

CANADA / JUDGMENT

Dahl v. Dahl

2023 BCSC 2184

COURT

Supreme Court of British Columbia

DECIDED

27 November 2023

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2023 BCSC 2184 Dahl v. Dahl

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dahl v. Dahl,

2023 BCSC 2184

Date: 20231127

Docket: E183344

Registry: Vancouver

Between:

Tania Lynn Dahl, also known as Grace Dahl,

also known as Tania Lynn Truman

Claimant

And

Gregory Peter John Dahl

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 37 on December 14, 2023.

Before: Master Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant appearing by videoconference:

W. A. McLachlan, K.C.

Counsel for the Respondent appearing by videoconference:

S. T. Taylor (November 15, 2023)

M. Goyal, A/S (November 27, 2023)

Place and Date of Hearing:

Vancouver, B.C.

November 15, 2023

Place and Date of Judgment:

Vancouver, B.C.

November 27, 2023

Introduction

- [1] THE COURT (by videoconference): The respondent seeks orders that the parties jointly retain two experts:
- a) Patti Daum, chartered professional accountant and chartered business valuator, for the purpose of preparing an expert report assessing the respondent's 2022 Guideline income; and
 - b) Derek M. Nordin, vocational rehabilitation consultant, for the purpose of preparing an expert report assessing the claimant's 2022 Guideline income.
- [2] The respondent proposes that the costs of the reports be shared equally by the parties. The claimant opposes all of the relief sought.

Background

- [3] The claimant is 60 years of age. The respondent is 56 years. They began living together on March 1, 2003 and married on September 9, 2005. They separated on October 19, 2018. There are no children of their marriage.
- [4] During the relationship, the parties incorporated and operated two businesses, CCON Metals Inc. ("CCON") and CCON Recon Inc. ("Recon").

History - Court and Arbitration Proceedings

- [5] On December 14, 2018, the claimant filed a notice of family claim. On January 18, 2019, the respondent filed a response to family claim. On January 22, 2021, the respondent filed a counterclaim.

- [6] A trial was scheduled for September 7, 2023 for eight days, however, the parties agreed to resolve all issues by arbitration with arbitrator Lawrence Kahn, K.C. They entered into an arbitration agreement in December 2021. Issues addressed included valuation of family property, division of family property and debt, and amount of spousal support payable by the respondent to the claimant. At the time, the respondent was represented by family lawyer Angela Thiele.
- [7] The arbitration was held on December 21-23, 2023. The parties made submissions on February 2, 2022. On May 27, 2022, the arbitrator issued his Award.
- [8] At the arbitration, the value of CCON and Recon were the subject of an expert report authored by Kiumars Ghanavizchian, CPA, CA, CBV, MBA of Blair Mackay Mynett Valuations Inc. dated November 25, 2019. He opined that the value of the companies was between \$830,000 (low), \$870,000 (mid) and \$910,000 (high).
- [9] In general terms, the arbitrator concluded that the respondent had failed to disclose financial information in the course of the family action and that the financial statements for CCON and Recon were unreliable for a variety of reasons, as set out in para. 159 of the Award. The arbitrator rejected the expert's valuation and attributed a higher value to the companies, namely \$1.5 million for both.
- [10] The claimant tendered evidence that she suffered from a variety of medical issues, including lupus and fibromyalgia. A report from her family physician, Dr. Blaine, was tendered which indicated she was unable to seek and maintain gainful employment. The respondent did not tender any expert evidence to the contrary.
- [11] With respect to spousal support, respondent's counsel argued at the arbitration that it should be based on the Spousal Support Advisory Guidelines ("SSAG") with the respondent having a Guideline income of \$234,000 and the claimant having no income: Award, para. 179. This would result in mid-range monthly support of \$5,289.
- [12] The arbitrator concluded that, to be consistent with his valuation of CCON and Recon, it was appropriate to impute an income to the respondent that was 30% higher than the amount suggested by respondent's counsel, namely \$304,000. He accepted that the claimant's income was nil. This resulted in an order that the respondent pay the claimant mid-range spousal support of \$7,098 per month, commencing June 1, 2022: Award, para. 181.
- [13] The Award also provided that the respondent was entitled to apply to vary spousal support on a material change in circumstances, but the arbitrator declined to set a specific review date: Award, para. 182.
- [14] The parties subsequently settled costs of the arbitration, which was incorporated into a Consent Costs Award dated September 26, 2022. This required the respondent to pay the claimant costs of \$118,357.48.
- [15] The respondent did not seek judicial review of the Award or the Consent Costs Award.

Post-Award Developments

- [16] The respondent says he has been complying with his spousal support obligations since the Award was issued. The claimant says the respondent has failed to make any payments towards the Consent Costs Award.
- [17] The respondent is now sole owner of CCON and Recon. He says after the Award was issued, on the advice of his then-counsel, he "self-adjusted" the level of income he was receiving from the companies as of June 1, 2022, to be consistent with the level of imputed income as determined by the arbitrator. This resulted in his 2022 income being \$247,144.
- [18] He now argues that without this "artificial" adjustment to his 2022 income, had he continued being paid at the same rate as before the Award was issued, his 2022 income would have been about \$107,067 for the year. In order to sustain what he now refers to as the "artificially-inflated" income level, he claims to have had to borrow funds from various sources to maintain the financial viability of the businesses and to keep up-to-date with his monthly spousal support obligation.
- [19] An unusual feature of this application is that the respondent is not currently alleging definitively that there has been a change in circumstances since the Award was issued. The relief he seeks in this application is intended to essentially be a form of discovery process through which he hopes to determine whether there has been a material change in circumstances. At paras. 4-5 of the respondent's Affidavit #1 sworn October 16, 2023, he sets out his rationale for this application:
4. However, it was also specified in the Award that a review of my spousal support payments could be triggered upon a material change in circumstances.
 5. I am now seeking such a review to determine whether or not, there has been a material change in the financial circumstances of either myself and/or the [Claimant].
- [20] The respondent suggests in general terms that CCON and Recon have experienced substantial changes in their business circumstances which threatens their continued financial performance, and thus the level of income he can draw from them.
- [21] CCON extracts valuable metals from used catalytic converters and acquires these from local companies and small business owners in the automotive industry for resale. The respondent says provincial legislative changes were made to the Metal Dealers and Recyclers Regulation, B.C. Reg. 101/2012, which came into effect on March 14, 2022. These require that each transaction involving a catalytic converter must be reported. As a result, most of his customers can only buy catalytic converters with a serial number etched on the converter that matches the insurance documents of the car. The additional formalities have resulted in a significant decline in the availability of catalytic converters and a "substantial loss" of CCON's traditional sales revenue. This is not quantified.

- [22] Recon acquires scrap metals and used batteries in the automotive industry, processing them into bulk batteries for sale and export to offshore smelters. The respondent says that its ability to acquire metal from various regions, including provincial, national, and international, has been impacted due to low margins and highly aggressive pricing strategy of the company's competitors. This has reduced or eliminated traditional sources of revenue for Recon. This is also not quantified.
- [23] The respondent proposes that, in order to assess whether there has been a material change in his financial circumstances, the parties should jointly retain Ms. Daum to prepare an expert report regarding his 2022 Guideline income, and share the cost of same in the first instance.
- [24] With respect to potential changes in the claimant's circumstances, the respondent says that in the Award, the arbitrator acknowledged the respondent's role and responsibility of working for CCON and Recon. It is noted in the Award that she was responsible for the "front end" of the business, including human resources, office administration, banking and related tasks. Despite this, the respondent says the arbitrator provided no written reasons or explanation for having concluded that the claimant's 2021 Guideline income was nil.
- [25] Current counsel now argues that the claimant admitted in her examination for discovery that she had not sought employment since the parties separated, not because of health issues, but rather because she was already employed with CCON and Recon and had no plans to pursue further employment.
- [26] On this application, the respondent says that whether the claimant has ability and capacity to earn income requires an independent expert assessment. He requests an assessment by the vocational expert, with costs to be shared in the first instance. At para. 15 of Part 2 of the application, the respondent states:
15. In order to determine, whether or not there exists a material change in financial circumstances of either Party, a comprehensive independent review is required to assess the Parties' 2022 Guideline Incomes, for the purpose of determining the Applicant's spousal support obligations pursuant to the Spousal Support Advisory Guidelines.

Applicable Law

Variation of Spousal Support

- [27] The test applicable to varying spousal support is summarized in *Zandbergen v. Craig*, 2023 BCSC 7 at paras. 39-43:
- [39] *L.M.P. v. L.S.*, 2011 SCC 64 [L.M.P.] remains the leading authority on variation of spousal support: *Jennens v. Jennens*, 2020 BCCA 59 [Jennens] at para. 15.
- [40] In *Mazloomi v. Mazloomi*, 2021 BCSC 871 at para. 25, the court summarized the guidance provided by the L.M.P. and Jennens decisions:

- [25] Jennens and L.M.P. provide the following guidance for applications to vary spousal support:
- a) The onus is on the applicant to prove a material change in circumstances: L.M.P. at para. 31; Jennens at para. 20.
 - b) The change in circumstances must be a material one, such that "if known at the time, would likely have resulted in different terms": L.M.P. at para. 32.
 - c) The focus of the analysis is on the prior order, and the circumstances under which it was made: L.M.P. at para. 33.
 - d) What amounts to a material change will depend on the actual circumstances of the parties at the time of the order: L.M.P. at para. 34.
 - e) In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances: L.M.P. at para. 35.
 - f) Certain factors can assist a court in determining whether a particular change is material, such as the subsequent conduct of the parties, which may provide indications as to whether they considered a particular change to be material: L.M.P. at para. 35.
- [41] On a variation application when a material change in circumstances has been established, the court is not conducting an appeal or a hearing de novo concerning the original order; rather, the court should limit itself to making "the making the appropriate variation" and it should avoid weighing all of the factors to arrive at a fresh order that is unrelated to the existing order: *Droit de la famille - 091889*, 2009 QCCS 3389, L.M.P. at paras. 47 and 50.
- [42] In *Willms*, at para. 47, our Court of Appeal confirmed the limited scope of analysis in an application to vary an order pursuant to s. 17 of the DA and stated:
- [47] That being the case, a relatively limited reassessment of the appropriate level of support was appropriate in this case. The only material change was the fact spousal support needed to no longer be determined with reference to the "with child support" schedule in the SSAG. The judge was correct to say he ought not to engage in a wholesale analysis of the parties' circumstances.
- [43] On a variation application, the court is to take the amount of support originally ordered as correct at the time the order was made and then consider how circumstances have since changed. Support will be varied only when, in addition to some material change in circumstances, "the balance between the parties has become so distorted that it has become unjust" and there are conditions arousing "the conscience of the court and call for action": *Walters v. Walters*, 2011 BCCA 331 at para. 48.
- [28] The respondent relies on Rule 19.18(3) of the Family Law Act, S.B.C. 2011, c 25 ("FLA"), which deals with the court's ability to change an arbitration award for any reasons for which an order in relation to the same matter could be changed under the Act:

19.18 (3) On application by a party, the Supreme Court may change, suspend or terminate all or part of an arbitration award for any reason for which an order in relation to the same matter could be changed, suspended or terminated under this Act.

[29] Section 167 of the FLA deals with changing orders respecting spousal support:

167 (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.
- (3) Despite subsection (2), if an order requires payment of spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may not make an order under subsection (1) for the purpose of resuming spousal support unless satisfied that
 - (a) the order is necessary to relieve economic hardship that
 - (i) arises from a change described in subsection (2) (a), and
 - (ii) is related to the relationship between the spouses, and
 - (b) the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order.

Appointment of Joint Expert

[30] Rule 13-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009 ("SCFR"), addresses the appointment of joint expert:

Rule 13-3 -- Appointing Joint Expert Witnesses

Definition

- (1) In this rule, "financial issue" means
 - (a) an issue arising out of a claim under Part 5 or 6 of the Family Law Act or out of an application for a FHRMIRA order,
 - (b) a claim for an interest in property based on unjust enrichment or other trust claims, or

- (c) a claim for compensation based on unjust enrichment.

[am. B.C. Regs. 133/2012, s. 5; 249/2014, s. 5.]

Joint appointment on financial issues

- (2) If any party wishes to present to the court expert opinion evidence on a financial issue,
 - (a) that evidence must be presented to the court by means of a jointly appointed expert unless the court otherwise orders or the parties otherwise agree, and
 - (b) Rule 13-4 applies.

Other appointments on non-financial issues

- (3) If a party wishes to present to the court expert opinion evidence on an issue other than a financial issue,
 - (a) the parties may present that evidence by means of a jointly appointed expert under Rule 13-4, or
 - (b) any one or more of the parties may appoint his or her own expert.

[31] The respondent also relies on Rule 13-4(3):

Application to Court

- (3) If the parties do not agree that a joint expert is required or do not agree on any matter relating to the appointment of a joint expert, any party may apply to the court in accordance with Rule 10-5 for an order
 - (a) appointing a joint expert, and
 - (b) settling any matter relating to the appointment of the joint expert.

[32] In *Aquilini v. Aquilini*, 2012 BCSC 1616, the court concluded that a joint expert is mandatory on a financial issue, unless there is agreement or a court order authorizing a departure from that procedure. One party cannot opt out of the joint expert regime. When an expert prepares a report on a financial issue under this rule, it will be admissible only as a joint report in the absence of agreement or court order. Before the court makes an order relieving the parties of the requirement to present evidence through a joint expert, there should be evidence that use of a joint expert is inappropriate or impractical. Factors considered include (at para. 43):

- 1) Is the financial issue one on which the court is likely to require expert evidence?
- 2) If so, is there evidence of a properly qualified expert who is available and who the parties, or either of them, can afford to retain?
- 3) Is appointment of a joint expert consistent with the purpose and intent of the Family Rules?

Analysis

- [33] If the respondent wishes to apply to vary spousal support, he bears the onus of proving there has been a material change in circumstances since the Award was issued. The Award was effectively a final order and the court is to assume that the amount of support originally ordered was correct at the time the Award was issued.
- [34] On this application, the respondent has not tendered evidence seeking to establish there has been a post-Award change in circumstances. Rather, he seeks to compel the claimant to participate in what amounts to pre-application discovery through which he hopes to develop expert evidence that will help him meet his evidentiary onus for an intended application.
- [35] The respondent relies on Rule 13-3(2) of the SCFR. It contemplates that if a party wishes to present to the court expert opinion evidence on a "financial issue" it must be presented to the court by means of a jointly-appointed expert, unless a court otherwise orders or the parties otherwise agree. In this rule, "financial issue" is defined as (a) an issue arising out of a claim under Part 5 [Property Division] or Part 6 [Pensions] of the FLA, (b) a claim for an interest in property based on unjust enrichment or other trust claims, or (c) a claim for compensation based on unjust enrichment. Accordingly, the issues for which the respondent is seeking appointment of a joint expert do not qualify as "financial issues" as that term is defined in Rule 13-3.
- [36] Rule 13-3(3) provides that if a party wishes to present the court evidence on an issue other than a "financial issue", they may do so by means of a jointly appointed expert under Rule 13-4 or any one or more of the parties may appoint their own expert.
- [37] At present there is no pending proceeding with an approaching trial date for which such expert evidence is necessary. Respondent's counsel did not direct me to any authorities which support the proposition that Rule 13-3 can be invoked after a final order has been made to force the opposing party to fund half the cost of the respondent's efforts to develop expert evidence in aid of an intended application to vary the final order.
- [38] A practical problem the respondent has is that the arbitrator concluded he had failed to disclose financial information, and that the companies' financial statements were not reliable. The determination of the respondent's Guideline income in the arbitration was closely linked to these companies and their unreliable financial statements.
- [39] The respondent now proposes to engage a different expert to develop an opinion regarding the respondent's 2022 Guideline income, presumably to be based on the following year's financial statements for these companies. It is not clear how he proposes to address the arbitrator's concerns regarding failure to disclose and unreliability of financial statements. I do not consider that it would be justifiable in the circumstances to force the claimant to fund half the cost of a new expert report based on potentially suspect financial statements. If the respondent wishes to develop such evidence, it will have to be at his own expense.

- [40] A second concern is that the factors the respondent points to as being indicative of the claimant's circumstances having changed are actually just critiques of the arbitrator's reasoning in the Award. He relies on the alleged inconsistency between a comment that the claimant had worked for CCON and Recon and the conclusion that the claimant had nil income for purposes of calculating spousal support. The respondent now wishes to subject the claimant to a vocational assessment in the hopes of developing evidence establishing the claimant has some capacity to work. Presumably, this would be in aid of arguing she is intentionally unemployed or underemployed. This is a critique of matters that are apparent on the face of the Award, not a post-Award change in circumstances. If the respondent disagrees with the Award, his remedy was to seek judicial review.
- [41] Also problematic for the respondent is the fact that his then counsel's own submissions regarding the appropriate quantum of spousal support incorporated the assumption that the claimant's income was nil. As such, her income, at that point in time at least, appears to have been conceded or uncontested.
- [42] It frankly appears the respondent is seeking to have a "do-over" of the arbitration with a new presider and new evidence which addresses adverse findings made in the Award. If the respondent wished to argue that the claimant ought to have income imputed to her due to intentional unemployment, it was open to him to seek a vocational assessment for use in the arbitration. If he took issue with the evidence regarding the claimant's health issues, it was also open to him to seek a report addressing those issues as well. It appears he did not do so.

Conclusion

- [43] The respondent has not persuaded me that these are appropriate circumstances in which to order the appointment of joint experts as sought in the application. The application is dismissed.
- [44] The claimant has been successful in resisting the application. She is entitled to costs of the application, assessable and payable forthwith. I am open to taking submissions on a lump sum to avoid the cost of having to go through an assessment for a single application.

[Submissions Regarding Costs]

- [45] THE COURT: All right. By agreement then, costs will be fixed for this application at \$2,000. Thank you. That concludes my reasons.

"Master Bilawich"

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