
CANADA / JUDGMENT

Kular v. Kular

2018 BCSC 1715

COURT

Supreme Court of British Columbia

DECIDED

4 July 2018

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2018 BCSC 1715 Kular v. Kular

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kular v. Kular,

2018 BCSC 1715

Date: 20180704

Docket: E6714

Registry: Chilliwack

Between:

Baljinder Kaur Kular

Claimant

And

Amrik Singh Kular

Respondent

Before: The Honourable Madam Justice Choi

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

P. Virk

The Respondent, appearing in person:

A. Kular

Place and Date of Trial/Hearing:

Chilliwack, B.C.

July 3-4, 2018

Place and Date of Judgment:

Chilliwack, B.C.

July 4, 2018

Introduction

- [1] There are two applications before the court. Mr. Kular's notice of application dated January 10, 2018, indicates that he seeks:
- 1) retroactive to May 1, 2014, to terminate child support pursuant to an order made October 2007 which set child support at \$622 per month for two children; and
 - 2) retroactive to May 1, 2014, to terminate the \$325 per month payable in extraordinary expenses pursuant to an order of September 8, 2008, of Mr. Justice Joyce.
- [2] I interpret Mr. Kular's application to mean that he asks this Court to cancel arrears of child support amounting to over \$20,000 as of December 2017 and to terminate ongoing child support for basic and extraordinary expenses.
- [3] Ms. Kular also filed an application, in which she seeks to impute income to Mr. Kular at a minimum of \$31,200 per year. This amounts to \$15 per hour for a 40-hour week.

Background

- [4] The parties were married on December 19, 2003, and had two children, a son and a daughter. The parties divorced pursuant to an order of October 5, 2007 ("October 2007 order"). Their son passed away in March 2016.
- [5] The October 2007 order included an order for monthly child support in the amount of \$622 for two children payable by Mr. Kular based on an annual Federal Child Support Guidelines, SOR/97-175 [Guidelines] income for him of \$40,815.
- [6] The October 2007 order also set out that daycare and the children's activities were agreed upon extraordinary expenses, but did not specify an amount payable.
- [7] On September 8, 2008, Mr. Justice Joyce ordered that Mr. Kular pay Ms. Kular half the daycare costs and additionally pay the sum of \$325 per month for extraordinary expenses. Receipts were to be provided upon request.

- [8] On February 29, 2016, Mr. Kular's appeared before Mr. Justice Grauer who ordered that child support be terminated and that arrears be fixed at \$15,416. 49 as of February 1, 2016.
- [9] Ms. Kular had not been served with the application or the order. The matter was reviewed by Mr. Justice Grauer on September 8, 2017. He set aside his previous order of February 1, 2016, without prejudice to Mr. Kular to apply to vary the October 2007 order.
- [10] He also stayed the October 2007 order for six months from September 8, 2017, and ordered that Mr. Kular had liberty to apply to vary the order of October 2007 on the basis of a material change in circumstances. This is Mr. Kular's variation application.
- [11] Mr. Kular's evidence is that since May 2014, he has been receiving assistance for persons with disability in the amount of \$1,133.42 per month. He deposes that "there has been a significant change in my employment status" and that he relies on a note from his family dr. Dr. Douglas dated January 8, 2017 which states:

To Whom it Concerns:

The above named patient is currently a person living with a disability. He has been under my care for depression, insomnia, backache, GERD, alcohol dependency and anxiety".

- [12] In Mr. Kular's second affidavit of March 5, 2018, he further deposes that "I have been unemployed for approximately 5 years. I last worked with Sun West in sanitation". He attaches another note from Dr. Douglas dated February 28, 2018. It says:

To Whom it Concerns:

The above named patient has chronic medical issues from his drug and alcohol problems. His disability status for the moment is permanent. I do not envisage a time for recovery in the near future. If further assessment or evidence is needed, I would be happy to refer him for an independent medical evaluation.

- [13] Ms. Kular questions whether Mr. Kular is unemployed by choice. She argues that he is deliberately unemployed or underemployed since 2014. She further submits that he has not taken any steps to find further employment and has not demonstrated why he cannot find employment that pays at least \$15 per hour.
- [14] Despite requests, she argues that he has not provided appropriate evidence on this matter, so his application ought to be dismissed and her application seeking imputation of income ought to be granted. This lack of evidence includes the failure to produce medical records regarding the conditions he claims to be suffering from, his disability benefits file, his income tax returns, or any of his employment records.

Law

- [15] Given that much of the October 2007 order was made under the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 [Divorce Act], s. 17 is the operative section that provides this Court with authority to vary, rescind or suspend orders.
- [16] While the Divorce Act does not address cancellation of arrears owing under an order, the Family Law Act, S.B.C. 2011, c. 25 [FLA] does so in s. 174. I agree with Mr. Virk that the legal principles found in the case law on s. 17 of the Divorce Act and s. 174 of the FLA, however, are largely the same.
- [17] Section 174 of the FLA allows the court to reduce or cancel arrears owing under an order for child support if the court is satisfied that it would be grossly unfair not to reduce or cancel the arrears. The court may consider the efforts of the person responsible for paying support to comply with the order, the reasons why the payor cannot pay the arrears owing, and any circumstances the court considers relevant.
- [18] Counsel for Ms. Kular submitted a number of useful authorities for the matter at hand.
- [19] The leading case of *Earle v. Earle*, 1999 BCSC 283, 86 A.C.W.S. (3d) 764, a decision of Madam Justice Martinson, outlines the principles for the cancellation or reduction of arrears. The decision sets out that the payor has a heavy onus and that a judge must be confident that the evidence is reliable, accurate and complete (para. 28). The applicant cannot rely on hearsay evidence.
- [20] Other cases have followed *Earle*. In the case of *Beavis v. Beavis*, 2014 BCSC 422, Madam Justice Fenlon indicated at para. 15 that there are two elements to the test, being gross unfairness and change in circumstances. Financial disclosure and obligation to earn capacity relate to the change in circumstance in assessing whether the applicant has proven a significant and long lasting change in circumstances due to a reduction in income.
- [21] In *Luney v. Luney*, 2007 BCCA 567, the Court of Appeal held that the test for reduction or cancellation of arrears is onerous and that the test is not easy to meet. This is because parents have a duty to support their children. Therefore, cases in which arrears are reduced or cancelled are rare (para. 43).
- [22] With respect to imputing income, s. 19 of the Guidelines is the operative section. Mr. Kirk cited *Hanson v. Hanson*, [2000] B.C.W.L.D. 234 (S.C.) and *Baldini v. Baldini* (1999), 46 R.F.L. (4th) 407 (B.C.S.C.), which are also both decisions of Madam Justice Martinson. Mr. Kirk also cited a Manitoba Court of Appeal case, *Donovan v. Donovan*, 2000 MBCA 80, and *Taylor v. Taylor*, 2010 BCSC 1539.

Analysis and Decision

Should the Order Be Varied?

- [23] Mr. Kular has the onus of proving why there is a material change in circumstances such that this Court should vary the order. The change must be significant and long lasting and be one that, if known at the time, would likely have resulted in different terms. The change must not be reasonably foreseeable at the time of the order: see *Willick v. Willick*, [1994] 3 S.C.R. 670 and *Earle*.
- [24] I accept that Mr. Sular has met that threshold of a material change in circumstances. Since the orders were made in 2007 and 2008, Mr. Kular is not working and he is receiving disability assistance. Ms. Kular argues that Mr. Kular's evidence is weak, that he is unemployed by choice and his addiction are self-imposed. I agree that Mr. Kular's evidence is not fulsome, but I also recognize that he is a self-represented litigant. Unfortunately, Mr. Kular's submissions were also very sparse.
- [25] With respect to cancelling all the child support arrears, Mr. Kular has not met the high burden of gross unfairness. The evidence in his affidavits was less than complete.
- [26] That he unfortunately has a drug and alcohol addiction, among other illnesses, does not amount to gross unfairness such that all the arrears may be cancelled.
- [27] However, I do not accept that child support ought to have continued to be paid at \$622 per month following the death of the parties' son in March of 2016. This is an amount which was payable for two children. Ms. Kular acknowledges this.

Should Ongoing Child Support Be Paid?

- [28] Turning now to whether ongoing child support ought to be paid, Mr. Kular's notice of application sought to terminate future child support payments completely. However, he indicated in oral submissions that he could pay \$52 per month on an ongoing basis. It appears that amount was chosen because the Guideline income on \$13,600 is \$50 per month. Mr. Kular receives approximately \$13,000 disability benefit per year.
- [29] I agree that Mr. Kular has not provided enough evidence otherwise to demonstrate that he cannot work at all. Being designated a person who qualifies for disability benefits does not mean he cannot work for the purpose of paying child support. I agree that his doctor's notes are inadmissible hearsay and do not amount to expert evidence (Taylor at para. 33). I agree with the comments of Mr. Justice Greycliff in Taylor at para. 34, that medical notes such as the one provided "are often made, at the request of a patient to a busy medical practitioner, for a purpose directed by the patient" and, in that sense, are often "self-serving self-reports". However, I also accept that Mr. Kular is suffering from one or more illnesses. Whether this renders him totally disabled from working is another question.
- [30] Ms. Kular seeks that I impute income in the amount of \$31,200, which is an annual salary at \$15 per hour for 40 hours a week. Based on my observations of Mr. Kular in court, I question whether he can work in a full-time capacity.

- [31] In the circumstances, I will impute income to Mr. Kular in the amount of \$20,000 per year retroactive to April 2016. This sum includes the amounts he receives in disability benefits. A Guidelines income of \$20,000 per year is \$165 per month for one child.
- [32] With respect to the \$325 per month in extraordinary expenses, I find that the October 2007 and September 2008 orders together contemplated Mr. Kular contributing \$325 to the children's daycare and activities collectively. There is no evidence in the affidavits of the extraordinary expenses or their costs, even in general terms.
- [33] Given the death of the parties' son in March of 2016, I find there is a material change in circumstances for the extraordinary expenses payment. I do not accept the submission that the \$325 per month is payable notwithstanding that there was only one child after March 2016.
- [34] I order that retroactive to April 2016 the extraordinary expenses payable for the parties' daughter are \$162 per month. Ms. Kular accepts that the extraordinary expenses ceased as of June 2018 when their daughter graduated from high school.

Conclusion

- [35] I dismiss Mr. Kular's application to cancel the child support arrears from May 2014 to March 2016. Commencing April 2016, Mr. Kular's Guidelines income is imputed at \$20,000 per year, which is \$165 per month payable as long as the child remains a child of the marriage pursuant to the Divorce Act. The income and support are always subject to a material change in circumstances. The \$325 in extraordinary expenses is reduced in half, being \$162 commencing April 1, 2016, and ending at the end of June 2018.
- [36] Ms. Kular is the substantially successful party and is entitled to her costs.
- [37] I dispense with the requirement of Mr. Kular's signature for this order.

"Choi J."

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