
CANADA / JUDGMENT

Chmelyk v. Chmelyk

2017 BCSC 1976

COURT

Supreme Court of British Columbia

DECIDED

2 November 2017

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

2017 BCSC 1976 Chmelyk v. Chmelyk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chmelyk v. Chmelyk,

2017 BCSC 1976

Date: 20171102

Docket: 44222

Registry: Kamloops

Between:

Barbara Anne Chmelyk

Plaintiff

And

Peter James Chmelyk

Defendant

Before: The Honourable Mr. Justice Dley

Reasons for Judgment

Counsel for the Plaintiff:

C. Oien

Counsel for the Defendant:

W. Clark

Place and Date of Hearing:

Kamloops, B.C.

October 13, 2017

Place and Date of Judgment:

Kamloops, B.C.

November 02, 2017

Introduction

- [1] The parties separated after a 20-year relationship. They entered into a separation agreement requiring Mr. Chmelyk to pay spousal support up to a maximum of \$1,000 per month.
- [2] The parties' 15-year-old daughter had been living with Ms. Chmelyk, but now lives with Mr. Chmelyk.
- [3] Ms. Chmelyk says that as a result of the child now going to live with her father, there has been a change in circumstances which requires Mr. Chmelyk to increase the amount of spousal support beyond what had been agreed to.
- [4] I have concluded as follows:
 - a) the child's primary residence is with Mr. Chmelyk;
 - b) Ms. Chmelyk shall pay child support from July 1, 2017;
 - c) Mr. Chmelyk shall pay 69% of the special and extraordinary expenses and Ms. Chmelyk shall pay 31%; and
 - d) the amount of spousal support shall not change.

Background Facts

- [5] The parties began living together in 1990, were married in 1994 and separated in 2010. They are parents to Dominic James Chmelyk born October 8, 1992 and Heather Leigh Chmelyk born January 13, 2002.
- [6] In March 2011, the parties settled their differences by entering into a separation agreement (the "Agreement"). At the time of the Agreement, Dominic was living with his father, and Heather was living with her mother.
- [7] At the time of the Agreement, Mr. Chmelyk operated an oilfield construction company and earned approximately \$100,000 per annum. Ms. Chmelyk was unemployed.
- [8] The parties acknowledged that the Agreement was intended to be a final settlement of spousal support and property division.

- [9] The parties agreed that Heather's primary residence would be with Ms. Chmelyk and the Agreement provided specified access to Mr. Chmelyk.
- [10] They agreed that for the purposes of child support, Mr. Chmelyk's annual income was \$100,000, and Ms. Chmelyk's income was imputed at \$25,000. Mr. Chmelyk paid child support for Heather and Ms. Chmelyk paid child support for Dominic.
- [11] They agreed that Mr. Chmelyk would pay spousal support of \$1000 per month and Ms. Chmelyk's entitlement to support would be reviewed after February 28, 2016, or if she commenced cohabitation with another person. They agreed that the review would proceed as follows:
- a) The quantum of spousal support shall not increase from its current level of \$1,000 per month under any circumstances;
 - b) Reduction in Peter's income may be taken into account; and
 - c) Barb will be required to demonstrate that she has made reasonable efforts to reach and maintain economic self-sufficiency and should she not do so there will be an adverse inference drawn against her in determining her ongoing entitlement to spousal support.
- [12] Mr. Chmelyk deposed that the reason for placing a cap of \$1,000 per month on the spousal support was because he paid Ms. Chmelyk a lump sum of approximately \$61,500 and assumed several debts.
- [13] Dominic is no longer a child of the marriage.
- [14] In 2016, the parties litigated questions of child support, extraordinary and special expenses and spousal support. Madam Justice Hyslop reviewed the issues of income and expenses and considered the question of entitlement to spousal support. Justice Hyslop concluded that (Chmelyk v. Chmelyk, 2016 BCSC 1700):
- a) Ms. Chmelyk continued to be entitled to spousal support on a compensatory basis;
 - b) Mr. Chmelyk earned in excess of \$100,000 per annum since executing the Agreement as a result of which the monthly spousal support payments of \$1000 would not be reduced;
 - c) Heather's costs for playing volleyball were to be shared by the parties on a proportionate basis; and
 - d) Mr. Chmelyk's income for the purposes of child support was assessed at \$110,000 per year. Mr. Chmelyk was ordered to pay child support of \$1,004 per month commencing July 1, 2016.
- [15] On or about July 2017, Heather moved out of her mother's home and went to live with Mr. Chmelyk in Vernon. Heather continues to attend school and participate in high level volleyball.

[16] Mr. Chmelyk seeks the following orders that:

- a) he have the primary residence of Heather;
- b) commencing July 1, 2017, Ms. Chmelyk pay child support and Heather's special and extraordinary expenses;
- c) his obligation to pay spousal support either be terminated or the amount decreased;
- d) Ms. Chmelyk's parenting time with Heather be at the child's discretion and that a Views of the Child report be prepared;
- e) the location of exchange for parenting time is at Mr. Chmelyk's residence; and
- f) Mr. Chmelyk's costs of providing summer care for Heather during July and August 2017 be declared as an extraordinary expense and shared proportionately between the parties.

[17] Ms. Chmelyk responds by seeking the following orders that:

- a) commencing September 1, 2017, on a trial basis for a maximum of 10 months, Heather may reside with either parent, and the primary residence to be reviewed June 1, 2017;
- b) based on Ms. Chmelyk's income of \$47,000 and Mr. Chmelyk's income of \$110,000, Ms. Chmelyk shall pay child support of \$429 for each month when Heather resides with Mr. Chmelyk more than 60% of the time;
- c) her spousal support should be increased; and
- d) the parties pay specific amounts for Heather's volleyball expenses or outstanding proportionate shares of medical prescriptions.

Discussion

[18] The parties spent much of their time in this hearing rehashing many of the same issues that had been the subject of the hearing before Justice Hyslop. For example, Ms. Chmelyk questioned the accuracy of income reporting and suggested, as she had in the prior hearing, that Mr. Chmelyk was under-reporting his income. Ms. Chmelyk pursued the same kind of forensic analysis in this hearing that she presented to Justice Hyslop.

[19] It is apparent that Mr. Chmelyk's income has and should come under scrutiny. The concerns with respect to the accuracy or manner of income disclosure were a major topic in the prior hearing. Justice Hyslop determined that Mr. Chmelyk's annual income, in what had essentially become a single person operation, was \$110,000. The material that I have been presented with provides the same kind of annual income range that was open for consideration before Justice Hyslop.

[20] Giving respect to the argument made, I must nonetheless conclude that it is essentially a re-argument of what was before the court in the prior hearing. I see no reason to depart from the reasoning of Justice Hyslop, and accordingly decline to make any major adjustments.

However, I do conclude that Mr. Chmelyk's income has increased slightly as a result of rental revenue. I, therefore, accept Ms. Chmelyk's submission that the sum of \$112,293 is a number that I can consider as being Mr. Chmelyk's income. For the purposes of this application, I therefore conclude that Mr. Chmelyk's income for 2017 is \$112,293.

- [21] I also accept Ms. Chmelyk's submission, that her 2017 income will be \$51,341, and that is the amount to be used for the purposes of calculating child support.
- [22] It is apparent that Heather has decided that she is going to live with her father. Although Ms. Chmelyk argues that there has been parental alienation, I have not been convinced that such is the case. Heather is described as a confident, intelligent and mature young person. She is almost 16 years old and her wishes should be respected.
- [23] Mr. Chmelyk urges the court to order a Views of the Child report to confirm Heather's wishes to live with him. Ms. Chmelyk says that such a report would not be helpful because of the alienation that has occurred. I infer that the reason why Ms. Chmelyk does not pursue the report is because there has been no alienation and Heather's wishes to live with Mr. Chmelyk would only be emphasized.
- [24] I conclude that it is in Heather's best interests to live with Mr. Chmelyk.
- [25] Accordingly, there will be a declaration that Heather's primary residence will be with Mr. Chmelyk. Ms. Chmelyk shall pay child support effective July 1, 2017, and on the first day of each subsequent month, unless the parties otherwise agree or a court otherwise orders.
- [26] Mr. Chmelyk paid money to relatives to care for Heather while he was working in Fort St. John. He seeks reimbursement of those monies as special and extraordinary expenses. This expense would be, as Ms. Chmelyk most articulately describes, an extravagant babysitting cost. During the time that Mr. Chmelyk was away working, there was no reason why Heather could not have spent that time with Ms. Chmelyk. I am also not convinced that there was any legitimate reason why Heather could not have accompanied Mr. Chmelyk and spent time with him in Fort St. John. For those reasons, I decline to make such an award.
- [27] Mr. Chmelyk says that the spousal support should be reduced due to his decreased income or should be terminated because enough time has passed to allow Ms. Chmelyk to become self-sufficient. Ms. Chmelyk says that because Heather has changed residences to now live with her father, that is a change of circumstances requiring a review of the spousal support.
- [28] I decline to accept either party's submissions. The spousal support shall remain unchanged and will continue indefinitely.
- [29] Justice Hyslop found that Ms. Chmelyk was entitled to spousal support on a compensatory basis. That finding is unassailable.

- [30] This was a long marriage and although Ms. Chmelyk has made huge strides in increasing her income along the road to self-sufficiency, she is not there yet. Accordingly, there is no reason to terminate the support.
- [31] Mr. Chmelyk's income has not fallen below \$100,000, which was the threshold amount set out in the Agreement. Accordingly, there is no reason to reduce the amount of spousal support as agreed upon.
- [32] Ms. Chmelyk refers to *Miolla v. Miolla*, 2016 BCCA 137 at para. 29 as authority for the proposition that a change in a child's residence reflects a material change that triggers a variation of spousal support. In *Miolla*, the husband had been paying spousal and child support. The children subsequently left the wife's residence and moved in with the husband. The issue was whether the husband could seek a variation of spousal support because of the change in the children's residence. The court concluded that in the father's circumstances, the change of residence of the children was a material change. That is not the case here. There is no application brought by Mr. Chmelyk seeking to reduce the amount of spousal support because he now provides the primary residence for the child.
- [33] *Miolla* does not stand for the proposition that a change of residence automatically constitutes a material change of circumstances such that spousal support must be reviewed. It is the circumstances of the change of residence that is the relevant inquiry. It does not follow that the recipient of spousal support who no longer has child rearing obligations is by default entitled to have the spousal support reviewed.
- [34] Ms. Chmelyk's expenses have not increased because of additional child rearing obligations. Ms. Chmelyk has not brought an application to set aside the Agreement, the terms of which closely reflected the considerations set out in the entitlement to spousal support in both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) and the Family Law Act, S.B.C. 2011, c. 25.
- [35] Since the time the parties entered into the Agreement, Mr. Chmelyk's income has increased by about \$12,000. Ms. Chmelyk's income has increased by about \$26,000.
- [36] I am, therefore, not satisfied that there has been a material change in Ms. Chmelyk's circumstances such that the terms of the separation agreement should not be respected. I, therefore, dismiss Ms. Chmelyk's application to increase the amount of spousal support.
- [37] The balance of the relief set out in the respective applications can be dealt with simply by ordering that the parties' obligations to pay special and extraordinary expenses, as determined by Justice Hyslop, are now reversed to reflect the fact that Mr. Chmelyk provides the primary residence for Heather. Based on the assessments of the respective incomes, Mr. Chmelyk shall pay 69% of the special and extraordinary expenses and Ms. Chmelyk shall pay 31%.
- [38] For the most part, Mr. Chmelyk has been the successful party in these applications, and he shall receive costs at Scale B.

"S.D. Dley J."

DLEY 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/17/19/2017BCSC1976.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/chmelyk-v-chmelyk-2017>

Prepared on 29 October 2026 · Esheria