

CANADA / JUDGMENT

Pawluck v. Pawluck

2024 BCSC 265

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 265 Pawluck v. Pawluck

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pawluck v. Pawluck,

2024 BCSC 265

Date: 20240123

Docket: E110479

Registry: Vancouver

Between:

Brian Kevin Pawluck

Claimant

And

Susan Irene Pawluck

Respondent

And

BKP Investments Ltd.

Third Party

Before: The Honourable Justice Brongers

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant and Third Party:

C. Chisholm

Appearing on her own behalf:

S. Pawluck

Place and Date of Hearing:

Vancouver, B.C.

December 21-22, 2023

Place and Date of Judgment:

Vancouver, B.C.

January 23, 2024

THE COURT:

Introduction

- [1] This is an application by the claimant, Brian Pawluck, for a variation of his spousal support obligation that is payable to the respondent, Susan Pawluck.
- [2] This obligation was established by a consent order of the Court that was issued in 2014 further to the parties' settlement of their family claim. It provides that Mr. Pawluck is to pay Ms. Pawluck \$4,500 per month, subject to being varied in accordance with s.17 of the Divorce Act (RSC, 1985, c. 3 (2nd Supp.))
- [3] Mr. Pawluck has tried twice already to obtain such a variation. His attempts were unsuccessful. The first was denied by the court in 2015, and the second was denied in 2018. Mr. Pawluck appealed the latter dismissal in 2019, but to no avail. All of the judges who considered his evidence and his submissions were of the view that Mr. Pawluck had not demonstrated that there had been a material change of circumstances since the 2014 settlement was reached and the consent order was issued.
- [4] This is, therefore, Mr. Pawluck's third attempt to vary his obligation to pay support to Ms. Pawluck. He says that this time he has shown that circumstances have changed sufficiently to justify a termination of the obligation.
- [5] Ms. Pawluck disagrees. She says that his application should be dismissed once again.

Background

The Parties' Marriage

- [6] Mr. Pawluck and Ms. Pawluck were married on May 30, 1981, when they were in their early 20s. They are now 65 and 66 years old, respectively.
- [7] They have two children, both of whom are independent adults in their 30s.
- [8] During the marriage Mr. Pawluck was the primary income earner while Ms. Pawluck cared for the family at home. Mr. Pawluck was a successful chartered accountant, becoming a senior partner at PricewaterhouseCoopers ("PwC").
- [9] The parties do not agree on their separation date. Ms. Pawluck says it was in January 2009. Mr. Pawluck says it was in June 2010. Either way, their marriage was a long one.

The Family Claim

- [10] Mr. Pawluck commenced this proceeding by filing a notice of family claim on February 15, 2011.
- [11] On July 21, 2011, an interim spousal support order was issued by Justice Punnett. It provided that Mr. Pawluck is to pay Ms. Pawluck \$17,500 per month on a without prejudice basis. At the time Mr. Pawluck was apparently earning approximately \$500,000 per year.
- [12] The trial of the family claim began in November 2012 before Justice Loo. It was adjourned after just a few days. Justice Loo ordered that Mr. Pawluck was to continue to pay his interim spousal support obligation of \$17,500 per month during the adjournment.
- [13] Mr. Pawluck retired involuntarily from PwC on February 28, 2013. He received an early retirement allowance and a pension-like entitlement to receive payments from the PwC Partner Income Security Program ("PISP").
- [14] On February 13, 2014, Mr. Pawluck and Ms. Pawluck agreed on a without prejudice basis that spousal support would be reduced to \$4,500 per month effective February 1, 2014. The agreement was reflected in a February 14, 2014 consent order.
- [15] The parties then reached an agreement to resolve all of their outstanding issues relating to family assets, children's assets, and spousal support. Its details were set out in minutes of settlement that were incorporated into a "Final Order" which was issued by Justice Loo by consent on April 8, 2014.
- [16] Of particular significance to the present application are two aspects of the Final Order.
- [17] First, paragraph 7 of the Final Order (which is found under the heading "Assets") states:
 - 7. The PISP shall be shared between the parties pursuant to Schedule "A" to this Order which is incorporated and enforceable as part of this Order.

- [18] In turn, Schedule "A" provides that the PISP entitlement is to be shared by having Mr. Pawluk pay 40 per cent of his annual gross payments received through the program to Ms. Pawluck in monthly installments. Somewhat confusingly, Schedule "A" refers to these payments as "Monthly Spousal Support", even though it is apparent that this aspect of the order addresses a family property division issue.
- [19] Second, paragraph 13(a) of the Final Order (which is found under the heading "Spousal Support") states:
13. The claimant [Mr. Pawluck] shall pay to the respondent [Ms. Pawluck] spousal support in the amount of \$4500.00 per month commencing on May 1, 2014 and continuing on the 1st day of each and every month thereafter subject to variation in accordance with Section 17 of the Divorce Act.
- [20] Justice Loo also issued a final divorce order dated October 3, 2014.

Mr. Pawluck's First Variation Application

- [21] On November 5, 2014, Mr. Pawluck filed his first application to vary his spousal support obligation. He sought an order that he pay no support, subject to further review should he receive employment income in the future. It was heard by Justice Greyell on February 23 and March 3, 2015.
- [22] The application was dismissed on April 9, 2015, in reasons that are indexed at *Pawluck v. Pawluck*, 2015 BCSC 529.
- [23] Justice Greyell's fundamental basis for doing so was his finding that Mr. Pawluck had not established that there had been a material change in circumstances since the final order. The chambers judge noted in particular that Mr. Pawluck was already unemployed with no concrete prospects for reemployment at the time he agreed to the Final Order. Furthermore, he found that the reduction in monthly support from \$17,500 to \$4,500 in the consent order of February 14, 2014 was made because of the reduction in Mr. Pawluck's income consequent on his retirement from PwC. Justice Greyell also felt that Mr. Pawluck had not demonstrated that his continued unemployment will be for other than a temporary period going forward.
- [24] Mr. Pawluck did, in fact, find work a few months later. On November 1, 2015, he became a managing director at Duff & Phelps Canada. Mr. Pawluck was hired initially on a one-year contract which paid him \$255,000. That contract was extended, although his annual salary was slightly reduced to \$200,000. However, Mr. Pawluck's employment was terminated on May 31, 2017. In the end, he worked at Duff & Phelps for a total of 19 months.

Mr. Pawluck's Second Variation Application:

- [25] On June 18, 2018, Mr. Pawluck filed his second application to vary his spousal support obligation. He asked for an order terminating his obligation retroactively or, in the alternative, for it to be reduced with a fixed date for termination or review in the future. It was heard by Justice Macintosh on June 12 and 13, 2018.
- [26] The application was dismissed on June 18, 2018, in reasons that are indexed at *Pawluck v. Pawluck*, 2018 BCSC 1079.
- [27] Like Justice Greycliff three years earlier, Justice Macintosh was not persuaded that there had been a material change in circumstances since the Final Order. Mr. Pawluck had argued that the difference between the two applications was that his unemployment was now prolonged. Justice Macintosh rejected this argument, reiterating Justice Greycliff's finding that Mr. Pawluck's unemployed status had already been taken into account when it was agreed in 2014 that his monthly support obligation would be reduced from \$17,500 to \$4,500 in the Final Order. Furthermore, Justice Macintosh noted that Mr. Pawluck's assertion of unemployability was undermined by the fact that he had obtained work from 2015 to 2017.
- [28] Mr. Pawluck appealed Justice Macintosh's decision to the Court of Appeal. The appeal was dismissed on May 15, 2019, in reasons that are indexed at *Pawluck v. Pawluck*, 2019 BCCA 167.
- [29] Writing for a unanimous division, Justice Abrioux held that Justice Macintosh had not erred in finding that Mr. Pawluck had failed to establish a material change in circumstances. Justice Abrioux reiterated that the spousal support obligation provided for in the Final Order already contemplated that Mr. Pawluck would be unemployed for an unspecified period.
- [30] Furthermore, at the time of the second application, Mr. Pawluck had only been unemployed for about one year, essentially the same duration of Mr. Pawluck's unemployment at the time of the Final Order. It was also noted that Mr. Pawluck's request to be relieved from his spousal support obligation was arguably weaker on the second application as compared to the first given the fact that Mr. Pawluck had demonstrated his employability by obtaining work with Duff & Phelps.
- [31] That said, Justice Abrioux also recognized that there might come a time in the future when the duration of Mr. Pawluck's unemployment would be sufficiently long so as to constitute a material change in circumstances. He explained this by reference to then counsel for Mr. Pawluck's assertion that there is a "bright line" at which this period can be determined. At paragraphs 27 and 32 of his reasons, Justice Abrioux wrote:
- [27] The appellant's [Mr. Pawluck's] position is that when the Final Order was made in April 2014, the parties contemplated that he would be unemployed for some unspecified, yet finite, period of time. By the time of the application before the chambers judge in June 2018, the "bright line" for this period had been reached. That is, the appellant's unemployment had been so prolonged as to constitute a material change in circumstances. The appellant says that he is thus entitled to a variation pursuant to s.17 of the Divorce Act, as specifically

provided for by the Final Order.

...

[32] In my view, while it may be that the "bright line" alleged by the appellant will be reached at some point in the future, the chambers judge committed no error in concluding that no material change of circumstances had been established as of June 2018.

Mr. Pawluck's Third Variation Application:

[32] On January 27, 2023, Mr. Pawluck filed this third application to vary his spousal support obligation. In his notice of application, he seeks an order terminating the obligation effective February 28, 2023, or, alternatively, a reduction of the obligation in an unspecified amount to be determined by the Court with a fixed duration.

[33] The application was made returnable on February 24, 2023. Ms. Pawluck, however, was not prepared to proceed on that date. What ensued was a series of exchanges and multiple court appearances to address the issue of when the application should be heard. I can see no utility in setting out the chronology of this dispute, which at times became heated and acrimonious, or to comment on it in any detail. Suffice it to say that each party viewed the conduct of the other as being unreasonable, with Mr. Pawluck feeling that Ms. Pawluck was unjustifiably attempting to postpone adjudication of his application, and Ms. Pawluck feeling that Mr. Pawluck was denying her a chance to fairly respond.

[34] The only aspect of their procedural skirmish that I will mention because of its tangible impact on the support payments made to date is an order of Justice Iyer dated July 13, 2023. In an apparent attempt to create a disincentive for further delay, she ordered a suspension of Mr. Pawluck's obligation to pay spousal support on an interim basis pending the hearing of the application. As a result, Mr. Pawluck has not made any monthly payments of \$4,500 to Ms. Pawluck since July 1, 2023. She has, however, continued to receive her PISP payments of approximately \$5,000 per month.

[35] The application was finally heard before me on December 21 and 22, 2023. At the conclusion of the hearing, I adjourned the matter to today, January 23, 2024, so that I could review the voluminous material filed and the parties' submissions. It was agreed by the parties that the suspension of the spousal support obligation ordered by Justice Iyer would continue in the interim.

The Law

[36] The Court's authority to vary a spousal support order is provided by s.17 of the Divorce Act. Its relevant portions are:

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively,

(a) a support order or any provision of one, on application by either or both former spouses;

...

17(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

...

17(7) A variation order varying a spousal support order should

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[37] Guidance on how to exercise this authority is provided by the Supreme Court of Canada in the case of *Willick v. Willick*, [1994] 3 S.C.R. 370, *G.L. v. E.G.*, [1995] 3 S.C.R. 370, and *L.M.P. v. L.S.*, 2011 SCC 64. A recent concise summary of the proper approach is provided by our Court of Appeal in *Hague v. Hague*, 2022 BCCA 325 at paragraphs 30 and 33:

[30] Applications to vary or terminate spousal support are assessed under a two-stage framework:

1. Under s. 17(4.1) of the Divorce Act, before making a variation order, the court must be satisfied that there has been a change in "the condition, means, needs or other circumstances" of either former spouse. This requires the applicant to establish a material change in circumstances since the making of the order sought to be varied.
2. Once the material change threshold is met, the court must determine what variation is appropriate in light of the change in circumstances. A court "should limit itself to making only the variation justified by the change."

...

[33] A material change in circumstances is a change that, "if known at the time, would likely have resulted in different terms": A material change is one that must not actually have been contemplated when the spousal support order was made: However, a material change may have been objectively foreseeable when the support order was made

[38] Also of assistance is Justice Abrioux's explanation of the applicable law in the appeal of Mr. Pawluck's second variation application found at paragraphs 22 to 26 of *Pawluck v. Pawluck*, 2019 BCCA 167.

[39] My assessment of the evidence presented in this application will be governed by all of the principles set out in these binding jurisprudential authorities.

Analysis

Mr. Pawluck's Position

[40] In her comprehensive written submissions provided at the hearing, counsel for Mr. Pawluck succinctly set out the essential grounds for her client's spousal support variation application. They are:

- (a) Mr. Pawluck has experienced a prolonged period of unemployment since February 2013, notwithstanding the significant efforts he has made to find work;
- (b) Mr. Pawluck is now 65 years old, which is normal retirement age;
- (c) Mr. Pawluck is experiencing stress-related health issues; and
- (d) Mr. Pawluck has complied with his legal obligation to make his spousal support payments to Ms. Pawluck in spite of his lack of employment by drawing upon his capital assets, payments that have now totaled over \$1,000,000.

[41] Accordingly, Mr. Pawluck submits that notwithstanding the fact that his annual income is slightly over \$100,000, these factors constitute a material change in circumstances that justify varying the amount of spousal support payable to Ms. Pawluck under the Final Order.

[42] Furthermore, Mr. Pawluck points out that Ms. Pawluck also received over \$1.3 million in cash as part of the divorce settlement. She currently owns a large home in Whistler whose assessed value is over \$3.8 million, in which she has equity of about \$2.2 million. Furthermore, Ms. Pawluck currently receives PSIP payments of \$5,204 per month, an amount that is expected to remain stable and to be adjusted for inflation. As such, Mr. Pawluck estimates that if Ms. Pawluck were to receive payments from the Canada Pension Plan (CPP) and Old Age Security (OAS) plus the PISP payments, she would receive approximately \$6,600 per month (\$79,200 per year) even in the absence of any spousal support.

[43] Finally, Mr. Pawluck suggests that to the extent that Ms. Pawluck may have any financial difficulties today, it is due to her own mismanagement of her finances, and is not a consequence of the breakdown of the Pawlucks' marriage.

[44] With respect to the specific variation being sought, counsel for Mr. Pawluck indicated at the hearing that it now differs slightly from what was set out in the notice of application given the lengthy delay that has ensued from the time of filing.

- [45] Mr. Pawluck's preferred order would be to have his obligation to make monthly support payments of \$4,500 terminated effective July 1, 2023. This proposed date reflects the effect of Justice Iyer's July 13, 2023 suspension of spousal support payments on an interim basis. Such an order would relieve Mr. Pawluck from having to make any further payments to Ms. Pawluck, and would not require Ms. Pawluck to reimburse Mr. Pawluck for any overpayments. In other words, such an order would ensure that neither party would now have to transfer any money to the other.
- [46] In the alternative, should the Court find that a transition period is warranted, Mr. Pawluck submits that there ought to be a gradual termination of the support obligation. Specifically, he proposes that the support payable from July 1, 2023 to January 1, 2024 ought to be reduced to \$2,250 per month, after which no support would be payable from January 1, 2024 going forward.

Ms. Pawluck's Position

- [47] Ms. Pawluck represented herself at the hearing. She did so admirably, preparing her own written submissions which she provided to complement her detailed and clear oral submissions.
- [48] Ms. Pawluck's position is that, as was the case for his first two variation applications, Mr. Pawluck has not shown that there is a material change in circumstances that would justify a variation in his spousal support obligation to her.
- [49] Ms. Pawluck's main arguments in support of this position can be summarized as follows:
- (a) Mr. Pawluck's continued unemployment was contemplated at the time the Final Order was issued;
 - (b) Mr. Pawluck's normal aging process was also contemplated at the time the Final Order was issued; and
 - (c) Mr. Pawluck's alleged health issues are exaggerated and do not constitute a change in circumstances either; and
 - (d) Mr. Pawluck's alleged inability to find employment is not credible given his experience and the availability of corporate board work and other similar positions for which he would be suitable.
- [50] With respect to her own circumstances, Ms. Pawluck submits that she is still in need of spousal support from Mr. Pawluck. She notes that she, too, is aging and is less employable than she used to be. She has tried to find work, with limited success. She has also suffered, and continues to suffer, from various physical and mental health issues that require medication and counselling.

- [51] Ms. Pawluck also strongly disputes Mr. Pawluck's assertion that she has mismanaged her own finances. She notes in particular that she invested her savings into her Whistler property which she built using much of her own labour. This home is now a valuable asset that she feels she should be able to enjoy, and not be forced to sell and downsize in order to meet her living expenses.
- [52] Accordingly, Ms. Pawluck submits that Mr. Pawluck's application should be dismissed, and that her entitlement to a monthly support payment of \$4,500 should be maintained.

Discussion

- [53] The first stage of the s.17 Divorce Act analysis is to determine whether there has been a material change in circumstances since the making of the order sought to be varied. In this case, that order is the consent Final Order issued by Justice Loo on April 8, 2014.
- [54] Having reviewed the application record, I am of the view that there has been such a material change. It stems from two factors: (1) the prolonged period of unemployment Mr. Pawluck has now experienced; and (2) that Mr. Pawluck has now reached a normal retirement age. These circumstances were not present in 2015 or 2018 when the first and second variation applications were before the Court, and they justify a different outcome for this third variation application.
- [55] With respect to the first factor, with the exception of the 19-month period from November 2015 to May 2017, Mr. Pawluck has not had any significant employment since his involuntary retirement from PwC in February 2013. This is not for lack of trying. I accept that Mr. Pawluck has made significant efforts to search and apply for suitable positions, particularly in relation to corporate board work. However, other than his relatively brief contract with Duff & Phelps, he has only managed to obtain a part-time advisory committee position for an asset management firm which pays just \$20,000 per year. I also accept that Mr. Pawluck's ability to find employment within his field of expertise has been limited by a lifetime non-competition clause with PwC that he was required to agree to in order to maintain the PISP payments he shares with Ms. Pawluck. As such, factoring in his time at Duff & Phelps, the total period that Mr. Pawluck has been effectively unemployed since leaving PwC is now almost 10 years. In my view, this is sufficiently prolonged so as to be a material change in circumstances.
- [56] With respect to the second factor, while Mr. Pawluck was 55 years old at the time of the Final Order, he is now 65. As has been held by this Court in other cases (see, for example, *Brouwer v. Brouwer*, 2019 BCSC 274 and *Beninger v. Beninger*, 2019 BCSC 366), I find that this is a reasonable retirement age that also constitutes a material change of circumstances.
- [57] Now, it is true that the parties did contemplate at the time of the 2014 Final Order that Mr. Pawluck would be paying \$4,500 in spousal support to reflect his unemployed status. However, it cannot reasonably be said that they also contemplated that this amount would then be paid indefinitely for the remainder of the parties' lifetimes, even past the point

when Mr. Pawluck reaches retirement age and should no longer be expected to continue to seek out full-time employment. If this were the case, the parties would not have made express reference to the fact that Mr. Pawluck's obligation is subject to variation pursuant to s.17 of the Divorce Act in their settlement agreement.

- [58] In other words, if Mr. Pawluck had been 65 years of age and mostly unemployed for the 10 years prior to the time of the Final Order, I find that the spousal support obligation that would then have been agreed to would almost certainly have been different.
- [59] Accordingly, there has been a material change in circumstances and the first stage of the s.17 Divorce Act analysis is met. I will now consider the second stage, namely, what variation is appropriate in light of the change in circumstances.
- [60] This consideration requires an examination of the spousal support variation objectives set out in s.17(7) of the Divorce Act. They involve both compensatory and non-compensatory considerations: Beninger at paragraphs 60 and 61.
- [61] Beginning with compensatory support, its purpose is to address the economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown.
- [62] In the case at bar, Mr. Pawluck has paid Ms. Pawluck a total of \$1,055,000 in spousal support since July 2011 (\$17,500 per month from July 2011 to January 2014, and \$4,500 per month from February 2014 to July 2023). In the circumstances of this case, I find that this significant amount is sufficient to provide Ms. Pawluck with equitable compensation for the impact of the parties' "traditional" marriage arrangement which enabled Mr. Pawluck to pursue his lucrative professional career while at the same time limiting Ms. Pawluck's economic opportunities.
- [63] As for non-compensatory, or need-based, support, its purpose is to relieve any economic hardship of former spouses arising from the breakdown of the marriage.
- [64] According to Ms. Pawluck's F8 financial statement, her current sources of monthly income are the PISP payment of \$5,204.89 and the \$4,500.00 spousal support payment, for a total of \$9,704.89.
- [65] Ms. Pawluck also says that she presently has monthly expenses of \$20,906.28, of which \$13,266.67 relates to the \$1,600,000 mortgage on her Whistler home. However, Ms. Pawluck also explained that this is actually a reverse mortgage for which no payments need to be made until the house is sold. Furthermore, the assessed value of the home is \$3,828,000.
- [66] On the basis of this information and the other affidavit evidence presented, I am not persuaded that Ms. Pawluck is experiencing economic hardship arising from the breakdown of her marriage to Mr. Pawluck. As such, I do not find that there is a non-compensatory need for Ms. Pawluck to receive ongoing spousal support at this time. This is particularly the case when she still receives the PISP payment of over \$5,000 per month, and will continue to do so for the foreseeable future.

- [67] In sum, for the second stage of the s.17 Divorce Act analysis, I find that a termination of the \$4,500 per month spousal support obligation provided for in the Final Order is now warranted.
- [68] The only remaining matter to be determined is what specific variation terms should be ordered to give effect to the conclusions I have reached. To that end, I have considered the two proposals put forward by counsel for Mr. Pawluck; namely: (1) full cessation of spousal support effective July 1, 2023; and (2) a transitional reduction of spousal support to \$2,250 per month for the period from July 1, 2023 to January 1, 2024, with a full cessation thereafter.
- [69] In my view, the latter is preferable. In particular, given that the \$4,500 spousal support obligation has been in place for so long, a six-month transition period for its cessation is equitable and warranted.

Disposition

[70] For all of these reasons, the following order is issued:

- (1) Mr. Pawluck's application is allowed.
- (2) Pursuant to s.17 of the Divorce Act, paragraph 13 of the Final Order of the Court (Loo J.) dated April 8, 2014 is varied so as to provide as follows:
 - (a) effective July 1, 2023, Mr. Pawluck shall pay to Ms. Pawluck spousal support in the amount of \$2,250 per month commencing on July 1, 2023 and continuing on the first day of each month until January 1, 2024; and
 - (b) effective January 1, 2024 Mr. Pawluck shall have no further obligation to pay Ms. Pawluck any spousal support.

(SUBMISSIONS ON COSTS)

- [71] THE COURT: So my decision on costs will be as follows. Mr. Pawluck has been substantially successful and he is presumptively entitled to his costs of bringing this application when it was vigorously opposed by Ms. Pawluck. She is well aware of this given that she was awarded her costs in respect of the previous applications that she won. I can see no reason to depart from the standard costs rule in this case. Therefore, Mr. Pawluck will be awarded his costs of this application payable at the scale of ordinary difficulty.

"Brongers, J."

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