
CANADA / JUDGMENT

Schmidt v. Schmidt

2007 BCSC 785

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 785 Schmidt v. Schmidt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schmidt v. Schmidt,

2007 BCSC 785

Date: 20070601

Docket: D11771

Registry: Chilliwack

Between:

Sandra Schmidt

Plaintiff

And:

Danny Walter Schmidt

Defendant

Before: The Honourable Madam Justice Dickson

Reasons for Judgment

Counsel for the Plaintiff

C. Widdifield

Counsel for the Director of

Maintenance Enforcement

P. Hundal

Counsel for the Defendant

J.L. Pratt

Date and Place of Trial:

May 18, 2007

Chilliwack, B.C.

INTRODUCTION

- [1] The defendant, Danny Schmidt, applies for a retroactive variation of child support and reduction of child support arrears in connection with the order of Chief Justice Williams granted on June 1, 1998, as well as cancellation of interest and penalties and a repayment schedule for arrears. The application is brought pursuant to section 96 of the Family Relations Act, R.S.B.C. 1996, c. 128. The central issues at the hearing were:
- i) whether the defendant is intentionally under-employed and should, therefore, have income imputed to him pursuant to section 19(1) of the Federal Child Support Guidelines (the "Guidelines"); and
 - ii) whether this court should stay enforcement proceedings with respect to child support arrears.

FACTUAL BACKGROUND

- [2] The plaintiff and defendant were married on August 12, 1989, separated on April 4, 1997, and divorced by the June 1, 1998 order of Chief Justice Williams (the "Order"). They have two children, Robert and Jordan, both of whom remained in the custody of the plaintiff following the separation and divorce.
- [3] Robert was born on February 8, 1984. He has not been a child of the marriage since March, 2003. Jordan was born on February 22, 1990 and is presently seventeen years old.
- [4] Pursuant to the terms of the Order, the defendant was to pay child support for Robert and Jordan in the amount of \$575.00 per month commencing on June 1, 1998. At the time the Order was made he was employed as a printer by ASM Printing and earned approximately \$40,000 annually. In 1999, he earned approximately \$30,000.00.
- [5] In October, 1999, the defendant left his job at ASM Printing to study horticulture with a view to starting his own landscaping business. He did so, he deposes, to improve his opportunities for earning income. The defendant commenced his horticulture studies in January, 2000 and graduated in January 2002. Thereafter, he started a lawn and property maintenance business.

- [6] The defendant deposes that his total annual income from 2000 to 2006 was: 2000 - \$9,342.72; 2001 - \$8,712.39; 2002 - \$15,435.76; 2003 - \$15,786.56; 2004 - \$11,440.49; 2005 - \$21,033.26; 2006 - \$22,649.16.
- [7] As a result of his return to school and related reduction in earnings, the defendant applied, in January, 2000, for a variation in child support payable pursuant to the Order (the "2000 Variation Application"). The 2000 Variation Application was dismissed. The Reasons for Judgment were not placed before me on this application, but the defendant deposed the court found he could obtain employment as a printer and thus declined to vary the Order.
- [8] In an affidavit filed in support of the 2000 Variation Application (the "2000 Affidavit"), the defendant deposed that, as of that date, he had a common law spouse who was employed and earning income. He did not place any information before me on this application regarding his current domestic circumstances.
- [9] In the 2000 Affidavit, the defendant also deposed that his research into the horticulture industry revealed persons skilled in the field can earn between \$40,000 and \$70,000 annually. He did not explain in any detail on this application why his earnings have been so much lower than projected.
- [10] The Order was registered with the Family Maintenance Enforcement Program ("FMEP") and an Attachment was issued so that income tax refunds or other government benefits would be seized to pay accumulating arrears. In addition, in 2001 the defendant was advised that he could not renew his driver's licence or obtain a provincial licence of any kind.
- [11] The FMEP accepts that Robert has not been a child of the marriage since March, 2003. According to the FMEP, the child support payable for Jordan alone from March, 2003 was \$343.00 per month, based on the estimated annual income of \$40,000.00 included in the Order. Since the Order was registered, only a small amount of child support has been obtained by way of attachment. As of the date of the hearing, the sum of \$44,550.93 is due and owing for ongoing maintenance and interest on arrears.
- [12] The defendant says that the enforcement steps taken by the FMEP have made it almost impossible for him to earn a living and, as a result, he experiences considerable emotional and financial stress and strain.
- [13] The plaintiff lives in Penticton on a disability pension. She suffered a head injury in a motor vehicle accident in 2003, as a result of which her memory is impaired.
- [14] The defendant claims that Jordan and Robert have told him Jordan has not lived with his mother in Penticton for approximately 1 ½ years. In support of this allegation, he presented copies of school records indicating Jordan was enrolled at the Learning Centre in Osoyoos in October, 2006.

- [15] The plaintiff and Jordan both deny the defendant's allegation and depose that Jordan lives at home with his mother in Penticton. In addition, the plaintiff deposes that Robert denies the statements attributed to him by the defendant. The plaintiff notes, however, that Jordan did leave her care for a few weeks in 2005 to live in Osoyoos during a time of family turmoil. She stated unequivocally that he returned shortly thereafter and has been living with her since then.
- [16] I am satisfied on the material before me that the plaintiff made an error in her affidavit as to when Jordan left her home to live briefly in Osoyoos and conclude that, but for a brief period in 2006, he has resided continuously with the plaintiff. In reaching this conclusion I take into account all of the evidence on the point, including a letter from Canada Revenue Agency Benefit Programs dated January 24, 2007 expressing the view that Jordan lives at home with his mother.

LEGAL PRINCIPLES

- [17] Section 19(1) of the Guidelines allows the court to impute such amount of income to a parent as it consider appropriate in the circumstances. One of the relevant circumstances is whether the parent is intentionally under-employed.
- [18] Parents have a joint legal obligation to support the children of their marriage, and, in order to do so, each must earn what he or she is capable of earning. Imputing income is the way in which the court gives effect to this legal requirement: *Hanson v. Hanson* [1999] B.C.J. 2532 (S.C.).
- [19] Before income can be imputed, the court must find that the parent at issue is intentionally under-employed. Bad faith is not required for a finding of intentionality. Rather, the parent required to pay is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning. Relevant factors for consideration include, amongst other things, the parent's age, experience, skills and health, as well as available job opportunities. Persistence in unremunerative employment may entitle the court to impute income: *Hanson; X. (R.L.) v. X.(J.F.)* 2002 BCSC 1222.
- [20] The test for variation of a child support order is a material change of circumstances. In particular, a variation may be justified when there is a change in the condition, means, needs or other circumstances of the parent(s) or child: *Willick v. Willick* [1994] 3 S.C.R. 670.
- [21] The court should not reduce or cancel child support arrears except in exceptional circumstances. The court must make a finding of gross unfairness before cancelling or reducing arrears on an application brought pursuant to section 96 of the Family Relations Act: *X. (R.L.); Stralak v. Stralak* (1996), 21. R.F.L. (4th) 77.

- [22] Although the Supreme Court has jurisdiction to deal with enforcement issues with respect to outstanding child support arrears, enforcement is often best left to the Provincial Court pursuant to the provisions of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127. This is so because that court has effective mechanisms available to it to enforce the payment of arrears: X. (R.L.).

APPLICATION OF THE LAW TO THE FACTS

Is the defendant intentionally under-employed and, therefore, should income be imputed to him pursuant to section 19(1) of the Guidelines?

- [23] The defendant submits that the Order should be varied retroactively such that he has no obligation to pay child support for the alleged 1 ½ year period when Jordan did not reside with the plaintiff. In addition, he seeks a further variation of the Order to the Guidelines amounts applicable to his income levels from 2000 to the present as disclosed in his affidavit and set out in paragraph 6 above.
- [24] I have concluded that the material does not establish Jordan lived away from his mother's home for 1 ½ years, as alleged by the defendant. Accordingly, I decline to vary the Order on the basis that he did.
- [25] I also conclude that, since 2000, the defendant has been intentionally under-employed and is capable of earning approximately \$40,000 per year, just as he was in 1998 when the Order was made and 2000 when the 2000 Variation Application was dismissed. He is a skilled, able-bodied 43 year old man who chose, in 1999, to leave a well paid job to pursue an apparently lucrative field of interest. Since then he has, without clear explanation or justification, failed to achieve income levels even remotely commensurate with either his previous earning history or projected earning capacity. He must at least attempt to do so in order to meet his legal obligation to Jordan. He is not entitled to persist in unremunerative employment or pursue unproductive career aspirations.
- [26] I am not satisfied on the material before me that, despite the defendant's best efforts, there is an absence of job opportunities in his community, given his considerable skills. Although the defendant deposed that the market for printers has been devastated he did not explain why he continues to work in a business that he says generates less income than would a full time job at minimum wage. I do not accept that his vague complaints of stress brought on by FMEP enforcement steps constitute a credible explanation.
- [27] Taking into account the foregoing, I conclude there has not been a change in circumstances since the Order was made and the 2000 Application was dismissed. I impute income to the defendant of \$40,000 annually and dismiss his application to vary the Order and cancel arrears.

Should this court stay enforcement proceedings with respect to child support arrears?

[28] Counsel for the Director of Maintenance Enforcement urged me to leave enforcement of the Order to the Provincial Court pursuant to the provisions of the Family Maintenance Enforcement Act. He noted that the defendant has failed, on this application, to provide information regarding his current domestic circumstances, including whether he presently has a partner and, if so, her income levels. He submitted that such relevant information would be produced in Family Maintenance Enforcement Act proceedings and argued that I should conclude the Provincial Court is in the best position to deal with the question of enforcement. I agree, and reach this conclusion for the reasons outlined in X. (R.L.).

[29] In summary, the defendant's application is dismissed.

"Dickson J."

The Honourable Madam Justice Dickson

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