
CANADA / JUDGMENT

C.A.L. v. D.E.L.

2021 BCSC 2719

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Supreme Court of British Columbia

DECIDED

7 May 2021

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2021 BCSC 2719 C.A.L. v. D.E.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.A.L. v. D.E.L.,

2021 BCSC 2719

Date: 20210507

Docket: E171130

Registry: Victoria

Between:

C.A.L.

Claimant

And

D.E.L.

Respondent

Corrected Judgment: The neutral citation number on the front page of the judgment was amended on January 11, 2023

Before: The Honourable Justice Giaschi

Oral Reasons for Judgment

In Chambers

The Claimant, appearing in person:

C. Larose

Counsel for the Respondent:

B. MacLeod

Place and Date of Hearing:

Victoria, B.C.

May 7, 2021

Place and Date of Judgment:

Victoria, B.C.

May 7, 2021

- [1] THE COURT: We are here this morning for delivery of my oral reasons. I reserve the right to amend these reasons for grammar and clarity, but the result will not change as a consequence of any such amendments.
- [2] There are three applications before me, all of which stem from a final order made by Justice MacKenzie on September 4, 2019, after an 18-day trial. The first application filed on January 4, 2021, is by the claimant. She seeks orders concerning family property and debt and a declaration regarding the allocation of various payments made by the respondent. The second application is also by the claimant and also filed on January 4, 2021. In this application, she seeks a variation of the parenting and support orders made by MacKenzie J. The third application is by the respondent filed January 20, 2021. He also seeks a variation of the spousal and child support orders made by MacKenzie J.

Application 1

- [3] The claimant's first application was partially heard by Justice Steeves on January 26, 2021. He dealt with those parts of the application concerning family property and debt. The only issue before me arising out of this application concerned whether payments made by the respondent to the claimant in 2019 were to be applied against retroactive support or against a compensation payment that had been awarded. This issue was disposed of at the hearing on April 27, 2021. I found that the respondent had specifically allocated the payments as being on account of spousal support or child support. I held that the respondent was entitled to allocate payments to a particular debt or obligation. In doing so, I relied on the general common law rule that a debtor who owes more than one debt to a creditor may allocate the payments to a particular debt. The cases I relied on for that proposition are: *Waisman and Ross v. Crown Trust Company*, 1970 CanLII 158 (SCC), [1970] SCR 553, at pp. 559-560, and *Colautti Construction Ltd. v. Ashcroft Development Inc.*, 2011 ONCA 359, at para. 55.

Applications 2 and 3

- [4] The second and third applications are the subject of these reasons. Both applications essentially request a review and variation of the parenting and support orders made by MacKenzie J.
- [5] On September 4, 2019, MacKenzie J. issued a final order in this matter following a full trial. The relevant parts of his order provided, *inter alia*:
- a) The primary residence of the children of the marriage was to be with the respondent, with the claimant having generous parenting time;
 - b) The claimant's 2019 guidelines income was determined to be \$65,965. (para. 4);
 - c) The respondent's guidelines income was determined to be \$186,699 which amount was calculated as follows,
 - i. a long-term disability benefit from SSQ in the amount of \$45,500, plus
 - ii. a non-taxable annuity income from a structured settlement in the amount of \$88,879, grossed up for taxes, plus
 - iii. 50 percent of rental income in the amount of \$4,500, plus
 - iv. a CPP disability payment in the amount of \$10,084, less
 - v. a \$20,000 deduction for medical expenses;
 - d) The parties were to exchange tax returns and other financial information by July 1 of each year so long as there were support obligations. Any adjustments to these support obligations would be prospective as of August 1 of each year and payable from that date;
 - e) The claimant was to pay the respondent \$1,024 per month for child support for two children commencing September 1, 2019, so long as both children resided primarily with the respondent and subject to any future readjustment upon review, as set out in paragraph 7 of the order, or a change in the parenting arrangements;
 - f) On consent, the respondent was to pay 100 percent of the special and extraordinary expenses of the children;
 - g) The respondent was to pay the claimant \$1,654 per month in spousal support commencing September 1, 2019, subject to any readjustment upon review; and
 - h) Spousal support was payable until August 2025 at the low end of the range and any change in spousal support upon review was to commence on August 1 of each year.
- [6] In addition to the above, paragraph 16 of MacKenzie J.'s order includes a contact order prohibiting the parties from contacting each other, except in limited circumstances.

- [7] As is apparent from paragraphs 7, 9, 13 and 14 of MacKenzie J.'s order, there was to be an annual review of the support obligations of the parties pursuant to s. 168 of the Family Law Act, S.B.C. 2011, c. 25. This means that the parties need not prove a material change in circumstances to vary the support orders.

Applications 2 and 3 - Parenting and Support Variations

- [8] The claimant requests a variation of paragraph 2 of the order of MacKenzie J. to reflect changes in the primary residences of the children since the order was made. She also seeks variations of the support orders to reflect both changes in the primary residences of the children and changes in the incomes of the parties. The respondent requests changes in the support orders to reflect changes in the incomes of the parties.
- [9] I will first address whether there have been changes in the primary residences of the children and the effect of any change on the support orders. I will then address whether there have been changes in the incomes of the parties that justify a variation in the support orders.

Changes in Primary Residence

- [10] The parties have two children. H. born May 2002, (18 years of age as of the hearing of the applications), and N. born January 2005, (now 16 years of age).
- [11] Paragraph 2 of the order of MacKenzie J. provided that the primary residence of the children was to be with the respondent, and the support orders were calculated accordingly.
- [12] The claimant submits that H. lived with her during the period from August 28, 2019, to March 13, 2020, and that N. has resided with her since June 19, 2020. The claimant submits that the support orders should be adjusted to take into account these changes of residence.
- [13] I will address H.'s alleged change of residence first and then N.'s change.
- [14] There is conflicting evidence before me as to where H. resided during the relevant period. The claimant attests to H. residing with her and attaches as exhibits to her affidavits some mail directed to H. at her house and some correspondence she authored wherein she says H. was residing with her.
- [15] The respondent on the other hand attests that H. resided with him except for the month of September 2019. He attaches some texts between himself and H. which do seem to suggest that she was to move back in with him in early October 2019. He additionally attaches a letter that H. signed to the Canada Revenue Agency in which she states that except for one month, she lived with the respondent.
- [16] Based on the evidence before me, and especially the letter H. signed to the Canada Revenue Agency, I am not satisfied that H. resided with the claimant during the period from August 28, 2019 to March 13, 2020.

- [17] Turning to N.'s change of residence. The parties are agreed that N. has resided with the claimant since June 19, 2020, and that this is a permanent arrangement. In view of this agreement, the support payments going forward will be recalculated on the basis of N.'s new residence; however, as support is to be reviewed annually and new payments calculated as of August 1 of each year, I am not satisfied that I should make a retroactive change for the month of July 2020 alone.
- [18] Accordingly, I make no retroactive adjustments to the support payments on account of changes in the primary residence of the children. However, support payments for the period commencing August 1, 2020, shall be calculated on the basis of N. residing primarily with the claimant and H. residing primarily with the respondent.
- [19] A variation of paragraph 2 of the order of MacKenzie J. will be made to reflect the new residency arrangements.

Incomes

- [20] Justice MacKenzie determined the 2019 incomes of the parties for support purposes to be \$186,699 for the respondent and \$65,965 for the claimant.
- [21] For the support period commencing August 1, 2020, the claimant's notice of application requests an order setting the respondent's guideline income at \$182,199 and her income at \$58,383.
- [22] In submissions before me, the claimant submitted that her 2020 guidelines income should be \$58,383, being the line 150 amount of her 2019 tax return. She further submitted that the guidelines income of the respondent should be \$102,941 as declared on his 2019 tax return plus the grossed-up amount of the structured settlement annuity he received in the amount of \$91,926.48. The claimant was not able to provide me with the amount of the gross-up.
- [23] The respondent submits that the claimant's guideline income should be \$78,372 and that his income should be \$79,935. The respondent submits that as of the end of May 2020, he no longer received the SSQ long-term disability payment which was \$45,523 in 2019 and he no longer receives any rental income. The respondent also submits that the \$20,000 deduction allowed by MacKenzie J. should be increased and should be deducted from the amount of the structured settlement annuity before gross-up.
- [24] Before turning to the analysis of the incomes of the parties, I note that the structure of MacKenzie J.'s order was for there to be annual reviews of the party's incomes in July of each year and that support orders were to be varied as of August 1 of each year. The applications before me are for a review and determination of the 2020 incomes of the parties which impact the support payments for the period from August 1, 2020 to August 1, 2021. I make this note because there was some suggestion during submissions that I should make income determinations that would have a prospective effect and hopefully negate the need for a further review in July 2021. This would be desirable, and I will endeavour to provide the

parties with some guidance to negate the need for a further review. However, neither application has expressly requested a change in the review schedule implemented in MacKenzie J.'s order. In my view, it is not open to me to change that schedule in the absence of a proper application.

Claimant's income

- [25] The claimant is a registered nurse. At the time of the trial before MacKenzie J., she had been on disability since April 23, 2019, and expected to be on disability into the fall of 2019. Her need to be on disability was challenged by the respondent; however, the parties eventually agreed during the trial to set her income by consent at \$65,595. (see MacKenzie J.'s reasons at paras. 33-38).
- [26] It is important to note that although the claimant expected to be off disability in the fall of 2019, in fact, she did not return to full-time work until November 2020.
- [27] The claimant's line 150 income on her 2019 tax return is in the amount of \$58,383. This is the amount she says should be used for her 2020 guidelines income.
- [28] The respondent submits that the claimant's income should be \$78,372 being the amount a full-time nurse would earn.
- [29] I accept that the claimant earned \$58,383 in 2019 being the amount reported on T1 general tax form. However, in the circumstances of this review, this is not the amount that should be used for the claimant's income for support purposes.
- [30] The use of line 150 of the T1 general tax form to determine a spouse's income for support is mandated by Section 16 of the Guidelines. However, Section 17 of the Guidelines further states that if the Court is of the opinion that the determination of a spouse's annual income under Section 16 would be unfair, the Court may have regard to the spouse's income over the past three years and determine an amount that is fair and reasonable. Further, Section 2(3) of the Guidelines specifies that the most current information should be used.
- [31] The evidence before me, which is the most current information, is that the claimant was on disability and returned to work full-time in November 2020. It is clear on the evidence that she now has more income available to her than she had in 2019. In fact, her most recent F8 financial statement filed March 23, 2021, states that her guideline income for support is now \$70,625. Also attached to her F8 is a letter dated March 16, 2021, from her employer noting that she has a full-time position of 75 hours bi-weekly and is paid \$39.62 per hour. This translates to a bi-weekly pay cheque of \$2,971.50 and an annual salary of \$77,259. When her union and professional dues are deducted, which is required by the guidelines, the amount is \$75,084.

- [32] Given that the claimant has been working full-time since November 2020 and will continue to work full-time for the remainder of the August 2020 to July 2021 period under consideration, it would be unfair to calculate the support obligations on the basis of her 2019 tax return. She has more income available to her for support than is reflected in that return.
- [33] However, I am also of the view that her income for support should be something less than the full annual income a nurse would earn. The claimant has not worked full-time throughout the period under consideration. From August 1, 2020 to November 2020, she was still on disability and was earning less than a full-time nurse. The exact amount is unclear, but in my view, the appropriate amount to use as the claimant's guidelines income from the period August 1, 2020 to July 31, 2021, is \$70,000.

Respondent's Income

- [34] The claimant submits that the respondent's income for support purposes should be calculated by adding his line 150 income from his 2019 tax return being \$102,938 to the grossed-up amount of his non-taxable annuity. This would result in an income to the respondent of over \$200,000.
- [35] The respondent submits that his income for support purposes should be calculated by taking into account only his CPP disability benefit and the grossed-up amount of his non-taxable annuity. He says that the other sources of income in his 2019 tax return, most significantly, the SSQ payment and the RDSP income are no longer available to him.
- [36] The respondent's line 150 income on his 2019 tax return discloses an income of \$102,938. Of this amount, \$629.74 was employment income, \$45,523.44 was the SSQ disability payment, \$10,315.92 was the CPP disability benefit and \$46,459.88 was RDSP income.
- [37] The respondent also filed an updated F8 financial statement on January 20, 2021. In this F8, he deposes that his income for support purposes is \$101,942.40 comprised of CPP disability income of \$10,315 and his annuity of \$91,626.
- [38] The evidence before me is that there have been changes to the respondent's income since it was assessed by MacKenzie J. and as reported in his 2019 income tax return. The changes relate to the SSQ disability benefit, rental income and the amount of the annuity.
- [39] Concerning the SSQ disability income, the evidence before me clearly establishes that the insurer stopped making payments and that an appeal of that decision was unsuccessful. The last payment was made in May 2020, and there is no possibility of these payments recurring. Accordingly, I agree with the respondent that this source of income was not available to him and will not be available to him during the period under consideration.

- [40] Concerning the RDSP income reported in the respondent's 2019 tax return, the respondent deposed in his affidavit that he cashed in his RDSP in 2019 to pay debts. He deposes that the amount in the RDSP was \$89,404.48 and that on cashing it in, he received only \$46,459.88. He says the remainder was either remitted, withheld for tax liabilities or government contributions that were clawed back. I accept his evidence that the RDSP is depleted and no longer available to him as a source of income.
- [41] Concerning the respondent's annuity, the evidence is that this has been increased to \$91,626.48.
- [42] Based on the evidence before me, I am satisfied that the income available to the respondent in the period under consideration is significantly less than his income as assessed by MacKenzie J. and is significantly less than the income reported in his 2019 income tax return. In fact, his actual income during the period under consideration will be approximately half of what is reported in his 2019 tax return. In the circumstances, I am satisfied that it would be unfair to the respondent to determine his income for support on the basis solely of his 2019 income tax return, and that to do so, would not be using the most current information available.
- [43] Accordingly, and subject to my comments below regarding the medical expense deduction, I find that the respondent's income for support purposes for the period under consideration is his CPP disability benefit of \$10,315.92 plus the grossed-up amount of the structured settlement annuity of \$91,626.48.

Medical Expense Deduction

- [44] The respondent submits that a further reduction from his income should be made to take into account that he has extraordinary expenses due to his medical disability. The respondent submits that this deduction should be in the amount of \$43,676 and that this amount should be deducted from the annuity prior to the gross-up.
- [45] At the trial, and before me, the claimant agreed to a reduction in the respondent's income to take into account that he has unusually high medical expenses. The amount she agreed to at the trial, and the amount determined by MacKenzie J. to be appropriate, was \$20,000. She submits this is the amount that should be deducted, and the deduction should be from the total income after the annuity is grossed up, not before the gross-up.
- [46] I find that I am in agreement with the claimant on the deduction. The amount of the deduction and when it was to be applied was an issue at the trial. The respondent asked for a deduction of between 45,000 and \$75,000. The claimant conceded that a \$20,000 reduction from total income for medical expenses was fair. MacKenzie J. agreed with the claimant and held the claimant's income was to be reduced by \$20,000. There has been no appeal of this aspect of MacKenzie J.'s order, and I am of the opinion that it is not open to me to reconsider this issue on a review.

[47] I also note that the expenses the respondent submits should be deducted are for housekeeping, yard work and to pay a handyman. There is no suggestion that such expenses only arose after the order of MacKenzie J. such that they were not in contemplation at the time. In my view, the respondent is attempting to simply relitigate a matter that has already been decided.

[48] I, therefore, find that the respondent's income for support is to be calculated as follows.

- a) CPP disability income of \$10,315.92; plus
- b) the grossed-up amount of the \$91,926.48 annuity; less
- c) \$20,000 for medical expenses.

[49] When this calculation is performed, the respondent's income for support purposes is \$110,448. This amount includes the gross-up amount and the \$20,000 deduction.

Spousal Support

[50] Given the incomes of the parties as I have determined them (\$70,000 for the claimant and \$110,448 for the respondent), the amount of spousal support payable by the respondent to the claimant is zero at the low and midpoints of the range and \$231 at the high end of the range.

[51] Justice MacKenzie held that spousal support at the low end of the range was appropriate and I see no reason to depart from this.

[52] Accordingly, based on the incomes of the parties, neither party is required to pay spousal support to the other commencing August 1, 2020.

Child Support

[53] Given the incomes of the parties as I have determined them, the child support obligations of the parties as calculated in accordance with the guidelines are:

- a) The respondent will pay to the claimant the sum of \$1,035 per month for child support commencing August 1, 2020.
- b) The claimant will pay to the respondent the sum of \$666 per month for child support commencing August 1, 2020.
- c) When the support obligations are set off, the respondent will owe the claimant \$369 per month commencing August 1, 2020.

[54] The aforesaid child and spousal support obligations of the parties shall continue to be subject to the review provisions imposed by MacKenzie J.

[55] To assist the parties in respect of the period to commence on August 1, 2021, based on the information currently available, it appears the claimant's guidelines income will be \$75,084 and the respondent's guidelines income will be substantially the same as it is now at \$110,448. These incomes will give rise to an obligation on the part of the respondent to pay an offset child support amount to the claimant of approximately \$318 per month, but will not give rise to a spousal support obligation at the low or midpoints of the range. I hasten to repeat that these calculations are merely to assist the parties and to hopefully avoid the need for a further review of the support obligations. These calculations are not intended in any way to fetter the discretion of the justice that hears any subsequent review applications.

Special Expenses

- [56] The respondent additionally requests a variation of MacKenzie J.'s order that he be solely responsible for all Section 7 expenses. Specifically, the respondent is content to be solely responsible for the costs of post-secondary education for the children, but requests that all other special or extraordinary expenses be shared.
- [57] I am cognizant that the order concerning the division of special or extraordinary expenses was made on consent. However, consent does not immunize an order from review when a material change in circumstances is shown, and I am satisfied that there has been a material change in circumstances since the order of MacKenzie J.
- [58] In fact, there have been at least two material changes, namely the permanent change in the residence of N. and the dramatic decline in the income of the respondent.
- [59] Therefore, pursuant to Section 7(2) of the child support guidelines, special or extraordinary expenses, except post-secondary education costs, are to be shared in proportion to the incomes of the parties, meaning 60 percent by the respondent and 40 percent by the claimant.

Communication/Contact Orders

- [60] The claimant has additionally requested no contact and no communication orders.
- [61] In my opinion, the evidence before me does not establish the need for any such orders beyond what was made by MacKenzie J. The only exception is that paragraph 16(d) of MacKenzie J.'s order provides that neither party may contact the other party's counsel direct. This is obviously unworkable now that the claimant is unrepresented. Accordingly, I vary only para. 16(d) of the order such that it will now read:

If a party is represented by counsel, that party shall not e-mail, text, or otherwise contact the other party's legal counsel except through their own legal counsel. If a party is unrepresented, that party may contact the other party's legal counsel.

Orders

[62] In summary, I make the following orders:

a) Paragraph 2 of the order of Justice MacKenzie is varied as follows:

The primary residence of N. shall be with the claimant and the primary residence of H. shall be with the respondent. The claimant will have parenting time with H. at a time and place of H.'s choosing and for whatever length of time H. chooses. The respondent will have parenting time with N. at a time and place of N.'s choosing and for whatever length of time N. chooses. Parenting time will be determined in accordance with the Children's views and wishes.

b) The claimant is found to be a resident of British Columbia and is found to have a gross annual income of \$70,000.

c) The respondent is found to be a resident of British Columbia and is found to have a gross annual income of \$110,448.

d) The respondent will pay to the claimant the sum of \$1,035 per month for child support commencing August 1, 2020, and continuing on the first day of each and every month thereafter for as long as the children are eligible for support under the Family Law Act or until further agreement of the parties or court order.

e) The claimant will pay to the respondent the sum of \$666 per month for child support commencing August 1, 2020, and continuing on the first day of each and every month thereafter for as long as the children are eligible for support under the Family Law Act or until further agreement of the parties or court order.

f) Commencing August 1, 2020, and continuing until further agreement of the parties or court order, neither party is required to pay spousal support.

g) The respondent is to be solely responsible for the payment of expenses related to the post-secondary education of the children of the marriage. All other special or extraordinary expenses of the children of the marriage are to be shared by the parties with the respondent to pay 60 percent and the claimant to pay 40 percent.

h) The review provisions contained in the order of MacKenzie J. shall continue to remain in effect.

i) Finally, paragraph 16(d) of the order of MacKenzie J. is varied as follows:

If a party is represented by counsel, that party shall not e-mail, text, or otherwise contact the other party's legal counsel except through their own legal counsel. If a party is unrepresented, that party may contact the other party's legal counsel.

[63] Now, can I hear submissions on costs, please.

- [64] C.A.L.: I'm sorry, I didn't -- I didn't -- wasn't aware that I had to do that. I don't have any submissions on costs at this point.
- [65] THE COURT: All right. Ms. MacLeod.
- [66] CNSL B. MACLEOD: Yes, with three cross applications, there was a lot heard. It's a little bit difficult to keep straight who heard what -- or sorry, who was successful on sort of which parts of those. It looks like the success was divided and I would suggest that both parties bear their own costs.
- [67] THE COURT: I agree. Both parties shall bear their own costs. Thank you both. We are concluded.
- [68] CNSL B. MACLEOD: Thank you.
- "Giaschi J."

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