
CANADA / JUDGMENT

L.A.H. v. A.M.H.

2014 BCSC 241

COURT

Supreme Court of British Columbia

DECIDED

14 February 2014

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.A.H. v. A.M.H.,

2014 BCSC 241

Date: 20140214

Docket: E78627

Registry: Kelowna

Between:

L.A.H.

Plaintiff

And

A.M.H.

Defendant

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:

R.J. Smith, Q.C.

Counsel for the Defendant:

N. McDougall

Place and Date of Trial/Hearing:

Kelowna, B.C.

November 29, 2013

Place and Date of Judgment:

Kelowna, B.C.

February 14, 2014

Introduction

- [1] The defendant seeks an order terminating his obligation to pay spousal support or, alternatively, reducing the level of that support.
- [2] His existing obligation to pay spousal support is set out in the order of the Honourable Mr. Justice Barrow made January 14, 2009.

Background

General Background

- [3] The parties married on July 29, 2001, and separated on May 11, 2007. They were divorced on January 14, 2009, part of the order of Mr. Justice Barrow referenced above.
- [4] There are three children of the marriage: twins, A and C, born on July 12, 2005; and L, born on June 25, 2007.
- [5] The defendant is a dental hygienist employed by his brother. He was trained in that occupation and working full-time in that capacity before he met the plaintiff.
- [6] The plaintiff is an occupational therapist employed with the Interior Health Authority ("IHA"). She, too, was trained and employed at or near full-time in that field before she met the defendant. She continued to work full or near full-time hours until the twins were born, at which point in time she first took maternity leave. She has not returned to full-time employment since then. She has, however, retained a position with IHA since then, working in a part-time capacity and continues to do so.
- [7] Previous orders dealing with parenting time have made the principal residence of the children with the plaintiff. The defendant has had significant parenting time. On March 15, 2013, the amount of parenting time for the defendant increased, by the plaintiff's calculation, to 42 percent of the time. That parenting time arrangement was structured in a way to increase the defendant's time, but remained weighted heavily toward weekends, so as to minimize the impact on his employment and income.

- [8] The parties' incomes, according to the financial statements filed in the fall of 2012 with the application heard in early 2013, show incomes of \$195,835 for the defendant and \$28,221 for the plaintiff.

Judicial Proceedings

- [9] On October 20, 2008, the parties consented to an order before Master Young that, among other things, required the defendant to pay spousal support \$2,715 per month. No duration was specified. That order also addressed custody, guardianship and child support. Nothing in the order or the materials before me articulates the basis upon which the spousal support order was made.
- [10] On January 4, 2009, the parties entered into the consent order before Mr. Justice Barrow. That order was the product of a judicial settlement conference, and as a result, there are no reasons explaining it. Again, the materials before me do not set out the basis upon which the terms were reached.
- [11] Spousal support was set at \$2,500 per month, again with no specified duration and no provision for review. The order also addressed the division of property, custody, guardianship and access. It is not possible from the terms of the order to determine the value of the property retained by either party or their full financial circumstances.
- [12] The defendant has continued to pay spousal support in accordance with that order since that time. Although there have been some issues with respect to the timing of payment and periodic accumulations of arrears, there were no arrears at the time of this hearing. The plaintiff enrolled with the Family Maintenance Enforcement Program to assist in enforcing payment.
- [13] Early in 2013, the defendant brought an application seeking, among other things, the termination of spousal support and variation of the child care arrangements. In addition to her response to that application, the plaintiff filed her own cross application, which included an application for a declaration of arrears of spousal support and several variations to the order of Mr. Justice Barrow. I heard that application and oral reasons were delivered on March 15, 2013. In respect of the applications dealing with spousal support, that order provided as follows:
7. The Respondent's application to vary the amount of spousal support is dismissed. Spousal support shall be paid pursuant to the Order of Mr. Justice Barrow of January 14, 2009.
 8. Spousal support will be reviewed no sooner than October 1, 2013.

[14] The defendant had the matter reset for this hearing before me without filing a new application. Each party filed additional affidavit material relevant to a variety of issues that had been the subject of the March 2013 order, including spousal support. In respect of the latter, the affidavit evidence focussed on possible employment opportunities in occupational therapy in the Okanagan area and the steps taken (or lack thereof) by the plaintiff in pursuit of increasing her employment income.

[15] In my oral reasons for judgment in March 2013, I referred to s. 17(4.1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the recent Supreme Court of Canada decision in *L.M.P. v. L.S.*, 2011 SCC 64 ("*L.M.P.*"). I read from the court summary of that decision as follows:

The proper approach under s. 17 to the variation of existing orders is found in *Willick and G.(L.)*, [two cases from the Supreme Court of Canada] where it was held that a court must be satisfied that there has been a material change in circumstances since the making of the prior order or variation, meaning a change that, "if known at the time, would likely have resulted in different terms".

In this case, the trial judge erred in conducting a *de novo* hearing on the issue of the wife's ability to work and in concluding that she had become economically self-sufficient without making a finding about whether there had been a material change in the wife's circumstances since the 2003 order. The Court of Appeal also erred in determining that the wife had the capacity to work, and that this, coupled with the passage of time, amounted to a material change of circumstances. Upon examination of the actual circumstances of the parties at the time the order was made and the terms of the order, it is apparent that there had been no material change of circumstance since the making of the order and that there was therefore no basis on which to vary it under s. 17(4.1)

[16] In *Powell v. Levesque*, 2014 BCCA 33, our Court of Appeal also recently referred to *L.M.P.* for the above statement of principle and added at paras. 24 and 25:

[24] The Court added that whether a material change of circumstances has been demonstrated will depend on the actual circumstances of the parties at the time of the order (para. 34) and in general will require some degree of continuity, not merely a temporary set of circumstances (para. 35).

[25] The Court further confirmed that the threshold test for variation is the same whether or not the previous support order incorporated provisions from an agreement between the parties. It reiterated (at para. 36) that the question remains: "Has a material change of circumstances occurred since the making of the order? (See *Willick; G.(L.)*; *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920.)"

(emphasis in original)

[17] I also noted in the March 2013 reasons that I did not have evidence before me that provided any clear understanding of the division of property or the impact that it had on the relative financial position of the parties. Further, I said that the effect of my order regarding

parenting time meant that the children would be with the defendant more, providing a greater opportunity for the plaintiff to pursue employment. I observed that, in my view, it was appropriate that she do just that but noted that there were too many unknowns at that time to do more than set a time for a review. Time was needed to see what the plaintiff might be able to accomplish.

- [18] In the requisition resetting this matter for hearing before me, counsel for the defendant characterized it as "a continuation of the previous application". Each party filed material that dealt with a broad range of issues not limited to but including spousal support.
- [19] Mr. McDougall for the defendant had proceeded on the basis that all issues that had been dealt with in March could effectively be re-argued by way of the "continuation". Mr. Smith for the plaintiff took exception to that proposition, indicating that a new notice of application and response needed to be filed pursuant to the Rules, allowing for a clear delineation of the issues, facts and law.
- [20] After dialogue with counsel, Mr. McDougall for the defendant withdrew his request to deal with all issues except a review of spousal support. Mr. Smith conceded that the material he had filed on behalf of the plaintiff was all of the evidence that she was able or wished to place before the court in relation to a review of spousal support. I directed that the review of spousal support proceed, but as a precaution, I provided Mr. Smith the opportunity to ask that the proceedings be adjourned if, during the course of the hearing, he felt it necessary to file additional material in respect of spousal support in order to avoid any prejudice. No such request was made.

Issues and Positions of the Parties

- [21] In the application of the defendant that led to the March 15, 2013 order, he said that the plaintiff had "failed or refused to attempt to become economically self-supporting" and that he had "paid spousal support for a period longer than the relationship".
- [22] At this hearing, he focused on the same issues but with emphasis on the alleged lack of pursuit of employment that, he suggested, had been available. His new evidence is a collection of information regarding employment opportunities and job postings for occupational therapists that he felt were suitable for the plaintiff and which, to his knowledge, she had made no effort to pursue. He indicated that any logistical issues that might be associated with the pursuit of those employment opportunities could be addressed without any significant expense for child care.
- [23] He suggested that income be imputed to the plaintiff consistent with income that could have been generated from those employment opportunities. He produced several calculations of spousal support pursuant to the Spousal Support Advisory Guidelines utilizing the Divorcemate software.

- [24] The plaintiff, through her counsel, took the initial position that the issue was not properly before the court since the order of March 15, 2013, had dealt with the application then filed. She argued that the only way in which the issue could properly be back before the court was through a new application. In addition, the plaintiff says that the application filed by the defendant is for termination of spousal support, and as such, this court must either grant that application or dismiss it. Other compromise orders, such as imputing income and reducing spousal support, are not appropriate.
- [25] Mr. Smith on behalf of the plaintiff conceded at the hearing that no additional material or evidence would be filed in respect of the spousal support issue, and if the scope of the matters to be dealt with only covered the review of spousal support and whether or not it should continue in accordance with Justice Barrow's order, then it could be argued on the strength of the material before the court without any prejudice to the plaintiff. He did not concede that the procedure was proper.
- [26] The plaintiff says that there had only been two employment positions available since the March 2013 order in Kelowna, that one had been filled, and the other involved hours that would unduly interfere with her parenting responsibilities. She references the impact on her volunteer commitments in the children's school and the cost of child care if she were to increase her hours of work.
- [27] She stresses that the Divorce Act does not require her to be self-sufficient but rather indicates that one of the objectives of the spousal support order is to promote the economic self-sufficiency of each spouse within a reasonable period of time. She stresses the compensatory basis for her spousal support.
- [28] She argues that if spousal support is to be altered, it should be done on the basis of imputed income to her of \$32,400 per year. She says that her needs and means must both be assessed.

Analysis

- [29] As was noted in the original hearing of the application of the defendant, s. 17 of the Divorce Act governs applications to vary spousal support orders. It provides:

Order for variation, rescission or suspension

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
 - (a) a support order or any provision thereof on application by either or both former spouses; or
 - (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

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.

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.

[30] Despite my observations and comments in March 2013, the material filed on this review does not assist in understanding the financial position of the parties at the time of or as a consequence of the order of Barrow J. As occurred in the submissions leading to the March order, the parties again did not address the fundamental issue of any change in circumstances.

[31] The explanatory and editorial comments included with the Spousal Support Advisory Guidelines and the Guidelines themselves are not law and do not displace the Divorce Act provisions. Their place in the context of judicial decision making is, however, firmly entrenched (see *Chutter v. Chutter*, 2008 BCCA 507 at para. 100) but should be applied in variation and review proceedings with caution (*Powell* at para. 42). Their use in initial applications is quite different than in variation applications as described in *Beninger v Beninger*, 2007 BCCA 619, at paras. 51 and 52:

[51] In determining the appropriate level of spousal support on an initial application, this Court has said that the Spousal Support Advisory Guidelines: A Draft Proposal (Ottawa, Dept. of Justice: 2005) (the "SSAG") should be used as a guide in determining both the quantum and duration of support, assuming that entitlement has first been established. (See, for example, *Yemchuk v. Yemchuk*, 2005 BCCA 406, 16 R.F.L. (6th) 430; *Redpath v. Redpath*, 2006 BCCA 338, 33 R.F.L. (6th) 91; *Tedham v. Tedham*, 2005 BCCA 502, 47 B.C.L.R. (4th) 254; and *McEachern v. McEachern*, 2006 BCCA 508, 62 B.C.L.R. 185.) A question which arises in this appeal is what use, if any, a court may make of the SSAG on a variation application.

- [52] This question is answered, to some extent, by the authors of the SSAG who indicate in their proposal that the SSAG should be approached with considerable caution on variation applications. They state that the SSAG were not designed to address some of the more complex issues which can arise on variation proceedings, including the impact of remarriage, second families and retirement. In some cases, entitlement may also have become an issue since the initial order was made. In certain circumstances, however, the SSAG can be used on a variation application, albeit with care.
- [32] In the Guidelines, the term "indefinite" is typically not used alone but rather is clarified as "indefinite (duration not specified)". The Guidelines also note that in circumstances such as exist with these parties, initial orders are typically to be indefinite with any time limits only imposed upon "subsequent review or variation". As a product of that underlying rationale, all of the Divorcemate calculations provided by the parties in this application have indicated a duration of spousal support of approximately three to 13 years, or one-half to two times the length of the marriage.
- [33] Clearly, the defendant's approach at this hearing was to endeavour to show that the plaintiff has not pursued employment despite the availability of job opportunities within her field of expertise and training. In doing so, he seized upon my comments in March 2013 and treated this hearing as simply a question of scrutinizing the efforts of the plaintiff to find further employment or enhancing her income.
- [34] This approach, however, is too simplistic. The observations made by me in March were intended to convey to the parties, and specifically to the plaintiff, that her employment status and efforts or lack of efforts to enhance her employment status were certainly relevant to the spousal support issues before me. Those comments did not, and could not according to the law, alter the threshold requirement for a variation of a spousal support order (see Beninger at para. 22; L.M.P. at paras. 29 and 60). I do not believe I was too subtle in conveying that.
- [35] By making provision for a review not sooner than six months from the date of that order, the parties were given an opportunity to consider their positions and pursue whatever options they felt were available or appropriate in the circumstances. That included obtaining the evidence necessary to support those positions.
- [36] As indicated, the defendant approached this hearing as though it were simply a continuation of the earlier hearing before me. The terms of the order in March simply do not support that proposition. That view, however, certainly makes the absence of evidence and submissions on the question of change in circumstances even more glaring. When a party is told of an important deficiency in their evidence during a hearing, it is expected that it will be addressed by further evidence or submissions or both.
- [37] In a companion case to L.M.P., the Supreme Court of Canada in R.P. v. R.C., 2011 SCC 65, referenced the evidentiary requirements on an application for variation as follows:

[25] On an application to vary, the court should consider the terms of the order and the circumstances of the parties at the time the order was made to determine whether a particular change is material

...

[44] Normally, an applicant should adduce documentary evidence establishing the applicant's specific financial circumstances at the time of the original order. Nevertheless, we recognize that in some cases a trial judge might be able to make findings about what the applicant's circumstances were at the time of the order based on non-documentary, circumstantial or indirect evidence other than documentary evidence of the applicant's specific financial circumstances at the time of the original order.

In that case, the court found that there were evidentiary gaps that resulted in there being no way of measuring whether there was any material change that would entitle the applicant to a variation of spousal support (para. 33). The court also stated that, as no explanation for why the applicant failed to provide adequate evidence was provided, the court could not make an inference that a change of circumstances had occurred.

[38] The provision in the March 15, 2013 order for review did not, in the circumstances of this case, change the overall analysis that required, as a preliminary necessity, that there be a material change in circumstances.

[39] In this case, the financial circumstances of the parties at the time of the order are simply not clear. Current financial statements are part of the application record, but alone they do not allow me to assess any change in circumstances from the time the order was made. There is no comparative evidence dating back to the time of the order.

[40] The March 15, 2013 order did increase the amount of time the children are with the defendant. Parenting time and responsibility variations certainly can be important in this context, but the changes here are not sufficient in my view. As noted above, his time with the children is principally to increase his time around weekends. In the absence of evidence of the impact of these changes on both parties, I am unable to infer that they are sufficient to meet the tests set out above.

[41] The parties each made submissions as to whether it is appropriate to impute a level of income to the plaintiff based on the availability of employment. In my reasons in March 2013, I noted that it was my view that time had come for the plaintiff to pursue increased employment income.

[42] The evidence filed since that date references various job prospects, and each of the parties in their affidavit material comments on the suitability or lack thereof of those jobs. It is notable that the plaintiff did not pursue any of the jobs, even those that did not have the geographic challenges that she felt were intolerable.

- [43] If I were to impute a higher level of income to the plaintiff, I would then need to consider if that was a change in circumstances justifying a variation to the spousal support order.
- [44] In his submissions, Mr. Smith said that if I find the plaintiff is underemployed, I could impute the equivalent of a 0.6 or 0.8 full-time equivalent, which would equal \$46,537 or \$62,050 respectively. It is his position, however, that the plaintiff is prepared to accept an income imputed in the amount of \$32,400 and that that would be "the proper amount to be imputed to her".
- [45] It is my conclusion that, in all of the circumstances, it would be inappropriate to vary the order of Barrow J. given the evidentiary gaps that exist, even if I were prepared to impute some level of increased income to the plaintiff. The defendant has simply not met the obligation he faces to succeed in such an application.
- [46] In hindsight, it may have been preferable that I did not make a provision for a review in my March 2013 order. I will not specifically provide for a review here. I do not, however, want to preclude the defendant from pursuing a variation application if he believes that he can satisfy a court that a change in circumstances has occurred. I will not comment further or repeat what I said in March about the plaintiff and her efforts to increase her income. Certainly she is aware of them, and the parties and any court hearing a further application can determine if they have any bearing on the disposition of such an application.
- [47] The application to vary spousal support is dismissed.

"D.A. Betton, J."

The Honourable Mr. Justice D.A. Betton

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