
CANADA / JUDGMENT

Samson v. Samson

2008 BCSC 1179

COURT

Supreme Court of British Columbia

DECIDED

29 August 2008

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2008 BCSC 1179 Samson v. Samson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Samson v. Samson,

2008 BCSC 1179

Date: 20080829

Docket: E024668

Registry: New Westminster

Between:

Cynthia Ann Samson

Plaintiff

And

David Barrie Samson

Defendant

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the plaintiff:

M. Smyth

Counsel for the defendant:

J.M. Lazar

Date and Place of Trial/Hearing:

May 13 and 14,

June 6, 2008

New Westminster, B.C.

- [1] The parties were married on September 3, 1994 and separated on September 12, 2005 after eleven years of marriage.
- [2] They have two children, a son born April 2, 1996 and a daughter born March 7, 1998.
- [3] The plaintiff commenced this action on April 18, 2006 seeking orders of divorce, sole child custody and guardianship, child and spousal support, and a reapportionment of family assets.
- [4] The defendant filed a statement of defence and counterclaim on June 19, 2006 agreeing to a divorce and the payment of child support, but opposing sole custody and guardianship of the children, spousal support, and reapportionment of assets. In his counterclaim he sought a divorce, joint custody and guardianship of the children, a shared parenting regime and an equal division of assets.
- [5] On December 1 and 5, 2006 the parties entered into a written settlement agreement entitled "Minutes of settlement". This settlement agreement included a number of provisions that are relevant to the present application of the plaintiff before me. They are as follows.

WHEREAS:

- 8. Except as noted herein, the Parties wish to resolve any outstanding issues in this action without the need for further adversarial Court proceedings.
- 9. The Plaintiff undertakes to forthwith make all effort and take all reasonable steps to become and remain economically independent and self-sufficient, and given the forgoing, and notwithstanding the present shared parenting arrangement, and the possibility of imputing income to the Plaintiff for her intentional underemployment and/or unemployment, the Defendant agrees to the child and spousal support provisions herein, on a without prejudice basis, subject to review.
- 10. The Parties separately intend this Agreement to be the final settlement of their respective rights in or to the property of the other and the property held by them jointly and a full release of any right, interest, or claim that either party may have upon the property of the other, as set out in the Writ and Claim, or Defence and Counterclaim.
- 11. The Parties wish to have these Minutes codified into a Consent Order.

IN CONSIDERATION of the promises and the mutual covenants contained in this Agreement, the parties agree as follows:

1. The Plaintiff and Defendant shall share joint custody of the Children.
2. The Plaintiff and Defendant shall share joint guardianship of the Children
4. Until further agreement, or order of the Court, the Parties shall share their time with the Children on an equal basis, with the schedule of care being 4 consecutive days and 4 consecutive nights with the Defendant followed by 4 consecutive days and 4 consecutive nights with the Plaintiff, according to the existing rotation ("Shared Parenting Plan").
6. The Shared Parenting Plan may be reviewed on the request of either party when the Plaintiff obtains employment.
13. Notwithstanding the possibility of imputing income to the Plaintiff for her intentional underemployment and/or unemployment, the Defendant shall pay base child support to the Plaintiff, based on his present Guidelines income of \$70,283, and pursuant to Section 9 of Guidelines, in the sum of \$1057 per month, commencing December 1, 2006, up to and including June 1, 2007, without prejudice to the Defendant's right to argue at any subsequent review of this matter, that this Guidelines income or Guidelines payment ought to be lower.
14. The Defendant shall pay spousal support to the Plaintiff in the sum of \$650.00 per month commencing December 1, 2006, until varied by agreement or further Court order, without prejudice to his right to argue quantum, entitlement or duration at any subsequent review of the spousal support.
15. The Parties may review both child support and spousal support (including entitlement, quantum and duration), as well as a possible off-set of child support (in accordance with Section 9 of the Guidelines), at any time after June 1, 2007, and implement any changes in either or both spousal support and/or child support amounts effective July 1, 2007.
16. The Plaintiff shall forthwith make all efforts and take all reasonable steps to become and remain economically independent and self-sufficient, and shall provide the Defendant with notice in relation to any employment she obtains and provide him with income particulars in relation to such employment.
17. The Defendant shall be responsible for the costs associated with any sports activities that he may enrol the Children in, and the Plaintiff shall be responsible for the costs associated with Rachel's dance until further Order or agreement and such obligation shall form part of any review after June 1, 2007, as noted above, so that the Parties will share Section 7 Guidelines special and/or extraordinary expenses for the Children in proportion to their respective incomes.
18. Commencing on May 31, 2007, and continuing thereafter on May 31st each year, for so long as there is a child support obligation on either parent, the Parties shall review their respective child support obligation(s) to the other, by exchanging their prior years Income Tax Returns and Notices of Assessment by May 31st.

31. The balance of relief requested in the Statement of Claim or Counterclaim not specifically dealt with herein, save and except for the claim for Divorce, shall be dismissed as if heard on the merits.
- [6] On June 14, 2007 defence counsel informed plaintiff's counsel that the defendant was requesting a review of child and spousal support.
- [7] On July 3, 2007 defence counsel informed plaintiff's counsel that the defendant had ceased paying spousal support as of July 1, 2007 and child support would be reduced to \$447 per month based on an offset of incomes with the plaintiff's income imputed at \$40,000 annually.
- [8] On September 20, 2007 the Minutes of Settlement agreement was filed in the New Westminster Registry of the Supreme Court.
- [9] The defendant has continued to pay child support of \$447 per month since July 1, 2007 but has not paid any spousal support since that date.
- [10] The plaintiff applies before me on a notice of motion dated September 27, 2007 for original interim orders of child and spousal support pursuant to the Divorce Act, R.S.C. 1985 ch. 3 and the Family Relations Act, R.S.B.C. 1996 ch. 128. Orders are sought for ongoing and retroactive child support back to January 1, 2006 based on a higher Guidelines income for the defendant than set out in the Minutes of Settlement, and ongoing and retroactive spousal support back to January 1, 2007, based also on a higher Guidelines income for the defendant than set out in the Minutes of Settlement.
- [11] Plaintiff's counsel says the plaintiff will be content with the continuation of the requirements for both child and spousal support in the Minutes of Settlement, if need be, but says this is not a review application authorized by the agreement.
- [12] In her application the plaintiff proposes a further review of the defendant's spousal support obligations in one year.
- [13] The defendant opposes the plaintiff's application relying on the agreement and seeks an order of set-off of child support obligations and s. 7 expenses based on imputed income to the plaintiff, as well as an order cancelling his spousal support obligations to the plaintiff on the basis that she has not made all efforts and taken all reasonable steps to become and remain economically independent and self-sufficient as she undertook to do in the agreement.
- [14] His counsel submits that the plaintiff is not entitled to bring on these original applications for child and spousal support as she is confined to her rights and remedies as set out in the Minutes of Settlement and those are restricted to a review. Accordingly he submits the present application of the plaintiff should be considered as a review at which time he is entitled to have his own obligations under the Minutes of Settlement reviewed as well.

- [15] In his own motion the defendant applies for a divorce.
- [16] On the issue of child support the parties agreed in the Minutes of Settlement to review their respective child support obligations by exchanging income tax returns and notices of assessment by May 31st of each year commencing May 31, 2007.
- [17] I assume that the parties intended by this provision that their child support obligations be automatically adjusted based on the disclosure of this income tax information, although the provision does not expressly say that.
- [18] The parties further agreed to a review of child support at any time after June 1, 2007.
- [19] On the issue of spousal support the parties agreed that the defendant should pay \$650 per month commencing December 1, 2006 "until varied by agreement or further court order without prejudice to his right to argue quantum, entitlement or duration at any subsequent review of the spousal support." The parties agreed to a review of spousal support at anytime after June 1, 2007, as well
- [20] The wording of the agreement indicates that the defendant was concerned about the plaintiff's efforts to become economically independent and self-sufficient so he imposed a specific obligation on the plaintiff to make all efforts and take all reasonable steps to become and remain economically independent and self-sufficient, and included a right of review.
- [21] The defendant also required the plaintiff to give him notice of any employment she obtained and particulars of that employment.
- [22] I assume that this obligation ties in with the defendant's obligation to pay spousal support "until varied by agreement or further court order," without prejudice to any subsequent review. If the plaintiff obtained employment, the defendant wanted to be able to seek a variance of his spousal support obligation before any subsequent review took place.
- [23] However, what the defendant has done here is to vary his spousal support obligation unilaterally without any agreement or court order on a review or otherwise. He has also unilaterally varied his obligation for child support.
- [24] I assume the defendant has done this relying on the prospect of getting an order of the court on a review that would uphold his decisions, as the parties have agreed to implement any changes effective July 1, 2007, which was the time at which he ceased paying spousal support and varied child support on imputed income to the plaintiff.

Discussion

- [25] The plaintiff's application is not by its wording an application for a review and the defendant has not made his own application for review.

- [26] The issues therefore are whether the plaintiff is entitled to bring on original interim applications or is confined to her right of review which was available to her as of June 1, 2007 pursuant to the Minutes of Settlement, and whether her present application should be considered a review application.
- [27] Although the Minutes of Settlement do not provide for any final determination of the plaintiff's rights to spousal support, so that the principles laid down in *Miglin v. Miglin*, [2003] 1 S.C.R. 303, for determining the enforceability of such a provision do not come into play, the Minutes of Settlement in my view do confine both parties to a review of child and spousal support at any time after June 1, 2007.
- [28] Accordingly I conclude that the plaintiff has no authority to bring on original applications for spousal and child support and I dismiss these applications.
- [29] While I conclude that the plaintiff cannot bring on these original applications in the face of the remedy she has confined herself to in the Minutes of Settlement, I am unable to consider her applications as review applications over her objections when she has not sought a review. The defendant has not sought a review either so I am unable to consider his requests for orders as if this was a review.
- [30] In my view the defendant was not entitled by the wording of the Minutes of Settlement to cease spousal support and vary child support without an agreement or court order on a review or otherwise. He was obliged to maintain his agreed support payments for both until varied by further agreement or court order even though on any subsequent review any change is to be implemented effective July 1, 2007.
- [31] The plaintiff is in a position to seek an order for retroactive spousal support under the agreement to July 1, 2007 at \$650 per month. To the end of August 2008 the total arrears for spousal support would be \$8,450.
- [32] The plaintiff is also in a position to seek an order for retroactive child support under the agreement to July 1, 2007 at \$610 per month (the difference between \$1,057 and \$447) to the end of August 2008. The total arrears would be \$7,930.
- [33] The Minutes of Settlement have been filed with the Court and s. 122 of the Family Relations Act makes the provision for maintenance of the children enforceable as if it were an order of the court. I am not aware of the agreement being codified into a consent order as the agreement contemplates.
- [34] At this time I am not in a position to issue any order for payment of these arrears because they have not been sought on any enforcement application of the agreement. What has been sought are alleged arrears owing on the basis that the defendant made more money in 2006 than he declared in the Minutes of Settlement, because of his receipt of \$15,651.43 from the Workers' Compensation Board for a permanent partial disability award, and made more money in 2007.

- [35] This application for arrears to 2006 is unsuccessful because I am satisfied that the defendant did not receive the WCB award until the year 2007. In any event such an allegation is an attack on the enforceability of the agreement itself and would require new pleadings.
- [36] The application for arrears to January 1, 2007 is based on the original application which I have dismissed.
- [37] I leave it to the plaintiff to bring on a proper application for enforcement of the arrears under the Minutes of Settlement as I leave it to the defendant to bring on a proper review application if he wishes his obligations to be reviewed.
- [38] In the meanwhile the obligations for child and spousal support in the Minutes of Settlement continue until further agreement or court order.
- [39] In view of the fact that the plaintiff's application has been dismissed I order costs to the defendant for the three days of hearing thrown away. I decline to order costs to the defendant for preparation because I expect that this preparation will be used on any further application.

"Truscott J."

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Prepared on 29 October 2026 · Esheria