

CANADA / JUDGMENT

Rolston v. Rolston

2024 BCSC 1040

COURT

Supreme Court of British Columbia

DECIDED

17 June 2024

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2024 BCSC 1040 Rolston v. Rolston IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Rolston v. Rolston, 2024 BCSC 1040 Date: 20240617 Docket: E61630 Registry: Kamloops Between: Stacy Lee Rolston also known as Stacy Lee Sullivan Claimant And Leslie Brian Rolston Respondent Before: The Honourable Mr. Justice Hori Reasons for Judgment Counsel for the Claimant: A.S. Allidina Appearing in person on his own behalf: L.B. Rolston Place and Date of Hearing: Kamloops, B.C. April 25, 2024 Place and Date of Judgment: Kamloops, B.C. June 17, 2024

Introduction

- [1] The parties in this family law action were married on October 12, 2002. They separated in March 2006, and were divorced by an order dated December 16, 2009.
- [2] The parties have two children. The oldest was born February 5, 2004 and is currently 20 years of age. The youngest was born on December 14, 2005 and is 18 years old.
- [3] The claimant commenced this action on September 10, 2009 out of the Salmon Arm Registry of the Supreme Court of British Columbia. With the parties' consent, by an order pronounced on November 10, 2022, the court transferred the Salmon Arm action to the Kamloops Registry for all purposes.
- [4] On January 21, 2015, Justice Donegan made a series of orders with the consent of the parties (the "Donegan J. Order"). Those orders included the following:
- The respondent's annual income is approximately \$80,000;
 - Due, in part, to increased transport costs for parenting time, the child support payable by the respondent will be \$1,025 per month, retroactive to June 1, 2013;
 - Child support will be adjusted on June 1, 2015 with reference to the Federal Child Support Guidelines [Guidelines] and the respondent's 2014 income. The adjusted amount for child support will be payable commencing June 1, 2015, and will be readjusted on June 1 of each year thereafter;

- d) The claimant and the respondent will exchange their entire income tax returns and Canada Revenue Agency notices of assessments annually by May 20 of each year commencing on May 20, 2015; and
 - e) In the event that significant s. 7 expenses arise in the future, the parties will share those expenses, net of coverage, in proportion to their respective yearly incomes.
- [5] Based on the terms of the Donegan J. Order, the claimant applies, in this application, for the following orders:
- a) establishing the child support payable by the respondent from January 1, 2016 to date, based on the annual Guidelines income for the respondent in each year;
 - b) establishing the prospective child support payable by the respondent based on his Guidelines income;
 - c) setting the respondent's total obligation for retroactive child support;
 - d) imputing an income of \$150,000 to the respondent for the year 2022 and for each subsequent year thereafter;
 - e) setting the respondent's total obligation for retroactive s. 7 expenses from January 1, 2016 to date, based on an equal sharing of those expenses between the parties;
 - f) providing that any prospective s. 7 expenses be shared equally by the parties, and that the respondent reimburse the claimant for his share of those expenses within 14 days of being provided with a receipt or proof of payment;
 - g) specifying that the youngest child's current s. 7 expenses include:
 - i. Post-secondary expenses; ii. Extracurricular activities; iii. Medical and dental expenses; and iv. Any other expenses that the parties agree upon in writing.
 - h) requiring the parties to exchange:
 - i. Copies of their respective income tax returns for the previous year; ii. Copies of any notices of assessment or reassessment; and iii. All corporate financial statements and corporate tax returns, for so long as the youngest child is eligible to receive child support.
 - i) requiring the parties to adjust the child support by July 30 of each year based on the respondent's Guidelines income for the previous year with a minimum income of \$150,000, for so long as the youngest child is eligible for support; and
 - j) imposing fines on the respondent pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA] for failing to comply with court orders.

Background

- [6] During their relationship, the respondent was a helicopter pilot and the sole income earner for the family. The claimant did not earn income during the marriage, nor did she start earning any income following the separation. Instead, the claimant maintained the household and cared for the children.
- [7] After the separation, the children resided primarily with the claimant. The youngest child continues to reside with the claimant. However, the oldest child moved out of the claimant's home in March 2023, after she attained the age of majority.
- [8] While the claimant has not earned any income since the separation, her financial statement suggests that her expenses, and the expenses associated with the children, have been paid by the claimant's new partner.
- [9] After January 21, 2015, the respondent paid child support in accordance with the Donegan J. Order. The respondent provided his 2014 income tax information to the claimant and the parties adjusted the child support to \$1,122 per month, in accordance with the Donegan J. Order.
- [10] The claimant subsequently requested income tax information from the respondent numerous times in 2016 and 2017. However, she received no response from the respondent and received no disclosure of his financial information. The claimant gave up trying to obtain the financial information from the respondent after 2017 until the respondent contacted her in 2022 to request changes to the child support arrangements.
- [11] The respondent denies having received any request for income tax information from the claimant. However, the respondent was aware of his obligation to provide his income tax information on an annual basis.
- [12] In March 2022, the respondent sought to change the child support arrangement to pay child support for the oldest child directly to her. On March 9, 2022, the parties exchanged various text messages relating to the child support arrangement. As part of that text message exchange, the claimant asked for the respondent's tax information since 2017. In response, the respondent wrote: Why exactly do you need tax info this has nothing to do with a change in what I'm paying it's changing the recipient. Was the text I sent confusing? All my T4s are und 60,000 and I'm paying you based on 75,000 so maybe you should think about that.
- [13] The claimant responded as follows: I don't want just your T4s. You own a business so you can send all of your pre tax corporate income and the income on all of your T1's and any salaries paid out to any "close" third parties so that can you can pay what you should have been paying.
- [14] The respondent's response was: Corporate income has nothing to do with my salary! You are paid on my income not my company income! It's a simple ask I don't understand why you are so concerned about me just directly paying my daughter.

- [15] The respondent finally produced the financial information related to his company once legal counsel became involved on behalf of the claimant. Claimant's counsel made a demand for the respondent's financial information by letter dated April 13, 2022.
- [16] Effective May 1, 2023, the respondent reduced his child support payments to \$706 per month. This reduction corresponds to the date when the oldest child turned 19 years of age and moved out of the claimant's home. Retroactive Child Support
- [17] In considering whether to award retroactive child support, the court must consider whether there was a material change in circumstance at the relevant time. If the court is satisfied that a material change in circumstance had occurred, it must then go on to consider the factors established by *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.]. Those factors are:
- a) Whether any delay in seeking child support was unreasonable;
 - b) Whether the payor parent engaged in blameworthy conduct;
 - c) The circumstances of the child or children; and
 - d) Whether a retroactive award of child support would lead to undue hardship for the payor parent.
- [18] In 2012, the respondent began earning his income through a corporate entity. The child support amount in the Donegan J. Order is based on an annual income for the respondent of \$80,000, and the order required an annual adjustment of support based on the respondent's level of income. Accordingly, by the time of the Donegan J. Order, the respondent must have been aware that his obligation to pay child support was based upon the level of his income.
- [19] The respondent was aware of his obligation to provide income tax returns and notices of assessment each year by May 20. In fact, the respondent disclosed his 2014 financial information to the claimant and the parties adjusted the child support payable by the respondent upward to \$1,122 per month starting on June 1, 2015.
- [20] Notwithstanding various requests for financial information made by the claimant in 2016 and 2017, the respondent failed to comply with those requests which was contrary to the Donegan J. Order.
- [21] The respondent's unwillingness to provide his financial information is clear in the text message exchange between the parties that occurred on March 9, 2022. The respondent initiated the exchange of text messages because he wished to change the child support arrangements. When the claimant responded by requesting financial information, the respondent was clearly unwilling to provide it.
- [22] The respondent did not provide the financial information necessary to allow the claimant to assess whether an increase in the child support was warranted until April 2022 when the claimant retained counsel.

- [23] Notwithstanding the respondent's unwillingness to provide financial information that would have supported an increase in child support, he readily reduced his child support to \$706 per month commencing May 1, 2023. This reduction in child support follows upon his oldest daughter turning 19 years of age.
- [24] Once the respondent disclosed the necessary financial information related to his personal and corporate income, the parties agreed to jointly retain an expert to determine the respondent's Guidelines income from 2015. Accordingly, on July 31, 2023, the court ordered that the parties jointly retain a Guidelines income expert to prepare the report.
- [25] The expert retained for the purposes of preparing the Guidelines income report was Patti Daum. The date of the expert's report is January 2, 2024. The report is evidence of the respondent's Guidelines income for the years 2015 to 2022. The report shows that starting in 2017, the respondent's Guidelines income was significantly higher than the income established in 2015 by Justice Donegan.
- [26] After considering all of the factors from D.B.S., I find that the blameworthy conduct of the respondent in this case is the factor that has the most significant impact on the retroactive support analysis. The respondent's conduct with respect to non-disclosure of his financial information deprived the claimant of the information she required to apply for an increase in child support, and it deprived the children of the support to which they were entitled. Any hardship occasioned by a retroactive award of child support was brought about by the respondent's own conduct and the non-disclosure of his financial information elevated his own interests over his children's right to an appropriate amount of support.
- [27] Accordingly, I find that the blameworthy conduct on the part of the respondent justifies a retroactive award of child support. Any hardship occasioned by a retroactive award was the result of the respondent's own blameworthy conduct.
- [28] The findings of the Supreme Court of Canada in *Michel v. Graydon*, 2020 SCC 24 [Michel], at para. 34, apply to the respondent in this case:
- [34] It follows that I agree with the hearing judge that Mr. Graydon's failure to accurately disclose his income at the time of the March 29, 2001 order, and failure to disclose material changes in his income for the 11 years that followed, constituted blameworthy conduct, which justifies an order for retroactive child support (and which also eliminates any need to protect Mr. Graydon's interest in the certainty of his child support obligations (D.B.S., at para. 125)). As I have explained, failure to disclose material changes in income undermines the child support regime imposed by the Guidelines. Date of Retroactivity

- [29] The Court in D.B.S. held that it will usually be inappropriate to make a support award retroactive to a date more than three years before recipient parents give formal notice of their intention to seek increased support to payor parents. However, the Court held that the date when the increased support should have been paid may be a more appropriate date to start the retroactive payment where payor parents engage in blameworthy conduct. At para. 124 of his reasons, Justice Bastarache decided:
- [124] The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances -- including an increase in income that one would expect to alter the amount of child support payable -- is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.
- [30] Similarly, Justice Martin in Michel held that the date of effective notice is not relevant where a payor parent engages in blameworthy conduct. At para. 36 of the reasons, Justice Martin provides the following rationale: His argument on this point is immaterial, however, because the date of effective notice is not relevant when a payor parent has engaged in blameworthy conduct (irrespective of the degree of blameworthiness). Again, in light of such conduct, there is no need to protect Mr. Graydon's interest in the certainty of his obligations beyond the date when circumstances changed materially (D.B.S., at para. 125). Having furnished an inaccurate picture of his income from the start of his child support payments, it does not lie in his mouth to now insist that it was inappropriate for the hearing judge to award support dating back to the March 29, 2001 consent order. Indeed, in the circumstances of this case it was clearly appropriate for the hearing judge to do so.
- [31] Accordingly, given the blameworthy conduct in which the respondent engaged in this case, the date of retroactivity is not limited to three years before the claimant provided formal notice to the respondent. In this case, the appropriate date from which to measure retroactivity is June 1, 2016. The Donegan J. Order requires the adjustment of child support on June 1 of each year. The parties adjusted child support as of June 1, 2015. However, the parties made no further child support adjustments after that date. Therefore, the first unfulfilled child support adjustment is the one that should have occurred as of June 1, 2016.
- Guidelines Incomes

- [32] As I indicated earlier, the parties retained Patti Daum to prepare a Guidelines income report to establish the respondent's Guidelines income for the years 2015 to 2022. The report is based upon the income tax information of the respondent and the financial statements for his company. The Guidelines income report establishes the respondent's annual Guidelines income summarized in Table 1 below: TABLE 1 2015 \$66,000 2016 \$86,000 2017 \$120,000 2018 \$102,000 2019 \$152,000 2020 \$175,000 2021 \$193,000 2022 \$73,000
- [33] During the years covered by the Guidelines income report, the respondent earned his income through his company. The company was a closely held corporation controlled by the respondent. In 2022, the company shut down its operations.
- [34] The respondent deposes that his corporate operations wound down due to high operating costs, non-profitability and the non-feasibility of the business. The respondent claims that when his company ceased operations, he commenced employment with SER Contracting ("SER"), a company owned and controlled by his mother. The claimant's evidence is that he is an employee of SER and is paid a salary for his work. As a result, the Guidelines income report shows a significantly reduced income for the respondent in 2022 as compared to the previous years.
- [35] The claimant alleges that starting in 2022 the respondent was either intentionally under-employed or was concealing income through SER. The claimant alleges that the respondent's involvement in SER is more than just an employee. She deposes that Facebook postings list the respondent's address as the business address for SER and lists the respondent's telephone number as a contact.
- [36] Based upon these factors, the claimant submits that I should impute an annual income of \$150,000 to the respondent for the year 2022 and onward.
- [37] The evidence tendered by the claimant in support of her position is not sufficient to conclude that the respondent is intentionally under-employed or that he is concealing income. There is no evidence tendered by the claimant to establish what other, more lucrative, positions might be available for the respondent in the marketplace. There is no specific evidence tendered by the claimant that the respondent purposely shut down the operations of his business to avoid child support obligations, or that there was no legitimate or business reason for discontinuing that business.
- [38] Further, there is no evidence from which I can reasonably infer that the respondent is using SER to hide or shelter his personal income. More evidence with respect to the operations of SER and the financial records of that company are necessary to establish the claimant's claim in that regard.
- [39] Accordingly, I am not prepared to impute an income to the respondent over the amount established by the Guidelines income report. However, if further evidence becomes available to the claimant on this question, she has leave to renew her application for an order imputing income to the respondent. Quantum of the Retroactive Child Support

- [40] The Donegan J. Order contemplates the adjustment of child support on June 1 of each year based on the respondent's income in the previous calendar year. Therefore, pursuant to the Donegan J. Order, the child support for each year is based on the respondent's income for the previous calendar year. I am not prepared to vary the Donegan J. Order to reflect a different adjustment date for child support because I find that such a variation is not necessary.
- [41] For the 2017/18 year, the child support amount must be adjusted part-way through the year to account for the change in the Guidelines table amounts that became effective on November 22, 2017. In addition, the child support payable in the year 2022/23 must be adjusted as of March 1, 2023 to account for the oldest child no longer being a child of the marriage.
- [42] The evidence before me in this application accounts for the support actually paid by the respondent to February 1, 2024. In order to apply the appropriate credit for the amounts paid by the respondent, I have established the retroactive support amount to February 1, 2024.
- [43] Accordingly, I have particularized the retroactive child support payable by the respondent in the following Table 2: TABLE 2 Year (June 1 to May 31) Respondent's Annual Income
Monthly Child Support Annual Child Support 2016/17 \$66,000 \$1,001 \$12,012 2017/18 \$86,000 \$1,291 (6 months) \$1,329 (6 month) \$15,720 2018/19 \$120,000 \$1,781 \$21,372 2019/20 \$102,000 \$1,548 \$18,576 2020/21 \$152,000 \$2,183 \$26,196 2021/22 \$175,000 \$2,454 \$29,448 2022/23 \$193,000 \$2,666 (9 months) \$1,691 (3 months) \$29,067 2023/24 \$73,000 \$696 (9 months) \$6,264
Total Retroactive Child Support: \$158,655 Less total paid by the respondent: <\$107,854> Net payable in retroactive child support: \$50,801
- [44] Accordingly, the retroactive child support payable by the respondent is \$50,801 from June 1, 2016 to and including February 1, 2024. Prospective Child Support
- [45] The Guidelines income report establishes the respondent's Guidelines income for 2022 at \$73,000 per year. Pursuant to the Donegan J. Order, the child support payable by the respondent for the months of March to May 2024 is based on the respondent's 2022 Guidelines income. The child support must then be adjusted to reflect the respondent's 2023 income for child support commencing on June 1, 2024.
- [46] The respondent's 2023 income tax documents are not before me in this application. Therefore, the only basis upon which I can establish prospective child support is based on the respondent's most recent Guidelines income information which is set by the expert at \$73,000 per year.
- [47] Accordingly, child support commencing on March 1, 2024 will be \$696 per month.

- [48] However, as of June 1, 2024, the parties will either adjust this child support amount based on the 2023 income tax information or they may make further application for an adjustment if such an application is necessary.
- [49] The Donegan J. Order that the parties are to exchange their entire income tax returns and notices of assessment annually by May 20 of each year remains in place. However, I will vary that order to include disclosure of the financial statements and income tax information of any corporate entity in which the respondent is a shareholder or director. Retroactive s. 7 Expenses
- [50] The claimant seeks an order that the respondent pay 50% of the s. 7 expenses incurred from January 1, 2016 to the present day. The Donegan J. Order provides that the parties pay s. 7 expenses in proportion to their respective yearly incomes. However, in this application, the claimant is prepared to share these expenses equally with the respondent.
- [51] The claimant claims the sum of \$12,096 as the respondent's share of these retroactive expenses.
- [52] I will order that the respondent pay to the claimant 50% of the medical expenses for the children and the expenses related to post-secondary education incurred from 2017 to date. The total of the respondent's share of those expenses is \$6,175.95, after deduction of the payments already made by the respondent.
- [53] The claimant has not satisfied me that the other expenses claimed by her qualify as s. 7 expenses as defined in the Guidelines, or that the respondent has agreed to contribute to those expenses.
- [54] Accordingly, the respondent will pay to the claimant \$6,175.95 as his 50% share of the uninsured medical costs and post-secondary education expenses. Future s. 7 Expenses
- [55] Based on the claimant's concession that she is prepared to pay 50% of the children's s. 7 expenses, I will vary the Donegan J. Order to provide that the parties will share future s. 7 expenses on an equal basis.
- [56] I am not prepared to specify what expenses qualify as s. 7 expenses. Appropriate guidance on that question is set out in the Guidelines under s. 7. The parties will have to agree whether a particular expense qualifies under s. 7 of the Guidelines or not. Failing agreement, the parties will have access to the courts for determination.
- [57] However, in accordance with my previous findings, medical, dental and other health-related expenses that exceed insurance reimbursement by at least \$100 annually are s. 7 expenses and will be shared equally by the parties. These expenses will include counselling by a qualified professional, physical therapy, prescription medications and vision care. Fines and Penalties

[58] The claimant seeks various fines and penalties against the respondent pursuant to the provisions of the FLA for:

- a) failing to make financial disclosure;
- b) failing to comply with the Donegan J. Order;
- c) discussing these proceedings with the children; and
- d) failing to fully cooperate with the joint expert.

[59] In other circumstances, I may have imposed fines and penalties against the respondent for his conduct in this action to date. However, in this case, the respondent has suffered the consequences of his conduct by having to pay retroactive child support for the children from 2016. In my view, it would be inappropriate in these circumstances to further penalize the respondent by imposing fines and penalties.

[60] Accordingly, I decline to impose the fines sought by the claimant. Summary of the Orders Made

[61] In summary, the orders made in this application are:

- a) The respondent will pay retroactive child support from June 1, 2016 to the claimant;
- b) The respondent's annual Guidelines income is set out in Table 1 of these reasons;
- c) Based on his annual Guidelines income from Table 1, the respondent will pay child support from June 1, 2016 in the amounts set out in Table 2 of these reasons;
- d) The respondent will pay retroactive child support from June 1, 2016, to February 1, 2024, inclusive, in the net amount of \$50,801, after deducting the payments already made;
- e) The respondent will pay child support in the amount of \$696 per month commencing on March 1, 2024, and continuing on the first day of each month thereafter until further order or further agreement between the parties or until the youngest child is no longer a child of the marriage;
- f) The prospective child support amount will be reviewed, based on the respondent's 2023 income information, and adjusted, if appropriate, commencing on June 1, 2024;
- g) Paragraph 7 of the Donegan J. Order is varied to include the disclosure of any financial statements and income tax information of any corporate entity in which the respondent is a shareholder or director;
- h) Paragraph 8 of the Donegan J. Order will be varied to provide that s. 7 expenses will be shared equally by the parties;
- i) The respondent will pay \$6,175.95 to the claimant as his 50% share of the children's retroactive s. 7 expenses;

- j) Medical, dental and other health-related expenses that exceed insurance reimbursement by at least \$100 annually are s. 7 expenses and will be shared equally by the parties;
 - k) The claimant's application for fines against the respondent is dismissed. Costs
- [62] The parties have leave to make submissions on the issue of costs of this application if they cannot agree. If a further hearing on the issue of costs is necessary, the parties will schedule a costs hearing within 60 days following the release of these reasons. "D.K. Hori J." HORI J.

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