
CANADA / JUDGMENT

Ferguson v. Ferguson

2019 BCSC 1946

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 1946 Ferguson v. Ferguson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ferguson v. Ferguson,

2019 BCSC 1946

Date: 20191113

Docket: E160037

Registry: Vancouver

Between:

Heather Cheryl Ferguson aka. Heather Cheryl Romank

Claimant

And

Duncan Todd Ferguson

Respondent

Before: The Honourable Mr. Justice Branch

Reasons for Judgment

Counsel for Claimant:

P. Daltrop.

Counsel for Respondent:

J. McQueen.

Place and Date of Hearing:

New Westminster, B.C.

October 11, 2019

Place and Date of Judgment:

New Westminster, B.C.

November 13, 2019

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I. Introduction

- [1] This is an application by the respondent to suspend or reduce his support obligations due to a loss of employment. Given that the terms of his dismissal substantially maintained his annual income level through to the end of 2019, I find that the respondent fails to meet the "material change" test.

II. Background

- [2] Judgment in the trial of this matter was rendered on July 17, 2017: H.C.F. v. D.T.F., 2017 BCSC 1226. The resulting order was entered December 12, 2017 (the "Final Order").
- [3] The Final Order provided that the current income of the respondent as of July 17, 2017 would be treated as \$933,820 for the purposes of calculating child support, and \$855,545 for the purpose of calculating spousal support.
- [4] Based on these income levels, the Final Order provided that:
- a) commencing August 1, 2017, and continuing for so long as the parties' one child was a child of the marriage, the respondent would pay child support of \$7,123 per month, and
 - b) commencing August 1, 2017, and terminating on November 30, 2024, the respondent would pay spousal support in the amount of \$16,000 per month.

- [5] At the time of trial, the respondent was employed as the Managing Director-Western Canada, for Scotiawealth. On January 28, 2018, the respondent's position was eliminated. The respondent commenced a wrongful dismissal proceeding. The case was settled on May 23, 2018. The settlement included a salary continuation for 18-months commencing January 29, 2018 and ending July 30, 2019 (the "Salary Continuation"). The annual salary used for the purposes of the Salary Continuation was \$1,000,681.
- [6] The respondent provided evidence about his efforts to find work since the dismissal. These efforts are reviewed in greater detail below but, in short, he has not yet regained employment.
- [7] The respondent has continued to pay all amounts owing for child and spousal support pursuant to the Final Order up to the date of this application. At the hearing, the respondent indicated a willingness to continue to pay support based on an assumption that his level of income going forward be attributed at \$250,000, with both parties being at liberty to seek a fresh determination of the proper support level once the respondent is re-employed.
- [8] This \$250,000 proposal was based in large measure on the fact that the respondent remains entitled to the receipt of the financial benefit associated with certain restricted share units ("RSUs") granted while in his former position. Specifically, the respondent will be cashed out of a portion of his RSUs by the end of 2019. The respondent valued this forthcoming transaction at \$250,000 for purposes of his most recent July 25, 2019 F8 Financial Statement (the "Financial Statement"). The parties agree that this transaction should be treated as income to the respondent, as the entitlement to same was not considered as part of the property division at trial.
- [9] The Financial Statement details that the respondent is holding approximately \$5.7 million in financial assets. Since then, he has purchased a home in Toronto for approximately \$2.9 million, but this transaction has not yet closed.
- [10] The Notice of Application also sought certain relief with respect to family counselling. This aspect of the application was not pursued, and is adjourned generally.

III. The Legal Test

- [11] The parties agreed that the respondent must first establish a material change in circumstances in order to support the requested order: *Willick v. Willick*, [1994] 3 S.C.R. 670 at para. 20; *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 17.
- [12] The test for a material change was discussed by Justice Donegan in *D.N.K. v. D.A.K.*, 2016 BCSC 2198:
- [44] The first question to be answered, therefore, is whether D.A.K. has established that there has been a material change in circumstances. In *S.L.C. v. C.J.R.C.*, 2016 BCSC 656, Madam Justice Gray summarized the law in this area at paras. 75-76:

[75] As set out in the Continuing Legal Education publication, the Family Law Source Book, at 2.45:

A change in circumstances must represent a clear and distinct departure from what the court knew of the circumstances or could reasonably have anticipated when making the order (Canning v. Fearn, 2000 BCSC 362 (CanLII)). A change in circumstances will not be material unless it was not foreseen or could not reasonably have been contemplated by the judge in making the original order (Dietrich v. Kujbida, 2004 BCSC 455 (CanLII)).

[76] As set out in Carter v. Carter (1991), 1991 CanLII 819 (BC CA), 58 B.C.L.R. (2d) 45 (C.A.), a material change must be "substantial, unforeseen and of a continuing nature."

[13] Assessing whether there has been a change in the respondent's circumstances requires a determination of the respondent's present income. This, in turn, raises the question of the potential imputation of income. Section 19 of the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines"), provides as follows:

Imputing income

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

- [14] In assessing how these provisions should be applied in the case of a high income earner, Justice Fleming's summary in *M.A.T v. K.P.T.*, 2017 BCSC 1603 is useful:
- [92] The respondent suggested that income is not imputed to high income earners who take lower paying employment, provided they still earn a significant income that meets the reasonable needs of the children and the recipient spouse. He cites one authority for this proposition: *D.M.D v. R.L.D.*, 2015 BCSC 2332. In that case, both parties disputed each other's Guidelines income in relation to child support for two children: their natural child, and a step child to the husband. Their natural child lived primarily with the husband although an order provided for equal shared parenting. During the marriage, the husband had earned annual incomes of \$2 - \$3 million as a dental surgeon. After the separation, he sold his practice and began working as an associate. His income dropped very significantly. He also invested in a franchise restaurant and another dental practice along with the building in which it was located. Justice Loo concluded it was inappropriate to impute income to the husband on the grounds of intentional underemployment, based on a number of circumstances, which suggested his income reasonably reflected a significant decline in his income earning capacity. The husband had worked exceptionally hard for many years, sometimes operating 12 hours a day in addition to being on call every day of the year. After the separation, and before selling his practice, his referrals had dropped by 50% due to local competition. His billings had fallen below \$1 million. Significantly, he had developed severe osteoarthritis and a herniated disc in his neck that resulted in constant pain during his previous surgery schedule.
- [93] In my view, *D.M.D.* does not establish a general principle that would require a different approach when determining whether it is appropriate to impute income to a high income earner.
- [94] The respondent is now 54. He has entered what are typically the peak earning years for successful professionals. He is a very accomplished business person with significant expertise arising from the combination of his education and high level, multi-faceted, long-term involvement in the wireless telecommunications industry, both in North America and the UK. For many years now, he has played a key role in the governance and growth of several companies and engaged in various business ventures. He has also directed, along with others, the management of investments for the venture capital branch of one of Canada's largest pension funds. It is obvious the respondent has tremendous talent, drive, and ambition. He appears to thrive on the significant demands of his various work and business commitments.
- [95] I have no reason to believe he is not in excellent health. He described himself as a capable, if not, competitive athlete, who integrates exercise into his daily life.
- [96] Given the limits of his testimony and the documentary evidence regarding his new position with Scale Up Ventures, it is difficult to assess what he is likely to actually earn. I find it very difficult to accept, however, that the respondent would be satisfied with an annual salary of \$200,000. If his compensation is in fact limited to that amount, he has elected to reduce his

income from employment by approximately \$325,000 per year. Although his decision to leave OMERS may have been reasonable, taking a position that limits him to this income is not, and would clearly constitute intentional underemployment

- [98] In other words, I find the respondent is entirely capable of earning a very high annual income, and it is likely he will continue to do so from several sources, through some combination of salary, bonuses, director's fees and various forms of equity compensation.
- [99] Based on my assessment of his earning capacity, I conclude it is reasonable to impute or attribute to him an annual income of \$800,000 for 2016 onward. I consider this a fair income for both child support and spousal support purposes.
- [15] The Court of Appeal's decision in *Van Gool v. Van Gool*, 1998 CanLII 5650 (BCCA) is also of assistance:
- [28] Counsel did not refer us to any decisions which have specifically considered s. 19 of the Guidelines. In my view, however, the concept of imputing income to a spouse for the purpose of determining the extent of his or her maintenance obligations is not new. . The analysis engaged in in imputing income to a spouse under s. 19(1)(a) is similar to that engaged in prior to the enactment of the Guidelines under the former child support provisions of both the Divorce Act and the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"). . Section 15(8) of the Divorce Act required the Court to consider, as an objective of child support, that the obligation should be apportioned between the parents "according to their relative abilities to contribute to the performance of the obligation." (A similar provision is now found in s. 26.1(2) of the Act.) Sections 93(2) and 96(1) of the FRA addressed this concept by reference to the "capacities" of the spouses. Pursuant to those provisions, in making or varying an order for child support, the courts considered not only the amount of income a spouse was actually earning, but the amount of income a spouse could earn if working to capacity.

[Emphasis added.]

IV. Analysis

- [16] There is no doubt that a loss of employment can serve as a material change: *Wiatrak v. Wiatrak*, 2015 BCSC 2415 at paras. 29-34. The question is whether it does so qualify on the facts of this case.
- [17] Much of the oral argument was spent on evaluating the respondent's efforts to find work since his dismissal. However, I find that this application can be determined on the basis of the respondent's actual financial situation, disregarding whether there should be an attribution of income.

- [18] The Guidelines generally approach the issue of income on an annual basis. The starting point is each individual's line 150 income for the particular taxation year. As such, I find that the analysis of the alleged material change should begin by considering the respondent's overall income for 2019. In *Albinet v. Albinet*, 2003 MBCA 22, the court stated:
- [25] There is no provision in the Guidelines, other than the court's right to impute income in an appropriate case, to determine income on anything other than an annual basis. For such purposes, s. 2(3) provides that "the most current information must be used." Where income increases or decreases steadily over three years, the court is allowed to average income, but that is not the case here.
- [26] To calculate support on anything other than an annual basis would encourage unnecessary litigation, where payors, who may earn a more or less constant income year after year, might run to court whenever there is a month-over-month result that might yield a different table amount. Some payors consistently work part of the year and are off part of the year, either on social assistance or employment benefits. Therefore, except in exceptional circumstances, support should be based on annual income where it is available and not on monthly fluctuations.
- [19] In *R. (K.D.) v. P. (J.E.)*, 2014 BCPC 375, the court stated at para 25:
- The case law is clear that monthly drops in income are not the determining factor. Rather the annual income is the determining factor.
- [20] Through July 31, 2019, the respondent received his Salary Continuation at a rate of approximately \$80,000 per month, or \$560,000 year-to-date.
- [21] For the balance of the year, the respondent's own Financial Statement indicates that he is to benefit from cashing out a portion of his RSUs for the estimated amount of \$250,000, an amount which both parties agree must be treated as income.
- [22] Tallying these two amounts alone brings us to \$810,000 in projected income for 2019.
- [23] Next, the claimant argues that there should be some assessment of income, or an attribution under s. 19(1)(e) of the Guidelines (invoked where property is not reasonably utilized to generate income), to account for investment earnings on the respondent's financial assets. I agree: *Kim v. Hong*, 2013 BCSC 587 at paras.350-376. Applying a conservative 3% return to the \$5.7 million in financial assets, it yields a further \$171,000. Even if one were to reduce the financial assets to account for the respondent's recent purchase of a \$2.9 million home (which the respondent says is supported by *J.M.D. v. R.M.J.D.*, 2011 BCSC 1295 at paras. 29-35), that would still leave the respondent with \$2.8 million in financial assets. An ability to earn 3% on these assets would still yield a further \$84,000 in income per year.
- [24] Taking the lesser of these figures, and combining it with the other sources of income above provides a projected income for the respondent for 2019 of \$894,000. Set against the \$855,545 and \$933,820 used for the determination of support at trial, I cannot find that there has been

a change in circumstances that is sufficiently "substantial" to justify a modification to the Final Order at this time. The respondent's means have not changed to such an extent that a change to the Final Order is required. A high-income payor may be able to sustain larger fluctuations in annual earnings before a material change is found: *O. (C.A.) v. O (S.J.)*, 2012 BCSC 378 at para. 35.

- [25] If the respondent continues to be unemployed into 2020, the facts may begin to justify a different outcome. However, the respondent remains hopeful that he will find employment at or near his past income level. Indeed, he has made a decision to move to Toronto in order to maximize his opportunities to find similar work (given that, since his dismissal, more managerial functions have migrated to head offices in Toronto). As such, it is too early to say whether the respondent's income will in fact be lower in 2020. I find that it is premature to determine that there will be a change in circumstances effective January 2020.
- [26] If it were necessary to assess attribution on the basis of under-employment in order to support the conclusion that there has been no material change in circumstances, I would note the following. It is clear that the respondent has been making substantial efforts to find a position as lucrative as his prior position. I also accept that there has been some contraction in the financial services industry in B.C., particularly at the upper management level. The real question, however, is whether, at a certain point, the respondent must accept (at least for support calculation purposes) that he may not be able to achieve his previous lofty income heights. As Justice Harvey stated in *Malviya v Bhupendra*, 2018 BCSC 454:
- [251] Section 19 of the FCSG provides for the imputation of income to a person, such as the claimant, whom I find is intentionally unemployed or under-employed.
- [252] The claimant was entitled to a reasonable period to explore employment opportunities within the area of food safety and inspection, but there comes a time when all persons seeking employment need to widen the scope of their inquiries so as to obtain meaningful employment.
- [Emphasis added.]
- [27] To similar effect see *Gostevskikh v. Gostevskikh*, 2018 BCSC 1441 at paras. 68, 99, 109.
- [28] The issues in terms of any additional attribution are: (1) whether the respondent is intentionally under-employed and, if so, (2) what is his current capacity to earn income.
- [29] His evidence indicates that he has turned down at least one offer, and has walked away from other potential opportunities, because he determined that the positions would not be sufficiently lucrative or in alignment with his former position. Turning down or walking away from employment alternatives does establish intentional under-employment. Further, the details of such proposals can help establish his current capacity: *Hollett v. Collingwood*, 2019 BCSC 1591 at paras.32-33.
- [30] I would rely, in particular, on the following evidence:

- a) The respondent is only 50 years old. He has a Bachelor of Commerce degree, and a broad array of financial services designations. He began his career as an investment advisor in 1994, and was able to work his way up to regional managing director by 2013.
 - b) The respondent was presented, in the period from May to August 2018, with an informal offer to become Executive Vice President for Harbourfront Wealth Management Inc., which included remuneration of \$100,000, a bonus, and the potential for equity ownership. He turned down this opportunity on his assessment that the remuneration was too low, and that the company was not able to provide a "stable opportunity";
 - c) In the same period, the respondent was pursued by a former colleague, now at IG Wealth Management, to become the branch manager of their White Rock office. IG Wealth Management estimated that the combination of base salary and bonus would be \$500,000 per annum (the "IG Projection"). The respondent decided not to pursue this role because it "represented a dramatic step backwards in responsibility, complexity and compensation". He was also not confident that the compensation would reach the levels projected.
 - d) During the September to November 2018 period, the respondent was offered a position with Canaccord Genuity for the role of Senior Leader in the Canadian wealth management business (the "Canaccord Offer"). It included a base salary of \$150,000 with a potential performance based bonus tied exclusively to recruitment. He declined the position because "the title, job responsibilities, and compensation did not align with my expectations".
 - e) The respondent continues to pursue potential opportunities, particularly in Toronto.
- [31] Based on this evidence, I would conclude that the plaintiff is intentionally unemployed. He had 18 months to find alternate employment. During this time he was able to obtain both firm offers and prospective opportunities from which he has walked away. While he is personally entitled not to settle for anything less than a position as lucrative as his prior position, he is not entitled to impose the effects of that decision on his family.
- [32] I find that he is presently able to be employed. I conclude that he had the capacity to achieve a minimum \$325,000 salary for the balance of 2019, after the Salary Continuation came to an end. This is largely based on deriving a midpoint between the \$150,000 base of the Cannacord Offer, and the \$500,000 of the IG Projection. This would, in turn, result in a further \$135,000 attribution for the last five months of 2019.
- [33] This attribution analysis only reinforces the conclusion already reached, that there has yet been no material change in the respondent's financial capacity.

IV. Disposition and Costs

- [34] The application is dismissed.

If the parties are unable to agree on costs, the parties may provide written submissions, with the respondent providing his within 30 days of this decision, and the claimant replying within 30 days thereafter.

"Branch J."

The Honourable Mr. Justice Branch

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