# THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *D.L.D. v. R.C.C.,*
2013 BCSC 590

Date: 20130405
Docket: E122734
Registry: Vancouver

Between:

**D.L.D.**

Claimant

And

**R.C.C.**

Respondent

Before: Master Caldwell

In Chambers

## Reasons for Judgment

| | |
|---|---|
| Counsel for Claimant: | T.R. Bell |
| Counsel for Respondent: | T.L. Jackson |
| Place and Date of Hearing: | Vancouver, B.C.<br>March 7, 2013 |
| Place and Date of Judgment: | New Westminster, B.C.<br>April 5, 2013 |

[1] The competing applications before me mainly involve the occupancy of two large homes, personal and asset restraining orders, the potential sale of one of the houses, parenting arrangements for two children including the preparation of a custody and access report and support for the claimant and the children.

[2] The parties met in 2002/2003. The claimant was working at the Swedish Touch Massage Parlour in Vancouver and had a child, G.R.D., residing with her from a previous relationship; the respondent was and remains a self-employed architect. He also had two children from a previous relationship, both of whom lived with their mother, and for whom he paid support.

[3] The respondent supported the claimant financially from approximately August 2003 and they began living together in a marriage type relationship at some time between 2003 and August 2005 when the claimant and her son moved into the respondent's home on 140A St. in Surrey. The parties, together, had a son R.O.C.D., who was born in May 2005 and is now nearly 8 years old.

[4] The parties married on June 16, 2012 and separated sometime between July 6 and July 27, 2012.

[5] During the relationship, the respondent earned significant income of between $500,000 and more than $1,000,000 annually. His current financial statement indicates an income of $652,000 from his architectural company.

[6] The parties lived a lavish lifestyle. They own two properties in South Surrey each of which has a probable value of somewhere between $1.5 million and $2.5 million or more. They accumulated a stable of expensive vehicles including an Audi R8, Porsche Panamera and a Maserati GT and two boats, one an $800,000 yacht and the other a $100,000 ski boat.

[7] They have accumulated debt of almost $4 million and, according to the respondent's financial statement, have annual living expenses of in excess of $1 million.

[8] The claimant currently lives in the former matrimonial home on 140A St. while the respondent has recently moved into a new home which the parties have been building for more than a year. It is in the same general neighbourhood as the matrimonial home. The claimant seeks to retain the 140A home and opposes any attempt to sell it prior to a determination on asset division and support. The respondent submits that there is no possibility that the claimant will ultimately be entitled to that home in all of the circumstances and that it must be sold in order to get rid of approximately $1 million in mortgage and an associated monthly payment of some $5000. He is prepared to pay up to $2500 per month for the rental of a house for the claimant.

[9] Each of the parties levels significant criticism if not vitriol at the other.

[10] The claimant alleges that the respondent unilaterally cut off her access to cash and credit cards and thus her previous lifestyle; she says that he has denied her access to her cars, that he favours R.O.C.D. and has physically assaulted G.R.D. on more than one occasion, once by kicking him in the stomach and once by hitting him with a ski. She says, and the evidence supports, that the respondent “bugged” her Porsche in order to gain access to her private conversations and that he had experts of his choosing access her computer where he discovered and has now disclosed various intimate photographs of the claimant apparently in communication with a person in Florida with whom she now has a relationship. There are other allegations of misfeasance, name-calling of her and of G.R.D., infidelity and the like which are provided in great detail but which need not be specifically catalogued here.

[11] The claimant says that she has at all times been the primary caregiver to both children and that the respondent has been a disinterested parent at best, choosing instead to work long hours in order to provide financially for the family. In this regard she has provided supporting affidavits from her former employer, the spouse of that person and a former housecleaner attesting to her parenting role and abilities.

[12] The respondent alleges that the claimant is a self-absorbed online gaming addict who does little if anything to properly parent either of the children or to

manage the day to day operations of the household. He points to the fact that he has provided housecleaners and nannies at various times throughout the relationship because the claimant refused to do anything around the home, preferring to stay up until the wee hours of the morning playing online video games and then failing to get the children to school on time. He accuses her of name-calling aimed at him and at the children, infidelity and damage to or destruction of property. He says that on one occasion G.R.D. had a problem at school; when the claimant found out about it, her response was to throw G.R.D.'s computer to the floor, destroying it. G.R.D.'s apparent response was to throw an air fan into a wall in the home and then over a balcony onto a hardwood floor. The respondent says that this incident is indicative of the relationship between the children, especially G.R.D., and the claimant. In support of his allegations regarding the claimant's behaviour and her relationship with the children, the respondent tenders affidavits from two people who worked around the house or yard in past years and who depose to the types of communications they say they witnessed.

[13] The respondent also points to what he says are various acts of petty vandalism such as pouring liquid on his bed, spreading used cat litter on his desk and depositing broken eggs and dog feces on his Audi R8. He also alleges that the claimant has acted to completely frustrate all attempts to sell the 140A property and he provides evidence of the realtor in support of that allegation.

[14] Regarding the children, the respondent alleges that he has been an extremely active and involved parent with both children. He denies the allegations of abuse regarding G.R.D. and also allegations of sexual impropriety regarding his youngest daughter (age 20) which were levelled against him by the claimant. He says that he was an active and caring father in his first marriage and has continued that in this relationship; he provides evidence from his first wife to support this claim in glowing terms. He denies that the claimant has been a primary caregiver in this relationship and as noted above says that he has had to engage a series of housekeepers and nannies to care for the house and children.

[15] The parties agree that a custody and access report should be prepared; they disagree on the author with the claimant favouring Mary Korpach and the respondent favouring Michael Elterman.

[16] The claimant for the most part denies the respondent's allegations although both acknowledge that their behaviour could have been much better over the years and particularly since separation. In particular, she denies any knowledge regarding the acts of vandalism and she denies having taken various items of the respondent's personal belongings including a Piaget watch, his personal jewelry and a white gold wedding band. It is interesting to note in this regard that Tab 13(H) consists of various Facebook entries authored by the claimant including two, which read:

> D.L.D.: selling some name brand jewelry... if interested message me only :)
> (a third party enquires: Like from 5 and Dime?)
> D.L.D.: no lol...some cartier etc.)

[17] The timing of the entries puts them approximately three months post separation while they continued to live in the same house; the continuing chain of Facebook entries indicates the claimant's utter disdain and contempt for the respondent.

**PARENTING**

[18] The parties have agreed that at least on an interim basis they should share joint custody of both children pursuant to the provisions of the *Divorce Act,* R.S.C., 1985, c. 3 (2nd Supp.) and accordingly that order will go.

[19] The more difficult questions involve where the children will reside and who will make major decisions regarding them at least until the custody and access report can be completed and more likely until the matter can come to trial.

[20] The claimant submits that the *status quo* has been with her as the primary caregiver and that pursuant to the reasoning in the cases of *Prost v. Prost,* (1990) 30 R.F.L. (3d) 80 (BCCA), *Leung v. Leung,* (1998) 44 R.F.L. (4th) 121 (BCCA) and *Clement v. Locke,* [1997] B.C.J. No. 2602 (QL) (SC) that *status quo* should be

maintained pending trial unless there is actual risk to the children. She says that this is particularly so where, as here, there are major conflicts in the affidavit material.

[21] I do note that while these parties addressed most of their submissions on the concept of custody and claimed such relief under both the *Divorce Act*, and the *Family Relations Act*, R.S.B.C. 1996, c. 128, the new *Family Law Act,* S.B.C. 2011, c. 25., s. 37(1) directs that when dealing with parenting arrangements and guardianship the court “must consider the best interests of the child only.” It would seem from this statutory directive that such issues as *status quo* are to be considered in the context of and as one factor in determining what is in the child’s best interest and not as a form of trump card which overcomes all else but risk to the child.

[22] While I agree that the law is basically as stated above, I am unable on the material before me to agree that the *status quo* is as stated by the claimant. On the material it would appear more likely that the children resided in the home in the care of housekeepers and nannies and that each of the parents spent time with them as and when it was convenient. The material before me indicates that the respondent will be hiring a nanny to live at the new residence and to care for the children when he is at work; it also indicates that the claimant is not employed outside of the house and that as such she can be available to the children to the extent she has been in the past. Each of the parties have fulfilled some of the roles normally reserved for parents albeit often in conflict with one another; they should be able to continue in that regard while now living in separate houses.

[23] I also note that unlike the *Leung* case where the parties resided in Richmond and Coquitlam, these parties live almost around the corner from each other in the same neighbourhood and in virtually identical proximity to the children’s schools and activities.

[24] The residence of the children will be shared equally between the parties on a 7 day rotation, from Friday after school, 4:00 p.m. to the following Friday at 4:00 p.m. The party who has the children for the last half of the Spring Break will return the children to the other party as scheduled at the end of the Spring Break and that party

will have the children until 4:00 p.m. on Friday April 5 at which time the 7 on 7 off schedule will commence.

[25] The parties will both remain guardians of both children and will consult with each other as contemplated by the former “Master Joyce Model” and as now provided in the *Family Law Act,* ss. 39-45, however, in the event of an impasse the respondent shall have the right to final decision subject to the right of the claimant to apply to the Court challenging such decision.

[26] The parties agree to the preparation of a custody and access report and I agree that one is appropriate and in fact necessary in the circumstances of this case. While I have heard the claimant’s submission that Mary Korpach is located closer to the parties and the other individuals who will likely be interviewed in the preparation of this report, I am satisfied that Michael Elterman is available to prepare the report and has unequalled experience in dealing with such situations and assisting the court; he will prepare the report with the cost to be covered initially by the respondent but with liberty to the parties to argue as to the ultimate apportionment of cost at trial.

**THE HOMES**

[27] The home on 140A St. has been the matrimonial home throughout this relationship and is the only home R.O.C.D. has ever known until recently. The 32nd St. home has long been planned and under construction and is now occupied by the respondent. Since the hearing of this matter, the children’s time has been equally divided between the two houses.

[28] The respondent submits that he is unable to continue to pay the mortgages on both properties. He puts the total monthly payment at $13,000 of which approximately $5000 relates to the 140A home; that leaves $8000 as the payment towards his accommodation. He says that he is prepared to rent the claimant a home in the area for up to $2500 per month or less than a third of what he is content to pay for his own housing. In addition, the respondent continues to possess and

operate cars and boats which have hundreds of thousands of dollars of equity in them.

[29] I am not satisfied that it is either necessary or expedient, as those terms are considered in *Bodo v. Bodo,* [1990] B.C.J. No. 346, to order the sale of the 140A home at this time. It may ultimately be that both homes should be sold. I am satisfied that there is sufficient cash available from income and available assets to meet the mortgage obligations regarding both houses, particularly if after the award of spousal support the claimant becomes responsible for the mortgage payment on 140A. I note particularly in this regard that the difference between what the respondent is prepared to pay for rental accommodation for the claimant and the amount of the mortgage payment is only $2500 per month or less than $25,000 between now and trial. While this is a significant amount for most people, in the context of this case it is not prohibitive when considering that it allows the children to remain in familiar surroundings until trial and it is also an amount which can be considered by and adjusted for by the trial judge should he or she feel it appropriate to do so.

[30] The claimant will have exclusive occupancy of the 140A home and the respondent will have exclusive occupancy of the 32nd St. home; mutual restraining orders will prohibit each party from attending at the others home except as may be incidental to the residential issues regarding the children.

[31] In the circumstances of my decision on this issue it is unnecessary to consider the cancellation of the CPL and accordingly it will stay in place pending further order of the court or final determination at trial.

**CHILD SUPPORT**

[32] For purposes of support, I first look to the issue of the respondent’s income.

[33] The claimant says that his income should be set at just over $1 million as that was his total income for 2011, inclusive of a dividend payment of $375,000; failing that his income should be the average of 2009-2011 inclusive of dividend, a figure of $865,000.

[34] The respondent says that his income should be based only on his employment income as the dividends for the past few years have been targeted at the new house construction and that further dividends are not available in the current economic climate. He lists his 2011 employment income at $652,000, saying that 2012 may not be as good but he has not done his taxes yet. I imagine that if his 2012 income were in fact down, he would have had his taxes done in advance of this application in order to establish that fact. He also seeks relief due to the fact that he pays support to a former wife and child in the amount of $7600 per month, plus payment of the mortgage on their home, a total of some $115,000 per year.

[35] In all of the circumstances, I would fix the respondents income for purposes of interim child support and for interim spousal support at $652,000.

[36] Based upon the *Guideline* income, and given that the claimant has no income, a straight application of the *Child Support Guidelines* yields a monthly payment of $8429, however ss. 4 and 9 of the *Guidelines* provide for a departure from strict application of the *Guidelines* in appropriate situations:

> **4.** Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is
>
> (*a*) the amount determined under section 3; or
>
> (*b*) if the court considers that amount to be inappropriate,
>
> - (i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
> - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
> - (iii) the amount, if any, determined under section 7.
>
> **9.** Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (*a*) the amounts set out in the applicable tables for each of the spouses;
>
> (*b*) the increased costs of shared custody arrangements; and

> (*c*) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[37] The s.4 ability to depart from the *Guidelines* has also been recognized in such cases as *Francis v. Baker*, [1999] 3 S.C.R. 250 and *MacDonald v. MacDonald,* 2002 BCSC 1453. In the latter case, an income of $4.6 million would have resulted in a child support order of $62,000 per month; that was reduced to $18,000 in the circumstances of that case.

[38] Instances of s.9 departure from simple application of the *Guidelines* include the cases of *Contino v. Leonelli-Contino*, 2005 SCC 63 and more recently *Flick v. Flick,* 2011 BCSC 264 at paragraph 64:

> 64. The factors to be considered in determining the amount of support to be paid in a shared parenting situation under s. 9 were outlined by the Supreme Court of Canada in *Contino v. Leonelli-Contino*, 2005 SCC 63 (S.C.C.). They include:
>
> • the language of s. 9 warrants emphasis on flexibility and fairness (para 39)
>
> • it requires acknowledgement of the overall situation of the parents and the needs of the child (para 39)
>
> • the weight of each factor under s. 9 will vary with the particulars of the case (para 39)
>
> • take into account the financial situations of both parents (para 40)
>
> • calculating the set-off amount is the starting point, not the end of the enquiry (para 49)
>
> • the set-off amount does not take into account actual spending patterns as they relate to variable costs of the fact that fixed costs of the recipient parent are not reduced by the increased spending of the payor (para 4)
>
> • the court retains the discretion to modify the set-off amount where, considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the child as they move from one household to the other (para 51)
>
> • one of the overall objectives of the Guidelines is, to the extent possible, to avoid great disparities between households (para 51)
>
> • the court must examine the budgets and actual expenses of both parents in addressing the needs of the child and to determine if shared custody has in effect resulted in increased costs globally (para 52)
>
> • increased costs would normally result from a duplication and the child effectively being given to homes (para 52)
>
> • the expenses will be apportioned between the parents in accordance with their incomes (para 53)

> • the analysis should be contextual and remain focused on the particular facts of each case
>
> • the court has full discretion under s. 9(c) to consider "other circumstances". (para 72)
>
> • courts should demand information relating to s. 9(b) and(c) when the evidence filed is deficient. (para 57)

[39] I have considered, among other things, the various estimated costs associated with the children as reflected in the parties financial statements, the income and general expenses and access to equity in extravagant assets of these parties, the amount of support being paid to the respondent’s first family, the shared custody/residence regime and its associated expenses and the approach of courts as reflected in the above noted cases and have determined that the appropriate amount for interim child support in this case is $4500 per month commencing April 1, 2013 until further order of the Court.

**SPOUSAL SUPPORT**

[40] As noted above, I proceed on the basis that the respondent’s income is $652,000. I also proceed on the basis that there is no issue as to entitlement to at least, interim spousal support, that having been acknowledged by the respondent. Given that this is an interim application, I place minimal weight on arguments and issues such as economic advantage or disadvantage, self-sufficiency and the like but rather focus on the situation as it exists now and until trial.

[41] I also accept that this case involves income above the $350,000 ceiling provided for in the *Spousal Support Advisory Guidelines*. (“SSAG”).

[42] The respondent submits, and I agree, that the SSAG have little if any application above the recognized ceiling, particularly in situations of shared parenting. This is acknowledged both by the authors of the SSAG and courts which have considered the situation -- see for example *Bozak v. Bozak*, 2008 BCSC 1458, a decision of Stromberg-Stein, J. where she said at paragraph 56:

> 56 In my opinion, the *SSAG* are really of no assistance in this case and this is one of those cases to take the "pure discretion" approach: *Loesch v. Walji*, 2008 BCCA 214 (B.C. C.A.). The "pure discretion" approach takes into account the actual amount of child support, to avoid what Dr. Bozak's counsel

> describes as an absurd result, as evidenced by the figures provided by Dr. Bozak's counsel, where what Dr. Bozak is left with at the end of the day would be less than what Ms. Bozak ends up with. On the analysis of Ms. Bozak's counsel, after tax, Ms. Bozak would end up with more income than Dr. Bozak. Of import is this comment in *The Spousal Support Advisory Guidelines: A Draft Proposal*:
>
> At some point, the large amounts of child support include a component that compensates the recipient spouse for the indirect costs of childcare responsibilities, leaving less need for spousal support to do so. This approach will become more important where the payor's income is well above the ceiling: p. 113.

[43] I have also reviewed the decision of MacKenzie, ACJ (as she then was) in *Goriuk v. Turton,* 2011 BCSC 652 where the payor's income was $9.7 million and she was seeking mid-range SSAG support of over $96,000 per month; the award was $25,000 net, to be grossed up for taxes, resulting in a total award of less than half of the mid-range SSAG amount.

[44] Again, I have considered the things which I itemized above as relating to child support in coming to a decision regarding interim spousal support. I have also considered the two approaches to spousal support awards for income above the ceiling, namely the Minimum Plus approach and the Pure Discretion approach. The figures provided by the respondent for $350,000 ceiling income are $4624 for child support and a range of $6163 - $9073 for spousal support. I have already established $4500 as the appropriate child support amount in this case. In the present case, the respondent earns significantly more than $350,000 even considering the monies paid to his first family and it is also clear that there will be a tax advantage to the payment of spousal support.

[45] In all of the circumstances, the respondent is ordered to pay the claimant interim spousal support of $11,000 per month commencing April 1, 2013 until further order of the Court. On the basis of such support, the claimant shall be responsible for the payment of the mortgage, utilities and maintenance on the 140A St. house; in the event that any of these expenses fall into arrears or are not paid on time the respondent shall be entitled to pay them directly and such payments shall be credited to him as spousal support paid.

[46] I make no order regarding the return of specified chattels and personal belongings as I prefer to leave that to the determination of the trial judge based on his or her findings regarding credibility and “who actually has what”.

[47] There will be a mutual asset restraining order; that was originally sought under s. 67 of the *Family Relations Act*, now s. 91 of the *Family Law Act* but it will provide for the normal exception relating to the ordinary course of business in order that the respondent can continue to operate his architecture business.

[48] I was also asked to grant injunctive relief in the form of a sealing order regarding the respondent’s affidavit sworn February 12, 2013 due to certain compromising and intimate material contained therein. I am of the view that the granting of such injunctive relief is beyond my jurisdiction, however, I am of the view that I may direct that the noted affidavit be placed in a sealed envelope in the court file and that it not be accessed without further order of the Court; I would further direct that the parties, and in particular the respondent, not disseminate that affidavit or any of its contents or attachments to anyone in general nor to the children in particular. Should the claimant wish greater or more certain injunctive relief, she will have to seek it at the hands of a judge of this Court.

[49] Success has been divided; costs will be in the cause.

“Master Caldwell”