
CANADA / JUDGMENT

K.D. v. N.D.

2014 BCCA 70

COURT

British Columbia Court of Appeal

DECIDED

21 February 2014

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2014 BCCA 70 K.D. v. N.D.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

K.D. v. N.D.,

2014 BCCA 70

Date: 20140221

Docket: CA041110

Between:

K.D.

Respondent

(Plaintiff)

And

N.D.

Appellant

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Chiasson

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

July 19, 2013 (K.D. v. N.D., Vancouver Docket E080488).

The Appellant appeared in person

The Respondent appeared in person

Place and Date of Hearing:

Vancouver, British Columbia

February 6, 2014

Place and Date of Judgment:

Vancouver, British Columbia

February 21, 2014

Written Reasons by:

The Honourable Mr. Justice Chiasson

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Lowry

Summary:

The appellant sought cancellation of spousal support on a review authorized by the trial judge in divorce proceedings. The chambers judge revised the appellant's income for the purposes of the SSAG from \$153,809 to \$147,138 and the imputed income of the respondent from \$31,284 to \$40,000. The judge declined to order a specific review and left the parties to apply to vary if there was a material change in circumstances. On appeal, the appellant advances five submissions: the case law does not support a spousal support order with no end date; spousal support is not an automatic right; self-sufficiency is an objective of the Divorce Act; he should not bear the costs of the respondent's choices; the SSAG indicate that net income is to be used in the calculation and that the duration of support should be up to one year per married year. Held: appeal dismissed. The judge did not err exercising his discretion not to order a specific review. He did not proceed on the basis the respondent automatically had a right to spousal support. While recognizing that a spouse does not have a duty to become self-sufficient, the judge clearly was aware of the respondent's need to strive for self-sufficiency. The judge carefully considered the positions of the parties and the choices they made. The starting point for an analysis under the SSAG is gross income. Spousal support with child support is calculated on the basis of net income. The parties used "MySupportCalculator.ca" to calculate an appropriate range for spousal support. It deals with net income. The duration of spousal support with child support differs from the duration without child support, which is the measure used by the appellant.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

- [1] This is an appeal from an order varying spousal support. As the chambers judge stated, "[t]he proceedings between [the] parties have been complicated, protracted and expensive". I provide a short recapitulation of the history of the proceedings in order to place the order under appeal into context.

Background

- [2] The parties were married in August 1999. They separated in June 2006, but remained in the matrimonial home in an attempt to reconcile. The respondent left the workforce in 2004 in order to concentrate on fertility treatments. Prior to that, she had worked for 18 years as an administrative assistant earning \$30,000 to \$50,000 per year. As a result of the fertility treatments, daughters were born in May 2005 and April 2007. The parties separated formally at the end of that year.
- [3] An order for divorce was pronounced by Madam Justice Fisher on July 23, 2009. She found the appellant's income pursuant to the Spousal Support Advisory Guidelines (Ottawa: Dept. of Justice, 2008) [SSAG] to be \$153,809 and the respondent's SSAG income to be \$0. The appellant was ordered to pay child support for the parties' two daughters and to pay spousal support as follows:
- a) \$2,800 per month commencing August 1, 2009 and continuing until August 31, 2010; and
 - b) \$1,900 per month commencing September 1, 2010, based upon the [respondent] being imputed to have an income of \$31,284 for spousal support purposes, and continually thereafter subject to either party's right to apply for a review of the duration and quantum of the [respondent's] spousal support on or after September 1, 2012.
- [4] Unexpectedly, three months after the trial judgment, the respondent became pregnant and gave birth to a boy on June 1, 2010. In the fall of 2010, she brought an application to vary the spousal support order by postponing the date on which income would be imputed to her.
- [5] On December 16, 2010, on the basis of changed circumstances, Madam Justice Boyd varied the order of Fisher J. as follows:

The [respondent] will not be imputed with any income commencing September 1, 2010; rather the [respondent] will be imputed to have an income of \$31,284 for spousal support purposes commencing June 1, 2011. The [appellant] will pay to the [respondent] for her support the following:

- a) \$2,800 per month commencing August 1, 2009 and continuing until May 31, 2011; and

- b) \$1,900 per month commencing June 1, 2011, based upon the [respondent] being imputed to have an income of \$31,284 for spousal support purposes, and continually thereafter subject to either party's right to apply for a review of the duration and quantum of the [respondent's] spousal support on or after July 1, 2013.

An appeal of this order was dismissed by this Court on December 15, 2011.

Chambers decision

[6] On June 12, 2013, the appellant filed an application for a review of the order of Fisher J. He sought the elimination of spousal support before the end of 2013. On July 19, 2013, Mr. Justice Steeves varied the order as follows:

- a) The Claimant's salary, for the purposes of ongoing Spousal Support calculations effective September 1, 2013, will be \$147,138.

[b)] The Respondent is to be imputed a salary of \$40,000 per year for the purposes of ongoing spousal support calculations effective January 1, 2014.

[7] The judge discussed the decision of Fisher J. and then turned to the situation as it was before him. He stated:

[5] I should also add that the order of Madam Justice Fisher for spousal support was based on Guideline income for the claimant in the amount of \$153,809. At that time the respondent had no employment income. However, Madam Justice Fisher concluded that some income should be imputed to her for the following reasons:

1. That she had substantial work experience before and in the first years of the marriage;
2. She is able to work if she decides to do so;
3. She was not prepared to make any efforts to work [for at] least the next four years;
4. She had an obligation to make reasonable efforts to support herself;
5. She is able to work under the access schedule put in place.

[6] For these reasons, income in the amount of \$31,284 was imputed to the respondent to begin in September 2010. The intention was to give her an opportunity to make reasonable efforts towards economic self-sufficiency. The [appellant] is currently paying \$1,900 per month in support. There are no arrears.

[7] The current situation as of today is that the respondent has been working part-time since June 2012. She works four hours per day and earns \$15 per hour. She estimates that her employment income will be about \$16,770 for 2012, at least for the purposes of calculating spousal support.

- [8] The respondent also anticipates working more hours and possibly even full-time. She had some medical difficulties some time ago, but they have resolved. She describes a return of some of those symptoms recently.
- [9] For his part, the [appellant] currently has income of \$147,138. However, he says that his employment is not secured because his employer has lost a large client and is downsizing. A large number of other employees have been laid off so far.
- [8] At para. 10, the judge set out the appellant's reasons for seeking to eliminate spousal support:
1. The respondent is capable of earning more than her current earnings of about \$16,000. She is also capable of earning more than the income of \$31,284 imputed to her in 2009. According to the [appellant], there are positions that the respondent can work at that pay in the range of \$40,000 to \$60,000. He has told her about these positions, but according to the claimant she insisted on working part-time.
 2. The respondent is understating her income because she receives money from her family, a male friend (the father of her third child) and investments she has not declared.
 3. His income, the [appellant's], has decreased since 2009.
 4. His employment security in the near future is in jeopardy.
- [9] He then referred to the decision of Mr. Justice Groves in *Bockhold v. Bockhold*, 2010 BCSC 214, and adopted a number of propositions from that case:
1. A spouse's illness and disability is relevant to spousal support even if there is no causal connection between the disability and the marriage, para. 27.
 2. In some cases employment and self-sufficiency are not achievable, para. 26.
 3. No "duty" to achieve self-sufficiency exists. Failure to achieve self-sufficiency is one factor among others to consider, para. 47.
 4. The authorities generally favour an indefinite order, para. 56.
 5. A spouse may never be able to achieve a level of self-sufficiency similar to the marital standard without continuing [support], para. 58.

The appellant observes that in proposition 4 the judge did not include the words of Groves J.: "in a lengthy marriage".

- [10] At para. 12, the judge concluded that "it is clear that, for the most part the respondent's income is what she says it is". He noted that the respondent had received a loan from her parents for legal costs and that the father of her son had paid for some of the expenses related to the birth of the child.

- [11] The judge referred to the fact the respondent had consolidated some small bank accounts and stated at para. 13 that "contrary to the suspicions of the [appellant], these do not reflect additional income". He held that the appellant had "overstated the respondent's expenses".
- [12] The judge commented at para. 17 that the respondent "is now working part-time, looking after the young children" and found that she was "generally looking at better prospects involving more income. The judge stated that the respondent is entitled to spousal support and, referring to the decision of Fisher J., observed that it was envisioned that "spousal support would be payable up to 17 years".
- [13] He continued at para. 18: "[n]onetheless, it is the case that the respondent was put on notice with the order and judgment in July 2009 that she has to move towards economic self-sufficiency". The judge rejected the appellant's contention that the respondent did not want to work at all or was willing to work only part-time as not "supported by the evidence of the current situation". He stated at para. 19, "I accept that the respondent has been moving towards economic self-sufficiency".
- [14] At para. 20, the judge observed that "in the year since her recovery from surgery, the respondent has made good progress towards economic self-sufficiency", adding, "I conclude that further progress will be made".
- [15] The judge adjusted the appellant's income from \$153,809 to \$147,138. He added, "[t]o be clear, this is line 8 of the [appellant's] Form 8", filed pursuant to the rules of the Supreme Court. The income to be imputed to the respondent was adjusted from \$31,284 to \$40,000 and stated to be the amount on line 8 of her Form 8.
- [16] There was uncertainty whether a small amount paid to the respondent by the boy's father for support of her son should be included in her Form 8 income. The judge stated that the respondent did not hide the fact she received the money, but had not included it on her Form 8 because she did not know whether she should do so. On "an interim basis" the judge directed that the money should be included as "other income", stating that "[i]f required, written submissions can be provided on this issue and I will consider it again" (at para. 25).
- [17] At paras. 26-29, the judge discussed whether he should order a specific review of spousal support in the future, stating:
- [26] I reviewed with the parties whether a review in the future was appropriate, as was done after the July 2009 order. Both parties are agreed that they have been to court too often. It has taken a toll emotionally and financially. Unfortunately there are still matters in dispute such as costs, division of assets such as airline points and drafting of orders. I think to their credit, the parties do not wish to come to court again if it can be avoided, and that is certainly understandable.

- [27] For these reasons, I conclude that a future specified review is not warranted in this case. Some security is required on an ongoing basis, and a future review obviously is counterintuitive to that purpose.
- [28] Having said that, as discussed in argument, it is open to either party or both under s. 17(1) and (4.1) of the Divorce Act, R.S.C., 1985, c. 3 to apply for a variation of spousal support if there is a change in the condition, means, needs or other circumstances of either party.
- [29] This right of application for variation exists apart from this order or other orders, and I raise it because of the claimant's concern about his employment security as well as the respondent's concern about possible health issues.

The appellant's position

- [18] The appellant presented over three pages of reasons for appealing this order. He advances five submissions: the case law does not support a spousal support order with no end date; spousal support is not an automatic right; self-sufficiency is an objective of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.); he should not bear the costs of the respondent's choices; the SSAG indicate that net income is to be used in the calculation and that the duration of support should be up to one year per married year. I shall address each of these issues.

Discussion

No end date

- [19] The appellant contends that the judge erred in failing to set an end date to spousal support. He referred to a number of cases to support his proposition. The respondent relied on other cases where no end date was set.
- [20] Pursuant to s. 15.2 of the Divorce Act, the court has discretion to order periodic spousal support and to make such an order for a definite or indefinite period. The appellant asserts that the parties were married for six years, which he describes as a short marriage. In fact, the parties appear to have been together for at least eight years and were married for ten years. Fisher J. described the marriage as "of medium duration". I am not aware of any authority that requires a judge to set a definite period of spousal support depending on the duration of the marriage. The length of the marriage is one factor a judge must consider when considering spousal support (s. 15.2(4)), but it is not a determinative factor in considering the quantum, duration or right to review spousal support.
- [21] In complaining that there is no end date, the appellant appears to be seeking a "time-limited" support order. Such an order has been described as "unusual" and reflective of a "clean break" model of marriage breakdown (Stein v. Stein, 2006 BCCA 391 at para. 57). In the present case, the appellant sought cancellation of his spousal support obligations. The financial circumstances of the respondent and the ages of the children do not suggest that a time-limited order would have been appropriate. The issue addressed by the judge was

whether a right of review as of a certain date should be ordered, as was done in 2009.

- [22] The judge expressed reasons for his exercise of discretion not to order "a future specified review". He made it clear that if circumstances change, an application to vary can be made. I see no basis on which this Court could interfere with the judge's exercise of discretion to decline to order a specific review.

Spousal support not an automatic right

- [23] The appellant points out that a spouse is not automatically entitled to spousal support. In my view, the judge did not proceed on the basis that the respondent had an automatic right to support. He considered the circumstances of the respondent and the children. She is caring for three young children and is striving to increase her economic prospects. The judge held that the respondent "is entitled to spousal support in the circumstances". I see no basis on which this Court could interfere with the various findings of fact that led to the judge's conclusion.

Self-sufficiency an objective of the Divorce Act

- [24] The chambers judge referred to the absence of a duty to achieve self-sufficiency. I think it is important to put that concept in context. In *Bockhold, Groves J.* relied on *Leskun v. Leskun*, 2006 SCC 25. That case involved a wife who had not achieved self-sufficiency. Per se, that was not a breach of duty. The central issue was why she had not achieved self-sufficiency. There is no suggestion in the case, or in the reasons of *Steeves J.* in the present case, that a spouse does not have an obligation to strive for self-sufficiency to the extent he or she is able to do so.
- [25] As is obvious from the reasons for judgment, on the evidence before him, the chambers judge rejected the appellant's contention that the respondent was not taking steps to improve her lot, found that she had made progress towards self-sufficiency and imputed a level of income to her "in order to assist her with her attempts to increase her employment income". He also observed that the respondent was on notice that "she has to move towards economic self-sufficiency".
- [26] I see no basis on which it can be suggested that the judge was not aware fully of the objective of self-sufficiency in the Divorce Act. He clearly was and took it into account.

Costs of respondent's choices

- [27] The appellant appears to contend that the respondent has made "a personal choice not to be self-supporting". Insofar as this is based on the position the respondent took at trial in 2009, it was rejected by the trial judge and the appellant's contention was determined by *Steeves J.* not to be supported "by the evidence of the current situation".

- [28] The reasons of the chambers judge are replete with references to the respondent's continuing efforts to improve her economic situation. There is no basis on which this Court could interfere with the judge's appreciation of the evidence and his findings of fact.

Spousal Support Advisory Guidelines

- [29] The appellant contends that the judge erred by using gross income figures in the calculation of spousal support. The starting point for the support analysis is gross income. The judge made it clear that he was addressing line 150 in the appellant's income tax return and line 8 in the parties' Form 8. Both deal with gross income.
- [30] At the suggestion of the judge, the parties used "MySupportCalculator.ca" to calculate an appropriate range for spousal support. As instructed by that site, they input the appellant's gross income and the full income imputed to the respondent. The same basis for calculation was used at trial. The appellant asserts this was incorrect because pursuant to the SSAG, spousal support with child support is to be calculated based on net income.

- [31] MySupportCalculator.ca advises:

Annual Gross Employment Income is the most current amount the individual earns from his/her employment per year before deductions such as tax, EI and CPP premiums. Gross employment income can be found on Line 101 of a T1 General return from the Canada Revenue Agency (provided the return reflects the most current income), or on Box 14 of a T4 Slip from an employer. This calculator then considers the most significant generally applicable federal and provincial taxes payable, payroll deductions (CPP, EI), benefits and credits, in doing the necessary calculations of child and spousal support. (Note that some minor taxes/benefits/credits will not be considered.) [Bold emphasis added.]

Be aware that in calculating child and spousal support under the CSG and SSAG, an individual's income is determined using Total Income - Line 150 of a T1 General return - as a starting point, which is then subject to further adjustments. Due to the complexity of the potential adjustments for different types of income, this calculator is limited to only one type of income, Gross Employment Income (Line 101). If a party is self-employed or earns income from any other source (particularly dividends, capital gains, non taxable income or social assistance), this calculation will not reflect the reality of the situation, and a family lawyer (and possibly a tax specialist) should be consulted. [Emphasis in original.]

- [32] The chambers judge did not err using gross income as a starting point and there was no error in the calculation.
- [33] With respect to the duration of support, the appellant quotes from the without child support formula in the SSAG, which provide a duration of 0.5 to 1 year of spousal support for each year the spouses have cohabitated. For situations with child support, the duration formula is different and specifically provides that initial orders are indefinite. The time limits are "softer" when there are dependent children and "are intended to structure the process of

review and variation of initial orders that are indefinite in form; they are not intended to give rise to time-limited orders, at least not initially" (SSAG at 83). Not only was the judge entitled to make an indefinite order, the SSAG suggest that this is usually the approach that judges ought to take.

Conclusion

[34] It is important for the parties to appreciate the role of the chambers judge on a review of spousal support and the role of this Court on appeal. The judge was required to apply the criteria in s. 15.2 of the Divorce Act based on the evidence of the circumstances then extant. This Court will not interfere with a judge's decision on spousal support in the absence of an error of principle or significant error in the judge's findings of fact.

[35] In my view, in the present case, no error of principle has been demonstrated. The findings of fact, with which the appellant may disagree, were supported by evidence. It is not open to this Court to interfere.

[36] I would dismiss this appeal.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Lowry"

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