Joyce" provisions to enable the sensible resolution of parenting issues.
- [14] The second paragraph by consent commences as follows:

2. Any and all claims that either the claimant or respondent may have against each other for a division of family assets are dismissed, subject to the following:

[15] There followed nineteen subparagraphs. These dealt with asset and debt issues, including entitlement to the former matrimonial home, a refinancing of the former matrimonial home, a provision that the respondent pay to the claimant the sum of \$37,500.00, provisions dealing with several debts, provisions dealing with several items of personalty, including the contents of the former matrimonial home, a dismissal of each party's claims of spousal maintenance from the other, a provision confirming no arrears of child maintenance as of August 31, 2010, and the following subparagraph:

- n. The claimant will pay to the respondent the sum of \$7,500.00 towards the orthodontic expenses of the children currently outstanding;

[16] On page 5 of the order, following the terms I have referred to in the preceding paras. 9-15, is the following wording:

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT [A signature line in the following form must be completed and signed by or for each approving party.]

[17] Underneath is the signature of the lawyer then acting for D.R.O., and underneath that is the signature of the lawyer then acting for R.B.O. Both of those lawyers regularly appear before me in family law matters.

[18] On April 4, 2011, the parties entered into a second consent order. The claimant provided an unentered copy; the unentered copy is not the same as the actual entered order. The entered order reads as follows:

THIS COURT ORDERS that:

1. By Consent, the \$4,412.00 held in trust by Fulton & Company LLP shall be divided equally between the Claimant, R.B.O., and the Respondent, D.R.E. and paid out from Fulton & Company LLP's account;
2. By consent, neither party is responsible to pay any money which the other party owes to Revenue Canada;
3. By consent, each party shall bear their own costs of this application.

[19] The same approval as to form and consent wording appears on the top of page 2 of the order. Beneath that wording is the signature of the claimant and beneath that is the signature of the present lawyer for the respondent. The order was entered on April 21, 2011.

[20] The April 4, 2004 consent order was the resolution of a dispute as to entitlement to a child tax credit in the amount of \$4,412.00 which was held by the then lawyers for the claimant in their trust account.

[21] Other facts relevant to the issues before the court in this application are as follows:

- a) Since October of 2011, and up until the time H. commenced living with his grandparents, H. was residing at least 70 percent of the time with the claimant;
- b) The contract cost for T's orthodontic treatments was \$6,360.00 and for H. was \$6,100.00, totalling \$12,460.00; and
- c) Following the September 10, 2010 order, \$1,200.00 was withheld by the respondent to be set-off against the claimant's child support obligations.

[22] As ordered by Justice Grauer on September 7, 2010, those obligations were incurred at the rate of \$262.00 per month. This resulted in an off-set of \$1,048.00 through to the end of 2010, and a contribution of \$152.00 toward the child support due January 1, 2011.

[23] Apart from that \$1,200.00, the claimant has paid nothing toward child support since September 7, 2010.

[24] In his affidavit filed July 12, 2012, the claimant deposes that on January 1, 2011 he used \$30,000.00 from his divorce settlement to open a business, BMMA. He deposes that in February 2011 he began suffering excruciating pain in his neck and back and was no longer able to teach classes or run the front office. He deposes that he saw a chiropractor and that made matters worse, and so he visited his family doctor who referred him to a specialist. He deposes that the business was not successful, he was forced to close it, and essentially lost his initial investment (there was a discrepancy between whether his initial investment was \$30,000.00 or \$20,000.00, but nothing of significance turns on that).

[25] He deposes that he is unable to work in any physical capacity. He attaches a note from his doctor, Dr. Anderson, dated September 27, 2011 which states "Unable to work physically in any capacity [for approximately six months] x 6m pending Rx [by which I assume Dr. Anderson means treatment]."

[26] The claimant deposes that he has tried to get work in Kamloops, but due to his lack of education and issues with his physical ability, has been unable to work. He deposes:

11. ... Due to my injury, I must return to school to complete my high school and then reeducate myself in a new career. I am facing large costs to do so.
12. My entire life I have worked in the trades including irrigation, construction, and landscaping. Physical, labor intensive jobs is all that I know.

[27] He attaches financial information. The most recent financial documentation is a notice of assessment dated February 24, 2012, which shows a total income to be <\$7,683.00>. He also attaches A.F.'s notice of assessment for the tax year 2011 dated February 24, 2012, which puts her total income at <\$2,348.00>.

[28] In her third affidavit made July 18, 2012 and filed July 19, 2012, the respondent deposes in opposition to some of what the claimant has sworn to, as follows:

7. ... The Respondent agreed to pay the Claimant \$37,500.00 in settlement of his claims against your Respondent \$7,500.00 of which was set off against his share of orthodontal expenses projected or incurred for the children's benefit. An additional \$1,200.00 was set off against the Claimant's outstanding arrears of child support. There was no payment made by the Claimant to your Respondent in January of 2011 as the Claimant alleges.

...

21. ... As stated above, \$7,500.00 was set off against settlement proceeds agreed with the Claimant. The orthodontal services required by the children are ongoing and the \$7,500.00 set off from the settlement sum will probably not be half of the total expenses when all is said and done. H. still wears a retainer and requires followup examination(s) from time to time and T. is still in braces.
22. ... the funds which were divided were done so pursuant to a Consent Order entered into between the Claimant and me. The application for Child Tax Benefits he refers to were made "going forward" only - not as [an] attempt to 'double dip' so to speak.
23. ... the children have all been covered under my MSP coverage since 2008. The Claimant has failed or neglected to cancel the children's coverage under his MSP coverage. He knows that the children were included in my medical coverage. He has obviously made no payment whatsoever on his account or he would have known about the excess billing for the children for which I am not responsible by reason of his neglect.

[29] In response to paragraph 22 of the claimant's affidavit reproduced above, the respondent in a supplemental affidavit made and filed July 23, 2012 deposes:

3. In response to paragraph 22 of E. #1 is false, after receiving 50% of the Child Tax Benefit via the Supreme Court via order dated April 4th, 2011, the Respondent filed a CRA appeal for 2009 onwards. This appeal covered the same time period as the monies awarded by the court. In essence trying to double dip and get those monies from me twice. This was not a new application "going forwards" as she asserts. [EXHIBIT A]. She lost the appeal and no changes were made to my eligibility with CRA thus proving I was awarded those benefits correctly and justly.
4. I assert her appeal provided the proof of the just award of those benefits via my wife, A.F. and ask those funds be returned to me or applied against my outstanding child support arrears.

[30] The claimant has attached correspondence between A.F. and Canada Revenue Agency confirming a review of Canada Child Tax Benefit eligibility for T., H. and C. for the period from 2009 to present.

[31] The claimant has also provided evidence showing that he has been billed by Revenue Services of British Columbia for B.C. medical premiums from 2006 through to September of 2009 in an amount totalling \$2,893.00. In a further affidavit affirmed and filed August 20, 2012, he deposes that the bill for \$2,893.00 was not part of the divorce settlement and he is requesting half from the respondent, which is \$1,446.50. He then deposes in paragraph 3 of that affidavit:

3. The fact that neither lawyer addressed this bill during the divorce negotiation is unfortunate. If the Respondent can prove she has been paying the premiums since 2008, I welcome the proof as according to Revenue Services of BC this is untrue.

[32] He further deposes that on August 8, 2012 he again met with his family doctor. He attaches a note dated August 8, 2012, where the doctor writes:

1st seen at clinic March 30/11. Seeing specialist. Undergoing treatment - compliant - unable to work at physical job.

[33] There are several other issues addressed in the various affidavits. I have read those affidavits, but the facts deposed to (many of them placed in issue by the deponents in responding to the opposing party's materials) are not directly relevant to the notice of application which is before me.

Orders Sought

Cancel Child Support in Arrears

[34] The arrears of child support commenced January of 2011 from the \$1,200.00 withheld; \$152.00 was applied toward the support payable for January 2011, which was ordered in the amount of \$262.00 per month. Accordingly, child support became in arrears by \$110.00 at the end of January 2011, and then accumulated for the balance of 2011 at the rate of \$262.00 per month. It appears from the respondent's affidavit that her entitlement to support for H. ceased effective October 2011.

[35] The arrears of \$2,096.00 for February 2011 through to September 2011 inclusive, together with the \$110.00 arrears from January 2011 totals \$2,206.00 up to September 2011. From October 2011 to and including September 2012, further arrears of \$3,144.00 have accumulated.

[36] I will not cancel any of the arrears which have accumulated prior to October 1, 2011. The modest child support ordered by Justice Grauer should have been paid. No effort was made to pay it.

[37] However, there are a number of circumstances which do justify cancellation of some of the past twelve month's arrears. T. has been primarily resident with the claimant. The claimant is presently unable to perform physical labour. Since October 2011, H. has been primarily resident initially with the claimant and subsequently with his grandparents.

[38] I cancel \$1,500.00 of arrears of child support. The total child support arrears, therefore, is fixed at \$3,850.00 as of September 30, 2012.

Return of \$1,270.00 for Overpayment of Orthodontic Costs, Claim for \$2,424.50 for MSP B.C. Premiums and Return of \$2,206.00 dealing with Canada Child Tax Benefit ("CCTB") Money

[39] The agreed upon contribution for orthodontic costs was incorporated into the consent order executed by both parties' lawyers on behalf of the parties. The order does not consent to the claimant paying half of the orthodontic expenses. The order consents to the claimant paying \$7,500.00. What is now sought is a return of some funds, contrary to what was previously entered into as a settlement and incorporated into a consent order. Settlement agreements can only be set aside or varied upon the satisfaction of fairly stringent requirements. The requirements for setting aside a consent order are even more stringent. Those requirements have not been met by the claimant. The application for return of \$1,270.00 for what is claimed to be an overpayment of orthodontic costs is dismissed. The settlement was that the claimant would pay \$7,500.00. That settlement was incorporated into a consent order.

[40] It is apparent that the consent order was an effort to resolve all issues surrounding assets and liabilities of the parties. The claimant must have been aware that he was paying MSP premiums at the time of the consent order. It is regrettable that there was an apparent duplication of payments. That is not something that is the respondent's fault. It is not something that would entitle the claimant to recover a further contribution for MSP premiums.

[41] As noted above, it was the intention of the consent order entered into between the parties that all financial issues be resolved. As with the claim respecting the orthodontic costs, the claimant has not met the tests for setting aside or varying either settlements or consent orders. The claim for return of the MSP premiums is dismissed.

[42] The CCTB money was dealt with by way of a second consent order. The terms of that order exhaustively deal with the entitlement to the \$4,412.00 divided in accordance with the terms of that order. In her submissions, made on behalf of the claimant, Ms. Ferguson made it clear that she was seeking a return of half of the \$4,412.00 referenced in the consent order made April 4, 2011 and entered April 21, 2011.

[43] As with the other two claims I have dealt with, the claimant has not satisfied the requirements to set aside a consent order. The claim for return of the \$2,206.00 paid pursuant to the April 4, 2011 consent order is dismissed.

Ongoing Support

- [44] Although not specifically requested in the "orders sought" by the claimant, the submissions made by the claimant as set out in paragraphs 23 and 24 of his affidavit made and filed July 12, 2012, are to the effect that he should have no income imputed to him and, accordingly, as at today's date, all support payable by him to the respondent for support of C. should be terminated until the claimant attains an income level which would again trigger payment of child support under the Guidelines.
- [45] I am satisfied that at present the claimant has income less than \$10,820.00 per annum. However, I am not satisfied that he is incapable of earning any income. The consent support order was based on annual income of \$27,000.00. At present, the Guidelines would require \$239.00 monthly support for one child. I impute annual income of half that amount, \$13,500.00, and order that effective October 1, 2012 the claimant pay to the respondent the sum of \$70.00 per month for the support of C. and \$30.00 per month for the special expenses of C., and the order of Justice Grauer made pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) is varied to that extent to account for the change of circumstances resulting in the impact on the claimant's employability.
- [46] To sum up:
- 1) \$1,500.00 of arrears of child support is cancelled and arrears of child support is fixed at \$3,850.00 as at September 30, 2012;
 - 2) Upon being satisfied of a material change of circumstances affecting the income of the claimant, I attribute income to the claimant of \$13,500.00;
 - 3) I find that a further change of circumstance is that the infant child, H., is no longer being parented by the respondent and accordingly child support for the support of the infant child, C., is \$70.00 per month commencing October 1, 2012, together with \$30.00 a month contribution to special expenses, also commencing October 1, 2012; and
 - 4) The relief sought in paragraphs 4, 5, and 6 of the notice of application filed July 12, 2012 is dismissed.
- [47] The respondent has been largely successful here. She has been successful on all of the parts of the claimant's application relating to the settlement negotiated between the parties which resulted in the provisions of the consent order portions of Mr. Justice Grauer's order. Although in her response she opposed all of the relief sought, her affidavit filed July 19, 2012, along with her response, confirms that H. has been spending approximately 70 percent of the time with the claimant, and says she essentially conceded at the outset that she was no longer entitled to support for H. As well, she has been successful in persuading the court that some income ought to be attributed to the claimant.

[48] On the other hand, the claimant has been successful in obtaining some relief with respect to arrears of child support, and has been successful to some extent in reducing the child support payable. In the circumstances, each party should bear their own costs.

"Master R.W. McDiarmid"

MASTER McDIARMID

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