

CANADA / JUDGMENT

Bredenkamp v. Bredenkamp

2020 BCSC 730

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2020 BCSC 730 Bredenkamp v. Bredenkamp

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bredenkamp v. Bredenkamp,

2020 BCSC 730

Date: 20200512

Docket: E13836

Registry: Campbell River

Between:

Barend Johannes Bredenkamp

Petitioner

And

Susanna Gertruida Bredenkamp

Respondent

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

The Petitioner, appearing in person:

B.J. Bredenkamp

The Respondent, appearing in person:

S.G. Bredenkamp

Place and Dates of Hearing:

Campbell River, B.C.

February 27 and 28, 2020

Place and Date of Judgment:

Campbell River, B.C.

May 12, 2020

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I. Overview

- [1] By way of petition filed July 18, 2017, Barend Bredenkamp asks that the October 24, 2000 order of Justice Ritter made in the Court of Queen's Bench of Alberta, Action No. 4803-96817, be varied, terminating the petitioner's obligation to pay spousal support to the respondent, Susanna Bredenkamp.
- [2] In her cross-application filed August 1, 2019, the respondent asks that: Justice Ritter's order be reinstated and enforced; be varied retroactively from 2016 onwards and prospectively based on an imputed income to the petitioner; the order for spousal support survive the petitioner's death and be binding on his estate; and that all arrears be paid forthwith.

II. Background

- [3] The parties are each 69 years old. They both currently reside in British Columbia. They have two children who are in their 40s and independent.

- [4] The petitioner and the respondent were born, raised and went to school in South Africa. They are university-educated. The petitioner became a psychiatrist and the respondent obtained a Bachelor of Arts degree with courses in languages and psychology.
- [5] The parties were in their early 20s when they married in April 1973 in South Africa. At the time, Mr. Bredenkamp was a medical student and Ms. Bredenkamp was working as a teacher on a one-year contract teaching Xhosa and Afrikaans to high school students. She then worked as a proof-reader and a typist, but stopped working in 1975 when the parties' first child was born.
- [6] The parties moved to Canada in 1987, living first in BC and later moving to Alberta. The transition to Canada was difficult for them, both personally and financially. Their relationship lasted about 20 years, during which for the most part, the respondent was a homemaker. They separated in either 1993 or 1994, in the midst of financial pressures on the family unit.
- [7] Mr. Bredenkamp commenced a divorce proceeding in Alberta following separation. He moved back to BC shortly thereafter. Following separation, he continued with his financial obligations towards the respondent and their children, including paying for their children's education and retiring significant family debts. The parties were divorced on November 13, 1997.
- [8] By court order dated April 30, 1995, the petitioner paid the respondent interim spousal support of \$4,000.00 per month and interim child support of \$1,000.00 per month. This order was time-limited and expired in four months.
- [9] Despite the expiry of the April 30, 1995 court order, the petitioner continued with the same support payments to the respondent. In November 1997, the parties consented to an order requiring the petitioner to pay \$2,500 per month for spousal support to the respondent commencing October 1, 1997. The support order was for a period of three years, at which time the respondent was at liberty to apply for further support.
- [10] In July 2000, the respondent applied to extend the support indefinitely, to increase the monthly amount of support to \$5,000, and to receive a \$30,000 lump sum payment for retroactive support. Justice Ritter heard the matter on October 24, 2000 and ordered the petitioner to pay ongoing support of \$2,500 per month to the respondent for a period of indefinite duration. The petitioner continued to make those support payments to the respondent, although there was a brief period of time where Mr. Bredenkamp was in arrears. He caught up on his arrears and as of 2017 was up to date with all of his spousal support payments.

[11] In September 2017, the petitioner applied to terminate his spousal support obligations and obtained an order for substituted service of Ms. Bredenkamp. The matter was heard on November 6, 2017, in the absence of the respondent. Justice Thompson granted the order sought and terminated spousal support. However, on subsequent application by the respondent, that order was set aside by Justice Skolrood on June 10, 2019 as follows:

1. The Final Order of the Honourable Justice Thompson, terminating the Petitioner's obligation to pay spousal support, be set aside. The underlying order is not re-instated, but will remain stayed pending a re-hearing of the Petition.

[12] By virtue of these orders, the respondent has not paid any spousal support since 2017.

[13] Both parties are self-represented in the proceeding before me. The evidence at the hearing consisted of affidavit evidence from each of the parties, an affidavit from Mr. Bredenkamp's current wife Olena Kryvchenkova, and an affidavit from one of the parties' children.

[14] Attached to some of the exhibits in the affidavit material were printouts from websites. I determined that these constituted hearsay, and did not admit them into evidence. I have not relied on them in arriving at my decision.

III. Issues

[15] The central issue before me is whether there has been a material change in the condition, means, needs or other circumstances of either former spouse since Justice Ritter's order was pronounced on October 24, 2000 such that the order should be varied.

IV. Legal Framework

[16] Pursuant to s. 5(1)(a) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), a court in a province has jurisdiction in a variation proceeding if either former spouse is ordinarily resident in the province at the commencement of the proceeding.

[17] Spousal support and the variation of spousal support orders are governed by ss. 15.2 and 17 of the Divorce Act.

[18] Section 15.2(6) of the Divorce Act sets out the objectives of spousal support as follows:

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (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.

[19] Section 15.2(4) of the Divorce Act states:

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (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.

[20] The factors set out in s. 15.2(4) of the Divorce Act require the court to balance the circumstances of each spouse, bearing in mind the objectives of spousal support stipulated in s. 15.2(6) of the Divorce Act, to achieve an equitable alleviation of the adverse consequences of the breakdown of the marriage: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 36.

[21] Section 17(1) of the Divorce Act permits the court to vary, rescind or suspend, prospectively or retroactively, a spousal support order.

[22] Section 17(4.1) of the Divorce Act sets out the factors for consideration by the court in varying a spousal support order:

(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.

[23] Section 17(7) of the Divorce Act sets out the objectives of a variation of a spousal support order, which are essentially the same as the objectives for spousal support generally as set out in s. 15.2(6) of the Divorce Act.

[24] A variation may only be ordered if the applicant has established that there has been a material change in the circumstances of either party since the original order or since the last variation order. A material change in circumstances is a change, such that, if known at the time, would likely have resulted in different terms: *L.M.P. v. L.S.*, 2011 SCC 64 at para. 66; *R.P. v. R.C.*, 2011 SCC 65 at para. 25.

- [25] On a variation application, the court should consider the terms of the order and the circumstances of the parties at the time the order was made when determining if a change is material: R.P. at para. 25.
- [26] Both sections 15.2(5) and 17(6) of the Divorce Act prohibit the court from taking into consideration misconduct of a spouse in relation to the marriage.

V. Analysis

- [27] There was no dispute that during the marriage, the respondent stayed at home to raise the children, and that Mr. Bredenkamp was the primary income earner.
- [28] At the time of the proceedings before Justice Ritter, Ms. Bredenkamp was approximately 50 years old, and had been in receipt of spousal support for approximately six or seven years. She had never earned more than \$10,000 in income from employment since the parties' separation. In contrast, Mr. Bredenkamp's line 236 income at the time of the order was in excess of \$150,000.
- [29] In making the order for indefinite spousal support, Justice Ritter noted the following in his Reasons for Judgment:
- Ms. Bredenkamp was entitled to support based on her role at home with the children during the parties' marriage.
 - The maintenance provided was intended to encourage Ms. Bredenkamp to become self-sufficient and obtain employment, possibly with the help of an employment counsellor.
 - Ms. Bredenkamp has a university degree and other training, which places her in an advantaged position compared to other people who may have been full-time caregivers for an extended period of time.
- [30] I now turn to each of the party's circumstances.

A. Circumstances of Mr. Bredenkamp

- [31] Mr. Bredenkamp relocated to Campbell River in 2007 and runs a psychiatry practice. He will turn 70 years old in August 2020. He lives with his second wife, Olena Kryvchenkova. They married in 2003 and Ms. Kryvchenkova was a full-time homemaker until 2008. She works in the psychiatry practice along with Mr. Bredenkamp, doing various jobs to assist him in the management of his practice and helping to keep his overhead costs low. In recent years she was paid about \$3,000 per month, but her salary was increased at the beginning of 2019 to \$4,000 per month.
- [32] Mr. Bredenkamp's income has fluctuated significantly over the years since separation. For most of the early years post-separation he was in transition, moving several times and eventually settling in Campbell River to establish his own psychiatric practice.

- [33] His line 236 income post-2000 has varied from a low in 2005 of \$100,000 to a high in 2017 of \$333,000. His corporate income in 2019 was \$113,062, though his average income over the last five years has been about \$250,000.
- [34] Mr. Bredenkamp is now in the process of winding down his practice to fully retire by the end of 2020. The retirement plans are precipitated by poor health and a letter from the College of Physicians and Surgeons of British Columbia in which he was advised that they would conduct more frequent reviews of his practice once he has reached 70 years of age.
- [35] Mr. Bredenkamp reports the following health concerns: osteoarthritis which primarily affects his hands, causing pain when writing or typing; moderate to severe spinal stenosis; a recent upper spine/traumatic neck injury which causes him pain; and five hernia operations since 1984 which were successful but have left residual pain.
- [36] Upon retirement, Mr. Bredenkamp expects to receive approximately \$57,890 in annual income comprised of the following monthly payments:
- a) Canada Pension Plan ("CPP") payment of \$1,327.19;
 - b) Old Age Security payment of \$686;
 - c) Registered Retirement Income Fund payment of \$1,811; and
 - d) Dividends from his former practice of \$1,000.
- [37] Mr. Bredenkamp has a line of credit and other debts totalling around \$52,000.
- [38] Mr. Bredenkamp submits that his financial circumstances are further restricted because he is trying to save for retirement, pay down his debts and pay for his stepson's education.
- [39] Mr. Bredenkamp's stepson was six years old when the parties married. He is now 22 years old and enrolled in his third year at the University of British Columbia, studying engineering physics. He is dependent on Mr. Bredenkamp financially to complete his education. His first three years were funded through an RESP but Mr. Bredenkamp submits that his stepson will now require financial assistance from himself and Ms. Kryvchenkova to complete his education. Mr. Bredenkamp's evidence was corroborated by Ms. Kryvchenkova.

B. Circumstances of Ms. Bredenkamp

- [40] Ms. Bredenkamp is almost 70 years old and lives in Vancouver in a rented apartment with the parties' adult son. She is not employed.
- [41] Ms. Bredenkamp has a Bachelor of Arts degree from South Africa. In addition, she obtained her real estate licence and took training in Swedish relaxation massage. The massage training became outdated and she did not pursue any further training in that field. In 1999 Ms. Bredenkamp enrolled in a diploma program in computer systems technology. She failed the programming courses and did not receive her diploma. In 2013 she applied for a Bachelor of Science in Rehabilitation related to chiropractic work in South Africa, but was

not accepted into the program.

- [42] Since 2000, Ms. Bredenkamp has spent a significant amount of time living in South Africa. Between 2006 and 2019 she spent a total of eight years in South Africa. Most of her trips were spread out in one year intervals, with the latest "visit" lasting five years.
- [43] Ms. Bredenkamp gave various explanations for her frequent returns to South Africa following the separation. Most of these reasons were personal, such as the declining health of her parents. Though it is evident that these frequent and lengthy absences from Canada interrupted her ability to sustain continuous employment, Ms. Bredenkamp attributes her spotty work history due to her health, advancing age, and lack of transferable skills.
- [44] In 1989 Ms. Bredenkamp was diagnosed with Meniere's disease. She says that though she is generally able to control the disease, it sometimes causes vertigo and nausea. However, while she presented with this illness at the time of the October 2000 hearing, Justice Ritter did not find her to have any medical impediments to working.
- [45] Ms. Bredenkamp says that she also has scoliosis of the spine. There was no evidence about what impact this has had, if any, on her ability to work.
- [46] Ms. Bredenkamp also says that she suffered a spinal injury in 2006 which affects her back, legs and feet, and restricts her movements and activities. However, evidence as to the extent and degree of any disability flowing from this injury is sparse. The only medical evidence provided in support is an opinion letter from Ms. Bredenkamp's chiropractor in South Africa, Dr. Shacksnovis, dated April 4, 2007.
- [47] There are a number of deficiencies with Dr. Shacksnovis' opinion letter that make it inadmissible. The letter fails to comply with the requirements for expert opinion evidence such as the attestation of the expert, expert qualifications, and the instructions provided. In addition, the report suffers from more fundamental flaws that cause me to place very little weight on it. The letter is 13 years old, and provides no insight into Ms. Bredenkamp's current condition. It does not describe how the respondent's condition might affect her ability to work, nor does it provide any prognosis. It simply reports that Ms. Bredenkamp saw her chiropractor in 2007 for pain in her left side low back extending to her left thigh and leg, and paresthesia. After four chiropractic treatments she reported that the pain was greatly reduced, though paresthesia remained. The chiropractor recommended a follow-up appointment with a neurosurgeon and an MRI scan if her condition remained unresolved. There is no evidence that the respondent saw a neurosurgeon or had an MRI.
- [48] Ms. Bredenkamp also says that she continues to suffer from depression (accompanied with anxiety attacks) which started during their marriage. However, there is no indication that the depression has been disabling. Ms. Bredenkamp has been able to control her depression and anxiety with medication and other treatment, though she says her depression was exacerbated after the termination of spousal support in 2017.

- [49] I turn now to Ms. Bredenkamp's work history. Since the separation Ms. Bredenkamp has worked in a variety of part-time or temporary jobs, in roles such as a language instructor or waitress. She has not held any job for longer than one year. Ms. Bredenkamp says that she has been persistent in looking for work but has not been able to secure it. She submits that she applied for jobs around the world; sometimes holding two part-time jobs at a time. However, in the six years between 2003 and 2013 in which she reports earning income, her average employment income was \$5,394 per year.
- [50] Ms. Bredenkamp has not reported any employment income since 2013. She says that though she provided her services to various people, she did not expect or receive payment.
- [51] Since the separation, Ms. Bredenkamp has been relying on spousal support from Mr. Bredenkamp to meet her financial needs. Since 1997 she has been in receipt of spousal support of \$30,000 per year. Ms. Bredenkamp received over \$700,000 in spousal support payments from Mr. Bredenkamp between August 1994 and November 2017.
- [52] She left the marriage with no debts, though she says she has now incurred about \$17,000 in debt to the Canada Revenue Agency due to unpaid taxes on her spousal support payments. Additional debts include \$11,000 on her Visa and \$36,000 in RRSPs. Both of Ms. Bredenkamp's parents passed away following the separation. In her personal financial statement, she disclosed that she inherited \$63,966 from her parents' estate in 2017.

VI. Conclusion on Petitioner's Application

- [53] I am satisfied that there has been a material change of circumstances that warrants terminating spousal support effective November 6, 2017.
- [54] The parties were in their early 40s when they separated. By November 2017, 17 years had transpired since the making of Justice Ritter's Order and over 23 years had passed since the parties' separation. Thus, simply by the passage of time, there has been a material change of circumstances.
- [55] In addition, Mr. Bredenkamp's circumstances have also changed. He is almost 70 years of age, in ailing health, and on the cusp of retirement. He has since remarried, and has financial obligations to his new spouse and stepson. While he has continued to enjoy a lucrative career, since the separation his current wife has aided him significantly in this regard.
- [56] In *Chutter v. Chutter*, 2008 BCCA 507 at para. 50, leave to appeal refused [2009] S.C.C.A. No. 41, Justice Rowles discussed the purpose of compensatory support, saying that it "is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse."

- [57] Non-compensatory spousal support is "grounded in the 'social obligation model' of marriage, in which marriage is seen as an interdependent union" (Chutter at para. 54) or a "joint endeavour" where the "default presumption of this socio-economic partnership is mutuality and interdependence" (Bracklow at para. 20). Upon a marriage's dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse, not the state: Chutter at para. 54.
- [58] "Need" is a flexible concept and is one of several considerations which a judge must take into account in deciding whether any order for spousal support is warranted. Similarly, economic self-sufficiency is a relative concept, which is "informed by the standard of living previously enjoyed by the parties": Chutter at para. 56, quoting from *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256 (C.A.).
- [59] As the Court noted in *Fisher v. Fisher*, 2008 ONCA 11 at para. 52, "[s]ection 15.2(6)(d) of the Divorce Act promotes the objective of economic self-sufficiency only if it is 'practicable' to do so and where the objective can be realized 'within a reasonable period of time'."
- [60] The duration of the compensatory award is determined not by when the spouse achieves economic self-sufficiency, but rather when compensation is achieved: *Tedham v. Tedham*, 2005 BCCA 502 at para. 60; Chutter at para. 79; *Morigeau v. Moorey*, 2015 BCCA 160 at para. 37.
- [61] Justice Ritter found that support was payable on a needs basis. The amount set was to allow Ms. Bredenkamp the time to be able to secure lucrative employment, and promote economic self-sufficiency. Unfortunately that did not occur, and Ms. Bredenkamp has not become self-sufficient.
- [62] The parties' relationship ended over 26 years ago. Since that time, the respondent has made very little effort towards becoming economically self-sufficient. Rather than focussing on a stable job or career development, Ms. Bredenkamp has chosen to spend most of the last 14 years travelling back and forth to South Africa. While Ms. Bredenkamp may currently be limited in her employment options due to her age, health, and lengthy absence from the work force, she was not so limited 20 years ago when Justice Ritter pronounced the order entitling her to needs-based support, noting that its purpose was to assist her towards becoming economically self-sufficient.
- [63] In my view, Ms. Bredenkamp has been afforded more than a reasonable period of time to achieve economic self-sufficiency. It is the respondent's personal choices that have caused her to be unable to secure stable and remunerative employment; her financial predicament can no longer be blamed on any economic disadvantage suffered as a result of the marriage.
- [64] The respondent cites a number of authorities in support of her claim for spousal support beyond November 2017. While the authorities are instructive, no two cases are the same, and each case must be determined by its own facts.

- [65] In *Story v. Story* (1989), 29 B.C.L.R. (2d) 21 (C.A.) at para. 81, the court held that it is often unrealistic to expect a 45 or 50-year-old spouse who has been out of the job market for many years to be retrained and compete in the job market. While the age of the respondent is similar to the recipient spouse in *Story*, the circumstances are different. In *Story*, the respondent had no marketable skills aside from her brief experience with the postal service prior to her marriage. Here, the respondent has a Bachelor of Arts degree, worked as a masseuse, and obtained her real estate license. All of these would have provided the respondent with a real opportunity to find employment.
- [66] The respondent also relies on *Pepper v. Pepper*, 2016 BCSC 1542, where Justice Fitzpatrick found a payee had not been fully compensated for her loss from the breakdown of a 24-year marriage despite receiving 20 years of spousal support payments and finding a part-time teaching job after separation. Again, I find the situation in *Pepper* is distinguishable from the case at bar. In *Pepper*, the payee spouse made strong efforts to attain economic self-sufficiency, despite being disadvantaged by not working during the marriage. Here, while I acknowledge that the respondent's career prospects would have been hampered by her not working during the parties' marriage, her prospects were not non-existent. Her minimal efforts to find permanent employment post-separation are not consistent with a desire to achieve economic self-sufficiency. I note also that the parties in *Pepper* had been married for longer duration than in this case, with a comparatively shorter period of spousal support having been paid at the date of the application.
- [67] Finally, the respondent refers me to *Rozen v. Rozen*, 2016 BCCA 303, where the court found that the payee from a 20-year marriage had not received full compensation despite spousal support payments of approximately 17 years. *Rozen* is again distinguishable because the marriage had lasted longer than the support payments. The payor spouse in *Rozen* also earned more than Mr. Bredenkamp, but paid less in spousal support.
- [68] In my view, more than a reasonable period of time had transpired between the parties' separation and November 6, 2017. Indefinite does not mean permanent; it simply refers to an order for support without a time limit at the time it is made.
- [69] The evidence does not support a finding for continued entitlement for spousal support beyond November 2017, on a compensatory or needs basis.
- [70] I therefore order that the October 24, 2000 Order of Justice Ritter made in the Court of Queen's Bench of Alberta, Action No. 4803-96817, is varied, and the petitioner's obligation to pay spousal support to the respondent, Susanna Bredenkamp, is terminated as of November 6, 2017.

VII. Conclusion on Respondent's Application

- [71] Ms. Bredenkamp submits that she should benefit from Mr. Bredenkamp's financial success and wants a retroactive increase in spousal support from 2016 onwards. Given my above order, this would effectively mean that if she is successful in having the support increased

retroactively, Mr. Bredenkamp would pay increased spousal support for 2016 and most of 2017. While I accept that the respondent's sacrifices in marriage significantly helped the petitioner in establishing his career, the petitioner's current success is also attributable to his continuing hard work and the assistance of his current spouse, who has worked with him in his practice.

- [72] I cannot find any justification for a retroactive increase. In my view, Ms. Bredenkamp has been adequately compensated in the support orders that have been in effect since the separation. The respondent's application for retroactive variation of spousal support is dismissed.

VIII. Costs

- [73] Costs ordinarily follow the event, and in family cases, costs are usually awarded to the party that has attained substantial success. Thus, in the ordinary course, Mr. Bredenkamp would be entitled to his costs.
- [74] However, the costs award is discretionary. The court is permitted to make a different costs award having regard to the circumstances of the parties, such as hardship on the unsuccessful spouse: *T.E.A. v. R.L.H.C.*, 2019 BCSC 1883 at paras. 24 and 25.
- [75] I find that a costs order would cause undue hardship to Ms. Bredenkamp. In contrast, Mr. Bredenkamp is in a stronger financial position and can more easily bear the financial consequences of not getting his costs of this proceeding. As such, I order each party to bear their own costs.

"Shergill J."

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