
CANADA / JUDGMENT

Ciriello v. Ciriello

2013 BCSC 1195

COURT

Supreme Court of British Columbia

DECIDED

5 July 2013

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2013 BCSC 1195 Ciriello v. Ciriello

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ciriello v. Ciriello,

2013 BCSC 1195

Date: 20130705

Docket: E112419

Registry: Vancouver

Between:

Giovanna Ciriello

Claimant

And

Marco Ciriello

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Claimant:

D.G. Batist

Counsel for Respondent:

J.H. Bryant

Place and Date of Trial:

Vancouver, B.C.

November 19 - 21, 2012

Place and Date of Judgment:

Vancouver, B.C.

July 5, 2013

I. Introduction

- [1] This is a family dispute in which a divorce order was granted on November 21, 2012 by this Court. In addition, the division of property was dealt with by agreement between these parties and is no longer relevant.
- [2] The issues which remain outstanding are the quantum and duration of spousal support. The Court was also asked to declare that the respondent has paid interim spousal support to the claimant for the years 2008 - 2011, and that those amounts have been paid pursuant to an order. The result of such a finding would be that the amounts paid are taxable to the claimant and deductible to the respondent pursuant to a handwritten separation agreement with the effective date of January 1, 2008.
- [3] The respondent does not contest the granting of an order for spousal support; however, the parties are not in agreement as to the quantum.
- [4] Where I use first names in this judgment it is for convenience and clarity; no disrespect is intended.

II. Facts

- [5] The claimant Giovanna Ciriello was born in Italy, became a Canadian landed immigrant in 1983 and a Canadian citizen in 1992. She was born April 9, 1944 and is now 69 years old.
- [6] The respondent, Marco Ciriello, is the son of Renato, by his first wife.
- [7] The claimant was re-married to Renato Ciriello in 1964, separated in 1975 and was divorced from him in 1978. Giovanna and Renato became the parents of a son, Stefano.
- [8] The claimant and the respondent started cohabitating in 1979, shortly before he graduated from university in Italy as an architect. In 1983, having achieved landed immigrant status, the claimant and the respondent moved to Vancouver where the respondent began working as an architect for Mr. Grinti.
- [9] Prior to leaving Rome they sold an apartment and the proceeds were deposited into the respondent's bank account as a requirement for his landed immigrant application in Canada.

- [10] The respondent's employment with Mr. Grinti was short-lived and for a period of time, the respondent worked as an architect for various employers with some periods of unemployment.
- [11] In 1982 the claimant and Stefano then returned to Italy to allow Stefano to complete his high school education. The respondent remained in Vancouver, working sporadically as an architect. The claimant sold some assets in Rome and worked as a tutor in the Italian language to support herself and Stefano.
- [12] In 1982, the claimant returned to Canada. The claimant and the respondent were married on December 17, 1982. She returned to Italy to complete an application for landed immigrant status which was granted shortly thereafter. The claimant and Stefano then returned to Canada in 1983 and have lived in Canada ever since.
- [13] As an architect, the respondent was unable to maintain permanent full-time employment. The claimant took up work as an Italian teacher for the Berlitz school from 1983 - 1986, for the Vancouver School Board on a part-time basis from 1990 - 1992, as a cook in 1996 and cleaned homes and offices in 1997 - 1998. The claimant's employment ended in 1998 when she found she was unable to continue working due to the arthritic condition of her knees and other medical issues.
- [14] She has not worked nor applied for any employment since that time.
- [15] In 2001, the claimant was diagnosed with chronic lymphocytic leukemia ("CLL"). The claimant was also diagnosed with osteoarthritis of her knees in 2006. After 2001, she began to follow a macrobiotic diet personally prescribed for her by a doctor in Boston, Massachusetts. She also suffers from morbid obesity.
- [16] The parties separated on or about November 4, 2005 at which time the respondent left the rented family home. At the time of their separation the parties had no particular assets except for an RRSP in the respondent's name and an automobile similarly registered. The RRSP was divided by agreement between the parties after they had separated.
- [17] The respondent has worked for a number of years as an architect on a self-employed basis or as an employee of a single architectural firm. He has no architectural practice of his own; he relies entirely upon work provided by a senior architect. The sole source of employment income for this family is the respondent. He has continually provided support for the claimant and acknowledges that he must continue to do so.
- [18] The parties spent a good deal of time and effort during the hearing providing the Court with considerable details of their financial history over the tenure of their relationship. While detailed long term memories with attendant frailties were revealed with very few supporting documents or verifiable accounting records, it must be remembered that there is:
- little likelihood the claimant will be successfully employed in the future; and,

· the only source of income for this couple is derived from the architectural practice of the respondent based on unusually long working days without holidays or vacation days. Under those conditions, his career will unlikely be long lasting.

- [19] Apart from specific issues related to spousal support which I will canvas below, there is little purpose to be served by reviewing the financial background of the parties much further, which is the source of much dispute. As noted above, the resources available to these parties are limited.
- [20] Since separation, the respondent has continuously paid spousal support. Reporting by both parties of their separation to Canada Revenue Agency ("CRA") has been imperfect. The respondent was not interested in obtaining a divorce and his lack of interest in my view accounts for his poor reporting. The claimant blindly relied on the reporting prepared by others content to receive support from the respondent.
- [21] The respondent did not in the years prior to 2008 obtain any written acknowledgement or order for the payment of spousal support. In early 2009, the family accountant, Mr. Montagano wisely suggested that a document should be drawn to record the fact of spousal support. I say wisely because the respondent would be able to deduct from his income support money paid to the claimant and the claimant would pay income tax on that money at a lower rate thus permitting the couple to benefit from lower overall taxes. The document was actually drafted by the respondent with some assistance from Mr. Montagano; neither has any legal training.
- [22] The document recorded the payment of spousal support for the prior year, 2008. The claimant signed the document, filed and marked as Exhibit 1, Tab 1, which allowed the respondent to deduct \$34,000 paid as spousal support on his income tax return. Quite generously, he paid on behalf of the claimant to the CRA the tax liability which the declaration of the receipt of spousal maintenance created in 2008.
- [23] In 2009 and up to 2011, the claimant received similar amounts for spousal support but quite deliberately did not declare those receipts as income. Relying on the document as having a continual effect, the respondent deducted spousal support from his income in 2009 paid in the amount of \$38,418, in 2010, \$42,525 and in 2011, \$47,445 for a total of \$127,388.
- [24] Regardless of how this problem arose, the respondent has deducted from his income tax returns \$127,388 which he in fact paid to the claimant. There is no dispute over that fact.
- [25] At the time of trial it was not known what tax liability would flow to one or both of the parties as a result of this circumstance. In addition, the claimant has been paid the Guaranteed Income Supplement ("GIS") retroactive to June 2010, she failed to declare the receipt of the \$127,388 from the respondent. The claimant may be obliged to pay back the GIS payments according to submissions made by her counsel. Neither of the parties has the capacity to pay additional taxes or return an overpayment of the GIS. As noted above, the resources of these parties, given their alleged needs, are quite limited.

- [26] The claimant's financial statement sworn on September 13, 2012, sets forth monthly expenses of \$5,995 per month or \$71,940 per annum.
- [27] For the sake of comparison, in the tax return filed by the respondent for 2011, his net business income was \$94,496.12. He declared spousal support payments, which are acknowledged to have been paid by the respondent to his former spouse in the amount of \$46,445. That resulted in a taxable income for the respondent of \$45,833.52 with total tax payable of approximately \$11,600. On August 21, 2012, the CRA reassessed the respondent's tax return by deleting the claim for spousal support on the basis that he had not provided a court order or written agreement providing for the spousal support or a receipt for the payment. Effectively his taxable income then returned to \$94,496.12, and while I have not made exact calculations, his tax liability would have essentially doubled.
- [28] I have set forth the calculations above to demonstrate that the claim for support made by the claimant, regardless of its merit, exceeds the capacity of the respondent because assuming his income remains at the \$94,000 level and his tax on that income remains at or about \$22,000, he would have little left at all to pay for his own expenses.
- [29] The respondent gave evidence that he has worked continuously seven days a week for many years without any work breaks or holidays. That work schedule provides his income. He is now 61 years old and he gave testimony he has not taken a holiday in decades. The only time there was evidence that he has travelled outside of Canada was to return to Italy briefly to assist his ailing father.
- [30] The respondent has been very generous to the claimant in the past but a work schedule without breaks, weekends or holidays would be tantamount to indentured servitude. It is not acceptable to argue, as the claimant has done, that the respondent should "work harder to meet her needs". If her "needs" are equal to her claimed expenses of \$72,000 per annum after taxes, the respondent does not have the capacity now working seven days per week without breaks or holidays to meet those needs. It would, in my view, be wholly unfair to the respondent to force him, by Court order, to work without breaks for weekends or holidays. He has chosen to work that way but this Court cannot by order impose that regime.
- [31] During the process of this matter coming on for hearing an order was made that the respondent pay on a continuing basis \$3,000 per month by way of spousal maintenance.
- [32] As noted above, the parties have very limited resources. The respondent does not have an RRSP and is approaching retirement. In order to pay the parties' tax liability in 2008, the respondent dissolved his RRSP and took out a \$6,000 line of credit. He has four years later been unable to repay the bank loan and still owes a small amount to the CRA apart from the potential reassessments noted above. Another matter of some difficulty which has occurred is that the claimant has become involved in the care of stray pets, particularly cats. At one point in time, she had over 130 cats and 9 dogs in her rented North Vancouver home.

- [33] Prior to the separation of the parties, the respondent was paying for the pet food, pet medication and veterinary bills. The respondent has also paid for extensive medical and dental bills for the claimant and as a result does not have sufficient funds to pay his own medical bills and dental requirements. He has, with his employment, no medical or dental insurance. Notwithstanding that lack of assistance for his own dental needs, he has paid since separation for her to attend at her doctor in Boston and to have that doctor to attend to meet her in Toronto. These attendances have substantial costs attached.
- [34] The respondent was involved in an automobile accident in December 2011 and his motor vehicle was a total loss. The accident was not assessed as his fault but he does anticipate at some point in time receiving a settlement from ICBC. There is little evidence concerning the extent of his injuries from this accident, and as a result a positive outcome is speculation.
- [35] He gave evidence that he would like to retire at or about age 65 and he is presently working between 70 and 100 hours per week. He has attempted to seek employment with other architectural firms by circulating his curriculum vitae but without success or response from other architectural firms.

III. Submissions

- [36] Following the hearing of evidence, counsel made submissions in writing. In summary the submissions are that the claimant seeks an order for spousal support at or above the highest end of the Spousal Support Advisory Guidelines ("SSAG") and opposes any order which would categorize payments made by the respondent to the claimant in 2008 - 2011 as payments for spousal maintenance or support. The claimant seeks spousal support on the basis that the parties were married for 26 years and she is chronically disabled with chronic CLL, osteoarthritis in both knees, obesity, fatigue and low energy. It is unlikely that she will obtain employment. The claimant submits that no income should be imputed to her.
- [37] The claimant submits she should not account for spousal support given to her by the respondent in the years 2008 to 2011. If accepted by the Court, that submission represents a large benefit to the claimant. It also creates a significant potential detriment to the respondent because he has paid a large sum and cannot deduct that sum from his income. Unfortunately for her, the respondent will be obliged to include the sums paid to her in revised income tax forms for at least some of those years. The consequence to him is serious indeed. Given his lack of resources with which to pay this additional tax burden, his ability to pay spousal support is, on balance, diminished. Counsel for the claimant submits that the failure of the claimant to report the income received from the respondent was neither underhanded nor illegal. Counsel submits that she was following the rules of the CRA.
- [38] It is noted that the claimant testified she knew nothing of income tax rules. While it may be true that the claimant did nothing underhanded, the consequences of the claimant's failure to declare income may be highly adverse, particularly as it is argued, the professional status of the respondent would potentially end with a bankruptcy. The expression "killing the

goose that laid the golden egg" comes to mind. The claimant submits that bankruptcy will have no effect on the professional standing of an architect. That submission was made without any legal or statutory references. I take judicial note of the fact that the Architectural Institute of B.C. requires reporting of an event of bankruptcy by any member and the Institute may take follow-up steps.

- [39] The claimant argues that business expenses deducted by the respondent are unreasonable deductions as per s. 19(1)(g) of the SSAG. The expenses claimed such as a computer, a printer, paper and writing instruments are different from the kinds of expenses involving travel promotion or discretionary entertainment. In the case before me there is no aspect of entertainment in any of the expenses claimed. These are not golf or equestrian expenses or private club fees but rather expenses in my view which were incurred in order to earn income particularly in the circumstances of the present case where the respondent works very long hours including weekends.
- [40] Likewise the claimant submits the motor vehicle expense claimed by the respondent is unreasonable. The motor vehicle expense, in this case, is very modest to say the least and is a necessary use of a motor vehicle for the purpose of attending building and work sites which are the stock and trade of an architect.

IV. potential lawsuit

- [41] Counsel for the claimant suggests that I should take into account the potential for a personal injury judgment in favour of the respondent. In *Omah-Maharajh v. Howard*, 1998 ABQB 81, the Court dealt with a potential lawsuit. In that case a neurologist had indicated there was a potential lawsuit against the Royal College of Physicians and Surgeons of Canada under the circumstances set out in para. 54 of that decision:

... a court should not crystal-ball gaze. A court should fix support based on facts at the time of the order including facts that do not yet exist but will likely exist in the immediate future on the balance of probabilities.

- [42] As no lawsuit has yet been commenced by the respondent, it would be speculation to attribute any value to that injury. In that regard I note that the respondent did not require an extended period of time off work as result of whatever injury he may have received during that motor vehicle accident. Without significant injury and significant wage loss he would not expect a significant recovery in that lawsuit.

V. DISABILITY CAUSALLY CONNECTED TO THE MARRIAGE

- [43] The claimant states at p. 16 of her submissions that "It is submitted that the claimant's medical condition is causally connected to the marriage..." While it is clear that the claimant has a medical condition which has been disabling, the expression causally connected was reviewed by the Court of Appeal of British Columbia in *Taylor v. Taylor and Campbell, Saunders & Company*, 50 B.C.L.R. (3d) 212 (C.A.) at para. 57, where the Court specifically

found that while Mrs. Taylor's illness arose during the marriage that the illness was not causally connected to the marriage. Given the contents of para. 65 of the Taylor judgment a finding of a causal connection is not well founded in this case.

- [44] Causation usually refers to illness caused or exacerbated by child bearing or stress of the marriage. There was no evidence of either of those elements. The only child born to the claimant; on the evidence, was born during an earlier marriage. In this case, no medical evidence relating to causation was called at all. The compensatory model is not the appropriate one in this case.
- [45] The appropriate model in Taylor is need, that is, the claimant needs some support and that has been admitted throughout by the respondent. The question before the Court is the level of that support.

VI. The Respondent's income

- [46] The respondent earns a gross amount of \$45 per hour. Taking a 40 hour week and 46 weeks per year (allowing for 6 weeks' vacation and statutory holidays), the respondent's gross income is \$82,800. As submitted by the claimant, there is a limited ability to earn income and it is unlikely to improve in the foreseeable future. Given her pensions and other receipts, she receives something in excess of \$6,000 per annum. Applying those figures to the Spousal Support Advisory software, the high range provides for a support payment of \$2,944 per month by the respondent to the claimant.

VII. Conclusion

- [47] The parties have created a thorny problem for themselves by not properly reporting their separation as well as not making an agreement or obtaining a court order with respect to the payments made by the respondent to the claimant. Unfortunately, that lack of decision making has cost each of them a considerable sum. The respondent had to cash in his RRSP and at present has neither savings nor a pension. The claimant chooses not to declare the support she received, but in so doing reduces the funds available for the respondent to make support payments. She has a small ongoing pension and will have to carefully budget the funds she does receive.
- [48] A decision in favour either party may be catastrophic for their financial future. I intend to leave the matter without an order in respect to the historical payments. Neither party can afford the consequences.
- [49] A monthly payment of \$3,000 ordered on a without prejudice basis will be continued as the spousal support payable by the respondent to the claimant as a final order henceforth, payable on a monthly basis. This order shall continue in effect until the respondent retires or otherwise ceases to practise as an architect in British Columbia, when the order may be reviewed at the request of either party.

VIII. Costs

[50] As success has been divided by the parties, I order that the respondent pay only the disbursements of the claimant forthwith after review by the Registrar or agreement by the parties, otherwise each party will bear their own costs.

"Ball J."

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