

CANADA / JUDGMENT

Doucet v. Doucet

2020 BCSC 1218

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1218 Doucet v. Doucet

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Doucet v. Doucet,

2020 BCSC 1218

Date: 20200818

Docket: E29397

Registry: Cranbrook

Between:

David John Doucet

Claimant/Respondent

And

Margaret Heather Doucet, by way of her Committee, Amie Doucet

Respondent/Appellant

Before: The Honourable Madam Justice MacNaughton

On appeal from: An order of a Master of the Supreme Court of British Columbia, dated March 17, 2020 (Doucet v. Doucet, Cranbrook Docket E29397).

Reasons for Judgment

Counsel for the Claimant:

M. Matthews

Counsel for the Respondent:

J. Hogg, Q.C.

Place and Date of Trial/Hearing:

Cranbrook, B.C.

July 13, 2020

Place and Date of Judgment:

Cranbrook, B.C.

August 18, 2020

Background

- [1] In August 2019, Mr. Doucet filed a notice of family claim seeking spousal support, equal property division, and a divorce. On March 17, 2020, Master Keim gave oral reasons ordering Ms. Doucet to pay interim spousal support of \$2,100 monthly to Mr. Doucet (the "Keim Oral Reasons"). Ms. Doucet appeals from that order.
- [2] The parties were married on November 7, 1970. Although the parties dispute the date of separation, in 1997, while the parties were still married, Ms. Doucet suffered a serious brain injury when a rock from a rockslide entered her vehicle and struck her. As a result of her injuries, she became unable to manage her own affairs. As part of settling her claim for damages against the Crown, Ms. Doucet receives tax-free monthly payments under a structured settlement agreement.
- [3] On this appeal, Ms. Doucet argues that Master Keim erred in considering these payments when making the interim spousal support order as, he submits, they are not income.

Master Keim's Reasons

- [4] In finding that the claimant was entitled to interim support pursuant to s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA], Master Keim considered that the parties had a 47-year marriage, the claimant provided daily care to the respondent for several years following her accident, the respondent had an ability to pay spousal support, and the claimant needed some support to maintain the marital standard of living: Keim Reasons at paras. 16-19.
- [5] In considering the condition, needs, and means of both parties, as required by s. 15.2(4) of the DA, Master Keim noted that the claimant had an income of \$18,000, consisting of pension income and Old Age Security payments, and that he is assisted in keeping his expenses low by the fact that he resides in a debt-free property purchased with a portion of Ms. Doucet's settlement funds. The settlement funds used to purchase the property were in addition to the structured settlement.

- [6] Mr. Doucet sought \$3,000 per month in support, noting that this was less than he would be entitled to under the Spousal Support Advisory Guidelines [SSAG], using the figures of \$18,000 for his income and \$140,995 for Ms. Doucet's income (calculated using her \$30,820 tax return income plus the \$117,389.76 in tax-free income she receives from the structured settlement payments). He also submitted that, after accounting for all of Ms. Doucet's annual care needs, she had a surplus of at least \$36,000 per year.
- [7] Master Keim rejected Mr. Doucet's proposed figures, noting that there was "no evidence that he needs what would amount to a 66% increase in his income in order to comfortably meet all of his expenses": at para. 22. She further noted that the SSAG calculations are based on an assumption that the parties have similar needs, which was not the case in the circumstances before her given that Ms. Doucet has "a significant housing and care cost that the claimant does not", resulting in her requiring a greater portion of the available funds: at paras. 23-24.
- [8] After Ms. Doucet's care costs and her trustee and committee fee are deducted, she has \$3,182.48 per month remaining from the structured settlement payments to meet her additional expenses. This put the parties in a "relatively equal position of each having no housing or care costs weighing on their budget": at para. 25. Ultimately, the \$2,100 monthly spousal support was ordered because it would roughly equalize the funds available to the parties after their care and housing needs were accounted for: at paras. 25-26. Master Keim noted that this award satisfied the objectives of the DA for spousal support orders by balancing the economic advantages and disadvantages arising from the breakdown of the marriage: at para. 27.

Positions of the Parties

- [9] Ms. Doucet argues that Master Keim erred in considering the monthly structured settlement payments as income in calculating the quantum of spousal support for the following reasons:
- a) the monthly payments are not included for calculating income tax under the Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.) and are not listed in her income tax returns;
 - b) considering the structured settlement payments for spousal support purposes effectively does indirectly what the court is not permitted to do directly, namely, divide excluded property;
 - c) it is contrary to public policy to use money intended to provide for persons with serious brain injuries for spousal support purposes; and
 - d) the F8 financial statement used in family law cases does not list or include structured settlement payments as a source of income for the purpose of spousal support calculations.
- [10] Mr. Doucet argues that Master Keim's decision is owed deference, and in particular submits that:

- a) the court is entitled to consider the "conditions, means, needs and other circumstances of each spouse" on an application for spousal support, which allows for courts to assess "means" without excluding certain categories of income, including non-taxable income; and
- b) the question of whether the payments are excluded for property division purposes is not determinative of whether they may be considered for the purpose of awarding spousal support.

Standard of Review

- [11] The standard of review on an appeal from a master's interim support order is that the decision will stand unless it was "clearly wrong": *McDonald v. McDonald*, 2015 BCSC 1285 at paras. 2-3. I explained the application of this standard in the context of an appeal from an interim support order in *Bandpey v. Talebpourazad*, 2019 BCSC 2059 at paras. 19-21:
- [19] The "clearly wrong" standard of review is met where the findings made by the first-instance decision maker are unsupported by the evidence: *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 55-56. It is also met if the decision maker applies the wrong test, fails to consider a part of the test, gives weight to a factor that is not properly considered on the application before them, or rejects undisputed evidence without giving an explanation for doing so: *Ma v. Zhao*, 2019 BCCA 248 at paras. 24-28.
- [20] However, if the decision maker applied the correct legal test and there is an evidentiary basis to support the finding made, the "clearly wrong" threshold is not met: *Raj v. Khosravi*, 2015 BCCA 49 at paras. 6, 48. It is improper for the reviewing court to substitute its view of the evidence in order to find that the decision was unreasonable: *Raj* at para. 48.
- [21] In *Nestor v. Nestor*, 2019 BCCA 203, the Court of Appeal considered an appeal from a chambers judge's decision on interim support. The Court explained, at para. 19, that appeals from interim support orders are to be discouraged. Interim support orders should not be overturned unless the reasons disclosed an error in principle, a significant misapprehension of the evidence, or that the award was clearly wrong. This standard of review closely mirrors the standard applied to masters' decisions. Further, interim support orders should only be interfered with if the court is convinced that the sum awarded is inordinately high or low: *Nestor* at para. 19.

Analysis

- [12] Ms. Doucet argues that the master erred in considering the monthly structured settlement payments because they are not included in calculating income tax and are not listed in her income tax returns. I disagree. Both the SSAG and the Federal Child Support Guidelines, SOR/97-175 [CSG] contemplate non-taxable income being considered. More fundamentally, as I will explain below, s. 15.2(4) of the DA allows the court to consider "means" available to the spouses other than "income" as defined in either the SSAG or the CSG.

- [13] Presumably, Mr. Doucet's argument is premised on the fact that the SSAG defines the starting point for determining income as the definition of income under the CSG. Annual income for child support purposes is determined using the spouse's "total income" reported in their Canada Revenue Agency T1 General form tax assessment. However, s. 16 of the CSG explains that this general rule is subject to ss. 17-20 of the CSG.
- [14] Subsection 19(1) of the CSG permits a court to impute income to a spouse in appropriate circumstances, including where "the spouse derives a significant portion of income from other sources that are exempt from tax": s. 19(1)(h). Additionally, the SSAG specifically contemplate issues arising with respect to non-taxable income, as discussed at page 47.
- [15] Both the SSAG and the CSG contemplate non-taxable payments being considered for the purposes of assessing support. The fact that the structured settlement payments are non-taxable does not preclude them from being considered for spousal support purposes.
- [16] Ms. Doucet also argues that it is improper to consider the structured settlement payments for spousal support purposes because they are excluded property under s. 85(1)(c) of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. This provision provides:
- 85 (1) The following is excluded from family property:
- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse
- [17] Ms. Doucet relies on Justice Wedge's decision in *M.K. v. R.A.S.*, 2004 BCSC 1798, in support of her argument. *M.K.* was an appeal from a Provincial Court order imputing an income of roughly \$95,500 to a spouse by treating as income monthly structured settlement payments that the spouse received as damages for a very serious brain injury in a motor vehicle accident. The structured settlement reflected compensation for non-pecuniary damages, loss of income earning capacity, and the cost of care. Also included in the imputed income was the roughly \$8,000 per year that the spouse received in Canada Pension Plan ("CPP") disability benefits.
- [18] In *M.K.*, Justice Wedge concluded that money received under the structured settlement to compensate for damages in a personal injury claim should only be characterized as "income" within the meaning of the CSG to the extent that it could be determined that the award is intended to compensate for loss of earnings. In coming to this conclusion, she relied, in part, on authority characterizing personal injury settlements as excluded property in the context of property division claims: at paras. 31, 37. Her reasoning for excluding the funds was that monetary damages are the only way that our legal system is able to compensate injured plaintiffs for loss of amenities of life, or the enjoyment of life, and cost of future care, which are intensely personal issues: at paras. 32-33. Further, the plaintiff's

choice to receive the award as a structured settlement rather than a lump sum payment should not make a difference to whether it is considered to be income: at para. 34.

- [19] In that case, Justice Wedge was able to determine the proportion of the settlement that was intended to compensate the spouse for loss of capacity to earn income until retirement. She calculated his income for child support purposes, using the amount of the structured settlement payments that was representative of his loss of income, plus the annual CPP disability benefits he received.
- [20] In this case, the structured settlement was not allocated to the various heads of damages pursued by Ms. Doucet in her action against the Crown. It is not clear what proportion of the award, if any, was intended to compensate for loss of earnings. Therefore, Ms. Doucet argues, none of the structured settlement payments can be considered as income for the purposes of awarding spousal support.
- [21] I accept that there is insufficient evidence to determine what portion of the settlement agreement that Ms. Doucet reached with the Crown was intended to compensate her loss of ability to earn an income. However, I agree with Mr. Doucet's submission that the characterization of funds for the purposes of property division is not determinative of whether or not they can be considered for support purposes.
- [22] Despite the fact that the division of family property and spousal support may sometimes overlap, they are two distinct issues arising on the breakdown of a relationship. In BC, under the FLA, spouses are presumptively entitled to an equal division of family property simply by virtue of being a "spouse" within the definition of the FLA. This model accords with an intuitive expectation of fairness--it is fair for spouses to share the property and debt that they accrue together during their relationship, with certain exceptions, as Justice Wedge points out in *M.K.*, for property that is particularly personal.
- [23] While property division regimes differ from province to province, spousal support under the DA applies to married spouses across the country. Most provinces also have statutes pursuant to which unmarried spouses can claim support, Quebec being an exception. Unlike with property division, spouses, whether married or not, are not presumptively entitled to support. Instead, the spouse claiming support must demonstrate their entitlement to it on compensatory, non-compensatory (needs-based), or contractual grounds in accordance with the objectives that support is intended to fulfill. These objectives are (DA s. 15.2(6); FLA s. 161):
- a) to recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - b) to apportion between the 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) to relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - d) in so far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [24] As Justice L'Heureux-Dubé explained in *Moge v. Moge*, [1992] 3 S.C.R. 813, spousal support became necessary as divorce became more widespread and it became clear that the consequences of marital breakdowns often had a disproportionately negative impact on one spouse, with a corresponding advantage to the other. Spousal support is intended to compensate spouses for their contributions to a relationship and to equalize the losses they incur on its breakdown. It recognizes the profound interdependencies that marriage creates, and that obligations to one's spouse arise not only during the marriage, but also after it ends. With respect to non-compensatory support, the goal is to assist spouses in maintaining the marital standard of living, to the extent possible.
- [25] In awarding support, the court must consider the factors in s. 15.2(4) of the DA, "against the background of these objectives": *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 36. As Master Keim correctly identified, the court must consider the "condition, means, needs and other circumstances of each spouse" in making an order for interim spousal support that appropriately meets the objectives. The wording of this provision suggests that the court has greater discretion to determine what evidence it is appropriate to consider when assessing each spouse's "means" in making an order for spousal support than it does in deciding what constitutes family property versus excluded property--both terms are carefully defined in the FLA--when making an order for property division. This gives the court a greater ability to fashion a support award that meets the objectives of spousal support in the particular circumstances of a case.
- [26] Spouses' income is generally used to determine the appropriate quantum of support in accordance with the SSAG formulas. However, s. 15.2(4) of the DA allows the court to consider any of the spouses' means, which encompasses more than income alone. "Means" includes "all pecuniary resources, capital assets, income from employment or earning capacity, and other sources from which the person receives gains or benefits": *Strang v. Strang*, [1992] 2 S.C.R. 112 at 119.
- [27] The SSAG itself recognizes that it is primarily helpful in assessing support in "typical" cases. Although it may be an error for the court not to follow the SSAG in certain circumstances, where the circumstances before the court are atypical, strict application of the formulas may not be appropriate.
- [28] As Master Keim expressly noted in her reasons, this is not a typical case, and application of the usual support ranges, which are based on a relatively equal sharing of income, would not be appropriate in meeting the objectives of the DA given that Ms. Doucet has significantly higher needs than Mr. Doucet. In determining the appropriate quantum of interim support, Master Keim considered the totality of the "means" available to each spouse and the extent

to which those means were sufficient to meet each of the spouses' needs. The evidence before her was that Ms. Doucet is currently able to comfortably meet all of her needs, including her significant care expenses, with several thousand dollars per month in funds leftover. She had also amassed "significant savings" of \$787,000. In her view, after considering the factors required under s. 15.2 of the DA, interim support was needed to equalize the economic consequences of the breakdown of the marriage. I see nothing "clearly wrong" in her analysis.

- [29] I am supported in this view by our Court of Appeal's decision in *Lozinski v. Lozinski*, 2017 BCCA 280. In that case, the court dismissed an appeal of child and spousal support orders following a summary trial. The appellant argued that the trial judge erred in considering his Veterans Affairs disability pension to be "income" in awarding support. After discussing *M.K.* and other decisions considering whether structured payments for disabled spouses could be considered as "income" for the purpose of support awards, Justice Dickson held that it was unnecessary to resolve this issue because, in a shared parenting context, judges are permitted to consider the "conditions, means, needs and other circumstances" in determining the quantum of child support awards under s. 9(c) of the CSG--a broader discretion than "income" alone: at para. 32.
- [30] The same test applies with respect to spousal support under s. 15.2(4) of the DA. The trial judge in *Lozinski*, "engaged in the sort of broad and flexible analysis mandated by Parliament in s. 9(c) of the [CSG] and s. 15.2(4) of the [DA]" by examining the factual context in which the appellant received and used his pension funds, as he was entitled to do in exercising his discretion: at paras. 46-48.
- [31] Although *Lozinski* dealt with payments under a disability pension, in my view, the legal principles with respect to s. 15.2(4) of the DA apply in the same way to the structured settlement payments that the appellant receives in this case.
- [32] I also disagree with Ms. Doucet's argument that it would be contrary to public policy to consider the structured settlement payments for spousal support purposes. In my view, the fact that s. 15.2(4) requires the court to consider the conditions, means, and needs of the spouses gives the decision maker the appropriate discretion to refuse to consider such payments where it would not be appropriate or fair to do so given the needs to the spouse receiving the payments.
- [33] Finally, Ms. Doucet argues that the Form 8 Financial Statement does not provide a place to record payments of the kind she receives under her structured settlement. I disagree with that argument. Form F8 is a tool to help the parties complete their financial statements in accordance with the Rules. It is s. 15.2 of the DA that governs the legal analysis. The fact that a particular source of funds does not appear on Form F8 does not mean it is precluded from consideration under s. 15.2(4) of the DA.

Conclusion

[34] A fair reading of Master Keim's reasons supports that she considered the structured settlement payments to be a resource that was relevant to her assessment of the parties' "conditions, means and needs" in awarding interim spousal support. She applied the appropriate test and exercised her discretion based on the facts and evidence before her. Her decision is not clearly wrong and the appeal is dismissed.

"MacNaughton J."

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