
CANADA / JUDGMENT

Clarke v. Clarke

2013 BCSC 2130

COURT

Supreme Court of British Columbia

DECIDED

22 November 2013

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2013 BCSC 2130 Clarke v. Clarke

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clarke v. Clarke,

2013 BCSC 2130

Date: 20131122

Docket: E40949

Registry: New Westminster

Between:

Teresa Lynn Clarke

Claimant

And

Allan Dale Clarke

Respondent

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Claimant:

C. J. Carta

Counsel for the Respondent:

T. Yu

Place and Date of Hearing:

New Westminster, B.C.

November 8, 2013

Place and Date of Judgment:

New Westminster, B.C.

November 22, 2013

- [1] On December 5, 2012, Mr. Justice Saunders ordered the claimant to pay the respondent interim spousal support of \$600.00 per month commencing January 1, 2013 and continuing each month thereafter until further order of the Court.
- [2] The claimant now seeks a variation of that order to terminate the spousal support obligation and relies on the Divorce Act, R.S.C. 1995, ch. 3, and the Family Law Act, S.B.C. 2011, ch. 25.
- [3] On a variation application both s. 17(4.1) of the Divorce Act and s. 167(2)(a) of the Family Law Act require the applicant to demonstrate that there has been "a change in the condition, means, needs or other circumstances of either ["former" in the Divorce Act] spouse" since the making of the spousal support order.
- [4] The claimant relies on the following changes in circumstances to give this Court jurisdiction to vary the support order of Mr. Justice Saunders, namely:
 - a) the claimant, as a result of borrowing money to purchase the respondent's interest in the matrimonial home now has a mortgage payment of \$1,890.32 per month;
 - b) the claimant meets without assistance from the respondent other substantial expenses with respect to the former matrimonial home;
 - c) the claimant, as ordered by Mr. Justice Saunders, paid the conveyancing expenses of the matrimonial home totaling \$1,650.13;
 - d) the respondent's debt to Revenue Canada was paid out of the respondent's receipt from the claimant of his share of the matrimonial home;
 - e) the respondent now has in excess of \$200,000.00 held in deposit which came from the purchase of his interest in the matrimonial home; and
 - f) the respondent's income increased by about \$6,000 per annum once he began to receive his Old Age Pension benefits.
- [5] In my opinion, I am not entitled to vary the interim spousal support order before me if the previously mentioned provisions of the Divorce Act and the Family Law Act must govern my decision.

- [6] The claimant relies on *Sork v. Sork*, 2009 BCSC 998 [Sork], where the Court considered an application for interim spousal support following a separation agreement in 2007 that addressed interim spousal support. Madam Justice Bruce wrote at paras 34 and 35:
- [34] For a variety of reasons the court has discouraged multiple interim applications and variation applications in family proceedings. In addition to the costs associated with such applications, they often make disputes more acrimonious. Moreover, it is a waste of the court's time and scarce resources to "tinker" with what is only a temporary measure until a permanent order is made at trial and, at best, represents only an approximation of what properly reflects the rights and obligations of the parties.
- [35] In *Hama Martinson J.* adopts a test for variation of interim orders that I find is appropriate and equally applicable to an interim separation agreement. At para. 12 of *Hama*, this test is described as follows:

...Therefore, interim orders, once made, should only be varied when there is a compelling change of circumstances, such that one or both parties would be seriously prejudiced by waiting until trial.

- [7] In *Jakob v. Jakob*, 2010 BCCA 136 at para. 39, the Court agreed with the following statement of the law:

In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

- [8] The purchase of the respondent's interest in the matrimonial home by the claimant was expressly contemplated by the order of Mr. Justice Saunders. That purchase and the consequence that it has provided capital to the respondent, and has led to the payment of one of his debts, and has increased the expenses of the claimant, were foreseen at the time of the interim spousal support order. That the respondent would very soon be eligible to receive the federal Old Age Pension would clearly have been in contemplation at the time of the interim support order in December 2012. The claimant may now find herself in financial circumstances which impose a strain on her income but, in my opinion, *Sork* has not changed the law. On the contrary, Madam Justice Bruce expressly adopted the test in *Hama v. Werbes* (1999), 66 B.C.L.R. (3d) 120, which prevents variation without a compelling change of circumstances and which would seriously prejudice a party while awaiting trial.
- [9] However, I must consider the precise terms of the order of Mr. Justice Saunders. It was pronounced on December 5, 2012 and settled by the Registrar on March 27, 2013. Paragraph 10 of the draft order as presented to the Registrar read:

The parties are at liberty to apply to vary the spousal support provided within this order, on or after 01 July 2013 without showing a change of circumstances.

[10] The order as settled inserted the word "interim" before the phrase spousal support, and struck out the words "without showing a change of circumstances" and inserted "if there is any material change in the parties' incomes". Thus para. 10 of the entered order reads:

The parties are at liberty to apply to vary the interim spousal support provided within this order, on or after 01 July 2013 if there is any material change in the parties' incomes.

[Emphasis added]

- [11] The words that were deleted echo, in a much abbreviated form, the words of both s. 17(4.1) of the Divorce Act and s. 167(2) of the Family Law Act. Those words if employed in the order, would circumscribe my jurisdiction in the manner that I have described. The words of the order, however, speak only of a material change in the incomes of the parties not a change in "the conditions, means, needs or other circumstances" of the parties.
- [12] In the unusual circumstances of this application with an order defining the circumstance in which it may be varied, I am entitled to vary the interim support order even if the only significant change is that the income of either party has materially changed. I might add that not only does the order contemplate a variation when there is a material change in income, it also speaks of "any" material change. However, I do not interpret that language to mean this Court may vary the interim support order when there has been only a trivial change in income.
- [13] The respondent's income has materially changed by receipt of a federal Old Age Pension since the order of December 5, 2012. The respondent's income has been in the range of \$40,000 to \$50,000 per annum and the Old Age Pension added \$6,000 per annum. I do not consider that to be a minor change. It is a "material change".
- [14] However, it is not open to this Court to interpret the expression "material change" without regard for the authorities. A "material change" is one which, if known at the time of the order, would have led to a different result. See for example, *L.G. v. G.B.*, [1995] 3 S.C.R. 370 at paras. 49 to 51. As I have already mentioned, the prospective change in the respondent's income was known at the time of the order. The respondent's birth date would have been known to the claimant. It is also found in the notice of family claim. He was born on May 2, 1948. The notice of family claim also indicates the respondent had been resident in British Columbia for 50 years. The claimant and Mr. Justice Saunders would have known that when the respondent reached the age of 65 on May 2, 2013, he would be eligible to seek the Old Age Pension. The December 5, 2012 order should not be read to mean that when the respondent began to receive his Old Age Pension, about five months after the interim spousal support order was pronounced, that fact would trigger the right to apply for a variation of the interim spousal support order. I do not accept there has been a "material change" of the type contemplated by the authorities that would entitle me to vary the order. I

also adopt what Madam Justice Martinson said in Hama at para. 12: "If judges are not to get bogged down on interim applications, they certainly should not get bogged down on applications to vary interim orders".

[15] It is important that the issues in this litigation have not been finally resolved. I am told that the division of pension benefits, for example, will need to be addressed either by agreement or in a trial. When that is done there may be a need to return to the question of spousal support. There may also be other issues of which I am not aware that may lead a trial judge to adjust the financial arrangements between the parties. Now is not the time to make an adjustment without the full picture.

[16] The application is dismissed. The respondent is entitled to his costs in the cause.

"Affleck J."

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