
CANADA / JUDGMENT

Evanow v. Lannon

2017 BCSC 725

COURT

Supreme Court of British Columbia

DECIDED

3 May 2017

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2017 BCSC 725 Evanow v. Lannon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Evanow v. Lannon,

2017 BCSC 725

Date: 20170503

Docket: E1343919

Registry: Prince George

Between:

Michael John Evanow

Claimant

And

Karen Patricia Lannon

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph [2] on May 5, 2017

Before: The Honourable Mr. Justice Tindale

Supplementary Reasons for Judgment

Counsel for claimant:

C.G. Fletcher

Counsel for respondent:

R.C. Gibbs, Q.C.

Place and Date of Hearing:

Prince George, B.C.

March 3, 2017

Place and Date of Judgment:

Prince George, B.C.

May 3, 2017

[1] On October 12, 2016 I pronounced reasons for judgment in this case that dealt with a variety of issues, including retroactive child support. Those reasons are indexed at 2016 BCSC 1871 (the "Reasons").

[2] The respondent, Karen Patricia Lannon, filed a Requisition on January 6, 2017 seeking the following relief:

- (1) a reconsideration of the Courts decision on the duration of retroactivity of child support.
- (2) a consideration as to whether any credits for child support paid by the claimant to the respondent should be deducted in their totality or only the after-tax portion of those payments.

Counsel advised that that the respondent only seeks a reconsideration of the duration of retroactivity. The parties do not require the Court's assistance with the issue of the credit.

[3] The claimant, Michael John Evanow, is opposed to the relief sought.

[4] The formal order from the Reasons has not yet been entered.

Position of the Parties

Respondent

[5] The respondent argues that this Court should reconsider the duration of retroactivity for child support for the following reasons:

- (i) the Court misapprehended the respondent's position regarding the duration of retroactive child support and therefore did not correctly apply the law to her actual position;
- (ii) the Court did not set the presumptive date for retroactive variation as the date blameworthy conduct began; and
- (iii) in the alternative, the Court misapplied the doctrines of effective notice and retroactivity.

- [6] The respondent's first argument is that the Court misapprehended her position on the duration of retroactive child-support and, based on a mistaken position, misapplied the law. Counsel for the respondent argued at trial that the retroactive child support order should go back to 1993 and not 2007.
- [7] That argument is based on the evidence that, between 1997 and 2007, approximately \$1 million was accumulated in the claimant's companies and as such the Court could infer that there was approximately \$100,000 available to the claimant as income for each of those years. The respondent seeks to impute this income to the claimant for this period.
- [8] Further, the respondent argues that in 1997 the claimant paid \$300,000 to his former partner to acquire all of the shares in the companies; this is evidence that the claimant had more money available to him and that some of this amount should be imputed as income from 1993 until 1997.
- [9] In her affidavit #3, made November 18, 2014, the respondent deposed that she was seeking a retroactive increase in child support from 2007 onward. The respondent argues that it is not fatal that she set up a more limited position in her affidavit than that which she made in final submissions in court.
- [10] The respondent argues that this Court in the Reasons found that the claimant knowingly engaged in blameworthy conduct. She further argues that she would not have submitted that there was extraordinarily serious blameworthy conduct going back over 20 years if she was only seeking retroactivity to 2007. The respondent argues that the claimant, for decades, was earning many times the income on which his child-support payments were based.
- [11] The respondent argues that *D.B.S. v. S.R.G.* 2006, SCR 37 establishes two distinct situations that give rise to two different periods of retroactivity:
- (i) in the usual case of effective notice, a maximum 3 year reach back from the date that effective notice is given; and
 - (ii) in the case of blameworthy conduct, a presumptive date of retroactivity back to the time when there was a material change in circumstances and blameworthy conduct began.
- [12] The respondent's second argument is that the Court did not engage in the proper analysis of the presumptive date for retroactive variation as the date blameworthy conduct began. The respondent states that this is the date when the claimant's income diverges from \$30,000 per year.
- [13] The respondent argues that if this Court had meant to exercise its discretion to not adjust child support from 1993-1997 to 2007 the Reasons would have explained why this was so. She argues that it is most probable that this Court believed that the respondent only claimed retroactivity to 2007 and misapplied the law on the presumptive date of retroactivity, which should have started to run when the payor engaged in blameworthy conduct by suppressing crucial financial information.

- [14] Finally the respondent argues that this Court misapplied the doctrines of effective notice and retroactivity. The respondent argues that the evidence supported a finding that the claimant received the letter from her dated January 23, 2001 addressing the issue of child support, and that that date should be the date of effective notice. The respondent further argues that if this Court was not going to order retroactive child support to the date of the material change in income, then it should have found that January 23, 2001 was the date of effective notice and permitted reaching back 3 years, adjusting support as of 1998.
- [15] The respondent argues that the claimant has been rewarded by a further 9 years of artificially-low support by ignoring the 2001 letter and concealing a material increase in income. This has forced the respondent to bring the claimant to court.

Claimant

- [16] The claimant argues that the respondent's petition should not be granted. The claimant argues that this Court carefully weighed the evidence, established the facts, and considered the decision in D.B.S.
- [17] The claimant acknowledges that this Court found that there was blameworthy conduct on his part that merited reaching back before the date of effective notice. The claimant notes that the effective notice date was consistent with the evidence that the respondent herself gave. The claimant argues that this can be found in the respondent's affidavit #3 at paras. 21 and 59 which read as follows:
- [29] I am seeking a retroactive variation of child support, including section 7 special and extraordinary expenses, commencing in 2007, which is three years prior to the letter I sent to Mike requesting to revisit the amount of child support payable.
- [59] I am seeking a retroactive increase in child support from 2007 forward, which is three years prior to my letter to Mike seeking to revisit the issue of child support, to which Mike failed to respond.
- [18] The claimant argues that there was no expert financial evidence led by the respondent for any years prior to 2007 nor was there any evidence that she requested financial information from him prior to 2007. The only evidence that was sought from the claimant, and produced for trial, goes back to 2007.
- [19] The respondent made a choice not to seek any evidence of the claimant's actual earnings prior to 2007. In essence, the respondent is asking this Court to make a finding in the absence of evidence.
- [20] The claimant notes that the opinion found in the first financial analysis, conducted by Ms. Perry at the request of the respondent, was based on evidence from 2009 forward. It was not until a second report from Ms. Perry, dated July 3, 2015, that the amount of retroactive support was calculated back to 2007.

- [21] The claimant further argues that, as noted in the Reasons, the respondent gave no explanation supported by evidence to clarify why she did not pursue this claim after her letter of 2001:
- [207] The respondent did not pursue a change in the child support order in 2001. Her explanation for not doing so amounts to the fact that the claimant was unpleasant to deal with as well as her obligations to her family and her practice as a pediatrician.
- [208] There is no evidence that the respondent had any fears of harm if she made an application to change the existing support order. The respondent was also financially capable of bringing such an application.

The delay in seeking child support is not presumptively justified and the court has the discretion to balance the extensive delay in seeking child support against the needs of the child.

Decision

- [22] The law concerning when a court should reconsider a decision is conveniently summarized in *Cheema v. Cheema*, 2001 BCSC 298 at paras. 4 and 6:
- [4] The ability of a trial judge to re-open an issue before formal judgment has been entered is an unfettered discretion that is to be used sparingly. The governing principle often quoted is that as stated by MacDonald J.A. in the leading case of *Clayton v. British American Securities Ltd.* (1934), [1935] 1 D.L.R. 432 at 440, [1934] 3 W.W.R. 257 at 295 (B.C.C.A.):

It is, I think, a salutary rule to leave unfettered discretion to the trial Judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result.

- [6] After accepting the principle set out in *Clayton*, Wood J.A. (McEachern C.J.B.C. and Rowles J.A. concurring) in *Sykes v. Sykes* (1995), 58 B.C.A.C., 6 B.C.L.R. (3d) 296 (C.A.) stated at para. 10:

In my view, new evidence is not an essential prerequisite to a trial judge's exercise of discretion to re-open. In some cases, it may be the only circumstance which would justify a re-opening. Indeed it may be that in many cases a re-opening would only be justified on the basis of new evidence which was not available at the time of the original trial. It will in all cases depend on the circumstances. But, a discretion to re-open may also properly be exercised where the trial judge is satisfied, either because of the argument of one of the parties, or on the basis of his own reconsideration of the record, that the original judgment was in error because it overlooked or misconstrued material evidence, or misapplied the law.

[Emphasis added]

- [23] The court in Cheema continued at para. 23:
- [23] In conclusion, the governing principles as to when a judge may properly re-open a judgment are set out in Clayton and Sykes. The judge's unfettered discretion is to be used sparingly so as to provide finality and avoid the potential for an abuse of the court's process. The underlying rationale to the discretion is to prevent an injustice from occurring. Examples of cases where judges have exercised their discretion are where material evidence was overlooked, the law was misapplied, the judgment was unclear and or ambiguous, and, perhaps less certainly, where there has been a change in circumstances since the making of the judgment.
- [24] At trial, the respondent did advance an argument that the retroactive child support should be calculated as far back as 1993 or, in the alternative, from 1997. The Reasons did not specifically address this point and, for that reason, I am prepared to reconsider my judgment to address it.
- [25] The respondent argues that the claimant's income was considerably more than the \$30,000 that Mr. Justice Lowry based the December 17, 1993 order on.
- [26] She supports her claim by pointing to the claimant's 1998 purchase of his then-partner's interest in the companies for \$300,000. The respondent further argues that between 1997 and 2007 the claimant's companies accumulated \$1 million in retained earnings. These retained earnings are evidence of the claimant grossly underpaying his child support, because the companies in his control were able to accumulate large amounts of money that should have been imputed as income to the claimant.
- [27] The evidence the claimant tendered at trial was that his income from 1993 to present was \$30,000 or less.
- [28] The Reasons expressly acknowledged that the claimant purchased his partner's interest in the companies as well as the monies that the companies accumulated from 1997 until 2007.
- [29] Two experts testified at trial - Ms. Perry and Ms. Bakay. They both provided expert reports that attempted to determine the claimant's income during the relevant period. Both experts calculated claimant's income from 2007 forward. All of the documents the experts relied on for creating their reports related to the finances of the companies and the claimant's income from 2007 forward. There was no expert opinion given and there were no documents tendered in evidence as to what his income was prior to 2007. Also of note, the experts disagreed on the claimant's income from 2007 forward.
- [30] I found that the claimant knowingly engaged in blameworthy conduct by not increasing his support for Jadine and by failing to notify the respondent about his increases in income; para. 205 of the Reasons. There was evidence that the claimant's income increased dramatically since 2007: the Reasons at para. 206.

- [31] In her counterclaim, the respondent sought retroactive child support and, I agree, she did not limit the duration of the retroactive child support that she was seeking to 2007. The respondent did, however, have the burden of proving her claim for this period.
- [32] The evidence was not sufficient to determine the claimant's income from 1993 through to 2007 and, consequentially, the respondent did not prove her claim for a change in support through that period. Additionally, there was no evidence to find that the claimant engaged in blameworthy conduct prior to 2007.
- [33] Concerning the effective date of notice, the Reasons at paras. 32 and 66 expressly acknowledge both the 2001 and 2010 letters that the claimant sent to the respondent. The circumstances surrounding the 2001 letter and the respondent's actions were dealt with at paras. 207 and 208 of the Reasons.
- [34] The respondent gave some evidence that sought to establish the 2010 letter as the date of effective notice, allowing this Court to reach back three years from that date to 2007. The respondent, however, was in the best position to know which letter she intended the claimant to act upon, and present the best evidence available to support that assertion.
- [35] The respondent gave evidence in her affidavit #3 that she was seeking a retroactive increase in child support from 2007 forward, which is three years prior to her letter that she sent to the claimant in 2010. I do not accept the respondent's argument that this Court limited her ability to argue the duration of retroactive child support because of her affidavit #3.
- [36] The respondent did argue that an order for retroactive child support should go back to 1993, however, she only called evidence of the claimant's finances from 2007 forward.
- [37] The Reasons were based on the evidence that I had before me. I am not satisfied that the order for retroactive child support should be changed.

Conclusion

- [38] The respondent's application is allowed insofar as I have clarified the Reasons. I am not satisfied that the order for retroactive child support should be changed. The balance of the respondent's application is dismissed.

"The Honourable Mr. Justice Tindale"

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