

CANADA / JUDGMENT

Garces v. Valencia

2024 BCSC 1684

COURT

Supreme Court of British Columbia

DECIDED

11 September 2024

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2024 BCSC 1684 Garces v. Valencia IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Garces v. Valencia, 2024 BCSC 1684 Date: 20240911 Docket: E150505 Registry: Vancouver Between: Guillermo Ivan Caceres Garces Claimant And Maria Eugenia Valencia Respondent Before: The Honourable Madam Justice W.A. Baker Reasons for Judgment Counsel for Claimant: A. Jaffer-Jeraj Counsel for Respondent: D. Ozensoy Place and Date of Hearing: Vancouver, B.C. September 5, 2024 Place and Date of Judgment: Vancouver, B.C. September 11, 2024

Introduction

- [1] In this application the claimant seeks to vary a spousal support order that was made on April 4, 2019.
- [2] The parties began living in a marriage like relationship in 1987, had three children who are no longer children of the marriage, and separated in June 2013. The respondent is presently 56 years old. The claimant is presently 60 years old.
- [3] The claimant does not dispute the respondent's entitlement to spousal support. He disputes the quantum ordered by the court.
- [4] The respondent filed an application for spousal support on March 18, 2019, and mailed the application to the claimant. The claimant says he did not receive the application and had no notice of the hearing which resulted in the order against him. However, by June 2019 he did learn of the order against him, because on June 11, 2019, the Family Maintenance Enforcement Program advised him of the arrears against him in the amount of \$71,400, and his ongoing monthly support obligation of \$1,700. The claimant took no steps to vary the order against him until he filed this application on September 20, 2023.
- [5] The basis of the April 4, 2019 order is not clear. The order simply states that The claimant shall pay the respondent retroactive spousal support in the amount of \$1,700 per month from January 2016 to the date of the order, and ongoing support in the amount of \$1,700 commencing May 1, 2019. No guideline incomes are stated. No duration of support is mentioned. No reference is made to the spousal support guidelines, or the range within those guidelines, upon which the order was made.

- [6] On today's application, I was provided with a financial statement sworn by the claimant on November 22, 2016, and a financial statement sworn by the respondent on March 1, 2019. The claimant's financial statement states his annual income at that time to be \$55,000. The respondent's financial statement at that time states her annual income to be \$7,755.
- [7] Before me, counsel for the respondent provided me with a DivorceMate calculation which used \$55,000 and \$7,320 as the incomes for the parties, which resulted in monthly support payments of \$1,719, at the low end of the range according to the Spousal Support Advisory Guidelines. Based on this, I find it likely that the court calculated spousal support at the low end of the guideline range, using guidelines incomes of \$55,000 for the claimant and approximately \$7,500 for the respondent. For the purposes of today's application, these are the assumptions I make in assessing the submissions of the parties.
- [8] The claimant agrees that the parties had a 26 year relationship, and the respondent is presumptively entitled to indefinite spousal support. However, he seeks recognition of the fact that once he retires he will have no ability to continue paying spousal support. He submits I should either set an end date for support, or set a date for review when he turns 65 years old.
- [9] The claimant seeks a variation of the order for support, based on the parties actual incomes going back to 2016, and a cancellation of arrears and interest accumulating on the arrears.
- [10] The claimant also seeks credit for overpayment of taxes he has paid since he began paying support, as a result of the respondent's failure to report her receipt of spousal support on her own taxes.

Issues

- [11] This application raises the following issues:
- Is the claimant entitled to seek a variation of spousal support?
 - What are the guideline incomes to be used in calculating spousal support?
 - To what extent is the claimant entitled to a variation of retroactive spousal support?
 - Should spousal support be terminated when the claimant reaches age 65, or should a review of support be ordered at that time?
 - Should the arrears be cancelled?
 - Is the claimant entitled to a credit for his over payment of taxes? Is the claimant entitled to seek a variation of spousal support?
- [12] The April 4, 2019 order is based on an income for the claimant of \$55,000 and an income for the respondent of \$7,500. The annual support ordered was \$20,400 (12 x \$1,700). The claimant says that, based on the parties' tax returns, their actual incomes and monthly spousal support owing would be as set out below. The respondent's income in the year 2020

has been adjusted from her tax return to deduct the \$20,000 she received in CERB, which she has to repay. These figures were not disputed by the respondent on this application. Year Claimant's income Respondent's income Monthly support Annual support 2016 \$48,833 \$7,195 \$820 \$9,840 2017 \$34,895 \$7,755 \$534 \$6,408 2018 \$60,931 \$9,035 \$1,022 \$12,264 2019 \$67,393 \$14,760 \$1,048 \$12,576 2020 \$70,737 \$17,260 \$1,053 \$12,636 2021 \$68,232 \$35,685 \$641 \$7,692 2022 \$73,751 \$16,961 \$1,160 \$13,920

- [13] In addition to this financial information, the claimant provided his 2023 tax return which shows a guideline income of \$82,239. The respondent did not provide her 2023 tax return, but in her financial statement sworn January 5, 2024 she states her current income is \$16,961.
- [14] Section 17(1)(a) of the Divorce Act provides that a court may make an order varying, retroactively or prospectively, a support order. Section 17(4.1) of the Divorce Act provides that before making such a variation, the court must be satisfied that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order. If such a change has been established, the court must take that change into account. The Family Law Act has similar provisions; however, s. 167(2) of the FLA also stipulates that a variation may be made if the reviewing court is satisfied that evidence of a substantial nature that was not available before the prior hearing is now available, or that a lack of financial disclosure by either spouse was discovered after the order was made.
- [15] A change of circumstances must be material, in the sense that if it had been known at the time of the prior order it would have resulted in different terms: *LMP v LS*, 2011 SCC 64 at para 31-33. If a material change has been established, the court must then determine whether a variation is required in light of that change: *LMP* at para 47.
- [16] The claimant disputes the guideline incomes which appear to form the basis of the April 4, 2019 order. He submits the following factors represent material changes which, if they had been known at the time the order was made, would have resulted in a different quantum of spousal support:
- a) At the time the respondent brought her application, she represented to the court that her income in 2019 was \$7,755 (as set out in her F8 sworn March 11, 2019, which attached no tax returns). She swore that she anticipated no significant changes to the information sworn in her F8. However, her most recent tax return prior to swearing this F8 was her 2018 income tax return, which showed her income in 2018 was \$9,035. In addition, by the end of 2019, her 2019 income in fact was \$14,760. The increase in the respondent's income in 2018 resulted from a decision she received in 2018 that she was entitled to disability income of \$1,180 per month. Prior to that she had been receiving social assistance in the amount of \$610 per month. The claimant submits the respondent substantially understated her income to the court in 2019, which resulted in a larger support order than she was entitled to.

- b) On March 28, 2023 the respondent received a judgment in relation to injuries she suffered in 2015. She received a judgment in the amount of \$422,528, which included damages of \$35,000 for past loss of earning capacity and \$156,000 for future loss of earning capacity. The claimant submits that the damages the respondent received in this judgment must be taken into account as part of the respondent's guideline income in the relevant years.
 - c) To date the respondent has failed to report to CRA the spousal support she has received. As a result, the claimant has not received a reduction in his income for the purposes of paying income tax, and has been required to pay more tax that he ought to have. The claimant claims his loss in this respect totals \$54,816.
 - d) The claimant submits that his income does not allow him pay the ordered spousal support, his own expenses, and address in any way the arrears and interest on arrears, which have risen from \$71,400 in June 2019 to \$81,432 as of December 2023.
 - e) The claimant submits that the respondent and their son incorporated a company in May 2022, and the respondent has not disclosed any income regarding this company. The claimant submits that the respondent's income from this company must be taken into account.
- [17] Having reviewed all of the material changes alleged by the claimant, I am satisfied that two factors do constitute a material changes which would have resulted in different terms had they been disclosed to the court in 2019.
- [18] First, I am satisfied that the respondent materially underrepresented her income in 2019. She knew at the time she swore her F8 in 2019 that her monthly income was more than double the amount she stated in her F8, and that her annual income was substantially more than \$7,500.
- [19] Second, I am satisfied that the judgment the respondent received in 2023 represents a material change in circumstances which must be taken into account: *Miolla v Miolla*, 2018 BCSC 2295.
- [20] I am satisfied that the claimant has met the test to make an order for a variation of the spousal support order made April 4, 2019. What are the guideline incomes to be used in calculating spousal support?
- [21] No guideline incomes are stated in the April 4, 2019 order. At that time, the only information the court had before it with respect to the parties' incomes were their F8s sworn in 2018 (for the claimant) and 2019 (for the respondent).
- [22] Since that time, the parties have sworn updated F8s and have exchanged tax returns and notices of assessment.
- [23] I am satisfied that the claimant's tax returns reflect an accurate statement of his income, and should be used for the purpose of calculating spousal support.

- [24] With respect to the respondent's tax returns, I am not satisfied that they accurately reflect her income for the purposes of calculating spousal support.
- [25] In the decision in her motor vehicle case, *Valencia v Duggan*, 2023 BCSC 476, the court made the following findings which are relevant to the issues before me:
- a) The respondent received the following certificates in Colombia: beauty and cosmetology in 1997, cleaning and cosmetology products in 2001, and in body massages and preparation of products for facials, body aesthetics and colon therapy in 2010.
 - b) The respondent did manicures, pedicures and hairdressing between 2006 and 2010, and also sold clothes, beauty products, and other merchandise.
 - c) After her move to Canada, the respondent began receiving social assistance benefits.
 - d) In Canada, the respondent received a certificate in child minding in 2013. Between 2013 and 2018, the respondent took numerous courses in English, ending with a Level 4 course at Douglas College (which she did not complete).
 - e) In December 2018 the respondent received a designation as a person with disabilities, and began receiving benefits in January 2019.
 - f) No deduction from her damages for income loss were made to account for spousal support payments.
 - g) The respondent claimed loss of past income earning capacity over a four year period - from mid 2018 to the first day of trial (August 2, 2022). Taking into account a number of factors, including the pandemic and its impact on the kind of work the respondent was qualified to engage in, the court awarded damages in the amount of \$35,000. All awards were subject to a discount of 15% in relation to the respondent's failure to mitigate. Therefore, the final award to the respondent under this head of damage is \$29,750. If this award is divided equally, it results in an award equal to \$607/month for the 49 months from June 2018 up to and including July 2022.
 - h) The respondent claimed loss of future earning capacity in the amount \$305,607. After taking into account the relevant contingencies, the court awarded the respondent \$156,000 for future loss of earning capacity, which was subject to a discount of 15%. The final award for loss of future earning capacity, therefore, was \$132,600. The court does not state whether this award is intended to reflect losses to age 65 or some other age. Given that the decision is not express in using an alternate retirement date, I will assume that the court assessed this loss until she reached age 65, or eleven years from the date of trial. Divided equally over the 129 months between August 2022 and May 2033 (when the respondent turns 65), the future loss of earning capacity award equals a monthly income of \$1,028.

- [26] The claimant submits that the respondent's income in the future should be set at \$30,000, which he says represents a minimum wage income. He says this is reasonable given that her disability and damages award combine to close to that amount. I do not agree that such an income should be imputed to the respondent, who has been determined to be permanently disabled.
- [27] I am satisfied that the respondent's income for the purposes of calculating spousal support must include her disability income and a monthly amount reflected her loss of future earning capacity award.
- [28] I order that for all future support payments, the claimant shall pay the respondent support at the low end of the SSAG range, calculated yearly based on the claimant's tax return income, and the respondent's income which includes her reported taxable income plus \$12,336 (12 x \$1,028).
- [29] The parties will exchange their tax returns and notices of assessment no later than July 1 of each year, and support will be adjusted based on their incomes as set out above. To what extent is the claimant entitled to a variation of retroactive spousal support?
- [30] The claimant seeks to have all support payable under the order of April 4, 2019 varied.
- [31] The claimant gave notice to the respondent of his intention to vary support when he filed this application in September 2023.
- [32] While he submits he did not know that the respondent had set the April 4, 2019 hearing date, and did not know the order had been made at that time, he certainly knew the order had been made by June 2019 when FMEP began enforcing the support order against him. The claimant did not seek to vary the order in 2019, once he became aware of it. Rather, he began paying spousal support, as ordered, and did not advise of his challenge until 2023.
- [33] The respondent relies on what has been called the three year presumptive rule in applications to reduce support retroactively, relying on *Colucci v. Colucci*, 2021 SCC 24 at para. 91-94. In *Colucci*, the Supreme Court of Canada referred to the presumptive three year rule with reference to *D.B.S. v S.R.G.*, 2006 SCC 37.
- [34] In *D.B.S.*, the court does identify that ordinarily the appropriate limit of any retroactive changes is three years before the application for variation is filed. However, in determining that three years is presumptively the limit to retroactive variations, the court explains it rationale as follows: 118 Having established that a retroactive award is due, a court will have four choices for the date to which the award should be retroactive: the date when an application was made to a court; the date when formal notice was given to the payor parent; the date when effective notice was given to the payor parent; and the date when the amount of child support should have increased. For the reasons that follow, I would adopt the date of effective notice as a general rule. 123 Thus, even if effective notice has already been given, it will usually be inappropriate to delve too far into the past. The federal regime appears to have contemplated this issue by limiting a recipient parent's request for historical income

information to a three-year period: see s. 25(1)(a) of the Guidelines. In general, I believe the same rough guideline can be followed for retroactive awards: it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent. 125 The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.

[35] In D.B.S. the court considered when a payor parent, who had knowledge of their own financial situation, would be permitted to retroactively change support obligations which the recipient parent had been reasonably relying on, when the recipient had no prior knowledge of the payor parent's financial situation. In other words, if payor wishes to reduce their support obligation because their income had decreased, the onus is on the parent to raise their reduced circumstances as soon as possible with the recipient parent.

[36] In the case before me, the situation is quite different. It is the respondent who misrepresented her income at the original hearing, and it is the respondent who is the recipient of a substantial award in relation to her motor vehicle accident which impacts the quantum of her spousal support award. I also note that in 2021, the respondent reported income, in addition to her disability payments, in the amount of \$18,800. No explanation as to the source of this additional money was provided. Overall, I am concerned that the respondent has not been forthright with respect to her income. In the context of support payments, this amounts to blameworthy conduct. In the circumstances of this case, I do not agree that the respondent is entitled to rely on the three year presumptive limit on a retroactive award.

[37] I find that the order made April 4, 2019 will be varied in its entirety. The guideline income for the claimant beginning in January 2016 to the date of this hearing, will be his taxable income as disclosed on his tax returns. The guideline income for the respondent will be her taxable income as disclosed on her tax returns, with the addition of the loss of income awards she received in her personal injury award. The one exception to this is the year 2020, from which I have deducted the \$20,000 CERB reported income which she must repay.

- [38] For simplicity's sake, I state the guideline incomes from 2016 to 2022, reflecting the past and future loss of earning capacity awards, to be the following: Year Claimant's income Respondent's reported income Respondent's loss of income award Respondent's guideline income 2016 \$48,833 \$7,195 n/a \$7,195 2017 \$34,895 \$7,755 n/a \$7,755 2018 \$60,931 \$9,035 \$3,642 \$12,677 2019 \$67,393 \$14,760 \$7,284 \$22,044 2020 \$70,737 \$17,260 \$7,284 \$24,544 2021 \$68,232 \$35,685 \$7,284 \$42,969 2022 \$73,751 \$16,961 \$9,389 \$26,350
- [39] While the claimant's guideline income for 2023 is known, the respondent's reported income is not known. Once her income for 2023 has been produced, \$12,336 must be added to her reported income for 2023 to determine her guideline income for support purposes. I order that the respondent must produce to the claimant her tax return and notice of assessment for 2023 within 30 days of this decision. If she has not filed her taxes for 2023, she must produce all records of income within 30 days of this decision. Should spousal support be terminated when the claimant reaches age 65, or should a review of support be ordered at that time?
- [40] I do not agree that spousal support should be ordered indefinitely past the age of 65. There are many circumstances which may impact the claimant's ability to work past the age of 65. I agree that spousal support should be reviewed after August 7, 2029, when the claimant reaches 65 years of age. Either party may initiate a review of spousal support after August 7, 2029. Should the arrears be cancelled?
- [41] Section 174 of the FLA provides that a court may reduce or cancel arrears if satisfied that it would be grossly unfair not to do so.
- [42] Because I have ordered a recalculation of all spousal support payments owing by the claimant since 2016, I find that it would be grossly unfair to maintain arrears which accrued under the original support order.
- [43] Once the parties have recalculated the spousal support payments owing by the claimant, in accordance with this decision, the parties will be in a position to reconcile the payments made by the claimant since June 2019 with the total payments he was obliged to make in accordance with this decision.
- [44] If any amounts remain owing by the claimant following this reconciliation, the arrears owing and recorded by FMEP will be reduced to such outstanding amount owing. If no amounts remain owing at the date of reconciliation, all arrears as shown on the accounting maintained by FMEP as at the date of reconciliation are cancelled.
- [45] The parties have leave to apply to the court for a formal order cancelling any arrears as at the date of reconciliation, to comply with the requirements of FMEP. Is the claimant entitled to a credit for his over payment of taxes?

- [46] I do not agree that the claimant is entitled at this time to a credit in relation to the taxes he overpaid due to the failure of the respondent to report the spousal support she received from the claimant.
- [47] I order the respondent to refile her last seven years of income tax returns, reflecting the support payments she received from the claimant. In refiling her income tax returns, the respondent shall reflect the payments required and made as reconciled with the support payments ordered herein. Unless the parties agree to a different date, the respondent must refile her tax returns within 120 days of this decision, and provide such refiled tax returns to the claimant.
- [48] If the claimant is obliged to pay any fees, costs or penalties arising from his refiling of his tax returns, he may apply to have such costs recovered against the respondent. Costs
- [49] The claimant is entitled to his costs of this application. "W.A. Baker J."

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