
CANADA / JUDGMENT

O.K. v. V.K.

2018 BCSC 2404

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 2404 O.K. v. V.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

O.K. v. V.K.,

2018 BCSC 2404

Date: 20181211

Docket: E113449

Registry: Vancouver

Between:

O.K.

Claimant

And

V.K.

Respondent

Before: The Honourable Madam Justice Choi

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

M. Weremchuk

The Respondent, appearing in person:

V.K.

Place and Date of Hearing:

Vancouver, B.C.

August 8 & December 4, 2018

Place and Date of Judgment:

Vancouver, B.C.

December 11, 2018

[1] THE COURT: The respondent, Mr. K, applies for the following orders:

- 1) to vary spousal support, including on a retroactive basis;
- 2) to cancel or reduce support arrears from 2016 to 2018. The arrears equal \$35,149 as at August 12, 2018;
- 3) to cancel default fees imposed by the Family Maintenance Enforcement Program ("FMEP");
- 4) to enforce the claimant's payments to the respondent by accounting them in the FMEP balance;
- 5) to decrease the duration for which spousal support is payable; and
- 6) that the claimant, Ms. K, disclose documents pertaining to her inheritance from her parents.

[2] The parties had a trial in 2015 and 2016 before Mr. Justice Masuhara relating to their family law issues. On August 23, 2016, Mr. Justice Masuhara made orders relating to parenting, division of property, spousal support, and child support, among others. The 2016 order stipulated that commencing January 1, 2016, until December 1, 2026, on a monthly basis, the respondent shall pay the claimant \$1,318 for spousal support, and \$1,152 for child support as long as the parties' children remain children of the marriage pursuant to the Divorce Act. Both were subject to court ordered quantum reviews.

[3] On March 9, 2017, the respondent filed an application to vary the support order before Mr. Justice Masuhara (the "March 2017 Application"). The application was heard in May 2017 and was dismissed. The reasons are indexed as O.K. v. V.K., 2017 BCSC 858 (the "Reasons"). I quote the "Orders Sought" in the March 2017 Application as follows:

- 1) An order to retroactively recalculate support payments for 2015;
- 2) An order to retroactively calculate support payments for 2016;
- 3) An order to cancel or reduce arrears for January - March 2017;
- 4) An order to determine spousal support payments for 2017; and

- 5) An order to enforce debt collection from the claimant.
- [4] The claimant argues that the respondent's present application mirrors the March 2017 Application and that it ought to be dismissed because it is *res judicata*.

Res Judicata

- [5] In *L.M. v. British Columbia (Director of Child, Family and Community Services)*, 2016 BCSC 275, I set out the principles of *res judicata* at paras. 37-40:

Res Judicata

- [37] *Res judicata* prevents the re-litigation of issues already addressed by the court and also demands that parties bring forward all claims and defences with respect to the matter in the first instance: *Lim v. Lim*, 1999 BCCA 596. The policy reasons behind *res judicata* are settled: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 [C.U.P.E.]; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460.
- [38] The policy reasons can be described as advancing the objective of finality in litigation to avoid duplicative litigation requiring "litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so" (*Danyluk* para. 18). This objective must be balanced with the competing principle that litigants have the opportunity to have their cases decided on the merits: *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 26.
- [39] The authors of *Spencer Bower and Turner, The Doctrine of Res Judicata* (4th ed., 2009), state:

Two policies support the doctrine of *res judicata estoppel*: the interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause. *Maugham L.C.* said:

The doctrine of *estoppel* is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

- [40] Central to the *res judicata* argument is that parties must raise all issues in the first instance and cannot litigate in a piece-meal fashion. There are two branches of *res judicata*: (1) issue *estoppel*; and (2) cause of action *estoppel*.
- [6] The respondent argues:
- 1) that at the hearing in May 2017, Mr. Justice Masuhara gave him liberty to bring a further variation application once he had obtained better evidence. In support of this argument, he points to para. 12 of the Reasons, which states:

Given the foregoing, the materials Mr. K has submitted are insufficient to support a prospective variation in support. Mr. K's support arrears are also a concern. Mr. K must provide a response to the deficiencies identified in addition to any items required to establish the justification; all in the proper form if he wishes to seek a variation. I am not seized of any future application.

- 2) that the substance of the March 2017 Application and the present application are not the same. For example, the respondent points out that his March 2017 Application did not seek production of the inheritance documents but that the present application does.
- [7] For the reasons that follow, I find that most of the respondent's application is barred by the doctrine of *res judicata*. On May 23, 2017, Mr. Justice Masuhara dismissed the relief sought under the March 2017 Application. At that time, Mr. K sought cancellation or reduction of arrears and a variation of his income imputed at trial. This is the same relief sought now.
- [8] The parties disagreed whether Ms. K's inheritance was considered by Mr. Justice Masuhara. I ordered the transcript and heard further submissions. I agree with Ms. K that Mr. K previously raised the issue of the inheritance, and that submission was rejected. Therefore, the respondent's present application for document disclosure in respect of the inheritance is barred by the doctrine of *res judicata*. There is no basis to order production of these documents.
- [9] Lastly, I disagree that Mr. Justice Masuhara adjourned Mr. K's application to allow him to present better evidence. Paragraph 13 of the Reasons states, "[t]he present application is dismissed." The order was settled on August 21, 2017; the respondent argued at the Registrar's hearing that the order should include a term reflecting para. 12 from the Reasons, allowing him to reset the variation application with new evidence, a submission that was rejected by the Registrar. The order was entered dismissing the application.

Retroactive and Prospective Variation of Support

- [10] Paragraph 11 of the Reasons found that Mr. K was in arrears of \$21,755. As at August 12, 2018, the Family Maintenance Enforcement Program document indicates that he is in arrears of \$35,149. I will only consider the arrears that have accumulated since March 2017 and whether there ought to be a variation of support and cancellation of arrears since that date.

Legal Framework

- [11] The respondent's notice of application indicated that he was relying on ss. 152(1) and (2)(a)-(c) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], which pertain to variations of orders respecting child support, and ss. 167(1) and (2)(a)-(c) of the FLA, which govern variations of orders respecting spousal support. These provisions state:

Changing, suspending or terminating orders respecting child support

152 (1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (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.

Changing, suspending or terminating orders respecting spousal support

167 (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (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.

[12] I note that the parties were divorced. The trial order of Mr. Justice Masuhara from which the variation is sought does not indicate whether the orders were made under the FLA or the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Given that the respondent's present notice of application seeks orders under the FLA, my orders will be made pursuant to the FLA.

[13] The case of *Cotter v. Cotter*, 2015 BCSC 1730 at para. 22, cites the material change test in *Willick v. Willick*, [1994] 3 S.C.R. 670 as the test to be met for variation of spousal support orders under both s. 167 of the FLA and s. 17(4.1) of the Divorce Act:

The "material change" test that must be met under both provisions was expressed in *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670 at 688, 119 D.L.R. (4th) 405:

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.

[14] In *Cotter*, at para. 31, the following test is set out respecting child support variations:

[31] It is not as common to order a "review" of a child support order as was done in this case. The usual practice is that parties exchange financial information on an annual basis and adjust child support payments accordingly. If this type of self-regulating regime is not in place, or the parties cannot agree on the appropriate Guidelines incomes, then one or both parties applies to the court under either s. 152 of the FLA or s. 17(4) of the Divorce Act to vary the child support order. The same variation test described above regarding spousal support applies to child support variation applications: *L.M.P.* at para. 32.

[15] The principle that the *Willick* and *L.M.P. v. L.S.*, 2011 SCC 64 test is used in support variation applications under both the FLA and the Divorce Act is further affirmed in *Hausmann v. Klukas*, 2016 BCSC 853:

[38] In the circumstances of this case, I see little practical difference between s. 17 of the Divorce Act and s. 152 and 167 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] which now govern applications to vary child and spousal supports orders made under the FRA.

[41] Section 14 of the Guidelines provides in part:

Circumstances for variation

14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

.

(b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstance of either spouse or of any child who is entitled to support

[42] Prior to the Guidelines, *Willick v. Willick*, [1994] 3 SCR 670, established that a material change of circumstances is required before a court may vary a child support order made under the Divorce Act, meaning a change, if known at the time the order was made, would likely have resulted in different terms.

[43] In *Bockhold v. Bockhold*, 2006 BCCA 472, the court confirmed s. 14 does not supplant the *Willick* test which governs applications under the FLA, as well as the Divorce Act: *L.M.P. v. L.S.*, 2011 SCC 64; and *Cotter v. Cotter*, 2015 BCSC 1730.

[44] The material change test also applies to spousal support variation requests (L.M.P., at para 32).

Analysis

[16] At trial, Mr. Justice Masuhara found that the respondent's income for 2015, on a prospective basis, was \$90,000. He dismissed the respondent's March 2017 Application to vary that income. I must now consider whether the respondent's income and circumstances have changed since the March 2017 Application.

[17] As I understand it, the thrust of the respondent's evidence and argument is as follows:

- (a) An income of \$73,127 should be imputed to him for 2018 as an average of the amounts earned in 2016, 2017, and 2018. Mr. K has provided Spousal Support Advisory Guidelines calculations which set his income at \$69,947 for 2016 and \$60,679 for 2017, figures which he argues are based on the income accepted by the Canada Revenue Agency in its notice of assessment or reassessments of his tax returns for those years.
- (b) He is an employee of Moonport Technologies Corporation, incorporated in May 2016. He and his mother are equal voting shareholders. His mother lives in Russia.
- (c) His Form 8 financial statement, filed July 26, 2018, deposes employment income of \$72,000 per year. He has not included any financial statements, tax returns or breakdown of salaries, wages, management fees or other payments for Moonport because he does not control that corporation. The form requires production of financial disclosure "if you control a corporation". He is an equal shareholder with his mother, not a controlling one; the two of them have some disagreements, implying some difficulties in obtaining documents.
- (d) He is encountering difficulties finding work and cannot meet his living expenses. In 2018, Moonport had a consulting contract with a company called Gluwa from April 12, 2018, to October 12, 2018, pursuant to which he provided services from Moonport to Gluwa. The compensation is \$31,250 for that six-month term, equalling an hourly rate of \$62.50. Mr. K is struggling to meet his expenses on that limited income and has little with which to pay support. In support of his argument, Mr. K produced his personal RBC Bank statements from July 2016 to January 12, 2018, and Moonport's bank accounts with RBC from May 2016 to December 28, 2017.
- (e) 2017 was a difficult year due to a lack of work. He secured employment with Aporime Technologies with an annual salary of \$70,000 commencing March 6, 2017. However, on May 15, 2017, effective the following day, he was released from his employment because the project was cancelled. Mr. K could not find alternative work despite his many efforts until Moonport secured the consulting agreement with Gluwa in April 2018.

[18] For the reasons that follow, I dismiss the variation application:

- (a) Based on the evidence adduced, I cannot find that the respondent's income for 2018 is actually \$72,000 as stated in his Form 8 financial statement. The documentation he provided does not support this income. Furthermore, Mr. K seeks an income of \$73,127 in his 2018 Spousal Support Advisory Guidelines calculation; however, it is not clear what income he is using. The respondent has produced no records to indicate what amounts he or Moonport earned in 2018. The figures also ignore the imputed income from Mr. Justice Masuhara's orders.
- (b) There is no evidence that Mr. K's mother has any substantive role in Moonport. Ms. K argues that the respondent's mother is not a computer programmer and is only a shareholder so that Mr. K can avoid producing Moonport's financial documents that would otherwise be required by the Form 8.
- (c) On the evidence, I cannot determine the basis for the employment income reported to the Canada Revenue Agency in 2017. I noted that there was employment for two months with Aporime, but the income received for those two months is not clear. There is also an unexplained deposit of approximately \$13,000 from Gluwa into Moonport's bank account in late 2017. The claimant has noted that this deposit preceded the contract term between Moonport and Gluwa, and there is no evidence as to why that payment was made. The \$13,000 deposit is the only deposit into Moonport's bank account in 2017. Mr. K has produced a letter dated July 7, 2017, for a contract between Moonport and Tech Systems from May 30, 2016, to September 22, 2016. Given that this contract is for the 2016 year, it does not provide any clarity on the 2017 income amounts claimed by Mr. K. That there are no attachments to the tax returns provided in these materials, including any T4s, also hinders a review of Mr. K's income.
- [19] The onus is on the respondent to prove a material change in circumstances in order to vary his income from \$90,000. A change, to be material, must be one that, if known, would have likely resulted in different terms. The change must not be a temporary one, but one that is significant and long lasting. In my view, the fact that the respondent's income fluctuated was known to both parties as well as Mr. Justice Masuhara. Indeed, Mr. Justice Masuhara found that the respondent's income fluctuated from a high of \$127,184 in 2011 to a low of \$90,500 in 2015.
- [20] I do not find that the respondent has discharged his onus, and I consequently dismiss his application for variation of his income.

Cancellation or Reduction of Arrears

Legal Framework

- [21] The reasons for judgment from the parties' trial indicate that some of the orders were made pursuant to the FLA. I will, therefore, consider the respondent's application for a cancellation of arrears pursuant to s. 174 of the FLA:

Reducing or cancelling 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.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

[22] In *Kular v. Kular*, 2018 BCSC 1715 at paras. 19-21, I held as follows:

- [19] The leading case of *Earle v. Earle*, 1999 BCSC 283, 86 A.C.W.S. (3d) 764, a decision of Madam Justice Martinson, outlines the principles for the cancellation or reduction of arrears. The decision sets out that the payor has a heavy onus and that a judge must be confident that the evidence is reliable, accurate and complete (para. 28). The applicant cannot rely on hearsay evidence.
- [20] Other cases have followed *Earle*. In the case of *Beavis v. Beavis*, 2014 BCSC 422, Madam Justice Fenlon indicated at para. 15 that there are two elements to the test, being gross unfairness and change in circumstances. Financial disclosure and obligation to earn capacity relate to the change in circumstance in assessing whether the applicant has proven a significant and long lasting change in circumstances due to a reduction in income.
- [21] In *Luney v. Luney*, 2007 BCCA 567, the Court of Appeal held that the test for reduction or cancellation of arrears is onerous and that the test is not easy to meet. This is because parents have a duty to support their children. Therefore, cases in which arrears are reduced or cancelled are rare (para. 43).

Analysis

[23] In my view, the respondent has not met the heavy test set out in the case law. I am concerned that his document disclosure is incomplete and unreliable. There are many questions raised by the claimant respecting the disclosure, and satisfactory explanations have not been provided. On the basis of the evidence adduced, I find that the respondent failed to meet the test of either gross unfairness or material change in circumstances required for a reduction or a cancellation of arrears. Therefore, I dismiss this application.

Disposition

[24] In summary, I dismiss all the relief sought by the respondent in his notice of application filed July 26, 2018. The claimant is entitled to her costs in any event payable forthwith at the level of ordinary difficulty.

"Choi J."

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