

CANADA / JUDGMENT

Jennens v. Jennens

2020 BCCA 59

COURT

British Columbia Court of Appeal

DECIDED

14 February 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 59 Jennens v. Jennens

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Jennens v. Jennens,

2020 BCCA 59

Date: 20200214

Docket: CA45963

Between:

Jaclyn Eileen Jennens

Respondent

(Claimant)

And

Bradley Jennens

Appellant

(Respondent)

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia dated

February 15, 2019 (Jennens v. Jennens, 2019 BCSC 180,
Vancouver Docket E133212).

Counsel for the Appellant:

J.D. Nelson

Counsel for the Respondent:

N.D. Allen

Place and Date of Hearing:

Vancouver, British Columbia

January 9, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 14, 2020

Written Reasons by:

The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Abrioux

Summary:

The parties were in a marriage-like relationship for 19 years before separating. In 2015, the parties entered into a consent order regarding the appellant's child and spousal support obligations. The appellant's income increased three-fold in the three years following the consent order, and the respondent applied for a variation of support. A chambers judge varied the spousal support, retroactively and prospectively, and ordered that there be an annual review of spousal support until the time set for its termination. On appeal, the appellant argues the judge erred in finding that there was a material change in circumstances justifying a variation of spousal support. Held: Appeal dismissed. The judge did not err in holding the parties had not contemplated the appellant's significant rise in income at the time of entering into the consent order.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

- [1] The appellant, Mr. Jennens, appeals the order of a chambers judge dated February 15, 2019, varying his spousal support obligations on a retroactive and prospective basis, and providing for an annual review of spousal support until the time set for its termination. In making the variation, the judge found that there was a material change in circumstances from the time of the consent order imposing the spousal support obligations on the basis that the parties had not contemplated when they agreed to the consent order that the appellant's income would increase to the extent it did.
- [2] The appellant contends that the judge made a palpable and overriding error of fact, or an error of mixed fact and law, in finding that the parties did not contemplate the increase in the appellant's income. At the hearing of the appeal, the appellant also argued that the judge erred in ordering that there be an annual review of the appellant's spousal support obligation.
- [3] For the reasons that follow, I would dismiss the appeal.

Background

- [4] The parties began cohabiting in 1993 and had three children after they were married. They separated near the end of 2012. During the marriage, the appellant worked in a home construction business. The respondent, Ms. Jennens, was primarily a stay-at-home mother but did some bookkeeping services for the business.
- [5] In 2011, the appellant joined up with his step-brother in a home construction business that was carried on through a company named Vernon Summerhill Fine Homes Ltd. ("Summerhill"), the shares of which were owned equally by them. They decided to go separate ways at the end of 2014 -- the appellant retained all of the shares in Summerhill, his step-brother received half of Summerhill's assets and the ongoing contracts were allocated between them.
- [6] In January 2015, after the respondent had commenced the family proceeding, the parties jointly retained a chartered business valuator to estimate the amount of income available to the appellant pursuant to the Federal Child Support Guidelines, SOR/97-175, and the Spousal Support Advisory Guidelines for 2011, 2012 and 2013. The valuator calculated these amounts to be \$84,000, \$74,000 and \$102,000, respectively.
- [7] Shortly before the parties agreed to the May 5, 2015, consent order, the appellant provided his 2014 income tax return to the respondent. It showed his line 150 income to be \$100,300. During the negotiations leading to the consent order, the appellant's position was that his income could go down because he was no longer working with his step-brother and he now had a profit-sharing arrangement with his employees. The appellant wanted his income for the purpose of ongoing support to be set at \$86,667, being his average of the amount calculated by the valuator for the years 2011-2013.

- [8] The consent order recited that the appellant's Guideline income was \$94,840 per annum and that the respondent's Guideline income was \$30,000 per annum. The consent order dealt with the division of family property, child support and spousal support. It provided that, commencing in 2016, the parties would exchange financial information by July 1 and would review the amount of table child support and special expenses by July 31 of each year. With respect to spousal support, it stipulated that the appellant was to pay the respondent \$1,034 per month until April 1, 2028, after which the appellant's obligation would terminate.
- [9] In August 2016, the parties negotiated an increase in the child support based on the income available to the appellant rising to the level of between \$270,000 and \$280,000. There was no discussion at the time about a change in spousal support.
- [10] The income available to the appellant continued to increase and, in September 2018, the respondent filed a notice of application for orders varying child and spousal support. At the hearing of the application before the chambers judge on February 5, 2019, the parties were agreed that the respondent's income for support purposes was \$30,000 for each year from 2015 and that, with one exception in respect of which the judge ruled in favour of the appellant, the pre-tax corporate income of Summerhill for 2015, 2016 and 2017 (after adjustment for expenses the judge found to be ineligible) was \$307,679, \$385,256 and \$261,265, respectively.

Decision of the Chambers Judge

- [11] In his reasons for judgment (indexed as 2019 BCSC 180), the judge first dealt with the application to vary the child support. Turning to the application to vary spousal support, the judge made reference to the test for variation under s. 17(4.1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), which requires a finding of a change in circumstances since the order was made or last varied. The judge quoted at length from *L.M.P. v. L.S.*, 2011 SCC 64 at paras. 29-37, where the Court described what constitutes a material change in circumstances. Relying on *Dedes v. Dedes*, 2015 BCCA 194 at paras. 25-26, the judge noted that the question turns on what the parties actually contemplated at the relevant time, rather than what one party knew or reasonably foresaw at the time.
- [12] The judge rejected the appellant's argument that at the time of the consent order the parties contemplated that the appellant's future income would be uncertain and that the respondent elected the certainty of fixed amount payments for 13 years. The judge found that the parties did not contemplate that the appellant's income would become significantly higher than \$94,840 and certainly not three times as high. He found that there would likely have been different terms in the consent order if the parties had contemplated that the appellant's available income would increase three-fold. He concluded, therefore, that there had been a material change in circumstances warranting a variation of spousal support.

- [13] The judge ordered retroactive spousal support and ongoing spousal support. The order signed by the judge ordered retroactive spousal support from August 1, 2016, to February 1, 2019, in the amount of \$207,655 after deducting payments that had been made, and ongoing spousal support in the amount of \$5,899 per month commencing March 1, 2019. The judge also ordered a variation of the consent order to provide for an annual review of spousal support until August 1, 2027.

Discussion

- [14] As noted by the chambers judge, the relevant statutory provision is s. 17(4.1) of the Divorce Act:

Factors for spousal support order

(4.1) 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.

- [15] As also noted by the chambers judge, the leading authority on variation of spousal support is L.M.P. The judge quoted paras. 29-37 of that decision, the most relevant of which to this appeal are as follows:
- [32] That "change of circumstances", the majority of the Court concluded in Willick [Willick v. Willick, [1994] 3 S.C.R. 670], had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" (p. 688). G. (L.) [G. (L.) v. B. (G.), [1995] 3 S.C.R. 370] confirmed that this threshold also applied to spousal support variations.
- [33] The focus of the analysis is on the prior order and the circumstances in which it was made.
- [34] The decisions in Willick and G. (L.) also make it clear that what amounts to a material change will depend on the actual circumstances of the parties at the time of the order.
- [35] In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances (see *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40, at para. 49). Certain other factors can assist a court in determining whether a particular change is material. The subsequent conduct of the parties, for example, may provide indications as to whether they considered a particular change to be material (see *MacPherson J.A.*, dissenting in part, in *P. (S.) v. P. (R.)*, 2011 ONCA 336, 332 D.L.R. (4th) 385, at paras. 54 and 63).
- [16] Both parties also rely on the following paragraph of Dedes:
- [25] As articulated in L.M.P., the test for material change is based not on what one party knew or reasonably foresaw, but rather on what the parties actually contemplated at the time the order was entered by agreement. A function of the material change threshold is to prevent

parties from re-litigating issues that were already considered and rejected; in such cases, an application to vary would amount to an appeal of the original order (see Gordon [Gordon v. Goertz, [1996] 2 S.C.R. 27] at para. 15). As was stated by L'Heureux-Dubé J. in Willick at p. 734, "the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the Divorce Act provisions". See also G. (L.) v. B. (G.), [1995] 3 S.C.R. 370 at paras. 49–51 and Jakob v. Jakob, 2010 BCCA 136 at para. 40.

[Underlining in original.]

- [17] On appeal, the appellant says the judge made a palpable and overriding error of fact, or an error of mixed fact and law, by finding that the parties did not contemplate an increase in his income. The appellant maintains that the parties did contemplate that his income would increase and, therefore, there had not been a material change in circumstances at the time of the respondent's application. As such, he argues the judge erred in varying the spousal support.
- [18] In *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10, the Supreme Court of Canada confirmed that appellate courts must not interfere with findings of fact made by a judge unless the judge made a palpable and overriding error. A similar degree of deference must be accorded to a judge's inferences of fact (para. 20), which should be disturbed by an appellate court only if they are clearly wrong (para. 22). With respect to questions of mixed fact and law, the standard of review is correctness if there is an extricable legal principle, but the standard is one of palpable and overriding error if there is not an extricable legal principle (paras. 26-36).
- [19] The appellant has not identified an extricable legal principle in respect of which it is asserted the judge erred. The issue, then, is whether the judge made a palpable and overriding error in finding that the parties did not contemplate that the appellant's income would become significantly higher than the amount of \$94,840 attributed to him in the consent order.
- [20] The appellant correctly asserts that the onus was on the respondent to prove a material change in circumstances (see *L.M.P.* at para. 31), and says that the respondent did not lead any evidence that the parties did not contemplate an increase in the appellant's income. However, the respondent did lead such evidence. In one of her affidavits in support of the variation application, the respondent deposed that, in the negotiations leading to the consent order, the appellant wanted to have his income set at the average of his 2011, 2012 and 2013 incomes (\$86,667), being a decrease from his 2013 income, on the basis that he was no longer working with his step-brother and was not guaranteed to earn a similar income because Summerhill's employees were now to have a profit-sharing arrangement.

- [21] The respondent did not agree to the figure of \$86,667, but the amount attributed to the appellant in the consent order (\$94,840) was less than the amount calculated by the valuation for 2013 (\$102,000). It was open to the chambers judge on this evidence to infer that, while the parties contemplated that the appellant's income would fluctuate to some extent, they did not contemplate that it would increase significantly. The drawing of this inference was not clearly wrong, and is entitled to deference by this Court.
- [22] The appellant argues that his income was bound to increase because Summerhill's business had been split and he was not going to have to share its income with his step-brother any longer. In my opinion, neither logic nor the evidence supports this argument. While it is true that the appellant would no longer have to split Summerhill's income with his step-brother, logic suggests that Summerhill's income would be cut approximately in half because one-half of the contracts and other assets were allocated to the appellant's step-brother and would no longer generate income for Summerhill. The evidence was that the appellant was representing to the respondent that his income from Summerhill was likely to be reduced as a result of the split with his step-brother.
- [23] The appellant says the present appeal is similar to the appeal in *Sandy v. Sandy*, 2018 BCCA 182. In that case, the parties had previously settled a spousal support obligation by agreeing to a lump sum payment, and the judge varied the spousal support by ordering ongoing monthly payments (in addition to the lump sum payment) on the basis that the payor's income had increased since the settlement. On appeal, the Court held (at para. 66) that the judge had erred in drawing the inference that the increase in the payor's income had been unforeseen.
- [24] In my view, this appeal is not comparable to *Sandy*. In that case, there was evidence that the payee spouse was aware at the time of the settlement that the payor's income could fluctuate significantly in the future because there had been increases in his income of approximately \$100,000 in three of the four years preceding the settlement. Here, there were fluctuations in the appellant's income in 2011, 2012 and 2013 in the order of \$10,000 and \$20,000, but these fluctuations were nowhere close to the magnitude of the \$200,000 increase in the appellant's available income in 2015 and 2016.
- [25] The appellant relies on two particular aspects of the evidence to argue that the judge's finding was wrong. First, he points to the fact that the consent order included a review clause for child support but not a review clause for spousal support, and he says this shows that the parties chose to achieve certainty and finality and agreed that neither the duration nor the quantum of spousal support would be disturbed in the future. Second, the appellant relies on the fact that the respondent was aware in 2016 that his income had increased and took steps to vary child support, but did not ask for a change in spousal support.
- [26] The significance of a review clause in a support order is that the amount of support can be varied at the time of the review without the applicant having to show a change in circumstances. A review clause is a common provision in child support orders because s.

14(a) of the Federal Child Support Guidelines provides that any change that would result in a different child support order is a change in circumstances giving rise to a variation order for the purpose of s. 17(4) of the Divorce Act. All that the absence of a review clause in a spousal support order means is that the applicant for a variation order must show a material change in circumstances. The absence of a review clause is not evidence of an agreement between the parties that the amount of support would remain unchanged even if there was a material change in circumstances. Nor is it evidence that at the time of entering into the consent order the parties contemplated that the income of the appellant would increase significantly in the future without any variation in the amount of the spousal support.

- [27] The appellant says that the fact the respondent did not ask for a change in spousal support when they were negotiating a change in child support in 2016 is evidence that the parties contemplated, at the time of entering into the consent order, that the appellant's income could increase without there being any change in spousal support. It may provide some evidence in that regard, but it is not sufficient to make the judge's finding clearly wrong. There are other reasons why the respondent may not have asked for an increase in spousal support at the time, including the respondent's evidence that the appellant told her that spousal support was non-negotiable and she believed him.
- [28] In addition to maintaining that the judge's overall finding was wrong, the appellant points to two paragraphs of the judge's reasons which he says contain palpable errors that infected the judge's finding. In para. 34, the judge said the following:
- [34] [The appellant's] decision to increase his child support payments effective August 1, 2016 is laudable but he refused to disclose the 2016 financial documents as required by the Final Order until November 2017.

The appellant says it was wrong to refer to his increase in child support payments as being laudable because it was not done voluntarily but as a result of pressure from the respondent, and the reference to the 2016 financial documents was wrong because the August 1, 2016, increase in child support payments was based on the 2015 financial documents.

- [29] In my view, the characterization of the appellant's agreement to increase child support without requiring the respondent to make a court application is not a palpable error and, indeed, it is favourable to the appellant. Next, I do not interpret the judge to have said that the August 1, 2016, increase was based on the 2016 financial documents because he states that they were not disclosed until November 2017 and it is clear from earlier in the reasons that the judge understood the 2016 financial documents related to the adjustment in child support to be made in 2017. In addition, even if the judge erred, his errors were not overriding because para. 34 is contained in the portion of the reasons dealing with the issue of retroactive variation of child support, not variation of spousal support.
- [30] The other paragraph which the appellant says contains a palpable error is para. 43:

[43] I do not accept the respondent's argument that, at the time of the Final Order, the parties contemplated that the respondent's future income was in question and that the claimant elected to have the certainty of a fixed amount of spousal support for 13 years until April 1, 2028. The parties were married for 19 years before they separated. Given the length and circumstances of their marriage, the claimant was entitled to indefinite spousal support. I agree with the submission of counsel for the claimant that the 13 year limitation of his spousal support obligation was to his benefit, not hers.

The appellant says it was wrong for the judge to have referred to the limitation of the spousal support obligation as being 13 years. He says the duration of spousal support was 15 years because the consent order specifically confirmed that he had paid spousal support for the two years following the parties' separation at the end of 2012.

[31] In para. 43, the judge was rejecting the appellant's argument that in entering into the consent order the respondent benefited from the certainty of a fixed amount of spousal support for a specified period of time. The judge was not in error in referring to the specified period of time as being 13 years because that was the length of time the respondent was to receive spousal support after entering into the consent order. The extra two years of spousal support referred to by the appellant had already been received by the respondent before she entered into the consent order. Even if the judge could be considered to have made an error in this regard, it was not a material error because the judge was of the view that the respondent was entitled to indefinite spousal support. In concluding that the time limitation of the spousal support was to the appellant's benefit and not the respondent's, it would not have made any difference if the limitation was 13 years or 15 years.

[32] Finally, at the hearing of the appeal, the appellant raised as a ground of appeal that the judge erred by ordering an annual review of his spousal support obligation until August 1, 2027. This ground of appeal was not raised in the amended notice of appeal or the appellant's factum, and no advance notice that it was going to be raised at the hearing was given to the respondent.

[33] Rule 30 of the Court of Appeal Rules, B.C. Reg. 297/2001, provides that the Court may permit a party to use arguments, raise points of law or cite authorities that were not used, raised or cited in the party's factum. While it is the practice of the Court to liberally allow new authorities to be cited at the hearing of the appeal, the Court does not generally give permission for a party to raise a point of law unless the other party could reasonably have expected from the party's factum that it would be raised at the hearing of the appeal: *Sutton v. Alaska Air Group, Inc.*, 2014 BCCA 58 at paras. 5-6. In this appeal, the appellant not only wishes to raise a point of law not contained in his factum, but also wants to pursue an entirely new ground of appeal relating to a provision in the judge's order that was not challenged in his factum. In these circumstances, I would decline to deal with the appellant's argument regarding the annual review of the appellant's spousal support obligation ordered by the judge.

Conclusion

[34] The appellant has not demonstrated that the judge was clearly wrong when he inferred from the evidence that the parties did not contemplate at the time of the consent order that the appellant's income would increase significantly in the future. It follows that he did not err in concluding there had been a material change in circumstances entitling him to make an order varying the spousal support payable by the appellant.

[35] It is for these reasons that I would dismiss the appeal.

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Abrioux"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/00/2020BCCA0059.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/jennens-v-jennens-2020>

Prepared on 27 October 2026 · Esheria