

CANADA / JUDGMENT

Linn v. Alguire

2024 BCSC 914

COURT

Supreme Court of British Columbia

DECIDED

21 May 2024

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2024 BCSC 914 Linn v. Alguire

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Linn v. Alguire,

2024 BCSC 914

Date: 20240521

Docket: E200574

Registry: Vancouver

Between:

Lin Linn

Claimant

And

Timmy Arnold Alguire, also known as Tim Alguire

Respondent

Before: The Honourable Justice Giaschi

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

B.W. Walkinshaw

The Respondent, appearing on his own behalf:

T. Alguire

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 10, 2024

Place and Date of Judgment:

Vancouver, B.C.

May 21, 2024

Table of Contents

Introduction.. 3

Facts. 3

Justice Brundrett's Order and Reasons. 3

Events Since Brundrett Order 6

Positions of the Parties. 7

Issues. 8

Should the Support Orders be Varied?. 8

Legal Principles. 8

Discussion.. 9

Material Change in Circumstances. 9

Amount of the Variation. 11

Retroactivity of the Variation. 12

Cancelling/Recalculating Arrears. 12

Orders. 14

Introduction

- [1] THE COURT: We are here today for me to deliver my reasons in this matter. I reserve the right to amend these reasons for grammar and clarity and to provide full citations and quotations, but the results will not change as a consequence of any such amendments.

- [2] The respondent applies to vary the final order of Justice Brundrett made on February 24, 2023, following an 8-day trial in this matter. In particular, the respondent applies to vary the orders made in respect of child and spousal support retroactive to January 1, 2023, and prospectively. He additionally applies to cancel the arrears owing in respect of child and spousal support. The application is opposed by the claimant.

Facts

- [3] The parties began living in a marriage-like relationship on July 1, 2005, and separated on January 26, 2020.
- [4] The parties have three children: Mitalin, I believe now aged 18; Tamilin, 15; and Tiamlin, age 12.
- [5] The claimant is 55 years of age; the respondent is 63 years of age.

Justice Brundrett's Order and Reasons

- [6] The parties attended an 8-day trial before Justice Brundrett in January and February 2023. Both parties were represented by counsel at the trial.
- [7] On February 24, 2023, Brundrett J. issued oral reasons for judgment. A final order dated February 24, 2023, was filed on May 25, 2023 (the "Brundrett Order").
- [8] The reasons and order addressed parenting, excluded property, division of property, child support, spousal support, and arrears of spousal support. The parenting issues comprised the majority of the reasons.
- [9] In relation to parenting, it was ordered that Mitalin and Tamilin were to reside with the respondent, and Tiamlin was to reside with the claimant. Parenting time was set on the basis of a two-week rotation.
- [10] The respondent's income for support purposes was determined to be \$151,304 per year and the claimant's income for support purposes was imputed to be \$38,000 per annum.
- [11] In respect of the respondent's income, Brundrett J. noted that:
- The respondent had long worked at London Drugs as an account manager and had a part-time position with the Department of Defence involving air cadets, which position he gave up in October 2022 [para. 13];
 - The respondent's 2022 income was \$151,304, which amount had been agreed by the parties [para. 110];
 - The respondent's 2022 income was "somewhat higher" than his salary in the previous years [para. 110]; and

- d) A small portion of his income, \$10,000, was from his part-time position with the Department of Defence from which he had voluntarily stopped working [para. 111].
- [12] Justice Brundrett declined to decrease the respondent's income on account of macroeconomic factors, as he considered this too speculative. [para. 112]. Ultimately, at para. 113, Brundrett J. determined the respondent's 2022 income was the appropriate figure to use for the support calculations.
- [13] In respect of the claimant's income, Brundrett J. noted:
- a) The claimant spoke Mandarin, Chinese and English "reasonably well", although it was clearly a second language [para. 10];
 - b) The claimant had a bachelor's degree in computer science [para. 10];
 - c) The claimant had had various jobs and failed business ventures, and had declared bankruptcy in 2016;
 - d) Since 2020, the claimant had worked as a school supervision aide for 2.5 hours per day [para. 11]; and
 - e) The claimant had earned \$6,876 in 2020 and \$29,979 in 2021; [para. 105].
- [14] The main issue concerning the claimant's income was how much additional income should be imputed to her. The respondent sought to impute an income to the claimant of \$55,000 per year. The claimant conceded that income should be imputed, but only to the extent of \$38,000 per year. Justice Brundrett observed that the claimant was not suitable for many of the jobs the respondent had proposed for her [para. 106] and that her skills and education had not yielded a significant level of income in the past [para. 107]. At para. 109, he concluded that having regard to the claimant's age, education, skills, historical earnings, and other personal circumstances, a reasonable income to impute was \$38,000.
- [15] Given the incomes of the parties as found or imputed, Brundrett J. ordered that:
- a) The claimant pay the respondent \$607 per month in child support in respect of Mitalin and Tamin, commencing March 1, 2023;
 - b) The respondent pay the claimant \$1,366 per month in child support in respect of Tiamlin, commencing March 1, 2023; and
 - c) The respondent pay spousal support to the claimant in the amount of \$1,972 per month, commencing March 15, 2023, for 92 months, at which time the spousal support was to be reviewed.
- [16] It is to be noted that the offset amount of child support was \$759 per month, payable by the respondent to the claimant [Reasons para. 117]. It is further to be noted that spousal support was assessed between the middle and high end of the Spousal Support Advisory Guidelines [SSAG] range [para. 127].

- [17] In relation to arrears of spousal support, Brundrett J. determined that the arrears were \$39,452.86. He ordered that \$36,000 of this amount be paid from the monies held in trust from the proceeds of the sale of the family home and that the balance of \$6,452.86 be paid in monthly instalments of \$268.87 per month for 24 months.

Events Since Brundrett Order

- [18] Since the Brundrett Order, the respondent has failed to make his support payments as ordered. He deposes that this is because he simply does not have the income to make the ordered payments. The claimant deposes that as of January 2024, she is owed over \$28,000 by the respondent, which amount includes \$7,000 held in trust.
- [19] Despite an income being imputed to her, the claimant has made no efforts to increase her income and continues to be employed part-time as a school supervision aide.
- [20] The respondent deposes that since the order was made, he has changed jobs from London Drugs to Amplified Audio Visual, where his income is \$108,000 per year. He further deposes that he has recommenced a part-time job with an air cadet squadron in Vancouver which pays him approximately \$10,000 per annum. He attaches his 2023 paystubs from London Drugs, Amplified Audio, and Department of National Defence to his affidavit. These indicate that:
- a) From January 1 to August 5, 2023, he earned \$41,314 at London Drugs;
 - b) From August 27 to November 11, 2023, he earned \$26,854 at Amplified Audio; and
 - c) From June 11 to October 31, 2023, he earned \$4,680 from the Department of National Defence.
- [21] At the hearing of this application, the respondent submitted his 2023 T4 slips into evidence. The claimant consented to the admission of this new evidence. The T4 slips indicate that in 2023, the respondent earned a total of \$123,013 of which \$75,336 was from London Drugs, \$40,855 was from Amplified Audio, and \$4,822 was from the Department of National Defence.
- [22] There is no suggestion that the respondent earned any other income in 2023, and I find as a fact that his 2023 income was \$123,013.
- [23] The claimant suggests that the respondent could have earned more money if he had remained employed with London Drugs, rather than seeking new employment. I do not accept this suggestion. The respondent commenced his new employment in late August 2023. Up to that point in time, he had earned \$75,336 at London Drugs or \$9,417 per month. This translates to approximately \$113,000 per year. Additionally, the respondent deposed to his reasons for changing jobs. These included a loss of customers at London Drugs, his concern that this trend would continue and that the offer of the new job came with the possibility of an ownership interest in the future. I accept these as valid reasons for the

change in employment. Moreover, it is apparent that the respondent's income at London Drugs has fluctuated over the years, and his 2022 income, upon which his support payments were based, was somewhat of an outlier.

- [24] Both parties depose to being under severe financial strain and to an inability to meet their expenses of daily living.

Positions of the Parties

- [25] The respondent, being self-represented, did not formulate his submissions particularly clearly. However, he relies on ss. 152 and 167 of the Family Law Act, S.B.C. 2011, c.25 [FLA] and it is clear that he wishes to vary the Brundrett Order in several particulars. First, he says that his income for support purposes should be reduced because his actual income in 2023 is less than \$151,304, and because he has had a job change. Second, he submits that the income imputed to the claimant should be increased because there are job opportunities available to her that will pay her more than \$38,000. Third, he submits that the support payments should be adjusted in accordance with the new incomes, that this adjustment should be made retroactive to January 1, 2023, and that the arrears should be recalculated.
- [26] The claimant submits that there should be no variation to the Brundrett Order. The claimant says that the respondent has not shown a material change in circumstances and that the application is effectively an impermissible appeal of the Brundrett Order. Additionally, the claimant submits that there is no basis for a retroactive variation to January 1, 2023. Finally, the claimant submits that arrears should not be cancelled because the claimant is struggling financially and needs the ordered support.

Issues

- [27] In view of the evidence and submissions of the parties, there are two issues:
- a) Should the Brundrett Order be varied in relation to support? This, in turn, depends on whether the incomes of the parties for support should be varied.
 - b) Should the arrears in the support payments owed by the respondent to the claimant be cancelled?

Should the Support Orders be Varied?

Legal Principles

- [28] Sections 152 and 167 of the FLA address variation in support orders.
- [29] Section 152 provides that child support orders may be varied where one of the following is established:
- (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;

- (b) evidence of a substantial nature that was not available during the previous hearing has become available;
- (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

[30] It is predominantly item (a) that is in issue in this application.

[31] Section 167 of the FLA provides that spousal support orders may be varied where one of the following is established:

- (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
- (b) evidence of a substantial nature that was not available during the previous hearing has become available;
- (c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

[32] Again, it is predominantly item (a) that is in issue in this application.

[33] In *Willick v. Willick*, [1994] 3 S.C.R. 670 at para. 20, a material change was described as:

a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

[34] In *S.M.R.C. v. S.H.C.*, 2014 BCSC 2197 at para. 11, Justice Ballance notes that the concept of a material change of circumstances is essentially the same for variation of child support and spousal support and that such a change must be "substantial, unforeseen, and continuing".

[35] The onus is on the party seeking a variation, in this matter the respondent, to prove a material change in circumstances. *Willick* para. 31.

Discussion

Material Change in Circumstances

[36] As indicated, the respondent submits a variation in the Brundrett Order is appropriate on two grounds: (1) because a higher income should be imputed to the claimant; and (2) because he changed jobs and his income in 2023 was significantly less than \$151,000.

[37] In my view, there is no basis for a variation in the order on the grounds that the claimant could be earning more than the \$38,000 imputed to her. This part of the respondent's application is merely rearguing the amount of income that should be imputed to the claimant, an issue decided by *Brundrett J.* The respondent points to no change in circumstances, let alone a material change in circumstances, that would justify a variation on this basis. He does not point to anything that has increased the claimant's capacity to

work or increased her job opportunities. He merely provides job postings for jobs he says the claimant can do. This is precisely what he did at the trial. At para. 134, Brundrett J. wrote: "In this regard, the respondent has filed job postings of positions he says the claimant could have applied for and had a reasonable chance of securing". The updated job postings he has provided to me are not evidence of a material change in circumstances or evidence of a substantial nature that was not available during the previous hearing.

- [38] Accordingly, a variation is not warranted on the basis that an income of more than \$38,000 should be imputed to the claimant.
- [39] However, I agree with the respondent that a variation is appropriate on the basis of his change in job and reduced income. His 2022 income, the income used for the support calculations, was \$151,000. His 2023 income, in contrast, is \$123,000. This represents a reduction of \$28,291 or approximately 19 percent. In my view, such a reduction is material.
- [40] The claimant submits that the change in income is not a material change because the respondent has not proven it was unforeseen or long-lasting. I disagree for the following reasons.
- [41] First, concerning the submission that the change was not unforeseen, there is no suggestion in the evidence that at the time of the trial, the respondent was contemplating a job switch. The evidence is that the respondent's last day of work at London Drugs was on or about August 5, and his first day of work at Amplified Audio was on or about August 27. In other words, the change in jobs occurred over six months after the trial. Additionally, the respondent deposes that it was in July of 2023, approximately five months after the trial, that he first met with the proprietor of Amplified Audio in relation to the new job. Hence, there is no evidence that the job change was foreseen and ample evidence from which I infer it was unforeseen.
- [42] Second, there is no basis for suggesting either the job change or the income change is not long-lasting. There is no evidence that the respondent might return to London Drugs. To the contrary, he indicated he wishes to remain with his new employer and hopefully secure an ownership interest at some point in the future.
- [43] The claimant further submits that the income change is not long-lasting because the respondent is paid partly on commission, and he could achieve the same level of income as he had in 2022. In my view, this is nothing more than speculation. The respondent's income history does not support an inference that an income of \$123,000 is temporary. To the contrary, the evidence suggests that it is long-lasting. Historically, with the exception of 2022, the respondent has never earned an income over \$150,000. His income in 2020 and 2021 was approximately \$100,163 and \$119,005 respectively. Additionally, he has deposed that 2022 was an exceptional year because of the completion of a large project in that year.

[44] Accordingly, I am satisfied that there has been a material change in circumstances that was substantial, unforeseen, and continuing, and that it is appropriate to vary the support calculations.

Amount of the Variation

[45] Based on the evidence before me, I am satisfied that the income of the respondent to be used in the support calculations is his 2023 income of \$123,000. The imputed income of the claimant is to remain at \$38,000 as found by Brundrett J.

[46] With these incomes, the child support payments under the Guidelines are:

- a) The claimant is to pay the respondent \$607 per month in respect of Mitalin and Taminlin;
- b) The respondent is to pay the claimant \$1,138 per month in respect of Tiamlin; and
- c) The setoff amount is \$531 per month payable by the respondent to the claimant.

[47] In respect of spousal support, the SSAG gives a range for spousal support of \$531 at the low end, \$963 at the midpoint, and \$1,346 at the high end. Brundrett J. determined that spousal support should be assessed between the mid and high range of the SAAG. It was not argued before me that this was inappropriate and I see no reason to depart from this. Accordingly, the spousal support will be \$1,150 per month.

[48] The duration of spousal support will remain as determined by Brundrett J., which means that support will continue for another 78 months or until November 15, 2030, at which time there is to be a review of spousal support.

Retroactivity of the Variation

[49] As indicated, the respondent requests that his support payments be varied retroactively to January 1, 2023. I decline to make any retroactive orders.

[50] First, a retroactive variation of support to January 1, 2023, would not be a variation, but would, in fact, be an appeal of Brundrett J.'s order. I do not sit in appeal of Brundrett J.

[51] Second, a variation order is generally effective from the date of effective notice: *D.B.S. v. S.R.G.*, 2006 SCC 37, at para. 121. I was advised during the hearing that no notice was given to the claimant prior to the filing and service of this application which occurred in late November 2023. Accordingly, the effective date of the notice and of the variation will be December 1, 2023, in respect of child support, and December 15, 2023, in respect of spousal support.

Cancelling/Recalculating Arrears

[52] Although the respondent has requested an order cancelling arrears, the basis upon which he says that arrears should be cancelled is unclear. In his notice of application, he did not refer to or rely on s. 174 of the FLA. Principally, he seemed to argue that the arrears should be cancelled in conjunction with the retroactive variation of his support payments. However, he did submit that he is in dire financial circumstances and has simply been unable to make the support payments ordered. He seemed to suggest that the arrears should be cancelled more generally because of hardship.

[53] Section 174 of the FLA sets out the general test for cancelling arrears for both spousal support and child support; namely, whether it would be grossly unfair not to reduce or cancel arrears.

174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

(2) For the purposes of this section, the court may consider

- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
- (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
- (c) any circumstances that the court considers relevant.

[54] The respondent must establish a material change in circumstances that he cannot presently pay arrears, that he cannot pay the arrears in the future, and that it would be "grossly unfair" to cancel the arrears: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 54; and *Kelly v. Martel*, 2022 BCSC 756 at paras. 70-72.

[54] The factors to be considered in granting an order cancelling arrears are set out in *Burgie v. Argent*, 2013 BCCA 247, at paras. 15 and 23, namely, (a) whether there is a material change in circumstances, and (b) whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future": *Semancik v. Saunders*, 2011 BCCA 264 at para. 25. The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold".

[55] I am not satisfied that the respondent has discharged the onus on him proving that he will be unable to pay the arrears in the future or that it is grossly unfair not to cancel the arrears.

[56] Although I accept that the respondent is under financial distress, it is not clear that he will be unable to pay the arrears in the future.

- [57] More significantly, it is apparent from the affidavits filed that both parties are struggling financially. In particular, the claimant appears to be under the same distress as the respondent. Additionally, from the respondent's financial statement filed January 2024, it appears that his assets exceed his debts, although he does not include his support arrears as a debt. In contrast, the claimant's financial statement indicates that her debts exceed her assets by a considerable amount. Under the circumstances, it cannot be said that it would be grossly unfair to not cancel the arrears.
- [58] Accordingly, I decline to cancel the arrears.
- [59] However, the arrears do require recalculation to take into account the variation in the support orders as of December 1 and December 15, 2023.
- [60] Additionally, given that both parties were required by the Brundrett Order to pay child support without regard to the setoff that applied, and given that there was some confusion at the hearing about the need for the claimant to pay child support when there was a net amount owing to her, I will order that the arrears be recalculated by applying the setoff, if this has not already been done. This means that for the period from March 1, 2023, to and including November 1, 2023:
- a) Any arrears of child support owing by the claimant to the respondent are to be cancelled; and
 - b) The arrears of child support owing by the respondent to the claimant for this period are to be recalculated based on the child support setoff amount of \$759 per month (\$1,366-\$607).

Orders

- [61] In summary, I order that the order of Brundrett J. made February 24, 2023, is varied as follows:
- a) Paragraph 9(b) is varied such that the respondent is found to be a resident of British Columbia and is found to have a gross annual income of \$123,000;
 - b) Paragraphs 10 and 11 are varied as follows:
 - i. Commencing on December 1, 2023, the claimant will pay to the respondent the sum of \$607 per month for the support of Mitalin and Taminlin;
 - ii. Commencing on December 1, 2023, the respondent will pay to the claimant the sum of \$1138 per month for the support of Tiamlin; and
 - iii. To satisfy each party's obligations to pay child support, the respondent will pay to the claimant the net sum of \$531 per month, commencing on December 1, 2023, and continuing on the first day of each and every month thereafter for as long as the children are eligible for support under the FLA or until further agreement of the parties or court order;

- c) Paragraph 12 is varied such that the respondent shall pay to the claimant \$1,150 per month in spousal support commencing on December 15, 2023, and continuing on the 15th day of each and every month thereafter until November 15, 2030, at which time there is to be a review of spousal support;
- d) The arrears of child support owing by the claimant to the respondent are to be cancelled;
- e) The arrears of child support owing by the respondent to the claimant are to be recalculated for the period from March 1, 2023, to and including November 1, 2023, using the setoff amount of child support of \$759 per month;
- f) The arrears of child support owing by the respondent to the claimant from and after December 1, 2023, are to be recalculated using the setoff amount of \$531 per month; and
- g) The arrears of spousal support owing by the respondent to the claimant from and after December 15, 2023, are to be recalculated using the amount of \$1,150 per month.

[Discussion of amendments to the draft order and costs.]

[62] The parties are to bear their own costs.

"Giaschi J."

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