
CANADA / JUDGMENT

Kjosness v. Kjosness

2019 BCCA 214

COURT

British Columbia Court of Appeal

DECIDED

27 May 2019

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2019 BCCA 214 Kjosness v. Kjosness

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kjosness v. Kjosness,

2019 BCCA 214

Date: 20190527

Docket: CA45528

Between:

Natalka Patricia Kjosness

Respondent

(Claimant)

And

Leslie Einer Kjosness

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Abrioux

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

August 14, 2018 (Kjosness v. Kjosness, New Westminster Docket E026075).

Oral Reasons for Judgment

The Appellant, appearing in person:

L.E. Kjosness

No one appearing on behalf of the Respondent

Counsel for the Director of Family Maintenance Enforcement Program:

J.L. Anderson

Place and Date of Hearing:

Vancouver, British Columbia

May 27, 2019

Place and Date of Judgment:

Vancouver, British Columbia

May 27, 2019

Summary:

The appellant husband brought an application to retroactively vary his spousal support obligations and cancel arrears in the range of \$30,000. The chambers judge dismissed the application on the basis that the husband had provided insufficient financial disclosure. The husband appeals from both the order dismissing his application and an order granting certain relief to the Director of Maintenance Enforcement relating to the enforcement of the support order. Held: Appeal dismissed. The husband did not establish that the judge committed any error warranting appellate intervention. The husband had been informed of the sort of evidence that would be needed to ground a successful application, but failed to provide a sufficient evidentiary foundation for the orders sought. Nor did he establish that the judge erred in principle, misapprehended the evidence or was clearly wrong in granting the relief relating to the enforcement of the support order.

Introduction

[1] ABRIOUX J.A.: This appeal arises from a longstanding family law proceeding. The appellant husband appeals the dismissal of the application that was heard on August 14, 2018, in which he sought a retroactive variation to his spousal support obligations and the cancellation of arrears. He also appeals the granting of certain relief to the Director of Maintenance Enforcement (the "Director") regarding enforcement of the support order.

Background

- [2] The husband and the respondent wife were married in 1988 and divorced in 2008. They are 70 and 62 years old respectively. Pursuant to the order of Madam Justice Holmes, as she then was, the parties were divorced and the husband was ordered to pay child and spousal support with his income imputed at \$70,000 (the "2008 support order").
- [3] When support payments were not made in accordance with the 2008 support order, the wife enrolled in the Family Maintenance Enforcement Program ("FMEP"). The husband's ongoing child support obligations were enforced under FMEP up until 2014, when the parties' children were no longer children of the marriage.
- [4] The husband's ongoing spousal support obligation is \$525 per month.
- [5] In 2017, the Provincial Court of British Columbia granted the Director a warrant of execution. The husband then applied to the Supreme Court of British Columbia to vary the 2008 support order, cancel his spousal and child support arrears and terminate ongoing spousal support. At the time, he was in arrears of support in the amount of approximately \$32,000. The application was dismissed by Madam Justice B.J. Brown on June 6, 2017 (the "2017 support application").
- [6] On June 6, 2017, bailiffs seized a number of shares (the "shares") from Marapharm Ventures Inc.--a publicly traded company of which the husband is the President and Chief Executive Officer--so that they could then be sold to pay the outstanding arrears.
- [7] On July 14, 2017, Mr. Justice N. Brown heard the Director's application regarding those shares. He ordered that some of the shares could be sold in order to generate sufficient funds to satisfy the arrears owed at that time. He adjourned that portion of the application relating to the Director's request to use the remainder of the shares as security for future spousal support obligations in order to allow the husband, who was represented by counsel, to apply to cancel the arrears and vary the support order.

Chambers Judge's Decision

- [8] On March 19, 2018, the husband's counsel filed the application contemplated by the July 14, 2017 hearing. In that application, he sought to vary the 2008 support order retroactively to January 1, 2011, claiming:
 - his income was no longer \$70,000 per year;
 - he did not have a regular salary or means to earn an income based on compensation of shares in lieu of income; and
 - FMEP had impeded his ability to earn a higher income.

- [9] Accordingly, he sought to vary the amount of spousal support contained in the 2008 support order retroactively to January 1, 2011, and to terminate his ongoing spousal support. In the alternative, he sought a date for the termination of support.
- [10] The application proceeded before the chambers judge on August 14, 2018. Both the husband and the wife were self-represented, with counsel for the Director appearing with respect to the enforcement issues raised by the husband.
- [11] In dismissing the husband's application, the chambers judge stated that he had reached the same conclusions as had Justice B.J. Brown in the 2017 support application. In doing so, he adopted paras. 4-8 of those reasons, where Justice B.J. Brown had found:
- (a) similar to what was the case under the former Family Relations Act, R.S.B.C. 1996, c. 128, arrears may be reduced or canceled where it would be grossly unfair not to reduce or cancel them and the court may consider the payor's efforts to comply, reasons for not complying, and any other circumstances (at para. 4);
 - (b) under the Divorce Act, the payor has the onus to provide sufficient financial disclosure to satisfy the court that there has been a change in circumstances that is significant, long-lasting, and not the result of choice or a lack of effort (at para. 5);
 - (c) aside from some subsequent payments, the husband effectively stopped paying support in 2012 but did not provide the court with a full history of earnings, assets, disposition of assets, or complete tax returns demonstrating that he could not pay or explaining why he could not pay (at para. 6);
 - (d) the husband's own estimated income appears to be sufficient to pay ongoing spousal support and make payments towards his arrears (at para. 7); and
 - (e) the original spousal support order was based on the wife's making basically the same income that she is currently making (at para. 8).
- [12] I note that Justice B.J. Brown had found no indication of any unfairness that would result from the continuance of the arrears. Nor did she find any significant change in circumstances that would merit a variation to the 2008 support order. In dismissing the application, she told the husband:
- [9] ... You have heard what I have had to say, sir, about what I would need before I would be prepared to cancel.
- [13] After adopting the aforesaid paragraphs, the chambers judge provided two examples of the husband's failure to disclose financial information--a failure which the judge said led him to have the same concerns as Justice B.J. Brown. First, the husband alleged that his company's financial statements, which the chambers judge referred to as "the audited financial statement information circular", incorrectly declared his 2016 income to be \$45,500, but he did not provide any evidence to substantiate this claim. Second, the husband stated that he had borrowed \$75,000 to exercise options to purchase shares, but again did not provide any

evidence regarding the details of the loan arrangement or the remaining amount outstanding.

- [14] Due to the husband's ongoing failure to make payments toward the arrears on his ongoing spousal support obligations, the chambers judge granted the Director's application for the bailiffs to pay the Director funds generated from the sale of the shares, with the remainder to be held as security for future spousal support payments.

Grounds of Appeal

- [15] The husband advances several grounds of appeal, including that Justice B.J. Brown and the chambers judge erred in:
- not varying the order when they had the jurisdiction to do so; and
 - ignoring or missing relevant evidence that demonstrated his change in income.

Standard of Review

- [16] An appellate court must show deference to a judge's findings of fact and factual inferences in a family law matter and will not reverse them unless there is a palpable and overriding error or a fundamental mischaracterization or misapprehension of the evidence: *Rick v. Brandsema*, 2009 SCC 10 at para. 30; *Hsieh v. Lui*, 2017 BCCA 51 at para. 38.
- [17] The standard of review on questions of law and principle is correctness: *Fleetwood v. Percival*, 2014 BCCA 502 at para. 9.
- [18] Where a judge is required to exercise discretion, an appellate court will give considerable deference to the judge and interfere only where the judge acted on a wrong principle or failed to give sufficient weight to all relevant considerations: *Fleetwood* at para. 9.

Decision

- [19] In *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254, Mr. Justice Punnett highlighted some of the consequences of insufficient disclosure in family matters:
- [48] This court has repeatedly noted the negative effects of inadequate and delayed disclosure. It increases expense, discourages settlement, prolongs the stress of litigation and, where children are involved, negatively affects them (see *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 at para. 9 and *Sebok v. Batis*, 2018 BCSC 585 at paras. 13-15).
- [20] First of all, I need not comment on the husband's desire, as stated in his factum, to appeal the order of Justice B.J. Brown in 2017, except to note that this relief cannot form part of what he seeks on appeal. This appeal can only relate to the alleged errors of the chambers judge in August 2018. No appeal was taken of Justice B.J. Brown's order.

- [21] In so far as the merits of this appeal are concerned, it is noteworthy, in my view, that the husband did not heed the advice of Justice B.J. Brown regarding the 2017 support application as to what would be needed to bring a successful application. As mentioned above, she suggested that he provide the court with "a full history of earnings, assets, disposition of assets [and] complete tax returns", which would help demonstrate that he could not pay or why he could not pay. This would assist in establishing a material change of circumstances such that the court could be satisfied that spousal support should be reduced or arrears cancelled.
- [22] At the hearing before the chambers judge, the financial information relied on by the husband was sparse in the extreme and did not approach what is required on applications to vary support orders. Furthermore, as noted by the chambers judge, the husband in fact contradicted some of the financial information that he himself provided, being the audited financial statement information circular of Marapharm Ventures Inc.
- [23] Accordingly, I am of the view that the appellant has not established that an error in principle was made, that a significant misapprehension of the evidence occurred or that the dismissal of his application was clearly wrong. It may be that with proper financial disclosure and the appropriate evidence before the court, the ongoing support obligation could be varied or terminated. But the chambers judge, in my view, did not have that evidentiary record before him.
- [24] I would also dismiss the husband's appeal of the relief that the chambers judge granted the Director.
- [25] Section 30.1 of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 ("FMEA"), provides in part:

Order requiring security for maintenance payments

30.1 (1) Whether maintenance is in arrears or not, the director, or if an order is not filed with the director, the creditor, on notice to the debtor, may apply to a court for an order under subsection (2).

- (2) On hearing an application under subsection (1), the court may order that, as security for payments in arrears or subsequent payments, the debtor provide security for maintenance payments in any form that the court directs.
- (3) If the court makes or has made an order under subsection (2), the court may issue a warrant of execution, on application by the creditor or the director without notice to any other person

- [26] In *D.S.W. v. J.A.K.*, 2012 BCSC 1977 ("*D.S.W.*"), Mr. Justice Barrow reviewed the applicable principles pertaining to the ordering of security for maintenance payments:

- [15] The principles that are to guide an application made under s. 26(10) were set out in *D.(B.) v. B. (L.D.)*, 2003 BCCA 189. In that case Newbury J.A. held that generally security should not be ordered, at least not in every case. If there has been either a history of deliberate refusal to honour a support obligation or if it is likely there will be a refusal to do so in the future, then alternative security under s. 26(12) may be ordered. The onus is on the applicant to show that alternate security is no longer necessary to protect the interests of the child.
- [27] While s. 26 of the FMEA deals specifically with the registration of a "maintenance order" in the land title office, there is no principled reason, in my view, why the reasoning in *D.S.W.* should not also apply to s. 30.1 and security for spousal support orders.
- [28] In this case, while I find that the chambers judge may have overstated the fact that there was no evidence with respect to the borrowing of the \$75,000, I would find that there was little evidence as deposed to by the husband to purchase share warrants. There was also evidence in the form of the FMEP Account statement of May 11, 2018, demonstrating the husband's lengthy history of failing to make support payments as ordered. These missed payments amounted to \$12,000 within a year of the 2008 support order and continued in the years thereafter. By February 2018, the arrears amounted to a sum in excess of \$30,000, at which time the balance then owing was largely eliminated by the sale of a portion of the shares.
- [29] Accordingly, there was, in my view, an evidentiary record before the chambers judge upon which he could reasonably exercise his discretion in finding that security for future support payments was required.

Conclusion

- [30] I would therefore dismiss the appeal.
- [31] GROBERMAN J.A.: I agree.
- [32] FENLON J.A.: I agree.
- [33] GROBERMAN J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Abrioux"

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