IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Griffiths v. Griffiths,***
2006 BCSC 1077

Date: 20060713
Docket: E000858
Registry: Vancouver

Between:

Ellen Harriet Gwen Griffiths

Plaintiff

And

Francis William Griffiths

Defendant

Before: The Honourable Mr. Justice Nathan Smith

Reasons for Judgment

Counsel for the plaintiff	Barbara E Bulmer
Counsel for the defendant	Colin A Millar
Date and Place of Trial:	June 5-8, 2006 Vancouver, B.C.

[1] During a 12-year marriage, the plaintiff and the defendant lived a very affluent lifestyle that included private schooling and country club membership for their two sons. Now that they have separated and divided their assets, there is a new financial reality that neither party has fully adjusted to. The defendant—the former husband—says he cannot afford to pay the amount of child support needed to finance the former lifestyle.

[2] The plaintiff and defendant have agreed on a complicated division of substantial corporate and personal assets and have settled all other issues, except child support. The defendant comes from a wealthy family, but says his assets have been depleted and he has very little income. His former wife says that any financial difficulties he may have were caused by his own reckless spending for his own benefit without regard to his responsibility to his children. She asks that income be imputed for the purpose of calculating child support.

[3] The parties were married in 1989. The plaintiff is 41 years old. The defendant, for whom this was a second marriage, will turn 56 shortly. There are two children of the marriage. Daniel is 12 and will be going into grade 8 in September. Kevin is 16 and will be going into grade 11. They live with their mother in West Vancouver, but spend alternate weekends and some holiday periods with their father.

[4] In the early years of the marriage, the defendant worked in his father's companies. In later years, he worked primarily on managing his investments. The plaintiff is a registered nurse, but only works about eight shifts per month.

[5] In 1999, the family moved from West Vancouver to Bellingham, Washington. The plaintiff says the defendant managed the family's finances, but she believes the family had a net worth of between $10 million and $20 million at the time. Shortly after moving to Bellingham, the defendant suffered a stroke, from which he says he has still not completely recovered.

[6] The marriage broke down after the defendant's stroke. The plaintiff returned to Canada in 2000 and the defendant followed a few months later. There was an attempt at reconciliation before they separated for good in 2001. The move to the U.S. had been for tax purposes and the move back to Canada triggered substantial tax liabilities. The move also resulted in a large loss on the resale of a house that had been purchased and renovated in Bellingham.

[7] On February 2, 2001, Master Patterson made an order that there was no reasonable prospect of reconciliation. On April 10, 2002, Mr. Justice Cole made an order that dealt with a number of issues and included an order that the defendant pay child support of $6,000 per month.

[8] In April 2005, the parties reached a "corporate re-organization agreement" which divided corporate assets in half, with each party holding investments in his or her own corporation. Some of the money due to the plaintiff's company was not paid until April 2006 because of complications that arose in determining the correct amount. Certain other assets were dealt with in an agreement dated September 6, 2005. Funds from the disposition of some other assets were still held in trust by the defendant's corporate solicitor at the time of trial.

[9] The September 2005 agreement was reached shortly before a trial that was scheduled to take place that month. It included a provision that the plaintiff would accept $3,000 per month in child support "on a without prejudice basis," until the issue of child support was resolved at trial. That amount was stated to be payable from July 1, 2005. The trial did not take place as scheduled. The payments of

$3,000 per month were made out of money being held in trust until approximately the end of January 2006, when that fund was exhausted. No payments were made after this until the interim $3,000 per month payment was incorporated into an order of Madame Justice Gray dated April 6, 2006. The order states that amount is to apply until permanent child maintenance is determined by further order of the court.

[10] The boys have been attending Collingwood School, a private school in West Vancouver. However, for disciplinary reasons the school has said it will not take Daniel back in September. The plaintiff says both boys have difficulties at school. She says she originally thought these difficulties related to the stress of the parents' separation and divorce, but Daniel has now been diagnosed with attention deficit disorder. She says the older son, Kevin, also appears to have learning problems to a lesser degree. At the time of trial, she had not decided on what school the boys will attend in September, but was considering a private boarding school on Vancouver Island. The annual tuition at Collingwood is almost $13,000 for each child. The boarding school would cost $31,000 each.

[11] Child support must be awarded based on the ***Federal Child Support Guidelines*****,** S.O.R. /97-175. In certain circumstances, s. 19 of the ***Guidelines*** allows the court to impute income beyond what the spouse who must pay support actually earns. Considerations under s. 19 include the earning ability of the paying spouse and appropriate management of assets to produce income.

[12] In this case, there is very little reliable evidence of what the defendant actually earns or of what should reasonably be imputed to him. The defendant says he has

not worked since his stroke, but no medical evidence was called to support the contention that his ability to earn income has been affected. In fact, the defendant was not employed at the time of his stroke and had not been employed for several years. The family lived very well from investment income and/or liquidation of assets when necessary. To the extent that his investments must be properly managed to generate income, the defendant has the assistance of professional advisors.

[13] Both parties are adjusting to the new financial situation created by the division of assets and the associated corporate reorganization. The defendant's 2005 income tax return shows large dividend income, as does the plaintiff's, but counsel agree that this reflects a one-time income attribution arising out of the re-organization and is not evidence on which support obligations can be calculated. Because of the re-organization, income tax returns for the years prior to 2005 do not reflect the current state of affairs.

[14] The major asset for each party is now an investment portfolio. As of April 2006, the plaintiff had stocks and mutual funds in her own name with a total value of about $1.3 million, plus mutual funds in the name of her company with a total value of $840,000. She also has a personal tax liability of approximately $400,000 that arises from the reorganization.

[15] Most of the defendant's investments are now held in a trust for his company, of which his main investment advisor, Mr. Nilson, is the trustee. The defendant says this trust was set up by his mother "to protect me in the event I spent it foolishly." The trust currently has investments worth $1.2 million. The defendant's company

has additional investments that are said to be worth $128,000 and he has an RRSP in his own name worth $188,000.

[16] Each party has also purchased a house in the $1 million price range. The defendant lives in his house with his new companion, Ms. Sizonenko, and her son. They recently renovated the kitchen. Title to the house is held jointly by the defendant and Ms. Sizonenko, although she did not contribute any money toward its purchase. The house is subject to a mortgage registered in the amount of $955,000, but the current balance actually owed under the mortgage and a separate line of credit totals only $365,000. The larger amount registered against the property permits the bank to advance more funds without having to register a new mortgage, but it also effectively prevents the house being used as security for other purposes.

[17] The defendant says he currently receives investment income of between $7,000 and $8,000 a month, with monthly expenditures exceeding that income by about $1,500. However, his account manager at the bank gave evidence, under subpoena, that in November 2005, the defendant reported to the bank that he was taking combined monthly draws from the company and the trust account of $23,000. The defendant did not deny making that statement and made no effort in his testimony to explain the discrepancy. In cross-examination, the defendant was frequently unable to answer questions on his holdings and his financial position. He repeatedly said that the questions should be directed to his financial advisor, Mr. Nilson, who was never called.

[18] The present financial arrangements have been put in place too recently to have produced a reliable income pattern. Mr. Nilson's evidence would have been useful in determining what income is currently available to the defendant and what is likely to be available in the future. Failing that, it would have been open to either party to call expert evidence on the various ways the defendant's portfolio could be managed and the income that could be generated by various investment strategies. No such evidence was called.

[19] Counsel for the defendant argues that, after deducting the estimated current value of his house and RRSP, he has "productive assets" of $738,748. That, he says, is the amount that is able to produce income. Counsel submits that, in the absence of sufficient history to determine a rate of return, I should assume a return of prime plus one per cent, or 6 per cent per year. That rate of return would generate annual income of $44,325. According to the child support tables, that income requires payment of $674 a month in support of two children.

[20] I cannot accept that submission. First of all, there is absolutely no evidence that the investments are being managed in a way that limits the return to 6 per cent. Such a return would suggest reliance on interest income, but the brokerage statements produced indicate that at least part of the defendant's portfolio consists of equities that may or may not produce income in the form of capital gains. Although the defendant gave evidence that he wants a low risk investment strategy directed to the preservation of capital, I find it inconceivable, given his background and lifestyle, that the he would ever be content with access to only $44,000 a year.

[21] The defendant's reduced financial circumstances did not prevent him from buying a house and putting it into joint tenancy with Ms. Sizonenko. I have no reason to disbelieve his evidence that her support has been important to him being able to recover from his stroke to the extent he has, but that does not entitle him to effectively provide her with a gift worth $500,000 in priority to his obligations to his children.

[22] Before buying his current house, the defendant lived in two different homes that his mother had purchased as investments. The defendant paid for utilities and maintenance, but did not pay rent. The plaintiff relies on that evidence in support of her contention that the defendant is always able to get financial support from his mother to meet whatever needs he has. She also says that he will eventually receive a substantial inheritance, which he could borrow against if necessary. However, she admits that she has no knowledge of the terms of the mother's will.

[23] Plaintiff's counsel says that brokerage records show draws from the defendant's stock account of approximately $19,200 a month over a 10 month period. During the same period, he also had access to a bank line of credit of $128,000, a large portion of which was spent on home renovations. By contrast, she says, the plaintiff has also borrowed against her house, but did so in order to invest the money at a rate of return greater than the interest she must pay on the loan.

[24] On an annualized basis, and including the line of credit, plaintiff's counsel says the defendant had access to about $358,000. If his cash draws are in the amount he reported to the bank, that figure would rise to about $400,000. I am

satisfied that the defendant probably has been drawing and spending money at a rate of between $350,000 and $400,000 per year, but I do not see how that level of spending will be sustainable for very long. Again, I am hampered by a lack of evidence about what income reasonable and prudent professional management of the defendant's holdings can be expected to generate, and by a lack of any performance history.

[25] A stated objective of the ***Federal Child Support Guidelines***, is to provide children with a fair standard of support that ensures they continue to benefit from the financial means of both parents. It is important that the reference in s. 1 is to the parents' "means," because a party's means include more than income. In its recent decision in ***Leskun v. Leskun***, 2006 SCC 25, the Supreme Court of Canada cited with approval at ¶29, the following definition:

> The word *means* includes all pecuniary resources, capital assets, income from employment or earning capacity, and any other source from which gains or benefits are received, together with, in certain circumstances, money that a person does not have in possession but that is available to such person. *(Canadian Family Law,* (2001), at p. 195)

[26] Applying that definition, I can consider the fact that the defendant owns a house, which he is able to borrow against. He chose to put the house in joint tenancy, although he was the only one to pay for it. He also chose to spend money on renovations. I can also consider the fact that he has historically had, and likely will continue to have, some access to his family's resources. However, on the state of the evidence any attempt to quantify those benefits would be pure speculation.

[27] I have therefore come to the conclusion that a child support order at this stage should be in the form of what is commonly called a “review order” under s. 15.1(4) of the ***Divorce Act***, R.S.C. 1985, c. 3. That section says:

> The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as it thinks fit and just.

[28] The review that occurs under s.15 at the end of the specified period or on the happening of the specified event is not the same thing as a variation of the order under s. 17 of the ***Act***. The difference was explained by the Supreme Court of Canada at ¶37 of ***Leskun,*** dealing with the identical provisions governing spousal support. Review orders, where justified by “genuine and material uncertainty” at the time of trial, allow either party to bring a motion to alter a support award with no onus to show the material change in circumstances that would be required to obtain a variation. The court also said that review orders should be used sparingly and, where they are used, should tightly define the issue for review.

[29] Having regard to the Supreme Court of Canada’s warning, I believe this is a case where there is “genuine and material uncertainty.” If the order I make is open to review in approximately one year, there should by then be evidence of the income generated from the defendant’s investments. If the plaintiff at that time believes the defendant’s assets are not being managed appropriately to generate income, she will be in a position to call opinion evidence about what different management could have produced over that period. Both parties expressed the hope that, once the

litigation is resolved, they will be able to develop a more co-operative attitude toward shared parenting. I am well aware that by making a review order I may be delaying that process, but I do not see any reasonable alternative on the state of the evidence.

[30] For the purposes of an order that is subject to review, I think the best evidence of what income the defendant has available is the evidence of what he reported to the bank—that is, $23,000 per month or $276,000 per year. Under the applicable support table, that would require a payment of $3,598.20 per month. However, where the income of the paying spouse is over $150,000, the court is not bound entirely by the ***Guidelines***. Section 4 of the ***Guidelines*** says that the amount set out in the support tables governs the first $150,000, but for the balance the court can set an amount it thinks appropriate having regard to the needs and circumstances of the children and the financial ability of the spouses.

[31] Having regard to the factors listed in s. 4(b)(ii), and in particular the defendant's apparent access to financial resources as shown by his lifestyle and spending pattern, I set basic child support at $4,000 per month. That amount will be retroactive to July 1, 2005, as contemplated by the settlement agreement and the order of Madam Justice Gray.

[32] Either party will have liberty to apply for a review of that amount after April 30, 2007, the date by which they must both file their personal tax returns for 2006. The parties will provide each other with those tax returns, as well as any corporate or trust tax returns filed on or before that date. In the interim, the parties will also

provide each other with copies of any monthly statements from banks, brokers or other financial advisors showing the state of their investments and the income received from those investments, including interest, dividends and capital gains. The hearing of the review application will be preceded by a judicial case conference to ensure there are no outstanding disclosure issues when the application is heard.

[33] The plaintiff also seeks special or extraordinary expenses under s. 7 of the *Guidelines*. These include the cost of the boys' private schooling, tutoring, summer camps, and participation in hockey and tennis. The boys play hockey and tennis through their membership in a country club and the plaintiff therefore seeks a contribution to club membership fees. The plaintiff also anticipates orthodontic expense for Kevin but there is no evidence confirming the need for that treatment or its likely cost. The total amount of special or extraordinary expenses claimed, as set out in the plaintiff's financial statement, is $59,400 per year.

[34] In ***McLaughlin v. McLaughlin***, (1998), 57 B.C.L.R. (3d) 186, the Court of Appeal made it clear that the mere existence of expenses for education or extracurricular activities does not automatically lead to an order for additional child support. The basic child support award under the ***Guidelines*** is intended to include some contribution to such expenses. The claim for an additional payment arises only if those expenses can be said to be "extraordinary," which the Court of Appeal held could be defined according to the combined income of the parties.

[35] However, s. 7 of the ***Guidelines*** was amended as of May 1, 2006, to add the following provision:

> (1.1) For the purposes of paragraphs (1)(d) and (f), the term "extraordinary expenses" means
>
> > (*a*) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
> >
> > (*b*) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
> >
> > > (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
> > >
> > > (ii) the nature and number of the educational programs and extracurricular activities,
> > >
> > > (iii) any special needs and talents of the child or children,
> > >
> > > (iv) the overall cost of the programs and activities, and
> > >
> > > (v) any other similar factor that the court considers relevant.

[36] The effect of this amendment in relation to this case is that, in determining whether an expense is extraordinary, the court is to consider the expense only in relation to the plaintiff's income, including the basic child support that is ordered. That leaves the same difficulty that arises in setting the basic amount of child support. Just as there is no reliable evidence of what income the defendant should now be able to expect from appropriate management of his investments, neither is there reliable evidence of the plaintiff's income against which expenses can be measured to determine if they are extraordinary. This is particularly true in relation

to the expenses for sports and other extracurricular activities. While the plaintiff has provided evidence of their cost, I am unable to say whether those costs are extraordinary in relation to her income and the basic support that I have ordered.

[37] The largest single expense claimed is private school tuition. There are also costs for tutoring and summer school that the boys must attend. Although it is impossible to quantify the plaintiff's income, I am prepared to accept that the cost of private schooling, combined with the other educational expenses, is such that the total education expenses can be considered extraordinary. The next question is whether they are reasonable, having regard to all of the factors set out in the ***Guidelines***.

[38] The plaintiff has made no decision about where the boys will go to school in September, which makes the assessment even more difficult. During the school year just ended, they both went to Collingwood at an annual tuition cost of $13,000 each. Kevin is welcome to return there, but Daniel is not. Kevin is going into grade 11 and it would be in his interest not to have to change schools at this stage.

[39] Daniel is younger and it appears will have to change schools in any event. The plaintiff wants Daniel to continue in a private school because she does not believe the services he needs exist in the public system. That may be true, but no evidence beyond the plaintiff's opinion was presented.

[40] Tutoring costs for the two boys total about $3,000 per year and I am satisfied that that expenditure is in their interest. Doing the best I can with the evidence presented, I find that the plaintiff has established entitlement to extraordinary

educational expenses of $16,000 a year. That amount is equal to one Collingwood tuition and the tutoring expenses. I order that the defendant contribute half that amount, or $667 a month, in addition to the basic support that I have ordered.

[41] The plaintiff seeks an order for security for child support. I am persuaded that this is appropriate given the uncertainty that will continue at least until the court is able to review this matter. The assets currently held by the plaintiff's corporate solicitor include a tax refund related to the disposition of property in the U.S. in the amount of $278,000 U.S. The defendant's share is half that amount. I order that $56,000 CAN be retained in trust from the defendant's share as security for one year's child support at the rate I have ordered. The defendant will be entitled to any income earned on that amount.

[42] The plaintiff seeks special costs. The settlement agreement of September 2005 says:

> Save and except as set out herein each party will bear his own costs of these proceedings.

Plaintiff's counsel says that refers only to costs to the date of the settlement agreement and not to costs of this hearing, which the agreement specifically contemplated as a future event. I do not think the language of the settlement is capable of that interpretation. The agreement says there was to be a hearing on outstanding issues. In the absence of a specific statement to the contrary, the previous reference to the costs of "these proceedings" must be taken to include the costs of that hearing.

[43] There will therefore be no order as to costs.

"Nathan H. Smith, J."
The Honourable Mr. Justice Nathan H. Smith