
CANADA / JUDGMENT

Senghera v. Senghera

2009 BCSC 899

COURT

Supreme Court of British Columbia

DECIDED

3 July 2009

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2009 BCSC 899 Senghera v. Senghera

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Senghera v. Senghera,

2009 BCSC 899

Date: 20090703

Docket: E027322

Registry: New Westminster

Between:

Bindri Senghera aka

Bindri Kaur Senghera

Plaintiff

And

Jagrup Singh Senghera

Defendant

Before: The Honourable Mr. Justice Bernard

Reasons for Judgment

Counsel for the plaintiff:

P.G. Kuchar

Appearing on his own behalf:

J.S. Senghera

Place and Date of Trial/Hearing:

New Westminster, B.C.

May 26, 2009

Place and Date of Judgment:

New Westminster, B.C.

July 3, 2009

A. Overview

- [1] At the trial of this matrimonial action the plaintiff ("the wife") seeks resolution of all corollary claims. A divorce was granted on November 5, 2008.
- [2] The wife asks for: (a) sole custody and sole guardianship of the two children of the marriage; (b) supervised child access for the husband; (c) child support and a proportionate sharing of s. 7 expenses; (d) spousal support; (e) 75% of the net family assets; and, (f) payment, from the husband's share of monies held in trust, for: (i) arrears in child support (approx. \$10,000) and the husband's proportionate share of s. 7 expenses incurred since separation, (ii) two judgments against the husband which were registered against the title to the matrimonial home and paid out of the sale proceeds, and (iii) fixed costs and other monetary amounts previously awarded, but not yet paid, within this action.
- [3] The defendant ("the husband") did not file a statement of defence in this action, notwithstanding that on February 19, 2009, Mr. Justice Leask ordered him to do so. He offered no reasonable excuse for this failure or for his failure to comply with several financial disclosure orders. He appeared on the trial date and stated that he wished the matter to proceed. The wife expressed the same desire.
- [4] The husband stated that his principal concerns related to matters of custody, guardianship and access. He seeks joint custody and joint guardianship, with primary residence to the wife. He opposes the supervision of access. He asks for access visits from Friday afternoon until Monday morning, for three weekends out of every four. He also seeks 1.5 months of access in the summer school breaks, and extended access periods over the Christmas and Spring breaks. The husband seeks equal division of the proceeds of the house sale and agrees that any money he owes to the wife from arrears of child support, or otherwise, should be taken from his share.

B. Evidentiary Synopsis

- [5] The parties met in December 1994, married on October 7, 1995, and separated on March 4, 2007. The marriage breakdown was acrimonious. There are two children of the marriage: Aneal (b. December 1999) and Asha (b. January 2001). Since separation, the children have resided with the wife.
- [6] During most of the marriage both parties were gainfully employed and, through savings and loans, managed to acquire, in 1998, the matrimonial home in which they resided until separation. After separation the wife and children remained in the family home. For the next 26 months, until the house was sold, the wife assumed full financial responsibility for it, including \$986 bi-weekly mortgage payments, insurance and security fees, and property taxes. The husband offered no financial assistance in this period, for the children or otherwise. To make ends meet the wife borrowed from family and friends: approximately \$25,000 from her father and \$3,000 from friends. When the home was sold the net proceeds of \$203,564 were placed into a trust account pending the outcome of these proceedings. When the parties separated there was a Westminster Savings line of credit debt of \$9,500 and a Visa credit card debt of \$1,000. There is no suggestion that these were not family debts. After separation two judgments were obtained against the husband and were registered against the title to the former matrimonial home. These were cleared with the proceeds from the house sale. One judgment for \$5,919 relates to the husband's unauthorized removal of gasoline while he was in the employ of the City of Vancouver. The other is for \$10,952 and it relates to an unpaid debt incurred post-separation. There is no suggestion that these are not the personal debts of the husband, for which he is solely responsible.
- [7] The wife is employed at Real Canadian Superstore, and has been so employed since 1991. She is a First Assistant Front-End Supervisor, earning \$48,000 per year. For the past nine years she says that she has declined offers of promotion to Front-End Supervisor (@\$60,000 - \$65,000 per year) because the position does not offer the flexible hours needed to care for her children.
- [8] The husband has a degree in Criminology. He was employed as a youth counsellor with the City of Vancouver from 1993 to 2005. In 2005 he earned \$64,841 (base salary plus overtime). In December 2005 the husband was terminated for "insubordination" and sued by the City. Since the loss of this employment the husband has had great difficulty in securing and maintaining any employment, let alone a position with similar remuneration. The husband has acknowledged that from 2004 to 2006 he had a cocaine habit. In the summer of 2006 he attended a ten-week "Narc-Anon" program in Quebec. He admits to one relapse since successfully completing the program. He says that he has not touched cocaine for the past two-and-one-half years.
- [9] The husband is presently employed, on an "on-call" basis with TDK Metro, earning \$15.50 per hour for unloading cargo from overseas shipping containers. He estimates that he presently works about 35 hours every two weeks; accordingly, his income is low. He says that

he has applied for other jobs without success. He produced no documentation corroborating his testimony about his job search. He said that he does not keep such records. In cross-examination the husband agreed that he has failed, without reasonable excuse, to comply with court orders made to compel full financial disclosure in the instant action.

- [10] In an interim order dated November 23, 2007, Master Keighley imputed an income of \$21,000 to the husband, and ordered the husband to pay child support in the amount of \$331 per month, commencing December 1, 2007, \$2,500 forthwith, and \$1,340 in costs, forthwith. The husband has made no payments pursuant to this order. Since separation the wife has incurred \$9,525 for the children's Kumon classes and \$704 for non-insured dental costs, to which the husband has made no contribution.
- [11] The wife presently resides in her brother's home with her brother, her brother's immediate family, and her parents. Similarly, the husband presently lives in his brother's home, shared with his brother, his brother's family, and his mother. Both homes are in metropolitan Vancouver and there is no suggestion that either is an unsuitable environment for the children of the marriage. The wife has expressed the desire to purchase a three-bedroom townhouse as a home for herself and the children when the proceeds of the sale of the former matrimonial home are distributed.
- [12] There is no suggestion that the wife is not a good mother. By all accounts the children are flourishing in her care. As for the husband's parenting abilities, the principal concern of the wife is that she believes that the husband "drinks and drives" while the children are in his care. She testified that in December 2008 and January 2009 she observed symptoms of alcohol intoxication on three occasions when he arrived at her residence to pick up or drop off the children. She said that on these occasions she noticed that he had bloodshot eyes, slurred speech, a flushed face, and an odour of liquor about him. The wife's brother testified to corroborate his sister's testimony in this regard. He said that on December 6, 2008, when the husband dropped off the children, he noticed that the husband had bloodshot eyes, was wobbly, and had an odour of alcohol on his breath. The husband testified that he has an "occasional" glass of wine, but asserted that he does not drink when he has the children in his care. He said that he would never jeopardize his access by so doing.

C. Findings and Analysis

Custody, Guardianship and Access

- [13] The wife has been the primary caregiver for the children from their births. Since the marital separation the children have resided with the wife and visited with the husband. The husband does not seek to alter, fundamentally, this arrangement. He does not suggest that the wife is an unsuitable custodial parent; indeed, by all reports the children are flourishing with her. The gist of the husband's position is that he, too, is a good parent, and ought to have significantly greater access time. He also says that his time with the children need not be supervised.

- [14] The parties have an acrimonious relationship, replete with resentment and allegations of mental and physical abuse. They have limited and poor communication with one another. I am satisfied that the prospect of successful joint parenting is too remote to entertain as an option which would be in the best interests of the children. In all the circumstances, I find that the best interests of the children would be served by granting sole custody of the two children to the wife. In relation to guardianship, however, I am satisfied that the husband ought to share this with the wife. The husband loves his children and has a healthy and genuine interest in their well-being. He has a history of being actively involved in their lives, including coaching their sports teams. He is a suitable co-guardian. Joint guardianship in the terms of the "Master Joyce model" would be appropriate in all the circumstances.
- [15] In relation to access, I am satisfied that the wife's concern about the husband's alcohol consumption is a legitimate one; however, it is one which may be adequately addressed by means less draconian than supervised access. I am satisfied that the imposition of an access term which restricts alcohol consumption is appropriate, in all the circumstances. There is no evidence from which I might reasonably conclude that the husband has a serious alcohol problem or that he is a chronic drinker. The husband purports to appreciate that he risks losing the access he cherishes if he were to breach a term restricting his alcohol consumption; moreover, the husband lives with responsible adults who have an interest ensuring that he abides by the terms of his access, and in keeping the children safe. The children, themselves, are old enough to recognize if their father is breaching the terms of his access.
- [16] I am satisfied that there is no compelling reason why the husband should not have overnight access visits with his children; accordingly, during the school year, the husband shall exercise access on alternating weekends, from 10:00 a.m. Saturday until 7:00 p.m. Sunday, and on every Wednesday, from the end of the school day until 7:30 p.m., or as otherwise agreed to by the parties. The parties shall evenly divide the winter, spring, and summer breaks and alternate all significant events/holidays. Neither party made detailed submissions in relation to an access schedule. If the parties, with the assistance of counsel, cannot agree on an access schedule, then the parties have leave to return to court to resolve the matter.

Child Support, Section 7, and Arrears

- [17] The wife says that the husband is intentionally under-employed. She notes that he earned more than \$60,000 annually when he worked for the City of Vancouver and that he has provided little evidence of his attempts to secure similarly remunerative employment. While one can appreciate the wife's frustration with the husband's poor earnings since he lost his job in 2005, I am not persuaded that he is, at this time, intentionally under-employed. His departure from the City's employ was ignominious, and it appears to have been related to a significant use of cocaine over a two to three year period. It is not surprising that he is having some difficulty finding a job; particularly, one which capitalizes on his education and

experience. He has managed to find some employment as a manual labourer. These jobs have not paid well and they have been unstable; however, they suggest that the husband has a willingness to work.

- [18] In light of all the circumstances, I impute to the husband an income of \$25,000 per year for child support purposes. I am satisfied that he is, in theory, capable of earning considerably more than \$25,000; however, his reality in the near future may be quite different. He needs to re-establish himself in the workforce and restore his reputation; meanwhile, the wife is entitled to be apprised of his efforts in this regard. The husband will be required to provide to the wife, at six month intervals, the details of all attempts to seek employment in the previous six months, and documented proof of all earnings from all sources in that same period.
- [19] Child support will be in the Guidelines amount of \$394 per month, payable on the first day of each and every month, commencing on July 1, 2009.
- [20] Future s. 7 expenses, defined as dental expenses not covered by insurance, Kumon tutoring fees, and all costs reasonably related to soccer, shall be shared by the parties in proportion to their respective incomes.
- [21] The arrears in child support (including interest and Family Maintenance Enforcement Program fines) and the husband's proportionate share (based upon an imputed income of \$21,000) of non-insured portions of dental fees and Kumon costs, incurred since separation, shall be paid from the husband's share of the monies held in trust.

Asset Division

- [22] The only family asset in issue is the net proceeds of the sale of the former matrimonial home. The wife seeks a 75% share of the sale proceeds. She asks for this reapportionment pursuant to s. 65(1)(e) and (f) of the Family Relations Act, R.S.B.C. 1996, c. 128. At the trial the husband did not address the issue of reapportionment.
- [23] I am satisfied that an equal division of the sale proceeds would be manifestly unfair. The bases for reapportionment advanced by the wife are sound. The wife was, for 26 months, solely responsible for preserving and maintaining the former matrimonial home. The financial burden was significant and could only be met by borrowing money from her family and friends. The wife received no financial assistance from the husband in this period. The wife also has a greater need than does the husband to become and remain economically independent. She is the primary caregiver for the parties' young children and the provider of their primary residence. Her employment earnings are compromised by the needs of the children, and will be so affected for many years to come. The husband is in poor financial circumstances; accordingly, his monthly financial contributions to the support of the children are very limited.

- [24] In all the circumstances and having regard for the cases cited by the plaintiff, I am satisfied that the wife ought to receive 70 percent of the net proceeds from the sale of the home (see *Kopejtko v. Kopejtko*, [1985] B.C.J. No. 1961 (B.C.C.A.) and *Krenzkamp v. Krenzkamp*, [1994] B.C.J. No. 931 (B.C.S.C.)).
- [25] There is no issue that the line of credit and credit card debt, totalling to approximately \$10,500, are family debts; ones which ought to be equally shared by the parties and paid from the net proceeds of sale before the 70/30 distribution. Similarly, there is no issue that the judgment registered against the title to the former matrimonial home is a personal debt of the husband and should be paid from the husband's 30 percent share of the monies held in trust.
- [26] The parties agree that their respective pensions shall be divided pursuant to Part VI of the Family Relations Act.

Spousal Support

- [27] The wife has secure employment at which she earns approximately \$48,000 per year. The husband is a casual labourer with an income less than half that of the wife. He is not in a financial position to pay spousal support. The wife's claim was premised on the husband's income being imputed at \$60,000; however, for reasons given above, it has been imputed at \$25,000.
- [28] The wife seeks compensatory spousal support on the basis of an alleged economic disadvantage suffered as a result of the marriage and its breakdown. The wife worked throughout the marriage. I accept her evidence that she has declined promotions to meet the needs of her children; however, the evidence suggests that such job opportunities have been postponed rather than lost. They will be available to her in the future. The income she has forfeited to care for the children is relatively small and I am satisfied that the asset reapportionment provides adequate compensation for the economic disadvantage she has suffered.

D. DISPOSITION

1. The wife shall have sole custody of the children of the marriage.
2. The wife and husband shall share joint guardianship of the children of the marriage, in the terms of the "Master Joyce Model."
3. The husband shall have specified access to the children, as follows:
 - (a) Every second weekend during the school year, from 10:00 a.m. Saturday to 7:00 p.m. on Sunday;
 - (b) Every Wednesday during the school year, from the end of the school day until 7:30 p.m.;
 - (c) Half of winter, spring, and summer breaks, on a schedule agreed upon by the parties; and,

(d) On holidays and for special events, on an alternating basis with the wife.

During access visits the husband shall limit his alcohol consumption to no more than one 6 oz. glass of wine or one 12 oz. glass of beer in any four hour period.

4. The husband's Guidelines income is imputed at \$25,000 per annum.
5. The husband shall provide to the wife written documentation of his earnings and all attempts to seek employment, on December 31, 2009, and at the end of each six month period thereafter.
6. The husband shall pay \$394 per month for the support of the two children of the marriage, payable on the first day of every month, commencing July 1, 2009.
7. The parties shall divide, in shares proportionate to their incomes, the uninsured portion of all future dental expenses for the children, all future costs of Kumon classes, and all future costs reasonably associated with soccer for the children. The husband shall pay his share of these costs within 15 days of receiving proof of the expenditure or intended expenditure.
8. The husband is solely responsible for the judgments against him; accordingly, they shall not be deducted from the proceeds of sale of the home before reapportionment and distribution.
9. The Westminster Savings and Visa debts are family debts for which the parties are jointly responsible. These shall be paid from the proceeds of sale before reapportionment and distribution.
10. The net proceeds of the sale of the former matrimonial home shall be distributed as follows:

On deposit in trust account: \$203,564

plus judgments already paid from proceeds: 5,918

10,952

less Westminster Savings line of credit: (9,500)

less Visa bill: (1,000)

Net proceeds for 70/30 division: \$209,434

Wife's share: \$146,954

Husband's share: \$62,980

less judgments: (5,918)

(10,952)

Husband's share: \$46,110

11. The arrears of basic child support are fixed at \$10,918 and the husband's share of past special expenses of \$10,229 (Kumon and dental only) shall be calculated based upon an imputed annual income of \$21,000 in this period. These amounts shall be paid to the wife from the husband's asset share before any distribution to him.
12. The amount of \$3,840, representing the total amount the husband was ordered to pay to the wife by Master Keighley on November 23, 2007, shall be paid to the wife from the husband's asset share before any distribution to him.
13. The spousal support claim is dismissed.
14. The plaintiff is entitled to her costs on Scale B. The plaintiff was substantially successful. The defendant repeatedly failed to comply with court orders aimed at facilitating the proceedings and a possible resolution short of trial. The plaintiff's costs shall be paid from the husband's asset share before any distribution to him.

"Bernard J."

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