
CANADA / JUDGMENT

Bradley v. Bradley

2012 BCSC 2191

COURT

Supreme Court of British Columbia

DECIDED

28 February 2012

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2012 BCSC 2191 Bradley v. Bradley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bradley v. Bradley,

2012 BCSC 2191

Date: 20120228

Docket: ED58260

Registry: Nanaimo

Between:

Shannon Christine Bradley

Claimant

And

Nelson Edward Bradley

Respondent

Before: The Honourable Mr. Justice Voith

Oral Reasons for Judgment

(appearing via teleconference)

In Chambers

Counsel for the Claimant:

B.R. Vining

Counsel for the Respondent:

E.A.L. Strain

Place and Date of Hearing:

Nanaimo, B.C.

February 24, 2012

Place and Date of Judgment:

Nanaimo, B.C.

February 28, 2012

- [1] THE COURT: The applicant, Mr. Bradley, has applied to vary the parties' consent order (the "Consent Order") made by Mr. Justice McKinnon on November 16, 2010. Specifically, Mr. Bradley seeks to suspend that portion of the Consent Order which requires him to pay spousal support and seeks to obtain a credit for the spousal support he has paid since February 2011.
- [2] The Consent Order granted the parties a divorce and addressed a number of issues, including the division of the parties' property. Paragraph 6 of the Consent Order requires Mr. Bradley to pay Mrs. Bradley \$2,479 each month in spousal support, commencing on January 1, 2010, and had him pay retroactive spousal support in that same amount for the period from January 1, 2010 to November 1, 2010. The term of the Consent Order addressing spousal support was not time-limited, nor was it expressly subject to review.
- [3] Many of the central facts which underlie this application are straightforward and not in dispute. The parties are both 49 years of age. They commenced living together in 1980 and were married in July 1986. They separated in October 2008. They have two adult children.
- [4] Importantly, for present purposes, the Consent Order was attained after an extensive exchange of multiple affidavits from each party and after full financial disclosure. Each party was represented by counsel. Neither party has argued that any term of the Consent Order, including the term pertaining to spousal support, was inappropriate when it was made or did not comport with the objectives of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
- [5] The material filed in advance of the Consent Order reveals that Mr. Bradley has limited education, that for many years he was a commercial fisherman, that he has held other forms of employment, and that from 1996 to 2008 he worked at the Harmac Mill in Nanaimo until it closed. When he left the Harmac facility he was a kiln operator and earned approximately \$87,000 annually.
- [6] It is also relevant that Mr. Bradley suffered a wrist injury when with Harmac, which apparently left him with a 40% permanent disability in his right wrist.

- [7] Mrs. Bradley stayed at home with their children for many years. She has had several psychiatric breakdowns of significant severity, some of which required hospitalization. The first of these occurred in 1995. In late 2007, Mrs. Bradley was diagnosed with bipolar disorder.
- [8] Mrs. Bradley finished high school, but has no post-secondary education. For many years, and at least since 2000, she has been employed in various capacities and by various entities. She has some experience as a bookkeeper. For some years she has worked at her father's car dealership because that environment is relatively stress-free, a fact which is important to her psychological health.
- [9] After leaving Harmac, Mr. Bradley moved to Fort St. John where he worked as a heavy duty equipment operator from June 2008 to March 2009 for a company called Petrowest Construction. In March 2009, he was told by the company that they would have no further work for some months. In April 2009, he found work with Rohl Industries, installing fibre optic lines. That work lasted until August 2009. In September 2009, he went to work for Peace Country Oilfield Contracting ("Peace Country") as a heavy duty equipment operator until mid-February 2011, when he was again laid off.
- [10] Mr. Bradley has also deposed that just prior to entering into the Consent Order, he was still operating heavy equipment, but that he had also been appointed as a part-time foreman by Peace Country. He believed this would provide him with more security and he believed there was a good chance he would become a full-time foreman.
- [11] Mr. Bradley has deposed that the foregoing work history establishes that working for companies in the oil and gas business is not secure or consistent. Notwithstanding that uncertainty, Mr. Bradley earned \$87,221, \$121,213, \$104,757, and \$96,795 for the years 2007, 2008, 2009, and 2010 respectively. This period covers Mr. Bradley's last years at Harmac, as well as his arrival at and employment in the oil and gas fields in the period prior to the Consent Order being made.
- [12] Mrs. Bradley's income in the same years varied between \$22,000 and \$37,000 per year.
- [13] The statutory framework for this application is governed by the following provisions of the Divorce Act:
17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
- (a) a support order or any provision thereof on application by either or both former spouses; or
- (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

...

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

...

- (7) A variation order varying a spousal support order should
- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
 - (b) apportion between the former 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 former spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.
- [14] A number of legal propositions are also relevant to the instant application. The court is to proceed on the basis that the original order was correct; *Haigh v. Haigh* (1997), 41 B.C.L.R. (3d) 139 (C.A.). As stated above, Mr. Bradley does not contest the validity of the Consent Order.
- [15] The onus to establish that a material change has occurred rests with Mr. Bradley. This requires Mr. Bradley to show not only that a change occurred, but also that the change warrants judicial intervention; *Walters v. Walters*, 2011 BCCA 331 at paras. 48-49; *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 at 313 (B.C.C.A.).
- [16] Some of these principles were summarized and further developed in *Murphy v. Murphy*, 2000 BCSC 974, where Martinson J. said:
- [17] A Court may make an order varying, rescinding or suspending, prospectively or retroactively, a support order or any provision thereof: s. 17(1)(a) of the Divorce Act. Before the Court makes a variation order in respect of a spousal support order, the Court shall satisfy itself that a change in the condition, means, needs or circumstances of either spouse has occurred since the making of the spousal support order, and in making the variation order, the court shall take that change into consideration: s. 17(4.1) of the Divorce Act.
- [18] The Supreme Court of Canada has said that the change must be a material change in circumstances, meaning a change that if known at the time of the original order, would likely have resulted in different terms: *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370. If the matter was known at the time of the order sought to be varied, it cannot be used as a basis for variation.

- [19] The British Columbia Court of Appeal has said that a court will vary a support order only where it finds a change that is substantial, unforeseen and of a continuing nature: *T. (T.L.A.) v. T. (W.W.)*, 26 B.C.L.R. (3d) 319 at 33. The Supreme Court of Canada has more recently said that the change cannot be trivial or insignificant: *Hickey v. Hickey*, [1999] S.C.J. 9 at para. 20. A change must therefore be one that is significant, unforeseen, and of a continuing nature. Otherwise, parties cannot properly organize their financial affairs and plan for the future.
- [17] Recently in *L.M.P. v. L.S.*, 2011 SCC 64, Abella and Rothstein J.J., for the majority, reasserted some of these propositions and said:
- [29] In determining whether the conditions for variation exist, the threshold that must be met before a court may vary a prior spousal support order is articulated in s. 17(4.1). A court must consider whether there has been a change in the conditions, means, needs or other circumstances of either former spouse since the making of the spousal support order.
- [30] In our view, the proper approach under s. 17 to the variation of existing orders is found in *Willick v. Willick*, [1994] 3 S.C.R. 670, and *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370. Like the order at issue in this case, *Willick* (dealing with child support) and *G. (L.)* (dealing with spousal support) involved court orders which had incorporated provisions of separation agreements. Both cases were decided under s. 17(4) of the Divorce Act, the predecessor provision to s. 17(4.1).
- [31] *Willick* described the proper analysis as requiring a court to "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" (p. 688). In determining whether the conditions for variation exist, the court must be satisfied that there has been a change of circumstance since the making of the prior order or variation. The onus is on the party seeking a variation to establish such a change.
- [32] That "change of circumstances", the majority of the Court concluded in *Willick*, had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" (p. 688). *G. (L.)* confirmed that this threshold also applied to spousal support variations.
- [33] The focus of the analysis is on the prior order and the circumstances in which it was made. *Willick* clarifies that a court ought not to consider the correctness of that order, nor is it to be departed from lightly (p. 687). The test is whether any given change "would likely have resulted in different terms" to the order. It is presumed that the judge who granted the initial order knew and applied the law, and that, accordingly, the prior support order met the objectives set out in s. 15.2(6). In this way, the *Willick* approach to variation applications requires appropriate deference to the terms of the prior order, whether or not that order incorporates an agreement.
- [34] The decisions in *Willick* and *G. (L.)* also make it clear that what amounts to a material change will depend on the actual circumstances of the parties at the time of the order.

- [35] In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances (see *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40, at para. 49). Certain other factors can assist a court in determining whether a particular change is material. The subsequent conduct of the parties, for example, may provide indications as to whether they considered a particular change to be material (see *MacPherson J.A.*, dissenting in part, in *P. (S.) v. P. (R.)*, 2011 ONCA 336, 332 D.L.R. (4th) 385, at paras. 54 and 63).
- [18] Finally, I recognize that in *Walters* the court emphasized the importance, in a variation application, of a judge considering both the objectives of s.17(7) and the parties' means, needs, and other circumstances under s. 17(4.1) of the Divorce Act.
- [19] In this case I am mindful that the parties had a 28-year relationship and that they were married for 22 years in what was a traditional marriage. I have alluded to Mrs. Bradley's physical and psychological frailties. I have also considered that there has been no significant change in Mrs. Bradley's capital assets, though she has bought a home and has, as a result of that purchase, undertaken a mortgage commitment. Her income in the past year of \$38,400 is also generally consistent with her pre-Consent Order income.
- [20] Mr. Bradley's present circumstances and the reasons for those circumstances are more nuanced. He says that the material change which warrants a variation of his spousal support obligation is his loss of employment with Peace Country in February 2011, and he asserts that if he had known at the time the Consent Order was made that he would lose his position, he would not have agreed to its terms, in particular the support obligation he assumed. As will be seen, this is not quite a complete assertion.
- [21] In addition, this central thesis is interwoven with numerous other factual assertions or arguments which, in light of the legal principles I have referred to, are not relevant and do not assist him.
- [22] Mr. Bradley argues, for example, that Mrs. Bradley may be capable of more remunerative or different work. He complains of and laments the high cost of living in the north. He emphasizes the constraints imposed by his wrist disability and the limitations that this disability places on him. Some of this pertains to medication he must take and which limits him from working in camps and some pertains to the pain which operating heavy equipment causes him.
- [23] He deposes in his affidavit of February 13, 2012, that he is unable to continue to work the long hours that he worked in 2008 and 2009 because that work is too gruelling. Still further, he deposes in that same affidavit that:

What the Claimant ... [refuses] to see is that I am a 50 year old man with a permanent disability that is making it more and more difficult for me to work at the employment ... I ... previously enjoyed.

- [24] Each of the foregoing matters, including the uncertainty of employment in the oil and gas business, were raised in the affidavits filed by the parties prior to the Consent Order, or at a minimum were known to Mr. Bradley. None of these matters could therefore be said to constitute a "material change in circumstances".
- [25] At the same time, the reality is that Mr. Bradley did lose his employment at Peace Country. Some argument was made on behalf of Mrs. Bradley that the departure was voluntary. This is not consistent with the employment records filed by Mr. Bradley and I do not accept that this is so. Still further, I do not accept any submission which seeks to paint Mr. Bradley as either slothful or inclined to avoid his responsibilities. Mr. Bradley's lifelong work history, including in recent years, shows him to be a diligent and hardworking man. He has always, when faced with a loss of employment, moved quickly and purposefully to find new employment.
- [26] In addition, to his credit, he has paid Mrs. Bradley all the spousal support he was required to pay under the Consent Order. To meet this obligation, he has used up the capital he received under the Consent Order and has had to borrow other monies.
- [27] I accept, therefore, that Mr. Bradley lost his job at Peace Country. I accept that there has been a significant downturn in the price of natural gas, which in turn has affected the availability of employment. This evidence of Mr. Bradley is not contradicted.
- [28] I also accept that Mr. Bradley has made some effort, without success, to find alternate employment. This, too, is supported by his affidavit material.
- [29] All of these changes were substantial, largely unforeseen, and have been of a continuing nature. I say largely unforeseen, because the nature of employment in the oil and gas fields is always somewhat uncertain or erratic.
- [30] At the same time, it appears that Mr. Bradley has made a conscious shift in his plans for future employment. In January 2011, Mr. Bradley incorporated a company called Hunter's Haven Ventures Ltd. The nature of that company in Mr. Bradley's affidavit materials reveals that Mr. Bradley and his new partner, Ms. Cooper, had or have some future plans to build guest cabins and run a hunting/guiding business, and tangible steps, beyond formation of the company, appear to have been taken to advance these future plans.
- [31] At some point, after being let go by Peace Country, Mr. Bradley appears to have used that corporate structure or the corporate structure provided by Hunter's Haven Ventures, to secure employment and improve his prospects in the oil and gas area. He believed that running his own business would improve his prospects of generating income. Specifically, he has contracted out his trucks and equipment and contracted himself as a foreman supervisor. His company, in its first year, generated approximately \$99,000 in revenue, and he has generated almost \$20,000 for himself.

- [32] Mr. Bradley's plan has much to commend it. He can obtain more or different contracts with different companies, and thereby avoid the cycle of being laid off by one company or another. In this way he can provide himself with greater employment and income security. As he gets older, this will be increasingly important, both for himself and Mrs. Bradley.
- [33] Still further, with his disability, such employment is more likely to allow him to work in the future. Again, this is in both his and Mrs. Bradley's interest.
- [34] In *Canuel v. Canuel* (1997), 39 B.C.L.R. (3d) 358, 94 B.C.A.C. 188, Madam Justice Southin, for the court, addressed a variation order where the payor spouse, apprehending that he might be laid off, resigned from his employment and became self-employed. Southin J.A. said:

11 But the critical question for us arises from the way the learned judge dealt with the appellant's change in circumstances. In my opinion, he erred in not focusing on matters as they stood before him. It is from time to time necessary in the ever-changing world of business for a paying spouse to change his or her occupation or employment to pursue what might be called long-term goals which require short-term pain. When spouses live together, such changes are borne by them both and they have to continue to be borne, to some extent, even when they are no longer living together if one looks to the other for support. The evidence persuades me that the appellant, when he resigned his job, was doing just that. He was making a choice for a long-term improvement in his financial situation against the risk that the company for which he was working might cease to operate or find it necessary because of economic conditions to terminate his employment. It may very well be that the appellant will return in the not too distant future to his former level of income. It does seem possible. But it was certainly nothing that the learned judge could be certain of at the time he heard the application in question.

- [35] Similar considerations pertain in this case. Mr. Bradley's loss of employment and his concurrent inability to find other employment caused him to reassess or revisit his career options. His ensuing decision was measured and reasonable, and was a product of his changed circumstances. He chose not to sit and wait for new employment, and he chose to move forward with a different strategy. The fact that this change came so quickly on the heels of the Consent Order does not alter this reality, nor does the fact that Mr. Bradley appears to have since been reoffered employment by Peace Country. Having set out on a course of conduct that was, I am satisfied, in the long-term interests of both parties, he cannot be expected to abandon it because some other form of employment has resurfaced. Such employment has proven, at least historically, to be short-lived in nature.
- [36] However, I am not prepared to retroactively credit Mr. Bradley with the support he paid Mrs. Bradley in the past year. The importance of certainty for Mrs. Bradley militates against this. Nor do I believe it would be appropriate for me to suspend Mr. Bradley's spousal support obligation altogether and place the onus on Mrs. Bradley to reapply for spousal support based on some future improvement in Mr. Bradley's financial circumstances.

- [37] The parties negotiated the Consent Order and Mrs. Bradley was the beneficiary of the spousal support provisions in that order. Mr. Bradley has, for the reasons I have described and in the way I have described, effectively retooled how he secures employment. He expects to do better this year than last, though he lacks, in the short term, the ability to make the payments required under the Consent Order.
- [38] The legal framework I have referred to and the circumstances I have described warrant varying Mr. Bradley's existing support obligations. I am reducing that obligation to \$1,250 monthly commencing on March 1, 2012. That obligation will, however, return to its present level of \$2,479 on August 1, 2013, or 18 months later. That provides Mr. Bradley some time to get his business up and running. It also makes clear that the variation is to be relatively short-lived and signals the expectation that he will imminently be again responsible for the spousal support to which he first agreed.
- [39] I observe that both parties agree I have the jurisdiction to make the foregoing form of order.
- [40] Mr. Bradley is also to produce both his income tax returns and those of Hunter Haven Ventures Ltd. to Mrs. Bradley within 30 days of them becoming available.
- [41] Each party is to bear their own costs of this application.

"Voith J."

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