

CANADA / JUDGMENT

Gontcharov v. Gontcharova

2020 BCSC 1314

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1314 Gontcharov v. Goncharova

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gontcharov v. Goncharova,

2020 BCSC 1314

Date: 20200904

Docket: E17065

Registry: Chilliwack

Between:

Oleg Gontcharov

Petitioner

And

Evgenia Goncharova

Respondent

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

(In Chambers via Teleconference)

Counsel for the Petitioner:

D. Cho

Counsel for the Respondent:

N. Cooper

Place and Date of Hearing:

New Westminster, B.C.

July 31, 2020

Place and Date of Judgment:

Chilliwack B.C.

September 4, 2020

- [1] The petitioner is the father of three children, aged 11, 12, and 13 at the time of this application. He seeks to retroactively vary child support and reduce his child support arrears.
- [2] The petitioner and the respondent were married in Russia in 2006. They separated in 2011, and were divorced on October 3, 2013.
- [3] The parties' divorce and family proceeding commenced in Yukon. On November 8, 2011 Mr. Justice Veale ordered the petitioner to pay \$706/month in interim child support. On January 16, 2012 the parties consented to an order increasing the petitioner's child support obligation to \$1,033/month, and requiring him to pay 66% of the special expenses.
- [4] There was a trial in 2015, following which, on March 2, 2015, Mr. Justice Gower ordered the petitioner to continue paying \$1,033/month in child support and 66% of the children's special expenses. The order imputed income of \$53,742/year to the petitioner, and stated that the petitioner was in arrears of \$24,526.68 on his child support payments, calculated to February 2, 2015.
- [5] The petitioner argues that he did not know that the trial was scheduled and so did not attend. He says he was in Belarus from July 2013 to March 2015 and did not have access to reliable internet. He suggests that perhaps the Belarus government was censoring his email. He returned to Canada on March 25, 2015. He says in late March 2015, when he had returned to Canada, his new wife told him that she had had earlier conversations with the respondent about the trial.
- [6] The petitioner says that as soon as he was served with the March 2, 2015 order he started trying to change it.
- [7] The respondent disputes the petitioner's submission as to whether he knew about the trial. She says that her lawyer attempted many times to obtain the availability of the petitioner for trial, but he would not respond to her. She says that her lawyer delivered the notice of trial to the petitioner's address for service, and to his email address, and her lawyer received a notification confirming that the petitioner opened the email. The respondent says that she spoke with the petitioner's new wife in February 2015 to ask whether the petitioner would be

attending the trial. Finally, the respondent says that the trial judge found that the petitioner had been properly served with the notice of trial, and the trial could proceed in his absence. The respondent's counsel delivered a copy of the trial order to the petitioner in March 2015.

- [8] The respondent says that the petitioner did not attempt to contact her or the children from 2013 until the present petition was filed.
- [9] Between November 25, 2011 and February 1, 2016 the petitioner paid a total of \$21,548.27 in child support. The respondent was enrolled with the Yukon Maintenance Enforcement Program, and in January 2016 that Program transferred the collection of the petitioner's child support obligations to the BC Family Maintenance Enforcement Program ("FMEP"). The petitioner made periodic payments to the maintenance enforcement programs throughout that time frame including in 2015, 2016, 2017, 2018, and 2019. As of March 7, 2019 the total amount owing, pursuant to the records of FMEP, was \$55,962.41.
- [10] The petitioner presented tax information which shows his reported income over the years 2011 to 2019, ranging from \$1 to \$41,777 in annual income. The respondent argues that, based on the Child Support Guidelines and his reported income, he would owe a total of \$24,685.92 for the years 2011 to 2019. He says his current yearly income is approximately \$6,440 from disability benefits, which are his sole source of income.
- [11] The issues raised on this application are whether the petitioner's child support obligations should be varied downwards, pursuant to s. 17 of the Divorce Act, R.S.C. 1985 (2nd Supp.), c.3 [Divorce Act] and whether the child support arrears should be reduced pursuant to s. 174 of the Family Law Act, S.B.C. 2011, c. 35 [FLA].

Should the petitioner's child support obligations be varied?

- [12] Section 17 of the Divorce Act provides that a court may vary a support order retroactively or prospectively. In an application to vary child support, s. 17(4) applies:
- s. 17(4) Before the court makes a variation order in respect of a child support order, court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
- [13] Section 14 is the applicable guideline for variations of child support orders. The relevant provisions read:
- s. 14. For the purposes of subsection 17(4) of the Act, anyone of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of child support:
- (a) In the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof.

- [14] The leading case dealing with variations of child support orders is *DBS v. SRG*, 2006 SCC 37 [DBS]. This case has been relied on consistently by the courts in British Columbia for many years. In *GMW v. DPW*, 2014 BCCA 282 [GMV v. DPW], the Court of Appeal confirmed:
- [32] This Court has stated that the test of materiality for a change in circumstances under s. 17(4) of the Divorce Act, as expressed in *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, has not been displaced by s. 14 of the Guidelines: *Wang v. Wang* (1998), 1998 CanLII 6374 (BC CA), 58 B.C.L.R. (3d) 159 (C.A.); *Baker v. Baker*, 1999 BCCA 433; *Bockhold v. Bockhold*, 2006 BCCA 472; and *C.L.B. v. A.H.B.*, 2013 BCCA 472. See also: *Brown v. Brown*, 2010 NBCA 5 at para. 16. The threshold requirement for variation of an existing order was described in *Willick* at 688:

In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

[Emphasis added.]

- [33] *Willick* also held: (i) the onus is on the applicant to establish a material change of circumstances (at 689); (ii) the existing order is presumed to have accurately assessed the needs of the children and therefore the correctness of that order must not be reviewed in the variation proceeding (at 687); (iii) the actual circumstances of the parties will determine if there has been a material change of circumstances during the relevant period (at 688); and (iv) the approach to the making of child support orders is child-centered and requires consideration of the children's needs, the relative ability of the spouses to pay and the joint obligation of the parents toward their children (at 689-90). The objectives of the Guidelines appear to echo this last statement in s. 1(a):

1. The objectives of these Guidelines are

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

- [15] The petitioner seeks a variation of child support orders going back to 2011. To do so would require me to review the correctness of the trial order made March 2, 2015. I am not permitted to do so, as set out in *GMW v. DPW*, above. For the purposes of this application I will only consider a variation for the period after March 2, 2015.

- [16] In *DBS* the Supreme Court of Canada discussed the factors to be considered in determining whether retroactive child support order should be made. The court cautioned that retroactive awards may result in unpredictability, and can impair the delicate balance between certainty and flexibility in the area of law dealing with child support. Importantly, the court states:

98. Before canvassing the myriad of factors that a court should consider before ordering a retroactive child support award, I also want to mention that these factors are not meant to apply to circumstances where arrears have accumulated. In such situations, the payor parent cannot argue that the amounts claimed disrupt his/her interest in certainty and predictability; to the contrary, in the case of arrears, certainty and predictability militate in the opposite direction.

[emphasis added]

- [17] In the case before me, the petitioner knew of the child support order in March 2015, within 30 days of it being made. The petitioner did not file an appeal of this order, nor did the petitioner challenge the trial taking place in his absence.
- [18] The petitioner states in his affidavit that he immediately began attempting to address the child support order as soon as he received it in 2015. However, other than these bald statements in his affidavit, the only evidence before me of his attempt to vary child support is a notice of application filed in the Supreme Court of Yukon on July 10, 2019. This application was not served on the respondent as the petitioner says he did not know where she was living.
- [19] Following the filing of the Yukon application, the petitioner says he discovered that the respondent was living in British Columbia. Parenthetically, I question this statement by the petitioner as he knew the respondent had been registered with FMEP since January 2016. As both parties were living in British Columbia, this petition was commenced in the Supreme Court of British Columbia. The respondent states in her affidavit that the first time she heard from the petitioner that he sought to change the child support order made in March 2015, was when she received the within petition in March 2020. I accept the evidence of the respondent that the first time the petitioner gave notice to her of his challenge to the child support order of March 2, 2015, was in March 2020.
- [20] I am not satisfied that the petitioner has provided a satisfactory reason for his failing to commence this petition before March 2020. He clearly knew of his support obligations given the evidence produced on this application of payments he made through the family maintenance enforcement programs in Yukon and British Columbia in the years 2015 to 2019. He also clearly knew that he was in arrears of his child support obligations throughout that period.
- [21] The Supreme Court of Canada in *DBS* at para. 118 stated that the court has four choices for the date to which an award should be retroactive. The dates include:

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.

- [22] The Court in DBS recognized that the date of effective notice should generally prevail. This is important when the Court considered how far back from formal notice a retroactive award may be made. Essentially, the Court considered that a parent may give effective notice years before formal notice was given, and the parties may attempt to resolve the issue informally for some time before formal notice was given. In those cases, the Court accepts that it would be fair to reach back in time before formal notice was given, as the parties were alive to the issue raised regarding the quantum of support since the date of effective notice. In those cases, the Court found that it would usually be inappropriate for a retroactive order to be made to a date back further than three years before formal notice (para. 123).
- [23] In some cases a court will order retroactive support to a date more than three years before formal notice; however, such cases are where the blameworthy conduct of the payor parent justified such an order: *A.J.D. v. C.C.*, 2017 BCSC 1559.
- [24] In the case before me, the first time the respondent learned of the petitioner's position that child support was in issue, was when the within petition was served on her. The petitioner included in his material correspondence dated in February 2020 where his counsel attempted to find out from the respondent how she could be served with the petition, but there is nothing in the correspondence which indicated the orders which the petitioner intended to seek.
- [25] The court records contain an affidavit of service indicating that the respondent was served on March 12, 2020. The filing of the petition on March 5, 2020 is the date the application was made to the court, and formal notice would have been given to the respondent when the petition was served on her on March 12, 2020.
- [26] I find that the date of effective notice and the date of formal notice to the respondent are the same. I find no basis to consider a variation of child support prior to March 12, 2020.
- [27] On a variation of child support, the petitioner must show that there has been a material change in circumstances since the order was made, which would likely have resulted in a different order being made had those circumstances been in place at the time the original order was made.
- [28] As I have found that no variation to the child support orders will be made prior to March 12, 2020, I have considered whether a variation as of that date is justified.
- [29] In 2015 an income was imputed to the petitioner in the amount of \$53,742/yr. In his affidavit dated March 5, 2020 in support of this petition, the petitioner makes the following statements:
- a) in 2019 his annual income was \$6,440;
 - b) his only source of income beginning in 2019 is CPP disability benefits;

- c) while he has applied for Persons with Disabilities Social Assistance, he had not received the results of that application as of March 5, 2020;
 - d) he was advised by one of his doctors that he was not medically fit to work as of March 5, 2020; and
 - e) he was scheduled to have cervical spine surgery on April 20, 2020 and following that surgery, his ability to work would be reassessed.
- [30] On July 4, 2020 the petitioner swore a new affidavit in which he stated that his April 20, 2020 surgery referred to in his March 5, 2020 affidavit, had been rescheduled and completed on February 28, 2020. He provided no explanation for why he swore on March 5 he had an upcoming surgery which had in fact been completed seven days prior.
- [31] The petitioner says that his health began to deteriorate in 2011. He says that prior to 2011 he was able to participate in sports, including judo, swimming, weight lifting, and outdoor activities.
- [32] In his March 5, 2020 affidavit the petitioner includes a letter from Dr. Varelas dated February 27, 2020. Dr. Varelas states that the petitioner was unable to work at that time for medical reasons, that he was scheduled to have surgery on his cervical spine on February 28, 2020 and that he would be reassessed regarding his ability to tolerate employment following that surgery. Dr. Varelas states that the petitioner would need to be off work for six months.
- [33] While the petitioner provided various clinical records which predate 2020 for orthopedic and neurologic complaints and investigations, the only letter which speaks to the petitioner's ability to work is the one dated February 27, 2020 from Dr. Varelas.
- [34] The petitioner provided a letter from Service Canada dated January 27, 2016 confirming his eligibility for the CPP disability benefit. However the basis for that disability finding was not provided. It is clear from his tax information that he did continue to work after he received that benefit, including in 2018 when he received \$28,751 in employment income in addition to his disability and other benefits. The petitioner states that he began working as a credit card salesman in 2018 but was laid off after five months. He also lost his Person with Disability assistance at that time because he was able to return to work.
- [35] The petitioner swore a current F8 financial statement in which he states his yearly income is \$6,400, but his yearly expenses are \$13,020. He shows no debt on his F8, and states the household receives no income from his current wife. In his affidavit he states that his wife earned \$1,193 in 2018 and \$384 in 2017. There is no explanation in his material as to how he and his partner are able to support themselves on incomes which do not come close to paying their expenses. I find the petitioner's statements as to income not credible, as a result.

- [36] The petitioner states in his July 2020 affidavit that between 2013 and 2019 he sent out approximately 4000 resumes to all levels of jobs, had many interviews, but was always denied a job because of his appearance and his inability to handle the physical requirements of jobs. Other than this bald statement, no documents were included in his affidavit to support his assertion that he applied for numerous jobs over the six year period indicated. As a result, I am unable to assess whether the petitioner applied for jobs which could accommodate his physical restrictions.
- [37] The respondent says that the petitioner is fluent in English and Russian, and attended university in Russia. The respondent attached to her affidavit a page from the petitioner's LinkedIn profile where he shows he has a "Master's degree, Environmental Science (2009-2011)".
- [38] The respondent says that during their marriage the petitioner told her he was unemployed by choice, would not take what he considered to be low paying work, and would go on disability rather than taking low paying work. The respondent described various cash payments received by the petitioner during the marriage which were not reported as income to Canada Revenue Agency.
- [39] The respondent says that the petitioner had a lurching gait throughout the marriage, which he told her resulted from an injury at birth. The respondent says that, notwithstanding the problem with his gait, the petitioner was not physically limited in any way, and he exerted himself physically in a number of pursuits without limitation, including hunting, fishing, hiking, and martial arts. The respondent included a photograph of the petitioner in a martial arts uniform displaying many medals and accolades he received in the sport.
- [40] I am satisfied, based on the letter from Dr. Varelas that the petitioner was not able to work for six months following his surgery at the end of February 2020. However, I am not satisfied that the petitioner is permanently disabled and will be unable in the future to obtain a job which would accommodate any physical limitations he might have.
- [41] I am not satisfied that the petitioner has been honest and forthcoming about his ability to earn an income, outside of the specific period referred to by Dr. Varelas.
- [42] I find that the petitioner has established that as of February 28, 2020 there has been a material change in circumstances which would change the basis upon which Mr. Justice Gower made the order in March 5, 2015 imputing income in the amount of \$53,742 to the petitioner. Beginning February 2020, I accept that the petitioner will be off work as a result of his medical issues. As such, I find that as of February 28, 2020, the petitioner's annual income is \$6,440. However, as Dr. Varelas did not indicate that the petitioner was permanently disabled from working. As a result, I suspend the petitioner's ongoing monthly child support and s. 7 obligations from March 12, 2020 to March 1, 2021 only. I have suspended the petitioner's child support obligation for one year from the date of his surgery, to give him time to address any medical follow up and allow him to re-enter the workforce.

- [43] Beginning on March 1, 2021, the petitioner's child support and s. 7 expense obligations as set out in the decision of Mr. Justice Gower will be reinstated.
- [44] At any time after February 1, 2021, the petitioner has leave to bring a new application to vary child support. If the petitioner maintains his position that he cannot work, his application must be supported with an opinion from a medical professional and full evidence of his efforts to obtain work or generate an income.

Should the petitioner's arrears be reduced?

- [45] As of June 30, 2020, the respondent states that the petitioner is in arrears \$63,610.85 for unpaid child support, s. 7 expenses, interest and default fees.
- [46] The petitioner seeks to reduce child support arrears pursuant to s. 174 of the FLA. Pursuant to s. 174 the court may "reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears."
- [47] There is a heavy burden on the party seeking to reduce or cancel arrears: *D.M.H.P. v. R.J.C.P.*, 2018 BCSC 1755 at para 73. The leading case is *Earle v. Earle*, 1999 BCSC 289, which concluded that the applicant must provide detailed and full financial disclosure showing the change is significant and long lasting, the change was real and not one of choice, and every effort was made to earn money during the time in question but those efforts were not successful.
- [48] In the case before me, I am not satisfied that the petitioner has met the heavy onus on him to demonstrate that the changes to his health which he says prevent him from working are significant and long standing. There is evidence before me that for his entire life the petitioner has had orthopedic and neurological issues which affect his gait and coordination. He says that his problems worsened in 2011, but he has not provided an opinion to that effect from a medical professional. The only evidence from a medical professional as to how his medical issues affect his ability to work is the letter from Dr. Varelas who gave the opinion that the petitioner would not be able to work for six months after his surgery on February 28, 2020.
- [49] While the petitioner has not reported income of any great amount from 2011 to 2019, I am not satisfied that this is because he is unable to find work. The only evidence he has provided regarding his ability to work is one paragraph where he states "Between 2013 and 2019, I had sent out approximately 4,000 resumes to all levels of jobs. I had many interviews, but I was always denied in the end. I suspect this was due to my appearance and my inability to handle the physical requirements of the jobs. I cannot walk more than 200 metres at a time."

- [50] This statement by the petitioner is simply not adequate to support an order reducing arrears. The onus is on the petitioner to provide evidence of what jobs he has applied for, what interviews he has had, and the outcome of his efforts. Has the petitioner applied to any programs which assist in job placements, has he attended any retraining programs, what research has he done to find jobs which would accommodate his physical restriction on walking?
- [51] The petitioner has simply not met the onus upon him to show that it would be grossly unfair to pay the arrears outstanding against him. I am not satisfied, based on the evidence before me, that the petitioner was incapable of earning an income during the period 2015 to February 2020.

Conclusion

- [52] The petitioner's obligation to pay child support pursuant to the Order of Mr. Justice Gower dated March 2, 2015 is suspended from March 12, 2020 to March 1, 2021.
- [53] The petitioner's child support arrears which have accrued between March 12, 2020 and the date of this order are cancelled. All other arrears remain outstanding.
- [54] The respondent was substantially successful on this application, notwithstanding the orders made in favour of the petitioner set out above. As such, I order costs of this application in favour of the respondent.

"Baker J."

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