

CANADA / JUDGMENT

## Clarke v. Clarke

2023 BCSC 2264

### COURT

Supreme Court of British Columbia

### DECIDED

22 December 2023

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2023 BCSC 2264 Clarke v. Clarke

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clarke v. Clarke,

2023 BCSC 2264

Date: 20231222

Docket: E90142

Registry: Kelowna

Between:

Nicola Lee Clarke

Claimant

And

Jason Sean Clarke

Respondent

Before: The Honourable Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Claimant:

A.J. Boland

Appearing on his own behalf:

J.S. Clarke

Place and Date of Trial/Hearing:

Kelowna, B.C.

December 14, 2023

Place and Date of Judgment:

Kelowna, B.C.

December 22, 2023

## Introduction

- [1] After being separated from the respondent for over 13 years, being divorced for over 12 years and a final order dealing with all issues between the parties having been made over ten years ago, the now 53-year-old claimant seeks an order increasing spousal support based on a material change in circumstances.
- [2] The application is brought under the Divorce Act, R.S.C. 1985 (2nd Supp), c. 3.

## Background

- [3] The parties were married on September 9, 1988, and have two children now aged 24 and 28 who are self-supporting. They separated on June 22, 2010, and were divorced on November 21, 2011. The respondent has since re-partnered.
- [4] Early in the relationship, the claimant developed a chronic pain condition and was diagnosed with fibromyalgia in 1992. She continues to struggle with that condition. She says her condition is severe, debilitating and continues to prevent her from obtaining gainful employment.
- [5] On August 22, 2013, following a summary trial, Justice Davies made a final order that dealt with all issues between the parties, including division of family property ("Final Order"). Both parties were represented by counsel at trial. The respondent was ordered to pay the claimant monthly spousal support of \$2,300 and monthly child support of \$1,785. The support orders were based on the respondent's annual Guidelines income of \$124,000 and the claimant's annual Guidelines income of \$9,153 which was in the form of CPP disability income she had been receiving since 1993. The spousal support order was to commence on September 1, 2013, and continue indefinitely. The Final Order provided that if the respondent removed the claimant from his medical and extended health insurance coverage, the claimant was at liberty to apply for an increase in spousal support.
- [6] At the time of the Final Order, the party's oldest child was nearing age 19 and their youngest child was aged 14.

- [7] Since the Final Order, the claimant's income has stayed relatively static while the respondent's income has steadily increased. He now earns approximately \$165,000 per annum including non-guaranteed annual bonuses.
- [8] By 2014, the parties' oldest child was no longer a child of the marriage, prompting the parties on December 21, 2017, to consent to an order varying the Final Order by reducing child support to \$1,119 per month with an end date of August 15, 2019. Immediately upon child support payments ending, the claimant reached out to the respondent requesting an increase in spousal support. No response was received.
- [9] On October 19, 2020, the claimant appeared before Justice Hori, inter alia, for an order increasing spousal support to \$3,233 per month based on a material change in circumstances in her medical condition and an increase in the respondent's income from \$124,000 to \$137,000. Justice Hori dismissed the application stating:
- [7] In order to vary a previous order with respect to spousal support, the claimant must prove that there has been a material change in circumstance. She has failed to do so in this case, because there is no evidence of that the claimant's income was at the time of the final order so as to allow me to determine if it has changed in a material way or not, and also because I am not satisfied that a change from \$124,000 to \$137,000 per year is a material change without knowing what the claimant's income was for the purpose of Mr. Justice Davies' final order.
- [8] With respect to the medical circumstances of the claimant, she says that her fibromyalgia has deteriorated. However, the claimant has suffered from fibromyalgia for 20 years of the parties' 22-year marriage. Therefore, she was suffering from that condition when the final order was pronounced. There is no convincing evidence that the condition has deteriorated in a material way and there is no medical evidence to support such a change. Therefore, the claimant's application to vary the final order to increase spousal support is denied.
- [10] At all times, the respondent has complied with all prior support orders and there is no suggestion of any arrears.
- [11] The claimant now asserts a material change in circumstances on the basis that:
- a) Child support has ceased as of August 15, 2019; and
  - b) The respondent's income has dramatically increased since the Final Order.
- [12] She seeks an increase in spousal support at the mid-range of the Spousal Support Advisory Guidelines from September 2023 (when she filed the notice of application) calculated on a "without child" formula basis.
- [13] In response, the respondent says the claimant remains functional despite her fibromyalgia diagnosis, could be gainfully employed and for over 13 years has failed to take any reasonable steps to become self-sufficient, or even partially self-sufficient. He points out that there is no medical evidence indicating that the claimant is disabled from employment.

While he does not seek to minimize the impact of fibromyalgia, he says that, prior to separation and despite her fibromyalgia diagnosis, the claimant was able to work along with the rest of his family cleaning their rental property and performing other work. By comparison, he has worked extremely hard all his life to support himself, his children, and now his new family. His job is physically taxing and at age 54, he must start planning for retirement. After being divorced for over 12 years, he seeks closure. He points out that he has complied with all orders and has never removed the claimant from his medical or extended health plans which he pays a 10% premium for. He also points out that because he is paying a variable rate mortgage on his current home, his expenses have significantly increased, and he cannot afford to pay more spousal support. For now, he is content to continue paying the claimant \$2,300 in spousal support as well as her medical benefits.

### The Legal Framework

[14] The relevant sections of the Divorce Act are ss. 17(1), 17(4.1) and 17(7) which read:

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively,

(a) a support order or any provision of one, on application by either or both former spouses;

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

(7) A variation order varying a spousal support order should

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[15] The factors to consider in spousal support varying applications were nicely summarized by Justice Shergill in *Mazloomi v. Mazloomi*, 2021 BCSC 871 at paras. 25-30:

- a) The onus is on the applicant to prove a material change in circumstances.

- b) The change in circumstances must be a material one, such that if known at the time, would likely have resulted in different terms.
- c) The focus of the analysis is on the prior order, and the circumstances under which it was made.
- d) The test for what constitutes a material change focuses on what the parties contemplated at the time of the original order, rather than what one party knew or reasonably foresaw.
- e) What amounts to a material change will depend on the actual circumstances of the parties at the time of the order.
- f) In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances.
- g) Certain factors, such as the subsequent conduct of the parties, may provide indications of whether they considered a particular change to be material.
- h) A material change in circumstances in the context of child and spousal support variation proceedings is a change that is significant and long-lasting.
- i) The cessation of child support obligations can constitute a material change in circumstances allowing for a variation in spousal support.
- j) A disparity in incomes with a substantial increase in one party's income can constitute a material change in circumstances warranting a variation.
- k) Treatment of post-order increases in a payor's earnings is ultimately a matter of discretion for the court, and each case must be determined on its own facts.

[16] It is on this legal backdrop that I will consider the claimant's application.

## Discussion

- [17] There is no dispute that, to decide this application, the appropriate test is whether there has been a material change in circumstances since the Final Order. The claimant argues that the cessation of the respondent's child support obligations and the increase in his annual Guidelines income are material changes that warrant an increase in spousal support.
- [18] The parties each filed affidavit material setting out their current financial circumstances, their respective means, needs and circumstances to support their respective positions. Regrettably, the claimant's material did not include medical evidence that persuasively supports her position that she is unemployable in any capacity. Indeed, her own evidence suggests that she can look after her aging parents.

- [19] In any event, the central question on this application is what the parties contemplated at the time of the Final Order respecting spousal support. Although the Final Order is silent on the point, I am persuaded that the \$2,300 spousal support the respondent was ordered to pay was calculated using a "with child" DivorceMate formula.
- [20] The claimant provided "with child" DivorceMate calculations for 2013 based on her then income of \$9,153 and the respondent's then income of \$124,000. Those calculations show child support payable of \$1,785 and spousal support payable in the range of \$1,945 at the low end, \$2,282 in the mid-range and \$2,639 at the high end. The amount of child support is the exact amount contained in the Final Order. I infer that Justice Davies rounded spousal support up from the mid-range of \$2,282 to \$2,300.
- [21] I also conclude that the cessation of child support obligations constitutes a material change in circumstances. At that time, the oldest child was age 18 and the youngest was age 14. The evidence is that both children were expected to continue their education past grade 12. That education was funded one-hundred percent by the respondent. While the exact timing is unknown, I am satisfied that the parties at the time would have anticipated that child support would end when the children were self-supporting.
- [22] Using the DivorceMate calculations provided by the claimant and based on the same income as was used to determine support in the Final Order, the amount of spousal support the respondent would have been paying using the "without child" formulae would have ranged from a low of \$3,158 to a high of \$4,211 with the mid-range of \$3,685. Accordingly, the amount of spousal support the respondent has been paying is approximately \$1,385 per month less than he would otherwise have paid if no children were involved (\$3,685 - \$2,300). At a minimum, the claimant seeks a variation of the Final Order to reflect this.
- [23] The claimant also argues that the respondent's increased income since the Final Order from \$124,000 to \$164,000 is a material change in circumstances.
- [24] I do not agree.
- [25] The respondent has been working for the same employer for nearly 30 years. I conclude that at the time of the Final Order, both parties would have anticipated his income to increase over the years. It has now been some ten years since the Final Order was made and the respondent's income has gone up roughly \$40,000 over that time frame, for an average annual increase of \$4,000 or slightly over 3% per year. This, in my view, would not have been unexpected and does not constitute a material change in circumstances. I am not persuaded that the annual increases in the respondent's income to its present level would have resulted in the Final Order having different terms.

- [26] Respecting the parties' conduct since the Final Order, I note that, on August 16, 2019, one day after the respondent's obligation to pay child support ceased, the claimant reached out to him setting out her dire financial circumstances and pleading for an increase in spousal support. The respondent did not reply. This is some evidence that the parties contemplated that spousal support would be revisited on the cessation of child support.
- [27] Respecting the parties' financial circumstances, and without detailing the evidence on the point, the respondent clearly enjoys a far better standard of living than does the claimant.
- [28] Like the findings in Mazloomi, I have concluded that the cessation of child support payments constitutes a material change in circumstances, and will therefore consider a change to the Final Order respecting spousal support. I am persuaded that a reasonable and fair order would be to vary the Final Order by increasing the respondent's spousal support obligations from the "with children" mid-range of \$2,300 per month to the "without children" approximate low range of \$3,200 per month commencing October 1, 2023.
- [29] I have concluded that the low range is appropriate because of the lack of admissible medical evidence submitted by the claimant respecting her medical condition since the Final Order on how her fibromyalgia condition has affected her ability to seek any form of employment.

### Summary

- [30] The Final Order of Justice Davies dated August 22, 2013, is varied by adding the following to para. 6:

Commencing October 1, 2023, and continuing on the first day of each month thereafter until further order or written agreement between the parties, the respondent shall pay the claimant spousal support of \$3,200 per month.

- [31] I have added the term "further order" because the claimant must understand that, at some point, the respondent will likely be applying to terminate spousal support. Should such an application be made, the respondent will likely be referencing the claimant's apparent lack of effort to become even partially self-sufficient in the 12 years since they separated. If she maintains she is totally disabled and unable to earn an income, she will likely need proof in the form of admissible medical expert opinion evidence on the point.
- [32] The variation I have made to the Final Order means that the respondent is in arrears of three months spousal support payments to date totaling \$2,700 (\$900 per month x 3). The respondent is at liberty to pay those arrears at \$300 per month in addition to his monthly spousal support obligations.
- [33] Respecting costs, I conclude that neither party was substantially successful and therefore each party will bear their own costs.

"G.P. Weatherill J."

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