
CANADA / JUDGMENT

M.E.D. v. A.T.D.

2015 BCSC 2387

COURT

Supreme Court of British Columbia

DECIDED

16 December 2015

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2015 BCSC 2387 M.E.D. v. A.T.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.E.D. v. A.T.D.,

2015 BCSC 2387

Date: 20151216

Docket: E033638

Registry: New Westminster

Between:

M.E.D.

Claimant

And

A.T.D.

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for Claimant:

M.E.D.

(Appearing in person)

Counsel for Respondent:

A.T.D.

(Appearing in person)

Place and Date of Hearing:

New Westminster, B.C.

October 16, 2015

Place and Date of Judgment:

New Westminster, B.C.

December 16, 2015

[1] This is an application filed on behalf of M.E.D. (the applicant) for an order terminating his spousal support obligation. A second order was sought concerning the transfer and registration of the two children of this marriage to A.T.D.'s (the respondent) health care plan. The parties agreed to complete the transfer of the children to that health care plan without a court order. As a result, I do not intend to refer to that matter further.

Factual Basis

[2] The applicant is 40 years old and resides in Surrey, B.C.

[3] The respondent is 39 years old and resides with the two children of the marriage in New Westminster, B.C.

[4] There are two children of the marriage: T.E.D. was born January 27, 1999, and A.H.D. was born April 27, 2003.

[5] The parties separated on or about January 1, 2009, and were divorced on October 31, 2010.

[6] The applicant is qualified and has worked as a journeyman welder. He has occasionally worked full time; the last time being with George Third and Son before he was laid off on November 24, 2010. His income fell significantly following this lay off, but he has seen slight increases in his part-time employment income over the last three years.

[7] The applicant refers to an anxiety and stress related disorder, which at times affects his ability to cope and function. The applicant had been under the care of a physician, who diagnosed the applicant as having psychosis as well as a delusional disorder, and noted that the applicant was hospitalized from May 27, 2014, until June 2014 and "as a consequence of this health issue his employability has been compromised to a significant degree". The same physician wrote a second letter stating that "there was no medical contraindication for [the applicant] to interact with his two teenage sons". The lack of detail in these letters concerning the nature of the medical issues reduced the ability of this Court to appreciate the seriousness of the diagnosis or its behavioural manifestations, except in that those manifestations were considered not sufficiently serious to present a risk during the

applicant's interactions with his two sons.

- [8] A further letter from Dr. Casey, written June 3, 2014, states that the applicant was admitted to the hospital on May 27, 2014, and remained in the hospital as of June 3, 2014. This letter contains no diagnosis or reason for the hospitalization. A final medical letter dated June 9, 2014, signed by Dr. Kunar, states that the applicant was in the hospital from May 27, 2014, until June 9, 2014, when he was discharged. Dr. Kunar closes his letter: "I would suggest he restart work on 16 June 2014".
- [9] There is an obvious conflict between the medical letter stating the applicant's "employability is compromised" and the one suggesting "he restart work on June 9, 2014", which were written within ten days of one another. Further, none of the medical letters mentions a diagnosis of clinical depression or anxiety, which are the terms the applicant used to describe his medical issues.
- [10] Since separation, the respondent has had sole custody of the children. The respondent is a full time student at Douglas College. She has had some work experience in various retail outlets and as a bank teller, but is unable from that income level to be independent, given her responsibilities for child care and support. Her work during the years of the marriage was dedicated to supporting her husband to become a journeyman welder. Since the divorce, she has begun work on a re-education program where she hopes to initially obtain a teaching credential. She is approximately one-third of the way through the program that would lead to a credential after two more years. She would then have the qualifications to apply for the two-year Simon Fraser University teaching program.
- [11] The respondent presently receives approximately \$1,600 per month in income, largely from some part-time work, GST rebates, the Provincial Rental Assistant Program and Kids Sport, which latter programme pays fees to allow the children to participate in a variety of sports.
- [12] She also works as the head coach and coordinator of the Royal City Hyacks Youth Cheerleaders Group in New Westminster. In addition, she has coached both soccer and football.
- [13] The respondent will require an additional four years of support to conclude the first aspect of her re-education program. In the circumstances and given the length of the parties' marriage, this is not an unreasonable time commitment required to become financially independent.
- [14] A trial was conducted before the Honourable Madam Justice Smith in this case, with reasons for judgment pronounced October 21, 2010. The court reviewed the respondent's circumstances at that time which gave rise to the spousal support award at paras. 58-61:

- [58] I note that the parties made an equal division of the family assets, including the matrimonial home, with no reapportionment. This was a 12-year marriage during which, for the most time, [M.E.D.] was the primary breadwinner. [A.T.D.] took primary responsibility for the home and family. She either stayed home with the children or worked part-time. I accept her evidence that she and [M.E.D.] agreed that she would resume her education and improve her qualifications after the children were both in school.
- [59] [A.T.D.] is 34 years of age and has time to gain qualifications and establish herself in a career. If she went back to work full-time without further training, she would possibly be able to earn what she did before when working full-time, in the vicinity of \$35,000. However, it is reasonable for her, in attempting to achieve economic self-sufficiency, to pursue further training. Her plan to pursue education as an art, music, and recreational therapist is a reasonable one. It is in a field she feels well-suited for and she will be able to earn more income than working in retail sales or as a bank teller.
- [60] I find that [A.T.D.] experienced an economic disadvantage arising from the marriage, in that she did not pursue post-secondary education and did not establish a career. Further, there are financial consequences for her arising from her ongoing responsibility for two children, now aged seven and 11, a responsibility that will continue for at least another 10 years, possibly more. Her current income is low and her skills need upgrading.
- [61] Equitable sharing of the consequences of the breakdown of the marriage requires an order for spousal support in [A.T.D.'s] favour. On the assumption that [A.T.D.] will be able to earn some money through part-time work, even while pursuing further education, I have consulted the Spousal Support Advisory Guidelines. With her employment income at the current level of \$1,550, and [M.E.D.'s] income at its current level of \$49,675, the Guidelines recommend spousal support on an indefinite basis for between 5.5 and 11 years, at a low range of \$555, a mid range of \$672, and a high of \$791.
- [15] Smith J. concluded that there should be an order for spousal support in the amount of \$675 per month commencing on November 1, 2010. She also concluded that the award should be reviewed after five years.
- [16] Prior to the expiry of the five-year review period, on September 25, 2014, an application brought by M.E.D. was heard by Fenlon J. (as she then was) for: (a) termination of spousal support and cancellation of all arrears; (b) retroactive variation of child support for 2011, 2012 and 2013, and a reduction of arrears or cancellation of arrears of child support; as well as other relief which is not relevant to the present application.
- [17] At that time, the arrears of support were in excess of \$34,000, and the Director of the Family Maintenance Enforcement Program obtained an order preventing the federal government from issuing a passport to M.E.D.

- [18] Beginning at para. 32 of the reasons of Fenlon J., the court considered the provisions of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and in particular, ss. 14 and 17 of that Act. The court set out the threshold test for varying spousal or child support outlined in the case of Willick v. Willick, [1994] 3 S.C.R. 670, a decision of the Supreme Court of Canada which contains the following at p. 688:

In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means 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.

- [19] Fenlon J. reviewed in some detail the employment and income of M.E.D. since the date of the prior order of Smith J. and concluded that, because there had been a reduction of his income to one half of his earnings at trial, M.E.D. had demonstrated a material change in circumstances, which was not due to intentional unemployment (para. 49).

- [20] The court went on to consider whether M.E.D. had met the threshold for a reduction of arrears, a high threshold described in 12 factors set out in the case of Earle v. Earle, 1999 BCSC 283. Based on a review of those factors the court concluded:

it would be grossly unfair not to reduce those arrears but I do not conclude it would be grossly unfair not to cancel them altogether. To put it more clearly, they should be reduced but not cancelled. There is no reasonable prospect that M.E.D. is going to be able to pay that sum of arrears, \$34,000 now or in the future.

- [21] The court concluded that it was appropriate to reduce the arrears from the amount of \$34,000 to \$7,500. Ongoing support was based on an income of \$30,000, and M.E.D. was ordered to pay child support of \$463 per month and spousal support of \$144 per month, rounded to a total of \$610 per month. In addition, he was ordered to pay \$100 per month towards the \$7,500 in reduced arrears, so that the total payable on the first of each month was \$710 commencing on October 1, 2014. Based on the order of Smith J., the total support payable by M.E.D. was \$1,429 per month. It was reduced effective October 1, 2014, to \$610, for a monthly saving to M.E.D. of \$819.

- [22] The present application was filed June 23, 2015, approximately eight months after the last application was heard.

Analysis

- [23] The present application is to terminate spousal support. This application will be treated as review of spousal support under s. 15.2 of the Divorce Act: see Leskun v. Leskun, 2006 SCC 25.

- [24] M.E.D. based this application on his financial circumstances and health issues. No evidence was led, and I appreciate the parties are not represented by legal counsel, to contradict the finding of entitlement of A.T.M. to spousal support based on a 12 year marriage. During the marriage, A.T.M. was a stay-at-home mom with primary care responsibilities for two children, and she received no academic or professional training to allow her to become economically self-sufficient, as noted in para. 13 above in the reasons of Smith, J. A.T.M. clearly established her entitlement to spousal support and no challenge has been made thereto in this application.
- [25] As noted above, spousal support was fixed in the mid-range by Smith J. M.E.D. did not, however, pay support in accordance with that order and \$34,000 in arrears accumulated before that sum was reduced to \$7,500 on September 30, 2014. A fire occurred in the building where M. E. D. resided and he received an insurance payout, which he used in part to pay the entire arrears of \$7,500 as of November 1, 2014. As a result, the monthly amount payable by M.E.D. was reduced by \$100 per month.
- [26] A.T.M. is a full-time student enrolled in the sport science and physical education program at Douglas College, working towards a Bachelor's degree in physical education. That degree, which requires approximately two more years of coursework, will enable A.T.M. to improve her income and move her along the road to financial independence. Ideally, she would like to pursue a Master's degree in art, music, and recreational use therapy. She is also involved in the community as a coordinator and head coach of the Royal City Hyacks Youth Cheerleading program. From the documents filed, it appears that A.T.M. is borrowing at least half of her tuition and other expenses from a student loan program.
- [27] On the completion of two more full years, or four semesters, A.T.M. plans to obtain a Bachelor's degree in physical education. Thereafter she intends to enroll in the Simon Fraser University two year teacher education program which will qualify her to teach in schools. I find that given the length of the marriage, the lack of any prior education or professional training and her need to become economically self-sufficient, that this educational plan is reasonable for her and is within the capacity of the parties.
- [28] The primary issues placed before the court by the applicant were his medical condition and financial status. These are the primary issues to be considered in this review: *Jordan v. Jordan*, 2011 BCCA 518. There has been no challenge to the entitlement of the respondent to spousal support as originally granted by Smith J. The respondent has, notwithstanding her duties as the primary parent and caregiver for the parties' two sons, continued working on a part-time basis, and undertaken a reasonable educational plan in order to achieve financial independence.
- [29] Although there is some inconsistency between the views of the applicant's doctors concerning his ability to return to work, he told the Court he had worked in the last year for one, two and three-month stints welding for B.C. Ferries. His income has remained stable and, in fact, increased over the last three years.

- [30] If the present application were treated as an application where proof of a material change in circumstance was required, the significant material change has been that the applicant since the order of Fenlon, J. now pays \$819 per month less in support than he did when that order was made. Such a change would not support the current application.
- [31] Based on all of the evidence heard on this application for review, I am satisfied on a balance of probabilities, pursuant to the Divorce Act , that the existing order for spousal support should be confirmed and shall remain in full force and effect. The application to terminate spousal support is hereby dismissed. There shall be another review four years from the date hereof.
- [32] There will be an order that the parties shall exchange a complete copy of their income tax return and all attachments on or before June 30 of each year commencing June 30, 2016. Adjustments to child support should be made annually without a further court application, but the parties have liberty to bring an application if there is a material change in the circumstances of either party and agreement cannot be reached concerning an appropriate adjustment.
- [33] Costs of this application for filing fees, photocopying and disbursements related directly to this application shall be paid by the applicant to the respondent forthwith after assessment by the Registrar or as agreed in writing by the parties.

"Ball J."

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