
CANADA / JUDGMENT

Reis v. Bucholtz

2012 BCSC 50

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 50 Reis v. Bucholtz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Reis v. Bucholtz,

2012 BCSC 50

Date: 20120117

Docket: E23143

Registry: New Westminster

Between:

Sofia Maria Bleck Da Cunha Reis

Claimant

And

Stuart Matthew Bucholtz

Respondent

Before: The Honourable Mr. Justice Bernard

Reasons for Judgment

Counsel for Claimant

Sofia Maria Bleck Da Cunha Reis

in New Westminster on September 30, 2011:

Garry K. Thomas

Claimant Sofia Maria Bleck Da Cunha Reis self-represented in Chilliwack on

December 2, 2011:

In Person

Counsel for Respondent on both dates:

G. Brenda Kaine

Place and Date of Hearing:

New Westminster, B.C.

September 30, 2011;

Chilliwack, B.C.

December 2, 2011

Place and Date of Judgment:

New Westminster, B.C.

January 17, 2012

A. Overview

- [1] The matters before the Court are post-trial cross-applications related to the quantum of ongoing child and spousal support, and to child access. Mr. Bucholtz filed his application in August 2010. Ms Reis filed hers in October 2010.
- [2] The parties are former common-law spouses. Their spousal relationship ended in October 2004. There is one child of the relationship, Vera (born May 7, 2003), whose primary residence is with the mother. Following a trial in 2008, Mr. Bucholtz was granted graduated access to Vera, and was ordered to pay both child and spousal support pursuant to the relevant provisions of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"). Those reasons for judgment were delivered on July 23, 2008 by Gropper J. and are indexed as *Reis v. Bucholtz*, 2008 BCSC 1156 [Reis].
- [3] In relation to the quantum of child support, the trial judge imputed an income of \$126,500 to Mr. Bucholtz, and an income of \$110,000 for the purpose of calculating spousal support. The trial judge ordered both retroactive and prospective child and spousal support.
- [4] Under the heading of "Prospective Child Support" the trial judge said:

- [82] Mr. Bucholtz will make full disclosure of all his income, including financial statements from Attica and the numbered company, on the 1st of September of each year. He will pay child support on the basis of that income, adjusted in accordance with the principles prescribed in this judgment, and he shall pay the applicable Guidelines amount of child support for the ensuing year.
- [5] Under the heading of "Prospective Spousal Support" the trial judge said:
- [92] Beginning on August 1, 2008, Mr. Bucholtz will pay Ms. Reis \$2,169 per month in spousal support, based upon the income that [Ms.] Reis expects to earn, that is, \$10,000 per year. Despite the expectation that either may earn more in the future, Mr. Bucholtz's income does vary and therefore an average amount should be used as his income for spousal support purposes.
- [6] The aforementioned "principles prescribed" for the purpose of determining prospective child support were based upon the expert report of Bill Payne, an accountant. The result was a "normalized income" of \$58,712 for 2003; \$254,717 for 2004; \$92,964 for 2005; \$94,679 for 2006; and an average annualized income of \$125,268 for these four years (see Reis, at para. 70).
- [7] The quantum of spousal support was determined using the low end of the range as set by the Spousal Support Advisory Guidelines, and its duration was set at five years.
- [8] In relation to child access, the trial judge set a specified two-week access schedule and said:
- [38] ... I find that Mr. Bucholtz's access, particularly overnight access, should be increased on a gradual basis. Mr. Bucholtz shall immediately have an additional overnight visit in week one, either on Tuesday or Wednesday night, beginning at 7:00 p.m., and ending 9:00 a.m. the following day. I leave it to the parents to determine which of those nights works best. An additional overnight should be added beginning on August 1, 2009, and each year thereafter until the access is four nights with Ms. Reis and three nights with Mr. Bucholtz each week.
- [9] In Mr. Bucholtz's application, he seeks a reduction of both spousal and child support corresponding to an alleged reduction in his income, as calculated in accordance with the accounting principles adopted at trial. He also seeks a "determination" of his access schedule in keeping with the order of the trial judge; more specifically, a variation from the presently ordered intermittent overnight access schedule to one granting consecutive overnights, in recognition of Vera's increased maturity and to minimize the "ping-pong" effect.
- [10] Ms Reis opposes all the relief sought on the basis that Mr. Bucholtz has failed to establish a material change in circumstances justifying any variation of the trial judge's order.

- [11] In her compendious application, Ms Reis initially sought 12 items of relief. Many of these items have been dealt with at prior hearings. The remaining contentious claims are for increased spousal and child support based upon an alleged increase in Mr. Bucholtz's income, and for "an amount for the child's section 7 expenses".
- [12] It is admitted that Ms Reis's earned income for 2008, 2009 and 2010 was \$19,905, \$15,022, and \$14,854, respectively.

B. Discussion

Mr. Bucholtz's Application

- [13] Ms Reis's principal position regarding the relief sought by Mr. Bucholtz is that Mr. Bucholtz has failed to establish a material change in circumstances, and that such is a prerequisite to the Court revisiting these matters. In this regard, Ms Reis submits: (a) that the changes in the parties' respective incomes, as shown in evidence and admissions (approximately - \$20,000 for Bucholtz and +\$5,000 for Reis), are not great enough to constitute a material change; and (b) that the revisions to access would constitute a material change unsupported by evidence, such as an updated s. 15 FRA report, showing that such would be in Vera's best interests. Ms Reis submits that Mr. Bucholtz's application should be dismissed on this threshold basis.
- [14] Alternatively, Ms Reis's position in relation to support is that Mr. Bucholtz's income for 2010 for child and spousal support purposes actually rose to \$353,258 (from the repayment of a shareholder loan of \$251,193 made to a mortgage company owned by Mr. Bucholtz); thus, commencing September 1, 2011, both child and spousal support ought to be increased accordingly. The loan repayment, per se, is not in dispute; however, Mr. Bucholtz says it was applied to a personal line-of-credit used to loan money to the mortgage company; thus, it would be wrong to include it in his income for either child or spousal support purposes.
- [15] In relation Mr. Bucholtz's request for one uninterrupted block of access, Ms Reis's alternative position to dismissal is that the application ought to be adjourned. Ms Reis said she was unprepared to properly address this application, as she understood it would not be a part of the non-specific "determination of access" sought by Mr. Bucholtz in his application. I am satisfied that an adjournment of this aspect of Mr. Bucholtz's application is appropriate, in all the circumstances. The proposed change is, arguably, significant and at the hearing Ms Reis found herself recently self-represented and unprepared to address this issue. If Mr. Bucholtz wishes to pursue this relief, an updated s. 15 FRA report (limited to the efficacy of Mr. Bucholtz's proposal) is strongly recommended.

- [16] Other access-related relief sought by Mr. Bucholtz is a determination of what constitutes "overnight" access. He complains that if overnight access commences at 7:00 p.m. (as is Ms Reis's position), then Vera must be picked up from school by her mother and returned to him at 7:00 p.m. on the day between two "overnights". He says this is too disruptive to Vera, and results in very little time with her before she goes to bed.
- [17] To address this problem, Ms Reis proposes the following access for Mr. Bucholtz: in week one of the two-week access cycle, Wednesday 9:00 a.m. to Friday 9:00 a.m., uninterrupted; and, in week two, Thursday 7:00 p.m. to Monday 9:00 a.m., uninterrupted. Such a schedule would give Mr. Bucholtz six "overnights" in the two-week cycle (as intended by Gropper J.) and would minimize the number of times Vera must be transferred between parents. As I understand it, such an arrangement would address Mr. Bucholtz's concerns and is, therefore, agreeable to him; accordingly, it is so ordered.
- [18] Turning to the threshold issue raised by Ms Reis in relation to support issues, given the trial judge's specific provision for annual reviews of child support, I am not persuaded that Mr. Bucholtz must first demonstrate a material change in circumstances before the quantum of child support may be adjusted to reflect any change in Mr. Bucholtz's income. The trial judge recognized that Mr. Bucholtz's income was likely to vary from year to year and specifically provided for annual adjustments. While she undoubtedly hoped that court applications for such a limited purpose could be obviated, I am satisfied that either party may resort to the Court, without limitation, if the quantum of child support cannot otherwise be resolved.
- [19] Regarding spousal support, I am not persuaded that the trial judge provided for similar annual reviews. If she intended to do so then, in my view, she would have adopted similar language to that used in relation to child support. It, thus, falls to Mr. Bucholtz to establish a material change in circumstances as a threshold to the proposed review (see *Willick v. Willick*, [1994] 3 S.C.R. 670 [Willick]; *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370; and *Bockhold v. Bockhold*, 2006 BCCA 472).
- [20] It is well-settled: (a) that a material change in circumstances means a change which, if known at the time, would likely have resulted in a different order (see *Willick*); and (b) that a court will vary a support order only where it finds a change that is substantial, unforeseen, and of a continuing nature (see *T.(T.L.A.) v. T.(W.W.)* (1996), 26 B.C.L.R. (3d) 319 at 333 (C.A.)).
- [21] Applying the foregoing legal principles to the issue at bar, I conclude that Mr. Bucholtz has failed to establish a material change in circumstances with respect to spousal support. When the trial judge determined both the quantum and period of spousal support, she was well-aware that both parties' incomes would likely vary within the five-year period for support. In relation to Mr. Bucholtz, she knew that past income variations brought his income well below \$100,000. I am satisfied that the sort of income changes Mr. Bucholtz relies upon cannot reasonably be regarded as ones which are substantial, unforeseen, and continuing in nature.

[22] In relation to the determination of Mr. Bucholtz's income for child support purposes as at September 1, 2008, September 1, 2009, and September 1, 2010, Mr. Bucholtz's position is that it was \$88,932, \$103,511 and \$101,319, respectively. In support of this assertion, Mr. Bucholtz relies upon the evidence of Ronald Tidball, Chartered Accountant. In his report, Mr. Tidball included a four-year earnings history for Mr. Bucholtz which showed the above-noted incomes in their respective years. In relation to these figures he said:

In preparing the Earnings History attached as Exhibit "A" hereto, I applied the same "normalizing adjustments" as those adopted by Mr. Payne, the accountant who testified for Ms. Reis in the trial of this proceeding, in his report dated September 24, 2007. Mr. Payne's methodology was adopted in Madam Justice Gropper's trial judgment dated July 23, 2008.

[23] Expert evidence contrary to that of Mr. Tidball was not tendered; however, Ms Reis submitted that Mr. Bucholtz's 2010 income ought to include the \$251,193 he received in repayment of a shareholder loan. In support of this position, she relies on the trial judge's decision to include, in Mr. Bucholtz's 2004 income, the net proceeds of a real estate sale, and submits that by application of the principles of res judicata and/or issue estoppel, the repayment of the shareholder loan must be included in Mr. Bucholtz's income.

[24] In relation to the 2010 shareholder loan repayment, Mr. Bucholtz said that these monies represented full repayment of a mortgage advanced by his mortgage company; that he was the source of the company funds (through a shareholder loan) borrowed against his personal line of credit; that the repayment was, thus, applied to the line of credit from where it came; and, that it would be nonsensical to include this money as income. The nature of Mr. Bucholtz's mortgage business is that he advances large sums of money to his company for the purpose of funding mortgages; that these sums are borrowed by him personally and secured against his personal property; and, that company profits come from the margin between the rate at which it loans money to mortgagors and the cost of borrowing by Mr. Bucholtz. If the monies were not used to reduce the line of credit (limited to \$400,000), then a source of funds vital to the company's profitability would be lost.

[25] Given the nature of Mr. Bucholtz's private mortgage business, the source of the funds, and the evidence of repayment to the line of credit, I am unable to accept Ms Reis's position that the 2010 shareholder loan repayment should be included in Mr. Bucholtz's income. As noted by counsel for Mr. Bucholtz, this was not money within the retained earnings of the company; there was a corresponding debt. Ms Reis's argument that res judicata and/or issue estoppel precludes the Court from concluding otherwise was not well articulated and I am left unable to see how either principle would apply to support her position.

[26] For the foregoing reasons, I conclude that Mr. Bucholtz's "normalized" income for child support purposes is as follows:

September 1, 2009 to August 31, 2010: \$88,932

September 1, 2010 to August 31, 2011: \$103,511

September 1, 2011 to August 31, 2012: \$101,319

- [27] The Federal Child Support Guidelines, SOR/97-175 ("Guidelines"), set the quantum of monthly support at \$814, \$934, and \$916, for the above-noted periods (to December 31, 2011), respectively. Effective January 1, 2012, Mr. Bucholtz's Guidelines child support will be \$931. The application of these figures to the periods in question establishes that Mr. Bucholtz has made a \$6,692 overpayment in child support.
- [28] Mr. Bucholtz seeks a court-ordered reduction in future support payments to gradually recapture the overpayment; however, I am satisfied that such an order would, at present, cause undue hardship for Ms Reis and Vera. As Ms Reis's financial circumstances improve (she has just started a new business), the parties should attempt to reach agreement regarding repayment. If such an agreement cannot be reached, then Mr. Bucholtz may apply to court for relief.

Ms Reis's Application

- [29] Ms Reis's claims for increased child and spousal support rested solely upon whether Mr. Bucholtz's 2010 income included the repayment of the shareholder loan. As it has been determined that it does not, these claims are dismissed.
- [30] The remaining relief sought relates to payment of an unspecified amount for unnamed section 7 Guidelines expenses. The trial judge made the following provision for such expenses:
- [95] In the future, expenses related to Vera's activities in school shall be borne proportionately by each parent. To the extent that they are able, the parties will agree in advance on the expenditure of special expenses. If that is not possible, Ms. Reis will advise Mr. Bucholtz of the intended expenditures, and Mr. Bucholtz will have ten days to provide his portion of the funds. If this remains a source of contention between the parties, it will be referred to the coordinator/mediator.
- [31] Ms Reis says that Mr. Bucholtz has not contributed to Vera's school expenses, dance lessons, and gymnastics. As proof of some of these expenses, she produced: (a) a letter, dated September 14, 2010, from Walnut Grove School of Music and Dance, stating that Vera took dance lessons from October to December 2008, and from September 2009 to June 2010, for a total cost of \$1,019; (b) a letter, dated September 29, 2010, from Langley Fine Arts School stating that \$60 in school fees were paid for the 2009/2010 school year; (c) a fee statement, dated September 16, 2010, showing a \$62 charge for Langley Fine Arts School fees; and (d) a receipt, dated September 27, 2010, showing payment of \$40 to Langley Fine Arts School for 2010/2011 field trips.
- [32] Mr. Bucholtz does not oppose paying his share of these expenses, as ordered by Gropper J. He says he simply has not done so because Ms Reis failed to provide any details of them to him until she attached the aforementioned evidence to her affidavit sworn October 7, 2010.

[33] I intend to resolve this matter as follows: (a) in relation to the foregoing expenses already incurred by Ms Reis, Ms Reis's debt to Mr. Bucholtz for his overpayment of child support shall be reduced accordingly; and (b) for any future special expenses, the order of Gropper J. is hereby varied, but only to the extent of requiring Ms Reis to provide to Mr. Bucholtz documentary evidence (e.g., a receipt, invoice, or estimate) detailing the special expense incurred or about to be incurred and, upon receipt of such evidence, Mr. Bucholtz shall pay his proportionate share within ten days. The coordinator/mediator shall remain in place to resolve any disputes.

C. Disposition

[34] The applications for variation in spousal support are dismissed.

[35] Pursuant to the child support review provisions of the order of Gropper J., dated July 23, 2008, the quantum of child support is hereby varied as follows:

- i) From September 1, 2009 to August 31, 2010: \$814/month
- ii) From September 1, 2010 to August 31, 2011: \$934/month
- iii) From September 1, 2011 to December 31, 2011: \$916/month
- iv) From January 1, 2012: \$931/month

[36] The access provisions of the order of Gropper J., dated July 23, 2008, are varied as follows:

- i) Week One: from 9:00 a.m. Wednesday to 9:00 a.m. Friday
- ii) Week Two: from 7:00 p.m. Thursday to 9:00 a.m. Monday

[37] The special expenses provisions of the order of Gropper J., dated July 23, 2008, are varied as follows:

- i) Ms Reis shall provide to Mr. Bucholtz documentary evidence (e.g., a receipt, invoice, or estimate) of any section 7 expense incurred, or about to be incurred, and within 10 days of receipt of such evidence, Mr. Bucholtz shall pay his proportionate share.

[38] Mr. Bucholtz's application to vary access to permit him a single uninterrupted block of time with Vera is adjourned generally.

[39] Given the mixed successes, each party shall bear their own costs of these applications.

"The Honourable Mr. Justice Bernard"

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