

CANADA / JUDGMENT

Rhys-Williams v. Rhys-Williams

2023 BCSC 164

COURT

Supreme Court of British Columbia

DECIDED

3 February 2023

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2023 BCSC 164 Rhys-Williams v. Rhys-Williams

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rhys-Williams v. Rhys-Williams,

2023 BCSC 164

Date: 20230203

Docket: E59312

Registry: New Westminster

Between:

Liberty S. Rhys-Williams also known as Liberty

Claimant

And

Victor Malcolm Rhys-Williams

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Claimant:

A. Rebane

Counsel for the Respondent:

L. Spencer

Counsel for the Family Maintenance Enforcement Program

V.A.M. Kerenyi

Place and Date of Hearing:

New Westminster, B.C.

January 25, 2023

Place and Date of Judgment:

New Westminster, B.C.

February 3, 2023

Introduction

- [1] These are reasons for judgment on an application by the respondent for a review of child support payable by the respondent to the claimant for the support of a single child, now sixteen years old.

Background Facts

- [2] The parties entered into a marriage-like relationship on April 11, 1994 when the claimant was 21 years old and the respondent was 58 years old. The parties were married on August 1, 1998. The single child of the marriage was born on January 29, 2007 (the "Child"). They separated on July 1, 2019. A final consent order (the "Final Order") was granted on November 12, 2020. The claimant and respondent were divorced on January 9, 2021.
- [3] The Final Order provided that the parties are guardians of the Child; both are residents of British Columbia; and that the respondent's 2019 Federal Child Support Guidelines, SOR/97-175 [Guidelines] income was \$60,000 and the claimant's Guidelines income was attributed at \$4,060. The Child was to reside primarily with the claimant and the respondent would have parenting time with the child as agreed. The respondent and the claimant agreed, based on the incomes aforesaid, the basic child support payable by the respondent pursuant to the Guidelines at the respondent's Guidelines income was \$567 per month (the "Table Amount").
- [4] The Table Amount was paid commencing on September 1, 2020 and on the first day of the month thereafter until the Child reached 19 years of age or the child continued thereafter to be "a child of the marriage" within the meaning of that phrase set forth in the Divorce Act, R.S.C. 1985, c. 3, or as otherwise provided in para. 10 of the Final Order.

- [5] The Final Order also provided that child support was reviewable upon the request of either party by delivering a written notice to the other once per annum commencing on July 1, 2021, and in the event, there arose any of the circumstances set out in para. 18(b)(i)-(v) of the Final Order. Not later than 14 days after a request for review of child support was made by either party, in accordance with para. 18 aforesaid, the parties were required to exchange "income information" required by para. 16 of the Final Order.
- [6] At para. 26 of the Final Order, it was agreed that the claimant's interests in the family assets and family debts were paid out by the respondent to the claimant in three tranches, totalling \$480,000, which sum was paid to the claimant beginning before August 27, 2020 with the last payment made before September 1, 2021. The respondent obtained the necessary capital to make these payments to the claimant, in part, by filing a mortgage on September 4, 2020 against his home in Burnaby which mortgage was secured by a line of credit and mortgage which total \$400,000 which requires monthly payments of \$1,882.81 by the respondent on the line of credit alone.
- [7] The respondent ceased to be employed after his company was wound up in 2019. He is now 86 years old. The evidence of the respondent is that the particulars of the winding up of the company was fully disclosed in earlier proceedings to previous counsel for the claimant. The respondent's evidence was corroborated by his income tax returns included in the materials filed were as follows: in the year 2019 \$60,522.57; in the year 2020 \$27,021.90; and in the year 2021 \$27,942. In the latter two years, 2020 and 2021, the income of the respondent was comprised principally of old age security; Canada pension plan benefits; other pensions and interest and investment income. In each of those years the respondent also received dividends taxable capital gains and RRSP income. There was no evidence of employment income being earned by the respondent in the last two years.
- [8] Counsel for the claimant expressed some dissatisfaction with reference to disclosure of the winding-up, but that dissatisfaction does not reflect a lack of disclosure by or lack of credibility of the respondent but rather on the lack of records available to current counsel for the claimant; records apparently disclosed having remained in the file of previous counsel for the claimant.
- [9] The respondent sought to have a review of child support in 2021 as authorized by the Final Order but the claimant refused to respond to the request and did not provide the "financial information" required by the Final Order. The respondent sought a review in 2022 but again the claimant refused to respond to the request for review of child support. As a result, the respondent filed the present application in which he seeks a reduction in child support to reflect the reduction on his annual income from \$60,000 to \$27,000 resulting in a Guidelines reduction of monthly child support payments from \$567 to \$252. The respondent seeks to have the lower payment take effect as at December 1, 2022. The claimant first received notice of the application for reduction on or before July 1, 2021 and again notice of a review of child support was given by the respondent to the claimant before July of 2022.

Review of Child Support Payable by the Respondent

- [10] It is evident that if the child support had been adjusted in a timely manner in accordance with the request for review provided in the Final Order that the amount of child support should have been reduced in 2021 and arrears now claimed would be substantially reduced or never have accrued at all. The respondent requested a review in 2021 and the claimant simply refused because child support would have been reduced in keeping with the Guidelines and the significant reduction of the respondent's income.
- [11] Based on the Family Maintenance Enforcement Program ("FMEP") calculations which do not take into account any adjustment of child support unless ordered by the Court or agreed, the monthly child support for the Child payable by the respondent as of the beginning of 2020 should have been approximately \$250 based on his Line 150 income of less than \$28,000. On one view of these issues, the respondent, had there been a review in July of 2021, would have been obliged to pay \$3,000 per annum rather than the \$6,840 (12 x \$567) which the respondent paid in 2021. Based on this reasoning, the respondent has significantly overpaid his child support obligations under the Guidelines in that year.
- [12] When counsel for FMEP appears in this Court, it is always made clear that positions advanced are those of FMEP and not for a party to the litigation. In this case, however, an affidavit filed by the staff of the BC Family Maintenance Agency ("BCFMA"), advanced what appeared to be an adversarial statement in relation to a trip made to Australia by the respondent to care for a seriously ill relative undergoing treatment for terminal cancer. That statement made in para. 11 of the affidavit states that the affiant "was advised", however the source of that advice is not stated contrary to the Supreme Court Family Rules, B.C. Reg. 169/2009, Rule 10-4 (12) and (13): *B.D.H. v. S.N.H.*, 2014 BCSC 2010 at para. 44; *Jamal v. Jamal*, 2016 BCSC 551 at para. 19. Hence that paragraph is not admissible. The purpose of that statement is to diminish the good faith support by the respondent for the Child. Regrettably, the information in that statement is inaccurate as it suggests that rather than pay child support, the respondent chose to purchase a luxury ticket for air fare to Australia. The unchallenged evidence of the respondent, in response to that "choice", was that he purchased the ticket, described as "business class, mixed cabin, which is reduced air fare, for a slight increase in comfort as the flight is between 14 and 15 hours" using airline travel credits and savings. Airline travel credits could never have been used to pay child support so the "choice" suggested by the staff of the BCFMA was not made by the respondent. It is unfortunate that the affiant on behalf of FMEP chose to enter the fray on one side, for instance, making no mention of the fact that for the period of time from April until June 21, 2022, the Child resided entirely with the respondent as the claimant was in Indonesia; the fact that the respondent has paid \$50 per week directly to the Child since June 2022, admittedly not categorized as child support, as well as an RESP for the Child currently valued at \$63,000 of which the respondent asserts, unchallenged, he was the sole contributor. It is unfortunate that the staff of this agency entered the fray at all, particularly with inadmissible and ill-founded statements from unidentified sources.

- [13] The claimant opposes the application of the respondent on the basis that the respondent should be using the capital from the Burnaby property to pay child support. In support of this submission the claimant cited *T.L.T. v. R.E.S.*, 2022 BCSC 598. *T.L.T.* is distinguishable and of little assistance to the case for the claimant herein. In that case, the parties were dealing with vast sums of money and a number of residential and vacation properties and other assets with a value over \$35,000,000. After mediation, the father voluntarily increased monthly child support payments to \$9,500 together with all special and extraordinary expenses. Less than a year later, the father terminated all child support claiming he had ceased to earn an income. The father denied having an ability to pay the claimant any amount towards the children's basic support, while at the same managing to pay monthly expenses which include a gardener, expenses for his Hawaii property, allegedly also a six month per year rental in Whistler, various life insurance premiums totalling about \$1,700 per month and fees for numerous club memberships, and luxurious vacations. The father owned two large luxurious homes in Vancouver. The father also owns full or partial interests or leases a number of recreational and holiday properties in San Francisco, Hawaii, Mendocino and at Whistler-Blackcomb, in addition to interests in two wineries in California.
- [14] In *T.L.T.*, the respondent asserted that wild fire losses caused the valuable winery business to not produce income and not be able to pay the respondent. Ultimately, however as the respondent was maintaining valuable properties, and a life style with expenses at \$300,000 per annum, the Court found he was deferring income and income should be imputed in the amount of \$560,000 per annum for Guidelines purposes: paras. 80-86.
- [15] The Guidelines govern the calculation of income for the purposes of determining child support. Section 19 of the Guidelines provides discretion to determine that a parent's income for Guidelines purposes should be more than their reported total income, and sets out a non-exhaustive list of circumstances. In these circumstances, I reject that Mr. Rhys-Williams is underemployed pursuant to s. 19(a). It cannot be said in this case given the advanced age of the respondent, 86 years old, that he is under-employed or unemployed. He operated a company for many years as consultant and wound the company up when he reached age 85. That retirement is an anticipated event. With respect to factor (b) the respondent has demonstrated that he has paid both federal and provincial income tax. With respect to factor (c) the respondent lives in Canada. With respect to factor (d), there was no evidence nor argument advanced that the income of the respondent, when he received income from employment was diverted in any manner to affect the level of child support as occurred in *T.L.T.* With respect to factor (e), the family property, a suburban home has been owned by the respondent since 1976 (48 years) and has never been rented or otherwise used to generate income. When the parties agreed to the Final Order the funds used to payout the family property interest of the claimant was drawn from the equity in the home in the amount noted above which is evidenced by the mortgage registered as registration number CA8412161 dated September 4, 2020. None of factors (f), (g), (h) or (i) have application in the case at bar.

- [16] That said, it is also clear that the discretion of this court to impute income is broad and not limited to the enumerated factors in s. 19: K.E.J. v. P.R.J., 2018 BCSC 1401 at para. 142. In K.E.J., the Court refused the claimant's request to impute income to the respondent based on his refusal to use his Employee Share Purchase program, which the claimant said reduced his income. It was found the refusal to adopt that program was reasonable, given his cashflow demands, and no income was imputed.
- [17] The situation in T.L.T. is completely distinguishable from the facts of the case at bar where the entire income of the respondent was about \$27,000 and his working life had come to a time of the winding up of his source of income on retirement.
- [18] In all of the circumstances of this case, there is no basis proven for this Court to exercise a discretion to impute additional income to the respondent. It is appropriate that the arrears of child support specified in the hearing before this Court in the amount of approximately \$3,400 be cancelled in its entirety forthwith; the child support payable by the respondent based on an income of \$27,000 shall be reduced from \$567.00 per month to \$252 per month payable commencing on December 1, 2022 and on the first day of each and every month thereafter.

Cancellation of Charge

- [19] This Court is satisfied, on the facts of this case, that the respondent will continue paying child support as ordered and that there is no need to a charge to be filed against the home of the respondent to secure future child support payments. The fact of the significant value of the RESP created for the benefit of the Child, solely by contributions made by the respondent, strongly supports this conclusion. The charge filed under Land Title Identifier CB332013 under the Family Maintenance and Enforcement Act on November 10, 2022, against the home of the respondent at 7843 Wesley Drive in the City of Burnaby, BC shall be cancelled forthwith and the said charge removed from the title to the home of the respondent.

Costs

- [20] The respondent has been substantially successful in this application and is therefore entitled to costs. Counsel for the respondent submitted that in order to avoid further expenses in relation to this case, that the costs should be fixed at \$1,000 plus disbursements for a half-day matter. The claimant submitted that the respondent should bear the costs or that, in the alternative the parties should bear their own costs. Given that the claimant's refused to consider any review of child support despite a significant change in the circumstance of the respondent, this court orders that the claimant shall pay costs of \$1,000 plus disbursements forthwith to the respondent for costs of this application. There will be no order for costs against FMEP.

"Ball J."

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