
CANADA / JUDGMENT

G.M.K. v. H.R.K.

2005 BCSC 1439

COURT

Supreme Court of British Columbia

DECIDED

17 October 2005

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.M.K. v. H.R.K.,

2005 BCSC 1439

Date: 20051017

Docket: E010236

Registry: Vancouver

Between:

G.M.K.

Plaintiff

And

H.R.K.

Defendant

Before: The Honourable Mr. Justice Ralph

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiff

Karen Iddins

Counsel for the Defendant

Diane MacKinnon

Date and Place of Hearing:

June 17, 2005

Vancouver, B.C.

- [1] Mr. H.R.K. has applied to vary orders of spousal and child support that were made in April 2003 (2003 BCSC 654). At that time Mr. H.R.K. was found to have an annual income of \$90,000. He was ordered to pay child support for the three children of the marriage in the Federal Child Support Guidelines amount of \$1,464 and spousal support of \$3,000.
- [2] The trial judge ordered that the spousal support would be subject to review on September 1, 2005. He also found that one of the children, A.K., was a child of the marriage at the time of the commencement of the trial, but he expressly made no determination of whether A.K. remained a child of the marriage at the time of judgment on April 28, 2003.
- [3] Central to Mr. H.R.K.'s application is his claim that H.[] Ltd. ("H.[] Ltd"), the business that has been the main source of the family's income for a number of years, has failed and he no longer has the financial capacity to pay support in the amounts he was ordered to pay.
- [4] Mr. H.R.K. is 56 years old. Ms. G.M.K. is 53. They married in 1978 and separated in 1999. Their divorce was granted in November 2002. Their three children are now 24, 21 and 17. Their 24 year old daughter ceased to be a child of the marriage in April 2004. Their 17 year old son moved to reside with Mr. H.R.K. in February 2005. The parties dispute whether their 21 year old son, A.K., remains a child of the marriage as defined under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
- [5] Mr. H.R.K. is a Certified General Accountant. In 1986 he started an accounting firm, K.[]. but the trial judge found that it had never generated significant income. In 1992, however, Mr. H.R.K. started H.[] Ltd which was the source of 85-95% of the family income over a number of years. H.[] Ltd provided labourers for construction projects and earned its income by charging for their services on a cost-plus basis. At the time of the trial the company was carrying on business but its earnings were down from earlier years. H.[] Ltd closed on November 30, 2003.
- [6] Mr. H.R.K. attributes the closing of H.[] Ltd to a number of factors including the departure of a key employee who then set up a competing business and a change in practice by H.[] Ltd's major clients from hiring their workers through a labour agency to one of hiring them "in house". He says that in the late 1990s and early 2000 H.[] Ltd had an average of 98 employees but at the beginning of 2003 it was down to 40 employees, and at the end of 2003 down to 19 employees. In 2002 and 2003 H.[] Ltd borrowed \$100,000 to meet expenses. Mr. H.R.K. later repaid the debt from his share of the proceeds from the sale of the matrimonial home. In its tax return for 2003 H.[] Ltd declared a loss of \$49,924. Its loss in 2002 was \$40,110.

The circumstances of Mr. H.R.K.

- [7] In 2003 Mr. H.R.K. drew \$68,000 out of H.[] Ltd as a management fee and \$12,000 as a salary. His total income from all sources was \$85,812. He paid spousal support of \$38,000 and child support of \$11,712 but has not paid child or spousal support since April 2004.
- [8] Since the closing of H.[] Ltd, Mr. H.R.K. has attempted unsuccessfully to earn income from operating his accounting practice. In 2003 its gross income was \$15,025 and its net income was \$916.00. In 2004 its gross income was \$19,419 and it incurred a net loss of \$686.85.
- [9] Mr. H.R.K. has also applied without success for a substantial number of accounting jobs with both public and private employers.
- [10] Mr. H.R.K. resides in a condominium recently inherited from his mother. Its assessed value is \$244,000. He has largely met his living expenses by drawing upon his share of the sale proceeds from the matrimonial home.

The circumstances of Ms. G.M.K.

- [11] Although the parties separated in 1999, Ms. G.M.K. has not worked outside the home since 1981. She obtained a Bachelor of Arts and Masters in Special Education in Germany prior to the marriage and in 1980 she received accreditation from the Ministry of Education allowing her to teach in British Columbia. She has taken some courses to equip her to teach English as a second language but she does not have a permanent teaching certificate. Ms. G.M.K. says that to become accredited to teach in the public school system she would have to become a full-time student for two years at Simon Fraser University or the University of British Columbia.
- [12] In September 2003 she incorporated a company with a view to opening a similar business to H.[] Ltd. In July 2004 her company received a short term contract for a bricklaying crew but has done little, if any, other business.
- [13] Ms. G.M.K.'s income in 2004 was \$59,473 made up of \$47,473 from RRSPs and \$12,000 spousal support. She also received child support of \$5,856. Ms. G.M.K.'s mother resides with her and contributes to household expenses and mortgage payments. In 2003 Ms. G.M.K.'s income was \$42,658 of which \$38,000 came from spousal support.
- [14] The arrears of support owing to Ms. G.M.K. at April 30, 2005 were \$49,776.

The circumstances of A.K.

- [15] As noted above, the trial judge made no order or determination of whether A.K. remained a child of the marriage after the date of the trial. A.K. turned 19 on [], 2002. He enrolled in one private course from February to April 2003 and a further three courses at Langara College in the fall of 2003. He did not attend school from January to September 2004 and worked at a part time job. In September 2004 he enrolled in three courses at Langara College, withdrawing later from one of them. He enrolled in four courses in the spring term of 2005 and at the time of this application was intending to enrol for further courses in the fall term. He has been working part time.

Issues

- [16] In relation to the child support order the factors the court must consider are set out in s. 17(4) of the Divorce Act. Before making a variation the court must be satisfied that there has been a change in circumstances as provided for in the Guidelines since the order of April 2003.
- [17] The factors that must be addressed in relation to spousal support are set out in s. 17 (4.1) of the Divorce Act. Before making a variation of the order the court must be satisfied that there has been a change in the condition, means, needs or other circumstances of either former spouse since the order of April 2003.
- [18] Relevant to a consideration of both child and spousal support is an assessment of Mr. H.R.K.'s current financial situation.
- [19] In opposing the application, Ms. G.M.K. says that Mr. H.R.K. used one bad year for H.[] Ltd as a justification for shutting the business down. In her submission Mr. H.R.K. has not demonstrated that his change in financial circumstances is long-lasting and he has not made all reasonable efforts to seek employment. In support of this position Ms. G.M.K. has provided an affidavit from Mr. Schmidtke, the senior vice-president of a company to whom H.[] Ltd provided its services. He deposes that the company's housing starts increased in 2003 and 2004 and the company was having a strong year in 2005.
- [20] Mr. H.R.K. responded to the affidavit and has deposed that between 2002 and 2003 the company allocated less and less work to H.[] Ltd "resulting in a 64% reduction of number of H.[] Ltd employees utilized".
- [21] I am satisfied that there has been a change in Mr. H.R.K.'s circumstances that should result in a variation of both the child and spousal support orders made in April 2003. The evidence, including the financial information he provided, supports the conclusion that Mr. H.R.K. has experienced a significant decline in income that is not likely to return to its former level in the near future. Mr. H.R.K.'s possible financial decline was recognized by the trial judge who observed in his reasons that for the first eight months of 2002 H.[] Ltd's revenues were approximately 20% lower than the previous year's. The evidence of Mr. H.R.K.'s efforts to maintain support payments after the closure of H.[] Ltd indicates that the loss of the business was not the result of deliberate or improper conduct by him in order to evade his responsibility to pay child and spousal support. It is also evident in the material before me that an increase in the housing starts is only one factor influencing whether a business such as H.[] Ltd will gain from that increase. As Mr. Schmidtke's brief affidavit addresses only this one factor, it is of minimal assistance in this respect.

- [22] A more difficult issue is the determination of Mr. H.R.K.'s present annual income for purposes of the Guidelines. Mr. H.R.K.'s financial information indicates that from 1994 until 2004 he never earned less than \$65,938 taking into account income that was split with Ms. G.M.K. in some years. The amount of this income derived from his accounting practice ranged from \$5,981 to \$18,050.
- [23] As the major portion of Mr. H.R.K.'s income prior to 2004 was derived from the now defunct H.[] Ltd, I do not consider that drawing on the pattern of income over the past three years would provide a fairer or more reasonable income. The evidence is strong, however, that Mr. H.R.K. has a capacity to earn income in excess of his 2004 and 2005 earnings. While I do not think the evidence supports an inference that Mr. H.R.K. is intentionally underemployed, his education, experience and skills indicate that his current "Total Income" in the T1 General Tax form constitutes an unreasonable determination of his income.
- [24] Recognizing that it is probable that over time Mr. H.R.K.'s income will increase, I determine his 2005 Guideline income to be \$36,000.

Child support

- [25] Mr. H.R.K. has not paid child support since April 2004. The circumstances of the three children have changed since that time but there are arrears of support due to Ms. G.M.K.. The evidence indicates that S. ceased to be a child of the marriage in April 2004. Mr. H.R.K. will be responsible for arrears of child support for S., if any, to that date, including extraordinary expenses as provided for in the order of April 2003. The arrears are to be calculated based on the income of \$90,000 attributed to Mr. H.R.K. in the April 2003 order.
- [26] Mr. H.R.K. will also be responsible for arrears of child support for C. to February 2005, the date when C. moved to reside with his father. Presumably Ms. G.M.K. has some obligation to pay child support to Mr. H.R.K. for C. but this issue is not before me and, accordingly, I make no order with respect to this.
- [27] The calculation of arrears of child support for A.K. turns in part upon the times at which, although no longer a minor, he may be regarded as a child of the marriage. As noted above, the trial judge made no order or determination of whether A.K. remained a child of the marriage after the date of the trial. Ms. G.M.K. accepts that he would not be considered a child of the marriage between the months of January and September 2004. His attendance at post-secondary education at other times has been spotty. He has taken a number of courses but he has not been in regular full-time attendance at college and he has maintained some part-time employment on a periodic basis. He continues to reside at home and to rely in part on his mother for support.
- [28] On the evidence before me, and having regard to the factors set out in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60, [1993] B.C.J. No. 1315, I conclude that A.K. remained a child of the marriage from April to December 2003 and beginning again in September 2004. If he

enrolled in the courses at Langara College in September 2005 as was intended at the time of this application, I conclude that he continues to be a child of the marriage. Mr. H.R.K. is required to pay child support based upon the table amount for an income of \$90,000 up to December 31, 2004 and at a Guideline income of \$36,000 from January 1, 2005. In my view, the evidence of any extraordinary expenses for A.K. is insufficient to support an order for them and I decline to make such an order.

Spousal support

- [29] The April 2003 order contemplated a review of Ms. G.M.K.'s entitlement to, and the amount of, maintenance as of September 1, 2005. While the reality is that the ruling in this application significantly impacts upon such a review, I do not consider that the present application constitutes that review. The basis for varying the spousal support order at this time is Mr. H.R.K.'s materially changed financial circumstances. In particular, a later review may find that the compensatory principles set out in s. 15.2 of the Divorce Act support Ms. G.M.K.'s continuing entitlement to spousal support. Mr. H.R.K.'s present means to pay support, however, have been substantially reduced and need to be reassessed independently of a review.
- [30] Despite Mr. H.R.K.'s lack of success in finding new employment, his training and experience indicate that there is a real possibility of such employment being obtained in the future. This prospect has a bearing on the manner in which arrears of support should be viewed.
- [31] As set out above, Mr. H.R.K. will be required to pay child support for A.K. based upon a Guideline income of \$36,000. In addition he will have expenses relating to C. who now resides with him. I recognize, however, that Ms. G.M.K. has needs in excess of what Mr. H.R.K. is able to pay.
- [32] In the circumstances, I have concluded that the spousal support order should be varied as follows:
1. spousal support will be reduced from \$3000 to \$500 per month retroactive to January 1, 2005;
 2. payment upon the arrears of spousal support arising prior to January 1, 2005, will be suspended for a period of eight months.
- [33] The parties should bear their own costs. To order otherwise would, in my view, unduly alter the balance sought to be achieved in this order.

"Bryan F. Ralph, J."

The Honourable Mr. Justice Bryan F. Ralph"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/05/14/2005bcsc1439.html>

CASE PAGE <https://chat.esheria.ai/case-law/canada/g-m-k-v-h-r-k-2005>

Prepared on 28 October 2026 · Esheria