

CANADA / JUDGMENT

Thibeault v. Thibeault

2007 BCSC 999

COURT

Supreme Court of British Columbia

DECIDED

5 March 2007

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2007 BCSC 999 Thibeault v. Thibeault IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Thibeault v. Thibeault, 2007 BCSC 999 Date: 20070305 Docket: 15969 Registry: Cranbrook Between: Joseph Claude Michel Thibeault Plaintiff And: Sheila Kathy Marie Thibeault Defendant Before: Master Bolton Oral Reasons for Judgment In Chambers March 5, 2007 Counsel for the Plaintiff: R. Buddenhagen Counsel for the Defendant: S. Rosenberg Place of Trial/Hearing: Cranbrook, B.C.

- [1] THE COURT: This is an application to vary maintenance in respect of four children of the parties. The parties began living together in 1985. They were married in 1990. They separated in December of 2004 and were divorced in January 2006. The maintenance was set, not by the divorce order but by separation agreement, following a judicial case conference in July 2006. I am satisfied that as a master, therefore, I do have jurisdiction to hear this application to vary the maintenance set by the separation agreement.
- [2] The parties, I believe, live in Sparwood. The circumstances following the separation were, for a considerable time, that the eldest of the four children lived pretty much full-time with the plaintiff father. The second eldest lived pretty much full-time with the defendant mother, and the two younger children lived four days with one and four days with the other.
- [3] In the fall of 2006, the plaintiff assaulted the defendant and broke her nose. One of the younger children saw the immediate aftermath of the assault and, as a result, has said that she is not going to live with her father any more. So, since about September of last year, the situation basically is that one child is with the father pretty much full-time, two children with the mother pretty much full-time, and one splits her or his -- I am afraid I am not sure which one of the children --
- [4] MR. BUDDENHAGEN: It's the youngest. It's Koby, Your Honour.
- [5] THE COURT: Thank you. Koby, the youngest, splits his time between the two households.

- [6] The parties are not all that far apart on the question of maintenance. They do agree that essentially it should be based on a point midway between two children and three children for the father to pay maintenance, and midway between one child and two children for the mother to pay maintenance, and then the two amounts offset. There is no dispute that the mother's income is currently about \$24,000 a year.
- [7] The only real dispute is with regard to the father's income. He calculated his income at something slightly over \$91,000, based on a recent letter from his employer. It is clear that this is his base income and that it is an increase from previous years. In all four of the years from 2002 to 2005, for which we have figures, he earned fairly considerably in excess of his base income, ranging from a low of just short of \$94,000 in 2002 to almost \$102,000 in 2005. The exact amount of his earnings is uncertain, but I do accept that it is going to be more than the \$91,200 spelled out in the letter from the employer.
- [8] Counsel for the wife has worked it out on the basis of \$101,700 which is the last complete annual figure that we have. In my estimate, a reasonable case -- in fact, a good case -- could be made to suggest that it is likely to be even more than that, since the \$101,700 was presumably based on his previous base salary of eighty odd thousand dollars a year. The base is going to be higher, so if the number of hours overtime stays the same, then his total earnings should be even more than \$101,000. But since that is the figure used by the defendant in her calculations, I am not going to increase it myself. I am, however, satisfied that her figure is the more accurate of the two presented to me, because in the absence of any evidence that overtime is not likely in 2007, a reasonably proportionate amount of overtime based on prior year's experience should be assumed.
- [9] So, I do find that the income of the plaintiff for Guideline maintenance purposes is \$101,700. It follows that the calculations of the defendant are correct, and maintenance should, therefore, be set on the premise that I have already given, the difference between two and a half and an offset for one and a half children based on \$24,000 a month for the defendant's income. This amounts to \$1,467 per month, and there will be an order that effective April 1st, 2007, child maintenance will be set at \$1,467.
- [10] So far as retroactivity is concerned, in many ways it might be appropriate to make the order retroactive to September when the situation changed following the assault and the decision of Kassidy to stay with her mother more or less full-time, but I do accept that the delay in bringing the application, although it certainly can be excused in many ways as a result of simply trying to deal with the new situation on the part of the mother, but to some extent, it would be unfair to make it retroactive when he has incurred obligations in the expectation that maintenance would continue on the basis of the separation agreement until the motion was filed. The motion was filed in late January.

- [11] I am doing the best I can to ensure fairness to both sides, and I think that it should be retroactive to January 1st. So, there will be an order that retroactive payments for March, February and January 2007 be made, which as I understand it, will be the difference between fourteen sixty-seven per month and nine eighty-three per month, which is --
- [12] MR. BUDDENHAGEN: Actually, Your Honour, it was nine eighty-six. I've got the copy of the separation agreement here.
- [13] THE COURT: Okay, that is fine, but it is nine eighty-three in this document.
- [14] MR. BUDDENHAGEN: Oh, sorry, yes.
- [15] THE COURT: Nine eighty three? Nine eighty-three or nine --
- [16] MR. BUDDENHAGEN: No. No, we'll accept that.
- [17] THE COURT: All right, nine eighty-three. So, the difference then is \$484 for three months to be payable in full no later than June 1st.
- [18] So far as special expenses are concerned, this is really quite difficult on the evidence here, given the various needs of the various children. Counsel for the father is quite correct when he says that not every extracurricular or educational expense qualifies as extraordinary. Some of them must be deemed to be included in the basic child maintenance, but it seems to me that hockey, almost by definition, is going to be an extraordinary expense unless the income of the payor, and therefore the maintenance for the child or children, is extremely high simply because hockey is such an expensive pastime compared to other things such as soccer or baseball where the expenses for equipment and the grassy equivalent of ice time are relatively low.
- [19] In addition, there do seem to be other expenses for music which tend to be somewhat more expensive than usual, perhaps because of the need to buy expensive instruments, and it is simply not possible to deal with those on an item by item basis. Quite certainly, expenses such as school yearbooks and relatively routine school expenses should be deemed to be included in the basic maintenance. As well, of course, it has to be remembered that the plaintiff father is going to be pretty much exclusively responsible for extracurricular activities of the eldest child in his more or less full-time care.
- [20] It seems to me that the appropriate result here is to order maintenance of \$2,400 a year or \$200 a month without specifying exactly what it is for, to have the order to go on to require the defendant mother to provide copies of all invoices for which she considers to be extracurricular activities or school expenses covered by this payment to the defendant and, if at the end of any year, the total expenses amount to more than \$3,600, the defendant will have liberty to apply for additional payments. If it is less than \$3,000, the plaintiff will have liberty to apply to reduce the payments for the following year. That, obviously, assumes some obligation on the mother as the well father to contribute to those expenses. In my view, that should not be retroactive and the first payment for extraordinary expenses will be

effective on April 1st.

- [21] In the absence of any response to the affidavit of the defendant dealing with the necessity for her getting her own prescription for Kolby, that seems to result from silliness on the part of the plaintiff in not providing adequate stocks of medication for Kolby to the mother. So, I am satisfied that he should pay \$121.56 as set out in paragraph 17 of the second affidavit of the defendant, and that will be payable forthwith. And I express the hope that the silliness will not continue; that he, given his access to drug plans, will continue to fill the prescription and provide a reasonable stock to the plaintiff so she is not faced with having to get her own prescription from time to time.
- [22] Subject to anything further from counsel, I think that that deals with everything before the court today. Ms. Rosenberg.
- [23] MS. ROSENBERG: Yes, it does cover everything.
- [24] THE COURT: Mr. Buddenhagen.
- [25] MR. BUDDENHAGEN: Nothing further, Your Honour.
- [26] THE COURT: All right, that is the order, thank you. "Master Bolton"

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Prepared on 29 October 2026 · Esheria