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CANADA / JUDGMENT

## Rota v. Rota

2010 BCSC 165

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COURT

Supreme Court of British Columbia

DECIDED

5 February 2010

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2010 BCSC 165 Rota v. Rota

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rota v. Rota,

2010 BCSC 165

Date: 20100205

Docket: E023246

Registry: New Westminster

Between:

Mirella Rota

Plaintiff

And

Paulo Rota

Defendant

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

The Plaintiff, Mirella Rota:

Appearing on her own behalf

The Defendant, Paulo Rota:

Appearing on his own behalf

Place and Date of Hearing:

New Westminster, B.C.

August 10, 2009

Place and Date of Judgment:

New Westminster, B.C.

February 5, 2010

1. Introduction

- [1] In this family law matter the plaintiff, Mirella Rota, is seeking an order that the defendant, Paulo Rota, increase the amount of extraordinary expenses that he pays for their two children. The defendant, on the other hand, seeks to reduce his overall child support payments and eliminate the extraordinary expenses that he currently pays, because of a change in his financial circumstances.

2. Background

- [2] The parties married in 1993, separated in 2005 and were divorced in 2007. The two children of the marriage are Marcello, born in 1995, and Antonio, born in 1998.
- [3] Pursuant to the divorce order, the defendant was to pay \$638 per month in child support, as well as his proportionate share of the children's extraordinary expenses. These expenses consisted of \$43.50 per month for soccer for both boys and \$11.50 per month for tutoring for Marcello. He was also to pay the plaintiff \$200 per month in spousal support, which the plaintiff agreed to terminate in March, 2009.
- [4] The child support amount was increased by a further order in August 2008, to \$1,144 per month, reflecting an increase in the defendant's income. He was also found to be in arrears with respect to child support and spousal support in the total amount of \$2,930 and was ordered to pay these arrears at the rate of \$200 per month.
- [5] In May 2009 the plaintiff enrolled in the Family Maintenance Enforcement Program because of the defendant's delinquency in making the payments that were required of him.

3. The Plaintiff's Application

- [6] In her affidavit, the plaintiff explains that both boys have difficulties with mathematics and reading comprehension and require ongoing tutoring in order to enable them to succeed in school.

- [7] Antonio receives tutoring from a teaching assistant at his school twice per week. His total tutoring expenses for the 2008-2009 school year, plus what I gather are maintenance sessions in July, were \$841. His other extraordinary expenses are soccer, at \$120 per year, and catechism at \$80 per year, for a total of \$1,041. The plaintiff does not anticipate any increase in Antonio's expenses.
- [8] Marcello's situation is different. In January 2009, his Grade 8 math teacher informed the plaintiff that Marcello was failing that subject and strongly recommended that she obtain a tutor for him. She says that she shared the information with the defendant, who told her "to go ahead with the tutor, do what [she] needed to do". The plaintiff obtained the services of a Grade 12 student for that purpose, at \$15 per session. Marcello barely passed the year.
- [9] The plaintiff strongly believes that Marcello requires the assistance of a professional tutor or he will struggle throughout high school. Her research indicates that this will cost about \$35 per week. When one adds in Marcello's soccer and high school fees, his extraordinary expenses would be about \$1,621 per year.
- [10] The defendant says that Marcello could have received the necessary academic support by attending summer school. He says that Antonio is principally in need of counselling to address the effects on him of the divorce, rather than tutoring. He believes that soccer registration should be taken out of the child support that he provides to the plaintiff.

#### 4. The Defendant's Application

- [11] The defendant works in the concrete business. He began in 2004 and his wages increased steadily in succeeding years. In January 2008 he switched companies in the hopes of obtaining greater benefits and a more "stable" salary. Unfortunately the decline in available construction work due to the recent economic downturn led to him being laid off from that new employer in October of that year. He returned to his previous employer, but had lost all of his previous seniority and now has to pay for his own benefits.
- [12] He has been able to pick up a few shifts at the company that laid him off and from a third company, but says he is struggling and is reliant on Employment Insurance benefits, which were to run out in November 2009, to top up these minimal earnings. When he works in the concrete business he is paid \$32 per hour.
- [13] The defendant estimates that his annual income has gone from more than \$76,000 per year at the time that the child support was varied to approximately \$33,690, including Employment Insurance benefits for 2009. He says that if it were not for the support of his girlfriend, with whom he lives, he would have had to move in with his parents.
- [14] The defendant deposes that he informed the plaintiff of his situation after he was laid off and that she was agreeable to receiving child support from him in amounts that reflected his reduced income. Therefore the defendant has paid the plaintiff child support in the amount stipulated by the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines], with this amount varying month to month according to his income. The defendant has also continued

to pay the \$55 in extraordinary expenses required by the original Order. Copies of his cheques made out to the plaintiff were included in his material for this application.

- [15] The plaintiff says that she told the defendant to pay her what he could and denies having come to any agreement to accept reduced child support payments in the long term.
- [16] The plaintiff further points to several significant expenditures by the defendant since he has been laid off, including vacations to Mexico, Las Vegas and Whistler, and the purchase of a vehicle and a larger town home, as an indication of his actual financial circumstances. She also notes that between 2006 and 2008 he earned a very high income, and she questions why he has nothing to show for that now that his employment is more tenuous.
- [17] The plaintiff works part-time at a bank, earning \$22,163 per year. She suffers from colitis and as a result is only able to work part-time, on her doctor's instructions. The defendant alleges that the plaintiff also receives income from selling Mary Kay cosmetics, but she indicates that she maintains her status as a "personal consultant" for Mary Kay only so she can buy cosmetics for herself.

## 5. Discussion

### a. Determining the Defendant's Income for Child Support Purposes

- [18] I accept the accuracy of the defendant's description of his reduced income following his lay-off. The challenge in determining his income from this point however is that the decline in the amount of available construction work, which led to his being laid off, is subject to change and his ongoing work for three different concrete companies could lead to a significant increase in his hours of work on short notice. It is a very well-paying job when he can obtain enough hours of work. I note that in his submissions he argued that it was better for him to remain in this current line of work and "wait for the economy to pick up" rather than seek a different, lower- paying job in the short term.
- [19] Section 17 of the Guidelines deals with the calculation of a payor's income for child support purposes where there has been a fluctuation in his or her income and reliance solely on s. 16 (the total income from all sources reflected in the payor's tax return) would be unfair:

### Pattern of income

17(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[Emphasis added.]

[20] In *Fuzi v. Fuzi*, [1999] B.C.J. No. 2263 (S.C.) at paras. 19-20, Pitfield J. offered the following helpful guidance in applying s. 17:

19. The mere fact of difference [that is, in income over several years] will not result in a finding of unfairness. The degree of permanence associated with the difference between the s. 16 determination and the result of the s. 17 analysis will be material [ ]
20. The quality of the increases or decreases and the reasons giving rise to them must be addressed in order to assess the fairness of the s. 16 determination in the context of s. 17.

[Emphasis added.]

- [21] The defendant should be commended for continuing to pay some child support, according to the Guidelines amount applicable to his month-to-month earnings, but I think it would be unfair to the children to reduce his payments to reflect completely his post-layoff income. It is fairer, and more reasonable, instead to proceed on the basis that he is in a temporary trough caused by having left his stable employment at more or less the same time that the work available to the entire industry decreased, and that the income he was capable of earning before his layoff will be available to him again in the not-too-distant future. There is a distinction between his situation, in which some work is still available and remains subject to increase, and that of a payor who is laid off from all employment and has no prospect of rehiring or greater earnings.
- [22] To borrow from Pitfield J.'s analysis in *Fuzi*, there is not the "degree of permanence" in the defendant's present income that should lead to it forming the ongoing basis of his child support obligations.
- [23] Accordingly I will look to the defendant's income on the past three years from the application date (\$76,474, \$78,585, and \$33,690 respectively) to arrive at a fairer and more realistic figure. The average of these amounts would skew too much towards his higher earnings, when he had a single reliable employer, while, as I have said above, his current income makes insufficient allowance for the likely increases in the near future. Therefore I think that the fairest way to reflect his income for child support purposes for the time being is to fix it at the approximate mid-point between the highest and lowest of these amounts, which is \$55,000. Accordingly the defendant's child support obligations from September 2009 (the month following the current application) onward will be reduced to \$833 per month, which is the amount indicated under the Guidelines for that annual income.
- [24] The defendant must continue to advise the plaintiff of his earnings on a monthly basis and of course either party may apply further if it appears that his earnings are diverging significantly and on an ongoing basis from the average I have arrived at.
- [25] I should say that even if I had not averaged the defendant's income upwards for the purpose of calculating child support, I would likely have imputed a similar amount of income to him for that purpose pursuant to s. 19 of the Guidelines.

[26] I am not satisfied that his financial statement provides an accurate picture of his expenses or the amount of financial support he receives from his girlfriend. Her income is not provided. He lists no real estate and describes himself as paying rent of \$325 per month, but during submissions he appeared to indicate that their recently-purchased town home is held in his girlfriend's name because of the difficulties he encounters in obtaining loans in light of a past bankruptcy, which suggests that he has or will obtain an interest in this home. He also indicated that his girlfriend has paid for their vacations.

[27] These kinds of lifestyle expenditures are inconsistent with his assertion that he is only surviving financially because of her assistance. The point is that if, as appears likely, he receives financial support from her which has the effect of reducing his expenses, he has a responsibility to allocate any of his own income that is freed up by her support to the fulfillment of his existing child support obligations.

b. Extraordinary Expenses

[28] Given the plaintiff's limited income and the reduced amount she will receive in child support, I am satisfied that the amounts she has claimed for the children's extraordinary expenses exceed those that she can reasonably cover herself: s. 7(1.1)(a) of the Guidelines.

[29] The general principle is that spouses share extraordinary expenses in proportion to their respective incomes: s. 7(2) of the Guidelines.

[30] During his submissions, the defendant strove to characterize the increased tutoring expenses as unnecessary and to suggest that the children could receive any required assistance from the school at no cost. On this point I accept the plaintiff's submissions that Marcello could only have attended summer school if he had failed the year in math and that Antonio's issues are not related to the need for further counselling. I am also satisfied that this tutoring is essential for both children if they are to keep up academically.

[31] Accordingly I will order that effective September 2009 the total extraordinary expenses will be those identified by the plaintiff: \$1,401 per year for Antonio and \$1,621 per year for Marcello, for a total of \$3,022 per year. This total will be shared by the parties in proportion to their respective incomes, applying the new income for child support purposes that I have previously arrived at for the defendant. As a result, the defendant will pay 60% of \$3,022 per year, to be provided to the plaintiff in monthly instalments of \$151.

6. Costs

[32] As the plaintiff has had substantial success in these applications, she will be entitled to her costs.

"The Honourable Mr. Justice Schultes"

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