

CANADA / JUDGMENT

Raschpichler v. Raschpichler

2024 BCCA 94

COURT

British Columbia Court of Appeal

DECIDED

1 March 2024

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2024 BCCA 94 Raschpichler v. Raschpichler

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Raschpichler v. Raschpichler,

2024 BCCA 94

Date: 20240301

Docket: CA49353

Between:

Jochen Raschpichler also known as Dick Raschpichler

Appellant

(Respondent)

And

Milena Silva Raschpichler

Respondent

(Claimant)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

The Honourable Madam Justice DeWitt-Van Oosten

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

dated August 22, 2023 (Raschpichler v. Raschpichler, 2023 BCSC 1505, New Westminster Docket E50139).

Oral Reasons for Judgment

Counsel for the Appellant:

R. McQueen

Counsel for the Respondent:

K.E. McNeilly

Place and Date of Hearing:

Vancouver, British Columbia

February 26, 2024

Place and Date of Judgment:

Vancouver, British Columbia

March 1, 2024

Summary:

The appellant appeals the judge's order dismissing his application to terminate his obligation to pay spousal support to the respondent as of the date of his retirement. Held: Appeal dismissed. The judge found that the appellant's retirement was a material change in circumstances before deciding that no variation in spousal support was warranted due to an ongoing entitlement to compensatory and non-compensatory support and the appellant's historic underpayment of spousal support. The judge's findings are owed significant deference and are amply supported by the record.

ABRIOUX J.A.:

Introduction

- [1] This appeal arises from the order of Justice Milman which dismissed Mr. Jochen Raschpichler's application under section 17 (1) and 17(7) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) to cancel or alternatively, significantly reduce his obligation to pay spousal support to the respondent, Ms. Milena Raschpichler.
- [2] On appeal Mr. Raschpichler challenges the judge's conclusion that although his retirement constituted a material change in circumstances, he must pay ongoing indefinite spousal support in the monthly amount of \$1,500.
- [3] For the reasons that follow, I would dismiss the appeal.

Background

- [4] The parties were married for 25 years before their separation in 2007.
- [5] During their marriage, they had three children. While married, the respondent was primarily involved in raising the children and working in the home; at times, she held periodic jobs outside of the home and in 2002 she completed a diploma in Library and Information Technology. The appellant worked in the forest industry, eventually holding a managerial position; he was the family's primary income earner during the marriage.
- [6] At the time of separation in 2007, the parties entered into a "homemade" separation agreement without the benefit of legal advice. The agreement called for the appellant to make monthly payments of \$250 in spousal support and \$250 in child support--approximately a third to a half of what might have been ordered by a court at that time.
- [7] The parties were divorced in 2013. In 2014, the parties' oldest child reached the age of majority but the appellant continued to make monthly payments in the amount of \$500 which was based entirely as spousal support. The appellant remarried in September 2015. In 2016, he informed the respondent that he had paid her enough support and that he would be making no more payments.
- [8] In response, the respondent filed a Notice of Family Claim on January 12, 2016 in which she sought an order for spousal support. The family proceeding was settled at a Judicial Case Conference (JCC) in March 2016 at which time the parties agreed to a consent order whereby the appellant would make monthly spousal support payments of \$1,500 based on an income of \$82,500.
- [9] The JCC judge also ordered an equal apportionment of the appellant's pension. One of the issues before the chambers' judge was whether the appellant had been entirely forthcoming with his financial records on his application for termination of spousal support.
- [10] On July 31, 2020 at the age of 64, the appellant's employment with TC Transcontinental was terminated. His income in 2019 was \$97,895. In 2020 it was \$156,000 which reflected the sizeable severance package he received that year: RFJ at para. 11.
- [11] In December 2021, the appellant unilaterally reduced his spousal support payments by half to \$750 per month. On November 18, 2021, he filed the application which forms the subject of this appeal. Specifically, he sought an order that the JCC order be varied so as to terminate his obligation to pay spousal support. In the alternative he sought an order that his spousal support obligation be "significantly reduced in quantum effective December 1, 2021 or at such time as the Court determines just, and time limited to a specific termination date."
- [12] In September 2022, the appellant received an inheritance from his deceased's father's estate in the amount of \$235,000. In May 2023, he received a further \$60,000 for a total inheritance of \$295,000. With his wife, he has equity in a new home said to be worth \$875,000 which is subject to a mortgage of \$62,000: RFJ at para. 13.

[13] The respondent has been employed at a bookstore and café since September 2012. As at the time of the hearing of the application in August 2023 she earned an annual income of \$47,000 which did not include the spousal support she received from the appellant. She owned a home worth \$400,000 which was subject to a mortgage in the amount of \$225,000. She had cash and investment assets worth approximately \$33,000 and is entitled to receive a half share in one of the appellant's pensions (the "Weyherhauser pension") which will pay her approximately \$500 when she elects to receive it. She has sizeable credit card debts and owes \$4,500 in unpaid taxes.

The Chambers Judge's Reasons for Judgment

[14] In addition to the background to which I have referred the judge also noted that:

- The appellant had three pensions which had a substantial value but only one of them came to be divided by the parties: at para. 9;
- The respondent received approximately \$105,000 toward her share in the equity of the former family home "but it is unclear if she received fair value in that regard because [the appellant] later sold the property himself but has not disclosed what he received for it or what was owed under the mortgage at the time": at para. 10.

[15] The judge, correctly in my view, then set out the issue before him:

[16] To justify revisiting the JCC order, [the appellant] must first show that there has been a material change in circumstances. I accept that his retirement meets that test, but that is only the beginning, not the end of the inquiry. Next, I must determine what change, if any, is appropriate: see *L.M.P. v. L.S.*, 2011 SCC 64.

[16] He then reviewed the applicable legal framework to which I refer below. He also referred to certain seminal authorities such as *Moge v. Moge*, [1992] 3 S.C.R. 813, 1992 CanLII 25 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715 observing that "in a traditional relationship, where one spouse subordinates a career for the sake of the family, the economic consequences of the marriage to that spouse can be prejudicial": at para. 19.

[17] He also referred to:

- *Leskun v. Leskun*, 2006 SCC 25, and *Hathaway v. Hathaway*, 2015 BCSC 1485 as authority for the proposition that "in determining the amount of support payable, the court must consider the assets that the payor has acquired since the parties divided their assets": at para. 23; and
- Certain authorities including *Wallberg v. Wallberg* (1994), 8 R.F.L. (4th) 372 (B.C.C.A.), where this Court held that a payor may properly be required to pay support from capital where the payee's living standard falls significantly below his own: see also *Bullock v. Bullock*, 2007 BCSC 318, aff'd 2008 BCCA 162 and *Boston v. Boston*, 2001 SCC 43, where the Court held that a payor can be required in appropriate circumstances to pay spousal support from pension earnings, even where the pension had previously been divided, if doing so is seen to be necessary to achieve the objectives of spousal support: at para. 24.

- [18] Of significance to the principal issues on appeal, the judge made two critical findings:
- [21] I accept that [the respondent] has made out a strong case for entitlement to spousal support, both on compensatory and non-compensatory grounds, and that her case for spousal support continues to be a strong one, given the ongoing disparity between the relative means and needs of the parties today . [and]
- [25] Here, I am satisfied that if the JCC order remains in effect, then there would be, at most, only limited double dipping into [the appellant's] pension earnings. I say this because the pensions from which he is benefitting today were only partially but not entirely divided. Even if there were significant double dipping, the Court held in Boston that it is not always possible to avoid double dipping, particularly where, as here, the rationale for ongoing spousal support persists. In this case, I am satisfied that [the respondent] continues to suffer from the effects of persistent underpayment of spousal support historically.
- [Emphasis added.]
- [19] The judge considered the appellant's submission that the respondent had made some improvident decisions in the litigation and otherwise, and concluded:
- [29] but that is not really the issue. What is important is the present effect of the parties' historical dealings on the relative means and needs of each of them currently. In any event, I accept her submission that at least some of the basis for the agreements that were reached and orders that were made, or not made, flowed from incomplete or inaccurate disclosure by [the appellant] of his actual financial circumstances.
- [20] In light of all the considerations to which he had referred, the judge concluded that the application should be refused. He ordered that the appellant pay the \$17,000 in arrears which arose following the unilateral reduction in support in December 2021 over a period of two years from the date of his order and that prospectively "he must resume paying her \$1,500 per month in spousal support, as required by the JCC order": at para. 30.

On Appeal

- [21] The appellant challenges the judge's findings and conclusions that an indefinite spousal order in the JCC amount of \$1,500 was warranted on a number of grounds which include that he failed to consider:
- The appellant's limited income and income earning assets;
 - The appellant's needs in addition to those of the respondent; and
 - The difference in value of the parties' assets, 17 years after separation, which did not justify a property division adjustment in the form of spousal support.

- [22] The appellant submits that effectively the order awarded the respondent retroactive support back to the date of separation in 2007 without the required analysis and despite the intervening 2016 JCC Order.
- [23] At the hearing of the appeal, the appellant advised that he was no longer challenging the order that he pay the \$17,000 in arrears of spousal support which have accrued since December 2021. It was also his position that although the parties' respective incomes were approximately the same at the time of the hearing of the application before the chambers judge, he was prepared to pay some spousal support going forward as long as it was for a specific period of time.

Standard of review

- [24] The standard of review with regard to support orders is highly deferential. This Court should only intervene if it finds "a material error, a serious misapprehension of the evidence, or an error of law": *Hinz v. Davey*, 2022 BCCA 232 at para. 33, citing *Hickey v. Hickey*, [1999] 2 S.C.R. 518, 1999 CanLII 691 (S.C.C.) at paras. 10-12. The alleged error determines the standard of review: *Hinz* at para. 33.

Discussion

- [25] The appellant applied under s. 17(1) of the Divorce Act for an order terminating support.
- [26] Termination of spousal support is a form of variation. Section 17(7) of the Divorce Act sets out the objectives of an order varying spousal support:
- (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 .
- [27] In *Hague v. Hague*, 2022 BCCA 325 Justice Marchand, as he then was, observed:
- [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."

(Rozen v. Rozen, 2016 BCCA 303 at paras. 19-23, citing L.M.P. v. L.S., 2011 SCC 64 at para. 47; Beninger v. Beninger, 2019 BCSC 366 at para. 50.)

- [28] The four objectives of a variance are the same as an initial support order under s. 15.2(6) of the Act and as was stated in Rozen v. Rozen, 2016 BCCA 303:
- [22] There are three grounds for entitlement to spousal support: (1) compensatory, which primarily concerns the first two objectives; (2) non-compensatory, which concerns the third and fourth objectives; and (3) contractual: Bracklow v. Bracklow, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420 at paras. 15, 41-42. The third and fourth objectives may also embrace compensatory support. With the third objective, "one merely asks what loss the marriage or marriage breakup caused that would not have been suffered but for the marriage" (para. 41). Also in the compensatory context, the fourth objective asks whether "[a] spouse's lack of self-sufficiency [is] related to foregoing career and educational opportunities because of the marriage" (para. 42).
- [23] The applicant bears the onus of establishing a material change: Willick v. Willick, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670 at 734. The court must consider all four relevant factors, no one being paramount: Moge v. Moge, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813 at 852. Continuing entitlement is always in issue as variance proceedings and can lead to termination of support: see e.g., Eichen v. Eichen, 2012 BCCA 32; Price v. Price, 2010 BCCA 452 at paras. 19, 35-37.
- [29] The appellant advances several arguments in support of his position that the judge erred in concluding that an ongoing and indefinite support order was warranted in this case. These include that the judge made palpable and overriding errors in concluding that there had been incomplete financial disclosure over the years and in failing to properly account for the parties' respective financial circumstances in the context of their "means, needs and other circumstances".
- [30] I wish to first briefly comment on the judge's statement at para. 46 of the reasons that the respondent "owes \$45,000 in unpaid tax". The tax liability was in fact \$4,500. The reasons were given orally and, having listened to the recording of the proceeding, the parties agree that the reference to \$45,000 was an inadvertent misstatement by the judge. When I consider the reasons as a whole I would conclude that this error did not amount to a material misapprehension of the evidence nor did it materially affect the judge's analysis and

conclusions.

[31] Nor would I accede to the argument that the judge erred in finding there had been incomplete or inadequate financial disclosure. There was evidence on the record upon which he could reach this conclusion. As the respondent points out in her factum this included:

- Providing incomplete financial disclosure at the JCC;
- Disclosing a 2020 income tax return to his 2023 financial statement which indicated zero income for 2020;
- Providing an incomplete 2021 Notice of Assessment; and
- Not providing complete details regarding the amount received in relation to the former family home.

[32] It was also evident from the record that at the time of the swearing of his financial statement in June of 2023, the appellant had received a significant inheritance from his father's estate, had \$75,000 in his TFSA and \$45,780 in his RBC chequing account. Over the preceding nine months he had disposed of \$195,351 while being in breach of the JCC support order by unilaterally paying the respondent half of the required \$1,500 per month.

[33] I consider the appellant's principal ground of appeal to relate to the judge's purported error in failing to consider the parties' respective "means and needs". Essentially, he argues that when the respondent commences to receive her share of the Weyerhaeuser pension her income will be more than his. In any event, their incomes were approximately the same at the time of the hearing of the application and it is not for the appellant to have to encroach into his capital to continue paying spousal support.

[34] Respectfully, what this submission does not take into account are the judge's findings which I have quoted at paras. 18 and 19 above. I would add that the appellant concedes that there has been historic underpayment of spousal support.

[35] This case contains certain of the features identified by this Court in Rozen where the parties divorced after 20 years of marriage and the husband was ordered to pay spousal support. After approximately 18 years of payments, he brought a variance application seeking termination of support on the basis of the reduction in income from retirement, an inheritance received by his ex-wife as well as her re-partnering.

[36] The chambers judge dismissed the application, holding that the support award was compensatory and entitlement was ongoing. While Rozen involved the respondent ex-wife, as opposed to the appellant ex-husband, having received an inheritance and re-partnering (although the respondent on this appeal will likely receive an inheritance of an unknown amount when her elderly mother passes) the framing and analysis of the question by this Court is of assistance here:

- [38] The real question, which encompasses the first three grounds of appeal, is whether the chambers judge erred in concluding that Ms. Rozen had not been adequately compensated for her loss by the receipt of spousal support for 18 years in the low sum she received. It is often difficult to determine when compensation has been achieved. The facts of this case, as found by Chamberlist J. and Bernard J., are sufficient to demonstrate that compensation had not been achieved when taking into account the statutory factors found in s. 17 of the Act:
- (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;
- [39] Ms. Rozen suffered significant disadvantage: giving up her opportunity for further education, full-time work, employment opportunities, reduced salary and pension. Conversely, Mr. Rozen enjoyed significant advantage: the opportunity for further education, focus his efforts on his career, and obtain very high income employment. This occurred as a result of the couple's decisions (i) for Ms. Rozen to work in the early years while Mr. Rozen pursued further qualifications; (ii) to permit Mr. Rozen to pursue his career; (iii) to have three children; and (iv) that Ms. Rozen would work less to be the primary caregiver of the children.
- [40] In my view, applying the high degree of deference in this case, it cannot be said that Bernard J. erred in concluding that Ms. Rozen had not been compensated to the extent that spousal support should end.
- [Emphasis added.]
- [37] I would reach the same conclusion here. I would add that I do not accept the argument that the judge was effectively awarding retroactive support to the date of the parties' separation in 2007 and/or reapportioning family assets after the fact in the guise of spousal support. In my view, he did no such thing. Rather he recognized the ongoing entitlement to compensatory and non-compensatory support and the material contribution of historic underpayment of spousal support by the appellant to the respondent's circumstances, including the modest equity she has in her home and the accumulation of credit card and other debt over the years.
- [38] The judge's findings and conclusions are amply supported by the record and, considering the deferential standard of review, there is no principled basis upon which this Court can or should interfere with his decision. In short, this appeal, in my view, is an impermissible "second kick at the can": *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 39.

Disposition

[39] I would dismiss the appeal.

[40] NEWBURY J.A.: I agree.

[41] DEWITT-VAN OOSTEN J.A.: I agree.

[42] NEWBURY J.A.: Thank you counsel, the appeal is dismissed.

"The Honourable Mr. Justice Abrioux"

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Prepared on 26 October 2026 · Esheria