
CANADA / JUDGMENT

Girard v. Girard

2006 BCCA 482

COURT

British Columbia Court of Appeal

DECIDED

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2006 BCCA 482 Girard v. Girard

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Girard v. Girard,

2006 BCCA 482

Date: 20061030

Docket: CA033210

Between:

Rene Arthur Girard

Respondent

(Plaintiff)

And

Sandra Marie Girard

Appellant

(Defendant)

Before:

The Honourable Madam Justice Ryan

The Honourable Madam Justice Saunders

The Honourable Madam Justice Kirkpatrick

J.G. Hardwick

Counsel for the Appellant

R.A. Girard

Appearing on His Own Behalf

Place and Date of Hearing:

Vancouver, British Columbia

March 31, 2006

Place and Date of Judgment:

Vancouver, British Columbia

October 30, 2006

Written Reasons by:

The Honourable Madam Justice Ryan

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Kirkpatrick

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

- [1] The appellant, Sandra Marie Girard, appeals the order of Madam Justice Beames in chambers pronounced 12 July 2005 and entered 9 September 2005. That order reduced the amount of arrears of spousal and child support owed Ms. Girard by the respondent, Rene Arthur Girard, to \$36,000.00 from a sum of approximately \$123,000.00.

Factual Background

- [2] The parties were married in 1984 and separated in 2000. There are two children of the marriage, a son and a daughter who, at the time of the chambers hearing in 2005, were ages 16 and 11 respectively. The appellant was 40 years of age at the time of the hearing. She had worked only inside the home for the duration of her marriage. The respondent was 42 at the time of the hearing and was employed as a stockbroker when the parties separated.
- [3] The parties entered into a separation agreement in 2001. This agreement provided that Mr. Girard would pay \$1,000.00 per child per month in child support in addition to financing the children's extra-curricular activities. The son moved in with Mr. Girard shortly after the agreement was signed, but child support continued for the daughter. The agreement also called for Mr. Girard to pay \$4,000.00 per month to Ms. Girard in spousal support for five years and at the end of that term to continue to pay the mortgage and taxes on Ms. Girard's

residence for a further five years.

- [4] The agreement also stipulated that the support payable by Mr. Girard could be reduced in the event of a material change in his annual income and that Ms. Girard would make reasonable efforts to find employment and become self-supporting.
- [5] Each of the parties experienced difficulties in the years immediately following their entering into the agreement.
- [6] In early 2002, the appellant began college courses, however, in late 2002 she was diagnosed with cancer and underwent surgery in December 2002, followed by a series of treatments. In early 2004, Ms. Girard's cancer metastasized leaving her left shoulder and arm significantly disabled. She applied for C.P.P. disability benefits in April of 2004.
- [7] The respondent had earned a large income during the stock-market boom of the late nineties and continued to earn a good income despite the market setbacks in 2001. In 2002, he also earned a significant income, but faced four separate lawsuits from former clients who had suffered losses. As a result, he made a proposal in bankruptcy in July of that year.
- [8] Until July 2002, Mr. Girard had made support payments pursuant to the agreement. He had told Ms. Girard of the financial difficulties he was facing. He applied to a Master of the Supreme Court to vary support requirements, but that application was denied. Beames J. notes in her reasons that Mr. Girard represented himself at the hearing and did not provide much, if any, evidentiary support for his application.
- [9] In September of 2002, Mr. Girard sold his home as part of his bankruptcy proposal and used part of the proceeds to pay the support arrears accumulated to that date. In October 2002, he left his employment on his doctor's advice as a result of stress. By November of 2002, Mr. Girard had completed his bankruptcy proposal, which was court approved in February 2003.
- [10] Mr. Girard, who was receiving Employment Insurance benefits in early 2003, applied again to vary the support requirements of the separation agreement. On March 2003, the matter went before Mr. Justice Brooke who ordered the spousal support and repayment of arrears be suspended for three months while the parties exchanged property and financial statements. During that time, Mr. Girard was to continue to pay \$1,000.00 per month in child support for the daughter.
- [11] The matter was set to be reviewed in June of 2003, but was adjourned and was not heard until November 2003. The financial situations of both parties had changed over that period of time. The appellant was forced to sell her home - Brooke J. found that this was a result of the unpaid spousal support - and was earning approximately \$6,000.00 per year housecleaning. The respondent had borrowed money from friends to start a business.

- [12] The decision from the November 2003 hearing was released in April 2004. Brooke J. found that Mr. Girard had provided insufficient evidence to determine whether his income had been materially reduced. In dismissing the application, Brooke J. required that Mr. Girard "at least" disclose his income tax returns for 2002 and 2003.
- [13] Following that decision, Ms. Girard sought judgment for \$83,000.00 - that being the total to that date of the maintenance Mr. Girard owed her. Mr. Girard counter-claimed to have the support varied and to reduce or cancel the arrears.
- [14] In March of 2004, Mr. Girard had secured employment earning approximately \$75,000.00 per annum.
- [15] Both parties' motions were heard in chambers on 7 July 2004. Barrow J. found it obvious that Mr. Girard was unable to pay the accumulated arrears. However, Mr. Girard still had not disclosed his 2002 and 2003 tax returns at that time, so the chambers judge was unable to determine an appropriate reduction.
- [16] Since that decision, the appellant moved to Vancouver. Both of the children of the marriage remained in Kelowna with their father. The respondent left his employment due to the financial difficulties of his employer and collected social assistance while he looked for employment in Kelowna, Vancouver, Toronto and Calgary.
- [17] In May 2005, Mr. Girard filed a notice of motion seeking a declaration that he no longer be required to pay child support to Ms. Girard, retroactive to August 2004; an order that the primary residence of the two children was with their father; and an order that the support arrears be cancelled or reduced.
- [18] Ms. Girard did not oppose the child support applications, but opposed the support arrears application. At that time, Ms. Girard was still being treated for cancer and a new potential tumour was being investigated. Her net income was \$869.42 per month, derived from either or both social assistance and C.P.P. disability payments.
- [19] It was not until these 2005 proceedings before Beames J. that Mr. Girard finally made adequate financial disclosure. Based on the new evidence, Beames J. found that Mr. Girard had not been in a position to pay \$4,000.00 per month in spousal support since at least 2003. Beames J. noted that it was Mr. Girard's failure to make proper disclosure that caused the rejection of his previous applications to vary support or cancel or vary arrears. Nevertheless, Beames J. found it would be grossly unfair to require Mr. Girard to pay the full arrears in light of the new information. In making this finding, Beames J. apparently relied on the conclusion reached by Barrow J. in the July 7, 2004 hearing that Mr. Girard had no prospect of being able to repay the total arrears of \$81,000.00 which had accumulated by that time.

- [20] As I mentioned earlier, by the time the matter was before Beames J., Mr. Girard's arrears totalled \$123,000.00. Upon reviewing the disclosed financial statements, Beames J. concluded that the amount of arrears ought to be varied. Accordingly she found that Mr. Girard owed \$8,100.00 from 2002, nothing from 2003, \$26,142.00 for 2004 and a small sum for the first two months of 2005. All told, Beames J. varied the amount of arrears owed by Mr. Girard to \$36,000.00.
- [21] One piece of evidence not referred to by Beames J. in her reasons, but raised by Ms. Girard on appeal, is Mr. Girard's entitlement to a tax refund of \$56,602.00 for the 2002 taxation year. The failure to do so is raised by Ms. Girard as a further ground of appeal.

The Grounds of Appeal

- [22] The appellant raises three issues on appeal. First, she argues that the trial judge erred in concluding that it would be grossly unfair to the respondent not to reduce the support arrears. Second, she argues the trial judge erred in failing to consider the respondent's 2003 income tax refund of \$56,602.00, which he did not disclose until May of 2005. Finally, she argues that even if a reduction in arrears was warranted, the reduction calculated by Beames J. was excessive.

The Standard of Review

- [23] An appellate court may not interfere with a lower court decision in a family law matter unless it concludes that "the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the [decision] is clearly wrong" (*Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 11). That same standard applies when reviewing decisions on the reduction or cancellation of arrears: *Bourque v. Gerlach* (2006), 223 B.C.A.C. 230, 2006 BCCA 157, at paras. 51 - 52.

Discussion

- [24] Sections 96(2) and (3) of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "Act") state:
- (2) If an application is made to reduce or cancel arrears under a maintenance order, the court may reduce or cancel the arrears but only if it is satisfied that it would be grossly unfair not to do so.
 - (3) For the purpose of subsection (2), the court may take into consideration
 - (a) the efforts the applicant has made to comply with the maintenance order,
 - (b) the applicant's explanation for any delay in applying for variation of the maintenance order, and
 - (c) any special circumstances that the court considers relevant.

- [25] The onus falls on the party applying for a reduction or cancellation of arrears to demonstrate that it would be grossly unfair to refuse the application: *Longstaff v. Longstaff* (1993), 49 R.F.L. (3d) 1, 86 B.C.L.R. (2d) 1 (C.A.) at para. 31 and *Ward v. Ward* (1998), 37 R.F.L. (4th) 163, 105 B.C.A.C. 175.
- [26] The appellant says that the chambers judge in the case at bar failed to give serious consideration to evidence relating to each of three factors set out in s. 96(3) of the Act. As a result, counsel for the appellant submitted that the decision of the chambers judge was unreasonable. With respect to the first factor - the efforts made by the respondent to comply with the support order - the appellant makes two points. First, she says, the respondent began to fall into substantial arrears beginning in July 2002, a year during which he had taxable earnings of over \$300,000.00. She says that even after Mr. Girard resumed employment in March of 2004, earning \$75,000.00 a year, he paid nothing in the way of spousal support and only \$602.00 in the way of child support.
- [27] As for the explanation for the delay in making the application to cancel arrears, the appellant says that the chambers judge erred in crediting the respondent with a diligent effort in dealing with the accumulating arrears. The appellant says that the proper conclusion is that the respondent persisted for three years in efforts to subvert the ability of the court to arrive at a just conclusion. Counsel says that Mr. Girard misrepresented his status as a bankrupt, suppressed information about his entitlement to a tax refund in 2003 and "generally flaunted his disclosure obligations pursuant to relevant statutes and rules".
- [28] Lastly, counsel for the appellant submitted that there are special circumstances favouring the appellant's claim. The appellant says that the effect of the default in support payments was disruptive to her training plans and put her economic future in peril. She says that she faced serious health problems during the time of her deprivation, that those health problems continue to challenge her and that they have rendered her unemployable. As a consequence, she has been forced to liquidate and exhaust her savings and her home.
- [29] The appellant says that the chambers judge failed to give adequate consideration to all of the evidence. Paying all due deference to the decision of the chambers judge, he submits that the entirety of the circumstances could not support the conclusion that it would be grossly unfair to not cancel the arrears.
- [30] Though I understand that Ms. Girard has faced financial and personal difficulties, I cannot reach the conclusion that the chambers judge erred in the ways she alleges. The chambers judge took a different view of the evidence than that urged upon her by the appellant. Beames J. took into account that Mr. Girard revealed his financial difficulties to Ms. Girard in a timely way. He made his first application to reduce his support payments when he was not in a position to pay them. It was then that he proposed bankruptcy. Although not explicitly stated in the reasons of Beames J., it seems she found that requiring Mr. Girard to pay the full arrears would be grossly unfair because a variation of support would likely have been granted on any one of his three previous court appearances had Mr. Girard presented the

court with adequate financial information.

[31] In spite of the arguments of the appellant to the contrary, I read the reasons of Beames J. to say that it may have been incompetent of Mr. Girard not to provide full disclosure in a timely fashion, but when Mr. Girard finally made something approaching full disclosure, it could not be said that he had previously attempted to hide income or otherwise defeat Ms. Girard's efforts to enforce payment. The respondent's sincerity in this regard was a finding open to the chambers judge on the evidence. It is not a finding with which this court can interfere.

[32] As the Supreme Court of Canada noted in *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, at para. 15:

As indicated in both *Gordon and Hickey*, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

[Emphasis added.]

[33] In my view, the reasons for judgment demonstrate that the chambers judge was aware of all of the factors that she was entitled to consider in determining the issue in Mr. Girard's favour. Assessing the weight and effect of the evidence is a task assigned to the chambers judge. Nothing in the reasons demonstrates that the chambers judge overlooked or misunderstood the law or the evidence on this issue. I would dismiss this ground of appeal.

[34] The second issue on appeal is whether Beames J. erred in failing to consider the tax refund of \$56,602.00 received by Mr. Girard in 2003 reflecting an overpayment of taxes for the 2002 tax year.

[35] As I mentioned earlier, this fact was squarely before the chambers judge. Unless the appellant can demonstrate otherwise, we must assume that the chambers judge was alive to this fact. A judge is not required to mention all of the evidence placed before her when drafting reasons for judgment. I cannot say that she overlooked this fact, or erred in failing to mention it in her reasons. This was one fact in the whole financial picture presented to the chambers judge.

[36] I would dismiss the second ground of appeal.

- [37] The final issue on appeal is whether the sum of the reduced arrears calculated by Beames J. was appropriate in the circumstances. Ms. Girard argues that the sum of \$36,000.00 is inappropriate as it represents a 76% reduction in the arrears owed by Mr. Girard.
- [38] I cannot say that the method employed by Beames J. in calculating arrears based upon capacity to pay was inappropriate in the circumstances. The appellant raises the concern that this represents a 76% reduction in arrears. But, the chambers judge did not engage in a simple percentage reduction; she examined the circumstances of both parties and reached the conclusion that it would be grossly unfair not to reduce the arrears to the amount that she chose. This was a matter for the chambers judge to determine based on the evidence before her. In my view, the appellant has not demonstrated that the chambers judge fell into any error of fact or law in reaching the decision that she did.
- [39] I would dismiss this ground of appeal.

Conclusion

- [40] I would dismiss the appeal.

"The Honourable Madam Justice Ryan"

I Agree:

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Madam Justice Kirkpatrick"

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