

CANADA / JUDGMENT

Kelly v. Somwe

2021 BCSC 1389

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1389 Kelly v. Somwe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kelly v. Somwe,

2021 BCSC 1389

Date: 20210611

Docket: E20078

Registry: Cranbrook

Between:

Rachel Jean Kelly

Claimant

And

Frigolait Mulimbi Somwe

Respondent

Before: The Honourable Madam Justice Gropper

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant

(via teleconference):

B. Veenstra

The Respondent, appearing in person
(via teleconference):

F. Somwe

Counsel appearing as Amicus Curiae:

P. Reimer

Place and Date of Hearing:

Cranbrook, B.C.

June 7, 2021

Place and Date of Judgment:

Cranbrook, B.C.

June 11, 2021

[1] THE COURT: This is my decision in this matter.

Introduction

[2] There are two applications before me related to child support and extraordinary expenses for the two children of the marriage.

[3] The first application is by Mr. Somwe, the father, to confirm two provisional variation orders pronounced by the Alberta Queen's Bench on March 21, 2019, varying the child support order of Master Scarth of September 21, 2015, (2015 order), for the calendar year 2018, and the provisional variation order pronounced June 6, 2019, varying the 2015 order for the calendar year 2019.

[4] The second application is by Ms. Kelly, the mother, seeking payment by Mr. Somwe of extraordinary expenses of \$8,991.62 representing Mr. Somwe's proportionate share of special and extraordinary expenses for the children.

Background

[5] Ms. Kelly and Mr. Somwe entered into a marriage-like relationship in the spring of 2005. They were married in August 2005 and separated in July 2008. They were divorced on March 9, 2010.

[6] There are two children of the marriage, a daughter born in January 2005 and a son born in April 2006.

[7] The children have resided primarily with their mother in Cranbrook since the parties separated. Mr. Somwe resides in Calgary, Alberta.

The 2010 Order

- [8] The order of divorce was granted in March 2010. Mr. Somwe was ordered to pay child support in the amount of \$400 per month commencing December 1, 2009, based on Mr. Somwe's income of \$25,400 per year. Mr. Somwe was ordered to provide Ms. Kelly with his previous year's tax return no later than June 30th of each year, beginning June 30, 2010.
- [9] Mr. Somwe did not provide Ms. Kelly with his income tax returns as ordered.
- [10] From 2013, Mr. Somwe worked as an electrician for various companies in Northern Alberta in the oil and gas industry.

The 2015 Order

- [11] In 2015, Ms. Kelly applied for an order to increase the amount of child support payments based on Mr. Somwe's new employment as an electrician in Northern Alberta. Ms. Kelly also applied to adjust the proportionate share of extraordinary expenses that Mr. Somwe would pay. Although Mr. Somwe was served with the application, he did not file any responsive materials to provide the court with an accurate picture of his financial circumstances. He did not appear at the hearing held on September 21, 2015.
- [12] Master Scarth ordered Mr. Somwe to pay \$2,104 per month in child support. While the order does not state the amount of income imputed to Mr. Somwe, it corresponds with an income of \$150,000 for two children under the Federal Child Support Guidelines. Based on Mr. Somwe's imputed income and Ms. Kelly's income, Mr. Somwe was ordered to pay 88% of the children's extraordinary expenses. He was ordered to provide a copy of his 2014 tax return to the claimant. Mr. Somwe was given liberty to apply to set aside the order on seven days' notice.

The 2017 Order

- [13] In 2017, Mr. Somwe sought an order that child support be varied retroactively and prospectively to correspond with his income and an order that the arrears of child support including interest and penalties be cancelled or reduced.
- [14] The application was heard by Mr. Justice Ball on July 10, 2017.
- [15] In support of this application, Mr. Somwe provided an affidavit that said that his income in 2016 was \$138,000. Mr. Somwe apparently believed that the amount that was imputed to him was \$200,000. It was not, as I have described. Mr. Somwe also deposed that he was laid off in August 2016 as a result of the downturn in the oil industry. He said his income for 2016 was \$88,000. He deposed that he expected his income for 2017 to be the same or perhaps less. Mr. Somwe did not provide evidence about any attempts he had made to secure new employment or additional employment in spite of the downturn that he described or to seek employment during the period he was unemployed.

[16] In his decision indexed at 2017 BCSC 1318, and referring to Mr. Somwe as "the applicant," Ball J. stated at para. 15:

I find the applicant has not established that the situation existing today is materially different from the situation prevailing when the 2015 order was made. In particular, I am not persuaded that the applicant is reasonably unemployed or underemployed based upon the evidence presented. The applicant has not been forthcoming about his work experience or income since the 2010 divorce order, and in particular has failed to provide income tax returns as required by two court orders. he has failed to provide sufficient particulars when describing his recent past unemployment and efforts to gain new employment. I must therefore conclude that he has failed to satisfy his onus of demonstrating that he is no longer capable of earning the income imputed to him by Master Scarth or that there has been any other material change in circumstances since the 2015 order. As a result, the application for a reduction in child support is dismissed.

[17] Ball J. then turned to Mr. Somwe's application to cancel or reduce arrears of child support.

[18] Citing the case of *Earle v. Earle*, [1999] B.C.J. No. 383 (S.C.), Ball J. found that Mr. Somwe had not proven a material change in circumstances justifying a reduction in child support or the cancellation of arrears. The court also noted that Mr. Somwe had accrued \$29,000 in his registered retirement savings plans between 2014 and 2016.

[19] Ultimately, Ball J. concluded at para. 22:

The applicant has not provided evidence demonstrating a significant or long lasting change, or that he is unable to pay now and in the future. Once again, he has failed to demonstrate that he is unable to earn the income imputed to him by Master Scarth. As such there has been no material change in circumstances and it would not be grossly unfair not to cancel or reduce the arrears.

Application the Alberta Queen's Bench

[20] In March 2019, Mr. Somwe made a family law application to vary child support to the Alberta Queen's Bench. He sought to retroactively reduce his child support from 2017 to reflect a Guidelines income of \$90,293.48. He sought repayment of the difference between the child support he had paid and that which he was seeking to pay.

[21] Mr. Somwe filed documents including his income tax returns and assessments from 2015 to 2018 along with the order for divorce, the 2015 order, documents from the Family Maintenance Enforcement Program (FMEP), a statement of assets and debts, and paystubs from his employer, Straight Group Limited Partnership, of Calgary, Alberta. The income tax returns and assessments filed with his application to the Alberta courts demonstrate the following incomes: in 2015, \$139,713; in 2016, \$89,396; in 2017, \$90,563; and in 2018, \$74,160.

[22] Notably, Mr. Somwe did not include the 2017 order or reasons for judgment of Ball J. Those were included in the claimant's affidavit provided to the Alberta court.

[23] In his application, Mr. Somwe said that he has never in a single year of work made an annual income of \$200,000 (which he says is his understanding of the basis of the 2015 order). Mr. Somwe also provided a description of the change in financial circumstances that he attached to his affidavit. In that statement, he described his work history and particularly his work in the oil and gas industry in Northern Alberta. He described it as project-to-project work which requires him to travel and to pay his own expenses. He described periods of intense work followed by periods of unemployment awaiting the next call from his employer. In respect of seeking employment, Mr. Somwe said "I have been very fortunate to be able to still find employment, in the meantime I personally know of fellow electricians who have more experience than I do that have not been able to find employment in the electrical industry."

[24] Mr. Somwe's application was heard by the Alberta court on March 21, 2019. The transcript has been provided. After Ms. Kelly brought the court's attention to the 2017 order, Mr. Somwe told the court:

I mention it but I didn't include it in the affidavit. That was because she came up with a statement that she was unable to work because of sickness which I did not get any information on at all on that particular statement except after the decision was made. So -- and that is why the court order was dismissed.

[25] After that hearing, the Alberta court found Mr. Somwe's Guidelines income for 2017 to be \$90,203 and for 2018 to be \$74,160. The Alberta court pronounced a provisional order varying the 2015 order such that the father pay the mother the sum of \$1,082 per month as base child support payable on the first day of each month commencing January 1, 2019.

[26] A further hearing was held by the Alberta court on June 6, 2019, to hear Mr. Somwe's application to vary the support order retroactively for the year 2018. The court varied the order to require Mr. Somwe to pay Ms. Kelly \$1,323 per month in child support for the calendar year 2018 and confirmed that from January 1, 2019, and continuing, the child support would be the amount of \$1,082 per month.

[27] In respect of Mr. Somwe's application to receive credit for his overpayment of child support from January 1, 2018 to December 31, 2018, the Alberta court referred that to the B.C. court for consideration.

The Current Application

[28] In support of this application, Mr. Somwe has provided his income tax return and assessment for 2019 stating his income to be \$76,130; for 2020, Mr. Somwe provided a T4 and a T4E which demonstrate that his income for 2020 was \$87,851. In his submission before me, Mr. Somwe reiterated what was contained in his statement attached to his affidavit filed in support of his application to the Alberta court.

The Legal Framework

[29] Applications to vary the quantum of child support are governed by s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). The applicable provisions in that section are as follows:

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively,

- (a) a support order or any provision [thereof], on application by either or both former spouses
- (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.

[30] Section 14(a) of the Guidelines provide:

For the purposes of [section] 17(4) of the [Divorce] Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof

[31] The legal framework for considering applications for reduction of child support retroactively and for the rescission of arrears was recently considered by the Supreme Court of Canada in *Colucci v. Colucci*, 2021 SCC 24. Madam Justice Martin writing for the court introduced the decision at para. 1:

This appeal centres on the appropriate framework for determining applications to retroactively decrease the amount of child support owing or forgive child support arrears under s. 17 of the Divorce Act. The amount of child support payable varies based on the payor parent's income, and income often fluctuates. As a result, applications to retroactively vary support are a common occurrence in courtrooms across the country. In an ideal world, when parents work together in the best interests of their children, they will provide full and accurate income information every year and recalculate the proper amount of support owing. When that does not occur, s. 17 of the Divorce Act allows a parent to ask the court to vary an existing order retroactively to align with the payor's actual income for the relevant period.

[32] In *Colucci*, the father asked the court to reduce his child support obligations retroactively and to rescind the arrears that had accrued. In respect of an application to vary child support retroactively, the court said at para. 5:

A payor who has established a past decrease in income is not automatically entitled to a retroactive decrease of support back to the date of the decrease. The overall decision is a discretionary one.

[33] Regarding an application to rescind arrears, the court commented at para. 8:

In these cases, the court order or agreement reflects the correct amount of child support owing, but the payor has failed to keep up with payments as they fell due. The payor subsequently asks the court to forgive all or part of the accrued debt because of present financial hardship. When the arrears reflect the amount that ought to have been paid, the payor cannot rely on a past decrease in income to explain why there are arrears. In these cases, there is a presumption against rescinding any part of the arrears, as courts have a range of other remedial options. Rescission sits at the far end of the range because it wipes out a legally recognized debt. As such, rescission is only appropriate in exceptional circumstances. Such circumstances may arise where full disclosure of the payor's financial circumstances shows that the payor is unable to pay the arrears and will be unable to pay in the future, even with a flexible payment plan.

[34] The court outlined the application framework when considering a retroactive decrease where the prior order overestimates payor income at para. 57:

This category of cases covers situations in which the payor has experienced a material drop in income that affected their ability to make payments as they came due. Decreased income is an all too common and unfortunate reality for many families. Any framework developed to accommodate retroactive variations of child support in response to decreased payor income must deal fairly with a wide range of factual situations, from payors who diligently paid the proper amount until they lost their employment or otherwise fell on hard times, to those who have made little effort to meet their responsibilities and are absent, intentionally underemployed or persistently delinquent.

[35] The court notes that most retroactive variation claims will be based on a material change in income. The onus is on the party seeking the retroactive decrease to show a change in circumstances. The test to be met is set out in para. 61:

To meet the threshold, a decrease in income must be significant and have some degree of continuity, and it must be real and not one of choice. Trivial or short-lived changes are insufficient to justify a variation. In this way, the threshold inquiry preserves some sense of certainty and predictability for the parties and the child, while allowing some flexibility in response to changes in the payor's income.

[36] The court describes the evidentiary requirement to support an assertion of a material change in circumstances at para. 62:

The payor must have disclosed sufficient reliable evidence for the court to determine when and how far their income fell, and to ascertain whether the change was significant, long lasting, and not one of choice. A decision to retroactively decrease support can only be made based on "reliable, accurate and complete information." The payor cannot ask the court to make findings on income that are contrary to the recipient's interests "while at the same time shielding information that is relevant to the determination of their income behind a protective wall"

[37] The court paid special attention to circumstances where the payor's income was imputed by the court:

Of course, a payor whose income was originally imputed because of an initial lack of disclosure cannot later claim that a change in circumstances occurs when he or she subsequently produces proper documentation showing the imputation was higher than the table amount for their actual income. The payor cannot rely on their own late disclosure as a change in circumstances to ground a variation order. This would "defeat the purpose of imputing income in the first place" and act as "a disincentive for payors to participate in the initial court process"

[38] In the passages that I have reviewed, the court cited the decision in *Earle*. In *Earle*, Madam Justice Martinson addressed the argument from a payor father that he could not pay child support when he was supposed to because his financial circumstances changed. She stated at paras. 27-30:

[27] People making this argument have a heavy onus. It is not good enough just to say that they could not pay because they earned less. They can only get a reduction or a cancellation of arrears if they present detailed and full financial disclosure, under oath (usually in the form of an affidavit) that:

- i. the change was significant and long lasting and
- ii. the change was real and not one of choice and
- iii. every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.

[28] The requirement that the information be under oath is an important one. A decision to cancel or reduce arrears can only be made on reliable, accurate and complete information. No judge will allow evidence that is not reliable and accurate.

[29] If there is no such sworn [statement], it is as if the judge has no evidence at all on which to base a reduction or a cancellation of arrears.

[30] Evidence cannot be hearsay either. That is, the person asking for a cancellation or a reduction of arrears cannot say in an affidavit that somebody else told him or her something important about the arrears. That other person has to swear an affidavit setting out the information. For example, the person asking for the reduction or cancellation cannot swear an affidavit and put in the affidavit a letter from his or her employer saying he or she is earning less. That letter is not under oath. Instead, the employer has to swear an affidavit explaining that the person is earning less and why.

Analysis

- [39] Mr. Somwe asks that I confirm the provisional variation orders of the Alberta court that determined that his income for 2017 was \$90,203 and, for 2018, \$74,160 and adjust his child support payments accordingly. For the reasons that follow, I will not confirm the provisional variation orders nor will I vary the amount of child support reflected in the 2015 order. I also decline to grant rescission of the arrears.
- [40] My first reason relates to Mr. Somwe's failure to make full disclosure about his financial circumstances to the court in 2015 and 2017. As noted in Colucci, a payor cannot rely on his own non-disclosure as a basis for his claim of change in circumstances. In his application to the Alberta court, Mr. Somwe was more forthcoming in his disclosure of his financial circumstances including his income tax returns and assessments. In doing so, he did exactly what Colucci warns against. His income was originally imputed because of his initial lack of disclosure. In the Alberta court and here, he is now claiming that a change in circumstances has occurred because he has subsequently produced documentation showing that the imputation was higher than the table amount for his actual income. He is relying on his own late disclosure as a change in circumstances as a ground for supporting a variation in child support. As noted in Colucci, this defeats the purpose of imputing income in the first place and acts as a disincentive for payors to participate in the initial court process.
- [41] The second reason is that Mr. Somwe misrepresented what occurred in the B.C. courts in 2015 and 2017 in his application before the Alberta court in 2019.
- [42] Mr. Somwe suggested to the Alberta court that the 2015 order was based on an imputed income of \$200,000. I appreciate that the 2015 order does not state what the court found Mr. Somwe's imputed income to be, but when he made his application to the Alberta court in 2019, he did know that it was not \$200,000. That was made very clear in the decision at para. 8 where Ball J. referred to the imputed income of \$150,000. Instead, he led the Alberta court to believe that his income was imputed to be \$200,000 and he "never made \$200,000 in his life". In the 2015 application, Mr. Somwe deposed that his income was only \$138,000. We now know that it was \$139,000 plus. The imputation of income made by Master Scarth without any financial disclosure from Mr. Somwe was very close to that which he had admitted that he earned for that year. The imputed income was not wildly inflated from what he actually did earn. He told the Alberta court that it was.
- [43] I consider that Mr. Somwe made a second and more egregious misrepresentation: Mr. Somwe's failure to provide the Alberta court with the reasons for judgment and the 2017 order. While Ms. Kelly did, it was apparently not considered by the Alberta court, likely because Mr. Somwe's comment that the decision dealt with the claimant's inability to work for a period was dismissed for that reason. That was deliberately misleading. The decision and the order are clear: Mr. Somwe's application to vary the 2015 order was dismissed by Ball J. because of a lack of evidence of his financial circumstances and because he did not provide evidence justifying the reasons for his reduction in income. Instead of being

forthright with the Alberta court, Mr. Somwe invited it to consider varying his child support for 2017 and 2018, which it did. In doing so, Mr. Somwe encouraged the Alberta court to vary his child support when that very application had been dismissed in British Columbia. That is improper. If Mr. Somwe wanted to challenge the decision of Ball J., his only option was to go to the B.C. Court of Appeal, not to a trial court in another jurisdiction and obtain a conflicting order.

- [44] The third reason that I decline to confirm the provisional various order is that while Mr. Somwe has demonstrated that his income has decreased since 2015 and has hovered in the range of \$75,000-\$90,000, he has not met the test to show a material change in circumstances. As explained in Earle and reiterated in Colucci, even where a payor shows that his income has decreased, that does not automatically mean that the child support payments ought to be varied downward. The change cannot be one of choice. Where a variation to child support is sought, as in this case, a reduction, Mr. Somwe must show that every effort was made to earn money or more money during the time in question and those efforts were unsuccessful. The evidence must be under oath and must not be based on hearsay.
- [45] Ball J. was clear in his reasons why he refused to vary the 2015 order. I have referred to para. 15 of Ball J.'s decision. Mr. Somwe did not demonstrate that he was reasonably unemployed or underemployed. He failed to provide particulars concerning his past unemployment and his efforts to gain new employment. Mr. Somwe blamed his decreasing income on the downturn in the oil industry in 2015 and 2016. Mr. Somwe makes the same assertions now. It is five years later. He cannot continue to refer to the downturn as a reason for not earning a greater income than he has. He has explained the cyclical nature of his work, periods of intense work and then periods of unemployment when he stands by waiting for his employer to recall him. I understand that.
- [46] Mr. Somwe is a journeyman electrician, but he provides no evidence of efforts that he has made in finding alternate or additional employment that may be more consistent and more remunerative. Instead, he says "I personally know of fellow electricians who have more experience than I do and have not been able to find employment in the electrical industry."
- [47] That is hearsay. That is not evidence under oath. Mr. Somwe is self-represented, but he is not unfamiliar with applications to vary child support. In his reasons, Ball J. thoroughly explained to Mr. Somwe what he was required to prove in order to have his child support varied. Then, as now, he has not provided the evidence required. Mr. Somwe has not met the two criteria required to show a material change in circumstances. He has only established that his income has declined. That is insufficient.
- [48] The application to confirm the provisional variation orders and to vary child support and rescind the arrears is dismissed.

- [49] I will move to the application by Ms. Kelly for a payment of extraordinary expenses. The 2015 order provided that Mr. Somwe shall pay 88% of the children's extraordinary expenses "which shall include daycare and other extraordinary expenses as agreed to by the parties and upon the production of invoices". Ms. Kelly seeks an order that Mr. Somwe pay to her \$8,991.62 representing his proportionate share of the special and extraordinary expenses of the children. Mr. Somwe has not provided a response to this application.
- [50] Ms. Kelly has provided invoices to support her application. They include school and extracurricular expenses, vision care, and orthodontia. Mr. Somwe has not agreed to the expenditures. For the last five years, he has concentrated on trying to demonstrate why the 2015 order ought to be varied. He cannot frustrate the payment of extraordinary expenses by simply not agreeing to them.
- [51] I find that the expenses incurred by Ms. Kelly meet the definition of "extraordinary expenses" set out in s. 7(1) of the Guidelines. On that basis, I make the order sought.

Costs

- [52] This application concerns child support and payment of extraordinary expenses. Ms. Kelly has been the successful party in these applications. She is entitled to costs. They may be enforced and collected as child support by the FMEP or its agents.
- [53] That concludes my reasons. Thank you, and we will adjourn.
- [54] CNSL B. VEENSTRA: Thank you, My Lady, appreciate it.
- [55] CNSL P. REIMER: It is Reimer, initial P., I will be drafting the order pertaining to the Divorce Act application. I am wondering if approval as to form of the order by Mr. Somwe might be dispensed with?
- [56] THE COURT: Yes, Mr. Somwe, Mr. Reimer is going to prepare the summary of my decision and I will review it carefully to ensure -- it will conform to my decision and I will review it carefully to ensure that it does. I will therefore dispense with your signature on the order. I will also --
- [57] CNSL B. VEENSTRA: My Lady, the only one question I had is, obviously, there are oral reasons for judgment. Do you expect that there will be a published version of the judgment or no?
- [58] THE COURT: I will order a copy of the reasons and I will publish them.
- [59] CNSL B. VEENSTRA: Thank you very much, My Lady.
- [60] THE COURT: All right, anything else?
- [61] FRIGOLAIT SOMWE: Yes, may I respond, please?

[62] THE COURT: If you have something to ask. You cannot comment on the reasons that I just gave.

[63] FRIGOLAIT SOMWE: Okay, well, I am asking how am I supposed to pay all my bills, everything that has been incurred, on a -- you know, a \$2,000 two-weeks paycheck, if anything?

[64] THE COURT: Mr. Somwe, I have made my decision. We will adjourn. Thank you.

"Gropper J."

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