

CANADA / JUDGMENT

Hamilton v. Brownsword

2022 BCSC 843

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 843 Hamilton v. Brownsword IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Hamilton v. Brownsword, 2022 BCSC 843 Date: 20220426 Docket: E102072 Registry: Vancouver Between: Anne Hamilton Claimant And Andrew Edward Brownsword Respondent Before: The Honourable Justice Blake Oral Reasons for Judgment (In Chambers) Counsel for Claimant: F. K. Robin Counsel for Respondent: J.P. Lewis Place and Date of Hearing: Vancouver, B.C. April 19, 2022 Place and Date of Judgment: Vancouver, B.C. April 26, 2022

- [1] THE COURT: The consent order of Justice Smith dated May 2, 2012 (the "2012 Order") dealt with all issues arising from the breakdown of the parties' relationship. Mr. Brownsword brings an application to review the 2012 Order, asking that his spousal support obligations to Ms. Hamilton be terminated immediately, or in the alternative, asking that his obligation terminate no later than September 1, 2024, that income be imputed to her, and that his guideline income be limited to his salary. While the 2012 Order does not indicate which statute it was made pursuant to, counsel agreed that Mr. Brownsword properly brought his application under the Family Law Act, S.B.C. 2011, c. 25, [FLA] and that in considering his application it is the FLA that governs. Brief Background
- [2] The parties commenced a marriage-like relationship on September 1, 1998, and separated on June 4, 2009. They have one daughter, M.B., who was born February 10, 2004 and is currently 18 years old. Since the parties' separation, M.B. has lived primarily with her mother and spends holidays and every other weekend with her father. The parties agree that M.B. has a number of medical challenges, including a diagnosis of Developmental Coordination Disorder and Autism Spectrum Disorder, which render it possible, if not probable, she will continue to be a child of the marriage after her 19th birthday. She has recently been approved for the designation of a "Person With A Disability". While she will finish Grade 12 this spring, she will be attending a further year of school to assist in the development of life skills for students with special needs. The parties each adduced a significant amount of evidence as to how much care M.B. requires, her current circumstances, and their thoughts about her potential future. However, the issue of M.B.'s circumstances, and Mr. Brownsword's obligation to pay child support after her 19th birthday, are not before me on this application, and so much of this evidence was not relevant for the specific issue I must determine on this application.

- [3] The 2012 Order was a consent order entered into after the parties successfully mediated all issues arising out of the breakdown of their relationship on February 10, 2012. At that time, M.B. was eight years old and Ms. Hamilton was struggling with her own significant health issues. She has not been employed in any manner since March 2001. The 2012 Order provided that Mr. Brownsword's obligation to pay spousal support would be:
- (a) a one-time lump sum payment of \$125,000; and
 - (b) monthly spousal support on the low end of the range of the Spousal Support Advisory Guidelines [SSAG], commencing September 1, 2011 and adjusted annually.
- [4] The 2012 Order did not specify the duration of Mr. Brownsword's spousal support obligation, did not set out any requirement that Ms. Hamilton commence working, and did not require that any income be imputed to her. It expressly provides that at any time after his 55th birthday, which I am advised is in February 2023, Mr. Brownsword is "at liberty to change his employment or retire, fully or partially, at any time in his sole discretion" and that any continuing obligation of support shall be based on his actual income at the time of the review "with no attribution of income to him based on his previous employment or any implied obligation to continue to work in any particular capacity on a full-time basis, it being acknowledged and agreed that he has no such obligation after his 55th birthday." (paragraph 32(f) of the 2012 Order).
- [5] The 2012 Order provided for annual reviews of quantum of child support and spousal support, which have occurred, and also provided in paragraph 32(d) for a review of both spousal support and child support in the following circumstances:
- a) if there is a material change in circumstances, such as custodial changes, a change of M.B.'s primary residence, or a change in employment;
 - b) any pension or disability pension is received by the claimant;
 - c) the claimant lives in a marriage-like relationship for a period of more than 24 months, or marries;
 - d) a change occurs leading to undue hardship for either party as defined by the Guidelines;
 - e) M.B. ceases to be eligible for support;
 - f) M.B.'s need for support changes by reason of reach the age of majority; or
 - g) having ceased to be eligible for support, M.B. becomes dependent and eligible for support again. The parties agree that none of these circumstances have occurred at this time.
- Position of the Parties
- [6] Mr. Brownsword brings his application pursuant to paragraph 32(e) of the 2012 Order, which provides:

- e. after August 31, 2021, both the Claimant's entitlement to and quantum of spousal support shall be reviewed with the following proviso:
 - i. any pension received by the Claimant shall be taken into consideration; ii. if the Claimant is living in a marriage-like relationship for a period of more than 24 months, or marries. His position is that paragraph 32(e) provides for a general review of Ms. Hamilton's entitlement to spousal support, and for a determination of both the duration and quantum of any spousal support obligation.
- [7] Ms. Hamilton is almost 61 years old, in poor health, and has been out of the workforce for over 21 years. Mr. Brownsword is 54 years old, turning 55 in February 2023. Currently, based on his 2020 income of \$524,356, he pays \$12,303 a month in spousal support and \$4,276 in child support. In May 2022, the parties will engage in their annual review, with the result that the June 1 payments will be based on Mr. Brownsword's 2021 income which was \$582,000. He is paid a monthly salary but also receives a bonus and realizes substantial earnings through the sale of Reserved Stock Units ("RSUs") in Oracle USA, his employer. He argues that due to the manner in which his income is paid -- by way of salary, bonus, and sale of the RSUs -- he is having to borrow money annually on a short-term basis to be able to both pay child and spousal support and cover his own living expenses. He is also experiencing complexities with the Canada Revenue Agency arising out of the appropriate tax withholdings. He argues that this is difficult for him, and causes him financial hardship, but he does not bring a financial hardship claim. Rather, he argues that he is, in his opinion, paying excessively when his current salary is compared to what he earned at the time of separation. His two remaining sets of RSUs will vest in 2022, and after that occurs, his income will be limited to his salary and any bonus. Since 2010, he has paid \$125,000 in lump sum spousal support and \$798,129 in monthly spousal support, for a total of \$923,129 in spousal support.
- [8] Mr. Brownsword argues his income has increased significantly as a result of his employment as a software engineer with Oracle Canada. He says his future with his employer is not secure, and that as he ages his productivity, endurance and focus are all diminishing. He takes the position that he will soon "age out" of his position and he wishes to plan for his retirement. His position is that Ms. Hamilton is not entitled to any further spousal support, and he wishes his spousal support obligation to Ms. Hamilton to be terminated. Alternatively, he argues that the duration of his obligation to pay spousal support should be set at no more than 13 years, in accordance with the SSAG recommendations, and he seeks an order that his obligation terminate no later than September 1, 2024 (which is 13 years after he commenced paying spousal support on September 1, 2011). Further, should spousal support continue, he seeks that income be imputed to Ms. Hamilton, and he argues that a minimum of \$60,000 should be imputed to her (being her salary when she ceased employment in March 2001). Finally, he also argues that as his total income is greater than \$350,000, his spousal support obligation should be based on his salary only, and not his line 150 income.

- [9] Ms. Hamilton argues that the parties resolved the matters arising out of the breakdown of the relationship when they reached the agreement that was reflected in the 2012 Order, and that paragraph 32(e) provided for a review of her entitlement to, and amount of, spousal support only if the two discrete circumstances set out in the paragraph occurred; namely, if she received a pension or if she was re-married or living in a marriage-like relationship for a period of more than 24 months. As neither has occurred, she says Mr. Brownsword's application for a review must be dismissed.
- [10] Ms. Hamilton argues that when the totality of the 2012 Order is considered, it reveals:
- (a) she had been unemployed since March 2001 and there was no intention of the parties to impute income to Ms. Hamilton in any anticipated circumstances;
 - (b) Ms. Hamilton was responsible for the significant majority of parenting responsibilities for M.B., and Mr. Brownsword benefited from this;
 - (c) Mr. Brownsword was entitled to adjust his spousal support obligation on an annual basis;
 - (d) Mr. Brownsword was entitled to work less or retire when he turned 55; and
 - (e) Mr. Brownsword was guaranteed that his spousal support obligation would be at the low end of the range. She says the 2012 Order clearly provided for review to occur only in specific circumstances, which have not come to pass at this time.

Analysis

- [11] Counsel for Mr. Brownsword confirmed during argument that his application is for a review of his spousal support obligations, pursuant to paragraph 32(e) of the 2012 Order, and is not for a variation of these obligations. Section 168 of the FLA sets out that an order may provide for a review of spousal support, and for this purpose may provide for the grounds on which a review will be permitted (s. 168(1)(c)) and the matters to be considered for the purpose of a review (s. 168(1)(d)).
- [12] The statutes and case law provide that a spouse can establish entitlement to spousal support on a contractual basis, a compensatory basis, and a non-compensatory basis: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, at para. 15.
- [13] I accept that Ms. Hamilton had both a compensatory and non-compensatory entitlement which resulted in the 2012 Order, which order now provides her with a contractual basis of entitlement.
- [14] Counsel agreed that a review is a hearing de novo and as such it is treated as an initial application for support. It is not necessary for Mr. Brownsword to demonstrate there has been a material change in circumstances on such an application: *Schmidt v. Schmidt*, 1999 BCCA 701. However, on such a review, the Court should take into account the potential unascertained circumstances that may have been contemplated by the parties at the time the order was made, whether those circumstances have come to pass, and adjust support in

a manner that takes these contemplated circumstances into account: *Morck v. Morck*, 2013 BCCA 186, at para. 17.

- [15] The 2012 Order properly contained specific provisions for the August 2021 review of spousal support, clearly identifying the specific circumstances in which a review was to be allowed: *Domirti v. Domirti*, 2010 BCCA 472 at para. 38.
- [16] On a review, the court must consider the specific circumstances the parties determined would be the relevant circumstances allowing the review, and must assess whether those relevant circumstances have come to pass or not. A review order permits parties to bring an application to alter support awards without having to demonstrate a material change in circumstances, but only in the narrow circumstances to which the review applies: *Domirti* at paras. 34 to 35. The Supreme Court of Canada has established that issues which are allowed to be reviewed should be clearly delineated, as "failure to tightly circumscribe the issue will inevitably be seen by one or other of the parties as an invitation simply to reargue their case": *Leskun v. Leskun*, 2006 SCC 25 at para. 39.
- [17] In these circumstances, I am not satisfied that the specific circumstances which would allow for a review of spousal support to occur have come to pass. Mr. Brownsword argues that his ability to review his spousal support obligation to Ms. Hamilton arises from the words in paragraph 32(e) of the 2012 Order that "after August 31, 2012, both the Claimant's entitlement to and quantum of spousal support shall be reviewed", and that Ms. Hamilton's entitlement to spousal support should be reviewed *de novo*. However, this argument ignores the fact that in negotiating their agreement, the parties clearly considered what factors would be relevant in determining whether a review of spousal support was warranted and those circumstances were clearly set out. Neither have come to pass.
- [18] I am satisfied that Ms. Hamilton has established that at the time of separation and the time the agreement was reached, she suffered from chronic illness, which included diagnoses of Ankylosing Spondylitis (an autoimmune disease), Crohn's disease (another autoimmune inflammatory condition), Enthesitis (an inflammatory condition), Papilledema (a compression of the optic nerves leading to vision loss) and Intracranial Hypertension, that she had not been working since March 2001, and that she had primary responsibility for the parties' special needs child. At the time of the 2012 Order, Ms. Hamilton had been out of the workforce for 11 years. Further, the 2012 Order clearly provides for Mr. Brownsword to be able to retire at the age of 55, or reduce his employment, with no imputation of income to him. It is notable the 2012 Order clearly sets out in paragraph 30 any additional variable income received by Mr. Brownsword was to be included in his income in the taxation year in which they are received, and so were to be included for the purpose of review of the quantum of both child and spousal support. However, there was no expectation that Ms. Hamilton become gainfully employed nor for any income to be imputed to her should she fail to do so. Rather, the agreement provides that she will be the primary caregiver for M.B., which she has been and continues to be.

- [19] I accept that the terms setting out the payment of spousal support, and the potential review of the same, were agreed to in recognition of Ms. Hamilton's illness and her role as primary caregiver of M.B. I find that the 2012 Order provided that without another source of income (such as pension income), or another marriage or marriage-like relationship, it was agreed that there would be no entitlement to a review in August 2021. The 2012 Order tightly circumscribes the circumstances in which Mr. Brownsword was entitled to seek a review at that time. I do not accept Mr. Brownsword's argument that the two circumstances set out in paragraph 32(e) are not the specific circumstances that must be established to entitle him to review his spousal support obligation. Both of these circumstances were already listed in paragraph 32(d), either of which would entitle a party to request a review of spousal support and child support. There was no need to repeat those circumstances within the review provisions of paragraph 32(e), unless they were the specific circumstances in which it was agreed the potential August 2021 review was to be allowed. The interpretation Mr. Brownsword argues for would render the paragraph as it was agreed to by the parties meaningless, and would allow him to re-argue spousal support provisions that were agreed to in the 2012 Order in circumstances that were not agreed to by the parties.
- [20] I find that the two potential circumstances contemplated by the parties, and specified in the 2012 Order, that would have allowed for Mr. Brownsword to review his spousal support obligations have not occurred, and he is accordingly not entitled to bring his review application. I note that there may be review of both spousal support and child support when either M.B.'s need for support changes by reason of reaching the age of majority as set out in paragraph 32(d)(vi) of the 2012 Order, or when Mr. Brownsword changes his employment or retires, fully or partially, at any time after his 55th birthday, as set out in paragraph 32(f) of the 2012 Order. I am informed by counsel the earliest these events may happen is in February 2023. Nothing in these reasons is intended to fetter the discretion of the judge hearing any future application to determine the threshold issue of entitlement, nor the duration and quantum of spousal support. Further, I make no determination on this application as to whether Ms. Hamilton's current medical diagnosis renders her either wholly or partially disabled such that she is not able to work either part-time or full-time.
- [21] Mr. Brownsword's application is dismissed and Ms. Hamilton is entitled to her costs of this application, to be assessed under Scale B of Appendix B to the Supreme Court Family Rules, B.C. Reg. 169/2009. "Blake, J."

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