
CANADA / JUDGMENT

C.D.G. v. D.J.P.

2017 BCSC 2169

COURT

Supreme Court of British Columbia

DECIDED

29 November 2017

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2017 BCSC 2169 C.D.G. v. D.J.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.D.G. v. D.J.P.,

2017 BCSC 2169

Date: 20171129

Docket: E091843

Registry: Vancouver

Between:

C.D.G.

Claimant

And

D.J.P.

Respondent

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

T. Bell

Appearing on his own behalf:

The Respondent, D.J.P.

Place and Date of Hearing:

Vancouver, B.C.

September 15, 2017

Place and Date of Judgment:

Vancouver, B.C.

November 29, 2017

- [1] Both the claimant and respondent had applications before the court.
- [2] By agreement, only the claimant's application for a review of spousal and child support proceeded. The remaining outstanding applications are adjourned, generally.
- [3] In her application, the claimant seeks an upward variation of both child and spousal support premised on the respondent's increase in income since the issue of support was last addressed in October 2015. Such variation, she argues, should be retroactive to January 1, 2016.
- [4] The respondent opposes any variation to the existing order on the basis his overall financial situation has not improved from that which he presented within 2015. He asserts that this is by virtue of significant changes in his expenses, over which he says he has no control. Those changes, he argues, outweigh the benefit of any increase to his income.

Issues

- [5] The issues, simply stated, are what effect does the respondent's increased income in 2016 have upon both child and spousal support and, assuming either or both are varied, what is the appropriate date for the variation?

Position of the Parties

- [6] The claimant argues the increase ought to be in respect of both child and spousal support commencing January 1, 2016, that the child support payable ought to be the set-off amount for parenting arrangements pursuant to s. 9 of the Federal Child Support Guidelines, SOR/97-175 [FCSG], and that spousal support ought to be the midrange number as provided by DivorceMate.
- [7] The respondent argues no change is warranted to either figure because he has had negative changes to his circumstances which essentially erase the net effect of his increased income.

The Background

- [8] This matter arises from lengthy litigation. The claimant and respondent can appropriately be called high conflict litigants. They share the parenting time of their two children on an equal basis.
- [9] There have been numerous applications respecting both parenting and financial issues since the trial of this matter in 2010. The matter last appeared before me in October 2015, at which time I revisited both child and spousal support and dealt with arrears I determined had accrued since my earlier order in 2012.
- [10] Madam Justice Gray, the presider at the trial of this matter, dealt with parenting issues arising since the trial's conclusion.
- [11] In October 2015, I found the respondent's income was \$150,000 and that the claimant's income was \$65,500.
- [12] On that basis, for reasons explained in my oral judgment, I set child support at \$940 monthly, an amount 10% below the set-off FCSG amount after having considered the factors set out in *Contino v. Leonelli-Contino*, 2005 SCC 63.
- [13] I set spousal support at \$540 monthly, an amount 20% below the low end of the range under the Spousal Support Advisory Guidelines [SSAG], again after setting out factors which, in my belief, militated in favour of a departure from the Guideline amount.
- [14] The factors I considered in 2015 are fully enumerated in my judgement, which was subsequently transcribed and available to the parties.
- [15] In it, I found the following factors warranted departure from the respective Guidelines:
- The matter of the respondent's proposal to creditors which has resulted in payments of \$1100 monthly to stave off bankruptcy;
 - The unequal division of the equity in the family home at trial resulting in the claimant receiving more of the equity along with an award of spousal and child support. The support was artificially inflated by the addition into the respondent's income of the "forgiveness" by his employer of an interest free loan received by him at the commencement of his employment and utilized for the joint benefit of the parties during cohabitation. I say artificially inflated because, while the notional payment was backed out of the respondent's income for support purposes, no allowance was made for the additional tax he was still required to pay by inclusion of the foregone payment into his annual income;
 - The claimant's re-partnering with Mr. L., who the claimant has described as a businessman, and the failure to particularize his contribution to common household expenses; and

· The claimant's successful application to have Dr. England prepare a s. 211 report and the parties' joint expense thereof - approximately \$20,000 - presumably for the purpose of revisiting the current parenting regime. Also a factor was the report's conclusion, which was unfavourable to the claimant, raising possible alienating behaviour on the claimant's part. The issue of the costs of the report were never addressed afterward, leaving the both parties out of pocket approximately \$10,000.

- [16] Since October of 2015, several things have happened which are relevant to the issue of support.
- [17] The income of each of the claimant and respondent has increased in 2016.
- [18] My order of October of 2015 required an exchange of tax information annually.
- [19] The respondent forwarded his 2015 income tax return to the claimant in or around May 2016, as required. It indicated an income of slightly in excess - by around \$800 - of the amount selected by me as his Guideline income: \$150,000. In the spring of 2017, he forwarded his income tax return for the year 2016, which indicated an income of \$168,470. This is an increase of over 10%.
- [20] The claimant's income for 2015 was modestly below that found by me in October. In 2016, it was \$71,056.
- [21] The claimant's expenses and other financial circumstances are little changed from that which they were in 2015.
- [22] She resides in the former matrimonial home with the two children, when they are with her, and a common law partner whose financial information was not disclosed.
- [23] The respondent's situation is little changed from October of 2015 save for the approximate 10% increase in his income. However, he notes that in the fall of 2017, he was obliged to leave his rented premises because of circumstances not of his doing and, in the result, acquired new rental premises at a rate of \$800 per month greater than was his expense for housing when this matter was last before me regarding support.
- [24] The respondent acknowledged that his expenses were inadvertently overstated in two instances: a double counting of counselling expenses under the headings "Medical" and "Children"; and a mistake as to his automobile expenses.
- [25] The parties both reside in single family residences in proximate areas of North Vancouver.
- [26] The claimant has assets in excess of liabilities comprised mainly of house equity; in excess of \$2,000,000 based on the home's assessed value.

- [27] The respondent has zero net worth and, likely, is in a modest deficit if one excludes furnishings and his automobile from the financial equation. This is because of a near bankruptcy some years following the trial as referred to in greater detail in my earlier reasons for judgment.
- [28] The resulting \$1,100 monthly payment pursuant to the respondent's proposal to creditors, as I earlier determined, arose in part because of tax treatment of the interest free loan advanced to him by a previous employer during the parties' cohabitation.
- [29] The claimant enjoyed the benefit of the loan proceeds during the marriage but none of the adverse tax consequences occasioned later when the respondent lost his employment and the whole of the "unforgiven" portion was taken into income and taxed in his hands. Such is more fully explained in my earlier reasons from 2015.
- [30] Despite the reasonably handsome incomes of each of the parties, each lives relatively frugally.

Discussion

- [31] The first issue to address is whether the changes to the parties' respective incomes warrants a change in the support payable.
- [32] The claimant argues that the FCSG mandate a change given the increase in the respondent's income and her contention that her discretionary income is little different from his. This, she argues, should result in child support reverting to the set-off amount based upon their respective incomes regardless of the date the change is implemented.
- [33] The claimant submitted, on the basis of anecdotal evidence from what the children have told her and travel undertaken with the respondent, the 'discount' afforded in the earlier order ought no longer be available. She further submits that variation upward in support to the set-off amount for the children and midpoint of the SSAG for the claimant would equalize the standards of living in each household.
- [34] Based on the agreed incomes of the parties, the increase sought by the claimant would increase child support from the current \$940 per month to \$1,259 and spousal support from the current \$540 per month to \$1,553.
- [35] Recognizing the respondent's marginal tax rate on income of \$168,000 is closing in on 50%, the net effect on parties would be an increase in after tax dollars to the claimant of approximately \$800 monthly with a similar decline in the respondent's disposable income. There would be a \$320 net increase for child support; with a \$500 increase (rounded) being the after tax cost of an increase of \$1,000 monthly in spousal support.
- [36] If the discount applied in the 2015 order continued, the net effect would be an approximate \$175 increase in child support and \$125 increase in spousal support with a similar decrease to the respondent's net income.

- [37] Depending upon the date chosen for the variation to take effect, the "arrears" created by the claimant's proposed retroactive change would range from a low of \$9800, combined child and spousal, to a high of \$26,500.
- [38] The respondent resists any change whatsoever noting that the actual expenses associated with the 'extras' pointed out by the claimant as opposed to her conclusory view that the activities denoted a more lavish lifestyle when the children were with the respondent. The actual expenses of the activities and travel to which the claimant referred are modest.
- [39] He notes, and I find it to be true, he has no reserve from which to pay any retroactive sum, let alone that proposed by the claimant if support was to be varied as of January 2016.
- [40] He also notes that, effective November 1, 2017, the entire effect of his increased income will be swallowed by the rent increase he involuntarily must face as a result of a decision by his former landlord.
- [41] I am satisfied that each household has limited discretionary funds as a result of, in part, the youngest child's medical needs and, in part, the expenses both bear for family counselling. The suggestion that the children live more lavishly in the home of the respondent has not, in my view, been made out.
- [42] In acknowledging the respondent's changed rent is a negative occurrence over which the respondent had no control, the claimant notes that it begins in November 2017 and, as such, should have limited, if any impact, on the assessment of past support, both child and spousal.
- [43] The respondent, although he had no application before the court, sought to terminate spousal support.
- [44] He noted the failure of the claimant to adduce evidence of her common law partner's financial situation and to particularize what, if anything, he contributed toward the expenses of her household.
- [45] On the evidence as a whole, little has changed comparatively in the parties' financial situations since the last application. The respondent's increased income will soon be offset by an increase in his expenses which I find was not of his own making.
- [46] Looking to the future, there is no suggestion that the rent to be paid by the respondent commencing in November is extravagant or more than he should pay. The claimant's housing expenses including her mortgage, taxes and maintenance costs exceed his.
- [47] As earlier noted, the claimant received a disproportionate interest in the former matrimonial home allowing her to retain it and build equity for her and, possibly, the children's future. Such, in part, addresses the claimant's entitlement to spousal support, particularly as it relates to her placement below the bottom end of the range.

- [48] The respondent, partly through his own improvidence but partly through events over which he had no control, finds himself, at age 52, with no savings or home equity.
- [49] In my earlier reasons setting both child and spousal support at "discounted" amounts, I noted the reasoning in Contino and the impact of that reasoning on the result.
- [50] What has changed is both the respondent's income and his expenses, albeit prospectively.
- [51] The respondent's situation remains precarious. His expenses, even as overstated in his Form 8 - that is double counting the children's counselling expense and overstating, admittedly, his car expense - still leave the respondent, and the children when with him, living in modest circumstances.
- [52] The upcoming rent change will eliminate, for the most part, the after tax consequences of his increased income though such was unknown to both in the summer of 2017.
- [53] The respondent continues to pay back his creditors at the rate of \$1100 a month and will for a further 16 months.
- [54] That said, I disagree that child support ought to be varied as suggested by the claimant. The same considerations which resulted in the 10% discount in 2015 remain in play.
- [55] However, his income has increased and it is appropriate that his child support obligation track that increase. Accordingly, I order that child support be varied from the current \$940 monthly to \$1,133 effective June 1, 2017.
- [56] I choose the date of June 1, 2017, rather than the claimant's preferred date of January 1, 2016, for reasons I shall come to.
- [57] As to spousal support, different considerations apply. Unlike the FCSG, there is no presumptive variation of spousal support as a result of an increase in the payor's income.
- [58] According to s. 17(4.1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the spouse applying for variation - here the claimant - must prove a material change in "the condition, means, needs or other circumstances of either former spouse".
- [59] In *L.M.P. v. L.S.*, 2011 SCC 64, the Supreme Court of Canada reaffirmed the two-fold test for variation of spousal support set out in *Willick v. Willick*, [1994] 3 S.C.R. 670, where at paras. 30-33 the Court stated:
- [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.
- [60] Here, looking at the respondent's overall circumstances, I am not persuaded the claimant has discharged the burden referenced in L.M.P. While the respondent's income has increased, he faces an upcoming corresponding increase in his expenses, the net effect of which negates the positive impact of such an increase.
- [61] His net position remains more or less the same as determined by me in October 2015. All of the negatives - the payment respecting his proposal in bankruptcy, the absence of savings occasioned, in part, by the expense of funding the report by Dr. England originally sought by the claimant, and the extraordinary costs associated with family therapy, some of which are unique to him in terms of individualized therapy - militate against a variation in the quantum of spousal support.
- [62] In addition, his expenses will increase in an amount I find proximate to the net value of the increase in his income as a result of circumstances beyond his control.
- [63] I note the payment of support below the low end of the SSAG may result in an extension to the duration of the claimant's entitlement, but that will arise only upon an application to terminate her support and upon the circumstances extant at that time.
- [64] Accordingly, the claimant's application to vary spousal support is dismissed.

Retroactivity

- [65] As I noted to the claimant's counsel during submissions, I do not agree that support should be retroactive to the beginning of 2016.

- [66] My earlier reasons attempted to set a template for the recalibration of support annually after an exchange of the parties' income tax information for the previous year. The goal, apparently not clearly stated, was to achieve certainty as to the date for review and the information relevant to the review.
- [67] In 2016, the parties exchanged their 2016 information and neither sought to vary the award from October. This was no doubt because their respective incomes had been accurately forecast in late 2015.
- [68] The next review date was the spring of 2017 utilizing 2016 tax information.
- [69] My intention was that the parties look forward, not backward in any review.
- [70] To be clear, had the respondent's income decreased, rather than increased, the result would be no different; any reduction in support would commence June 1 of 2017, not retroactive to the commencement of 2016.
- [71] That is the template which will apply going forward.
- [72] For clarity, the parties are to exchange their T1 General tax returns by May 1 each year. Any variation to the amounts payable will be effective June 1, whether by agreement between the parties or as later ordered by the court if they are unable to agree.
- [73] Consistency in the date for review leads to no unfairness over the long term. If there is a material change in the circumstances of either party such as loss of employment or long term illness resulting in reduction of income, they are, of course, entitled to apply on that basis.
- [74] Otherwise, reviews should occur based on historical information in June of each year.
- [75] Having found the appropriate review date is June, or thereabouts, in each year, I concede the information concerning the respondent's rent increase may not have been known at that time. Had his rent not increased, I likely would have varied spousal support upward in a fashion similar to the manner in which I viewed the matter in 2015: the low end of the SSAG less 20%.
- [76] However, the respondent's rent increase of effectively 40% more than what he paid historically amounts, in my view, to a material change in circumstances which would have resulted in any change being short lived with the undesirable consequence of yet another application in this litigation.
- [77] Hence, any perceived conflict between the dismissal of the claimant's application regarding spousal support and the retroactivity claim is explained.

Costs

[78] Success on this application was mixed and I order each party bear their own costs unless there were offers exchanged which might impact on the issue of costs. If there were, either party is at liberty to set this matter before me for submissions in that regard.

"Harvey J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/17/21/2017BCSC2169.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/c-d-g-v-d-j-p-2017>

Prepared on 30 October 2026 · Esheria