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R.L.C. v. R.G.C.

2021 BCSC 2386

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 2386 R.L.C. v. R.G.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.L.C. v. R.G.C.,

2021 BCSC 2386

Date: 20211207

Docket: E34799

Registry: New Westminster

Between:

R.L.C.

Also known as R.L.S.

Claimant

And

R.G.C.

Respondent

Corrected Judgment: The Reasons for Judgment have been
edited for publication purposes on December 29, 2021

Before: The Honourable Madam Justice Walkem

Reasons for Judgment

Counsel for the Claimant:

D.R. Greig

Counsel for the Respondent:

S.J. Zukerman

Place and Dates of Hearing:

Chilliwack, B.C.

June 23, 2021

Abbotsford, B.C.

September 22, 2021

Place and Date of Judgment:

New Westminster, B.C.

December 7, 2021

Introduction

[1] This is an application on behalf of R.G.C. to reduce the amount he pays in spousal support to R.L.C. (now "R.L.S."). The current order of Mr. Justice Macintosh dated July 29, 2016 ("2016 Macintosh Order") (Oral Reasons for Judgment, 2016 BCSC 1589), provides that:

1. The order of the Honourable Mr. Justice Pearlman made October 10, 2012 shall be varied as follows:
 - a. R.G.C. will pay to R.L.C. aka R.L.S. spousal support, based on an income of \$121,000 for R.G.C. and \$11,645.12 for R.L.C. aka R.L.S., based on the midrange Spousal Support Guidelines, being an amount of \$2,871.00 per month, beginning January 1, 2016 and continuing for each month thereafter.

[2] Mr. C. seeks an order:

Pursuant to section 167 of the Family Law Act, an Order forthwith terminating term 1 of the Order Made After Application on July 29, 2016, whereby the Respondent was ordered to pay monthly spousal support of \$2,871 commencing January 1, 2016.

In the alternative, pursuant to section 167 of the Family Law Act, an Order reducing the current level of spousal support and specifying the termination date of term 1 of the Order Made after Application pronounced on July 29, 2016, whereby the Respondent was ordered to pay monthly spousal support of \$2,871 commencing January 1, 2016.

[3] Here, the parties, in the course of their submissions, decided that they did not have sufficient financial information. This matter was adjourned so that the parties could provide additional financial disclosure including:

- a) whether Ms. S. could now take advantage of the municipal pension plan entitlement she had as a result of the marriage without penalty to what she could collect later. If so, this would affect the amount Ms. S. could collect now.
- b) Ms. S. was directed to provide her account information from 2017 and information about an "Armada Mortgage" investment that her accounts show her receiving interest income from.
- c) Mr. C.'s income tax and earnings for 2020, what he could expect to earn if he voluntarily retired, and what his ongoing entitlement to disability payments was.

Current Application

- [4] Mr. C., the payor spouse, argues that he has developed a debilitating disability which impacts his ability to continue to work and to pay spousal support. Mr. C. worked with the [redacted] Police Department and then later with the [redacted] Fire Department. During the course of his work, Mr. C. developed post-traumatic stress disorder and major depressive disorder. Mr. C. has been unable to work since approximately the beginning of 2020. He submits he would like to retire so that he can pursue alternative lines of work.
- [5] Mr. C. currently has an income replacement benefit which maintains his income, provided he remains "employed". The income benefit allows him to receive a salary replacement, despite the fact he cannot work. In 2018, the salary replacement totalled \$142,000 and in 2019, \$136,600. His financial disclosure showed his most recent income was \$136,897. With an adjustment of \$2,067 for union dues, his income for the purposes of the Spousal Support Advisory Guideline [SSAG] calculation is \$134,830.
- [6] Mr. C. can continue to collect the income replacement benefit for a certain period provided he does not leave the job.
- [7] Mr. C. submitted he would like to retire from his current position in 2022, and then seek alternative employment. He estimates this retirement would reduce his income by 50%. Mr. C. argues he should not be forced to remain on the payroll for a job his disability prevents him from doing, so that he can maintain paying spousal support at the current levels. Mr. C. argues that seeking alternate employment, even if at lower pay, is important to his mental health and well-being.
- [8] Ms. S. has Huntington's disease, a progressive and debilitating condition. Ms. S. had been identified as having the genetic marker for Huntington's at the time of separation, but had not yet developed symptoms. Subsequent to separation, Ms. S.'s condition worsened. Ms. S.'s disability was an important factor in determining the current needs-based spousal support.
- [9] Mr. C. argues that Ms. S.'s financial situation has improved, even though her disability continues, and that spousal support should be varied or terminated to account for Ms. S.'s increased means.

Issues

- [10] Should the spousal support Mr. C. pays to Ms. S. be reduced or eliminated to account for:
- a) the change in Ms. S.'s circumstances which result in a reduction of her need for spousal support;
 - b) the change in Mr. C.'s circumstances and the disabilities he has developed which prevent him working in the same jobs that he did when the existing spousal support was set;
 - c) depending on the above, what is the appropriate amount (if any) for spousal support?

Law

- [11] Spousal support orders should be varied under the legislation they were made. Both the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 [DA] and the Family Law Act, S.B.C. 2011, c. 25 [FLA] were pled. The current orders do not list the statute they are made under. However, a review of the record reveals the application for spousal support was originally made under the FLA. Section 167 of the FLA allows for a variation of spousal support, and directs a consideration of the needs, means, and circumstances of each person affected by a spousal support order.
- [12] A material change in circumstances can ground a variation of spousal support where the circumstances that gave rise to the original order have changed, such that the order would have been different if those circumstances were known.
- [13] The SSAG recognize that the illness or disability of a recipient spouse may be special circumstances. The Court has discretion to adjust the quantum and duration of spousal support, including increasing amounts to account for the unique situation of the parties.

Nature of the Spousal Support

- [14] In a previous decision regarding spousal support between the parties, *R.L.C. v. R.G.C.*, 2014 BCSC 1852 ("2014 Pearlman Decision"), Mr. Justice Pearlman emphasized that the spousal support was needs-based:
- [4] The claimant suffers from Huntington's disease, a progressive wasting disease that causes both physical and psychiatric deterioration. Ms. C. is unemployed and is in receipt of Canada Pension Plan disability benefits as a result of her Huntington's disease.
- [94] The claimant continues to be in need of spousal support. Her medical condition is progressive.

Ms. S.'s Huntington's disease and limited financial means were significant considerations when spousal support was set as needs-based.

- [15] The parties disagreed about the degree to which Ms. S.'s disability has manifested over the course of time. At one point, Ms. S. entered a care facility where monthly costs were high. In response, the 2016 Macintosh Order set spousal support at a higher amount to account for those increased costs. When Ms. S. left the facility, Mr. C. was not notified and continued to pay for the increased care facility costs for a period of time. Support was subsequently adjusted to be the current amount.
- [16] Ms. S. says her entitlement to compensatory support should be considered to be express, but acknowledges it is not explicitly set out in any of the spousal support claims that the support is compensatory. Compensatory support suggests a longer length of payment. If support is exclusively needs-based, it is open to variation when the needs of the recipient spouse change.
- [17] Ms. S. worked a full-time job up until the parties separated, at which point she quit working. Mr. C. played a significant role in child care because of his four days on, four days off work schedule.
- [18] There is nothing to suggest the spousal support was intended to be compensatory. I find that the spousal support ordered was intended to be needs-based.

Basis of Application

Length of Relationship

- [19] The parties disagree about the length of their original relationship. At most, Mr. C. suggests that, including their marriage and cohabitation immediately prior to that, they lived together for 14 years. Mr. C. argued the proper range of support is 7-14 years, based on his calculation of the relationship duration with discounts for periods of separation applied. Under this formulation, Mr. C. argues he has already reached the end of the time he should be expected to pay support.
- [20] In the 2014 Pearlman Decision, Pearlman J. made findings that the couple began to live together in December 1989, married in February 1995, and separated in January 2009. Based on these dates, the SSAG calculations show that the relationship was 19 years. I will use the 19-year figure in my calculations based on the dates listed. (I note that the figures and dates have been listed differently in different decisions on this file.)
- [21] Based on the facts, Mr. C. has been paying spousal support to Ms. S. for approximately 12.5 years. The SSAG suggest that the maximum time for a spouse to owe spousal support is between one-half to one year for each year of cohabitation, if the marriage was under 20 years. Over 20 years, spousal support may be considered indefinite.

- [22] Spousal support remains subject to review and variation based on the relative circumstances of the parties. Where spousal support is ordered based on need, it is subject to review based on evidence that the need of the recipient spouse has changed. The ability of the payor spouse to continue to pay is also a factor.

Ms. S.'s Circumstances

- [23] In earlier proceedings related to the divorce, in addition to the spousal support order, Ms. S. received equalization for her share in the family home, retroactive spousal support, and part of Mr. C.'s municipal pension.
- [24] The evidence before me is that Ms. S.'s needs have reduced, based on a material change in her circumstances, as set out below.

Savings and Investments

- [25] At the time of the 2014 Pearlman Decision, Ms. S.'s savings were around \$50,000. Her financial situation is better now. Ms. S.'s financial disclosure for this matter show savings of over \$110,000.
- [26] The financial disclosure of bank records showed Ms. S. attempted to transfer \$50,000 to her son on the same day an adjournment in this matter was ordered to allow for financial disclosure. Ms. S. submitted that this transfer was intended to provide the money to her son so he could invest it for her, and that the objective was not to hide this money to avoid having to disclose it.
- [27] Ms. S.'s financial records show a further interest-bearing investment of \$50,000 in Armada Mortgage. Ms. S. did not provide details of this investment, though ordered to do so. Her counsel submitted her failure to provide further disclosure was based on her disability. No evidence was provided on this point.
- [28] As the Supreme Court of Canada suggested in *Leskun v. Leskun*, 2006 SCC 25 at para. 34, the non-disclosure of assets is the cancer of family law. I find the timing, and the argument about a sudden desire to have her son invest money, or her inability to provide information about a \$50,000 asset, suspect.
- [29] I find Ms. S.'s non-disclosure reflects an attempt to shield her assets from consideration in this application to vary needs-based spousal support.
- [30] Ms. S.'s savings have grown considerably while Mr. C. was paying needs-based spousal support. This is a factor to be taken into account in deciding if it is appropriate to vary or end that support.

Re-partnering and Lowered Expenses

- [31] Ms. S. has re-partnered, and now lives with, and is supported by, her common law spouse. Her new partner pays rent and provides for most of her needs. Ms. S.'s bank records show her withdrawals are about \$2,000 per month for expenses. Even prior to taking into account Ms. S.'s new municipal pension entitlement, her expenses are less than the amount she receives in support. The support she receives monthly from Mr. C. surpasses her needs.

Municipal Pension

- [32] Ms. S. has now elected to take the municipal pension to which she was entitled upon her separation from Mr. C. The pension entitles her to \$2,044 per month, starting September 1st of this year and is guaranteed to age 65. After that, it pays approximately \$1,400 per month, whereupon she will have eligibility for her Canada Pension Plan. This is a change in her means.

Summary of Ms. S.'s Changed Circumstances

- [33] Mr. C. argues that the increase in Ms. S.'s savings, which now total over \$110,000, additional regular monthly income through the municipal pension, and the support provided by her new partner, amount to a material change in Ms. S.'s circumstances. In light of the needs-based nature of the existing spousal support order, Mr. C. argues that had Ms. S.'s present circumstances been known at the time the existing spousal support order was made, that order would have been different.

Mr. C.'s Circumstances

- [34] Ms. S. agreed that Mr. C. has PTSD, but argued that the difference between the two of them is that he is still getting paid as long as he remains employed. Mr. C. does not actually have to work, he only has to agree to remain employed "on the books" - to not retire - to get paid.
- [35] Ms. S. argued that, even though Mr. C. is off work due to the disabling impact of PTSD, he receives the same general income under his income replacement benefit coverage, and therefore, there has been no material change in his circumstances. Ms. S.'s counsel submitted it was "nothing short of sheer madness to retire", and that Mr. C. should maintain his current employment income despite that, practically speaking, he can no longer work in that job.

Case Law

- [36] Ms. S. pointed to a line of cases suggesting that a payor spouse cannot voluntarily reduce their income to avoid or reduce spousal support payments. Mr. C. pointed to case law which supported his contention that retirement and disability can be a change in circumstances that supports a reduction in spousal support. A brief summary of some of the authorities presented by the parties follows.

- [37] In *Jordan v. Jordan*, 2016 BCSC 1354, the payee spouse's evidence of her alleged disability causing her to be unemployable was found to be deceptive, leading to a finding that she was somewhat employable. This was not determinative of the outcome. Rather the material change in circumstances arose out of the payor's physical and mental limitations that limited his means to pay spousal support. Therefore spousal support was terminated: at paras. 59, 71, 75, 84.
- [38] Mr. Justice G.C. Weatherill in *Marthinsen v. Marthinsen*, 2020 BCSC 619, was not persuaded that the recipient spouse's alleged disability impaired her ability to obtain employment. Justice Weatherill stated that there is no legal requirement or social obligation for an individual to act as the insurer for their former spouse's needs for as long as they exist. In that case, the recipient spouse had a net worth of approximately \$1.2 million and any need she claimed for spousal support was self-created by her own failure to take reasonable steps towards self-sufficiency. Spousal support was terminated: at paras. 53, 61, 62.
- [39] In *Angulo v. Angulo*, 2019 ONSC 1456, Justice Horkins found that the payor spouse's retirement was a material change in circumstances warranting a termination in spousal support. The payor spouse was 68 years old and he had given his former spouse advance notice of his decision to retire. The retirement, although voluntary, was not to avoid the further payment of spousal support as alleged by the payee spouse: at paras. 92, 96.
- [40] The payee spouse in *Stringer v. Stringer*, 2017 BCSC 1470, did not provide any independent evidence of her disability, which she claimed influenced her inability to support herself after the conclusion of the relationship. The payor spouse's long-planned date of retirement, which triggered the review of spousal support, coupled with other factors that included the payee spouse's failure to take reasonable steps towards self-sufficiency, warranted a decrease in spousal support: at para. 163.
- [41] In reviewing the existing authorities, Mr. Justice Wilson in *Gajdzik v. Gajdzik*, 2008 BCSC 160, stated that there are no general principles for variation of spousal support in cases of voluntary retirement. Each case will be decided on its own unique circumstances. There, Justice Wilson ordered continued spousal support despite the payee spouse's failures to become self-sufficient and the payor spouse's voluntary retirement as a heavy duty mechanic. Justice Wilson found that the payor spouse could likely continue part-time work, and that the payee spouse could secure some part-time work, imputing an income for both of them resulting in a lowered spousal support award: at paras. 20, 35, 51, 52.
- [42] Based on a review of the authorities at paras. 94-104, Justice Sharma in *Petrie v. Lindsay*, 2019 BCSC 371, declined to put an end date on a spousal support order. The payor spouse wished spousal support to end when he reached 65 years of age, the date he wanted to retire. The payee spouse was found to be likely incapable of earning income, and the payor spouse's evidence regarding the precise date of his retirement was sparse: at paras. 95, 97.

- [43] Mr. Justice Punnett in *Szczerbaniwicz v. Szczerbaniwicz*, 2010 BCSC 421 at paras. 26-27, stated the following regarding voluntary retirement:
- [26] if the court finds that a party's retirement was motivated by the desire to avoid a maintenance obligation, it will most likely impute income. Even if the party's motivation was not to avoid maintenance, the court will likely impute income so long as the party has the ability to earn an income.
- [27] If the retirement is not voluntary because of economic circumstances, medical reasons, or an employer's actions and the payor is unable to work, the court will tend to reduce the maintenance payable; otherwise, if the payor is still capable of earning an income, his application to terminate or vary spousal support will likely fail: [citations omitted].
- [44] In *Szczerbaniwicz*, the payor personally wished to retire, and had a history of failing to pay his spousal support obligations. Given the circumstances, Justice Punnett inferred his retirement was partly motivated to avoid support obligations, and imputed his income to calculate a reduced monthly support figure: at paras. 29, 30, 63.
- [45] Mr. Justice Majawa in *Carey v. Carey*, 2021 BCSC 1537, dismissed an application to terminate spousal support based on an intention to retire. Justice Majawa found that unlike other cases that permitted variation based on an intention to retire, the husband's intention to retire was not sufficiently supported by the evidence that it would occur as stated. The husband did not meet the onus of establishing a material change in circumstances: at paras. 41, 45.
- [46] The question of how to address pension income where a pension was already divided as a marital asset was addressed by the Supreme Court of Canada in *Boston v. Boston*, 2001 SCC 43, where the Court summarized the principles on "double dipping" in cases of separation. The Court found that it is generally unfair for a party to benefit from pension both as an asset and a source of income. To avoid double recovery on retirement in the context of ongoing spousal support obligations, the portion of the pension that was not part of the equalization or the division of matrimonial assets should be used for calculating spousal support. However, the Court noted that sometimes double recovery is unavoidable. It may be permitted where there is: an ability to pay, the payee spouse reasonably used equalized assets in an income-producing way, and despite this there is still a persisting economic hardship from the marriage: at paras. 64-65.
- [47] Mr. Justice Edelmann in *Wheeler v. Wheeler*, 2021 BCSC 1269 found a loss in long-term employment to be a material change in circumstances, warranting a variation of spousal support. Despite 40% of the payor's pension being earned after the parties' separation, the pension income still factored into the spousal support amount: at paras. 8, 24.
- [48] The Court of Appeal in *Dedes v. Dedes*, 2015 BCCA 194 reiterated the legal principles regarding material changes in circumstances, emphasising that a material change is not based on what one party knew or reasonably foresaw at the time of the order, rather it is what the parties actually contemplated at the time of the order: at para. 25.

Analysis

a) Should spousal support be reduced or eliminated?

- [49] Overall, I am satisfied on the evidence before me that there has been a material change in the circumstances of both parties not contemplated when the existing spousal support order was made which, if known, would have resulted in a different order. A review of Ms. S.'s circumstances shows that she is no longer in the same position she was when the spousal support order was made. Ms. S. has re-partnered. Her new partner covers many of her household expenses. Her bank statements showed she pays approximately \$2,000 per month in expenses, which is considerably less than they were when the order was made or varied in the past. Many household expenses, such as rent, are covered by Ms. S.'s new partner. Ms. S.'s savings have grown from approximately \$50,000 to \$110,000. Additionally, she has acquired a \$50,000 interest in Armada Mortgage.
- [50] Additionally, Ms. S. is able to collect her portion of the pension accrued from Mr. C.'s work in the amount of \$2,044 per month. Ms. S. argues her decision to access pension benefits should not decrease Mr. C.'s obligation to pay spousal support because it was treated as an asset of the marriage. The spousal support at issue here is needs-based. I find that the availability of a steady and fixed source of pension income is a material change in Ms. S.'s needs and circumstances that should be considered.
- [51] The SSAG indicates that support is often reduced when there is a re-partnering and sometimes terminated. In cases where it is not, it is usually because there is a strong compensatory claim. Needs-based spousal support may be varied according to evidence that the recipient spouse's means have improved.
- [52] There was no further information provided about the Armada Mortgage investment of \$50,000 that she earns interest on. I find that Ms. S. attempted to shield her assets to avoid disclosing them, including through a failed transfer of \$50,000 to her son on the day disclosure was ordered.
- [53] Overall, as a result of the evidence provided, I find that Ms. S.'s needs have been significantly reduced, due to her re-partnering, drawing on the municipal pension, and accumulation of additional savings and investments.
- [54] At the same time, Mr. C. has developed PTSD and major depressive disorder. Currently, his income replacement benefit means his income remains stable as long as he remains in his current job. As his income remains relatively stable, I have not taken this to be a factor. It may be in the future, as addressed below.
- [55] On a consideration of the circumstances as set out above, I find it appropriate to reduce the spousal support Mr. C. owes to Ms. S. due to the fact that Ms. S. no longer has the same needs as she did when the current spousal support was set.

b) Should spousal support be reduced or eliminated due to Mr. C.'s disabilities and potential retirement?

[56] I do not find Mr. C.'s decision to retire, should he choose to exercise it, voluntary. He has worked long years as a police officer and firefighter. The cumulative result of that work is that he has developed PTSD and major depressive disorder. He cannot work at these jobs any longer. If he wants to work, it has to be at a job which does not pose the same stresses.

[57] Should he choose to retire, including if he chooses to do so in order to seek other work which he can do and finds meaningful, I do not find this would be due to an effort to avoid paying spousal support. Mr. C. is entitled to make such life decisions responsive to the disabilities he developed during the course of his employment. He is not bound to remain employed "on paper" because it affords a higher income for spousal support.

[58] That being said, he has not retired. His new income (including through pension or other employment) is not known. It may be that his income post-retirement remains substantially the same and does not warrant any adjustment to the spousal support ordered here. The application is therefore premature.

c) What is the appropriate amount of spousal support?

[59] Mr. C. has developed a disability, but can stay at his job for a period of time and continue earning \$134,830. Should he retire or seek alternate employment, his means may well be reduced. While he remains in his current job, support should be calculated based on Mr. C.'s income of \$134,830.

[60] Ms. S.'s income, taking into account the municipal pension she now collects, is \$38,716. There is no set way to calculate the new partner's contribution where a recipient spouse has re-partnered and an argument is made that spousal support should be reduced. Some ways that courts have implemented this change include: a step-down approach, lowering the amount of spousal support payable over time, lowering the amount of spousal support payable in the range, going below the range, taking into account part of the new partner's income, or termination of spousal support entirely.

[61] Here, I find that, based on the change in Ms. S.'s circumstances, spousal support should be varied as follows. Ms. S.'s income, taking into account the municipal pension, and contributions of her new partner, should be imputed at \$56,716. This amount is roughly calculated based on an assumption that Ms. S.'s new partner contributes approximately \$1,500 per month to her combined living expenses ($\$1,500 \times 12 = \$18,000$) totalling approximately \$18,000 per year. I consider this a conservative estimate and that his contribution is likely more.

- [62] Per the SSAG, reasons to set spousal support at the low end of the scale are dependant on the circumstances of the parties, but include a calculation of the relative financial position of the parties. Where the recipient spouse's financial needs have improved, including through re-partnering, that is a circumstance to be taken into account.
- [63] Spousal support payable by Mr. C. to Ms. S. is set at the low range of the SSAG at \$1,879 per month. This is the new amount payable from September 1, 2021. The amount Mr. C. paid was \$2,871 per month. Per this decision, the amount he owed was \$1,899 per month, resulting in an overpayment of \$992 for four months. The repayment of amounts overpaid may be equally deducted from the support due for four months from January to April, 2022, with \$992 being deducted from each of those months until the overpayment is eliminated.
- [64] Mr. C. further sought an order specifying the date of termination of spousal support. The 2014 Pearlman Decision granted Ms. S.'s application for retroactive spousal support to June 2009. At the time of this decision, Mr. C. has paid spousal support for nearly 12.5 years.
- [65] Given the changed circumstances of the parties, reflected in the improved financial circumstances of Ms. S., and the needs-based nature of the support, as well as the disabilities Mr. C. has developed, spousal support should terminate on June 1, 2024. From June 1, 2023 to June 1, 2024, spousal support should be set at half of the amount indicated above, at \$939.60 per month. This step-down approach gives Ms. S. time to adjust to the reduction. Based on the evidence, Ms. S.'s needs were below the support provided even before the municipal pension was taken into account. Overall, this would provide for 14.5 years of spousal support on a 19-year relationship. Additionally, Ms. S. has additional savings and investments to support her in meeting her needs in the future.

Conclusion

- [66] Based on the evidence before me, both parties are functionally disabled. That being said, Mr. C. has not yet retired. A reduction in spousal support to account for a retirement which has not yet occurred is premature. When Mr. C. does retire, spousal support may be reviewed based on his new income at that time.
- [67] Ms. S.'s needs have changed, supporting a reduction of spousal support and end date to that support as set out above.
- [68] Mr. C. is entitled to his costs in this application.

"A. Walkem, J."

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