
CANADA / JUDGMENT

Adsett v. Adsett

2020 BCSC 1189

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1189 Adsett v. Adsett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Adsett v. Adsett,

2020 BCSC 1189

Date: 20200812

Docket: E171079

Registry: Victoria

Between:

Jacqueline Elizabeth Adsett also known as

Jacqueline Elizabeth Bureau

Claimant

And

Duane Charles Adsett

Respondent

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

(via teleconference)

Counsel for the Claimant:

M.G. Norton

Counsel for the Respondent:

C. Buchan

Place and Date of Hearing:

Victoria, B.C.

July 28, 2020

Place and Date of Judgment:

Victoria, B.C.

August 12, 2020

- [1] Two applications were brought on for hearing before me on July 28, 2020 in this family case.
- [2] In his Notice of Application filed May 17, 2019, the respondent Duane Adsett seeks the following contested orders: an order with respect to the cessation of payment of spousal support, or alternatively payment of spousal support based on imputed income of the claimant of \$84,000 per year.
- [3] The remaining orders sought by Mr. Adsett include the following:
1. an order for divorce;
 2. an order setting out a payment schedule for payment by Mr. Adsett to the claimant, Jacqueline Adsett, of a \$10,000 "equalization payment" concerning the division of family property and debt (the equalization payment having been agreed to in a Separation Agreement dated April 22, 2016);
 3. an order that title to an Tracer Air Travel Trailer be transferred to Mr. Adsett in his sole name and that Ms. Adsett be removed from loan obtained by the parties for purchase of the trailer; and
 4. conduct orders pursuant to s. 222 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [4] Ms. Adsett takes no position on the granting of the order for divorce, and consents to the payment terms regarding the agreed upon equalization payment, transfer of the trailer and the conduct orders. I am satisfied that the statutory requirements for a divorce under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), are met and accordingly, that order and the remaining orders on which the parties consent are granted.
- [5] Mr. Adsett's application for a protection order pursuant to s. 183 of the FLA, preventing Ms. Adsett from communicating with or contacting Mr. Adsett's current partner Laurie Wood, was adjourned generally.

- [6] By Notice of Application filed May 17, 2019, Ms. Adsett cross-applies for an order that spousal support is increased, based on the parties annual incomes, and continue indefinitely. Alternatively, Ms. Adsett seeks an order that current monthly spousal support payments continue indefinitely. Ms. Adsett's application for payment of increased child support, retroactively and prospectively, was adjourned due to insufficient time available to hear submissions.

Background

- [7] The parties were married on July 9, 2005 and separated on October 1, 2015. There are two children of the marriage, who are currently 14 and 15 years old. The parties have shared parenting time on a week-on, week-off basis for approximately three years.
- [8] The parties entered a separation agreement on or about April 22, 2016 (the "Separation Agreement") which addressed all issues arising out of their separation including parenting and guardianship, child support, spousal support and division of family property and debt.
- [9] Pursuant to the Separation Agreement, Mr. Adsett currently pays monthly child and spousal support in the amount of \$918 and \$682, respectively.
- [10] The Separation Agreement states that spousal support will be reviewed on the earliest of six months after Ms. Adsett returns to work or two years after the date of the agreement.
- [11] Mr. Adsett is employed as a firefighter and works on a full-time basis. Ms. Adsett is a nurse. At the time that the Separation Agreement was made, Ms. Adsett was on long-term disability. She returned to work on a part-time basis in or about January 2018.

Issues

- [12] The issues to be addressed in these reasons include the following:
- Should income of \$84,000 be imputed to Ms. Adsett?
 - Should spousal support be payable to Ms. Adsett, or be terminated or paid indefinitely?
 - What spousal support is payable based on the parties Guideline incomes?
 - Should spousal support be payable to Ms. Adsett or be reduced to reflect an earlier alleged unequal division of family property?

Imputation of Income

- [13] The burden is on the party seeking an imputation of income to establish an evidentiary foundation for such a finding. The test for imputing income is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability: *Marquez v. Zapiola*, 2013 BCCA 433, at paras. 36-37.

- [14] Mr. Adsett submits that income of \$84,000 should be imputed to Ms. Adsett for the following reasons:
- a) That the purpose of spousal support in the Separation Agreement, made in April 2016 at a time when Ms. Adsett was on long-term disability, was to provide Ms. Adsett with support until she was able to return to work on a full-time basis. In this respect he points to Recital E that which records that Ms. Adsett was not working but planned to return to work as a nurse in the future if her health permits, gradually increasing her hours to full-time. The parties agreed that the recitals formed part of the agreement.
 - b) Ms. Adsett worked full-time as a nurse earlier in the parties' marriage (prior to the birth of the parties' first child) and Mr. Adsett contends that despite a period of disability, she is capable of working full-time as a nurse now.
- [15] Mr. Adsett has not provided any evidence in support of his contention that Ms. Adsett is capable of working on a full-time basis as a nurse. In his affidavit evidence he attached a letter from Ms. Adsett's psychiatrist, Dr. Karen Palmer, dated February 9, 2018 and addressed to "to whom it may concern", in which Dr. Palmer states that in her opinion Ms. Adsett will have to slow down her return to work schedule and suggests she work a maximum of three shifts per week, of 4-6 hours each, "over the next month".
- [16] Ms. Adsett denies that she is able to work on a full-time basis due to her physical and mental health limitations. She says that since January of 2013 she has worked part-time as a nurse, being medically accommodated at her job. At this time, this accommodation enables her to work .65 of a full-time position ("FTE").
- [17] Ms. Adsett has provided the following additional evidence which she says supports her contention that she is not able to work full-time:
- a) An unsigned Medical Duty to Accommodate Agreement under which the Island Health Authority agreed to accommodate Ms. Adsett into a regular part-time position at .65 FTE effective January 2, 2018.
 - b) A letter from Dr. Palmer dated May 26, 2019, in which Dr. Palmer provides an opinion that asking Ms. Adsett work more than .65 FTE would "likely result in a full relapse and a return to disability" and that "she will need to permanently limit her workload to .65 FTE, at most".
- [18] I am unable to accept the evidence submitted in the form of letters from Dr. Palmer and the Medical Duty to Accommodate Agreement entered into between Ms. Adsett and the Island Health Authority as proof that Ms. Adsett is unable to work more than .65 FTE. In my view, these documents constitute inadmissible hearsay evidence sought to be introduced for the truth of their contents.
- [19] Ms. Adsett has provided affidavit evidence that she continues to be unable to work more than .65 FTE (that is 65% of full-time) as a nurse. Mr. Adsett has not provided any evidence that calls this sworn evidence into question.

- [20] With respect to Mr. Adsett's submission that it was the parties' intention, as evidenced by the Separation Agreement, that Ms. Adsett would only be entitled to spousal support on a temporary basis, this is not relevant to the question of whether she has the capacity, in consideration of her age, education, health, work history and work availability, to earn more than she is at this time.
- [21] In summary, Mr. Adsett has not met his burden to establish the evidentiary foundation justifying an imputation of income to Ms. Adsett.

Review of Current Spousal Support

- [22] The first matter to be decided is whether Ms. Adsett continues to be entitled to spousal support.
- [23] The objectives of payment of spousal support were summarized by the court in *Chutter v. Chutter*, 2008 BCCA 507, at paras. 45-46:
- [45] Section 15.2 of the Divorce Act is the main provision governing entitlement to spousal support. Subsection 15.2(6) provides that a spousal support order should meet the following objectives:
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [46] In order to achieve a fair and equitable distribution of resources, all four of these objectives should be examined: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 850-853, 43 R.F.L. (3d) 345. Having regard to these policy objectives, courts must consider the condition, means, needs and other circumstances of each spouse, including the factors set out in s. 15.2(4):
- (a) The length of time the spouses cohabited;
 - (b) The functions performed by each spouse during cohabitation; and
 - (c) Any order, agreement or arrangement relating to support of either spouse.

- [24] There are three bases for entitlement to spousal support: compensatory, non-compensatory, and contractual support: *Moge v. Moge*, [1992] 3 S.C.R. 813 (compensatory support); *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (non-compensatory support); and *Miglin v. Miglin*, 2003 SCC 24 (contractual support).
- [25] I will first deal with issue of contractual support.
- [26] The Separation Agreement requires at Clause 20 that spousal support will be reviewed on the earliest of six months after Ms. Adsett returns to work or two years after the date of the agreement. As a result, a review was required by no later than April of 2018. Despite an apparent disagreement with respect to whether one party or the other had delayed a spousal support review beyond this date, both parties agree that a review is appropriate.
- [27] Under the Separation Agreement a spousal support review will consider entitlement, amount and duration of spousal support, taking Ms. Adsett's income into consideration. As a result, all of these issues are to be taken into consideration: FLA, s. 168; *Jordan v. Jordan*, 2011 BCCA 518 at para. 34.
- [28] Mr. Adsett contends that the Separation Agreement contemplated payment of spousal support only until Ms. Adsett was capable of working full-time. Even if I was to accept this interpretation of the parties' agreement, which I specifically do not, I have accepted Ms. Adsett's evidence that she is only capable of working part-time, at .65 FTE.
- [29] In addition, Mr. Adsett contends that it has been three years since the Separation Agreement was signed and it is now appropriate to terminate support.
- [30] I am not satisfied that under the terms of the Separation Agreement the parties agreed that spousal support would end when Ms. Adsett returned to work part-time or would otherwise only be entitled to spousal support on a temporary basis. Recital E contemplates only that Ms. Adsett planned to return to work as a nurse in the future "if her health permits". Similarly, clause 20(b) states that Ms. Adsett intended to return to work on a part-time basis and "hopefully" increase to full-time hours.
- [31] Although the Separation Agreement contemplates that Ms. Adsett may not be able to return to work full-time it does not expressly provide that spousal support is to continue indefinitely if she is unable to do so.
- [32] The issue of compensatory support arises in this case.
- [33] Generally, when there are children of the marriage compensatory support may be warranted where a partner cuts back on paid labour force participation in order to care for the children - an arrangement which may jeopardize that spouse's income security and economic independence: *Moge*, at paras. 867-868.

[34] Consideration should also be given to the economic advantages enjoyed by the partner who is able to continue to work as a result of the efforts of the other spouse to care for a home and children.

[35] A comparison of the parties' relative standards of living is required. The Supreme Court stated as follows at para. 870 of *Moge*:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[36] In consideration of whether non-compensatory support, needs based support is required, the parties' relative standards of living is also assessed. At para. 50 of its decision in *Chutter* the court referenced the finding of *Proswe J.A.* in *Yemchuk v. Yemchuk*, 2005 BCCA 406, that "in the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of living of the spouses following the marriage breakdown": *Yemchuk* at paras. 41, 48-49.

[37] I do not consider that the objective of promoting Ms. Adsett's economic self-sufficiency within a reasonable period of time arises in this case. Although Ms. Adsett has been able to return to work, she is only able to work part-time and there is no evidence supporting an argument that she is not working as much as she can. There is an obvious differential in the parties' relative standards of living given that Mr. Adsett is able to work full-time as a firefighter earning approximately \$140,000 in 2018 while Ms. Adsett earned approximately \$41,000 working part-time that year.

[38] I consider that the objectives of compensatory and non-compensatory (needs based) spousal support are applicable in this case. The parties' relationship lasted a significant period of time - approximately twelve years. Ms. Adsett was the primary caregiver for the children after they were born and was unable to work, other than on a part-time basis, until 2013. This would have benefited Mr. Adsett who was able to continue to advance his career as a firefighter. After the parties separated in 2015, there was a period of time during which Ms. Adsett was unable to work as a result of physical and mental health issues and was only able to return to work on a part-time .65 FTE basis in January 2018. These factors justify the on-going payment of spousal support on a compensatory and non-compensatory basis.

[39] For the foregoing reasons, I find that Ms. Adsett continues to be entitled to spousal support for an indefinite basis.

[40] I now turn the question of how much spousal support is payable.

- [41] Mr. Adsett seeks a retroactive reduction in spousal support to April 19, 2019, the date on which he filed his Notice of Application, with such support calculated in accordance with the Spousal Support Advisory Guidelines [SSAG] and based on the parties 2018 Guideline incomes.
- [42] With respect to what Guideline incomes should be applied to going forward, he contends that only increases in Ms. Adsett's income should be applied to a calculation of spousal support. In this respect, Mr. Adsett relies upon Clause 20(c) of the Separation Agreement which provides that "[t]he review of spousal support will include entitlement, amount and duration taking into consideration Jaquie's income" [emphasis added].
- [43] I see no basis for only taking increases in Ms. Adsett's income after April 2019 into consideration in determining the quantum of spousal support payable under the SSAG. I find that a Separation Agreement clearly contemplated a de novo review of spousal support which can only logically take the income of both parties into consideration.
- [44] I agree that it is appropriate this review should consider the parties relative incomes as at the date on which a review was formally sought by Mr. Adsett, being April 19, 2019.
- [45] I find that from April 19, 2019 forward, Mr. Adsett is obligated to pay monthly spousal support based on the parties' annual incomes recorded at Part C, line 19 of the Form F8 Financial statements they filed in July 2020. For Mr. Adsett that amount is \$129,801.99 and for Ms. Adsett, \$69,792.70.
- [46] I will leave it to the parties to complete a Divorce Mate calculation to determine the required monthly spousal support amount. I am satisfied given the length of the marriage, Ms. Adsett's physical and mental health challenges and the parties' likely differential standard of living that it is appropriate that spousal support should be paid at the mid-range determined through a Divorce Mate calculation and I so order.
- [47] If as a result of this calculation, Mr. Adsett has overpaid spousal support for the period April 19, 2019 to the date of judgment, any overpayment may be set off against the \$10,000 equalization payments payable by Mr. Adsett under the terms of the Separation Agreement. That is, monthly payments towards the equalization payment balance will be deferred until any spousal support overpayment has been satisfied.

Adjustments for Unequal Division of Family Property

- [48] Mr. Adsett submits that the Separation Agreement resulted in a disproportionate division of family property in favour of Ms. Adsett of approximately \$180,000. He says that this justifies a reduction in spousal support payable to Ms. Adsett on the basis that her needs are lower.

[49] Ms. Adsett submits that the Separation Agreement resulted in an agreed upon equal division of family property and therefore that no reduction is justified. In this respect, Ms. Adsett points to the Clause 34, which provides that an equalization payment of \$10,000 was required from Mr. Adsett.

[50] I agree with the submissions of Ms. Adsett.

Conclusion

[51] In conclusion, I make the following orders:

- a) The parties are divorced from each other effective on the 31st date from the date of this Order. The parties are at liberty to set the order for divorce out in an order separate from the order for other relief granted in this application.
- b) Mr. Adsett will pay spousal support to Ms. Adsett for the period commencing April 19, 2019 and for an indefinite period thereafter, with spousal support calculated payable at the mid-range determined through application of the SSAG, and shall be based on an annual earnings for Mr. Adsett of \$129,801.99 and for Ms. Adsett of \$69,792.70.
- c) Any overpayment resulting in Mr. Adsett having paid more in spousal support, pursuant to the terms of the Separation Agreement, for the period April 19, 2019 to the date of judgment that is found to be payable under the SSAG may be offset against the \$10,000 amount owing by him for the Equalization Payment.
- d) Subject to a deduction for overpayment of spousal support, starting September 1, 2020 and on the first day of each month thereafter, Mr. Adsett shall pay \$400 per month to Ms. Adsett towards the balance outstanding on the Equalization Payment until the balance is paid in full.
- e) Both parties shall take the necessary steps to transfer title of the Tracer Air Travel Trailer into the sole name of Mr. Adsett and to remove Ms. Adsett from the loan associated with the trailer.
- f) Both parties will ensure that all communications between one and another are respectful and polite, and neither party will make any public derogatory posts on social media or other public forums with respect to the other party or with respect to this family law matter.
- g) Neither party will make any derogatory comments about the other in front of the Children of the marriage.

[52] Each party will bear their own costs in respect of their applications.

"Mayer J."

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