

CANADA / JUDGMENT

Wheeler v. Wheeler

2014 BCSC 789

COURT

Supreme Court of British Columbia

DECIDED

7 May 2014

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

2014 BCSC 789 Wheeler v. Wheeler IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Wheeler v. Wheeler, 2014 BCSC 789 Date: 20140507 Docket: E011369 Registry: New Westminster Between: Rhondalee Joan Wheeler a.k.a. Rhondalee Wheeler Claimant And Angus Wallace Wheeler a.k.a. Angus Wheeler Respondent Before: The Honourable Mr. Justice Crawford Reasons for Judgment Counsel for the Claimant: J.M. Dreyer The Respondent: No on appearing Place and Date of Hearing: New Westminster, B.C. October 22, 2013 and April 22, 2014 Place and Date of Judgment: New Westminster, B.C. May 7, 2014

Introduction

- [1] On February 28, 2013 Mr. Justice Whalen in the Supreme Court of Newfoundland and Labrador Trial Division, made an order varying the Supreme Court of British Columbia's order of October 4, 2006.
- [2] The order of October 4, 2006 was a consent order wherein Mr. Wheeler's Guidelines income was found to be \$77,500 and his child support obligation pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Federal Child Support Guidelines was \$1,000 per month.
- [3] The children of the marriage were Nathan, born November 1989 and Keisha, born September 1994, both of whom were living with Ms. Wheeler.
- [4] The parties had divorced March 31, 2003.
- [5] In 2007 Mr. Wheeler earned \$81,194 but in December of that year he left British Columbia hurriedly to return to Newfoundland where, according to his tax returns he has been on social assistance ever since.
- [6] In January 2009 the daughter, Keisha, came to Newfoundland to live with her father and in April 2012 Keisha says her father evicted her.
- [7] Not until January 2013 did Mr. Wheeler apply to the Court to "change" the support order.
- [8] According to FMEP records the outstanding child maintenance owing was \$28,070.72. The Newfoundland Court Hearing

- [9] Whalen J. heard from Mr. Wheeler who in effect told the Court he had been unemployed since he came to Newfoundland in December 2007 and that his earnings were as follows: 2008 \$3,813 2009 \$12,812 2010 \$14,248 2011 \$14,397 2012 \$12,108
- [10] The tax returns state the principal taxable income was social assistance.
- [11] In accordance with the FMEP record, the Court found that as of January 2008 the outstanding arrears were \$14,412, that no support monies were payable as Keisha had been living with her father for 2009, 2010 and 2011, and that based on Mr. Wheeler's income for 2012 and 2013 the respective amounts would be \$205 and \$162, for a total of \$21,779.
- [12] From that total the Court deducted the monies that had been paid or garnisheed in the amount of \$5,882.50 leaving an outstanding arrears amount of \$15,957.
- [13] The Court then stayed enforcement and forwarded the file to British Columbia to take evidence from Ms. Wheeler as to her circumstances, assuming the mother had income from a hairdressing business and given Mr. Wheeler's advice that no support payments had been made to him. The assumption was that there should in effect be a claim for child support by Mr. Wheeler (though no such claim had been advanced by him) and that there would be a set-off in support monies to arrive at a net amount owing, if any.
- [14] I note again that Mr. Wheeler did not apply for child support from Ms. Wheeler.
- [15] As it turned out Mr. Wheeler probably had good reason for not directly making the claim to the Court. The British Columbia Court Hearing
- [16] The British Columbia court hearing was set for October 22, 2013 and adjourned generally and finally heard April 22, 2014. Evidence Advanced by Ms. Wheeler
- [17] Three affidavits were filed, one from Ms. Wheeler, one from the daughter Keisha, and one from the maternal grandmother, Maisie Wheeler.
- [18] Ms. Wheeler noted that she and Mr. Wheeler married in Newfoundland in 1990 and the children were born 1989 and 1994. The family moved to Langley, BC in April 2000, where she secured work with Canadian Airlines and Mr. Wheeler secured employment at a lumber company and was soon promoted to a supervisory position. Unhappily however, they separated soon after they moved to British Columbia and were divorced in March 2003.
- [19] Mr. Wheeler's move from British Columbia in late 2007 came without warning, save that Ms. Wheeler's affidavit indicates "he told me he got messed up with the wrong people because he owed them money on account of his gambling". That led to a discussion about potential danger for Ms. Wheeler and the children but soon after she noticed she had been followed and on one occasion her daughter Keisha was stopped by three men asking where her father was.

- [20] Ms. Wheeler says she called Mr. Wheeler's mother in Newfoundland seeking Mr. Wheeler. Mr. Wheeler called back and said he was in Newfoundland, but assured her no harm would come to her or the children. She concluded Mr. Wheeler had been obliged to leave British Columbia as his physical safety was at risk.
- [21] Ms. Wheeler's employment with Canadian Airlines ended in 2002 and she retrained as a hairstylist and has been employed part-time at a hair salon in Langley for seven years.
- [22] Her income for the years listed is as follows: 2008 \$26,846 2009 \$32,800 2010 \$32,285 2011 \$24,900 2012 \$14,561
- [23] She has a common law partner employed as an avionics technician.
- [24] With respect to their son Nathan, he stayed at home until January 2011 when he was then age 22. Nathan had graduated from high school in June 2007, turned 19 in November 2008, but continued to take business and criminology courses at Kwantlen College in Langley and Surrey, completing two years of study and as noted left the matrimonial home in January 2011 and is now working as an oil rig machine operator. Ms. Wheeler says Nathan was dependent on her for 2009 and 2010.
- [25] Keisha continued to reside with Ms. Wheeler until January 2009, but at age 15 went through serious emotional and social challenges, railing against her mother's discipline, skipping school and the like, and thus Keisha determined to move to Newfoundland as she had enjoyed the family relationships that she had found there. In the end Ms. Wheeler says she became convinced that was a better choice and Ms. Wheeler and her partner paid for Keisha's flight to Newfoundland.
- [26] However, throughout 2009 until Keisha's return in October 2012, Ms. Wheeler supported Keisha financially, sending money through Keisha's grandmother. That basic amount was \$50 a week or \$2,600 per year.
- [27] As well, Ms. Wheeler provided another \$1,000 a year when her grandmother visited BC. Other monies were also forwarded when it was apparent there was a lack of food at Keisha's house or her father was away, or otherwise when Keisha needed money.
- [28] That method of support, according to Ms. Wheeler was due to the concern about Mr. Wheeler's ongoing gambling. Also, Ms. Wheeler paid for Keisha to come back to Langley twice a year and on her return she would provide her with new clothes, shoes, cosmetics and the like, including bedding, towels, and wash clothes.
- [29] Also, Ms. Wheeler visited Newfoundland approximately twice a year.
- [30] For graduation Ms. Wheeler attests to spending approximately \$1,000 on a graduation dress, shoes, accessories, hairstyle and makeup and as well including grad photos and parties.
- [31] Also, Ms. Wheeler paid for Keisha's driver's training, some \$300, driver's licence fee, \$75, and a \$200 cellphone.

- [32] Ms. Wheeler deposed that in or about April 2012 Mr. Wheeler evicted Keisha and she moved to Gander living with another young lady and obtained part-time employment but throughout that time, April to October 2012 Ms. Wheeler and her partner sent \$500 per month to support Keisha.
- [33] Finally, in October 2012 Keisha returned to Langley. Keisha turned 19 in September 2013. Keisha has a boyfriend and he and Keisha rent a basement suite in Ms. Wheeler's house.
- [34] As to Mr. Wheeler, Ms. Wheeler says he is 45 years of age, tall, strong, and in good health.
- [35] She asserts Mr. Wheeler worked steadily in Gander and the surrounding community with his brother, Nevil Wheeler, as a plasterer and painter in a business she believes is run by the brother.
- [36] She also relies on a statement made on one occasion when Mr. Wheeler drove her to the airport when she was visiting Newfoundland and he advised her that he was painting and plastering multiple homes in a new subdivision in or near Gander and had worked in the subdivision all summer.
- [37] She also said that he had not opened a bank account as any monies there could have been garnisheed pursuant to the child support order.
- [38] The daughter Keisha also swore an affidavit and confirmed that she had been accosted by three men after her father left in 2007 and they asked her where he had gone; that her reasons given for moving to Newfoundland were as stated by her mother; that her mother and partner paid for her travelling; that her grandmother provided her \$50 a week while she was residing in Newfoundland and additional monies also came from grandmother to assist with food, clothing, and toiletries, because her father could not always provide food and sometimes he was away at work and there was "nothing to eat in the house"; that her father provided her no money when she asked and she was told to call her mother or grandmother; and she confirmed the additional supplies provided by her mother including the costs of graduation, driver training, driver's licence, and cellphone.
- [39] She also confirmed the support from her mother at some \$500 per month until she returned to British Columbia in October 2012.
- [40] She asserts her father did not tell the truth to Mr. Justice Whalen when he said he did not work. She deposes "he and my uncle worked all the time doing painting and plastering. Most mornings when I got up to go to school, he was already gone to work. He often came home from work later at night between 7:00 p.m. to 8:00 p.m. and sometimes later and sometimes not at all": para. 8.
- [41] The grandmother, Maisie Wheeler also provided an affidavit sworn April 18, 2014 and confirms that she was the conduit for the money provided to Keisha while she was in Newfoundland.

- [42] She also said she had seen Mr. Wheeler on various occasions at the club (bar) playing slot machines which gave her concern to see him gambling money he maintained he did not have to provide for Keisha.
- [43] She reported her son had lent Mr. Wheeler \$20,000 which had been gambled away and only some \$5,000 repaid.
- [44] As well, she said it was well known within the community that Mr. Wheeler and his brother, Nevil secured work in and around her community and the nearby community of Gander, and in a new subdivision in Gander doing plastering and painting, as self-employed individuals. She says she often saw Mr. Wheeler and his brother in their work clothes going to various work sites.
- [45] She noted that in spite of Mr. Wheeler telling Keisha he had moved to smaller accommodation and therefore she had to move out, in fact, Mr. Wheeler stayed on in the home he occupied and now has a girlfriend living with him. She also confirmed the monthly allowance and other payments that Ms. Wheeler made to Keisha through her. Ms. Wheeler's Guidelines Obligation Year Ms. Wheeler's Income Monthly Child Support Yearly Child Support 2009 \$32,800 \$306 \$3,672 2010 \$32,285 \$310 \$3,720 2011 \$24,900 \$229 \$2,748 2012 \$14,561 \$88 \$350 (for four months) Total: \$10,490
- [46] However, Ms. Wheeler's evidence is that she paid \$50 per week or some \$2,600 per year for 2009, 2010, 2011 and \$866 for the first four months of 2012, for a total of \$8,466. There is additional evidence of payments of \$500 a month through to October (\$3,000) plus additional payments each year of some \$4,000, plus graduation costs of \$1,000, in total, exceeding \$13,000.
- [47] Thus Ms. Wheeler's obligation under the Guidelines appears well met. Argument
- [48] Ms. Dreyer made reference to Madam Justice Arnold-Bailey's judgment in *Sidhu v. Sidhu*, 2014 BCSC 296 [Sidhu] for legal principles governing proceedings seeking confirmation of a provisional order from another province.
- [49] Ms. Dreyer argued Mr. Wheeler had proven ability to earn substantial income and there was no explanation for his failure to earn a substantial income in Newfoundland, and that the evidence was in fact that he was earning income and not declaring it.
- [50] As to Ms. Wheeler's obligation to pay child support, it was submitted that had been provided, though not directly to Mr. Wheeler. As well it was noted Mr. Wheeler had not brought any timely application for Keisha's support, but rather, after waiting until Keisha had returned to British Columbia, he then brought an application to reduce arrears.
- [51] It was submitted support for Nathan, the son, did not end until December 2011.

- [52] In further submission it was suggested that if a material change in circumstance was found as appropriate under the Divorce Act and the Guidelines, there should be an order for child support for one child of \$711.92 per month based on the original order.
- [53] In sum it was submitted that there should be no cancellation of arrears prior to January 2009, that Ms. Wheeler had paid for Keisha's support, and that given Mr. Wheeler's 2007 income of \$81,194, the support order should be changed to \$711.92, to continue to November 2013 when Keisha was no longer a child of the marriage. Discussion
- [54] I note Arnold-Bailey J.'s comments at paras. 32-35 in Sidhu which I now reproduce:
- [32] The Divorce Act provides for confirmation hearings of this nature in s. 19(7): Subject to subsection (7.1), at the conclusion of a proceeding under this section, the court shall make an order
- (a) confirming the provisional order without variation;
 - (b) confirming the provisional order with variation;
 - (c) refusing confirmation of the provisional order.
- [33] This Court must consider the Alberta court decision and determine whether it should be confirmed, confirmed with variation, or not confirmed. This requires the Court to consider the evidence that has been presented to both courts and determine whether the applicant has met the operating legal test.
- [34] The Divorce Act does not provide for how the "second" court ought to treat findings of fact made by the "first" court, but the case law suggests that the second court is entitled to make its own findings of fact based on all of the evidence it has received, including the additional evidence from the confirmation hearing. Ultimately, the second court must decide the case on its merits and determine whether it agrees with the first court's decision (see R.D.O. v. C.J.O., 2003 BCSC 804; Neufeld v. Neufeld, 2006 BCSC 1850; Young v. Young, 2011 BCSC 1712).
- [35] Before turning to the issues in this case, I note the recent BC Court of Appeal decision *Burgie v. Argent*, 2013 BCCA 247, in which the court made disparaging comments about these types of confirmation proceedings, calling them "unwieldy and unsatisfactory" as they pose a variety of problems. The court noted, "[t]he requirement of proceedings before two courts, each of which often hears only one side of the story, inevitably engenders delay, and has attracted judicial euphemisms such as 'ping-pong mechanism' and yo-yo process " (at para. 18). Those comments are particularly apt in relation to the present case. The provisional order made March 30, 2012, will be almost two years old by the time the present reasons are handed down, having come on for hearing in BC on November 18, 2013.

- [55] I need to consider whether indeed there has been a change of circumstances as stipulated in s. 17(4) of the Divorce Act which reads: Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order. [Emphasis in original.]
- [56] There is no question there has been a material change in circumstances. Mr. Wheeler fled British Columbia for the safety of Newfoundland and there was a substantial decrease in income but since 2008 he has ostensibly been living on social assistance. That evidence, however, is clouded by the assertions of Ms. Wheeler, her daughter, and her mother that Mr. Wheeler is in fact working and not declaring income.
- [57] There is a heavy onus on Mr. Wheeler which is described by Madam Justice Martinson in *Earle v. Earle*, 1999 BCSC 283:
- [22] Because cancellation or reduction of arrears is a form of variation, there is a substantial onus (a heavy duty) on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances.
- [58] Martinson J. went on to say that not only must the change be significant and long lasting, that the change is real and not a choice, and that every effort was made to earn money during the time in question and those efforts were not successful.
- [59] It is said he is healthy and strong and in his mid-40's, and earning income that is not declared as well as taking social assistance from the local authority.
- [60] No explanation was given as to Mr. Wheeler's inability to work and to only take social assistance. I am not satisfied Mr. Wheeler has made full disclosure to the Newfoundland Court.
- [61] Ms. Dreyer suggests I continue the income ability shown by Mr. Wheeler in 2007. While initially attractive, I am obliged to deal with the reality of being distant from Newfoundland and needing to make a sensible decision. Even if I accept the assertions made by Ms. Wheeler's daughter, I am limited by the rather vague evidence from her and indeed Ms. Wheeler and Maisie Wheeler, for it is not plain whether the subdivision development in or around Gander has been for several years or perhaps one summer. Rather I suspect it has been seasonal employment at variable rates.
- [62] I also take into account the social assistance payments and I will impute an income of \$35,000 per annum from 2008 onwards, which gives rise to support for one child for: Year Income Monthly Child Support Annual Child Support 2009 \$35,000 \$326 (x 12 months) \$3,912 2010 \$35,000 \$326 (x 12 months) \$3,912 2011 2012 \$35,000 \$326 (x 2 months) \$652 2013 \$35,000 \$318 (x 9 months) \$2,862 Total: \$11,338
- [63] To the total of \$11,338, we add \$14,412 and from that we deduct \$5,989.75, for a total of \$19,760.25 arrears of child support owing by Mr. Wheeler.

[64] It is trite law but it is to be remembered that these monies reflect the obligation of a parent to a child, that parents have a joint legal obligation to support their children and that maintenance is the right of the child, not the parent with custody, and maintenance is not based on what a payor parent earns, but what they have the ability to earn: see Earle paras. 15-18.

Conclusion

[65] I confirm the provisional order but with variation. Whalen J. had set the amount at \$15,957.50, plus interest and then deducted \$164.25.

[66] I find there is no set-off owed by Ms. Wheeler; that Mr. Wheeler owes Ms. Wheeler for child support \$19,760.25, plus interest. The stay order is set aside.

[67] In addition there will be an order that these reasons together with the supporting affidavit evidence and order of the Court are to be returned to Newfoundland with all due speed after the order is entered. "The Honourable Mr. Justice Crawford"

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/14/07/2014BCSC0789.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/wheeler-v-wheeler-2014>

Prepared on 25 October 2026 · Esheria