

CANADA / JUDGMENT

Sinclair v. Sinclair

2001 BCSC 716

COURT

Supreme Court of British Columbia

DECIDED

15 May 2001

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Source record

2001BCSC0716

Citation: Sinclair v. Sinclair Date:

20010515

2001 BCSC 716 Docket:

D090119

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

KELVIN ROY SINCLAIR
PETITIONER

AND:

MARIA SINCLAIR
RESPONDENT
Docket: F993156
Registry: Vancouver

AND BETWEEN:

NELLI SINCLAIR
PLAINTIFF

AND:

KELVIN ROY SINCLAIR
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE K. SMITH

Kelvin Roy Sinclair: Appearing in Person

Counsel for Maria Sinclair: Carol W. Hickman

Counsel for Nelli Sinclair: Paul M. Daykin

Date and Place of Hearing: March 26, 2001

Vancouver, B.C.

- [1] Mr. Sinclair seeks an order in action number F993165, Vancouver Registry, to vary a previous child-support order by reducing the amount awarded. Nelli Sinclair seeks an order in the same proceeding pursuant to s. 24 of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 attaching Mr. Sinclair's earnings to enforce the award.
- [2] These applications were heard concurrently with Mr. Sinclair's applications to vary downward a child-support order made in favour of Maria Sinclair in action number D090119, Vancouver Registry, and to cancel arrears of \$41,000 accumulated under that order.
- [3] For ease of reference, I will hereafter refer to Maria Sinclair and Nelli Sinclair by their given names.
- [4] Because the relevant circumstances are common to all applications, these reasons are given concurrently in both proceedings.

Background Facts

- [5] Mr. Sinclair and Maria were divorced by order of this court pronounced on April 7, 1994. They have one son, Brett, who is now nine years old. By consent, the court awarded custody of Brett to his mother and ordered Mr. Sinclair to pay to her \$500 per month for Brett's support. Mr. Sinclair paid a total of \$1,500 under that order by way of post-dated cheques written by Nelli, with whom he was then living in a common-law relationship. However, he made no payments after he and Nelli separated in August 1994 and arrears of \$41,000 have since accumulated.
- [6] Mr. Sinclair and Nelli reconciled and were married in November 1994. They have two children, Natasha, age 6, and Michael, age 4. This marriage broke down as well, and the parties separated. On August 24, 2000, by consent, this court ordered that the parties have joint custody of the two children and that Mr. Sinclair pay to Nelli "table-amount" child support of \$823 per month pursuant to the Child Support Guidelines and a further \$663 per month for special expenses pursuant to s. 7 of the Guidelines, making a total of \$1,486 per month.
- [7] The current applications were sparked by Maria's enlistment of the Director of Maintenance Enforcement in October 2000 in respect of the support order for Brett. When the Director attached his paycheques, Mr. Sinclair stopped payments to Nelli for the support of Natasha and Michael and launched these proceedings.

Circumstances of the Parties

- [8] Mr. Sinclair, who is 50 years old, is a qualified tradesman and has a varied work history. He is a long-time, senior employee of a labour union and earns a gross annual income of approximately \$65,000 per year. He has transcended a difficult childhood and has risen to a position of influence and responsibility in union-related affairs. He is a recovering alcoholic and drug addict and has been clean and sober for the past six years. He is also an undischarged bankrupt, having filed an assignment in bankruptcy on June 2, 2000.
- [9] According to the Form 89 Financial Statement that he filed in respect of Maria's order, sworn April 6, 2001, Mr. Sinclair's annual income for child support purposes is \$61,915. He has had an increase in his hourly pay, and the statement understates his gross annual income by approximately \$2,500, which is therefore in the order of \$64,400.
- [10] Mr. Sinclair's listed expenses total \$74,704. However, many of them appear to be overstated, namely, household supplies (\$1,200), gas and oil (\$1,540, particularly when it is his evidence that a Ford Explorer and business-related operating expenses are paid for by his employer), clothing (\$1,200), hair care (\$300), and toiletries and cosmetics (\$600), all of which seem high for a single man. Further, some of his claimed expenses are not necessities and ought not to take precedence over his child-support obligations. They are meals outside the home (\$1,000), cable television (\$500), and entertainment and recreation (\$1,200). As well, in addition to his court-ordered support obligations for his three children, he has claimed \$2,400 for child care, \$2,000 for children's clothing, and \$1,000 for school fees and supplies. Most, if not all, of these expenses are paid by the children's mothers and are included in Mr. Sinclair's court-ordered obligations.
- [11] Finally, Mr. Sinclair discloses that he pays approximately \$2,000 per year to his trustee in bankruptcy for the benefit of his creditors. It is notable in this regard that the Superintendent's Directive No. 11R, issued pursuant to s. 68(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, allows for the deduction from income available for creditors of child-support payments and child-care expenses, and further that s. 68(4)(a) permits Mr. Sinclair's trustee to amend the amount he must pay by taking into account any material changes in his personal or family situation. Since Mr. Sinclair did not disclose his obligations in respect of Brett in the monthly schedules of income and expenses that he provided to his trustee, there should be scope for a reduction of the amount payable to the trustee for the benefit of his creditors.
- [12] It should be noted, as well, that the order for Brett's support in the amount of \$500 per month was made before the Guidelines were enacted. Thus, these payments are deductible from Mr. Sinclair's income for income-tax purposes and the net cost to him is in the order of \$300 per month.

- [13] Other than that she is a recipient of social assistance, there is no evidence of Maria's financial circumstances. I am satisfied that they are modest at best. It cannot be said on the evidence that they have materially improved since the order for Brett's support was made.
- [14] Nelli is 43 years old and is a pharmacist, earning \$68,000 per year. She is the custodial parent of Natasha, who attends kindergarten, and Michael, who attends a special school for learning-disabled children to prepare him for entry into regular school. Her financial circumstances have not changed in any material way since the order in question was made.

Analysis and Conclusions

- [15] Mr. Sinclair seeks a variation of child maintenance in relation to Nelli's order such that his monthly obligation does not exceed \$1,000, including \$185 for special schooling expenses for Michael. He asks in respect of Maria that his monthly obligation for Brett be reduced to \$300.
- [16] The approach to be taken to the applications to vary the child support orders is clear: see *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 (B.C.C.A.) and *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 367. The amounts originally ordered must be taken as correct at the time they were made and I must consider whether there has since been a material change in the means, needs, or other circumstances of the parties. A material change is one that, if known at the time the orders were originally made, would likely have resulted in different terms. Further, a matter known at the time of the original order cannot later be relied upon as the basis for a variation.
1. Child support for Brett
- [17] Mr. Sinclair suggests that he should be treated as if he were responsible under the Guidelines for the support of three children in one family, as opposed to one child in one family and two in another. If he were, Brett's fractional share of a global support payment for all three children would approximate \$300. However, that is not a permissible approach: see *Meuser v. Meuser* (1998), 43 R.F.L. (4th) 140 (B.C.C.A.) at paras. 17-18. Subsection 3(1) of the Guidelines makes it clear that the amount of support is to be determined on the basis of the number of children to whom the support order relates. In this case, Mr. Sinclair is subject to one order in favour of Brett and another order in favour of Natasha and Michael, and the amount of support must be calculated separately under each.
- [18] Mr. Sinclair contended that his remarriage to Nelli and the attendant financial obligations incurred by him constitute a material change of circumstances justifying a variation of the order made in favour of Brett. However, new obligations to a second family standing alone, as they do here, cannot avoid pre-existing child-support obligations: *Baker v. Baker* (1999), 49 R.F.L. (4th) 162 (B.C.C.A.).
- [19] Moreover, the effect of Mr. Sinclair's bankruptcy on June 2, 2000, has been to relieve him of substantial financial obligations. As well, his income has increased since the order for Brett's support was made.

[20] Mr. Sinclair has therefore failed to demonstrate any material change in the means, needs, or other circumstances of either himself, Maria, or Brett that would justify a reduction of his monthly obligation. His application to vary that order is therefore dismissed.

2. Child Support for Natasha and Michael

[21] As already noted, there has been no material change in the means, needs, or other circumstances of Nelli and the two children for whom she is the custodial parent since the order for their support was made. Further, Mr. Sinclair's circumstances have suffered no adverse change. His liability for the arrears in Brett's support existed at the time of the order, although it was not disclosed to Nelli. As well, the bankruptcy, which pre-dated the order, relieved him of substantial liabilities and he has been the beneficiary of an increase in wages in the meantime. He has failed to meet the threshold requirement of showing a material change since the order such that, if it had been known, would have resulted in different terms.

[22] Mr. Sinclair also argued in respect of Nelli's order, but not in respect of the order obtained by Maria, that the combined effect of the orders for child support is "undue hardship", as that phrase is used in s. 10 of the Guidelines.

[23] The claim of undue hardship is one that Mr. Sinclair should have raised in the negotiations that led to the consent order for the support of Natasha and Michael. The order for Brett's support was then existent and Mr. Sinclair knew the state of accounts as between him and Maria. No significant change of circumstances has since occurred, except for Maria's decision to attempt to collect what was owed for Brett. The latter event ought to have been foreseeable by Mr. Sinclair. In the circumstances, he cannot be heard to say that the order to which he consented should be varied on the ground of undue hardship.

[24] In any event, Mr. Sinclair has not met the burden of establishing undue hardship. *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.) makes it clear that undue hardship must be something exceptional, excessive, or disproportionate in all of the circumstances and that something more than the ordinary hardship resulting from a lower standard of living after divorce is required: see paras. 45, 51. That is because the Guidelines amounts are intended to be a "floor" or minimum amount.

[25] Mr. Sinclair has not established that the hardship he claims is excessive or disproportionate in all of the circumstances. There is sufficient leeway in his expenses to accommodate his obligations to his children without his enduring exceptional privation. I must therefore reject his claim for relief on that ground.

3. Cancellation of Arrears

- [26] In respect of Mr. Sinclair's application for an order cancelling the \$41,000 in arrears owing on account of Brett's maintenance and support, the applicable principles are concisely summarized in *Earle v. Earle*, [1999] B.C.J. No. 383 (Q.L.) (S.C.) at para. 46. At the outset, there is a heavy burden on Mr. Sinclair to show a significant and long-lasting change in circumstances, and arrears of child maintenance will not be cancelled unless it is grossly unfair not to cancel them.
- [27] The most significant change in circumstances here is that Mr. Sinclair has been able to control his substance addiction for the past six years. Apart from that, there are no changes that could be considered substantial and there is nothing to suggest that, in the future, Mr. Sinclair will not be able to pay the arrears. In fact, he has stable, well-paying employment and his financial future looks to improve, not to deteriorate. He has therefore not proven that he is unable to pay the arrears and that he will be unable to pay them in the future.
- [28] Further, it has not been demonstrated that it would be grossly unfair not to cancel the arrears. In fact, it would be unfair to Maria to do so. The comments of Huddart L.J.S.C. (as she then was) in *Barton v. Barton* (27 November 1985), Vancouver Registry No. CC850939 (B.C.Co.Ct.) at page 10 are apt in this context:

To cancel arrears of a child maintenance order merely because that order, never sought to be varied, cannot at a moment in time be enforced, encourages a lack of diligent effort to pay in the hope that the more diligent parent will give up any attempt to enforce the order at whatever cost in lost savings and extra effort.

If the Courts are to respect the principle that parents share equally the responsibility for the care of their children, no result should be permitted that gives any appearance of favouring a parent whose efforts to fulfill that responsibility have been less than those of the other who shoulders it by dint of energetic and sustained application of his or her resources.

- [29] Ms. Hickman, counsel for the Minister pursuant to the B.C. Benefits (Income Assistance) Act, who represented Maria at the hearing, acknowledged that Mr. Sinclair cannot be expected to pay all of the arrears at once and suggested that he should attempt to work out a schedule for repayment with the Director of Maintenance Enforcement. I commend that suggestion to Mr. Sinclair.
- [30] In the result, Mr. Sinclair's applications to vary the order of April 7, 1994, to cancel the arrears accumulated under that order, and to vary the order of August 24, 2000, are dismissed.
- [31] Mr. Daykin seeks an order pursuant to s. 24 of the Family Maintenance Enforcement Act that Mr. Sinclair's employer attach and remit to Nelli, from each weekly paycheque owing to Mr. Sinclair, the sum of \$342.92, for a total of \$1,486 per month. The order of August 24, 2000, directed that the \$1,486 per month be paid in instalments of \$743 on the 1st and 15th days of each month by direct deposit to Nelli's bank account. However, Mr. Sinclair has rarely, if ever, made those payments on time; he has never made them by direct deposit to Nelli's

bank account; and he has fallen into arrears since the Director began to attach his earnings at Maria's request. As Mr. Daykin points out, his client is not on a level playing field with Maria in the circumstances. Thus, fairness requires that the order sought by Mr. Daykin be granted.

- [32] As well, I direct that notice of any future application concerning the maintenance and support of these children must be given to all parties in both actions. This will ensure that the hearing judge will have all relevant information on these interrelated matters.
- [33] Finally, Mr. Sinclair alluded to the unfortunate consequences for all concerned if the pressures upon him should affect his health adversely, and I cannot leave this matter without comment on his circumstances. His ability to abstain from his debilitating drug addiction for the past six years is a testament to his strength of character and his willpower. The dismissal of his applications will doubtless serve, in his mind, to add to the challenges that he must face every day. However, his successes to date demonstrate his understanding that the good life that he wishes for himself and for his children can be a reality only if he recognizes and discharges his legal and moral responsibilities to them. He, more than most, realizes that life is not always easy and that success comes more readily to those who persevere through the difficult times.

"K.J. Smith, J."

The Honourable Mr. Justice K.J. Smith

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Prepared on 26 October 2026 · Esheria