

CANADA / JUDGMENT

## Cartmell v. Cartmell

2022 BCSC 314

### COURT

Supreme Court of British Columbia

### DECIDED

2 March 2022

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2022 BCSC 314 Cartmell v. Cartmell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cartmell v. Cartmell,

2022 BCSC 314

Date: 20220302

Docket: E8914

Registry: Chilliwack

Between:

Loralynn Cartmell also known as Lora Lynn Cartmell

Claimant

And

James Ryan Cartmell

Respondent

Before: The Honourable Mr. Justice Caldwell

Reasons for Judgment

(Hearing proceeded via teleconference)

Counsel for the Claimant:

S.B. Talbot

Counsel for the Respondent:

W.L. Scott, Q.C.

Place and Dates of Trial/Hearing:

Chilliwack, B.C.

October 26 & 29, 2021

Place and Date of Judgment:

Chilliwack, B.C.

### **March 2, 2022**

- [1] The respondent applies to reduce or suspend his payment of spousal support to the claimant, his former spouse. He also applies to cancel or reduce any arrears of spousal support and any interest which may have accrued on such arrears.
- [2] The parties married in April 1989. They separated in March 2010 and were divorced by order of this Court in May 2011. The claimant is 52 years of age and the respondent is 55. There were three children of the marriage but they are now independent adults.
- [3] In April 2011, approximately one month before the divorce was granted, the parties appeared before Master Keighley at a judicial case conference and settled all of their outstanding issues by consent.
- [4] The parties agreed that the respondent's income, for the purposes of the Spousal Support Advisory Guidelines (the "Guidelines"), was \$74,579. They further agreed that the claimant would have an imputed income of \$15,000. Based on those numbers, child support was agreed at \$1,115 per month and spousal support at \$1,000 per month, both commencing May 1, 2011. The child support was to continue while the children remained the children of the marriage and the spousal support was to be reviewable after July 1, 2021. The spousal support order was a "with child or children" order.
- [5] This is the review contemplated by Master Keighley's order. Counsel for the respondent/applicant submits, and I agree, that in conducting a review of this nature, the Court is to take a fresh look at the circumstances and determine the appropriate amount, if any, to be paid in spousal support at the time of the review.
- [6] Paragraphs 10, 11 and 12 of the Master Keighley order deal with spousal support and read as follows:
  - 10. The Respondent will pay to the Claimant the sum of \$1,000.00 per month for the support of the Claimant, commencing May 1, 2011 and on the first of the month thereafter.
  - 11. On or after July 1, 2021, spousal maintenance may be reviewed. On a review, spousal maintenance must be determined by the amount fair in the circumstances existing at the date of the review, whether or not there has been a material change of circumstances.

12. Either party is at liberty to make an application for the variation or termination of spousal maintenance prior to July 1, 2021, if there is a material change in circumstances.

The review provisions of para. 11 are consistent with the case law and the position taken by the applicant through counsel.

[7] Since the making of the order, the following changes have occurred:

1. all of the children have become independent adults;
2. the claimant has become employed with the Chilliwack Pro-Life Society where she works approximately 30 hours per week and earns approximately \$33,000 per year from employment. Were she to work 40 hours per week, her income would be approximately \$44,000 per year;
3. the respondent earned approximately \$100,000 in 2018, \$95,000 in 2019, and \$78,000 in 2020;
4. the claimant re-partnered in 2020, and her new partner appears to earn approximately \$60,000-\$70,000 per year;
5. the respondent re-partnered prior to 2018, and his new partner appears to earn approximately \$75,000-\$85,000 per year;
6. the claimant had purchased a foreclosure property with the assistance of her parents, and currently shows assets of \$466,000 against debt of \$310,000;
7. the respondent shows current assets of \$870,000 and debt of \$340,000.

[8] The parties' relationship was a long-standing one. The claimant became pregnant at age 19 and thereafter worked little, if at all, outside of the home, until obtaining part-time work during the last two years prior to separation. The respondent provided financially for the family throughout the marriage. The children lived with the claimant following separation and she bore primary responsibility for their housing and care.

[9] Although the order of Master Keighley provides no specifics, it seems clear to me that in the circumstances of the parties I must assume that the spousal support had both a compensatory and non-compensatory aspect to it.

[10] In *M.H.W. v. D.K.W.*, 2019 BCSC 1011 [M.H.W.], Justice N. Smith noted:

[34] When a spousal support order is made on the basis of both compensatory and non-compensatory considerations, it is an error to treat the two bases for entitlement "as if they were separate heads of damages": Zacharias at para. 13. The Court of Appeal in Zacharias continued at para. 39:

- [39] It must be recognized, however, that while there may be more than one basis for a spouse's entitlement to support, the award is a single and indivisible one. It is not, as the chambers judge implied, made up of a "compensatory" component and a separate "non-compensatory" component. Rather, the whole of the award is available to address both compensatory and non-compensatory goals.
- [11] I take that statement to mean that where spousal support is ordered on a combination of compensatory and non-compensatory grounds, entitlement continues as long as either ground remains applicable.
- [12] The Court of Appeal in *Zacharias v. Zacharias*, 2015 BCCA 376 also made clear that where there is an entitlement to compensatory support, "... courts have not demanded a meticulous accounting of the detriment suffered by one spouse or the benefit received by the other" (at para. 51). Where the marriage was a long one, the marital standard of living is often a reasonable measure of appropriate compensation, but it will not always be determinative; all of the factors set out in s. 17(7) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) must be considered: paras. 51-55.
- [13] In *Bell v. Bell*, 2013 BCSC 271 the court also addressed the issue of economic advantages and disadvantages arising from the marriage as follows:
- [24] In considering a variation of a spousal support order, the court is still required:
- ... to take into account economic advantages and disadvantages arising from the marriage or its breakdown. This, in particular, recognizes the importance, when deciding on spousal support or variation orders, of compensating former spouses for advantages gained and disadvantages suffered as a result of the marriage itself and the decisions the parties made and roles they played within it: see *Moge*, supra. Section 17(7)(c) outlines the equally important objective of relieving economic hardship arising from the breakdown of the marriage .
- [14] Clearly in the present case, the claimant has, since separation and the order of Master Keighley, enjoyed a lower income, a lower standard of living, and reduced accumulation of assets over debts than has the respondent. I include that consideration, particularly when addressing the issue of compensatory support.
- [15] I have also considered the presence and role of each of the parties' new spouses, particularly the claimant's new spouse, as that issue relates to this application.
- [16] The claimant re-partnered in or about 2020. The respondent has been re-partnered for several years. The respondent's new partner enjoys slightly higher income than the claimant's new partner, and she has enjoyed that level of income on a consistent basis over the years. She has been present to help defray expenses and to provide physical and emotional support to the respondent over an extended period. The claimant, until late 2019, enjoyed no such financial, physical, or emotional support.
- [17] In *Rozen v. Rozen*, 2016 BCCA 303 (cited in *M.H.W.*), the Court said:

- [55] The ultimate question in this case is whether the recipient has continuing entitlement to compensatory support. The extent to which economic benefits conferred and detriments received from marriage or its breakdown have been fully compensated by spousal support to date is the dominant consideration. Re-partnering "generally" does not redress the basis for compensatory support: Morigeau at para. 39. Therefore, the new partner's means will generally not be relevant in variance applications of compensatory orders.
- [56] However, there is no bright line rule that re-partnering will never be considered on a variation of a compensatory order. It may be relevant for instance, as it is in this case, when the re-partnering enables the recipient spouse to use other assets to generate income.
- [18] Finally, I consider the parties' current incomes as disclosed above.
- [19] The respondent claims that the claimant is essentially underemployed. He says that she should at least be working full-time in her current position. He says further that in the almost 11 years since the order of Master Keighley, the claimant should have retrained and/or sought more lucrative employment.
- [20] The claimant has provided little if any evidence regarding attempts to obtain further employment or better paying work. She says that she was committed in her energies and in the use of her share of the family assets to parenting the children and attempting to "make ends meet" on her limited income. She also indicated that she has suffered from various health problems, but provided no medical evidence to support these assertions. Given her age, her training, and her limited opportunities for advancement in light of her role in the marriage (which has continued after the separation), I find that she is at, or reasonably close to, the level of income that she could reasonably be expected to earn in the circumstances of this marriage and its breakdown.
- [21] The claimant alleges that she continues to be disadvantaged as a result of her role in the marriage. She says that since separation and since the order of Master Keighley, the respondent has enjoyed greater income than her and in fact greater income than was contemplated in that order. She points to his Form 8 financial statement and other financial disclosure, which confirms his income at approximately \$100,000 in 2018. In addition, he has enjoyed access to the income of his new partner. The respondent has also been able to contribute to savings aimed at his retirement and has enjoyed extended health benefits beyond those available to the claimant.
- [22] The respondent provides no explanation for the reduction in his income from the year 2018 to the year 2020. That reduction was precipitous - a drop of more than 20%. Like the claimant, he also alleges that he suffers from a variety of medical complaints but, also like the claimant, he provides absolutely no medical evidence in support of those claims. I find that there is little if any evidence to support the respondent's income reduction from the \$100,000 he earned in 2018, and certainly no evidence whatever to support a reduction below the \$76,000 reflected on his current Form 8.

[23] On the basis of the above, I find as follows:

1. the parties' incomes for the purposes of this application and review are \$33,000 for the claimant and \$76,000 for the respondent, although he has certainly enjoyed a higher level of income in past years and has shown no basis for reduction;
2. it is not appropriate to consider, in any significant fashion, the income of either of the parties' new partners at this time;
3. the claimant has made reasonable efforts, in all of the circumstances, to obtain employment and to contribute to her own self-sufficiency since separation;
4. the spousal support paid pursuant to Master Keighley's order has not achieved compensation for the ongoing disadvantages experienced by the claimant as a result of the marriage and its breakdown;
5. the respondent has retained and grown the advantages which he obtained from the marriage and its breakdown, both in terms of assets and standard of living, while the claimant has not been able to do so, or certainly not to the extent of the respondent.

[24] Counsel advised that for incomes of \$33,000 and \$76,000, the Guidelines provide a range of monthly support from \$1,135 at the low end, to \$1,324 at the mid-range, and \$1,573 at the high end. Having reviewed the spousal support ordered by Master Keighley and based on the evidence before me, I see no reason to depart from the mid-range amount of support, as suggested by the Guidelines. I find that the mid-range figure of \$1,324 per month is "fair in the circumstances existing at the date of the review" as provided by para. 11 of Master Keighley's order, and in keeping with the approach suggested by the applicant's counsel at the outset of this review. I order that the spousal support payable by the respondent to the claimant be increased to the mid-range figure of \$1,324 commencing on March 1, 2022 and continuing on the first day of each month thereafter, until agreement of the parties or further court order. The spousal support may be reviewed on or after April 1, 2026 or upon a material change in circumstances of one or both of the parties.

[25] The claimant is entitled to her costs of this application and review.

"Caldwell J."

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Prepared on 29 October 2026 · Esheria