

CANADA / JUDGMENT

Oddou v. Mpega

2021 BCCA 258

COURT

British Columbia Court of Appeal

DECIDED

23 June 2021

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2021 BCCA 258 Oddou v. Mpega

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Oddou v. Mpega,

2021 BCCA 258

Date: 20210623

Docket: CA46913

Between:

Otilia Oddou also known as Otilia Marguerite Oddoumba

Respondent

(Claimant)

And

Lionel Mpega

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Fitch

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated

June 8, 2020 (O.O. v. L.M., 2020 BCSC 851, New Westminster Docket E48389).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

A. Rebane

Counsel for the Respondent

(via videoconference):

J.K. Broadhurst

Place and Date of Hearing:

Vancouver, British Columbia

June 23, 2021

Place and Date of Judgment:

Vancouver, British Columbia

June 23, 2021

Summary:

The respondent moved to British Columbia from Quebec to accommodate the appellant's employment as an RCMP officer. Following the breakdown of their relationship, the respondent's limited English language skills made it difficult for her to achieve financial self sufficiency. An initial support order from 2017 was to be reviewed in 2019. The appellant appeals from the result of that review, which took place in 2020. Both orders imputed full-time minimum wage employment to the respondent. The appellant argues the judge erred in misapplying the legal test for review of support orders and misapprehending the evidence. Held: Appeal dismissed. The judge carefully considered the relevant legal factors, and it is not for this Court to reweigh them. The judge did not misapprehend the evidence.

GRIFFIN J.A.:

Introduction

- [1] This appeal is brought from orders requiring the appellant father to pay spousal and child support to the respondent mother. The orders were made following a review of support on an application in chambers heard March 10, 2020. The chambers judge's reasons are indexed as 2020 BCSC 851.

- [2] The review was pursuant to an earlier order made after trial on August 11, 2017. The trial judge ordered child and spousal support payable by the appellant to the respondent but subject to be reviewed before the end of 2019. The trial judge's reasons, which are not under appeal, are indexed at 2017 BCSC 1411.
- [3] The factual background is that the respondent mother moved to British Columbia from Quebec to accommodate the appellant's employment in Surrey, British Columbia, as an RCMP officer. When the parties separated, she was not permitted to relocate with their child to Quebec. She had given up good employment as a Francophone in Quebec and found it difficult to obtain employment in British Columbia due to limits of her English language skills. She has not been successful in achieving financial self-sufficiency in British Columbia. Indeed, she has not earned even as much as full-time minimum wage income in the years since trial. Her efforts to attain self-sufficiency have attracted much criticism from the appellant, who has focused on findings of the trial judge that the respondent's English language skills are not so limiting as to provide an absolute barrier to employment in British Columbia or so as to limit her to minimum wage employment only.
- [4] Both the trial judge and chambers judge imputed full-time minimum wage income to the respondent, but they also found that she was entitled to spousal support on a compensatory and non-compensatory basis, subject to a review.
- [5] The critical paragraph of the trial judge's reasons, ordering a review of support in two years, was para. 189:
- [189] The respondent's five-year commitment with the Surrey detachment of the R.C.M.P. expires in 2019. By that time, the claimant will have had a further two years to seek and obtain employment. Subject to an agreement to the contrary by the parties, both child support and spousal support are to be reviewed before the end of 2019.
- [6] The critical paragraph of the reasons of the chambers judge, for purposes of this appeal, was para. 54:
- [54] The respondent views the provision for a 2019 review as a deadline for the claimant to achieve self-sufficiency. That is not correct. A review is not, as the respondent would have it, simply a review of the claimant's post-trial efforts to overcome any need for support. Further, as I read the trial decision, the most significant anticipated change for purposes of the review order was the expiry of the respondent's five-year posting which would be followed by success or failure in getting a permanent position. As far as that anticipated change goes, the respondent succeeded and his position has thus improved since the date of trial.

Grounds of Appeal

- [7] The appellant's central complaint is that the chambers judge should have been much more critical of the respondent's efforts to attain self-sufficiency.

- [8] In his factum, the appellant states as the grounds of appeal, that the chambers judge erred:
- a) "In law by misapplying the legal test for review of support orders by not providing appropriate weight towards self-sufficiency"; and
 - b) "By making a serious misapprehension of the evidence to support her determination of the appropriate amounts for child support and spousal support, and the appropriate length of spousal support".

Standard of Review

- [9] I will keep my reasons brief because I am of the view that the appellant has not met the standard of review required to succeed on appeal.
- [10] It is worth returning to the leading case on the standard of review in family law appeals, *Hickey v. Hickey*, [1999] 2 S.C.R. 518. In that case, Justice L'Heureux-Dubé, writing for the Court, explained why a deferential approach must be taken:

12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[Emphasis added.]

- [11] This Court has regularly held that it cannot set aside a decision solely because it would re-weigh the evidence or balance the relevant factors differently: see, e.g., *Gil-Eldh v. Branyik*, 2018 BCCA 98 at para. 35; *R.E.Q. v. G.J.K.*, 2012 BCCA 146 at para. 33.

Self-Sufficiency

- [12] No matter how ably and valiantly the appellant tries to frame the first ground of appeal as an error of law, even his articulation of the error belies that what he asks this Court to do is to assign a different weight to a factor that the judge took into account, namely, the respondent's efforts to attain self-sufficiency.
- [13] This is also evident throughout his factum, where he repeatedly states that the chambers judge erred by failing to give "adequate weight" to the factor of self-sufficiency (for example, at the appellant's factum paras. 55, 59, 60, 69).

- [14] The appellant has not shown that the judge overlooked any evidence in the consideration of the appellant's efforts to find employment or the circumstances she found herself on the breakdown of the relationship. The chambers judge took into account all of the arguments of the appellant as to the length of the marriage and the respondent's lack of due diligence in attaining self-sufficiency. It is not the role of this Court to look at the same evidence, re-weigh it, and reach a different conclusion.
- [15] The appellant also places emphasis on the trial judge's words when ordering a review of support obligations. He suggests that the trial judge was indicating the scope of the review and communicating that the respondent was obliged to be self-sufficient within two years. The appellant suggests that this is the lens through which the chambers judge ought to have viewed matters, and so she ought to have been much more critical of the respondent's unsuccessful efforts to attain self-sufficiency within the two years.
- [16] Respectfully, I do not find this argument to have merit. Had the trial judge been of the view that the respondent would be able to achieve self-sufficiency in two years' time, she could have ordered spousal support to end within two years. The judge certainly encouraged the respondent to become self-sufficient, but she also knew that there were obstacles facing the respondent.
- [17] It is to be kept in mind that the spousal support determination at trial was during a period of future employment uncertainty for both parties.
- [18] The respondent had not yet attained employment in British Columbia at the time of trial. At trial she was seeking an order allowing her to relocate to Montreal, but this relief was denied. Given the result at trial, she was faced with a choice of whether to stay in British Columbia where there were some employment barriers but she could be an active and involved mother to her young child or to move back to Quebec without her child.
- [19] At the time of trial, the appellant was part way through a five-year contract that would expire in 2019, following which it was unknown what might happen. On appeal the appellant admits that the RCMP might have offered the appellant a job posting to another location. It was difficult to predict what impact that might have, given the ongoing shared parenting arrangement.
- [20] The trial judge had to exercise judgment as to what the future might hold for both of the parties when ordering prospective support and decided it was best not to predict past the end of two years. It is fair to say that the trial judge expected that the respondent's efforts to attain self-sufficiency would be a relevant factor on review, but was not predetermining the weight to give that factor.
- [21] That is how the chambers judge viewed the matter as well, quite properly.

- [22] After reviewing the evidence, the chambers judge found as a fact that the respondent had not yet been adequately compensated for the economic disadvantage she incurred in the marriage upon the move to British Columbia to further the appellant's career (at para. 68). The evidence was capable of supporting this conclusion and it cannot be said that the judge misapprehended the appellant's situation.
- [23] The goal of encouraging self-sufficiency is only one of the factors to be weighed in determining the appropriate quantum of support. It cannot be said that there is a duty on the part of the respondent to attain self-sufficiency in a set period of time: see *Leskun v. Leskun*, 2006 SCC 25 at para. 26. The judge took into account the efforts made by the respondent.
- [24] Here, the respondent was entitled to support on both compensatory and non-compensatory grounds.
- [25] The chambers judge carefully considered the relevant legal principles, and in particular reviewed in detail this Court's discussion in *Tedham v. Tedham*, 2005 BCCA 502, of the relationship between self-sufficiency and compensatory support.
- [26] I come back to the problem that the appellant's arguments on the topic of the respondent's self-sufficiency ask us to weigh the evidence differently than did the chambers judge, which is not our role. I would therefore not accede to this ground of appeal.

Misapprehension of Evidence

- [27] The second ground of appeal, that the judge made a serious misapprehension of the evidence, is stated this way in the appellant's factum:
78. The chambers judge considered in her weighing of factors that the most significant anticipated change for the purposes of the review order was the expiry of the respondent's five-year posting which would be followed by success or failure in getting a permanent position. The chambers judge concluded that as far as that anticipated change goes, the respondent succeeded and his position has thus improved since the date of trial.
79. This was factually incorrect, as the evidence is clear that the respondent had already been a permanent employee of the RCMP at the time of the trial. The only change relating to the RCMP position would be the possibility of relocation, and the permanency of the position to situated in Surrey. There was no additional benefit gained by the respondent since trial as suggested by the chambers judge.

[References omitted.]

- [28] Respectfully, a fair reading of the reasons of the chambers judge does not bear out the suggestion that the judge misapprehended the significance of the appellant's posting with the RCMP. She understood what it meant in respect of his income and job security. His evidence at trial was that he had a five-year contract; his evidence at the time of the review application was that at the end of that five-year contract he had received a permanent posting to Surrey.
- [29] Even had the chambers judge misunderstood that the appellant's opportunity to keep working with the RCMP would have continued after the five-year contract, this was a result of the content of the appellant's affidavit evidence and it was not material to her reasons. As the appellant acknowledges, he could have been posted to some other location, including a remote location. Of course if that was to happen, one does not know if the appellant would have chosen to accept it, especially given that he has started a new family in British Columbia and given the shared parenting arrangement for his and the respondent's child.
- [30] Nor did the chambers judge consider the state of the appellant's posting with the RCMP to be the most relevant factor on review. She did not give that factor undue weight. The question of whether the respondent had made sufficient efforts to attain self-sufficiency was given much more consideration in the reasons than the fact that the appellant had obtained a permanent posting.
- [31] The relevant point understood by the chambers judge was that the appellant had almost exclusively benefitted from the sacrifice that the respondent had made in moving to British Columbia to accommodate his employment, and the respondent had borne the disadvantage from this choice. One cannot quarrel with that assessment.
- [32] The appellant further submits that the chambers judge erred in appreciating some of his evidence about his and his new spouse's priorities and the manner in which he chose to take paternity leave. Again, the reasons of the chambers judge illustrate that she understood the evidence, but simply did not give it the weight that the appellant prefers.
- [33] I am of the view that the appellant has failed to establish that the judge made a palpable and overriding error in her assessment of the evidence.

Conclusion

- [34] I would therefore dismiss the appeal.
- [35] HARRIS J.A.: I agree.
- [36] FITCH J.A.: I agree.
- [37] HARRIS J.A.: The appeal is dismissed.

"The Honourable Madam Justice Griffin"

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