

CANADA / JUDGMENT

Calibaba v. Calibaba

2011 BCSC 185

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Supreme Court of British Columbia

DECIDED

15 February 2011

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2011 BCSC 185 Calibaba v. Calibaba

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Calibaba v. Calibaba,

2011 BCSC 185

Date: 20110215

Docket: ED45812

Registry: Nanaimo

Between:

Michelle Lorraine Calibaba also known as Michelle Calibaba

Claimant

And

Gregg Steven Calibaba

Respondent

Before: The Honourable Mr. Justice D.A. Halfyard

Reasons for Judgment

Counsel for the Claimant:

M.S. Harrison

The Respondent Gregg Steven Calibaba Appeared in Person:

Place and Date of Hearing:

Nanaimo, B.C.

January 20, 2011

Place and Date of Judgment:

Nanaimo, B.C.

February 15, 2011

The applications

- [1] Each of the parties to this family law proceeding has brought an application.
- [2] The respondent Gregg Calibaba, by notice of application filed October 29, 2010, seeks the following relief:
 - a) Variation of the order of Madam Justice Gill made on May 14, 2007, so as to give the respondent telephone access with the children on additional specific days and times each week;
 - b) Variation of the order made by a judge of the court on December 12, 2008, so as to reduce the amount of child support payable by the respondent for the children of the marriage, retroactively to July 1, 2009; and
 - c) Variation of the order of Madam Justice Gill made on May 14, 2007, so as to terminate the respondent's obligation to pay spousal support to the claimant, or in the alternative, to reduce the amount of spousal support payable by the respondent to the claimant.
- [3] In her notice of application filed November 24, 2010, the claimant seeks variations of the order of Madam Justice Gill made on May 14, 2007, and the order of Mr. Justice R.D. Wilson made on June 26, 2008. The first variation sought would change the respondent's telephone access to the children from specified days and times, so as to give the children discretion to telephone the respondent whenever they wish to do so. The second variation sought, if granted, would require the respondent to transport the children from Nanoose Bay to Kamloops following his monthly access visit with them, in every second month.

Background facts

- [4] The parties were married on July 29, 1995. They separated on March 15, 2005, and were divorced by the order made May 14, 2007. There are two children of the marriage. Braydon Michael Calibaba was born on December 23, 1997, and is now 13 years of age. Jordan Paul Calibaba was born July 27, 2001, and he is now 9 years of age. The children have lived with their mother since the separation. The order of May 14, 2007, granted joint custody and guardianship to the parties, with primary residence to the claimant and reasonable and generous access to the respondent.

- [5] The claimant is now 39 years of age and the respondent is 46 years of age. It appears that they were 34 and 41 respectively, at the time they separated.
- [6] Not long after the parties were married in 1995, they moved from Kamloops to Parksville on Vancouver Island, where the respondent was posted as a new constable in the Royal Canadian Mounted Police. He continues to work as a police officer in the RCMP, has been promoted to the rank of corporal, and is currently stationed in Chemainus.
- [7] The claimant worked as a retail store clerk until August 1997. She did not work again until after the parties separated. She graduated from high school in 1989 at Kamloops and took one semester at Thompson River University in the fall of 1989.
- [8] In June 2006, the claimant moved from Qualicum on Vancouver Island to Kamloops. The respondent objected to this move, but was unsuccessful in opposing the claimant's court application to permit it. Mr. Justice Singh made an order on September 11, 2006, permitting the claimant to relocate to Kamloops with the children. I was told that the order gave interim primary residence of the children to the claimant, and required the claimant to transport the children from Kamloops to the Tsawwassen ferry terminal for access visits with the respondent, and to pick them up again at the Tsawwassen ferry terminal after the access visits and return the children to Kamloops.
- [9] The requirement that the exchange point for the respondent's access visits with the children would continue to be the Tsawwassen ferry terminal (as a general rule) was repeated in the order of May 14, 2007, (by consent) and the order set out a schedule of access visits from May 2007, to mid-June 2008.
- [10] On the respondent's application, Mr. Justice R.D. Wilson made an order on June 26, 2008, which specified his access visits up to May 11, 2009. The order continued the Tsawwassen ferry terminal as being the exchange point for access visits, except that, for the month-long access visits in August 2008, and August 2009, the claimant would bring the children to the Duke Point ferry terminal to begin these two visits, and the respondent would be required to return the children to their residence in Kamloops at the end of these long access visits.
- [11] The order of May 14, 2007, gave the respondent telephone access to the children on Wednesday and Saturday evenings between 7:00 p.m. and 7:30 p.m.
- [12] The order of May 14, 2007, required the respondent to pay \$1,206 per month child support commencing June 1, 2007. The order required the respondent to pay spousal support to the claimant in the amount of \$900 per month, commencing May 15, 2007. The order stated that the respondent's guideline income was \$81,600 and the claimant's guideline income was \$23,000.
- [13] The order made December 12, 2008, was made by consent. The respondent's child support obligation was increased from \$1,206 to \$1,345 per month, commencing on July 1, 2008. His guideline income was found to be \$92,000.

- [14] The respondent re-married on December 21, 2007. His wife is a police officer with the RCMP. They live together in Nanoose Bay, but he commutes to work in Chemainus and she commutes to work in Courtenay. They own their residence in joint tenancy. The property has an approximate value of \$550,000 and has a mortgage of about \$230,000. The mortgage payments are \$900 per month. No other information was provided as to the income or assets of the respondent's wife.
- [15] The claimant has been working as a receiver at the Sport Mart store in Kamloops since July 2006. She works there on a full-time basis (five days per week) and is presently earning \$12.36 per hour.

The issues

Access exchange point and telephone access issues

- [16] During the hearing, I expressed the opinion that there appeared to be no material change of circumstances to support the claimant's application to alter the exchange point on every second access visit, or to justify variation of the telephone access provision. The parties made no attempt to persuade the court that there had been any material change of circumstances in these respects. They informed the court that they could likely reach agreement as to the respondent's telephone access. I suggested that the parties might also consider the possibility that the children could travel by bus from Kamloops to some convenient point not too far from the Tsawwassen ferry terminal and be picked up by their father and then, at the end of his access visits, be returned to that bus station by him, to return by bus to Kamloops. The parties thought that possibility was worth exploring to see whether the bus driver could provide adequate supervision during these trips.
- [17] In any event, I conclude that no material change in circumstances has been established which could permit the court to re-open the orders, and consider variation, as requested by the parties. The first item of relief sought by the respondent is dismissed. The application of the claimant, filed November 24, 2010, is dismissed entirely.

Variation of child support

- [18] The consent order of December 12, 2008, required the respondent to pay \$1,345 per month in child support commencing as of July 1, 2008. The respondent's guideline income was found to be \$92,000 per annum, as at the date of the said order.
- [19] Section 17(4) of the Divorce Act makes it a precondition for variation of a child-support order that "a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child-support order or the last variation order made in respect of that order."

- [20] Section 14 of the Federal Child Support Guidelines defines "change of circumstances" so as to include "any change in circumstances that would result in a different child support order. . . ." The respondent alleges that his guideline income has decreased from \$92,000 to \$87,930. If he is right, then the respondent's child support payments should be reduced from \$1,345 to \$1,289 per month.
- [21] The claimant disputes this allegation and alleges that the respondent's income from employment for 2010 was about \$87,000 (not \$84,090) and when his pension of \$3,840 is added, his guideline income would be a minimum of \$90,840. But since the pension income is tax free, it is argued that an additional gross up should be made, so that the respondent's present guideline income is at least equivalent to the \$92,000 that was set by the order of December 12, 2008.

Discussion

- [22] After reviewing the evidence presented on both sides of this issue, and the arguments made by the parties, I have concluded that the respondent has failed to establish that his current guideline income is significantly less than \$92,000. Consequently, he has failed to establish a material change in circumstances that would justify any variation of the child support order. The question of whether a reduction in child support should be made retroactive to July 1, 2009, therefore does not arise.

Conclusion

- [23] The respondent's application for variation of the child support order is dismissed.

Should the order for spousal support be varied, so as to either terminate or reduce the respondent's spousal support obligation?

- [24] The order of May 14, 2007, granted the respondent "liberty to apply for a review after the 15th day of May, 2009." In my opinion, the order relieves the respondent from proving that there has been a material change in circumstances since the order was made, but does not shift the onus onto the claimant to prove that spousal support continues to be justified. I think the respondent bears the burden of showing that spousal support is no longer justified at all, or alternatively, should not continue at the present amount of \$900 per month. There is authority which establishes that on a review of this kind, the court should reconsider anew the issues of entitlement, quantum and duration. See *Munro v. Munro* 2006 BCSC 1758 at paragraph 18.
- [25] The facts alleged by the respondent in support of his application are the following:
- a) The respondent has paid spousal support of \$10,800 per year for more than three and one-half years, under the order of May 14, 2007.

- b) The claimant has failed to make reasonable efforts to increase her income-earning capacity so as to become economically self sufficient.
- c) The respondent has encountered financial difficulties as a result of having assumed responsibility for the family debts and his debt load has increased because he has been unable to refinance the debts at a lower rate of interest.
- d) The respondent's expenses to exercise access to the children have increased since the claimant moved to Kamloops with the children in the summer of 2006.
- e) The respondent has incurred additional costs to purchase clothing for the children made necessary by the claimant's failure to provide clothing for them, as required by the order of May 14, 2007.

[26] In my opinion, the facts alleged in subparagraphs (d) and (e) above are not capable of advancing the respondent's case. From my assessment of the evidence, the amounts involved are relatively small. I would also note that the claimant's costs to facilitate the respondent's access to the children (although caused by her own choice to move to Kamloops) are far greater than the respondent's costs of access.

[27] As to the amount of spousal support paid to date by the respondent, I agree that it is significant, but I note that it is approximately in the mid-range suggested by the spousal support advisory guidelines. Even so, the parties were married for less than 10 years when they separated, and so the duration and amount of the spousal support payments already made are factors to be considered.

[28] The two remaining facts alleged by the respondent in support of his application are in dispute.

Has the claimant failed to make reasonable efforts to become self sufficient?

[29] The claimant worked for the first two years of the marriage, but from the summer of 1997, until the separation in March 2005, she was not employed outside the home. She did attend to child rearing and household management. The children have remained living with her, since the separation, which is now a period of almost six years. Her child raising responsibilities will continue for many more years. It appears that the children are attending school and that they are in good health.

[30] The claimant has a grade 12 education, but has no special employment skills. She has been working for the same employer in Kamloops for more than four and one-half years. She works full time, which I find on the evidence to consist of 40 hours per week, Monday through Friday. She started out at \$10 per hour, but now earns \$12.36 per hour.

[31] In her financial statement sworn November 18, 2010, the claimant states that her guideline income for child support purposes is \$20,028. During the hearing of the application, counsel for the claimant suggested that her guideline income for 2010 was \$21,785. By my calculations, her income appears to be about \$25,000. I do note the claimant's evidence to

the effect that she has to take two days per month off work in order to drive the children to and from their access visits with their father. But it was not adequately explained why the claimant's income was claimed to be static when her hourly rate had increased from \$10 to \$12.36 per hour.

- [32] The claimant states that working at her job and caring for the children takes up all of her time. She says she is unable to pursue education or training that would increase her earning power. From her evidence, it appears that she intends to remain in her present employment, and does not intend to make any further efforts to increase her income or her income-earning ability.
- [33] The claimant was 34 years of age at the time of separation, and is now 39 years old. She appears to have done a good job of raising the children, and has maintained steady employment for a considerable length of time.
- [34] Although a former spouse has a positive obligation to make reasonable efforts to become self sufficient, she does not have an absolute obligation to become self sufficient. See *Rogers v. Rogers* 1999 BCCA 238; *Tedham v. Tedham* 2005 BCCA 502.
- [35] In my opinion, while the claimant's choice of occupation is her own decision, the law requires her to take reasonable steps to achieve economic self-sufficiency "insofar as practicable." As stated in *Tedham v. Tedham* (at paragraph 33):
- [33]. . . Section 15.2 of the Act does not require self sufficiency, but seeks to promote self sufficiency "in so far as practicable." In determining what is practicable, regard must be had for all the circumstances, including the age and gender of the spouse, her/his skills, or lack thereof, the opportunities for retraining, and the realistic prospect of the spouse being able to find not just a job, but one which enables her/him to become self sufficient, which may be a different matter.
- [36] Applying the law to the facts of this case, it is my opinion that the claimant has not made the reasonable efforts to achieve economic self sufficiency that the law requires of her.

Has the respondent suffered disadvantage and economic hardship arising from the breakdown of the marriage (i.e., by his assumption of family debts)?

- [37] I find that there was an approximately equal division of the family assets achieved by the consent order made May 14, 2007, and that there was nothing unfair to the respondent about the division of family assets. I infer from the evidence that the respondent wanted to retain the whole of his RCMP pension, and so the adjustments necessary for him to do this required that he assume liability for certain family debts. It appears that the pension was valued at about \$128,000, and that the claimant's share was about \$64,000. As a consequence of the respondent retaining the whole of the pension, the claimant received all of the net proceeds from the sale of the former family home in the amount of about \$129,000.

- [38] As I understand the respondent's evidence, he assumed liability for about \$15,000 in family debt, and then had to incur a further \$10,000 expenses to purchase household furniture and equipment that he required. The claimant says that the respondent only assumed about \$12,000 of family debts and she disputes that the \$10,000 for the purchase of new household furniture and equipment was necessary. She says that the respondent obtained what he wanted, from the former family home. On balance, I would accept the respondent's evidence that the family debts were closer to \$15,000 and that these additional purchases were reasonably required. But even so, on the respondent's own evidence, the maximum amount of these combined debts was only \$25,000.
- [39] In addition, the respondent says that he incurred about \$31,000 in legal fees, and says that this should be taken into account. The claimant deposes that she incurred legal fees in excess of \$25,000, which she paid with the help of her parents and the proceeds from the sale of the former family home. It seems to me that the expense of legal fees is neutral in this case. In order to make this a relevant factor, I think it would have to be shown that one party was guilty of improper conduct or made unreasonable claims, which caused the other party to incur legal costs that should not have been necessary.
- [40] The evidence establishes that, after the separation (the date is unclear), the respondent used \$50,000 of his assets to invest in the residential property in Ladysmith owned by his then fiancé. They were married on December 21, 2007. In May 2010, using the proceeds from the sale of the Ladysmith residence, the respondent and his wife bought a home in Nanoose Bay for \$560,000. That property presently has a mortgage of about \$230,000 against it. The respondent deposes that he pays one-half of the monthly mortgage payment of \$900 per month. As mentioned, the respondent has not presented evidence of his wife's income and expenses, or any details as to what expenses are shared between them (except he states that they each pay one-half of the monthly mortgage payment).
- [41] In his financial statement of October 29, 2010, the respondent swears that his unsecured debts have increased to about \$80,000 at the present time. He deposes that his debts have gotten out of control and that he believes his financial disaster has its roots in the debts he incurred at the time of separation and final settlement with the claimant. In his affidavit sworn October 29, 2010, the respondent states (in part) at paragraph 14, as follows:
14. I have lived daily since 2005 in a constant state of financial turmoil and instability as I struggle from payday to payday. As a man, a husband and a father, I am ashamed by my financial situation. . . .
- [42] I accept the respondent's evidence that he is in a difficult financial position. I also accept that he believes his present financial position, in large part, is caused by the debts he incurred as a result of the breakdown of the marriage. But I am not persuaded that those debts are the cause of his present predicament.

- [43] The respondent analysed the financial position of the claimant, and submitted that she has significantly increased her assets, and decreased her debt. He notes that she purchased a house in Kamloops on or about May 31, 2007, for \$290,000, with a down payment of \$85,000. The evidence also indicates that the house is now valued at about \$352,000, and there is a mortgage of \$223,000. The claimant's financial statement sworn November 18, 2010, shows that her unsecured debts are only a little over \$1,000
- [44] I find that the claimant has improved her financial position since the order was made on May 14, 2007. I find that this was due in part to the assets she received on the equal division of family assets, and in part from financial assistance she received from her parents.

Conclusion as to entitlement

- [45] In all of the circumstances, I conclude that the claimant is entitled to continued spousal support from the respondent, on the compensatory ground. The remaining issues are quantum and duration.

Quantum

- [46] I must consider the respondent's ability to pay. While it appears that his debts have spiralled out of control, and while I accept that he truly believes that his problems have stemmed from the breakdown of the marriage, I am not satisfied that this has been proved. It seems to me that the respondent diminished his ability to pay debts when he invested in his fiancé's property in 2006. I am also of the view that, when the Ladysmith home was sold, he could properly have obtained a share of those sale proceeds to remedy his debt position. Alternatively, I am unable to see why he and his wife could not obtain a second mortgage on their jointly-owned home, so that the respondent's debts could be paid out or substantially reduced.
- [47] I conclude that the respondent's present difficulty in paying \$900 per month in spousal support does not carry much weight on the issue of whether this amount should be reduced.
- [48] However, I find that the claimant's failure to make reasonable efforts to become self sufficient is an important factor in deciding what amount of spousal support should be paid to her. I must consider the spousal support advisory guidelines in making this determination, but I do not find them particularly helpful in the circumstances of this case. Counsel for the claimant has made submissions based on these guidelines, but counsel has used an income for the claimant which I think is much too low.
- [49] I fix the appropriate amount of spousal support as being \$700 per month.

Duration

- [50] It is almost six years since the parties separated. It is now only about three months short of four years that the respondent has been paying spousal support. The claimant is still a young woman. Having regard to the law governing spousal support as set out in the Divorce Act, and the leading cases which have defined and applied those rules of law, it is my opinion that spousal support payments of \$700 per month should continue until May 14, 2012.
- [51] If the claimant wishes to receive spousal support beyond May 14, 2012, then she will have to file an application on or before that date. At the hearing of such application (which may occur after May 14, 2012), the claimant will bear the burden of proof on the issues of entitlement, amount and duration. That is, the claimant will be required to persuade the court that she continues to be entitled to receive spousal support. If she is successful on that issue, then she will also have to prove the amount to which she is entitled and how much further into the future such payments should be made.

Costs

- [52] There has been divided success on these applications. I do not think that either party can be characterized overall as "the successful party," within Family Rule 16-1(7). As a consequence, and in accordance with the general rule in these circumstances, each party will bear their own costs.

"Mr. Justice D.A. Halfyard"

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