CANADA / JUDGMENT

Fraser v. Pelletier

2007 BCSC 1183

COURT
Supreme Court of British Columbia

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2007 BCSC 1183 Fraser v. Pelletier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fraser v. Pelletier,

2007 BCSC 1183

Date: 20070803

Docket: 0627625

Registry: Prince George

Between:

Garnet Douglas Fraser

Plaintiff

And

Marie Carmen Christine Pelletier

Defendant

Before: The Honourable Mr. Justice Chamberlist

Reasons for Judgment

Counsel for the plaintiff:

D.B. McGaughey

Counsel for the defendant:

D. W. Lindsay

Date and Place of Hearing:

July 9, 2007

Prince George , B.C.

INTRODUCTION

[1] These are cross-appeals of the master's order for spousal maintenance made June 19th, 2007. The plaintiff appeals on the grounds that -

1. The master incorrectly imputed income to the plaintiff when he found that the average of the plaintiff's line 150 income for 2003 to 2006 was $169,860;

2. An error was made by the master in finding the plaintiff's guideline income was $109,200; and

3. The master incorrectly concluded that the plaintiff works four days per week.

[2] The defendant appeals on the grounds that -

1. The award of $850 per month support (in addition to child support) does not provide the parties with identical notional net disposable income as set out in the Reasons for Judgment as the basis upon which the quantum of spousal maintenance was determined.

[3] I am satisfied that, for an interlocutory application and based on the evidence before him, the master was not clearly wrong in concluding the plaintiff worked four days per week, or in averaging past years' income and imputing current income as he did. The plaintiff's appeal is therefore dismissed.

[4] The defendant's appeal is a little more complex. Counsel brought DivorceMate Spousal Support Advisory Guideline (SSAG) calculations and printouts to the hearing before the master. These calculations presumed certain incomes for the parties. The master reserved and, after attributing income levels to each party, apparently also used the DivorceMate software to generate "with children" ranges of support under the Guidelines.

[5] At para. 44 of his reasons the master said:

The DivorceMate "with children" calculations (incorporating, of course, the Child Support Guidelines and the Spousal Support Advisory Guidelines) suggest the following:

a) With shared parenting and these incomes, Dr. Fraser would pay Mme. Pelletier monthly child support of $581.00;

b) With a 10 year relationship and these incomes Dr. Fraser could be expected to pay spousal support in a range of $868.00 to $1,548.00 monthly. The calculation indicates that, at $868.00, the parties will have identical notional net disposal income ($4,656.00 monthly). This, then, is the appropriate sum, rounded to $850.00 per month.

[6] Mr. Lindsay correctly points out that support of $868 will not result in equal net disposable income. He submits that perhaps the master was using an older version of DivorceMate, the latest version being 4.1.2007, and that the correct range would be $874 to $1,559, not $868 to $1,548. He is likely correct in explaining this dichotomy, but this, in itself, is obviously insufficient to challenge the range described by the master.

[7] The real basis for the defendant's appeal relates to the master's comment that "The calculation indicates that, at $868.00, the parties will have identical notional net disposal income ($4,656.00 monthly)." That, clearly, is in error. As Mr. Lindsay has demonstrated, to achieve identical net disposal income would require support on the order of $1,800. In fact, according to his calculations, support of $874.00 would result in the defendant receiving 43.7% of the net disposable income, and therefore the plaintiff retaining 56.3%.

[8] Counsel does not argue that the support described by the master ($868, rounded to $850) is outside the SSAG range produced by the DivorceMate software. He only argues that, firstly, it will not equally distribute income and, secondly, equal distribution is an appropriate standard for interim support in this case.

[9] I am not convinced that the master's reference to equalizing income was the intent of his reasons. It is as reasonable to conclude that it was the result of his decision. The master did not, unfortunately, analyze the defendant's expenses and/or need, or at least did not make reference to them in his reasons, but the defendant's property and financial statement listed expenses totalling $4,513 per month. These can be reduced; Firstly by mandatory deductions (tax, CPP, etc.), as the DivorceMate software incorporates them automatically into its calculations. Secondly, the defendant's entries for vacation ($250) and child care ($600) can be removed, as vacation expenses are not appropriate for interim applications and the parties will, for the most part, share the care of their daughters, so that the defendant's cost of child care should be minimized, if not eliminated.

[10] The result is that the defendant's expenses would be reduced to $3,269 and rounded to $3,270. Mr. Lindsay's DivorceMate calculation indicates that, with support of $874 and child support of $657, the defendant would have net disposable income of $4,126. It is true that the master directed child support of $581 and spousal support of $850, but it seems to me that even with these lower numbers it is almost certain that the defendant will be left with net disposable income sufficient for her and the children's needs until trial.

[11] As previously stated the master did not, in his reasons, enter into an analysis of the defendant's needs. The Court of Appeal in Redpath v. Redpath, 2006 BCCA 338, considered a case in which the trial judge had decided spousal support after analyzing the recipients expenses, without reference to the SSAG. In considering the standard of review for an appellate court, Newbury, J.A. said, at para. 24, in reference to the SSAG:

Now that they are available to provide what is effectively a "range" within which the awards in most cases of this kind should fall, it may be that if a particular award is substantially lower or higher than the range and there are no exceptional circumstances to explain the anomaly, the standard of review should be reformulated to permit appellate intervention.

[12] Thus if an analysis of needs suggests support outside of the range indicated by the SSAG, the court should consider and explain why support is not ordered within that range. On the other hand, if the support as ordered is within the SSAG range, the need to assess and explain any analysis of need is reduced. This would be even more compelling on an interim application as the advent of the Guidelines is implicitly to reduce the need to conduct lengthy enquiries of the payee's needs or the payor's ability to pay.

[13] It is often said that these are matters of judgment, and not of calculation, and this is an excellent example of that principle. We use computers for calculation and judges and masters for judging. We should be careful not to confuse the two.

[14] Beyond this, I will consider the larger principle behind Mr. Lindsay's submission: "Should it be the court's goal or intent, on an interim support application, to equalize income in the circumstances of this case?" Mr. Lindsay relies on this extract from Madam Justice Martinson's decision in W. v. W., 2005 BCSC 1010, 47 B.C.L.R. (4th) 348, to support his position that clearly the master intended to equalize income:

10 Compensatory support, as articulated by the Supreme Court of Canada in Moge, is still the main focus of spousal support law in British Columbia. The unanimous Court in Moge spoke about marriage as a joint endeavour and emphasized the impact of the length of the marriage on the significance of the endeavour. In the often quoted passage the Court said: (at p. 870)

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement . . . As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

11 In British Columbia this comment in Moge has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

12 Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example,

Dithurbide v. Dithurbide (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); Rattenbury v. Rattenbury, 2000 BCSC 722; Rinfret v. Rinfret, [1999] B.C.J. No. 2949 (B.C.S.C.); O'Neill v. Wolfe (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); Walton v. Walton, [1997] B.C.J. No. 1089 (B.C.S.C. [In Chambers]); Ulrich v. Ulrich, 2003 BCSC 192; and Carr v. Carr (1993), 46 R.F.L. (3d) 326 (B.C.S.C.).

13 Compensatory support recognizes not just economic disadvantage suffered as a result of a marriage or its breakdown but also economic advantage arising from the marriage or its breakdown: s. 15.2(6)(a) of the Divorce Act. The types of advantages and disadvantages that arise can be seen in situations such as the one presented in this case. That is, one spouse's career, (often that of the husband) is given priority and that spouse is the primary income earner. The other spouse (often the wife) is the primary parent, but also works and is a secondary earner.

14 It is sometimes argued that the disadvantage to the primary parent is off-set by the advantage that person receives by obtaining a share of the assets accumulated. In my respectful view this approach does not take into account how the advantages and disadvantages can arise based on the roles spouses play.

15 Raising children is a round the clock endeavour. The primary income earner is in a position to earn money to accumulate assets often in large part because that person is relieved of many aspects of that 24 hour a day job. When the relationship ends, it is not just the secondary earner who receives assets. The primary earner also receives a share, often half, of the assets.

16 Therefore, in a typical case, the primary earner has three benefits: the benefit of a share of the assets; the benefit of having had children; and the benefit of a higher income earning ability because of full participation in the work force, substantially unencumbered by child care responsibilities. The secondary earner has two of these benefits: the benefit of a share of the assets accumulated; and the benefit of having had children. However, that spouse often does not have the same income earning ability at the time of separation because of the role played in the marriage. It is that disadvantage, and the concurrent advantage to the other spouse, that can be addressed by a compensatory spousal support award.

[15] In this case the parties had a ten year relationship but it was not a traditional relationship in that both parties are professionals and they have worked reduced hours per week so that each of them can attend to the caregiving required by their children.

[16] It is obvious in Justice Martinson's decision at para. 13, supra, that she was dealing with a very traditional marriage, not a marriage like the one that this case appears to involve.

[17] I also note that at para. 20 of her reasons in W. v. W., Justice Martinson stated:

. . . Matters of quantum and duration will vary depending on a consideration of all the relevant objectives and factors: J. (S.M.) v. W. (R.H.C.), 2005 BCCA 254.

[18] Keeping in mind therefore that this is an interim support application, equalization of disposable income, and therefore presumably equalization of standard of living, is an issue best determined at trial. I note that in Yemchuk v. Yemchuk, 2005 BCCA 406, at para. 50, the court stated:

While equalization of the standards of living of the parties is not a stated objective of spousal support, in long-term marriages in which the parties have approached their roles as a partnership where each contributed their various resources, both economic and non-economic, to the relationship, equality of standard of living (which is not the same as equality of income) may well be the just result.

[19] Whether or not these parties' marriage fits within the Court of Appeal's meaning is a question best left to determination at trial.

[20] While I appreciate that the children go back and forth between the parties' residences, I am of the view that based on the child support and the spousal support orders made that the environments will be similar at each home pending the trial of this matter. The trial is presently set for September 15, 2007, which is not far into the future.

[21] In the result, both appeals are dismissed. Given the circumstances of this appeal, I am of the view that it is appropriate that each party bear their own costs of this appeal.

The Honourable Mr. Justice Chamberlist

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