

CANADA / JUDGMENT

Leger v. Leger

2023 BCSC 668

COURT

Supreme Court of British Columbia

DECIDED

25 April 2023

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2023 BCSC 668 Leger v. Leger

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Leger v. Leger,

2023 BCSC 668

Date: 20230425

Docket: E12335

Registry: Chilliwack

Between:

Caroline Collette aka Caroline Marie Leger

Claimant

And

Terry Leger aka Terry Alexandre Leger

Respondent

Before: The Honourable Justice E. McDonald

Reasons for Judgment

Counsel for the Claimant:

T.A. Dickson

The Respondent, appearing in person:

T.A. Leger

Counsel for the Family Maintenance Enforcement Program:

V.A.M. Kerenyi

Place and Date of Hearing:

Chilliwack, B.C.

March 1, 2023

Place and Date of Judgment:

Chilliwack, B.C.

April 25, 2023

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Introduction

- [1] These reasons for judgment concern cross-applications brought by the parties related seeking to vary court-ordered spousal support. The respondent, Mr. Leger, who is the payor spouse, seeks to end his obligation to pay spousal support and to reduce arrears of spousal support. On the other hand, the claimant seeks to increase spousal support to reflect that child support is no longer payable by the respondent.
- [2] For the reasons that follow, I have determined that it is appropriate to grant Mr. Leger's application and dismiss Mr. Leger's application, except to the extent that certain relief is consented to.

Background

- [3] The parties were married on May 14, 1993 and they separated on October 21, 2014. They are now divorced. There is some dispute as to the length of the parties' relationship. Ms. Leger pleads that the parties began living together in 1990 while Mr. Leger submits that the parties did not begin to live together until 1992. Therefore, the total length of the parties' relationship is either 22 or 24 years.
- [4] The parties have three children together all of whom are now adults and no longer children of the marriage.
- [5] On May 1, 2017, following a hearing of this family law proceeding, Justice Williams made an order, among other things, requiring Mr. Leger to pay Ms. Leger spousal support commencing May 1, 2017 and continuing until written agreement or further court order. Mr. Leger was provided with a right to review the spousal support after May 1, 2020.
- [6] On January 20, 2020, Ms. Leger filed a notice of application seeking, among other things, to retroactively vary the May 1, 2017 order of Williams J. in respect of child and spousal support.
- [7] On November 13, 2020, Mr. Leger filed an application response to Ms. Leger's January 20, 2020 application. In that response, Mr. Leger stated his position that child and spousal support ought to be based on his "true" 2018 and 2019 income which he said was lower than what was reflected in his income documents. Mr. Leger stated in the application response that the amount of monthly child and spousal support payable by him was \$854.78 and \$350.00, respectively.
- [8] On December 8, 2020, Justice Harvey determined the parties' 2018 and 2019 incomes and ordered, in relevant part, that:
 - 1. The respondent shall pay child support to the claimant in the amount of \$1,102.00 per month, commencing December 1, 2020 and continuing on the first day of each and every month thereafter so long as the child is eligible for support under the Divorce Act or further court order;
 - 2. The respondent shall pay retroactive child support to the claimant in the amount of \$3,542.85, payable in monthly installments of \$100.00 per month, commencing January 1, 2021 and continuing on the first day of each and every month thereafter until paid in full;
 - 3. The respondent shall pay spousal support to the claimant in the amount of \$1,185.00 per month, commencing December 1, 2020 and continuing on the first day of each and every month thereafter;
 - 4. The respondent shall pay retroactive spousal support to the claimant in the amount of \$8,364.00, payable in monthly installments of \$350.00 per month, commencing January 1, 2021 and continuing on the first day of each and every month thereafter until paid in full;

(The "Final Order")

- [9] On June 7, 2021, the parties consented to vary the Final Order to change the dates for all amounts payable from the 1st to the 15th day of each month.
- [10] Mr. Leger did not pay the spousal support ordered and he is indebted for support arrears. On or around March 26, 2018, Ms. Leger enrolled with the BC Family Maintenance Enforcement Program ("FMEP").
- [11] As of February 15, 2023, the FMEP's records indicate that Mr. Leger owes arrears in the amount of \$25,213.97, accrued interest of \$1,086.18 and statutory default fees of \$800.00, for a total due of \$27,118.15.
- [12] The Director of the FMEP issued notices of attachment dated August 12, 2021 and May 27, 2021. The Director also issued a report to a credit reporting agency on July 23, 2021 regarding arrears owed by Mr. Leger. On July 30, 2021, the Director registered a notice of maintenance order against Mr. Leger's real property.

The Orders Sought

- [13] In Mr. Leger's December 30, 2022 notice of application, he seeks the following relief:
 - a) To vary the December 8, 2020 order to terminate his obligation to pay the claimant spousal support effective June 1, 2022;
 - b) A reduction to the amount of support arrears owing by the respondent to the claimant;
 - c) To set aside the May 27, 2021 and August 12, 2021 notices of attachment issued by the Director of the FMEP and remove a notice of maintenance charge registered by the FMEP on title to respondent's property; and
 - d) To cancel any penalties applied by the FMEP and all interest accruing on the arrears of spousal support.
- [14] Mr. Leger also sought an order terminating his obligation to pay child support in respect of B.L.L., born May X, 2001, effective January 1, 2022. Ms. Leger consents to the cessation of child support payable in respect of B.L.L. effective January 1, 2022.
- [15] In the claimant's January 25, 2023 notice of application, she seeks an order varying the Final Order to require Mr. Leger to pay her spousal support in accordance with the Spousal Support Advisory Guidelines [SSAG] based on the "without child support" formula.

The Legal Framework

- [16] Section 17(4.1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] sets out the threshold requirements for varying an order for spousal support requiring that before a court makes an order varying court-ordered spousal support, the court must be satisfied that there has been a change in the condition, means, needs or other circumstances of either former spouse since the making of the spousal support order or the last variation order.
- [17] The objectives of an order varying a spousal support order are set out in s. 17(7) of the DA and they include recognizing economic advantages/disadvantages to the former spouses from the marriage or its breakdown, apportioning the financial consequences arising from care of the children of the marriage over and above child support, relieving economic hardship arising from the marriage breakdown and as far as is practicable, promoting economic self-sufficiency of the former spouses.
- [18] In *Mazloomi v. Mazloomi*, 2021 BCSC 871 at para. 25, the court summarized the leading guidance in respect of applications to vary spousal support:
- [25] *Jennens* [*Jennens v. Jennens*, 2020 BCCA 59] and *L.M.P.* [*L.M.P. v. L.S.*, 2011 SCC 64] provide the following guidance for applications to vary spousal support:
- a) The onus is on the applicant to prove a material change in circumstances: *L.M.P.* at para. 31; *Jennens* at para. 20.
 - b) The change in circumstances must be a material one, such that "if known at the time, would likely have resulted in different terms": *L.M.P.* at para. 32.
 - c) The focus of the analysis is on the prior order, and the circumstances under which it was made: *L.M.P.* at para. 33.
 - d) What amounts to a material change will depend on the actual circumstances of the parties at the time of the order: *L.M.P.* at para. 34.
 - e) In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances: *L.M.P.* at para. 35.
 - f) Certain factors can assist a court in determining whether a particular change is material, such as the subsequent conduct of the parties, which may provide indications as to whether they considered a particular change to be material: *L.M.P.* at para. 35.
- [19] The test for canceling or reducing arrears, which places a heavy onus on the applicant, involves considering whether there has been a material change in circumstances and whether it would be grossly unfair not to cancel or reduce the arrears based on the applicant showing that they are unable to pay now, and in the future: *G.F.W. v. J.L.R.*, 2012 BCCA 245 at para. 12, citing *Dring v. Gheyle*, 2018 BCCA 435 at para. 94.

Analysis

Mr. Leger's application to terminate spousal support and cancel arrears

- [20] One argument advanced by Mr. Leger is that Ms. Leger is no longer entitled to spousal support.
- [21] Mr. Leger disagrees that he and Ms. Leger had a traditional marriage or that she made employment choices that allowed him to advance his career. Mr. Leger submits that because he worked shifts, he was able to contribute substantially to the care of the home and the children. He denies that Ms. Leger lost career or educational opportunities due to her role in their relationship.
- [22] Ms. Leger submits that the parties had a long marriage and she has a strong compensatory claim for spousal support. I note that there is no term in the Final Order stating that spousal support is payable to Ms. Leger for a defined duration.
- [23] For most of the parties' relationship, Mr. Leger earned significantly more income than Ms. Leger. Ms. Leger took multiple maternity leaves to care for the children although she returned to work following each leave. Both parties pursued additional training and education during their marriage. Through this training, Mr. Leger was eligible to work as a federal corrections officer and Ms. Leger was eligible to work as a legal administrative assistant. Mr. Leger's training and career choice allowed him to pursue a much higher paying work than was available to Ms. Leger.
- [24] I find that Ms. Leger took time out of the work force to care for the parties' children. I also find that she pursued employment that facilitated Mr. Leger's career as a federal corrections officer. In other words, by working in non-shift work, at a job that required less hours, Ms. Leger was available to act, and she did act, as primary caregiver to the family. Mr. Leger does not dispute that following separation, B.L.L. resided with Ms. Leger.
- [25] I agree that the parties were in a long marriage and Ms. Leger has a strong compensatory claim for spousal support. That is because the parties structured their relationship to allow Ms. Leger to work and yet still provide primary care for the children and home, while Mr. Leger was able to devote significant time and attention to his demanding career as a federal corrections officer.
- [26] I find that Ms. Leger's part-time employment before 2015 was intended to allow her to provide primary care for the parties' children. After 2015, when Ms. Leger increased her hours to work 35 hours per week, I find that she continued providing primary care for the parties' home and children.
- [27] I accept that Mr. Leger also made contributions to household and child care responsibilities. However, given the nature of his work and the health challenges he encountered, I find it more likely than not that Ms. Leger was always the primary caregiver.

- [28] In view of all of the evidence, I find that Ms. Leger has an ongoing strong compensatory entitlement to indefinite spousal support.
- [29] In seeking to terminate his obligation to pay ongoing spousal support, Mr. Leger points out that following the parties' separation, his original monthly spousal support obligation was far lower than at present. In an order pronounced on May 1, 2017 by Williams J., it was determined that Mr. Leger had a gross annual income of \$82,000 and he was to pay Ms. Leger monthly spousal support of \$225 until further court order or agreement of the parties. Mr. Leger was provided with the right to review the issue of spousal support after May 1, 2020.
- [30] Mr. Leger submits that after 2017, he managed to pay the child and spousal support due and in 2019, he was even able to purchase real property as an investment. However, Mr. Leger submits that in 2020, following Ms. Leger's application, monthly spousal support payable increased to \$1,185 and he was required him to pay retroactive spousal support. At that point, Mr. Leger submits he was no longer meeting his support obligations and he fell behind.
- [31] Mr. Leger says that the Final Order failed to equalize the parties' financial situations and instead, it created a disparity. He points out that Ms. Leger is debt free while he has accumulated what he regards as a large and unmanageable debt load. Again, following the Final Order, Mr. Leger did not actually pay all of the support that he was ordered to pay.
- [32] Ms. Leger's counsel points out that Mr. Leger has managed to accumulate significant property following separation. According to Ms. Leger, Mr. Leger has decided to prioritize his property investment instead of paying the court ordered-support.
- [33] Before Harvey J., Mr. Leger submitted that child and spousal support ought to be based on his true 2018 and 2018 income, which were lower than the income ultimately determined in the Final Order. On this application, Mr. Leger continues to assert that spousal support should not have been based on, for example, on the income shown in his T4s or reported on his tax returns.
- [34] Much of the evidence contained in Mr. Leger's affidavit #3 made December 30, 2022, revisits the information and issues that were before Harvey J. In this affidavit, Mr. Leger requests a "reconsideration" by the court that no longer focuses on his gross income. While Mr. Leger states that there was a failure to convey his complicated pay issues to Harvey J., he says that he has no intention of challenging the Final Order as a whole.
- [35] Mr. Leger says that he provided evidence of the discrepancies and errors related to his pay and notwithstanding that evidence, the Final Order determined an income amount that was not correct. In essence, Mr. Leger submits that the Final Order gave Ms. Leger an economic advantage and created undue hardship for him by increasing spousal support and requiring him to pay retroactive support.

- [36] On a variation application, the court is to take the amount of support originally ordered as correct at the time the order was made and then consider how circumstances have since changed: *Walters v. Walters*, 2011 BCCA 331 at para. 48. Therefore, I have no ability to vary the Final Order because Mr. Leger believes it is wrong and he would like me to reconsider the evidence that was or could have been before the court. Rather, I am to consider how the circumstances have changed since the Final Order was made.
- [37] Another ground raised by Mr. Leger for terminating spousal support centres on Ms. Leger recently moving to another province to care for her elderly parent. This required Ms. Leger to leave her employment and take part-time employment at a reduced salary. She is anticipated to earn an annual salary of approximately \$14,800 whereas she previously earned nearly \$50,000 a year.
- [38] Ms. Leger acknowledges that her relocation has detrimentally impacted her income. Ms. Leger submits that the court ought to impute an annual income to her that is the same as what she earned before relocating. Therefore, I find that Mr. Leger's concern is no longer an issue because Ms. Leger agrees that income should be imputed to her for purposes of calculating spousal support.
- [39] In support of his application to terminate ongoing spousal support, Mr. Leger submits that he has accumulated significant debt due, in part, to the high levels of child and spousal support ordered in the Final Order. Mr. Leger points out that due to mental health concerns and the financial pressure caused, in part, by the Final Order, he went on medical leave from his employment.
- [40] Mr. Leger states that his employer continued to pay him, in error, even after he went on leave. He submits that FMEP has garnished those wages and he must eventually repay the wages upon his return to work. Mr. Leger says that this leaves him obligated to repay amounts to his employer that were actually garnished by FMEP.
- [41] However, I do not regard Mr. Leger's potential future obligation to repay wages as grounds to terminate ongoing spousal support. The fact that after the Final Order, Mr. Leger received employment earnings, allegedly paid in error, does not, in my view, result in debt repayments or a debt load that provides an exception under s. 12.2 of the SSAG. Further, Mr. Leger is not currently repaying the wages, rather, he states that he will have to do so in the future.
- [42] Ms. Leger points out, and I agree, that Mr. Leger's assets exceed his liabilities. While he has accumulated arrears of support, he has managed to improve his overall financial position including by investing in property. Mr. Leger's liabilities arose following the parties' separation. I do not agree that Mr. Leger's debt load or his debt service payments are inordinately high or that his debt repayments are exceptional so as to support terminating his obligation to pay ongoing spousal support.

- [43] In my view, Mr. Leger has failed to establish a change in circumstances since the making of the Final Order. In essence, he argues that the Final Order has caused him undue hardship by increasing spousal support which caused his debt load to increase. For obvious reasons, a payor is not generally entitled to point to a court-ordered obligation to pay support as proof of a material change in circumstances or undue hardship. When someone is ordered to pay support, it is obviously contemplated when the order is made that the payor will be required to devote some of their financial resources towards ongoing support.
- [44] In terms of the evidence required to establish that it would be grossly unfair not to cancel the arrears of support, the expenses stated in Mr. Leger's financial statement do not, in my view, demonstrate an inability to pay anything towards arrears. I further note that Mr. Leger owns property and I am not satisfied that there is no potential for future payment of the arrears.
- [45] When I consider all of the evidence, I find that Mr. Leger has failed to establish a basis for terminating his obligation to pay ongoing spousal support. Mr. Leger has not demonstrated that he has met the onus for cancelling or reducing the arrears of support that he owes. As I have already discussed, Mr. Leger has not shown a change in circumstances since the Final Order was made and he has not shown that it would be grossly unfair not to cancel arrears.
- [46] As I have concluded that Mr. Leger has not met the onus of showing that the arrears should be reduced or cancelled, I conclude that there is no basis for making any of the orders sought in respect of the FMEP, such as setting aside the notices filed by the Director of the FMEP.

Ms. Leger's application to vary spousal support

- [47] Ms. Leger seeks to vary the spousal support so that it reflects the without child support formula under the SSAG. Ms. Leger submits that since B.L.L. is no longer a child of the marriage and there is no ongoing obligation to pay child support in respect of her, Mr. Leger's spousal support ought to reflect this material change in circumstances.
- [48] The cessation of child support obligations is capable of constituting a material change in circumstances for purposes of a variation in spousal support: *Willms v. Willms*, 2020 BCCA 51 at para. 47 [Willms]; *Harrison v. Harrison*, 2020 BCSC 1203 at para. 61; and *McIntosh v. McIntosh*, 2007 BCSC 1331 at para. 58.
- [49] I agree that the cessation of Mr. Leger's child support obligation in respect of B.L.L., is a material change in circumstance that allows for a variation of spousal support.

- [50] Mr. Leger submits that the court should focus on his net income for purposes of calculating spousal support not his total income. His reported total income for 2019, 2020 and 2021 was \$165,991, \$144,644 and \$138,496, respectively. Mr. Leger submits that focussing on his net income is appropriate due to mandatory deductions from his pay from the federal pay centre, the garnishment by FMEP and tax reassessments resulting from the coding errors of the federal pay centre.
- [51] Mr. Leger describes various alleged errors made by the federal pay centre, for example, coding the workers' compensation repayment he received as taxable when it ought to have been treated as non-taxable. He has provided evidence concerning his efforts to remedy these alleged errors, for example, emails to address overpayment of employment income.
- [52] Mr. Leger may succeed in his efforts to correct errors at the federal pay centre. Those efforts may result in him being reassessed to adjust his total income in a taxation year. However, the current assessments of Mr. Leger's income are deemed valid and binding notwithstanding errors, defects or omissions: s. 152(8), Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).
- [53] Mr. Leger believes that an incorrect picture of his total income has arisen from various errors and other factors that he is attempting to address. However, in my view, the appropriate figure to use is Mr. Leger's total income reported at line 15000 of his individual income tax return. If Mr. Leger's income changes, for example, due to reassessment, the parties may agree to adjust spousal support or they may apply to vary the spousal support based on a material change in circumstances.
- [54] After considering all of the evidence, I conclude that for 2021, Ms. Leger has gross imputed income of \$46,558 and Mr. Leger has gross employment income of \$82,673, other employment income of \$19,436, employment insurance benefits of \$7,140, a net rental income loss of \$(3,831), plus non-table WCB compensation benefits of \$33,076, less union dues of \$1,419. Using an annual Guidelines income for Ms. Leger of \$46,558 and Mr. Leger of \$159,814, the SSAG "without child support" formula arrives at \$3,398, \$3,964 and \$4,291, as the respective, low, mid and high range of spousal support.
- [55] As I have found that the parties' marriage was a long one and Ms. Leger has demonstrated a strong compensatory entitlement to indefinite spousal support, I conclude that it is appropriate to order Mr. Leger to pay Ms. Leger monthly spousal support of \$3,964, which is consistent with the mid-range of spousal support. I find this amount of monthly spousal support appropriately reflects all of the circumstances and the findings made.

Disposition

- [56] By consent, B.L.L., born May X, 2001, is no longer a child of the marriage and the respondent's obligation to pay child support in respect of B.L.L. ceased effective January 1, 2022;

- [57] The balance of the respondent's December 30, 2022 application is dismissed.
- [58] Term 3 of the June 7, 2021 order is varied to provide that the respondent shall pay spousal support to the claimant in the amount of \$3,964 per month, commencing March 15, 2023 and continuing on the fifteenth day of each month thereafter.
- [59] The claimant is entitled to costs in respect of the applications and the Director of Maintenance Enforcement is entitled to costs in respect of the respondent's application.
- "E. McDonald J."
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