
CANADA / JUDGMENT

Kearns v. Kearns

2014 BCSC 929

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Supreme Court of British Columbia

DECIDED

28 May 2014

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2014 BCSC 929 Kearns v. Kearns

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kearns v. Kearns,

2014 BCSC 929

Date: 20140528

Docket: E1620

Registry: Courtenay

Between:

Carla Michele Kearns

Claimant

And

Troy Allan Kearns

Respondent

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for Plaintiff:

In Person

Counsel for Defendant:

C. Morris

Place and Date of Trial/Hearing:

Courtenay, B.C.

April 3, 2014

Place and Date of Judgment:

Courtenay, B.C.

May 28, 2014

Introduction

- [1] The respondent applies to terminate child support for the two children of the marriage, with the exception of certain stipulated special expenses relating to the childrens' post-secondary education, and to terminate spousal support. He also applies to vacate the term of a previous order requiring him to maintain a life insurance policy in the amount of \$400,000 with the claimant as the named beneficiary.

Background

- [2] The parties were married on May 18, 1991 after living together for two and a half years. They separated on June 2, 2005 and were divorced pursuant to a court order dated March 28, 2011.
- [3] The plaintiff is currently 51 years old. She is employed as a Behaviour Education Assistant for School Board No. 71 (Comox Valley School District).
- [4] The defendant is currently 50 years old and is employed as a pilot with the Canadian Armed Forces.
- [5] The parties have two children: Ashley Beth Kearns, born December 15, 1993 and Keri Ann Kearns, born November 16, 1995.
- [6] There are two previous court orders in this proceeding. The first, dated May 18, 2006, went by consent following a judicial case conference. In addition to addressing issues of guardianship and custody, it ordered that the respondent pay spousal support in the amount of \$2,000 per month for a period of three years and \$1,521 per month in child support.
- [7] A second order, dated December 13, 2010 (the "2010 order"), again by consent, varied the initial order and set spousal support as follows:
- a) \$3,886.00 per month commencing November 1, 2010 through until December 2011; and
 - b) \$1,700.00 per month commencing January 1, 2012 and continuing until such time as the parties agree in writing or the court orders otherwise pursuant to a review that may occur after June 1, 2013.

- [8] The 2010 order set child support at \$1,614.00 per month based on a Guideline Income of \$126,699.00 for the respondent and \$25,890.00 for the claimant. That amount was subject to adjustment annually as of June 1st of each year, with the parties to exchange copies of their annual income tax returns by May 20th of each year.
- [9] The order also provided that responsibility for special expenses would be divided 70%/30% as between the respondent and the claimant, with special expenses defined to include:
- a) health-related expenses that exceed insurance reimbursement available to both parties, including orthodontic treatment, prescription drugs and optical needs;
 - b) extraordinary expenses for secondary school education and other educational programs that meet the children's particular needs; and
 - c) reasonable expenses for post-secondary education when the time comes.
- [10] One other term relevant to the issues raised on this application is the requirement in para. 5 of the order that the respondent maintain a life insurance policy with a face value of \$400,000 pursuant to the terms of a separation agreement signed by the parties dated December 4, 2006.
- [11] Clause 5.8 of that agreement requires that the respondent maintain such a policy, with the claimant as the named beneficiary, while child support is paid.

Child Support and Special Expenses

- [12] The parties largely agree on the issue of child support given the present circumstances of the two children.
- [13] The respondent paid child support pursuant to the 2010 order until August 31, 2013 when he ceased making payments.
- [14] The parties' eldest daughter Ashley turned 19 on December 15, 2012. Ashley graduated high school in June 2011, then completed a one year course at North Island College in Campbell River in June 2012, where she obtained a Hospital Unit Clerk Certificate. Ashley currently works full-time at a McDonalds' Restaurant in Courtenay as a shift manager.
- [15] Ashley has applied to Thompson Rivers University (TRU) in Kamloops for the Bachelor of Science in Nursing Degree Program beginning in September 2014. At the time of the hearing, she had not heard if she has been accepted. The claimant says that if Ashley is not accepted in to the nursing program, she nonetheless plans to take a full course load and will re-apply the following year.
- [16] Ashley lived with the claimant until the former family home was sold in or around September 2013. She then moved in with the respondent. According to the claimant, the plan is that if Ashley is accepted into TRU, they will both move to Kamloops and live together.

- [17] The claimant agrees that the respondent's child support for Ashley should be terminated but says that it should be reinstated if Ashley resumes full time post- secondary studies.
- [18] The respondent seeks an order declaring that his child support obligation for Ashley ceased as of December 15, 2012, when she turned 19, and he asks for a credit for the payments made between that date and August 31, 2013, totalling \$5,445.00. It is not entirely clear what the respondent means when he asks for credit for these payments as his notice of application does not seek an order for repayment.
- [19] In the circumstances, I order that the respondent's obligation to pay child support for Ashley is terminated effective August 31, 2013. I decline to make any order with respect to payments made between December 2012 and August 2013. The issue of further payments if Ashley returns to school will be addressed below.
- [20] The parties' second daughter Keri turned 18 on November 16, 2013. She attends the University of Regina full time and lives in Regina with her paternal grandmother who is paid \$500.00 per month for Keri's room and board. In addition, Keri receives a further \$500.00 per month for other expenses.
- [21] Like her sister, Keri lived with the claimant until the summer of 2013. The respondent says that Keri moved all of her possessions into his house in August of 2013. The claimant says however that Keri never lived with the respondent. She simply moved her belongings to his house when the family home was sold and then she moved to Regina to attend university.
- [22] The claimant does not oppose termination of child support for Keri. I therefore order that the respondent's obligation to pay child support for Keri is terminated effective August 31, 2013.
- [23] The principal issue between the parties as it relates to the children is the payment of special expenses. Both allege that the other has at various times failed to make required payments.
- [24] As noted in paragraph 9 above, the 2010 order dealt specifically with special expenses and directed that they be divided 70/30 as between the respondent and the claimant. The order, in paragraph 1(b)(xi), also stipulated that:

The parties will perform an accounting once per month, supported by receipts, to ensure each of them has paid the appropriate share of the special expenses for the previous month and the party who has paid less than required will pay the amount of the deficiency to the other within fourteen (14) days of the accounting.

- [25] The main special expenses in issue are the costs associated with Keri's university, specifically the monthly \$500 paid to her grandmother for room and board and the \$500 paid directly to her for expenses.

- [26] The respondent says that he has made these payments and that the claimant has not reimbursed him for her share, being \$150.00 of each payment according to the 70/30 formula. For her part, the claimant says that the respondent has been deducting her share from his spousal support payments but has not provided her with any receipts.
- [27] What is apparent is that the parties have not complied with paragraph 1(b)(xi) of the 2010 order requiring the exchange of receipts and a monthly accounting.
- [28] In his notice of application, the respondent seeks an order maintaining paragraphs 1(b)(ix) and (x) of the 2010 order which together define the applicable special expenses and set the 70/30 split, but he seeks to vacate the remaining provisions dealing with child support, including paragraph 1(b)(xi). In their place, he seeks an order that he pay Keri's special expenses and that the claimant then pay her share directly to him.
- [29] In my view, it is unrealistic to establish a protocol whereby one parent assumes sole responsibility for payment of all special expenses associated with Keri's education. Situations may arise where for reasons of expediency or necessity, the other parent may be called on to pay an expense.
- [30] It does however make sense that the \$1,000.00 currently being paid per month, which represents Keri's primary expenses, be paid by one parent with that parent then being reimbursed by the other. As the respondent has been making these payments, it also makes sense that he should continue to do so.
- [31] Accordingly, I order that the \$500.00 payable to the grandmother and the \$500.00 payable directly to Keri continue to be paid by the respondent. The respondent will provide the claimant with proof of payment and the claimant will provide reimbursement of her 30% share to the respondent within 14 days of receiving such proof of payment.
- [32] The respondent shall also provide the claimant with proof of all payments made to date and the claimant will reimburse the respondent for any portion of her 30% share of those payments that remains outstanding.
- [33] Any other special expenses incurred by either parent will be dealt with in accordance with the protocol established under paragraph 1(b)(xi) of the 2010 order. It follows that I decline to vacate that term of the order.
- [34] As noted above, the claimant says that support payments for Ashley should be revisited if Ashley returns to school full time. However, I am not prepared to make any prospective orders regarding reinstatement of child support for Ashley based on possible future events. If Ashley does return to school, the expenses associated with her education will be treated as special expenses under the 2010 order and will be subject to paragraphs 1(b)(ix), (x) and (xi) of that order unless the parties agree otherwise.

The Insurance Policy

- [35] As noted in paragraphs 10 and 11 above, pursuant to paragraph 5 of the 2010 order and clause 5.8 of the parties' separation agreement, the respondent is required to maintain an insurance policy with a value of \$400,000 naming the claimant as the beneficiary, "while child support is paid".
- [36] The respondent seeks to terminate this obligation.
- [37] The claimant opposes this order on the basis that the policy was put in place to provide security for the childrens' education and she says it should be maintained until they have completed their studies.
- [38] In my view, the combined effect of paragraph 5 of the 2010 order and clause 5.8 of the separation agreement is to require the respondent to maintain the policy for so long as he continues to pay child support. As I have determined that his child support obligations have terminated, it follows that the obligation to maintain the life insurance policy is also terminated. I would note on this point the respondent's evidence that, in the event of his death, each of the children will receive a supplementary death benefit of over \$200,000 from the Canadian Armed Forces which will provide them with a measure of financial security.

Spousal Support

- [39] The most contentious issue between the parties is spousal support. The respondent seeks an order terminating his spousal support obligation. The claimant says that support should continue for another 8.5 years.
- [40] The respondent brings his application as a review of his support obligation, as distinguished from applying to vary an existing support order. This flows from paragraph 8 of the 2010 order which contemplates a review after June 1, 2013 of the "entitlement, quantum and duration" of the support payable by the respondent to the claimant.
- [41] The respondent cites *Domirti v. Domirti*, 2010 BCCA 472, where the court held that unlike an application to vary support, where the applicant must demonstrate a material change in circumstances, a review application entails a reconsideration of both entitlement to and quantum of support. In this regard, it is similar to an initial application for support (paras. 38 - 39, 41): see generally *Yemchuk v. Yemchuk*, 2005 BCCA 406, *Tedham v. Tedham*, 2005 BCCA 502, *Redpath v. Redpath*, 2006 BCCA 338 and *McEachern v. McEachern*, 2006 BCCA 508.
- [42] The respondent points to the following factors in support of his position:
- a) the claimant only works part time but is capable of full-time work as a secretary or in the teaching field;

- b) she has expressed an interest in upgrading her education, for example in the North Island College office management program, but she has consistently failed to pursue such a program;
 - c) she has moved all of her possessions to Kamloops and is in a "spouse-like" relationship with a man there who is capable of supporting her as needed; and
 - d) she has substantial assets available to her. In her June 18, 2010 financial statement, the most current statement available, she lists RRSP's in the amount of approximately \$185,000. This is in addition to the approximately \$192,000 she received as her share of the respondent's military pension and approximately \$300,000 that she netted from the sale of the former family home, which she had purchased from the respondent in December 2005.
- [43] The factors relied on by the claimant in response to the application to terminate support include the following:
- a) throughout their relationship, she put her career on hold in order to support the respondent's military career. This included changing residences 11 times during the course of the relationship;
 - b) the respondent has consistently failed to comply with his support obligations since separation thus requiring the claimant to apply to the court for relief. By way of example, the \$3,886.00 in spousal support set under the 2010 order for the period of November 2010 to December 2011 reflected the fact that the respondent was in arrears at the time of the order;
 - c) there is a significant disparity in income between the claimant and the respondent; and
 - d) her current monthly expenses exceed her monthly income.
- [44] With respect to the points raised by the respondent, the claimant denies that she is in a "spouse-like" relationship with a man in Kamloops. She admits that they are dating but she says it is not her intention to move in with him if she moves to Kamloops. She says she moved her belongings to Kamloops because she thought she had a job there which fell through.
- [45] In terms of income, the respondent's financial statement sworn March 26, 2014 lists employment income of \$119,256.00 plus income from his disability pension of \$8,589.12, for a total of \$127,845.12. Counsel for the respondent submits that the disability pension should not be included for the purpose of calculating income for spousal support purposes but provided no authority that would warrant such an approach.
- [46] The claimant has not filed an updated financial statement since her June 18, 2010 statement. That statement listed employment income of \$23,522.19 plus employment insurance benefits of \$2,368.00 for a total of \$25,890.19.
- [47] The claimant did submit copies of her 2012 T4 form, which listed employment income of \$26,204.30, and her 2013 T\$ form showing employment income of \$27,679.46.

- [48] I note that the 2010 order set the parties' income, for the purposes of determining child support, at \$126,699.00 for the respondent and \$25,890.00 for the claimant, figures which are very close to the most recent income figures available.
- [49] While the respondent's income can fairly be set at \$127,845.12 based on his most recent financial statement, the situation with respect to the claimant's income is less straight forward. The respondent seeks to attribute income to the claimant of between \$34,500 and \$54,500. The former figure includes \$10,000 of interest income he says she has or should have earned on the investment of the proceeds of the sale of the former family home, while the latter figure includes both that additional \$10,000 plus a further \$20,000 due to her intentional underemployment.
- [50] On the evidence before me, I do not find that the claimant is intentionally under-employed. While she did not explain clearly why she is currently not working full time, the respondent's position that she can and should be working full time is based purely on speculation with no clear evidence of other opportunities available to her or opportunities that she has foregone.
- [51] I do agree with the respondent that some income should be attributed to the claimant to reflect a return on the net proceeds of the sale of the family home, particularly since she has not provided any explanation of what has become of those funds. In the circumstances, the respondent's suggestion of \$10,000 per year is reasonable. This results in annual income attributed to the claimant of \$37,679.46, using her 2013 T4 income as the starting point.
- [52] The respondent brings his application to terminate spousal support under the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") which provides in section 168:

Review of spousal support

168 (1) An agreement or order respecting spousal support may provide for a review of spousal support, and for this purpose may provide for

- (a) the review to occur on or after a specified date, after a specified period of time or after a specified event has occurred,
 - (b) the type of family dispute resolution by which the review will take place,
 - (c) the grounds on which a review will be permitted, and
 - (d) the matters to be considered for the purposes of a review.
- (2) On review, a court, on application, may do one or more of the following:
- (a) confirm an agreement or order respecting spousal support;
 - (b) set aside all or part of an agreement, or terminate an order, respecting spousal support;
 - (c) make an order under section 165 [orders respecting spousal support].

- (3) In making an order under this section, the court is not required to consider any of the matters referred to in sections 164 [setting aside agreements respecting spousal support] and 167 (2) [changing, suspending or terminating orders respecting spousal support].

[53] As this is a review application under which the court may revisit both entitlement and quantum, it is also worth noting ss. 161 and 162:

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[54] The authorities establish that, leaving aside contractual obligations, entitlement to spousal support may be based on compensatory or non-compensatory i.e. needs-based, grounds. (Bracklow v. Bracklow, [1999] 1 S.C.R. 420 at paras. 41-43; Moge v. Moge, [1992] 3 S.C.R. 813).

[55] In the case at bar, many of the markers that typically give rise to an order for support on compensatory grounds exist. The evidence establishes that the claimant was the principal caregiver for the children during the marriage and that she subordinated her career to that of the respondent, which again required numerous changes in residence.

[56] I am also satisfied that spousal support is warranted on a needs basis given the significant income disparity between the parties resulting both from the breakdown of the marriage and from the division of responsibilities that existed during the marriage.

- [57] With respect to the quantum and duration of support, the Court of Appeal in *Domirtri* endorsed the use of the federal Spousal Support Advisory Guidelines (SSAG) as a useful tool in determining spousal support on a review application, again given that the issues on a review are similar to those that arise on an initial application for spousal support.
- [58] Using the incomes of \$127,845.12 and \$37,679.46 for the respondent and the claimant respectively, results in suggested monthly support at the low range of \$1,803.00, the mid-range of \$2,104.00 and the high range of \$2,404.00, for a total duration of 8.25 to 16.5 years, assuming no child support is payable by either party.
- [59] The respondent states in his affidavit that he has been voluntarily paying spousal support to the claimant since on or about June 4, 2005 approximately 8.5 years. Again, he now seeks to terminate that obligation.
- [60] The respondent somewhat overstates the situation given that his support obligation has been set by two previous court orders and, according to the claimant, there have been times when the respondent has failed or refused to pay, for example for 18 months beginning in 2008.
- [61] Considering the factors set out in ss. 161 and 162 of the FLA and the specific facts of this case, the respondent has not established that spousal support for the claimant should be terminated at this time. In my view, the claimant is still experiencing economic disadvantage stemming both from decisions made during the course of the parties' relationship and from the breakdown of that relationship.
- [62] That said, the claimant is gainfully employed and has managed to accumulate significant assets. As such she is well down the road towards economic self-sufficiency, one of the express objectives set out in s. 161 of the FLA. In the circumstances, it would be unreasonable to require the respondent to continue to pay her support for a further 8.5 years.
- [63] Taking all of the circumstances into account, I order that the respondent continue to pay spousal support for a further three years, terminating as of May 30, 2017. To the extent that the claimant has moved towards self-sufficiency but is not yet there, an additional three years will provide her time to take appropriate steps to achieve that goal, whether that be further education or some form of full time employment.
- [64] In terms of quantum, while the current \$1,700.00 per month is below the low end of the amounts pursuant to the SSAG, I see no reason to vary that amount, which has been in place since January 1, 2012 pursuant to the 2010 order. To the extent that this figure is low when compared to the SSAG range, I note that it would still result in the claimant receiving more than 30% of the parties' combined net disposable income. Since the respondent is content to maintain the 70/30 split on special expenses, maintaining the \$1,700.00 in support payments is a reasonable compromise.

[65] Pursuant to paragraph 7 of the 2010 order, the support payments have been made in equal allotments on the 1st and 15th day of each month out of the respondent's salary by way of a direct transfer from the Department of National Defense. That payment protocol will continue.

Summary

[66] In summary, I make the following orders:

- a) The respondent's obligation to pay child support for Ashley Beth Kearns, born December 15, 1993, is terminated effective August 31, 2013;
- b) The respondent's obligation to pay child support for Keri Ann Kearns, born November 16, 1995, is terminated effective August 31, 2013;
- c) Special expenses relating to Keri's university, specifically the \$500.00 paid monthly to her grandmother for room and board and the \$500.00 paid monthly to her directly for other expenses, will be paid by the respondent. The respondent will provide the claimant with proof of payment and the claimant will pay the respondent her 30% share of those expenses within 14 days of receiving such proof of payment;
- d) The respondent shall provide the claimant with proof of all such payments made to date and the claimant will pay the respondent any portion of her 30% share that remains outstanding;
- e) Any other special expenses incurred by either party in connection with Keri's education will be dealt with in accordance with the protocol established under paragraph 1(b)(xi) of the 2010 order;
- f) In the event that Ashley returns to school, the expenses associated with her education will be treated as special expenses in accordance with paragraphs 1(b)(ix), (x) and (xi) of the 2010 order unless the parties otherwise agree;
- g) The respondent's obligation under paragraph 5 of the 2010 order and clause 5.8 of the separation agreement dated December 4, 2006 to maintain a life insurance policy in the amount of \$400,000 with the claimant as the named beneficiary is terminated; and
- h) The respondent will continue to pay the claimant \$1700.00 per month in spousal support until May 30, 2017 at which time his obligation to pay spousal support will terminate. Payments will be made in equal allotments on the 1st and 15th day of each month out of the respondent's salary by way of a direct transfer from the Department of National Defence.

[67] As success has largely been divided, the parties shall bear their own costs.

"Skolrood J."

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