
CANADA / JUDGMENT

Mark v. Mark

2017 BCSC 2405

COURT

Supreme Court of British Columbia

DECIDED

9 November 2017

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2017 BCSC 2405 Mark v. Mark

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mark v. Mark,

2017 BCSC 2405

Date: 20171109

Docket: E123794

Registry: Vancouver

Between:

Heidi Maria Mark

Claimant

And

Carl Robert Mark

Respondent

Before: The Honourable Mr. Justice Greyell

Oral Ruling

In Chambers

Counsel for the Claimant:

K. Heinrichs

Counsel for the Respondent:

S. Gakhal

Place and Date of Hearing:

Vancouver, B.C.

October 23, 2017

Place and Date of Ruling:

Vancouver, B.C.

November 9, 2017

- [1] THE COURT: These reasons concern cross-applications in a family law matter relating to the respondent's obligations to pay child support and spousal support. By way of background, the parties commenced cohabitation in 1989. They married on July 28, 1990, and separated on July 28, 2011. They have two daughters, Taryn, now age 23, and Tessa, now age 25.
- [2] Following separation, the parties entered into a separation agreement, which was reflected in a final court order dated November 4, 2014, (the "Consent Order"), which provided that based on guideline incomes of zero for the claimant and \$217,500 for the respondent, by consent, the order contained the following terms:
2. BY CONSENT, pursuant to the provisions of the Divorce Act (Canada), the Respondent shall, commencing July 1, 2013, pay to the Claimant as child support for the Children, the sum of \$1,000 per month, payable on the first of each month, and continuing on the first day of each month thereafter to and including September 1, 2016 (the "Child Support").
 3. BY CONSENT, the Respondent shall provide the Claimant with 12 postdated cheques for the Child Support on July 1st of 2013, 2014, and 2015 and shall provide the Claimant with three postdated cheques for the Child Support on July 1st 2016.
 4. BY CONSENT, pursuant to the provisions of the Divorce Act (Canada), the Respondent shall pay 100% of the special and extraordinary expenses for the Children.
 5. BY CONSENT, pursuant to the provisions of the Divorce Act (Canada), the Respondent shall pay to the Claimant for spousal support \$4,500 per month on the 15th of each month commencing July 15, 2013, until further agreement of the parties or order of the court ("Spousal Support").
 6. BY CONSENT, the Respondent shall provide the Claimant with postdated cheques for the following 12 months of Spousal Support on July 1st of 2013, 2014, and 2015, and shall provide the Claimant with postdated cheques for the following eight months of Spousal Support on July 1st 2016.

7. BY CONSENT, the parties shall review the quantum of Spousal Support on or before March 31, 2017 and any variation of Spousal Support quantum at the review shall be retroactive to October 1, 2016.
- [3] The claimant on this application seeks orders that the respondent pay to her arrears of spousal support pursuant to the Consent Order, arrears of child support pursuant to the Consent Order, including arrears of regular support and extraordinary expenses; that the respondent pay retroactive and ongoing regular child support and special and extraordinary expenses commencing December 1, 2016, and a declaration that the respondent's obligation to pay the children's special and extraordinary expenses as set out in s. 4 of the Consent Order continues in full force and effect.
- [4] The respondent seeks an order the claimant pay arrears of spousal support pursuant to the Consent Order and a declaration that the respondent's spousal support obligation as set out in s. 5 of the Consent Order continues in full force and effect.
- [5] The respondent further seeks orders relating to the disclosure of documents or production of documents confirming any and all remuneration received by the respondent from his employers and/or companies in which he is involved since January 1, 2014.
- [6] The respondent, in a notice of application filed October 11, 2017, seeks an order that the Consent Order be varied, an order that a minimum wage be imputed to him for retroactive and a present-day calculation for support payments.
- [7] The child support set out in the Consent Order was contemplated to continue to September 2016, when it was expected that Tessa would graduate. Tessa did not graduate when expected. She remains in university at the University of Calgary, where she is currently in a paid internship. Taryn is currently in Los Angeles, where she has been since 2015. She is working as an account team coordinator.
- [8] As stated, the child support as set out in the Consent Order was to continue to and include September 2016. Tessa did not graduate in or had not graduated by September 1, 2016. She has continued her schooling into 2017. The reason that Tessa's education has been prolonged is that she has designated learning disabilities affecting her mathematical and reading abilities.
- [9] The reason the claimant was attributed no income in the Consent Order was because she has had significant health issues herself over the past number of years. She has suffered from Shigella, Epstein-Barr, arthritis, Lupus, peritonitis, pancreas surgery, face surgery to remove cancer, three reconstructive foot surgeries and other medical issues. She was essentially unable to work during the period of the marriage.

- [10] At the time the Consent Order was made, the respondent was working as a manager for IBM in tech software sales. He was terminated from that position on February 27, 2015, as a result of a company wide layoff. He was off work for some six months before he found employment with Traqspera Technologies ("Traqspera") in August 2015, when he became manager of software, sales and marketing, as well as the chief executive officer of the company.
- [11] The material before me indicates he worked with Traqspera until June 1, 2017, when he says the company failed and terminated his employment. As a term of his termination agreement he was paid a lump sum of \$50,000 in exchange for which his shares were repurchased and he agreed not to compete with the company for 12 months following his termination in North America. The respondent remains unemployed as at the time of the hearing in this matter.
- [12] The respondent says the decrease in his annual earnings since the date of the Consent Order and his ongoing unemployment represents a change in circumstances. He says, notwithstanding the reductions in his earnings over the last three years, up to December 2016, he maintained his spousal and child support obligations on the basis of the guideline income set out in the order. He says his actual income based on his tax assessment notices received for the taxation years 2014, 2015 and 2016 has been respectively \$209,243, \$171,379, and \$100,078.
- [13] On January 9, 2017, while he was employed by Traqspera, the respondent advised the claimant his circumstances had changed, that he was not "making as much as he did in the past" and that he had advised his bank to put a stop payment on cheques for support going forward. He said in an email of January 9, 2017, in addition to advising the claimant he had instructed his bank to place a stop payment on cheques, that:

My income circumstances is that in calendar year 2016 I made a gross income of \$100,000. I continued with the \$4,000 spousal alimony for the entire year 2016 and the completion of the \$1,000 child support that finished on September 1, 2016. These committed payments together with Taryn's expenses for University of Michigan, moving expenses to LA and everything necessary to get her on her feet was all paid for out of line of credit debt. I also continued to pay \$700 rent and utilities for Tessa to you and per-month expenses of \$900 directly to Tessa for her living expenses. This all came out of line of credit debt in 2016.

This debt spending by me cannot be sustained. 100 percent of what I made in 2016 went directly to you. That is not a fair nor equitable arrangement. I have attached my final paycheque stubs so you can see what I took home in net pay. I am committed to continuing to step up to my responsibility for the spousal alimony, but it will have to be at some number less than the current \$4,500 per month.

- [14] The respondent then sought to engage in negotiations toward a new arrangement for the spousal and child support. The claimant responded to the respondent's email by seeking particulars of his employment, of his earnings, why his employment with IBM had ceased and seeking his tax returns and copies of his notices of assessment.
- [15] The parties then engaged in an unproductive exchange of emails with the claimant taking the position the respondent was bound to continue payments under the Consent Order until it was varied and seeking documentation that would support the respondent's statement as to his income loss and his current circumstances. The exchange of emails demonstrates the respondent complained he had suffered a reduction in his income that warranted reduced spousal support payments and that the special and extraordinary expenses for which the claimant sought reimbursement were excessive.
- [16] The claimant commenced this application July 10, 2017. The respondent did not respond to the application until August 15, 2017. He noted in his response he had been terminated from Traqspera on June 1, 2017, and was currently unemployed and was facing significant hardship in complying with the Consent Order. It was not until October 10, 2017, the respondent brought this application seeking to vary the consent order and that a minimum wage be imputed to him.
- [17] The claimant has responded to the respondent's application by asserting the onus is on the respondent to establish a material change in circumstances which requires the court's intervention. The claimant takes the position a voluntary termination of employment is not a material change in circumstances, citing *Way v. Way*, 2014 BCSC 1587. The claimant says the respondent is capable of working, that he has not disclosed documents showing that he is searching for employment and therefore the court should impute income to him based on his past income.
- [18] The respondent's counsel sought to file an affidavit at the hearing in which he says the respondent has set out the attempts he has made to actively search for alternate employment. I advised the parties during the course of the hearing I would consider whether I would permit the respondent to file the affidavit in court. I have had an opportunity to consider the matter. It seems to me that the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules], govern this matter and, in particular, Rule 10-6(13), which reads:
- Unless all parties consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (6), (8) and (12).
- [19] Under the circumstances of this case and particularly the fact the claimant has not had an opportunity to respond to the affidavit, I am not prepared to permit the respondent to rely on the affidavit sought to be filed during the course of the hearing.

- [20] I turn to what I consider to be an appropriate disposition of the current application. My order will be an interim order, pending the full review that is contemplated in the Consent Order. I am satisfied the respondent has demonstrated that the guideline income underlying the ordered amounts for support in the consent order of \$217,500 has materially changed and that that issue should be addressed by way of this interim order.
- [21] Pending a full review, I set the respondent's guideline income at \$100,000, which is roughly his 2016 income figure. This amount may be adjusted up or down following the review, depending upon the circumstances established before the reviewing judge. The claimant's guideline income will remain at zero.
- [22] Both parties will need to establish for review purposes that they are earning income to the extent that they are able. For the respondent, that means establishing he is using reasonable efforts to search for alternative employment to replace his lost income. For the claimant, this means she should establish the fact that she remains having physical limitations in her working capabilities and that she has or is actively pursuing any disability payments to which she may be entitled. I am not satisfied on this application that either party has taken those necessary steps such as to enable me to proceed to review this matter on any type of final basis, and that is why this is an interim order.
- [23] The date the consent order will be varied to on an interim basis will be the date of the hearing. The respondent is not entitled to any change in the order to any other date because he chose not to apply until October, and at that time, filed incomplete material.
- [24] I make no order concerning special or extraordinary expenses except that they will be open to the judge who hears the review application to consider what are and what are not appropriate expenses. I simply comment that it appears to me on a review of the expenses that some, and in particular I refer to Tessa's trip to Poland, appear excessive and beyond the realm of reasonableness.
- [25] I will leave it to the parties to set the date for the review hearing.
- [26] Turning to the relief requested in the notices of application. I grant the claimant the orders sought, and I will refer to them by number, as set out in part 1 of the notice of application; (1) arrears of spousal support; (2) arrears of child support; (5) arrears of spousal support; (6) a declaration that the respondent's spousal support obligation continued in full force and effect to the date of the hearing is amended by way of this order based on a new guideline income amount and will be subject to the final review.
- [27] I grant order (7) to the extent it has not already been provided, that the respondent will provide a fully updated Form F8 financial statement together with all requisite attachments and all documentation confirming any and all remuneration received by him since January 1, 2014.

- [28] As to the respondent's application, I grant the first order that the consent order be varied to the extent that I have mentioned and that is the imputation of income of \$100,000 as of the date of the hearing. That also deals with the second order sought.
- [29] I grant the claimant her costs of this application. While the parties have had some shared success, in my view, the claimant has been substantially successful. Further to that, the respondent is not entitled at law to simply ignore the Consent Order and put in place a new set of rules. It is his obligation to apply to the court, certainly well before he did, to vary the terms of the Consent Order.
- [30] Are there any matters arising from these reasons, counsel?
- [31] MR. GAKHAL: Just one point, My Lord. Maybe clarify it and you might have mentioned it, but it is with regards to the \$700 rent payments that were being paid.
- [32] THE COURT: I did not mention the \$700 rent payment.
- [33] MR. GAKHAL: So the respondents are I guess our question, our query is does that \$700 affect any sort of spousal - or child support payments as - or additional - because it was an additional payment towards the Consent Order.
- [34] MR. HEINRICHS: My - I mean, in the - in the evidence that was provided in the affidavit materials it was acknowledged on both sides that the \$700 amount was a deal that the parties reached outside of the Consent Order and in addition to the Consent Order. It was - there was - I do not have my affidavit material in front of me, My Lord, but there was a text message written back by Mr. Mark to Ms. Mark indicating that this was yet more money that he was paying. It was - it was a grumpy email if one might put it that way, but the fact was it acknowledged the fact that this was a deal that the parties had reached that was in addition to the Consent Order. It was not payment for the Consent Order amounts of child support; i.e., it was not to be deducted off of the \$1,000 that the Consent Order indicated was to be paid for child support. On that basis that those moneys should not affect the Consent Order amount and that deal should continue forward, as it was part of the deal that that the parties has reached.
- [35] THE COURT: Well, I am ...
- [36] MR. GAKHAL: I guess my position, sorry, was that I understand what my friend is saying and perhaps there was an agreement with respect to the \$700, but in light - that was an income that the claimant was receiving that was not provided in any of her financials. It was not entertained at all. So it was showing that she was making zero dollars, yet her herself, in her affidavit acknowledged that she received 15,050 in totality for rental income. So it is our position that I believe that 15,000 in some way or another should be calculated - taken into account.

- [37] MR. HEINRICHS: If I might, the reason for that deal that the parties reached was that Tessa was moving in with Ms. Mark and that this was moneys that had not been predetermined would be necessary to pay for her expenses. The parties did reach a separate deal, but it was for an expense that he would otherwise be 100 percent responsible for, that is Tessa's accommodations during the time that she would be in - in university. I hardly think that this support should be added on to Ms. Mark's income given the fact that she had Tessa to take care of during that period of time. If you want to put it this way, she received income but had the expenses to balance that out.
- [38] THE COURT: I am going to not deal with this specific issue, counsel. I am going to leave it up to the reviewing judge to deal with the issue if it remains an issue. There are several references to the \$700 in the exchange of emails. It is clear that the respondent paid the claimant \$700 a month as rent. On the other hand, Tessa was living with the mother and that entails expense. So I think that is an issue that perhaps needs some further evidence and definition before the reviewing judge.

"Greyell J."

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