
CANADA / JUDGMENT

Sukul v. Sukul

2011 BCSC 507

COURT

Supreme Court of British Columbia

DECIDED

21 April 2011

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2011 BCSC 507 Sukul v. Sukul

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sukul v. Sukul,

2011 BCSC 507

Date: 20110421

Docket: E091830

Registry: Vancouver

Between:

Lisa Wai Kuen Sukul

Claimant

And

Sanju Prabhakar Sukul

Respondent

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Claimant:

A. Huang

Counsel for the Respondent:

T. Jackson

Place and Date of Hearing:

Vancouver, B.C.

March 15, 2011

Place and Date of Judgment:

Vancouver, B.C.

April 21, 2011

INTRODUCTION

- [1] The respondent father applies for an order varying a consent order made May 31, 2010 by increasing the time that the children spend with him by approximately 25 hours a month. If he is successful, he will have the children more than 40 percent of the time, and he seeks a further order imputing income to the claimant mother.
- [2] The claimant mother applied for an order increasing child support. Her application was set to be heard at the same time as the father's application but was resolved by the parties. Therefore the only issue is whether the father has demonstrated that there has been a material change of circumstance since the consent order was made.

THE APPLICABLE LAW

- [3] Section 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), provides:

Order for variation, rescission or suspension

17. (1) A court of competent jurisdiction may make an order varying

...

- (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

...

Factors for custody order

- (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

...

Conduct

- (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

...

Maximum contact

- (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

- [4] Section 20 of the Family Relations Act, R.S.B.C. 1996, c. 128, provides:

Variation or rescission of order

20. Subject to this Act, if a court has made an order under this Act, except an order under Part 5 or 6, the court may, on application, vary or rescind the order if circumstances have changed since the order was made or last varied.
- [5] What is required to demonstrate a material change in circumstances was considered by the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27. McLachlin J. (as she then was) for the Court stated:
- [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.
- [13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

BACKGROUND

- [6] The parties Lisa Sukul and Sanju Sukul were married in May 1996 and have three children of the marriage: Nikhil who was born November 8, 1998, Navin who was born September 26, 2000, and Jayan who was born February 20, 2004. The children are now 12, 10, and 7 years old. The parties separated on October 27, 2007.
- [7] Mr. Sukul is a chartered accountant employed as a tax advisor with Great-West Life. His work frequently required him to travel on Mondays to the Okanagan or eastern Canada. Mrs. Sukul worked as a marketing director in Hong Kong for approximately six years and then worked in Telus' marketing department for roughly the same length of time. She stopped work shortly before the birth of their third child and became a homemaker.
- [8] Shortly after their separation, the parties agreed that Mr. Sukul would have the children from Thursday at 6:00 p.m. to Sunday at 2:30 p.m. except for one weekend a month when Mrs. Sukul would have the children. On that weekend, Mr. Sukul would have the children from Thursday at 6:00 p.m. to Friday at 5:00 p.m. (the "parenting schedule"). The parties did not specify which weekend Mrs. Sukul would have the children, in order to accommodate Mr. Sukul's travel schedule.

The Separation Agreement

- [9] Both parties had legal counsel, and entered into a detailed 26 page Separation Agreement dated September 17, 2009 that attempted to cover all matters relating to the breakdown of the marriage. The Separation Agreement provides that the primary residence of the children is with Mrs. Sukul, but the parties will continue to co-parent and have joint custody and joint guardianship, and if they disagree on important decisions concerning the children, the issues will be resolved through co-parenting counselling or mediation pursuant to the dispute resolution clause.
- [10] The Separation Agreement includes the parenting schedule in clauses 7 to 13 and provides:

Parenting Schedule

Regular Parenting Schedule

7. (1) Except for the Special Schedule as set out in clauses 14 to 23 herein, the Children will reside with Lisa in the following times:
- (a) from 2:00 p.m. Sunday until 6:00 p.m. Thursday of every week, and
 - (b) one weekend per month, with the dates to be agreed upon by the parties, starting on Friday at 5:00 p.m. On this weekend, Sanju will have the Children in his care on the preceding Thursday from 6:00 p.m. until Friday at 5:00 p.m.

- (2) Except as set out in clause 7(1)(b) above and for the Special Schedule as set out in clauses 14 to 23 herein, the children will reside with Sanju from 6:00 p.m. Thursday until 2:00 p.m. Sunday of every week.

(the "Regular Parenting Schedule")

Review of the Regular Parenting Schedule

11. At either party's request, the parties will review the Regular Parenting Schedule if there is a material change of circumstances.
- (1) A material change of circumstances includes if Lisa is working for 30 hours or more on a consistent basis and outside of the home during the days the Children are residing with her.
- (2) The parties agree that it will not be a material change of circumstances if Lisa works and/or earns income except as set out in paragraph 11(1) above.
12. If on any review of the Regular Parenting Schedule, the parties are unable to reach agreement through negotiation within 30 days after the commencement of the negotiations, the issue will be resolved pursuant to the Dispute Resolution Clause herein.
13. If the parties do not review the Regular Parenting Schedule or review it and do not vary it in writing, the parties are deemed to accept that the Regular Parenting Schedule and the Regular Parenting Schedule will remain in effect.

[11] Clauses 14 to 23 deal with the Special Parenting Schedule and provides in part:

Special Parenting Schedule

Holiday Time

14. The parties intend that the Children will spend equal holiday time with each parent during each year, with the times to be collaboratively determined by the parties, taking into account the academic schedule of the Children.

Notice for Arranging Holidays

15. Except as already provided in this Agreement, the parents will collaboratively make their plans for each school holiday, statutory holiday and other special days in September of each year for the holidays that fall in the upcoming school year. The parents will collaboratively make their plans for the Summer School Break no later than May 31st of each year.

Children's Birthdays

23. The parents will collaboratively plan the Children's birthdays and together spend the Children's birthdays with the Children.

[12] Clause 24 deals with Vacation and Travel Arrangements and provides in part:

Vacation and Travel Arrangements

24. (1) If either parent wishes to take the Children on a vacation for longer than seven days or during the other parent's scheduled time with the Children then that parent will give notice as soon as possible, consult with and obtain the consent of the other parent. Such consent will not be unreasonably withheld.
- (2) Each parent will provide the other parent with a non-expiring letter permitting the other parent to travel on vacation with the Children outside of Canada.
- [13] Clauses 26 to 33 deal with child support, clauses 34 to 38 provide for review of child support, the exchange of financial information, and any necessary revisions of child support by May 31 of each year to ensure that the Child Support Guidelines are met. If the parties cannot reach agreement on any child support review, the issue is to be resolved pursuant to the dispute resolution clause.
- [14] Clause 40 requires both parties to establish a separate RESP and to make an annual contribution. Clause 42 requires both parties to designate the other as the irrevocable beneficiary of a life insurance policy held in trust for the children. Clauses 43 to 44 provide for Mr. Sukul paying \$100,000 to Mrs. Sukul in full settlement of any spousal support claim, and clauses 45 to 48 deal with her purchase of his interest in the matrimonial home.
- [15] Clause 68, the dispute resolution clause provides:

DISPUTE RESOLUTION

68. (1) If a dispute arises concerning a term of this Agreement regarding the Children, the parties will attempt to resolve the dispute through co-parenting counselling and failing co-parenting counselling, through mediation before taking court proceedings.
- (2) If a dispute arises concerning any other term of this Agreement, the parties will use their best efforts to resolve the dispute through negotiation and if an agreement is not reached in whole or in part then through mediation before taking court proceedings.

The Consent Order of May 31, 2010

- [16] The May 31, 2010 consent order of Mr. Justice Pitfield incorporates many of the terms of the Settlement Agreement including the parenting schedule and the dispute resolution provisions and provides:
9. If on any review of the Regular Parenting Schedule, the parties are unable to reach agreement through negotiation within 30 days after the commencement of the negotiations, the issue shall be resolved pursuant to the Dispute Resolution Clause set out at paragraph 68 of the Separation Agreement.

...

38. If, on any review of the Child Support, the parties are unable to reach agreement through negotiation within 30 days after the commencement of negotiations, the issue shall be resolved pursuant to the Dispute Resolution Clause as set out in paragraph 68 of the Separation Agreement.
- [17] It is apparent on the face of the Separation Agreement and the consent order that the parties intended to attempt to agree collaboratively, and under the dispute resolution provisions, attempt to resolve their disputes through co-parenting counselling and mediation before taking court proceedings. However, the dispute resolution provisions are not working, or at least not working as intended, in large part because the parties continue to be unable to communicate effectively and are in conflict with each other. Mrs. Sukul complains that Mr. Sukul is overbearing and demanding and contends that he failed to comply with the terms of the Separation Agreement. Mr. Sukul complains that Mrs. Sukul is uncooperative and exaggerates his failure, if any, to comply with the terms of the Separation Agreement.

The events giving rise to the applications

- [18] On May 20, 2010 Mrs. Sukul e-mailed Mr. Sukul requesting "[a]s per clause 35 of the separation agreement", a copy of his 2009 income tax return.
- [19] Mr. Sukul did not reply as quickly as Mrs. Sukul wanted him to. However, he replied on June 7 informing her that he would drop off his tax return that week but that he was more worried about keeping his job because of the re-organizational changes at work. He gave Mrs. Sukul a copy of his tax return on June 9, 2010.
- [20] On June 14, 2010 Mrs. Sukul tersely informed Mr. Sukul by e-mail that based on his line 150 income of \$320,853.49, his adjusted child support payments increased to \$5,333, he was to pay the retroactive difference of \$1,885 on or before July 1, and trusted he understood that he had to adhere to the Guidelines, and that his requirement to pay the increased support "will be enforced through the family maintenance court if necessary". She wrote him again when he did not respond within 14 days and complained that he had not provided her with confirmation that she was designated an irrevocable beneficiary of \$500,000 of his life insurance policy, or provided her with a copy of his 2009 RESP contributions for the children.
- [21] On June 15, 2010 Mr. Sukul replied that he would draft a response over the next several days.
- [22] On June 30, 2010 Mr. Sukul replied and informed Mrs. Sukul that he did not agree with her calculation of child support because it included \$47,065.16 of income from his parents' rental property that he never received. The parties had earlier agreed that the rental income would not be included in calculating his child support obligations.
- [23] He went on to state in part:

There will be no retroactive child support. The fact that I worked extremely hard to retain my job does not constitute a reason for you to receive a raise to watch your own children for only 4 days a week since I have custody 3 days a week. Everyone that knows you will agree that you are a well educated, well spoken person with significant job experience and that you are capable of earning a significant income. I am actually surprised that someone with your skill and ability needs me at all.

All three boys have indicated to me on numerous occasions that they want to spend more time with me. Jayan has been especially vocal about this recently.

Please be advised that in September of this year when Jayan begins all day school, I will be exercising my legal rights and taking equal custody of the children. Since I am the one that is working fulltime, I will advise you of the dates. Once you can prove fulltime employment then we can renegotiate the dates and the timing. If you are not in agreement with the child support amount that I have indicated then I will recalculate the numbers and adjust them in September based on equal custody and my income to date for the current year. This is fair and equitable and I believe that the court system will agree with my position.

[Emphasis added.]

- [24] On July 12, 2010 counsel for Mrs. Sukul wrote to Mr. Sukul informing him that Mrs. Sukul was prepared to exclude the rental income in calculating his Guidelines income, but that if he was not prepared to confirm child support of \$4,775 a month as of June 1, 2010, and arrears of \$2,654, she had scheduled a dispute resolution session on July 20, 2010 before Morag McLeod, a family law practitioner, and that if he failed to participate in the process, Mrs. Sukul would pursue the matter in court.
- [25] Mr. Sukul replied on July 14, stating that he was taking equal custody of the children in September 2010, and that he was not available on July 20 because of his work schedule, and he would not attend a dispute resolution session with a lawyer that Mrs. Sukul or her counsel had unilaterally selected.
- [26] On August 3, 2010 Mrs. Sukul applied in these proceedings to increase child support.
- [27] While it was not raised in argument, I question whether the parties complied with clause 38 of the Separation Agreement because it is not clear when the parties commenced negotiations, and when the 30 day period began to run before the parties were to resort to the dispute resolution clause. What is clear is that after July 14, there was no attempt by the parties to resolve the dispute through co-parenting counselling or mediation before Mrs. Sukul brought her application to increase child support.
- [28] In October 2010 Mr. Sukul voluntarily increased child support to \$4,600 a month retroactive to June 1, 2010.

[29] On November 22, 2010 Mr. Sukul brought this application to vary the regular parenting schedule. Before bringing his application Mrs. Sukul maintained that the dispute resolution clause has no application because there has been no material change in circumstance. That is, it is only when there has been a material change in circumstance that the parties need to attempt to resolve the issue through negotiations, co-parenting counselling, and mediation.

HAS THERE BEEN A MATERIAL CHANGE IN CIRCUMSTANCE?

[30] Mr. Sukul argues that the following circumstances have changed since the fall of 2007 when the parenting schedule began:

1. Since January 2010 he has reduced the amount of travel and rarely travels on Mondays anymore. While generally he has been able to determine his travel schedule, he obtained written confirmation from his employer on November 19, 2010 granting his request to be exempt from travel on Monday mornings.
2. In September 2010 Jayan began grade 1.
3. All three children have expressed to him that they would like to spend more time with him.
4. Since the fall of 2007, the children have become progressively more verbal about not wanting to return to their mother on Sunday mid-afternoon.

[31] Mr. Sukul relies on *D.B. v. A.M.*, 2009 BCSC 510, where the mother's change to her work schedule since the last order was made, was found to be a material change in circumstance. He relies on a letter from Great-West Life dated November 19, 2010 stating "Mr. Sukul has requested that he be exempt from any requirement to travel Monday mornings. Great-West Life has granted Mr. Sukul this request".

[32] However, Mr. Sukul has always had a large measure of control over his travel schedule on Mondays, and the parenting schedule took that into account.

[33] Mr. Sukul relies on *Larish v. Wieland* (4 October 2007), Vancouver E011777 (S.C.), where the child starting school was found to represent a change in circumstance. However, in that case the parties repeatedly agreed to a term of every order that each of them would have maximum contact with the child and that there would be periodic reviews to accommodate the "evolution of their co-parenting of the child, which will be responsive to the child's and the parties' changing lives and needs." In this case the parties would have foreseen in March 2010 when the consent order was made that Jayan was entering grade 1 in September 2010. The fact that he is now in grade 1 cannot be said to be an unforeseen material change in circumstance.

- [34] Mr. Sukul says the children have told him that they want to spend more time with him. On the other hand, Mrs. Sukul says that the children have told her that they like things the way they are. He also complains that Sundays are being "cut up"; the children want to spend more time with him on Sundays, and the pickups and drop offs at Mrs. Sukul's home have become difficult and strained.
- [35] Mrs. Sukul denies that there is significant acrimony during the transitions and no evidence that the children have been affected by the transitions. She resists Mr. Sukul having the children all Sunday because it would be disruptive, and she and the children would lose their only free time together on Sunday afternoons. She says that the children tell her they want to be with her on Sundays. She says that Mr. Sukul never told her before June 30, 2010 that he wanted to increase his parenting time and contends that he has only brought this application in order to reduce the amount of his child support. His out of town travel has always been under his control and was reduced before the Separation Agreement was signed.
- [36] I conclude that Mr. Sukul first notified Mrs. Sukul on June 30, 2010, less than three months after the consent order was made, that he was "exercising [his] legal rights and taking equal custody of the children" when Jayan began school, and that his proposal to do so had nothing to do with his travel schedule. The letter from his employer exempting him from travel on Mondays, is dated November 19, 2010--nearly 5 months after Mr. Sukul informed Mrs. Sukul of his unilateral decision. There is little doubt that Mr. Sukul would like to spend more time with the children, but his unilateral proposal to spend equal time with the children was likely in response to Mrs. Sukul who demanded an unreasonable amount of child support when she knew or ought to have known that he never received his parents' rental income.
- [37] Mr. Sukul's application to vary parenting time is dismissed and Mrs. Sukul is entitled to her costs. However that is not the end of the matter.

APPOINTMENT OF PARENTING COORDINATOR

- [38] The dispute resolution provisions of the Separation Agreement and the consent order are clearly not working as they should. The parties disagree on many matters regarding the children. The parties disagree over the children's homework, what Mr. Sukul may or may not be saying to the children and its impact on the children, and over vacation plans. Mr. Sukul wanted to take the children to India this past spring break, but Mrs. Sukul resisted. She says she is concerned not just over the length of time the children would be away, but that they are not used to the climate, food, and environment in India, that they might get sick from the superbugs, get lost or hurt in a strange place and many other matters which in my view are unfounded. The parties clearly do not communicate in a meaningful or effective way and that impacts negatively on the children.

- [39] Mr. Sukul is angry that Mrs. Sukul is not earning any income. Although they have been separated for over three years, and she has been licensed for selling mutual funds and life insurance for about two years, she has earned no income. Mrs. Sukul chooses to work from home. Under the terms of the Separation Agreement, the parties are to review the parenting schedule if there is a material change of circumstance but there can only be a material change of circumstance if Mrs. Sukul works "outside the home". As long as Mrs. Sukul works from home, there can never be a material change of circumstance, and the dispute resolution clause can only come into play if there is a material change of circumstance.
- [40] Mr. Sukul is willing for the parties to appoint a parenting coordinator. Mrs. Sukul resists, largely on the basis that she wants "some peace", and wants Mr. Sukul to follow the terms of the Separation Agreement. She complains that he took too long to provide her with evidence that he had made a contribution to the children's RESP in 2009 and designated her the irrevocable beneficiary under his life insurance policy. In a year from now, as long as Mr. Sukul complies with the terms of the Separation Agreement, she is open to the appointment of a parenting coordinator.
- [41] The difficulty with that reasoning is that it fails to take into account that the parties' continuing conflict is not in the children's best interests. Moreover, as I read the Separation Agreement, Mr. Sukul is not required to provide Mrs. Sukul with evidence that he has made the required RESP contribution, or designated her the irrevocable beneficiary under his life insurance policy. Under the terms of the Separation Agreement he is required to deliver within 14 days, information relating to the determination of child support, but the 14 day provision does not apply to the annual RESP contributions under clause 40, or the life insurance requirements under clause 42.
- [42] The children should not have to wait a year before the parties appoint a parenting coordinator. Mrs. Sukul brought her application to increase child support in August 2010. Mr. Sukul brought his application in November 2010. He sought in his application an order that he be able to take the children to India for the 2010 spring break. It took until March 2010, during spring break for his application to be heard (and Mrs. Sukul's application if it had not resolved) and by that time it was too late to go to India. I understand that the delay in setting down the applications may have been caused or contributed to by counsels' schedules, and not through any fault on the part of the parties. I am hopeful that appointing a parenting coordinator will result in a more timely resolution of the parenting issues.
- [43] There will be a parenting coordinator appointed for an initial period of two years. The parties will select an individual from the BC Parenting Coordinators roster and a parenting coordinator will be appointment by written agreement between the parties.
- [44] The duties are responsibilities of the parenting coordinator will be as follows:
1. (a) to promote the best interests of the children;

- (b) to help the parties resolve parenting issues in a way that is intended to minimize parental conflict and in a child-focused manner;
 - (c) to help with the implementation, maintenance and monitoring of the duties and responsibilities of the parties as set out in the Separation Agreement dated September 17, 2009, and the court order made May 31, 2010;
 - (d) to help resolve anticipated or actual conflicts in the Regular Parenting Schedule Arrangements; Special Parenting Schedule; Vacation and Travel Arrangements;
 - (e) to help facilitate the children's relationship with each of the parties;
 - (f) to help the parties communicate more effectively;
 - (g) to help with the exchange of information about the children (for example, their health, welfare, education and religion) and their routines;
 - (h) to make decisions that resolve conflicts about the children's participation in extra-curricular activities and programs;
 - (i) to make rules that will assist the movement of the children between the households of the parties; and
 - (j) to make rules that resolve conflicts concerning the children's day to day healthcare and education matters, passports, activities, religious education, and events that are not otherwise addressed in the Separation Agreement.
2. The parenting coordinator's duties and responsibilities will also extend to providing the parties with guidance as to the timing and process by which they should introduce new partners to the children.
3. The parenting coordinator has the authority to:
- (a) require that the parties or the children meet with him/her at the times and for the frequencies that s/he directs;
 - (b) require that the parties or the children participate in coaching in order to improve communication between the parties or the children;
 - (c) require that the parties or the children attend counselling with a counsellor, at the times and for the duration that the counsellor may require; and
 - (d) consult with or obtain information from third parties, including the parties' lawyers, family members, third party caregivers, school personnel, therapists and health care professionals.
4. When the parenting coordinator makes decisions or rules pursuant to this Order, s/he shall deliver a written statement of that decision or rule to the parties. This may be done through e-mail.

5. If either party is dissatisfied with the decision or rule of the parenting coordinator, they may apply to this Court for a review of that decision or rule, at which time the decision or rule may be affirmed or varied.
6. The terms of the appointment of the parenting coordinator are as follows:
 - (a) the length of the appointment is for at least two years and that the term may be lengthened by court order, or by the written agreement of the parties subject to the following conditions:
 - i. each party must have advised the parenting coordinator and the other party, at least two months before expiry of the parenting coordinator's term, whether that party wants to renew the parenting coordinator's appointment; and
 - ii. the parenting coordinator has the option not to renew the appointment.
 - (b) the person appointed as parenting coordinator may, with leave of the Court, withdraw at any time, having provided the parties in writing with reasonable notice (30 days if possible) of this intent and the reason or reasons for it;
 - (c) the person appointed to act as parenting coordinator may be changed at any time to a different person by order of the Court or by written agreement of the parties;
 - (d) if the person appointed as parenting coordinator is changed, all of the provisions set out in these Reasons apply to the newly appointed person;
7. The payment of the fees of the parenting coordinator is a special expense within the meaning of s. 7 of the Federal Child Support Guidelines. Each party will pay their proportional share of that expense. The parenting coordinator may in his/her discretion allocate the fees differently between the parties.
8. In the event that the parties return to court to litigate issues concerning the children, none of the work done by the parenting coordinator is privileged or confidential, and s/he may be compelled to give evidence by either party or the Court about any matter relating to that appointment.

"Loo J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/11/05/2011BCSC0507.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/sukul-v-sukul-2011>

Prepared on 25 October 2026 · Esheria