
CANADA / JUDGMENT

C.D.K. v. C.M.K.

2015 BCSC 2625

COURT

Supreme Court of British Columbia

DECIDED

6 November 2015

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.D.K. v. C.M.K.,

2015 BCSC 2625

Date: 20151106

Docket: E049311

Registry: New Westminster

Between:

C.D.K.

Claimant

And

C.M.K.

Respondent

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

S.J. Endacott

Counsel for the Respondent:

T.E. Hoover

Place and Date of Trial/Hearing:

New Westminster, B.C.

November 6, 2015

Place and Date of Judgment:

New Westminster, B.C.

November 6, 2015

- [1] THE COURT: The applicant, Mr. C.D.K., applies to confirm a provisional order to vary spousal support that was made by the Court of Queen's Bench of Alberta at Edmonton on March 24, 2015, by Mr. Justice R.P. Marceau. The application is made under s. 19 of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [DA] which provides, in subsection (7) thereof, that, subject to subsection (7.1), the court may make an order:
- (a) confirming the provisional order without variation;
 - (b) confirming the provisional order with variation; or
 - (c) refusing confirmation of the provisional order.
- [2] The order made provisionally by the Alberta court provides, in part, that the obligation of the applicant, Mr. C.D.K., to pay spousal support to the respondent, Ms. C.M.K., (who has now reverted to using her maiden name, C.M.B.), shall cease six months after the applicant has retired. Upon retiring, the applicant shall provide documentation to the court to indicate that he has retired.
- [3] The order also goes on to say as follows in para. 2 thereof:
- The Applicant shall, within two (2) months, provide to the Court in the Province of British Columbia, particulars of projected amounts concerning pension money and existing RRSPs that he may be entitled to upon retirement.
- [4] So at the time of the application before the Alberta court, there were, of course, no responding materials from Ms. C.M.B. That information is now before me.
- [5] In addition, Mr. C.D.K. has provided further information, including an affidavit that attempts to respond to para. 2 of the order of Mr. Justice Marceau that I just referred to.
- [6] The basic facts of the marriage are as follows: The parties began cohabiting in 1979 and were married in 1984. In 2006, they separated, and in 2007, they were divorced. There is an order of the Alberta court divorcing them, dated December 27, 2007. There was no trial at that time. The parties entered into a comprehensive agreement settling their affairs.
- [7] The parties have one child, K., who was born in 1990.

- [8] At all times the parties lived in Alberta during the course of the marriage. Subsequent to the divorce, K. got an opportunity to attend school here in British Columbia at Douglas College, after having some delay in graduating from high school for reasons that I will get to shortly. So he began attending Douglas College at the age of 20 in 2010, and for that reason, in part, and also due to Ms. C.M.B.'s mother's presence here and her ailing health, Ms. C.M.B. and K. moved to British Columbia in 2010.
- [9] K. continued his education at Douglas College until 2013. It took three years for him to complete a two-year program in arts. He has continued his studies. He is now a student at Simon Fraser University where he is studying for a degree.
- [10] Ms. C.M.B. resides with him in a two-bedroom condominium in Coquitlam. She indicates in her affidavit material that K. has medical problems, that those medical problems have been quite severe in the past, that they continue to be substantial, and that K. continues to be dependent on her.
- [11] At the time of the order in 2007, Mr. C.D.K.'s income, as indicated in the order, was \$95,493. He worked then and continues to work as a lineman with AltaLink. Ms. C.M.B. was working in an administrative capacity in a hospital setting and was earning then an income of \$39,318.
- [12] Mr. C.D.K. has continued to work at the same occupation as he had previously. His earnings have risen and he is now earning approximately \$130,000 per annum. His Form F8 Financial Statement that he filed recently indicates income for spousal support purposes of \$130,882.94.
- [13] Ms. C.M.B. has obtained employment in a secretarial capacity with Children's Hospital. Her income has also increased somewhat from that which she had in 2007. She now earns \$48,000 per year.
- [14] At the time of the divorce, Mr. C.D.K. was paying child support in the amount of \$600 per month. He discontinued paying child support when K. was 23 years age, upon K. finishing the two-year diploma program at Douglas College. He did so in accordance with an Alberta Provincial Court order that allowed him to discontinue child support at that time.
- [15] The 2007 order provides for spousal support of \$600 per month. There is no specific termination date set out in the order, nor any provision for review.
- [16] Mr. C.D.K. brought the application to terminate spousal support upon his retirement, on the footing that he wishes to retire in late 2015. He was born June 17, 1952, and is now 63 years of age. The provisional order provides that his obligation to pay spousal support will cease six months after his retirement. So if the order is confirmed and he retires in the near future he will be 63 or 64 when spousal support is terminated. Ms. C.M.B. is currently 58 years of age.

[17] The first issue to be determined is whether there has been a material change in circumstances within the meaning of s. 17(4.1) of the DA, which provides as follows:

(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.

[18] That provision was considered somewhat recently by the Supreme Court of Canada in *L.M.P. v. L.S.*, 2011 SCC 64, and in review of earlier case law, the Court said this at paras. 30 to 34:

[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.

[19] The divorce and matrimonial property agreement the parties entered into following their separation provides, potentially at least, for a review, in para. 4.8 thereof. That paragraph is nested under the heading "Spousal Support" and states as follows:

4.8 [C.D.K.] and [C.M.K.] acknowledge that the amount of spousal support payable may be reviewed in the event of a substantial change in either spouse's circumstances. Those events which may give rise to a review include . . .

[20] Four things are referred to:

1. a change in income;
2. cessation of child support payments;
3. retirement of either party; and
4. establishment of a new cohabitation or marital relationship.

[21] There has been no review pursuant to that provision. Clearly some of those circumstances have occurred. The incomes of the parties have changed, most particularly that of Mr. C.D.K. Child support payments have, in fact, ceased. Retirement of either party has not yet occurred, although that is the focus of the present application; that is, the intended or wished-for retirement of Mr. C.D.K. The fourth item, establishment of a new cohabitation or marital relationship, seems to have occurred in the past, in that Mr. C.D.K. refers to a subsequent common law relationship that lasted several years, but has since ceased.

[22] However, on this application, Mr. C.D.K.'s position is not that he is seeking a review of spousal support pursuant to that paragraph of the agreement. He seeks confirmation of the Alberta court order, which was based, as I understand it, on the DA and s. 17 thereof which, as I indicated, requires a material change in circumstances.

[23] The first issue is whether there has in fact been a material change in circumstances. The retirement of a party can be a material change in circumstances. However, in summary, it depends on the circumstances of the case.

[24] I was referred to the decision of Mr. Justice Joyce in *Peters v. MacLean*, 2014 BCSC 990, where His Lordship discusses the law in relation to retirement and material change of circumstances at paras. 25 through 38.

[25] So as I indicated, whether a material change in circumstances has occurred is very much a fact-based inquiry, depending on the circumstances at hand. An impending retirement or an actual retirement may possibly be a material change in circumstances, but not necessarily so.

[26] So despite Mr. C.D.K.'s intention to retire, the burden remains upon Mr. C.D.K. to show a material change of circumstances.

- [27] I am not satisfied that Mr. C.D.K. has met that burden in the circumstances of this case. There are a number of reasons for so concluding.
- [28] First of all, the Alberta court quite appropriately indicated in the provisional order that Mr. C.D.K. should provide an affidavit to the court in British Columbia providing particulars of projected amounts of pension money and RRSPs that he may be entitled to upon retirement. Mr. C.D.K. has, in fact, filed an affidavit, but I find that it is not fully responsive to the order that was made. The affidavit indicates in general terms the amount of money available to Mr. C.D.K. based upon CPP and OAP, and some of his retirement assets, so as to indicate in a general sense what would be required for him by way of savings to achieve a current annual income or an annual income projected, I should say, of \$50,000.
- [29] However, the affidavit does not actually state what Mr. C.D.K.'s projected income in retirement is expected to be. Specifically, it does not refer to the amount that he can expect to receive from his pension, depending on the retirement dates. He indicates that there is a pension value of \$383,000. What that would translate into in income is not clear. It is also not clear to what extent, if at all, the payment of \$600 per month would require him to dip into his capital in any way. In my view Mr. C.D.K. has not complied with the intent of the order.
- [30] So the situation is, in my view, quite distinguishable from that determined by Mr. Justice Joyce in *Peters*.
- [31] In order to assess the situation, I have to look in more detail at the relative financial circumstances of the parties.
- [32] As I have indicated, Mr. C.D.K. has not indicated with sufficient specificity what his retirement income is projected to be and how the payment of \$600 would affect him. The financial statement that Mr. C.D.K. has provided indicates, as I have already said, a current annual income of \$130,000. It indicates that his current expenses, including income taxes and including the payment of the \$600 per month, on a total annual basis, amounts to \$84,000. So at his current income, he still manages or ought to be able to save money. The net assets shown after debts are in the range of \$870,000.
- [33] Ms. C.M.B. has also filed a Form F8 Financial Statement. It is quite clear that her financial circumstances are far more strained than those of Mr. C.D.K., even allowing for the fact that \$600 has continued to be paid. Her income is \$48,000. Her net assets would be approximately \$529,000, although that does not include an amount with respect to a municipal pension that she would have accrued since 2010. But in any event, there is certainly a significant disparity in accumulated assets at this point.
- [34] She also indicates that at an income of \$48,000, annual expenses are \$55,000, so she indicates that she is in strained financial circumstances.
- [35] A somewhat unique feature of this case is the fact that the parties' child, K., who as I mentioned, is now 25 years of age, continues to be a dependant. There is some conflict between the parties on that fact. Mr. C.D.K. takes the position, appropriately, that legally

there is no order declaring that K. continues to be a child of the marriage for purposes of the DA. However, I find more persuasive the evidence presented on behalf of Ms. C.M.B. that, although she did not attempt to prove by way of a further application to court that K. continues to be a child of the marriage, the fact of the matter is that due to his medical condition, he does continue, in fact, to be a dependant.

- [36] Ms. C.M.B. continues to carry the weight of child support or dependency which, of course, is a matter that arises from of the marriage relationship. The details are set out in her affidavit.
- [37] So in summary, on that first point, I am not satisfied that Mr. C.D.K. has met the burden upon him to demonstrate a material change in circumstances, in the circumstances of this case, including the fact that he intends to retire. The information before me is simply not sufficient to demonstrate that.
- [38] However, in case I am wrong, I will go on to consider whether, if there were a material change in circumstances, a variation of the order would be justified and appropriate.
- [39] The relevant section of the DA is s. 17(7) which provides as follows:
- (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.
- [40] The marriage was essentially traditional, in the sense that, the wife and mother was largely responsible for domestic matters, including childcare. Mr. C.D.K. worked hard as a lineman and was frequently away from home. He continues to work hard. There is no suggestion otherwise. But as a result, when the parties had a child, the burden fell primarily on Ms. C.M.B., who reduced her work from full-time to part-time in 1990 when K. was born. She returned to work full-time in 2006. However, the fact is that during those 16 years, she was unable to move forward with her career or to develop her own career in such a way as perhaps now to be benefiting from that.
- [41] So as I have indicated already, she returned to essentially the same kind of work that she was doing before, and earning similar kind of money that she was earning before.

- [42] The order for spousal support, in my view, has a very strong compensatory aspect to it. Compensatory in the sense that it refers and fits within subsections (a) and (b) of s. 17(7), which I referred to.
- [43] There is also in this case a non-compensatory aspect of spousal support based upon s. 17(7) (c) of the DA, in that Ms. C.M.B. continues to endure an element of economic hardship arising from the breakdown of the marriage. Had the parties stayed together, I do not think that Ms. C.M.B. would be in the strained financial circumstances that she is now in, because K.'s support would continue to be the joint responsibility of both parties.
- [44] In that respect, there is nothing in the affidavit of Mr. C.D.K. to indicate that he is in a situation of financial hardship or that he expects to be upon retirement.
- [45] Another factor when considering any potential variation is the amount in question. The amount is only \$600, which I think by any standard is a low amount for spousal support in all of the circumstances. There is no child support being paid anymore. The spousal support has remained constant since 2007, without any increase whatsoever, notwithstanding the fact that Mr. C.D.K.'s income has risen substantially in the years since then and continues to be at a much higher level than it was in 2007.
- [46] So by way of illustration, if the employment income numbers were even the same as they were in 2007, but on a without child support basis, the spousal support, according to the Spousal Support Advisory Guidelines, would range from a low of \$1,755 to a high of \$2,233. That is, therefore, based upon the present ages of the parties, that is a male of 63 resident in Alberta and a female of 57 resident in B.C., with incomes from 2007 of \$95,493 for Mr. C.D.K. and \$39,318 for Ms. C.M.B.
- [47] So the amount of spousal support, as I said, by any standard is very low. Ms. C.M.B. has never sought an increase in spousal support and does not do so now. If the matter were to be the subject of a review, if indeed the terms of the agreement allowed for that, that issue would be considered, certainly if a counter-application were brought.
- [48] If I were of the view that a material change of circumstances existed, I would not, in any event, vary the spousal support from the \$600 that is now being paid by reducing or terminating it.
- [49] I decline to confirm the order of the Alberta court.
- [50] One further comment has to do with the question of the Alberta order. The Alberta order is entitled to be considered, but I have reviewed the transcript of the proceedings and it is very clear that they were very much of a summary nature. There was an absence of full information from Mr. C.D.K. The judge attempted to remedy that by making the order that I referred to, requiring Mr. C.D.K. to provide the B.C. court with relevant financial information. Mr. C.D.K. did not properly comply with that order. As I have said there was no evidence whatsoever from Ms. C.M.B. In declining to enforce the order I do not mean to indicate any lack of deference for the Alberta court.

- [51] Anything further?
- [52] MS. HOOVER: Yes, My Lord, with respect to costs, I would ask that Ms. C.M.B. be entitled to costs.
- [53] THE COURT: Ms. Endacott?
- [54] MS. ENDACOTT: Yes, I would argue that there should be no entitlement to costs because Mr. C.D.K. is -- he does have the -- he should be able to have his day in court to have his hearing with respect to retirement. He is seeking to retire, so there ought to be no costs, because this was brought in good faith. He is current in his spousal support. I would say there is no basis for costs in such a matter. It's not -- wasn't completely -- it wasn't at all out of left field to bring an application with respect to spousal support, given the circumstances of the parties.
- [55] THE COURT: All right. Well, I would not suggest for a moment that the application was not brought in good faith. However, the rule of costs is that costs should follow the event, and clearly Ms. C.M.B. has been successful. I see no reason why the ordinary rule should not apply.
- [56] So I will make an order for costs in favour of Ms. C.M.B. Do counsel have any submission to make with respect to what those costs ought to be?
- [SUBMISSIONS RE COSTS]
- [57] THE COURT: So I am going to set the costs in a lump sum of \$1,250, because the parties should not have to go to the extra time and expense in a case like this of attending to the registrar to set the costs. So costs will be set in a lump sum of \$1,250, and must be paid within 30 days.

"Verhoeven J."

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