
CANADA / JUDGMENT

Kargaran v. Ahmadi

2015 BCSC 1249

COURT

Supreme Court of British Columbia

DECIDED

20 July 2015

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2015 BCSC 1249 Kargaran v. Ahmadi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kargaran v. Ahmadi,

2015 BCSC 1249

Date: 20150720

Docket: E072777

Registry: Vancouver

Between:

Soheila Kargaran also known as Shohreh Amiri

Plaintiff

And

Farzin Ahmadi also known as Farzin Monirahmadi Ardebili

Defendant

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for Plaintiff:

S. Kinney

Counsel for Defendant:

R. McQuillan

Place and Date of Hearing:

Vancouver, B.C.

May 7, 2015

Place and Date of Judgment:

Vancouver, B.C.

July 20, 2015

INTRODUCTION

- [1] The respondent ex-husband and father, who I will refer to as the "Father", has applied to cancel, or alternatively reduce, the amounts he must pay to the claimant ex-wife and mother, who I will refer to as the "Mother", for child and spousal support as required by a court order made about two years ago ("Final Order"). The Father also seeks an order that the Mother must pay monthly child support to him, and pay 75% of special expenses. The Father seeks to cancel arrears of child and spousal support, and interest and penalties which were added by the Family Maintenance Enforcement Program ("FMEP").
- [2] The Father is a self-employed real estate agent who has previously worked as a mortgage broker and bank manager. He made an assignment into bankruptcy in September 2013 and was discharged from bankruptcy in August 2014. He is 44 years old. The Mother operates her own hairstyling business through a corporation which I will refer to as "ZZ Beauty". The Mother is 50 years old.
- [3] This case raises challenges in determining whether there has been a material change in circumstances. One challenge arises from the fact that both parties are essentially self-employed, with income that can fluctuate and expenses that may or may not be appropriate deductions for the purposes of support. Another challenge arises because the Father seeks to rely on evidence of the Mother's lifestyle, arguing that income matching her lifestyle ought to be imputed to her. A further challenge arises from the fact that the Father seeks to vary terms that were part of an all-inclusive settlement of the parties' financial disputes, on terms which divided assets unequally and limited the period for which the Father must pay spousal support.
- [4] Because there was a settlement, there are no reasons for judgment detailing the basis of the orders for child and spousal support. The support figures in the Final Order are the same as those from an interim order, and the evidentiary basis of that interim order can provide some assistance, although the reasons for judgment for the interim order were not provided at the hearing before me.

- [5] The Father's application proceeded to a one-day hearing on May 7, 2015. The evidence consisted of eleven affidavits and six Form F8 financial statements. I am grateful to counsel for their well-organized presentations.
- [6] On June 4, 2015, I gave oral reasons for judgment in which I provided most of the analysis of the issues, but did not set out the facts and law in detail. I advised that I would provide written reasons for judgment which would include those items, and these are those reasons for judgment.

ISSUES

- [7] The issues are as follows:
- a) Regarding spousal support, has there been a material change in the condition, means, needs or other circumstances of either of the parties?
 - b) If so, what order should be made regarding spousal support in the future?
 - c) Has there been a material change in the circumstance of the parties which would result in a different child support order?
 - d) If so, what order should be made regarding child support in the future?
 - e) Should the court cancel the arrears of child support?
 - f) Should the court cancel the arrears of spousal support?

FACTS

- a) Before Final Separation in November 2011
- [8] The parties began living together in October 2001. At that time the Father worked at a bank as a mortgage broker, and had previously worked as a bank manager. The Mother deposed that the Father told her that he had been dismissed from the bank for falsifying documentation, but the Father denies that.
- [9] At the time the parties met, the Mother had previously worked as a hairstylist.
- [10] The parties were married in September 2004. They separated several times, and their final separation was in November 2011. The parties were divorced by order pronounced March 27, 2013. The parties were together about ten years.
- [11] The parties have a daughter who I will refer to simply as the "Daughter". She was born in August 2005, and is now approaching her tenth birthday.
- [12] The Father was the higher income-earner during the marriage, and the Mother did most of the child care and housework. After the birth of the Daughter in 2005, the Mother took several months off work. After that, the Mother returned to work, but only part-time. At times, the parties had a nanny to enable the Mother to work.

- [13] The Mother incorporated ZZ Beauty in August 2008. It has a year-end of July 31. It appears the Mother began working 32 hours a week around the time she incorporated this business.
- [14] During the time the parties lived together, the Mother sent money to her mother and sister in Iran every five to six weeks, sending \$1,500 to \$2,500 each time. The Father sent funds about monthly to his mother in Iran.
- [15] The Mother deposed that the Father has an interest in real property in Iran which he has not disclosed. The Father's Form F8 financial statements do not refer to property in Iran.
- [16] The parties were living in a house in North Vancouver ("First North Van House") at the time of one of their earlier separations, in February 2009. The First North Van House was sold in June 2009. The Mother deposed that she learned at that time that the Father had drawn over \$40,000 from a joint line of credit for his personal use. The net sale proceeds of the First North Van House were divided equally, with each receiving about \$141,000.
- [17] The Mother purchased an apartment in North Vancouver ("North Van Apartment") using her share of the sale proceeds of the First North Van House.
- [18] During the parties' separation from 2009 to 2011, the Father did not pay child or spousal support to the Mother. The Father deposed that the Mother did not request such support, and the Daughter was spending equal time with each parent. In contrast, the Mother deposed that she sought funds from the Father but he did not provide any.
- [19] The Father began working as a realtor in 2009.
- [20] The Mother's 2009 line 150 income, as reassessed in January 2011, was about \$18,500. ZZ Beauty's financial statements for 2009 show about \$74,000 in gross sales and an operating loss of about \$41,000. The Father's 2009 income tax return was not in evidence.
- [21] The Mother's 2010 income tax return reported about \$26,000 in line 150 income. The gross revenue of ZZ Beauty for 2010 was about \$162,000, and the net income was about \$3,000.
- [22] The Father's 2010 tax return reported about \$89,000 gross business income and about \$46,000 net business income.
- [23] The parties' final reconciliation commenced around March 2011, when the Father moved into the North Van Apartment with the Mother. The parties jointly purchased a property in North Vancouver ("Second North Van House"), but in fact they did not live there together. They agreed to renovate it and share the cost of renovation equally.
- [24] The parties lived in a rental basement suite with the Daughter from July to December 2011. The Mother deposed that she and the Father agreed to share the expenses, but the Mother paid the rent. The Father agreed that the Mother paid the rent, but in contrast to the Mother, he deposed that she did not request contribution from him.

- [25] In July 2011, both parties executed documentation relating to mortgage applications. Both of them set out figures which essentially reflected their income without deduction for expenses, despite the fact that the forms requested figures net of those expenses. The Father stated that his 2010 income was \$89,300, and his 2011 expected income was \$170,000. The Mother stated her 2010 income was \$180,000 and her 2011 expected income was \$260,000. As a result, both parties provided grossly inflated estimates of their income for the purposes of obtaining mortgages. The Mother's position is that she simply filled out the forms the way the Father told her to fill them out, and that because he had been a mortgage broker, she relied on his expertise relating to those forms.
- b) Final Separation in November 2011 and First Set of Form F8 Financial Statements
- [26] The parties separated for the last time in November 2011. The Mother moved to another apartment. The Father moved to his sister's home where he lived rent-free until February 2015.
- [27] The Father's income tax return for 2011 sets out line 150 income of \$89,000.
- [28] The gross revenue of ZZ Beauty for 2011 was about \$178,000, and there was a net loss of about \$500.
- [29] The Mother's 2011 line 150 income was assessed at about \$23,500.
- [30] The Father's April 17, 2012, Form F8 financial statement sets out that his annual income was about \$109,000. That consisted of \$160,000 less stated employment expense deductions of about \$51,000, including referral fees of about \$19,000. The Father estimated about \$10,000 for monthly expenses, including about \$2,700 in payments to bank and credit card debt and about \$2,000 for pension. Apart from the Second North Van House and the mortgage on it, the Father listed about \$50,000 in pension and RRSP assets, about \$5,000 in savings, and about \$135,000 in unsecured debt.
- [31] The Mother's April 26, 2012 Form F8 financial statement sets out annual income of about \$23,000, including about \$1,100 of RRSP income. It claims housing costs of about \$2,700 per month and debt payments of about \$1,300 per month. It claims total monthly expenses of about \$7,000, being about \$84,000 per year. It estimates the value of the Second North Van House at \$1.35 million, with an associated mortgage of \$880,000 and therefore net equity of about \$470,000. Half of that is \$235,000. This financial statement sets out non-mortgage debt of about \$147,000. Using the figure of \$235,000 for the Mother's equity in the Second North Van House less \$147,000 for the non-mortgage debt, based on this April 26, 2012 Form F8 financial statement, the Mother had a net worth of about \$88,000.
- [32] Using the same net equity figure of \$235,000 for the Father's interest in the Second North Van House, based on his April 17, 2012 Form F8 financial statement, the Father's net worth was about \$155,000 ($\$235,000 + \$50,000 + \$5,000 - \$135,000$).

- [33] The Mother did not agree with the Father's claimed employment expenses. She sought to review the documents in support of his claim. By order made August 3, 2012 ("August 2012 Document Production Order"), the Father was required to produce specified documents including back-up documents for his claimed employment expenses.
- [34] The Mother deposed in July 2012 that she thought business was slowing and she does not have training outside the hairdressing field. She deposed that the Father invested family funds and retained the profit.
- [35] The Second North Van House was sold on September 26, 2012. The net sale proceeds were only about \$336,000, and they were held in trust pending further agreement or court order.
- c) Second Set of Financial Statements and Interim Support Order
- [36] Both parties provided Form F8 financial statements dated in November 2012.
- [37] The Mother stated in her November 27, 2012 Form F8 financial statement that her annual income was zero. She listed \$1,000 in assets, plus her interest in the proceeds of the Second North Van House. She listed personal debt of about \$202,000, including family loans of about \$133,000. She claimed total monthly expenses of about \$7,400, being about \$89,000 per year.
- [38] The Mother stated in her November 27, 2012 affidavit that she was renting a two bedroom apartment at a rent of \$2,800 monthly.
- [39] The Father's November 20, 2012 Form F8 financial statement set out that he expected to have an income of about \$63,500 for 2012. He estimated that as consisting of about \$4,000 in net business income (being \$37,000 gross commissions less \$33,000 in business expenses), plus about \$51,000 in RRSP withdrawals, plus \$9,000 in commission rebate from the sale of the Second North Van House. He estimated his monthly expenses at about \$6,500, including about \$3,400 in debt repayments. He listed about \$8,000 in assets other than the Second North Van House proceeds. He listed personal debt in excess of \$213,000, including about \$30,000 owing to Canada Revenue Agency and \$12,000 in personal loans. That is a net worth of about negative \$205,000, plus his interest in the Second North Van House.
- [40] In December 2012, some of the net sale proceeds of the Second North Van House were disbursed to pay down credit cards and/or to reimburse each party for renovation costs. On my calculations, about \$65,000 was used for those purposes.
- [41] The Father's line 150 income for 2012, pursuant to a reassessment, was about \$70,000, including about \$58,000 for RRSP withdrawal and about \$12,000 in net business income.
- [42] The Mother's 2012 line 150 income was about \$4,600.
- [43] ZZ Beauty's 2012 gross income was about \$173,500 and net of expenses it had a loss of about \$16,000.

[44] The Mother's position in negotiations prior to the Final Order was that the family assets should be reapportioned in her favour for several reasons. She claimed that she had paid more than half of the costs of renovating the Second North Van House. She also claimed that the Father had wrongfully disposed of family assets, including withdrawing over \$65,000 of RRSPs following separation. She also claimed that she made a greater contribution to family property.

[45] There was a hearing before Master MacNaughton on January 16, 2013, which resulted in what I will term the "Interim Support Order". The Father acted in person at the hearing which resulted in the Interim Support Order. I have not been provided with a transcript of either the proceedings or the reasons for judgment. The Interim Support Order required the Father to pay the Mother the following:

- a) interim child support of \$500.00 per month, retroactive to December 1, 2011; and
- b) interim spousal support of \$993.00 per month, also retroactive to December 1, 2011.

The Interim Support Order was based on a determination that the Father's annual income was \$73,282, and the Mother's annual income was \$20,000. Counsel advised that the calculations of child support were based on the set-off method.

[46] In this case, the position of the parties leading to the Interim Support Order and the evidence available at that hearing may be relevant to determining the circumstances at the time of the Final Order.

[47] The Mother's position at the hearing resulting in the Interim Support Order was that the Father's income for support purposes should be based on his April 2012 estimate of income of about \$109,000. The Mother argued, alternatively, that the determination of the Father's income should be based on his November 2012 estimate of about \$63,500. In either case, it was the Mother's position that some of what the Father claimed were employment expenses should be included in his income for the purposes of determining child and spousal support. In particular, the Mother raised the fact that the Father failed to provide documentation pursuant to the August 2012 Document Production Order, presumably arguing that the court should draw an adverse inference against the Father and conclude that his claimed employment expenses were not appropriate.

[48] Presumably the Father's position at the hearing resulting in the Interim Support Order was that the Father's income should be considered to be about \$63,500, as set out in his November 2012 financial statement. That consisted of about \$4,000 in net business income (\$37,000 gross commissions less \$33,000 in business expenses), plus \$50,640 in RRSP withdrawals, plus \$9,000 from the sale of the Second North Van House.

[49] As stated, Master MacNaughton determined the Father's income to be about \$73,000 for the purposes of the Interim Support Order.

- [50] The Mother's position at the hearing resulting in the Interim Support Order was that her income should be assessed at nil.
- [51] The position of the Father at the hearing resulting in the Interim Support Order was that the court should impute income to the Mother.
- [52] As stated, Master MacNaughton determined the Mother's income to be \$20,000 for the purposes of the Interim Support Order.
- [53] By consent, the arrears of interim support were paid from the net proceeds of the Second North Van House for the period ending in January 2013, without prejudice to the Mother's claim for a reapportionment of the sale proceeds in her favour.

d) Final Order

- [54] The parties were divorced by the Final Order, which was pronounced on March 27, 2013, by Mr. Justice Sewell. The terms relating to corollary relief were by consent and were as follows:
1. The parties would share joint custody and guardianship of the Daughter, with equal parenting time shared on an alternating weekly basis;
 2. Upon the Father "having been agreed to have a Guideline income" of \$73,282.00, and the Mother "having been agreed to have an imputed Guideline income" of \$20,000, the Father would continue to pay \$512 per month for the Daughter's support so long as the Daughter remained "a child of the marriage" as defined by the Divorce Act;
 3. Special and extraordinary expenses were to be shared with the Father paying his proportionate share (stated to be "currently 79%"), and some of the expenses were listed;
 4. The parties would exchange their income tax documents annually so long as the obligation to pay child support continued;
 5. The Father would pay time-limited spousal support, at the rate of \$993 per month for the six and two-thirds-year period from April 1, 2013 up to and including December 1, 2019, being until about eight years after separation; and
 6. Of the net proceeds from the sale of the Second North Van House remaining in trust after the interim payments, the Father would receive about \$83,500 and the Mother would receive about \$188,000. The Mother's evidence is that this distribution, in which she received \$104,500 more than the Father, reflected \$18,000 for arrears and ongoing support, about \$30,000 in renovation costs for the Second North Van House, and about \$15,000 from a debt relating to renovation costs. That accounts for \$63,000, so the balance of \$41,500 remains unexplained.

- [55] The Father's evidence is that he "eventually agreed to what [the Mother] proposed and accepted her stated income of \$20,000 per year". He further deposed that he believes "the reality" is that her income is closer to \$200,000 per year.
- [56] The Mother argued that the time-limited spousal support included a strong element of compensating her for working outside the home only part-time, as well as for her continuing need.
- [57] I obtained calculations using Divorcemate software as at June 2015. I would expect a small variation between the figures available today and those which would have been available at the time of the Final Order, in March 2013. On my calculations, child support for the incomes set out in the Final Order would be \$509 per month payable by the Father, which is within three dollars of the amount in the Final Order. My calculations show a range of spousal support under the Spousal Support Advisory Guidelines of \$759 to \$1,242 per month for an indefinite duration, with a minimum duration of five years and a maximum duration of 10 years from the date of separation. The figure in the Final Order of \$993 per month is about the mid-range figure of \$1,002 on my calculations. The duration of about eight years after separation is within the five to ten year period suggested by Divorcemate.
- e) Since the Final Order
- [58] The Mother's purchase of a house for \$1.15 million ("Mother's North Van House") completed in May 2013. She obtained a mortgage of \$862,000, requiring about \$288,000 for down payment and other costs. The Mother states that she had several sources for the purchase funds. She says she used the proceeds she received from the Second North Van House, being about \$188,000, received a gift of about \$95,000 from her mother, and used credit for the remainder of about \$5,000 plus expenses.
- [59] The Mother signed a mortgage application in 2013 which stated that she had an income of \$150,000. Again, her position is that this reflects gross business income rather than net income.
- [60] In June 2013, the Mother enrolled the Final Order with FMEP.
- [61] Tragically, in July 2013, the Mother's son from a prior relationship died at the age of 26 years ("Mother's Deceased Son"). The size of his estate was not clear on the evidence, but it was at least \$67,000, which was half of the net sale proceeds from the sale of his condominium.
- [62] The parties filed conflicting affidavits about whether the Father borrowed \$10,000 from the Mother's sister and brother-in-law. I am not able to determine which evidence to accept about this alleged loan.
- [63] The Mother has paid for renovations to the Mother's North Van House. The Father estimated that the renovations would have cost about \$100,000. However, that is speculation. The Mother's evidence is that the renovations cost her much less, apparently around \$10,000, and that she paid for this from the estate of the Mother's Deceased Son.

- [64] At some point in 2013, the Father bought a 2008 Lexus vehicle. It is his position that such a vehicle is necessary for his job as a realtor.
- [65] At some point in 2013, the Mother bought a new Range Rover. The Father deposed that he was with her when she bought it and the cost was about \$65,000.
- [66] The Father, Mother, and Daughter went on a Disney cruise in about August 2013. The Father says the Mother purchased the tickets and that they cost about \$7,500. The Mother says that the parties agreed to share equally the cost of the trip but the Father has not paid his share. The Father denies agreeing to repay the Mother a portion of this cost.
- [67] In August 2013, ZZ Beauty ceased having any employees. It presently rents to others three salon chairs for a total rental income of \$3,900 a month, and pays rent of about \$4,800 per month. The Mother says she works part-time on the weeks the Daughter is with her, and longer hours on the other weeks.
- [68] While the evidence did not address it, the Father's counsel Mr. McQuillan gave information during the hearing about what the Father did with the sum of about \$88,000 he received from the sale of the Second North Van House. Mr. McQuillan advised that the Father paid for heart surgery for his mother in Iran, paid personal debts including contractors on the Second North Van House, and bought the 2008 Lexus.
- [69] On September 11, 2013, the Father filed an assignment into bankruptcy. In his statement of affairs relating to his assignment into bankruptcy, the Father claimed about \$7,000 in assets and monthly income of \$3,000. He set out about \$192,000 in debts.
- [70] The Mother's 2013 line 150 income was assessed at about \$20,500.
- [71] ZZ Beauty's gross income for 2013 was about \$152,000, and net income was about \$9,000.
- [72] The Father's pre-bankruptcy income for 2013 was about \$33,000. His post-bankruptcy return for the remainder of 2013 set out line 150 income of about \$37,000. That is a total income for 2013 of about \$70,000.
- [73] The Father went to Iran in late 2013 or early 2014. He says he did so to take advantage of less expensive dental surgery.
- [74] The Mother went to Hawaii in January 2014 with the Daughter.
- [75] In March 2014, the Mother went to Iran for three weeks with the Daughter, and visited the Mother's mother, who is seriously ill. The Mother says that she used travel points to purchase the flight tickets.

- [76] In June 2014, the Mother refinanced the Mother's North Van House, obtaining a bank mortgage of only \$600,000. She says that she received assistance from her family, money from the estate of the Mother's Deceased Son, and used all of her credit in order to effect this refinancing. She also said that the value of the Mother's North Van House had increased owing to market forces.
- [77] The Father was discharged from bankruptcy in August 2014.
- [78] The Father went to Los Angeles in August 2014 with the Daughter, but says that he did so at the expense of one of his sisters, and that he stayed with a different sister.
- [79] The Mother signed a mortgage application in 2014 which states that she has an income of \$125,000. Again, her position is that this reflects gross business income, not income net of taxes.
- [80] The Mother was hospitalized for a few days in October 2014.
- [81] The Mother's March 16, 2015 Form F8 financial statement sets out annual income of about \$21,500. It estimates the value of her Range Rover at \$42,000, and the value of the Mother's North Van House at \$1.23 million. The financial statement sets out expenses of about \$5,800 per month, being about \$70,000 per year, with no vacation expenses claimed. The Mother claims housing costs of \$3,097 per month. She claims about \$785,000 in debt, including \$170,000 as "loan from family". Her claimed assets total \$1.272 million. Less the \$785,000 debt, she has a net worth of about \$487,000.
- [82] The Mother has possession of a BMW 3 series car, which belonged to the Mother's Deceased Son. She has not listed that as her personal asset.
- [83] The Father recently filed his income tax return for 2014. It reports line 150 income of about \$29,000. It describes his gross commissions as a realtor at about \$70,000. It claims about \$41,000 in business expenses in 2014. This includes a claim for about \$24,000 for referral fees and "deal fees".
- [84] The Mother's evidence is that she has not completed 2014 income tax returns and financial statements because she cannot afford to do so. She estimates that her current income will be similar to 2013.
- [85] FMEP has been garnishing the Father's commission cheques for up to 35% of the gross amount of the cheques. The total FMEP collected in 2014 was about \$17,200.
- [86] In February 2015, the Father moved out of his sister's residence and into his own rental residence. He was in arrears of child and spousal support of about \$9,000 at that time, and has not made any payments of child or spousal support since then. His mother assisted him financially so that he could rent this apartment.

- [87] The Father's February 13, 2015 Form F8 financial statement estimates his annual income as a realtor at about \$68,000 gross and about \$25,000 net. He estimates about \$5,300 in monthly expenses, including about \$1,500 in child and spousal support. He lists about \$22,000 of assets, consisting of about \$18,000 for his 2008 Lexus and about \$4,000 in RRSPs. He lists \$8,800 in debt, consisting entirely of a January 2011 debt owing to a relative. However, any personal debt from 2011 was extinguished by the bankruptcy, so I consider that the Father is debt-free.
- [88] The Mother says that the Father is an experienced and successful realtor, bank manager, and mortgage broker. The Father alleges that the Mother has "besmirched" his reputation in the community and that this may have affected his ability to earn income as a realtor. However, he has not provided any basis for this view. He did not provide evidence of what steps he has taken to find business or to find alternate work.
- [89] The Father says that the Mother employs a dog walker, a gardener, and a babysitter three days a week. The Mother denies using a dog walker. She says she takes the dog to work, and sometimes a friend looks after the dog in trade for hairstyling. The Mother says friends provide her with gardening services. The Mother says that the people do these things as favours and gifts to her.
- [90] The Mother was receiving treatment in April 2015 for anxiety and depression. She also says she is having problems with her feet.
- [91] At the time of the hearing before me, the Father was in arrears of child and spousal support in an amount of about \$13,400.

LAW

- [92] I turn now to set out the applicable law.
- [93] Before the court can vary a child support or spousal support order, there must be a material change of circumstances. This is set out in the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), ss. 17(4) and 17(4.1) as follows:

Factors for child support order

- (4) Before the court makes a variation order in respect of a child support order, the 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.

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.

[Underlining added.]

[94] The test for a material change of circumstances is set out in *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688, as follows:

the change must be a material change of circumstances. This means a change, such that, if known at the time, would have likely 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.

[95] To constitute a material change, it must be significant, unforeseen and of a continuing nature.

[96] The court proceeds on the assumption that the original order was correct and should not be departed from lightly. See *L.M.P v. L.S.*, 2011 SCC 64 at para. 33.

[97] The applicant, here the Father, has the onus of showing the material change in circumstances. See *Walters v. Walters*, 2011 BCCA 331 at para. 48; and *L.M.P.* at para. 31.

[98] If there has been a material change in circumstances regarding spousal support, the court must consider whether the change justifies variation of the support order by reference to the four objectives set out in s. 17(7) of the Divorce Act, as follows:

Objectives of variation order varying spousal support order

(7) A variation order varying a spousal support order should

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

- [99] The purpose of a spousal support order and any subsequent variation is to fairly and equitably share the economic consequences arising from the marriage and its breakdown, as set out in *Moge v. Moge*, [1992] 3 S.C.R. 813 at 848-849. A compensatory spousal support award should continue until the economic consequences of the marriage have been redressed, as set out in *Tedham v. Tedham*, 2005 BCCA 502 at paras. 58 to 60.
- [100] There is a heavy burden on a party seeking to reduce or cancel arrears of support. To reduce or cancel arrears, an applicant must demonstrate first, that there has been a significant and long-lasting change in circumstances, and second, that it would be grossly unfair not to cancel the arrears. Generally, arrears will be cancelled only if the applicant can show that there is an inability to pay now or in the future. See *Semancik v. Saunders*, 2011 BCCA 264 at para. 25.
- [101] Section 14.4(6) of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127, is as follows:
- (6) In a proceeding in which a court reduces or cancels the arrears under a maintenance order that is filed with the director, the court may order that
 - (a) if the arrears under the maintenance order are cancelled, the amount owing by the debtor at that time as annual default fees is cancelled,
 - (b) if the arrears under the maintenance order are reduced but not cancelled, the amount owing by the debtor at that time as annual default fees is reduced by the amount that is proportionate to the reduction in the arrears under the maintenance order, or
 - (c) if the court is satisfied that special circumstances warrant, the amount owing by the debtor at that time as annual default fees
 - (i) is not reduced or cancelled, or
 - (ii) is reduced or cancelled as the court considers appropriate.

ANALYSIS

- a) Has there been a material change in the condition, means, needs or other circumstances of either of the parties (regarding spousal support)?

[102] The threshold question is whether there has been a material change in circumstances.

- [103] At present, the parties have significantly different lifestyles. The Mother owns a home which is worth about \$1.23 million, a Range Rover (which she estimates is worth \$42,000), and the shares in ZZ Beauty. She has possession of the Mother's Deceased Son's BMW, and has taken vacations and renovated the Mother's North Van House. She owes about \$785,000, a significant part of which is the home mortgage of about \$600,000.

- [104] The Father has recently been discharged from bankruptcy. He is now living in an apartment, after having lived with his sister for three years. He has a 2008 Lexus which he estimates is worth \$18,000, and has RRSPs of about \$4,000.
- [105] The Mother's position is that the Father's circumstances are better now than they were at the time of the Final Order, because he has no debt as a result of his bankruptcy. In saying "no" debt, I am declining to include the reported family debt from 2011 which was extinguished in the bankruptcy.
- [106] Mr. McQuillan emphasized the argument that the Mother's present standard of living demonstrates that she earns more than \$20,000 per year. The question for the court, however, is not whether the settlement achieved by the parties resulting in the agreed terms of the Final Order was correct, but whether there has been a material change in circumstances since the time of the Final Order.
- [107] I first consider the Mother's circumstance. At the time of the Final Order, in March 2013, the Mother's most recent Form F8 financial statement was dated in November 27, 2012, and estimated her income as zero. I will describe the income information available at the time of the Final Order. The Mother's line 150 income in 2009, as reassessed in 2011, was about \$18,500. In 2010, it was about \$26,000. In 2011, it was about \$23,500. In 2012 it was about \$4,600. The net revenue of ZZ Beauty was a loss in 2009 of about \$41,000, a gain in 2010 of about \$3,000, a loss in 2011 of about \$500, and a loss in 2012 of about \$16,000.
- [108] One advantage of self-employment is that business expenses can sometimes provide personal benefits. Income is sometimes grossed up on that basis for the purposes of court-ordered support. Without the reasons for judgment leading to the Interim Support Order, I am left to guess the basis upon which Master MacNaughton determined that the Mother's income was \$20,000. Master MacNaughton may have imputed income based on a minimum wage job, or based on grossing up income in consideration of the personal benefit of business expenses, or based on the Mother's spending pattern, or based on some other reason.
- [109] The facts relating to the Mother's income have not changed materially since the Final Order. The Mother's 2013 line 150 income was assessed at about \$20,500, and she estimates that her current income is similar. ZZ Beauty had a net 2013 income of about \$9,000.
- [110] The Mother's estimate of her income in the July 2011 mortgage application documentation was far higher, being \$180,000 for 2010 and \$260,000 for 2011. Both the Mother and the Father ought to have provided estimates of their net income in the mortgage application documentation. The July 2011 mortgage application was dated prior to and available for the hearing leading to the Interim Support Order and the Final Order. Because it was available at the time of the Final Order, the information in it does not disclose a material change of circumstances.

- [111] The Mother's claimed expenses have not changed materially since the Final Order. I first set out the information available at the time of the Final Order. In April 2012, she estimated her expenses at about \$7,000 per month, being about \$84,000 per year. In November 2012, she estimated her expenses at about \$7,400 per month, being about \$89,000 per year.
- [112] I now turn to the information available now. In her recent financial statement of March 2015, the Mother estimates her expenses at about \$5,800 per month, being about \$70,000 per year.
- [113] The Father argues that income should be imputed to the Mother on the basis of her spending. However, there has not been a material change in her reported spending since the Final Order. As a result, her present spending pattern does not demonstrate a material change in her circumstances.
- [114] I also note that the Mother's reported indebtedness for family loans has increased by \$37,000 over the last couple of years, from \$133,000 in November 2012 to \$170,000 in March 2015. Over that period, the Mother has also reported gifts, including from the estate of the Mother's Deceased Son. This provides some explanation for how the Mother has met her expenses since the Final Order.
- [115] The Mother's net worth using figures in her April 26, 2012 Form F8 financial statement, as discussed above, was about \$88,000. The Mother's assets arising from the figures in her November 27, 2012 Form F8 financial statement were \$1,000 plus her interest in the proceeds of the Second North Van House. She listed personal debt of about \$202,000. The Final Order provided her with about \$188,000 from the proceeds of the Second North Van House, resulting in a net worth using the figures in her November 27, 2012 financial statement of about negative \$13,000 ($\$1,000 + \$188,000 - \$202,000$).
- [116] Since the Final Order, about \$65,000 of the proceeds of the Second North Van House were used to pay renovation expenses, the Mother has received a \$95,000 gift from her mother, and the Mother has received an unknown amount of funds from the Mother's Deceased Son's estate. In addition, the Mother's North Van House has increased in value by about \$80,000.
- [117] The \$65,000 paid for renovation expenses reduced the Mother's indebtedness, possibly to the full extent of \$65,000. The gift from her mother and the market increase total \$175,000. That is a total of \$240,000 before consideration of what the Mother received from the Mother's Deceased Son's estate.
- [118] The Mother's net worth set out in her March 16, 2015 Form F8 financial statement is about \$487,000. That is an increase of about \$500,000 in net worth since the time of the Final Order using the calculations I have just discussed, and an increase of about \$400,000 using the figures in the Mother's April 26, 2012 Form F8 financial statement.

- [119] The Mother's net worth has increased significantly. However, there has been a market increase in the value of her home, and she has received significant gifts. Her accommodation expenses increased from rent of \$2,800 per month in November 2012, to accommodation expenses of about \$3,100 per month in March 2015.
- [120] The question of whether there has been a material change requires consideration of whether the new facts would have changed the prior result. While the basis of the Mother's entitlement to spousal support is not revealed in the Final Order, the Mother's position was that she had a compensatory claim for spousal support. Her entitlement may also have been based on need, also called "non-compensatory" support.
- [121] Here, when the Mother received more than twice as much from the proceeds of the Second North Van House as the Father, it is apparent that the Mother received some recognition for a compensatory claim. The spousal support in the Final Order is limited to eight years after separation, which is just above the seven and one-a-half year midpoint of the five to ten year period suggested by the SSAG. The dollar figure for monthly spousal support is about the midpoint of the range suggested by the SSAG.
- [122] In these circumstances, even if the court had been advised that the Mother's net worth would increase by about \$400,000 to about \$500,000 primarily from gifts and market forces, there would not likely have been an alteration in spousal support. This is particularly so where the Father's net worth has increased by about \$143,500 over the same period, as discussed below. Had the court known that the Mother would receive gifts in the future from her mother and the estate of the Mother's Deceased Son, there would not likely have been an alteration in spousal support.
- [123] The Father deposed that he "eventually agreed to what [the Mother] proposed and accepted her stated income of \$20,000 per year", but he believes that in reality her income is closer to \$200,000 per year. This reflects the Father regretting what he agreed to, rather than establishing that there has been a material change in her circumstances since the Final Order.
- [124] In short, I conclude that there has not been a material change in the Mother's circumstances which would have led to a different order regarding spousal support.
- [125] I turn now to the Father's circumstances. The Final Order states that the parties agreed to the Father having an income of about \$74,000.
- [126] I first set out the information available at the time of the Final Order. The Father's 2010 tax return reported gross business income of about \$89,000 and net business income of about \$46,000. His 2011 tax return set out line 150 income of \$89,000. His 2012 income, as reassessed, was about \$70,000, including about \$58,000 for RRSP withdrawal and about \$12,000 in net business income.

- [127] I turn to the information available now. The Father's 2013 line 150 income for both the pre and post-bankruptcy periods, was a total of about \$70,000. His 2014 line 150 income was about \$29,000, on a reported gross income of about \$70,000.
- [128] The Father's net worth set out in his November 2012 financial statement was about negative \$205,000, before consideration of his interest in the Second North Van House. He received about \$83,500 for that interest, resulting in a net worth of about negative \$121,500 at the time of the Final Order.
- [129] The Father's February 2015 financial statement sets out a net worth of about positive \$13,000 but referred to a 2011 family debt for \$8,800. I do not accept the claimed 2011 family debt of \$8,800 as a debt, because that debt was extinguished by the bankruptcy, giving a net worth of about \$22,000. This is an increase of about \$143,500 since the time of the Final Order.
- [130] The Father's expenses have been reduced by the extinguishment of debt through the bankruptcy. He no longer has the monthly debt expense of about \$3,400 set out in his November 2012 financial statement. The monthly expense total of \$5,300 he claims in his February 2015 financial statement is significantly less than the \$10,000 he claimed in his April 2012 financial statement, and somewhat less than the \$6,500 he claimed in his November 2012 financial statement.
- [131] Do these changes reflect material change in the Father's financial circumstances, which would have led to changed figures for spousal support in the Final Order? I am not satisfied that either the Father's reduced income will be of a continuing nature, or that the facts now known would have changed the Final Order.
- [132] The Father's real estate earnings have historically fluctuated, and the pattern of his income since the Final Order is not significantly different from his pattern prior to the Final Order. In fact, the Father's earnings have increased significantly from the time of the Final Order, when he reported business income of only about \$4,000 net, and his income was largely from RRSPs. If the Father's income remains low, he ought to find alternate work.
- [133] In summary, an examination of the evidence available at the time of the Final Order and presently available shows that the Mother's claimed income and expenses have not changed in a material way. Any argument the Father could make about imputing income to the Mother based on her expenses was available at the time of the Final Order. The parties remain in the same jobs they held at the time of the Interim Order.
- [134] The Mother's net worth has increased, mostly through gifts. The Father's net worth has also increased, through the bankruptcy. The Father's expenses have declined because of the extinguishment of debt through his bankruptcy.

- [135] The court is not entitled to change the Final Order on the basis that the Father now thinks it was a poor deal. The court can intervene only if there has been a material change in circumstances.
- [136] My reading of the affidavits and financial statements leads me to have a real concern about whether the parties have provided true and complete evidence about their financial circumstances. The evidence of the parties conflicts on numerous matters, and the Mother alleges that the Father has failed to make full disclosure of assets in Iran. In such circumstances, a consent order like the Final Order reflects the assessment by the parties of risks including the risk that their evidence will be rejected. Master MacNaughton did not accept the evidence of either party about their income at the time of the Interim Support Order, and both parties faced the risk that the court would also reject their evidence at trial.
- [137] The Father has failed to establish a material change in circumstances which would likely have led to a different order.
- [138] As a result, the Father's application for termination or reduction of spousal support must be dismissed.
- b) If so, what order should be made regarding spousal support in the future?
- [139] As discussed, the Father's application to cancel or reduce spousal support must be dismissed.
- c) Has there been a material change in the circumstances of the parties which would result in a different child support order?
- [140] The Final Order required the parties to exchange financial information so long as the Daughter remains a child of the marriage. However, the Final Order does not provide for automatic changes to the child support. Therefore, the child support can be varied only if there has been a material change in the circumstances of the parties which would result in a different child support order.
- [141] Child support is based on the income of the parties, although in rare cases the court can also consider assets that have not been used productively. As stated regarding the spousal support order, I am not satisfied that there has been a material change in the income or circumstances of either party.
- [142] The Father's application to cancel or reduce child support must be dismissed.
- d) If so, what order should be made regarding child support in the future?
- [143] As stated, the Father's application to cancel or reduce child support must be dismissed.
- e) Should the court cancel the arrears of child support?

- [144] The Father seeks a reduction in child support retroactive to January 1, 2014, on the basis that the Father's income was reduced throughout 2014. The Father also seeks cancellation of the default fees assessed by FMEP, which are about \$800.
- [145] As stated, to reduce or cancel arrears, an applicant must demonstrate first, that there has been a significant and long-lasting change in circumstances, and second, that it would be grossly unfair not to cancel the arrears.
- [146] The Father has not demonstrated a significant and long-lasting change in circumstances. The Father may be able to pay the arrears in the future. As a result, I dismiss the Father's application to cancel the arrears of child support.
- f) Should the court cancel the arrears of spousal support?
- [147] For similar reasons, the Father's application for cancellation of arrears of spousal support is dismissed.

SUMMARY

- [148] The Father's applications are dismissed. The claimant Mother is entitled to costs of the applications.

"Gray J."

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Prepared on 27 October 2026 · Esheria