

CANADA / JUDGMENT

Omara v. Hegazy

2019 BCSC 1837

COURT

Supreme Court of British Columbia

DECIDED

21 October 2019

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2019 BCSC 1837 Omara v. Hegazy IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Omara v. Hegazy, 2019 BCSC 1837 Date: 20191021 Docket: E083803 Registry: Vancouver Between: Randa Omara Claimant And Hesham Hegazy Respondent Before: The Honourable Mr. Justice Crerar Oral Reasons for Judgment In Chambers Counsel for Claimant: Shayne J. Robinson Counsel for Respondent: Vandana Sood Place and Date of Hearing: Vancouver, B.C. September 9, 2019 Place and Date of Judgment: Vancouver, B.C. October 21, 2019 I. INTRODUCTION

- [1] The applicant ex-husband, who suffers from stage 4 classical Hodgkin Lymphoma, applies to set aside existing orders to pay spousal support, and to have support arrears cancelled.
- [2] The applicant currently owes the respondent \$123,303.90 in arrears, representing missed or incomplete spousal support payments from 2010 to the present.
- [3] The claimant ex-wife agrees, in the face of the applicant's dire health, to consent to the order cancelling spousal support going forward, but does not consent to the cancellation of the support arrears. II. FACTS
- [4] The parties were married on July 26, 1987. They separated on November 7, 2008.
- [5] There are two children of the marriage. Both children are now adults, and are not relevant to the present application.
- [6] At the time of separation, the applicant was working as a pharmacist at Shoppers Drug Mart. He is presently 59 years old.
- [7] On March 13, 2009, Justice Leask ordered, amongst other things, that the applicant:
 - 1. Had an income of \$96,300.00 per year for the purpose of support;
 - 2. Pay child support for the elder child in the amount of \$875.00 per month;
 - 3. Pay spousal support to the claimant in the amount of \$2,200.00 per month.

- [8] Since 2015, the applicant has suffered a series of serious health issues. In 2015, he was diagnosed with Lupus. In 2016, he was diagnosed with stage 4 classical Hodgkin's Lymphoma. The applicant has also been diagnosed with a gastric ulcer, positive Hepatitis B antibodies, and chronic kidney disease.
- [9] The applicant's employment was terminated by the pharmacy on February 12, 2016.
- [10] The applicant believed that he was terminated due to his medical condition. He filed a human rights complaint against his former employer. The human rights complaint was settled in October 2018, with the applicant receiving \$106,500.00. The bulk of the settlement funds has gone to legal and medical expenses.
- [11] The British Columbia Family Maintenance Enforcement Program ("FMEP") is currently holding the remaining \$40,489.78 of the settlement funds (the "Settlement Funds"), obtained by way of specific notices of attachment, whilst this matter is being addressed by the Court.
- [12] In 2016, the applicant applied for temporary premium assistance and long-term disability benefits. The applicant now receives disability benefits of \$2,200.00 per month. The applicant lives in a basement suite in Surrey, paying \$962.00 per month in rent.
- [13] The applicant states in his affidavit that due to his severe health issues, he does not believe that he will ever be able to hold regular employment again. III. POSITION OF THE PARTIES
- [14] The applicant presents no direct or sworn medical evidence, but his affidavit attaches several medical and clinical records, physician's notes, and prescriptions.
- [15] The applicant says that he seeks to be relieved of the spousal support and arrears obligations so that he can purchase two specific drugs for his medical conditions. These medicines are apparently not covered by MSP and are unaffordable in his current economic state.
- [16] First is the pharmaceutical Grastofil, which apparently improves a patient's immune system whilst taking chemotherapy. The cost of this drug is \$1,883.07 per session of chemotherapy. He was prescribed this medicine in May 2017 by Dr Jesse Shustik of the BC Cancer Agency. The applicant attaches to his affidavit the prescription for the drug. The second is Myfortic for his Lupus, prescribed by Dr David Collins. The applicant attaches to his affidavit several letters from Dr Collins.
- [17] The claimant is agreeable to cancelling future spousal payments in light of the applicant's dire health. But she is not willing to abandon the arrears, and seeks an order for ongoing payment of those arrears.
- [18] The claimant makes two main arguments to resist the cancellation of past arrears.

- [19] First, she says that the applicant has never voluntarily paid spousal support, and that he has missed payments. That he has missed payments is evident from the arrears themselves. The claimant's affidavit attaches ample evidence that the applicant, from the early stages, failed to make full support payments. In any case, the claimant registered the payments with FMEP soon after the Leask J order.
- [20] Second, the claimant says that before the separation, the applicant transferred considerable funds from the family accounts, of which funds she has never received a share. It appears that some of these transfers were to accounts in Egypt. This led to a November 7, 2008 order of Hinkson J (as he then was), restraining future transfers. IV. LAW
- [21] The Family Law Act, SBC 2011, c.25, ("FLA"), s.174 governs cancellation of arrears: Reducing or cancelling arrears
- (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) any circumstances that the court considers relevant,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) the efforts of the person responsible for paying support to comply with the agreement or order respecting support.
 - (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, Justice Choi summarized the governing principles for reduction or cancellation of arrears:
- a) The payor bears a heavy onus to establish that "it would be grossly unfair not to reduce or cancel the arrears";
 - b) The test for cancellation of arrears is onerous and not easy to meet: "gross unfairness" is a high bar;
 - c) Accordingly, cases in which arrears been cancelled are rare (*Luney v. Luney*, 2007 BCCA 567 at para 43);

- d) The evidence must be reliable, accurate, and complete;
 - e) The applicant cannot rely on hearsay evidence; and
 - f) Financial disclosure and obligation to earn capacity inform whether there has been a change in circumstances: has the applicant proven a significant and long-lasting change in circumstances due to a reduction in income? V. DECISION
- [23] I am satisfied that the applicant's health issues constitute a significant and serious change in circumstances since the spousal support order was made.
- [24] That said, I agree with the claimant that the applicant has fallen short of the high test to reduce or cancel arrears, in terms of his evidence, in terms of his past behaviour, and in terms of his historic failure to exhaustively disclose his assets.
- [25] That said, the claimant's present position is somewhat inconsistent. She recognizes that the applicant is in dire health and needs medications. It is unlikely that he would forego medications that may cure him or at least relieve his symptoms if he has funds secretly sequestered away.
- [26] The appropriate order in the current circumstances is to preserve the applicant's arrears debt to the claimant, while still providing him some time-limited interim relief to allow him to purchase medication and to attempt to focus on his health issues.
- [27] The Court thus orders that the applicant's obligation to pay the arrears be temporarily suspended until March 1, 2020, at which time they will be due and owing, along with any accumulated interest, unless further suspended or varied by further order of this Court.
- [28] The court has the jurisdiction to postpone payment of arrears for a reasonable period of time or make reasonable terms for payment, if it seems appropriate, taking into account all the circumstances of a case, including the present financial circumstances of the person required to pay: *Earle v Earle*, 1999 CanLii 6914 at para 24.
- [29] Apart from the court's inherent jurisdiction and the object of the Supreme Court Family Rules set out in Rule 1-3, other statutes and rules indicate authority to do so. The Court Order Enforcement Act, RSBC 1996, c 78, s 48 states: When order is payable
- (1) If an order has been obtained for a sum of money, the sum is payable immediately unless the court orders otherwise.
 - (2) The court may provide that an order is payable by instalments or may suspend execution for the time it considers proper.
- [30] FLA, s. 167 authorizes the court to suspend ongoing spousal support orders. Rule 15-4(31) of the Supreme Court Family Rules permits the court to stay the execution of an order until such time as it thinks fit, or order that the money be payable by instalments. Rule 15-4(33) allows a stay of execution or other relief based on new facts.

[31] The Court thus orders:

- a) by consent, the applicant's application to set aside the obligation of the applicant to pay spousal support to the claimant as per paragraph 3 of the March 13, 2009 order of the Honourable Mr Justice Leask, and any other order of this Court, be set aside with respect to payments after September 16, 2019;
- b) by consent, FMEP may and is directed to release to the claimant, forthwith, as a lump sum, the full amount of all of the funds FMEP has collected from the applicant and presently holds, including but not limited to the Settlement Funds, plus any accumulated interest;
- c) the arrears owing to the claimant are fixed as of September 16, 2019, at \$123,303.98 (the "Arrears");
- d) the applicant's application to cancel the Arrears is dismissed;
- e) the applicant's obligation to pay the Arrears be temporarily suspended until March 1, 2020, at which time they will be due and owing, with accumulated interest, unless suspended or varied by further order of this Court;
- f) FMEP may and is directed to suspend its collection of any or all of the Arrears until March 1, 2020, or such other date specified by further court order or agreement of the parties.

[32] As there has been mixed success, no costs are ordered. "Crerar J"

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