

CANADA / JUDGMENT

Gilhespy v. Gilhespy

2020 BCSC 1636

COURT

Supreme Court of British Columbia

DECIDED

3 November 2020

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2020 BCSC 1636 Gilhespy v. Gilhespy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gilhespy v. Gilhespy,

2020 BCSC 1636

Date: 20201103

Docket: E192419

Registry: Vancouver

Between:

Paul Gilhespy

Petitioner

And

Deborah Ann Ward Gilhespy

Respondent

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

The Petitioner, Paul Gilhespy:

In Person

The Respondent, Deborah Ann Ward Gilhespy:

No Appearance

Place and Date of Hearing:

Vancouver, B.C.

October 27, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 3, 2020

Introduction

- [1] The parties were married on May 18, 1991, separated on February 16, 2012, and divorced by order of the Alberta Court of Queen's Bench on July 11, 2016.
- [2] The parties were scheduled to go to trial in Edmonton, Alberta, in the Court of Queen's Bench on February 27 to March 2, 2017, to resolve the issues between them with respect to their respective entitlement to the matrimonial home, other property, bank accounts, RRSP's, pensions, spousal support and debts.
- [3] On February 13, 2017, the parties consented to an order, which is described, in part, as a corollary relief order to address the issues that were to have been resolved at the scheduled trial.
- [4] The order was indeed granted by Mr. Justice W. Renke, and included a provision that the petitioner would pay the respondent spousal support in the sum of \$4,000 per month until further court order or written agreement.
- [5] The petitioner now applies to this Court, pursuant to s. 18 of the Divorce Act, R.S.C. 1985, c. 3 ("the Act"), for a provisional order to cancel unpaid arrears of spousal support and to reduce his spousal support payments.

Jurisdiction

- [6] Section 5(1)(a) of the Act deals with the issue of jurisdiction on such an application and requires at least one former spouse to be ordinarily resident in British Columbia. In this case, the petitioner has lived in British Columbia since September 2019 so that requirement is met.
- [7] Section 18(2) of the Act provides that:
 - (2) Notwithstanding paragraph 5(1)(a) and subsection 17(1), where an application is made to a court in a province for a variation order in respect of a support order and
 - (a) the respondent in the application is ordinarily resident in another province and has not accepted the jurisdiction of the court, or both former spouses have not consented to the application of section 17.1 in respect of the matter, and

- (b) in the circumstances of the case, the court is satisfied that the issues can be adequately determined by proceeding under this section and section 19,

the court shall make a variation order with or without notice to and in the absence of the respondent, but such order is provisional only and has no legal effect until it is confirmed in a proceeding under section 19 and, where so confirmed, it has legal effect in accordance with the terms of the order confirming it.

- [8] In the event that a provisional order is made, s. 18(3) of the Act directs that the order and supporting documents be sent to the Attorney General for this province to be communicated to the Attorney General of the province where the respondent is ordinarily resident.
- [9] While the order did not specifically state that it was made pursuant to the Act, the reference to corollary relief persuades me that it must have been granted under the Act, entitling the petitioner to bring the application before me.
- [10] The respondent's counsel was served with the petition and supporting material before me but did not file any responding material and did not participate in these proceedings. On this basis, I will deal with the petitioner's application based solely upon the material that he filed and in the absence of the respondent as authorized by s. 18 of the Act. The respondent will be entitled to address any provisional order that I may make, when it is considered by the Alberta Court of Queen's Bench pursuant to s. 19 of the Act.

Background

- [11] The petitioner is a power engineer.
- [12] The respondent is an Administrative Support Worker for Alberta Health Services.
- [13] The parties have two children who are now self-sufficient adults.
- [14] At the time of their separation, the parties were resident in Alberta. The petitioner had been unemployed for a year due to the closure of the plant where he had previously work, but obtained employment in June of 2012 in Fort McMurray, Alberta.
- [15] According to the petitioner, the agreement was an attempt to apply the Spousal Support Advisory Guidelines ("SSAG").
- [16] He has sworn or affirmed that his 2015 Notice of Assessment from Canada Revenue Agency reported his income for that year as \$210,266, and as his 2016 Notice was unavailable when he reached his agreement for spousal support; his 2015 income was the basis for the agreement. He says that the respondent's income was treated as \$50,000 per year for the same purpose. Using these incomes, the low end of the SSAG for 2016 would result in monthly spousal support of \$4,207. The petitioner provided his Notices of Assessments for the years 2016 through 2018, which disclose gross income of \$195,454 for 2016, \$199,785 for 2017, and \$230,487 for 2018.

- [17] Assuming that the respondent's income was unchanged over this period, the low end of the SSAG would, if calculated in each of those years result in monthly spousal support of \$3,818 in 2016, \$3,932 in 2017 and \$4,738 in 2018.
- [18] The petitioner has a new wife with whom he moved to British Columbia in May of 2019, due to the wife's transfer here. The petitioner continued with his employment in Fort McMurray, commuting via Vancouver, Edmonton, and Fort McMurray in order to do so.
- [19] The petitioner contends that he developed health difficulties due to his commute, and thus sought accommodation from his employer to reduce his travel obligations. His employer in Fort McMurray was unable to accommodate his request and the petitioner sought different employment. In September 2019, the petitioner began working for Fortis BC. The evidence respecting these health difficulties is scant, and consists of a short note from a doctor dated September 17, 2020 and a handwritten note from a dental clinic dated September 14, 2020. The doctor's note states:
- Mr. Paul Gilhespy is being treated for physical and mental health issues due to frequent flights. He is not travelling currently and is actively being monitored.
- [20] The relevant part of the note from the dental clinic states:
- This is to confirm that Mr. Paul Gilhespy is being seen at our office and is being treated for his crowns and an appliance for his stress grinding (Bruxism).
- [21] The dental issues are not said to be due to the petitioner's travel challenges, but is possible to infer that they might be.
- [22] The petitioner's income for 2019 is divided between his Alberta employment, and the employment that he began in British Columbia that year. I assess his potential income from those two sources for that year at \$174,067 based on his 2019 Notice of Reassessment. Applying the low end of the SSAG would result in monthly spousal support of \$3,257.
- [23] The petitioner started working at Fortis BC in September 2019 and has already received one promotion in January 2020.
- [24] For 2020, the petitioner will earn \$45.44 per hour, as opposed to the \$68.39 he was earning in Alberta in early 2019. This is somewhat inconsistent with his pay stubs for the year to date, which have been \$4,230 bi-weekly and his pay stub dated September 18, 2020 indicates that he has already earned \$115,080 to date. Doing the best that I can with the information that the petitioner has provided, I project his income for this year to be \$145,000. Applying the low end of the SSAG would result in monthly spousal support of \$2,500, not the range of \$1,040 to \$1,400 asserted by the petitioner. The mid range would be \$2,900 per month, and the high end would be \$3,300 per month. Assuming that the respondent has continued to earn \$50,000 per year as the petitioner contends, the application of the low end of the SSAG would result in monthly spousal support payments of \$2,500, not the range of \$1,040 to \$1,400 asserted by the petitioner.

Discussion

(a) Arrears of Spousal Support

[25] In *Boekhoff v. Boekhoff*, 2016 BCCA 33 [Boekhoff], Madam Justice Garson explained at paras. 47-50:

47 The statutory authority to cancel arrears of spousal support is found in s. 17 of the Divorce Act. Section 17(1) provides:

17(1) court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (a) a support order or any provision thereof on application by either or both former spouses; or
- (b) a custody order or any provision thereof on application by either or both spouses or by any other person.

48 Section 17(4.1) sets out a number of factors considered on an application under s. 17(1), and reads as follows:

Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself 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 or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

49 An order cancelling arrears is a form of retroactive variation: *Earle v. Earle*, 1999 BCSC 283, [1999] B.C.J. No. 383 at para. 21 (B.C.S.C.). Accordingly, s. 17(4.1) applies to applications to cancel arrears (see for example: *Eichen v. Eichen*, 2012 BCCA 32; *Whyte v. Whyte*, 2002 BCCA433 at para. 49).

50 In making a variation order, the Court must take into account the objectives set out in s. 17(7):

A variation order varying a spousal support order should

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[26] In *Earle v. Earle*, 1999 BCSC 283, at para. 23, Madam Justice Martinson observed that:

23 The courts are generally reluctant to reduce or to cancel arrears. Under the Family Relations Act arrears will not be reduced or cancelled unless it is grossly unfair not to do so. This principle is similar to the one applied to the Divorce Act, which requires a material and long lasting change.

[27] If anything, until 2017, the petitioner was paying a little more than the low end of the SSAG amounts, and in 2018, considerably less than the low end of the SSAG.

[28] The petitioner states that he owes \$27,000 in arrears of spousal support since September 1, 2019. No evidence was provided to support this amount of arrears. However, the petitioner's calculations imply that he was paying some amount of reduced support since September 1, 2019. In 2019, while the petitioner's income decreased his court ordered payments of \$4,000 per month were still within the SSAG range although at the high end of the range.

[29] If the SSAG were applied to his income after September 1, 2019, his payment obligations would have been less than his agreed obligations, but his evidence is that there appears to be potential for him to receive raises that may enable him to earn close to what he previously made. In these circumstances, I am unable to find that the changes in the petitioner's employment circumstances are material and long lasting such that it would be grossly unfair to reduce or eliminate them.

[30] In the result, I decline to order either the cancellation or a reduction in the petitioner's arrears of spousal support.

(b) Ongoing Spousal Support

[31] In order to obtain the relief he seeks, the petitioner is obliged to show a material change in circumstances: *L.M.P. v. L.S.*, 2011 SCC 64. Paraphrasing this decision in *Boekhoff*, Garson J.A. defined a material change for the purposes of an application to reduce spousal support as one that, if known at the time the original order was made, would likely have resulted in different terms, while recognizing that other factors, such as the "subsequent conduct of parties", may provide indications as to whether they considered a particular change to be material.

[32] At para. 50, Garson J.A. wrote:

50 In making a variation order, the Court must take into account the objectives set out in s. 17(7):

A variation order varying a spousal support order should

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[33] The change that the petitioner relies upon is the change in his employment.

[34] In *Canuel v. Canuel*, [1997] B.C.J. No. 1654 (BCCA) Madam Justice Southin considered a similar application by a payor spouse who left his employment to start his own business, stating at para. 11:

11 But the critical question for us arises from the way the learned judge dealt with the appellant's change in circumstances. In my opinion, he erred in not focusing on matters as they stood before him. It is from time to time necessary in the ever-changing world of business for a paying spouse to change his or her occupation or employment to pursue what might be called long-term goals which require short-term pain. When spouses live together, such changes are borne by them both and they have to continue to be borne, to some extent, even when they are no longer living together if one looks to the other for support. The evidence persuades me that the appellant, when he resigned his job, was doing just that. He was making a choice for a long-term improvement in his financial situation against the risk that the company for which he was working might cease to operate or find it necessary because of economic conditions to terminate his employment. It may very well be that the appellant will return in the not too distant future to his former level of income. It does seem possible. But it was certainly nothing that the learned judge could be certain of at the time he heard the application in question.

[35] In my view, the evidence before me does not support a finding that the petitioner made a choice to change jobs for long-term improvement of his financial situation, and I am not persuaded, on the evidence that he did adduce that he has a medical condition that prevents him from flying back and forth to Alberta.

[36] I find, however, that he has switched employment for what I accept to be a reasonable conclusion and on his own evidence, there appears to be potential to continue to receive raises that may enable him to earn close to what he previously made. I conclude that he is not unreasonably trying to reduce his payments.

[37] When the petitioner's spousal support obligations were determined, something less than the low end of the SSAG was utilized. In *Boekhoff*, the Court of Appeal commented on the applicability of the SSAG on a variation application stating:

77 In summary, SSAG may serve as a useful tool on variation applications provided that its use is approached with caution and advertence to context. Where the factors giving rise to a party's initial entitlement to support remain essentially unchanged on the variation application, SSAG may be applied.

[38] In the circumstances, no evidence has been adduced that the factors giving rise to the respondent's entitlement to spousal support have changed on this application. Therefore, I find that the application of the SSAG is appropriate in this case and that the petitioner's spousal support payments should be reduced, going forward, to the low end of the SSAG, or \$2,500 per month, and I make that provisional order.

"The Honourable Chief Justice Hinkson"

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Prepared on 26 October 2026 · Esheria