

CANADA / JUDGMENT

Stuart v. Ganam

2013 BCSC 849

COURT

Supreme Court of British Columbia

DECIDED

15 May 2013

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2013 BCSC 849 Stuart v. Ganam IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Stuart v. Ganam, 2013 BCSC 849 Date: 20130515 Docket: E063116 Registry: Vancouver Between: Jeffery Stuart Claimant And Chelsea Ganam Respondent Corrected Judgment: The text of the judgment was corrected at paragraph 53 on May 16, 2013 Before: The Honourable Mr. Justice R. Punnnett Reasons for Judgment In Chambers Counsel for the Claimant: J.L. Desilets Counsel for the Respondent: M.R. Odishaw Place and Date of Hearing: Vancouver, B.C. March 21, 2013 Place and Date of Judgment: Vancouver, B.C. May 15, 2013

- [1] The respondent seeks an order varying child support, an order for s. 7 expenses, and orders for retroactive child support and retroactive s. 7 expenses. The claimant applied for a parenting order however the parties resolved that issue at the commencement of the hearing.
- [2] The parties were in a relationship but did not cohabit or marry. They had a child who is now seven years of age. Their relationship ended prior to the child's birth. On December 8, 2006, after a Judicial Case Conference, the parties entered into a consent order. The order provided that the respondent would have sole custody, the parties would be joint guardians with agreed upon access for the claimant and the claimant would pay child support of \$370 per month with arrears set at \$838. The order also provided that the parties would provide each other with their previous year's tax returns by May 30 of each year and their Notices of Assessment within 30 days of receipt and, as well, each was to advise the other of any significant change in their income. There was no provision in the order for s. 7 expenses.
- [3] At the time of the 2006 order the claimant's income was agreed to be \$40,000 per annum. From 2006 to 2010 the claimant was employed as a salaried employee. In July 2010 he lost his position and received a severance package. His source of income from September to December 2010 was employment insurance. Since 2010 he has been self-employed as an investor relations consultant through his personal corporation King James Capital Corporation. At times he has been paid personally and at times his company has received consulting fees from third parties. He in turn receives management fees from his company that are paid out within six months of his company's year-end. As a result such fees are reported on his personal income for the following year.

- [4] On occasion he receives stock instead of cash for his consulting services. His company treats such stock payments as income.
- [5] The claimant's income since 2006 has been the following: 2006 2007 2008 2009 2010 2011 2012
\$40,000 \$52,012 \$59,229 \$57,439 \$101,658 \$40,320 \$54,718
- [6] In 2007 the respondent was employed in Victoria, British Columbia. In March 2008 she moved to Dawson Creek, British Columbia to be with her husband however that relationship ended in July 2008. She then moved to Edmonton, Alberta to reside with her parents. This was followed by a move to Victoria for a brief period and in May of 2009 her relocation to Vancouver, British Columbia.
- [7] Her income, which is relevant to the s. 7 claim has been as follows: 2007 2008 2009 2010 2011 2012
\$69,568 \$29,657 \$68,696 \$110,075 \$126,277 \$126,277
- [8] On an annual basis the claimant paid the ordered child support of \$4,440 per annum (\$370 per month) for the years 2007 to June of 2012. As his income fluctuated, he paid additional sums during the years 2008 to May 2012. In July and August 2010 he paid the respondent \$600 per month from his severance. Commencing in September 2010 while on employment assistance he paid \$200 per month for September and October 2010 and \$250 per month for November and December 2010.
- [9] In June 2012 he unilaterally reduced his payments to \$174 per month and thereafter to \$200 per month.
- [10] The support payable under the Guidelines and the amount paid by the claimant is set out in the following table: Year Income Monthly Table Amount Annual Child Support Payable Annual Child Support Paid Difference 2007 \$52,012 \$478 \$5,736 + \$838 (in arrears ordered) = \$6,574 \$5,808 \$766 2008 \$59,229 \$548 \$6,576 \$6,636 (\$60) 2009 \$57,439.94 \$531 \$6,372 \$7,911 (\$1,539) 2010 \$101,548 \$935 \$11,220 \$7,908 \$3,312 2011 \$40,320 \$367 \$4,404 \$5,100 (\$696) 2012 \$54,718 \$504 \$6,048 \$3,624 \$2,424 Totals \$41,194 \$36,987 -\$4,207
- [11] The Table amount for retroactive support and arrears claimed for the six years total \$4,207. In addition, the respondent claims for nanny and childcare costs and other extraordinary expenses for the same time period. The above calculation of arrears and retroactive support does not include the claims for such extraordinary expenses. Income of the Claimant
- [12] The respondent seeks an order imputing income to the claimant on an annual basis. She wishes to insure that she knows what the monthly payments will be in order to avoid the past pattern of the claimant unilaterally and unpredictably varying his payments as his income varied.
- [13] The respondent also seeks to impute income to the claimant on the basis that his financial statement sworn on January 29, 2013 indicates annual expenses of \$99,223.80. However, he explains that the expenses listed are based on his household expenses in 2011 and 2012 and that his wife, who is unemployed and attending school, receives financial assistance from

relatives who contribute to their expenses. Given that explanation imputing income based on the claimant's expenses would not be appropriate. Nor should income be attributed where it appears on the evidence that the claimant is fully employed and currently earning what he is capable of earning.

- [14] Since the claimant went from being an employee with a substantial salary to self-employed in 2010 a three-year average of his income is not appropriate. In my view a more realistic assessment of his income is reflected in his 2011 and 2012 earnings as they represent his current self-employed income as opposed to his past income as an employee. The claimant suggests \$54,718 is a realistic current income based on his current contracts and I agree.
- Extraordinary Expenses
- [15] The primary s. 7 expense claimed is retroactive expenses for a nanny and daycare from 2007 to 2011. The child no longer attends daycare. The secondary s. 7 expenses are the costs of the child's dance, swimming, Taekwondo and hockey. The cost of Taekwondo, swimming and hockey is claimed at \$488 in 2010 and \$655 in 2011. In 2012 the costs claimed are \$790 for hockey and \$560 for dance.
- [16] The respondent concedes that the dance lessons and Taekwondo, in light of her income, fall within the Table support amount. She does however seek an order that the claimant pay his proportionate share for the hockey, both retroactive and ongoing.
- [17] The claimant deposes he has contributed to incidental hockey expenses and that he supplies all of the equipment required by the child for the hiking, climbing, and back country fishing that they do together. Retroactive Support
- [18] The respondent also applies for retroactive Table support back to and including 2007. In doing so she is seeking to collect beyond the normal three-year limit for retroactive payments.
- [19] In *Morgan v. Morgan*, 2006 BCSC 1197, Mr. Justice Kelleher summarized the principles to be applied in considering a retroactive variation of support as follows:
- [45] The basic principle underlying the D.B.S. decision is the same basic principle underlying all awards of child support: parents have an obligation to support their children in a way commensurate with their income. It follows that the payor parent must increase his or her child support payments when his or her income increases: D.B.S. at para. 48. If the payor parent fails to meet that obligation, he or she may later be ordered to pay retroactive child support.
- [46] The obligation to pay more child support when earning more income exists even if, as in this case, a child support order is already in place. Mr. Justice Bastarache, writing for the majority in D.B.S., explained at para. 68 that "the support obligation of a payor parent, while presumed to be the amount ordered by a court, will not necessarily be frozen to the amount ordered by a court" [emphasis in original]. Therefore, while the parent must pay at least as much as required under the court order, he or she is also obligated to make higher child

support payments when his or her income increases.

[47] However, even if a parent has failed to meet his or her obligation to pay the amount of child support that fits his or her income, a retroactive award may not be appropriate. In exercising its discretion to determine whether a retroactive award is appropriate in the circumstances, the court must consider the following four factors discussed at paras. 100 to 116 of D.B.S.:

- (1) Is there a reasonable excuse for why support was not sought earlier?
- (2) Was there any blameworthy conduct on the part of the payor parent?
- (3) Is a retroactive award appropriate in light of the child's past and present circumstances?
- (4) Will a retroactive award cause hardship to the payor parent or to his or her other children?

[48] None of these factors standing alone is determinative. The court must take a holistic approach. That is, the court must consider all of the facts and determine whether a retroactive award is warranted in the particular case: D.B.S. at para. 99. Further, it is not the case that retroactive awards are reserved for only exceptional cases: "It cannot only be exceptional that children are returned the support they were rightly due" (D.B.S. at para. 97).

[20] I now consider each of these factors and their application to this case. Reasonable Excuse

[21] In the spring of 2007 the respondent raised with the claimant the issue of sharing s. 7 expenses, specifically the costs of a nanny. The claimant did email some calculations of his share however no order or agreement to pay was ever finalized. When the claimant failed to contribute to such expenses counsel for the respondent wrote to the claimant's counsel in January 2008. The respondent did not thereafter raise the matter again until 2012.

[22] The respondent emphasizes the difficult time she found herself in in 2008 and 2009 arising from the breakdown of her marriage and her lack of employment as a result of the moves to Dawson Creek and Edmonton. She submits that her emotional state and her lack of income explain her delay in pursuing this matter. A lack of financial or emotional means may amount to a reasonable excuse (D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra, 2006 SCC 37, [2006] 2 S.C.R. 231 at para. 101).

[23] The claimant does not dispute the respondent had a difficult time during those years. However, he notes that she then waited an additional three years before making this application and that given her income during those three years a lack of income was clearly not a reason for the delay. Nor does the evidence indicate the respondent was emotionally unable to pursue the matter after 2009.

[24] It was not until June of 2012 that the claimant first demanded that the claimant pay child support based on his taxable income. She then filed this application in December of 2012.

- [25] Given no further steps were taken by the respondent after 2008 the claimant disputes that the 2007 and 2008 communications respecting nanny and childcare should be relied upon. He asserts that it was incumbent on the respondent to take steps in a timely fashion for such dates to be considered effective notice. This argument was address in D.B.S. as follows at para. 123: 123 Once the recipient parent raises the issue of child support, his/her responsibility is not automatically fulfilled. Discussions should move forward. If they do not, legal action should be contemplated. While the date of effective notice will usually signal an effort on the part of the recipient parent to alter the child support situation, a prolonged period of inactivity after effective notice may indicate that the payor parent's reasonable interest in certainty has returned. Thus, even if effective notice has already been given, it will usually be inappropriate to delve too far into the past. The federal regime appears to have contemplated this issue by limiting a recipient parent's request for historical income information to a three-year period: see s. 25(1)(a) of the Guidelines. In general, I believe the same rough guideline can be followed for retroactive awards: it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent.
- [26] As noted by Joyce J. in *E.G. v. B.D.G.*, 2009 BCSC 1531 at para. 26, D.B.S. does not define precisely what is meant by "formal notice".
- [27] The use of the words "effective" notice and "formal" notice presumably is intended to make a distinction between the two types of notice. The Concise Oxford English Dictionary (11th Ed.) defines "effective" as:
1. producing a desired or intended result.
 2. (of a law or policy) operative.
 3. existing in fact, though not formally acknowledged as such.
- [28] In D.B.S. the issue of effective notice was explained as follows: 121 Choosing the date of effective notice as a default option avoids this pitfall. By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the status quo is fair, and his/her interest in certainty becomes less compelling. 122 Accordingly, by awarding child support from the date of effective notice, a fair balance between certainty and flexibility is maintained. Awaiting legal action from the recipient parent errs too far on the side of the payor parent's interest in certainty, while awarding retroactive support from the date it could have been claimed originally erodes this interest too much. Knowing support is related to income, the payor parent will generally be reasonable in thinking that his/her child's entitlements are being met where (s)he has honestly disclosed his/her circumstances and the recipient parent has not raised the issue of child support.

[29] "Formal" is defined in the Concise Oxford English Dictionary (11th Ed.) as:

1. done in accordance with rules of convention or etiquette-having a conventionally recognized form, structure, or a set of rules
2. officially recognized: a formal complaint.

[30] In the context of para. 123 of D.B.S. above I take the distinction to be that once effective notice is given and a period of time passes, formal notice indicates that legal proceedings will follow.

[31] In this case the effective notice was given in 2007. The formal notice was given in June 2012.
Blameworthy Conduct

[32] The respondent alleges that the claimant engaged in blameworthy conduct consisting of the claimant's failure to provide his annual tax return information to the respondent. The claimant states he did although late on occasion. He on the other hand states that the respondent never provided her tax information to him. This is not an issue I can determine on the evidence. I therefore place no weight on the issue of financial disclosure and any blame that might be attached.

[33] The respondent also alleges the claimant is guilty of blameworthy conduct in that he knew the respondent was alleging a lack of sufficient funds for their child yet failed to fulfill his responsibility to the child. For example, her requests for contributions to childcare expenses were initially responded to yet no payments were made. However, the claimant asserts that some contributions to childcare expenses were made in 2008 and 2009 although not thereafter. It is of note that there was no order for s. 7 expenses and further that the respondent did pay the amount of support ordered in 2006.

[34] The claimant also disclosed to the respondent his change in employment and over the years he voluntarily increased the child support.

[35] Blameworthy conduct was defined by Mr. Justice Bastarache in D.B.S. at para. 106 as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support". He then referred to as examples of blameworthy conduct such behaviour as hiding income or income increases or intimidating the recipient parent. At paras. 107 and 108 he said: 107 No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: see *A. (J.) v. A. (P.)* (1997), 37 R.F.L. (4th) 197 (Ont. Ct. (Gen. Div.)), at pp. 208-9; Chrintz. 108 On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. Whether a payor parent is engaging in blameworthy conduct is a subjective question. But I would not deny that objective indicators remain helpful in determining whether a payor parent is blameworthy. For instance, the

existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct. In this context, a court could compare how much the payor parent should have been paying and how much (s)he actually did pay; generally, the closer the two amounts, the more reasonable the payor parent's belief that his/her obligations were being met. Equally, where applicable, a court should consider the previous court order or agreement that the payor parent was following. Because the order (and, usually, the agreement) is presumed valid, a payor parent should be presumed to be acting reasonably by conforming to the order. However, this presumption may be rebutted where a change in circumstances is shown to be sufficiently pronounced that the payor parent was no longer reasonable in relying on the order and not disclosing a revised ability to pay.

- [36] While the claimant did disclose his employment changes, and at times overpaid support, he at the same time underpaid based on his increasing income. He also failed to contribute to the childcare expenses to the extent he should have. Such conduct is blameworthy given the claimant was not acting reasonably in ignoring the issue of childcare expenses after 2008. Is a Retroactive Award Appropriate?
- [37] The underlying premise of the Guidelines is that the parents of a child are to share in the costs of supporting the child in accordance with their incomes. Whether a retroactive award is appropriate or not will depend on a number of factors. Among those are whether or not the child will receive any discernible benefit from the award or whether such an award would cause hardship to a payor parent. The balance needed between certainty and flexibility is also a factor (D.B.S. at para. 96).
- [38] There is evidence that until June of 2009 as a result of the respondent's personal circumstances she relied on the assistance and support of her parents and her aunt. But for their assistance the standard of living of the child would have suffered. In addition given the young age of the child a retroactive award will benefit the child. Hardship
- [39] Hardship is a factor because an award for retroactive support is based on past, not present, income. As noted at para. 115 of D.B.S.: 115 For instance, the quantum of retroactive awards is usually based on past income rather than present income; in other words, unlike prospective awards, the calculation of retroactive awards is not intrinsically linked to what the payor parent can currently afford. As well, payor parents may have new families, along with new family obligations to meet. On this point, courts should recognize that hardship considerations in this context are not limited to the payor parent: it is difficult to justify a retroactive award on the basis of a "children first" policy where it would cause hardship for the payor parent's other children. In short, retroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not. Courts should be attentive to this fact.
- [40] A retroactive award should be crafted to minimize hardship although it will not always be possible to avoid hardship. (D.B.S. at para. 116).

- [41] In this case the claimant has remarried. His wife is unemployed and is attending school. He has another child. His wife's relatives apparently provide financial assistance to her and the claimant. The claimant's employment is vulnerable to market forces and depends on his ability to attract and retain clients. On the other hand the respondent has secured employment with income at a level approximately double that of the claimant.
- [42] In taking these factors into account "a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix" (D.B.S. at para. 99). In my view while the delay by the respondent in pursuing the matter after 2008 weighs against her, likewise the claimant's ignoring of the respondent's efforts in 2007 and 2008 to address the daycare costs weighs against him. Given the guidance of D.B.S. the retroactive support and s. 7 expenses in this case should be calculated from a date three years prior to the July 2012 formal notice, that is, July 2009.
- [43] I calculate the amount of retroactive Guideline support owing from July 2009 to December 31, 2012 as follows:
- | Year | Income | Monthly Table Amount | Annual Child Support Payable | Annual Child Support Paid | Difference |
|--------------------|-------------|----------------------|------------------------------|---------------------------|------------|
| 2009 (July to Dec) | \$57,439.94 | 2 | \$531 | \$6,372 | 2=\$3,186 |
| 2010 | \$7,911 | 2=\$3,955 | (\$769) | 2010 | \$101,548 |
| | \$935 | \$11,220 | \$7,908 | \$3,312 | 2011 |
| | \$40,320 | \$367 | \$4,404 | \$5,100 | (\$696) |
| 2012 | \$54,718 | \$504 | \$6,048 | \$3,624 | \$2,424 |
| Totals | \$24,858 | \$20,587 | -\$4,271 | | |
- [44] The retroactive support therefore as of December 31, 2012 is \$4,271 for Table support.
- [45] In my view given the respondent's income level and the fact that it is substantially greater than that of the claimant the dance, swimming and hockey expenses at their present levels (and without deciding if they qualify as extraordinary expenses) should be the sole responsibility of the respondent both retrospectively and prospectively.
- [46] Based on the parties respective incomes and the s. 7 claim for nanny and childcare I have calculated the retroactive amount owing for extraordinary expenses for the period July 2009 to the present as follows:
- | Year | Claimant's Income | Respondent's Income | Childcare Costs Paid by Respondent | Claimant's Share |
|------|-------------------|---------------------|------------------------------------|--------------------------------------|
| 2009 | \$57,439.94 | \$68,696 | \$7,935 | 2 for 1/2 of 2009 45.5% = \$3,610.43 |
| 2010 | \$101,658.67 | \$110,075.00 | \$10,560 | 48.0% = \$5,068.24 |
| 2011 | \$40,320.00 | \$126,277.00 | \$5,340 | 24.2% = \$1,292.28 |
| 2012 | \$67,000 | \$126,277 | 0 | 0 |
- [47] The amount owing therefore for past childcare is \$8,165.73.
- [48] The claimant submits that to require the retroactive payment would impose a hardship on him given his current income, his responsibilities to maintain his wife and child, and his limited assets consisting of approximately \$40,000 in RRSP's.
- [49] Given the amount owing, the income of the claimant and his assets I do not find that payment of the sums due for Table support and extraordinary expenses will impose a hardship on the claimant.

- [50] Ongoing child support shall be in the sum of \$504 per month effective January 1, 2013. Any of those payments not paid for the months of January to April 2013 shall be added to the past support owing.
- [51] The parties have resolved the issue of other future s. 7 special or extraordinary expenses by agreement and have agreed to an order that "The parties will share, in proportion to their incomes, health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses, provided those expenses are agreed to in advance, with either party being at liberty to apply in the event an agreement cannot be reached."
- [52] As noted in my introduction the parties have reached agreement on parenting arrangements. The agreed upon terms should be incorporated by consent into the order arising from these reasons. Costs
- [53] Unless there are matters that I am not aware of respondent is entitled to her costs at Scale B. "Punnett J."

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