

CANADA / JUDGMENT

Ragan v. Ragan

2011 BCSC 766

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 766 Ragan v. Ragan IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Ragan v. Ragan, 2011 BCSC 766 Date: 20110610 Docket: 38709 Registry: Kamloops Between: Laurel Louise Ragan Plaintiff And Ralph DeVinny Ragan Defendant Before: The Honourable Mr. Justice Powers Reasons for Judgment Counsel for the Plaintiff: D.C. Dundee Ralph DeVinny Ragan appeared on his own behalf: Place and Date of Trial: Kamloops, B.C. April 20, 2011 Place and Date of Judgment: Kamloops, B.C. June 10, 2011

- [1] Mr. Ragan has applied, pursuant to the Divorce Act, R.S., 1985, c. 3 (2nd Supp.), to vary an order of spousal support which was made, by consent, in an undefended divorce proceeding dated May 31, 2010. The order dealt with a number of issues, including the division of the parties' family assets. The order provided that Mr. Ragan was to pay to Ms. Ragan the sum of \$4,500.00 per month for her support commencing March 1, 2008, and payable on the first day of each and every month thereafter. The order did provide that it would be reviewed upon Mr. Ragan turning 65 years of age.
- [2] The parties were represented by counsel.
- [3] Mr. Ragan was born in April of 1949 and is presently 62 years of age. Ms. Ragan was born in September of 1952 and is presently 58 years of age.
- [4] They were married June 29, 1974 and separated August 29, 2005. They lived together for approximately 31 years after their marriage. They were divorced on July 24, 2008.
- [5] Mr. Ragan operated his own business providing advertising services and consultation. They split income during the marriage by having the company pay Ms. Ragan a salary. Ms. Ragan is trained as a secondary school teacher, but has not taught for approximately 15 years. They have two children of their marriage who are now adults and no longer children of the marriage for the purposes of the Divorce Act.
- [6] They were financially successful as a family. They had significant assets at the time of their separation and divorce. They had significant registered retirement savings plans ("RRSP"), a motor vehicle, and significant equity in the home, as well as the interest in two companies; a holding company and Ragan Advertising Inc.

- [7] When the parties separated, Ms. Ragan continued to receive a payment from the advertising company, and all of the family expenses were paid by the company or Mr. Ragan. Ms. Ragan had some health issues arising from the separation, and the company paid for counselling for her for approximately 18 months. Eventually the matrimonial home was sold and Ms. Ragan moved to Vancouver, British Columbia.
- [8] The parties divided their assets and, for the purposes of this application, I assume that it was a fair division. It was something they both agreed to after being advised by counsel.
- [9] Ms. Ragan received the net sale proceeds of the home of approximately \$360,000.00, plus most of the furniture and the art work. She received the 2004 Volvo automobile and fifty percent of the RRSPs of a value of approximately \$250,000.00. She kept her BCTF pension and received a \$20,000.00 lump sum payment.
- [10] Mr. Ragan received all of the shares he held in the holding company. He was a fifty percent shareholder in that company. He had two other partners that each owned twenty-five percent of the shares. Mr. Ragan received all of the shares and assets of the advertising company. He also received one-half of the RRSPs of approximately \$250,000.00, and received a small number of other shares.
- [11] Mr. Ragan complied with his obligations to pay spousal support until November 1, 2009, when he reduced the payments from \$4,500.00 per month to \$2,000.00 per month. He then paid \$2,000.00 per month up to and including May 1, 2010, when he ceased making any support payments. His application is to vary the existing order to reflect those changes, and to cancel any and all spousal support arrears. Mr. Ragan's application to vary the existing order is pursuant to s. 17(1)(a) of the Divorce Act.
- [12] Section 17(4.1) of the Divorce Act provides: 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.
- [13] The original order of July 24, 2008 was based on Mr. Ragan having income of \$120,000.00 per year, and Ms. Ragan having no income. Mr. Ragan says that his circumstances have changed due to the general economic downturn which has affected the advertising business, as well as technological changes in that field. This includes the Internet and computers which allow people to obtain some of the services his company provided in the past at a much lower rate through the Internet. He says that there has been a steady decline in his business from 2008 to the point where he has had to close down the office where the business operated and let all of the employees go. He now operates out of a spare room in his home.

- [14] He has entered into a new relationship with Ms. Petra Franke. Ms. Franke received a salary from the company beginning in late 2008, but since then now receives payment for any work that she does for the company through her own company, Timeless Tin. Her company would simply render a bill to Mr. Ragan's company, Ragan Advertising Inc. Ragan Advertising Inc. may also pay other people for contract work, but does not have other employees. Mr. Ragan does not have any interest in Timeless Tin, although in some of its Internet promotions, he is shown in various capacities such as president or legal advisor CEO. He assists Ms. Franke with the business on occasion, but, based on his evidence, that would involve no more than five percent of his time.
- [15] Ms. Ragan was originally concerned that Mr. Ragan was intentionally under-employed or not applying himself to his business, but instead spending most of his time assisting Ms. Franke with her business. She believed he was doing this simply to minimize his income and, therefore, his spousal support obligation. I am satisfied that is not the case. I am satisfied that Mr. Ragan did recognize his obligations to his former spouse and did comply with the order until he believed he was no longer financially able to; that is, in November 2009.
- [16] There has been extensive exchange of documents, plus an examination for discovery since this application was filed. Ms. Ragan acknowledges that there has been a significant change of circumstance since the order was made, but does not agree that it has been so significant that Mr. Ragan's obligations to pay spousal support should be terminated at this time. Ms. Ragan herself did find some part-time employment when Mr. Ragan reduced the spousal support. She is now working on a part-time basis in a retail store in Vancouver.
- [17] The parties' present circumstances are not something that either of them anticipated when the order was originally made. Mr. Ragan had been successful in business all of his life and expected that his business would continue to succeed after the divorce. Given the length of the marriage, and the parties' financial circumstances at the time of separation, there is no reason that either one of them would expect the support obligations to change barring a significant change of circumstance. However, it was reasonable to expect Ms. Ragan to seek some form of employment, including a possible return to teaching. Her evidence is that when she began looking for work she discovered that it was difficult to find a teaching job in the Vancouver area which is highly competitive, especially given the length of time she has been out of the teaching force. Given the present circumstances, it is only reasonable in the present circumstances that she continues to seek employment and contribute to her own support to the extent that is possible. The obligation is on Mr. Ragan to continue to try to generate an income that is reasonable given his age and his work experience so that he is able to support himself and to contribute something to Ms. Ragan by way of spousal support. However, at present, the reality is that Mr. Ragan is simply unable to comply with the existing order.
- [18] Mr. Ragan's obligation to pay spousal support will continue for an indefinite period and be subject only to the conditions, needs, means and circumstances of each of the parties. The Spousal Support Advisory Guidelines [SSAG] are a useful tool in determining what a

reasonable amount of spousal support is. Mr. Justice Groves, in his helpful decision *Bockhold v. Bockhold*, 2010 BCSC 214, discussed the application of the SSAG to a variation order and found that the SSAG were an important consideration in dealing with a variation order, and although the Court may have a broader discretion on an initial application, it would still be an error of law to substantially depart from the SSAG in the absence of exceptional circumstances or a reasonable explanation [paras. 61-70], and in particular paras. 68-69:

- [68] In *Beninger v. Beninger*, 2007 BCCA 619, 47 R.F.L. (6th) 11, the Court held that if approached with caution and on a fact specific basis, the SSAG may be used on a variation application, keeping in mind the SSAG are "a guide, not ... the ultimate arbiter of either the amount or duration of support" (para. 57). This authority led Madam Justice L. Smith to conclude that the SSAG are relevant on review as well, but "similar caution and advertence to the context should apply" (*J.M. v. L.D.M.*, 2008 BCSC 1235 at para. 73).
- [69] In light of the conflicting authorities referred to above, the safest course to follow may be the approach outlined by Justice Metzger in *Kerman v. Kerman*, 2008 BCSC 500 at para. 76, 53 R.F.L. (6th) 156: I turn to quantum. I bear in mind the principle from *Bryant* that the Guidelines may be less applicable on a review. I bear in mind also the principle from *Redpath v. Redpath*, 2006 BCCA 338 (B.C.C.A.), at para. 42, that it may be an error of law to "substantially" depart from the Guidelines in the absence of "exceptional circumstances" or, as subsequent cases have stated, at least a "reasonable explanation" (for example, *McEachern* at para. 64). In my view, the synthesis of these decisions is that the principle in *Redpath* continues to apply on a review, but the exceptional circumstance or reasonable explanation inquiry for departing from the Guidelines will usually be broader on a review, as per *Bryant*, than it might be on an initial determination.
- [19] In determining what the appropriate amount of spousal support is at present, I need to consider the parties' conditions, needs, means and circumstances as they now stand and how I anticipate they might be in the near future. Mr. Ragan did ask that an order be made that his support obligations cease when he attains the age of 65. The existing order provides that the spousal support can be reviewed upon him turning 65 years of age. There is no reason to vary that term of the order and it will continue. Mr. Ragan's Financial Circumstances
- [20] Mr. Ragan's property and financial statement was filed July 30, 2010. He estimated his annual income at approximately \$40,000.00 at that time. He estimated his expenses at \$8,317.00 per month, which included \$4,500.00 for spousal support and \$1,000.00 for debt payments. Without those two amounts, his expenses are estimated at \$2,817.00. He shares a home with his present spouse and his one-half of the housing expenses, including the mortgage payment, is \$772.00. This is not unreasonable. The utility allowance of \$175.00 is reasonable. I do note, however, that the cable TV of \$50.00 is paid by his spouse through her company. His estimate for food of \$400.00 per month for himself may be a little high, and he simply may not be able to afford the allowance of \$100.00 for furnishings and equipment. Given his

present financial circumstances, the allowance of \$125.00 per month for vacation is not realistic. The amount for clothing at \$200.00 per month is not unrealistic given his business, but again, may be more than he can afford. The entertainment and recreational allowance of \$200.00 per month is also more than he can afford, especially given the fact that he has already allowed \$100.00 for meals outside the home. Realistically, his expenses could be reduced by approximately \$600.00 per month. This would leave a balance, before any payments for debts or spousal support, of about \$2,200.00 per month.

- [21] Mr. Ragan's income is not easy to determine because he is self-employed. He does have an interest in a holding company, Victoria Street Holdings Ltd., however, the evidence is clear that at this point that company does not generate income for Mr. Ragan. Ms. Ragan agrees that the company is a neutral factor at this time.
- [22] The financial information regarding Ragan Advertising Inc., which has a year-end of July 31st, shows that there has been a significant change in the viability of that company since 2008. The revenues, after production costs, were as follows: 2006: \$382,455.00 2007: \$407,604.00 2008: \$367,514.00 2009: 316,614.00 2010: \$163,213.00
- [23] The expenses, excluding the amount paid to Mr. Ragan, were as follows: 2006: \$311,039.00 2007: \$281,431.00 2008: \$245,915.00 2009: \$233,904.00 2010: \$141,650.00
- [24] The operating income, before amortization and management salaries, was as follows: 2006: \$71,416.00 2007: \$126,173.00 2008: \$121,599.00 2009: \$82,710.00 2010: \$21,563.00
- [25] Mr. Ragan's income tax return shows that he had the following income: 2006: \$72,000.00 2007: \$108,000.00 2008: \$137,875.00 2009: \$76,500.00 2010: \$45,575.00 (A dividend was declared by Victoria Street Holdings which added taxable income of \$39,375.00 to Mr. Ragan's tax return. He did not actually receive that money, but the advertising company paid him approximately \$98,500.00 for employment income). Ms. Ragan's Financial Circumstances
- [26] Ms. Ragan filed her property and financial statement November 12, 2010. She showed employment income of approximately \$11,700.00 per annum. She does pay union and professional dues, which I assume relate to the BCTF. These are \$45.00 per annum. Her net employment income, therefore, is approximately \$11,655.00.
- [27] Ms. Ragan has been able to retain a significant amount of the assets she received at the time of the separation, and does have some investment income which her counsel estimates to be approximately \$3,725.00 per annum. It is reasonable to treat her employment income at \$11,655.00 and investment income at \$3,725.00 for a total of \$15,380.00.
- [28] She claims expenses of \$3,682.83, including \$840.00 in debt payments. If the debt payments are subtracted, her expenses are \$2,842.00 per month. The debt appears to be for taxes as per instalments - September 15 to December 15, 2010. It would appear that the debt is now gone.

- [29] Her housing expenses are \$1,822.25. She rents an apartment in Vancouver. This includes most of her utilities, and the balance of the utility expenses of approximately \$143.00 appear reasonable. However, given the parties' present financial circumstances, she may not be able to afford this form of accommodation. Her claims for food and meals outside the home at \$245.00 per month are certainly reasonable. Her transportation expenses of \$203.65 per month are reasonable. The allowance of \$100.00 per month for vacation, again, may be something that is unrealistic given the parties' present circumstances. It is not unreasonable; it may be simply be something that neither of them can afford. Her claim for health expenses and personal expenses appear reasonable.
- [30] Ms. Ragan recognizes that there is a significant change in the income earned by the company. She notes that Mr. Ragan's present spouse receives money from the company. She questions whether this is a form of income splitting. The evidence from Mr. Ragan, however, is clear that his spouse does provide assistance in the business, and when she does, her time is billed at \$20.00 per hour through her company Timeless Tin. She did receive an income directly from the company beginning in late 2008. The records indicate that it was not a significant amount of money over time. In 2008, Ms. Franke appears to have received about \$5,000.00. In 2009, it appears to be approximately \$23,750.00. In 2010, it appears that approximately \$7,000.00 was paid to her and approximately \$3,300.00 to Timeless Tin.
- [31] The amount is significantly less in 2010. Ms. Ragan is suspicious of these amounts, but recognizes that, particularly the present amounts, do not appear to be excessive or unreasonable.
- [32] Timeless Tin appears on the records to have loaned money to Ragan Advertising Inc., and has had some of that paid back. Ms. Ragan is suspicious about those, but there is no evidence that this is not a legitimate loan and re-payment.
- [33] Ms. Ragan does not dispute that a reasonable estimate of Mr. Ragan's income is \$39,000.00 to \$40,000.00. His 2010 tax returns, which were received after the hearing, indicate employment income of approximately \$45,575.00. However, she says that should be increased for the purposes of calculating spousal support to take into consideration the personal benefits he may receive as a result of the company paying some of his expenses. It is reasonable to add the following amounts to Mr. Ragan's income as a result of personal benefits he receives from expenses paid by the company. These include: Business use of the home (the company pays \$150.00 per month for the rental of the space in the home): \$1,800.00 Home telephone (the company pays for a telephone in the home and for a cell phone that Mr. Ragan uses): \$300.00 A portion of travel expenses: \$2,535.00 A portion of meals paid while on travel: \$1,000.00 Medical Services Plan (this is paid by the company): \$726.00

- [34] I have not added anything for the travel expenses which appear to be business related. These additions should be grossed-up for the purposes of calculating spousal support. The total, therefore, is approximately \$3,826.00.
- [35] The auto expense was claimed by Ragan Advertising Inc. at \$8,401.00 in 2010.
- [36] The car expense will decrease when the car is paid for in May 2011. Ms. Ragan says that \$7,000.00 is a reasonable figure for the personal use portion of the automobile.
- [37] The accountants have attributed 20 percent of the automobile expenses to Mr. Ragan for his personal use. I am satisfied, based on the evidence I have heard and the submissions, that the majority of the vehicle use is for the purposes of business rather than pleasure. However, there is a benefit to Mr. Ragan which should be added to his income. I estimate, including fuel, use of the automobile and insurance, at \$250.00 per month for a total of \$3,000.00 per year. I have done this keeping in mind that 20 percent of the automobile expenses are already attributed to him by the accountants. This should be grossed-up as well when calculating spousal support under the SSAG. Therefore, the total of these expenses paid by the company which provide a personal benefit to Mr. Ragan, including automobile, is \$6,826.00 per year.
- [38] Ms. Ragan says these should be grossed up when entered into the SSAG for those calculations.
- [39] The attribution of income for expenses paid by a company is supported by the cases *Boucher v. Boucher*, 2010 BCSC 21, *Moran v. Cook*, 9 R.F.L. (5th) 352, *P.C.J.R. v. D.C.R.*, 2003 BCCA 207, and *E.G.P. v. S.L.P.*, 2009 BCSC 685 at para. 114 which indicates that these amounts should be grossed-up for the purposes of calculating spousal support.
- [40] The evidence is clear that the economic downturn, particularly in the last year or two, has had a significant impact on Mr. Ragan's income and his business. In September of 2010, the company had \$6,000.00 in the bank and about \$2,100.00 to \$2,200.00 in accounts payable. The line of credit stood at \$70,000.00 to \$80,000.00. Mr. Ragan was required to take money from his personal line of credit and advance it to the company in order to keep the company operating. He also borrowed money from his new spouse or her business in order to keep the company going. He has now restructured his company providing primarily consulting work. He has reduced his overhead by eliminating his office space and staff, and appears to have increased the profitability of the company, at least at this time. It remains to be seen how well Mr. Ragan will be able to improve the company's fortunes in the future. Obviously this is not what was expected by himself or Ms. Ragan, but is a reality that both of them must face.
- [41] The SSAG suggest that for income for Mr. Ragan from employment of \$45,575.00 and non-taxable income of \$6,826.00, and for Ms. Ragan employment and investment income of \$15,380.00, the range of spousal support is as follows: Low: \$1,252.00 Mid: \$1,460.00 High: \$1,541.00

- [42] It is obvious that Ms. Ragan will have to seek additional employment or more remunerative employment. Mr. Ragan simply does not have the means to pay the amount of support that Ms. Ragan would need to meet all of her expenses. However, he does have an ongoing obligation to pay support.
- [43] The order for support is varied as of November 1, 2009 to the sum of \$2,000.00 per month up to and including April 1, 2010. The support will be varied as of May 1, 2010 to the amount of \$1,460.00 per month, and will be payable on the 1st of each and every month thereafter.
- [44] The arrears under the existing order are, therefore, rescinded. Any arrears are based on the variation which I have made.
- [45] I have not made any order with regard to the payment of the arrears and I expect they will have to be paid over time.
- [46] The parties have not addressed the issue of costs, and there may be matters which I am unaware of which should be taken into consideration before an order for costs is made. If the parties are unable to agree on costs they have liberty to apply. "R.E. Powers J." POWERS J.

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