

CANADA / JUDGMENT

L.E.S. v. J.C.S.

2023 BCSC 317

COURT

Supreme Court of British Columbia

DECIDED

22 February 2023

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2023 BCSC 317 L.E.S. v. J.C.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.E.S. v. J.C.S.,

2023 BCSC 317

Date: 20230222

Docket: E-202148

Registry: Vancouver

Between:

L.E.S.

Claimant

And

J.C.S.

Respondent

Before: Master Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant appearing by videoconference:

T.L. Jackson

S. Xu

Counsel for the Respondent appearing by videoconference:

F. Wu

Place and Dates of Hearing:

Vancouver, B.C.

February 13 and 14, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 22, 2023

- [1] THE COURT (by videoconference): When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] The respondent seeks to vary an interim order for support made September 1, 2021, as varied October 1, 2021, based upon a revised income for the respondent and an imputed income for the claimant, or alternatively set revised amounts, and ancillary relief.

Background

- [3] By way of brief background, the parties had a 23-year relationship, having begun living together on March 1, 1996, marrying on July 21, 2001, and separating on January 23, 2019. They have one child of the marriage who is currently 20 years' old (the "Child") and attending a full-time dual program of study at the University of British Columbia and the Paris Institute of Political Science Studies in France (the "Program"). These studies require in-person attendance in France and UBC according to the program's schedule.
- [4] The respondent is the chief operating officer for a tire company operating out of the US, earning USD \$125,000 per year, plus the possibility of incentive bonuses contingent upon the overall profitability of the company based on its EBITDA.
- [5] The claimant is unemployed, having had a traditional role in the relationship, with the primary focus being caring for the child during the marriage.
- [6] In July 2021, the parties appeared for a two-day chambers application following which an order was pronounced on September 1, 2021 (the "Original Order"). At that time a trial had been scheduled for May 30, 2022, and the Child was studying in France with the intention of returning to B.C. for the 2022 school break, in accordance with the Program's schedule.

- [7] The evidence before the Court as to the parties' financial circumstances was that the respondent's income had varied from a low in 2017 of \$122,577 with increases until 2020 at which time it was \$184,322. There had been changes in the respondent's employment during that time, and some income was due to severance.
- [8] The claimant remained unemployed throughout the relationship despite that the Child was living outside of the home while attending the Program, living in France and largely independent. The claimant's evidence was that the Child required, and still requires, more assistance than usual given some medical issues. The claimant also provided evidence that she herself suffers from her own medical issues that affected her ability to work. In addition, and more recently, she was caring for her gravely ill mother. All of this has had the effect of delaying her re-entry into the workforce.
- [9] The Original Order was based upon a finding that the respondent's Guideline income was \$184,332 and the claimant's was zero, and included the following terms:
- a) the respondent shall pay to the claimant child support of \$1,624 per month for the four-month university break in 2021, totalling \$6,496;
 - b) if the trial did not proceed on May 30, 2022, the respondent would pay the claimant child support of \$1,624 per month commencing May 1, 2022 and payable on the first day of each month thereafter for the four-month university break;
 - c) if the trial did not proceed and the child was living with the claimant and attending the Program, the respondent would continue to pay basic child support in the amount of \$1,624 per month commencing September 1, 2022, and payable on the first day of each month thereafter for so long as the child is a child of the marriage or until further agreement between the parties or further court order;
 - d) commencing January 1, 2021, and continuing on the first day of each month thereafter until written agreement between the parties or further court order, the respondent would pay the claimant interim periodic spousal support in the amount of \$5,930 based on the Guideline income set out above and the mid-range of the Spousal Support Advisory Guidelines.
- [10] The reasons for judgment from that application are indexed at 2021 BCSC 1733.
- [11] The respondent seeks to vary that order on the basis that there has been a material change in circumstances, namely:
- a) The financial status of the respondent has changed, in that while he received an approximate \$25,000 bonus in 2021, keeping his income relatively consistent with what it had been in 2020 and what was before the court at that time, he only received \$750 in the year 2022, that being the bonus payable for the 2021 year. He deposes that he has been told that he will receive no bonus in 2023 for the 2022 year.

- b) The Child returned to BC as expected on May 1, 2022 for the summer break, but remained here and is now attending UBC as part of the Program's schedule, and currently living with the claimant in a studio apartment. However, the respondent deposes that he was advised by the Child that she may not be happy living in a studio apartment with her mother and may be considering moving in with her boyfriend, who she does sometimes stay the night with. The boyfriend lives closer to UBC and that removes a significant travel impediment, given that the studio apartment is in West Vancouver.
- c) The claimant's mother passed away in September 2022.
- d) Despite the claimant no longer caring for her mother, and the Child appearing to be more independent, the claimant has not found new employment. As such, the respondent argues she should be imputed income of \$31,000 based upon his calculation of minimum wage, times 40 hours per week, times 50 work weeks per year.
- e) The May 30, 2022 trial date did not proceed as scheduled as there was no available judge to hear the matter, although the claimant had indicated an intention to seek an adjournment in any event. The parties were able to appear on the issue of the trial's adjournment and secure a new trial date of September 19, 2022. Unfortunately, the claimant's mother passed away immediately prior to that date and the trial was adjourned on that basis. A new 12-day trial date has now been secured for May 1, 2023.
- f) There has been a lengthy passage of time, namely 17 months, since the interim support order was pronounced.

Legal Framework

[12] Section 216(3) of the Family Law Act provides that an interim order may be varied if satisfied that at least one of the following circumstances exist:

- (a) a change in circumstances has occurred since the interim order was made; or
- (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.

[13] Pursuant to s. 216(4), in considering a variation, the court must consider the following factors:

- (a) the change in circumstances or the evidence, or both, referred to in subsection (3);
- (b) the length of time that has passed since the interim order was made;
- (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement
- (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and

- (ii) would not necessarily reflect the final arrangement between the parties;
 - (d) whether a trial has been scheduled;
 - (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).
- [14] The test for varying interim support orders was confirmed in *Szabo v. Pulham*, 2015 BCSC 1393 at paras. 22 and 23:
- [22] The test for a variation of interim spousal support is now set out in s. 216(3) of the Family Law Act. The court must be satisfied that a change in circumstances has occurred since the interim order was made or that evidence of a substantial nature that was not available at the time the interim order was made has now become available. The factors the court must take into account are set out in s. 216(4):
- (a) the change in circumstances or the evidence, or both, referred to in subsection (3);
 - (b) the length of time that has passed since the interim order was made;
 - (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement
 - (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and
- (ii) would not necessarily reflect the final arrangement between the parties;
- (d) whether a trial has been scheduled;
 - (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).
- [23] Justice Baird's order is silent as to whether it was made under the Divorce Act or the Family Relations Act. Because of the primacy of the Divorce Act, when an order is silent, it is presumed to be made under the Divorce Act. However, I need not reach a conclusion in that regard, because I am satisfied that there are a number of factors which cumulatively amount to either a change in circumstances under the Family Law Act, or exceptional circumstances under the Divorce Act. In the result, I conclude that Justice Baird's spousal support order should be varied.
- [15] Further, in *M.A.F. v. J.C.F.*, 2021 BCSC 1447, the court described interim orders as follows at paras. 64 to 67:
- [64] Interim orders are stopgap measures, designed primarily to maintain the status quo and to provide short-term solutions until the issues can be fully canvassed at trial, on a full evidentiary record.
- [65] In *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403 Madam Justice D. Smith noted:

- [22] Interim orders are primarily designed to maintain the status quo and to provide short-term solutions until issues regarding the best interests of a child can be fully canvassed at trial: *Johnson v. Jessel*, 2012 BCCA 393 at para. 48; *Leung v. Leung* (1998), 1998 CanLII 4652 (BC CA), 44 R.F.L. (4th) 121 (B.C.C.A.) at para. 10; *Eaton v. Eaton* (1987), 1987 CanLII 2950 (BC CA), 11 R.F.L. (3d) 92 (B.C.C.A.); and *Prost v. Prost* (1990), 1990 CanLII 907 (BC CA), 30 R.F.L. (3d) 80 (B.C.C.A.). In this case, the best interests of the child was at issue. The incident that gave rise to the supervision order was disputed. This raised issues of the parties' credibility. The forum to resolve these issues and whether there is an ongoing need for supervision of the child are best resolved at trial and not by repeated interim applications. Appeals from interim orders on issues regarding the best interests of a child generally have been discouraged absent a compelling reason: see *Haigh v. Haigh* (1987), 1987 CanLII 2933 (BC CA), 9 R.F.L. (3d) 301 (B.C.C.A.).
- [66] In view of the fact that interim orders provide short-term solutions it is not contemplated that there be multiple interim applications. In *B.K. v. J.B.*, 2015 BCSC 1481 Madam Justice Holmes discussed the threshold for a variation application to proceed at para. 34:
- [34] [Section] 216(3) creates a threshold for an application to vary an interim order. If there is a material change in circumstances or new evidence of a substantial nature and the threshold [has been met], the court will determine the application according to the factors in s. 216(4).
- [67] Madam Justice Martinson noted in *Hama v. Werbes* (1999), 1999 CanLII 5828 (BC SC), 66 B.C.L.R. (3d) 120 (S.C.) at para. 12: "interim orders, once made, should only be varied when there is a compelling change of circumstances, such that one or both parties would be seriously prejudiced by waiting until trial."
- [16] At para. 68, the court cited with approval *Huculak v. Huculak*, 1998 CanLII 4878 (BCCA) where reference was made to the Manitoba Court of Appeal decision *Coley v. Coley*, 1981 CanLII 3459 (MBCA) following quote, at p. 327:

Applications to vary interim orders are rare. There is a heavy onus on the person who, instead of waiting until the trial takes place, brings on a motion to vary the interim order.

- [17] As to the court's considerations for interim support applications in the first instance, the seminal decision of *Robles v. Kuhn*, 2009 BCSC 1163, confirms at para. 12 that, among other things, interim support orders are intended to achieve a form of rough justice without the court undertaking an in-depth analysis of the parties' financial circumstances.

Analysis

- [18] Having regard to the above principles, including specifically the purpose and intent of interim orders and heavy onus upon the respondent to establish that there has been a material change or evidence of a substantial nature that was not available before the court at the initial hearing, I will consider the factors as set out in s. 216(4).

Change in Circumstances or Evidence of Substantial Nature that was not available (s. 216(4)(a))

- [19] I will deal firstly with the financial circumstances of the parties.
- [20] The evidence before the court at the time of the Original Order included the employment letter by which it was set out that the respondent had only a base salary of USD \$125,000, and that any further income above that would be subject to a performance bonus based on the company's EBITDA. Implicit in that is that there is a possibility that it may not be earned if the company's profits fail to meet the required minimum threshold. Similarly, there is a possibility that income could be higher.
- [21] Notably, the respondent argued at the initial application that he expected his income to decrease, albeit not necessarily by virtue of an expected failure to meet the performance obligations to give rise to the performance bonus, but because he expected that there would be a loss in US dollars. This was specifically commented upon in the reasons for the Original Order, at para. 43.
- [22] As such, the initial court contemplated that there could be a change in income, including a reduction if, for example, the Canadian dollar experienced a significant drop in value.
- [23] Even if I am wrong and it was not contemplated by the court at the initial hearing that there would be a potential loss or change in the respondent's income, including because the performance bonus was tied not to a specific amount but to performance of the company, then I am also not satisfied that the decrease in income from \$184,000 to what it now is at \$167,318, is evidence of a substantial nature that was not before the court. In this respect, the decrease is, effectively a 10% decrease. That is not a decrease of such significance beyond what the court contemplated as a possibility.
- [24] That it is not a significant variation from his income is illustrated by the fact that the evidence before the court showed that, if you averaged his income from 2017 to 2020, that average is lower than his 2022 income. In other words, he continues to earn what is an average income over the prior three years contemplated by the court when the Original Order was made.
- [25] Recognizing that the court achieves rough justice in setting income for interim support orders, I am satisfied that the change in the respondent's income does not meet the test for a material change, or evidence of a substantial nature that was not available to the court.
- [26] Turning then to the claimant's financial circumstances, I am satisfied that the court contemplated the claimant may continue to be out of work until trial, even if trial was adjourned. In this respect, the court commented on the factors affecting the claimant's return to work, finding her to be in "dire need", and concluding as follows:

- [67] Despite the urging of the respondent, I do not consider it reasonable to expect the claimant to be working, given all of the obstacles in her life at the moment and the fact that she has been out of the workforce for such an extended period of time. I therefore will not impute any income to her.
- [27] While it has been 17 months since that finding was made, it has only been five months since the claimant's mother has passed, and that is not such an inordinate time that the claimant would be expected to have fully re-entered the workforce.
- [28] In making the Original Order the court appeared to consider that the claimant had medical obstacles, and it is reasonable to assume that it was contemplated that the need to care for her mother would continue for some time, likely until her mother passed away. Thereafter, a reasonable period of time would be expected for mourning before a re-entry into the workforce after a significant departure.
- [29] In addition, the medical obstacles in her own life appear to be the same as they were before the court at the initial application. While the respondent took issue with the strength of that evidence, in particular the medical evidence in support, there was sufficient evidence at that application to satisfy the court that the claimant was facing obstacles, and nothing seems to have changed in that respect, such that the argument as to the imputation of income does not appear to be based on there being a material change with respect to the claimant, but rather an attempt to relitigate that issue altogether.
- [30] With respect to the Child, there can be little doubt that the court contemplated that she could be living in Vancouver with the claimant after September 1, 2022. That that occurred is neither a material change or evidence of a substantial nature that was not before the court at the time of the application. That she may now wish to live with her boyfriend is, at this point, speculation and not something to be considered at this application.

Length of Time that has Passed and Whether Trial has been Scheduled (s. 216(4)(b) and (d))

- [31] As to the passage of time, which I will deal with at the same time as the trial adjournments as they are related, it is clear on the face of the Original Order itself that the master considered the possibility that the May 2022 trial would not proceed by virtue of the fact that she specifically provided for that eventuality when considering child support.
- [32] I do not find that there has been an inordinate passage of time, it being only a year delay in terms of the trial date as originally scheduled and the currently scheduled date. If a trial does not proceed, the original presider would reasonably expect that it could take another year to be reset.
- [33] As noted, it was not only contemplated by the presider at the initial application that that could occur, but accounted for in the order itself. The trial was not only adjourned, but has now been reset and is imminent.

- [34] As to the timing of this application being on the eve of that new pending trial date, while the fact that the trial has been reset is a consideration, I do note that the subject application was filed November 3, 2022, and set for hearing initially on November 17, 2022.
- [35] The result of today would have been the same had this application been heard at that time, or closer to it, rather than today. I do not find that the fact that it took some months to bring the matter on for hearing, given that it was a lengthy matter set for two days, is inordinate or can be visited upon the claimant to any degree, rather than the usual realities of litigation.
- [36] Regardless, there has not been an inordinate length of time between the Original Order being granted and this application, or the new trial date.

Whether Original Order was Intended to be Temporary in Nature (s. 216(4)(c))

- [37] Overall, I am satisfied that the interim support order was made for the purpose of having a temporary arrangement in place, with the intention that that arrangement would not adversely affect the position of either party pending trial or some other resolution in the interim, despite that it would not necessarily reflect the final arrangement between the parties. That is clear on the wording of the order itself, and in the reasons

Potential Adverse Effects (s. 216(4)(e))

- [38] In balancing the potential adverse effects of varying the order, and declining to do so, the prejudice lies against make a variation.
- [39] As was noted in the reasons giving rise to the Original Order, the claimant was found to be in dire straits. Since then, due to the support she is being paid, she has been able to rent a studio apartment which she shares with the Child, a 20-year-old university student. The Claimant is not living excessively. While there may be circumstances in the future that may alleviate her financial strain, such as the Child leaving home or an inheritance from her mother's estate, both issues that were raised, albeit with speculation, during the application before me, those have not yet occurred. As things stand, her standard of living appears to be significantly lower than that of the respondent.
- [40] In addition, the financial circumstances of the parties and pending distribution of assets, namely that the funds held in trust from the proceeds of sale of the former family home provide sufficient assets to address any potential overpayment if the trial judge should find that there ought to have been an adjustment for this year, support that there is no prejudice to maintaining the status quo to allow the matter to be resolved after there is a full argument, full evidence, and a full assessment of credibility.

Conclusion and Costs

- [41] For these reasons, I dismiss the respondent's application.

- [42] The claimant also sought an order for special costs. In this respect, the court had made such an order when the parties reappeared for clarification and further argument on the issue of costs following the Original Order, the reasons for which are indexed at 2021 BCSC 2087. At paragraphs 33 and 34, the court noted as follows:
- [33] The respondent's actions since separation continue in the same abusive manner. I am satisfied that his actions in refusing to support the claimant and . . . delaying proper financial and document disclosure, disobeying a court order, and forcing the claimant to bring the application in order to obtain any financial support are worthy of rebuke.
- [43] The order for special costs made at that time was made to address the type of reprehensible conduct which is deserving of the court's rebuke, as had been exhibited by the respondent in litigating this matter up to that point.
- [44] The claimant argues that this application is part of that prior pattern of abuse, by forcing her to respond to this application and use not only her financial resources, but her emotional and time resources, such as they are, to respond to this rather than prepare for the upcoming trial.
- [45] While I have dismissed the application, I do not see it as a continuation of the conduct for which the special costs award was made at the initial hearing. In this respect, the respondent has continued to make his payments for child support pending the determination of this application. In other words, the award of special costs that was made at the original application seems to have the intended consequences of curtailing the respondent's behaviour that had been exhibited prior to that order being made.
- [46] As such, I do not make an order for special costs, but do order that the claimant shall have her costs for the two-and-a-half days of attendance, including for these reasons, assessed in the amount of \$5,000, plus disbursements which I summarily assess at \$250, for a total with taxes of \$5,880 payable forthwith.
- [47] Any questions arising from that?
- [SUBMISSIONS RE COSTS OF FEBRUARY 6, 2023, APPEARANCE AT 9:27:03 TO 9:33:08 A.M.]
- [48] THE COURT: Thank you. Having heard those submissions, I make the order that each party will bear their own costs for the February 6, 2023, appearance where the matter could not be heard. Both parties could have taken different approaches to ensure that the matter could have come on for hearing by prompt delivery of materials.
- [49] Thank you.
- "Master Robertson"

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