

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

M.R.B.

Plaintiff

AND:

J.L.B.

Defendant

BEFORE MR. JUSTICE BALLANCE

Heard: July 3, 2003
Judgment: December 31, 2003
Docket: Victoria 94-4866

Counsel:

James A.S. Legh for Plaintiff
Kathleen M. Birney for Defendant

INTRODUCTION

1 This is an application brought by the plaintiff, M.B., to vary an order made by Mr. Justice Williamson on June 29, 2001 respecting the imputation of income and the resulting child support obligations and to cancel or, alternatively, reduce the arrears in child support payments. The plaintiff further seeks to set aside or vary an order made by Mr. Justice Wilson on April 17, 2001 by which the plaintiff was ordered to pay to the defendant, J.B., the lump sum amount of \$5,000.00 for failing to make adequate financial disclosure. The plaintiff also initially applied to set aside a \$300 order for costs made against him, however, during the course of the hearing, his counsel confirmed that he was not pursuing that relief.

BACKGROUND SUMMARY

2 The parties have four children namely:

- K.M.B., born September 25, 1983;
- S.A.B., born September 11, 1985;
- L.N.B., born August 19, 1987; and
- K.J.M.B., born July 3, 1991.

5 The plaintiff is a self-employed long-haul truck driver. He travels across North America including the United States. He operates his business through KNDV which he owns exclusively. He is currently 40 years old. He has a fifth child by a different relationship and pays monthly support in the amount of \$100 in respect of that child.

6 An order for child support in this matter was made on June 27, 1995. A number of years later in July 1999 the defendant sought an order that the plaintiff provide a Property and Financial Statement and that the 1995 order be varied. A review of the history of these proceedings indicates that the hearing of the defendant's application was adjourned on numerous occasions, primarily because the plaintiff had repeatedly failed to fully disclose his pertinent financial information.

7 The defendant's application ultimately came on before Mr. Justice Wilson on April 17, 2001. Approximately one month before that date, the plaintiff's lawyer had withdrawn as counsel. The plaintiff did not appear at the April 17 hearing. Mr. Justice Wilson adjourned the hearing but ordered that the plaintiff forthwith pay to the defendant the sum of \$5,000.00 for failing to provide sufficient financial disclosure pursuant to section 92 of the *Family Relations Act*, R.S.B.C. 1996, c. 128. Also at that time, Mr. Justice Wilson ordered the plaintiff to make further financial disclosure by a certain date. The plaintiff neglected to do so within the time specified.

8 On June 29, 2001 the plaintiff, acting on his own behalf and the defendant, represented by counsel, appeared before Mr. Justice Williamson. During the course of that hearing the plaintiff filed his Property and Financial Statement. Although it is not entirely clear on the material before me, it appears as though the plaintiff did not file along with his financial statement the ordinary supporting documentation such as three years of previous income tax returns.

9 Mr. Justice Williamson imputed to the plaintiff an annual income of \$85,000.00. He ordered that the plaintiff pay the *Guideline* amount of child support based on that imputed income in respect of three of the four children of the marriage from October 15, 1999 to May 15, 2000 inclusive, and in respect of all four children from June 15, 2000 forward. The reason for the above distinction was that the eldest child, Kevin Burgess, had resided with the plaintiff for the period of October 15, 1999 through May 15, 2000 and thereafter began residing with the defendant.

10 Paragraph 4 of Mr. Justice Williamson's order provides as follows:

The Plaintiff shall have liberty to apply to vary this Order so long as, fourteen (14) days before the hearing, he provides the Defendant with a copy of each of the following documents:

- (a) His three most recent income tax returns;
- (b) His most recent annual financial statement for his trucking business;
- (c) His three most recent monthly financial statements for his trucking business;
- (d) Any contract which he has with any company for which he provides driving/trucking services;
- (e) His Affidavit explaining his business expenses; and
- (f) In the event the Plaintiff proposes to submit to the Court that his depreciation expenses ought reasonably to be deducted from his business income, any documents with respect to the purchase or lease and any supporting documents with respect to the capital cost of his trucking business.

11 In my view, the clear intention and effect of paragraph 4 of Mr. Justice Williamson's order is that he explicitly left it open to the plaintiff to seek a variation on condition that he first provide the stipulated financial information to the defendant. On a plain reading of paragraph 4 the plaintiff is entitled to bring this variation application without having to first demonstrate a material change of circumstances. The approach adopted by Williamson J. was fair and reasonable given the ongoing neglect on the part of the plaintiff to make complete and proper financial disclosure. It is not disputed that the plaintiff has now complied with the disclosure requirements imposed upon him by paragraph 4 of Mr. Justice Williamson's order.

12 The defendant alleges that the plaintiff overstates his expenses and understates his current income and means. In support of her contention she identifies a number of purported inconsistencies in the plaintiff's financial materials filed in respect of this application. I have carefully considered the points noted by the defendant as discrepancies and have concluded that there is only one discrepancy of any substance namely, the amount of the plaintiff's monthly draw for the year 2002. In this regard, the plaintiff deposes that he received a draw of \$1,000.00 per month from his trucking business. However, the materials which he filed indicate on balance that his monthly draw in 2002 was \$2,000.00 rather than \$1,000.00 and I find the plaintiff's attempted explanation in respect of this discrepancy to be unsatisfactory. This apparent understatement of income is of particular concern in light of the fact that the plaintiff says that his income in 2002 is significantly less than in previous years. I otherwise accept that the plaintiff's income for the purposes of the *Guideline* as noted in line 150 of his personal income tax returns for the years 1999 through 2002 inclusive. Those amounts are as follows:

1999 \$27,712.33

2000 \$22,390.17

2001 \$20,942.38

2002 \$ 5,392.94 To this amount I would add an additional \$12,000.00 to reflect a monthly advance of \$2,000.00 to the plaintiff for a total *Guideline* income in 2002 of \$17,393.00.

13 In the circumstances of this case I consider it appropriate to vary retroactively the amount of child maintenance to accord with the plaintiff's actual income in the pertinent years as opposed to the imputed income upon which the maintenance order was initially based. (*Thompson v. Dorn*, [2000] B.C.J. No. 315 (B.C. Master)). As observed earlier, it is my view that the inclusion of paragraph 4 in Mr. Justice Williamson's order expressly contemplated the potential of such a variation being made retroactively.

14 The defendant deposes that their son, K.M.B., resided with her from June 2000 until April 2002. The latter date is disputed by the plaintiff who says that K.M.B. moved out on his own in June 2001. The plaintiff's evidence is corroborated by K.M.B. who independently deposes that he indeed moved out of his mother's home in June 2001 and has been financially supporting himself since that time. K.M.B. is presently 20 years of age. I accept the evidence of the plaintiff and his son concerning this timeframe.

15 Based on the foregoing I find that the plaintiff's *Guideline* income and obligation to pay child support is as set out below:

16

	INCOME	PAYMENT PERIOD	GUIDELINE AMOUNT
1999:	\$27,713	Oct. 15 - Dec. 15, 1999	\$547 per month (3 children)
2000:	\$22,391	Jan. 15 - May 15, 2000	\$443 per month (3 children)
2000:	\$22,391	June 15 - Dec. 15, 2000	\$535 per month (4 children)
2001:	\$20,943	Jan. 15 - June 15, 2001	\$503 per month (4 children)
2001:	\$20,943	July 15 - Dec. 15, 2001	\$416 per month (3 children)
2002:	\$17,393	Jan 15 - Dec. 15, 2002	\$347 per month (3 children)

17 I make an order retroactive to June 29, 2001 for the payments as set out above.

18 The materials do not provide a reliable basis upon which to predict the plaintiff's income for 2003. In his Notice of Motion he offers to pay the sum of \$400 per month for the 2003 year in respect of the children other than K.M.B. That amount corresponds to a *Guideline* income in the area of \$20,100. That amount of income is consistent with past years and, accordingly, I order that the plaintiff pay child support in the amount of \$400 per month payable on the 15th of each month commencing January 15, 2003 and continuing until further order of this court.

19 I also order that the plaintiff provide a copy of his 2003 T1 personal income tax return together with all supporting documentation to the defendant no later than May 15, 2004 and provide the related notice of assessment within thirty days of the plaintiff's receipt of it.

20 It appears that even taking into account the reduced amounts of child support payable by the plaintiff as varied retroactively, the plaintiff may still be in arrears. There is a heavy onus on the plaintiff to show that there has been a significant and long-lasting change in circumstances in order to justify a reduction or cancellation. The courts are generally reluctant to reduce or cancel arrears and under the *Family Relations Act* will only do so if it would be grossly unfair not to do so. (*Earle v. Earle*, [1999] B.C.J. No. 383 (B.C. S.C.)).

21 I am not satisfied that it is appropriate or justified to reduce or cancel any arrears in child support. In particular I am not satisfied that the plaintiff will be unable to pay those arrears in the future. However, I am prepared to suspend any and all enforcement proceedings in respect of such arrears for a limited duration of twelve full months commencing on the hearing date of July 3, 2003 and I make that order.

22 I turn next to the issue of the \$5,000 imposed upon the plaintiff by Mr. Justice Wilson pursuant to section 92 of the *Family Relations Act* for failing to fully comply with the requisite financial disclosure.

23 As mentioned earlier, the plaintiff was unrepresented at the time of the hearing before Mr. Justice Wilson and did not appear. He deposes that at the time he was travelling frequently and had tremendous difficulty attending court when required. In relation to the April 17 hearing in particular, the plaintiff says that he had by then collected his file from his former lawyer, but had not realized there was a hearing date scheduled. He telephoned the defendant's counsel the next day and learned that she had appeared before Mr. Justice Wilson the previous day. The plaintiff deposes that he believed that all of the information which the defendant had requested had been provided including his financial information, his property statement and the income tax returns which had been filed at that point in time.

24 The plaintiff's reasons or excuses for non-disclosure are to my mind insufficient. The requests for full financial information were made repeatedly over an extended period of time including a time where he was represented by counsel. In short, the plaintiff has had ample opportunity to make appropriate and full financial disclosure and has consistently neglected to do so. In the circumstances, I see no legitimate basis upon which I ought to set aside or vary Mr. Justice Wilson's order with respect to the imposition of the payment of the \$5,000 sum and I decline to do so. I am prepared, however, to suspend any enforcement proceedings in relation to the payment of such sum until July 3, 2004.

25 Each party is to bear their own costs.