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CANADA / JUDGMENT

## Rice v. Rice

2009 BCSC 1778

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COURT

Supreme Court of British Columbia

DECIDED

24 December 2009

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2009 BCSC 1788 Rice v. Rice

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rice v. Rice,

2009 BCSC 1778

Date: 20091224

Docket: E43246

Registry: Nanaimo

Between:

Christine Rice

Plaintiff

And

Michael Peter Rice and Peter Rice Contracting Ltd.

Defendant

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Plaintiff:

B. Kaine

Counsel for the Defendant:

K. Rongve

Place and Date of Hearing:

Nanaimo, B.C.

November 4, 2009

Place and Date of Judgment:

Vancouver, B.C.

December 24, 2009

- [1] This matter concerns an application by the defendant to reduce or terminate spousal support and for the payment of child support.

## Background

- [2] The parties were married on October 6, 1990. They separated December 30, 2004, and were divorced October 29, 2007, by order of Romilly J. (the "2007 Order"). They have one child, Kelsey Leanne Rice who was born December 26, 1992. Kelsey is now aged 16 and resides with the defendant.
- [3] The 2007 Order contains comprehensive provisions whereby the parties agreed to various matters including joint custody and guardianship, Kelsey's primary residence and a division of various family assets. It adjourned generally child support claims, as well as a claim by the plaintiff to an interest in a company operated by the defendant, Peter Rice Contracting Ltd. ("PRC"). The 2007 Order further provided by consent that the defendant would pay spousal support of \$800 per month "reviewable on the fifth anniversary of the date of this Order." The 2007 Order imputed a Guideline income to the plaintiff of \$18,000 per annum and to the defendant of \$70,500 per annum.
- [4] A further consent order was issued by Halfyard J. on November 3, 2008, resolving the plaintiff's interest in PRC. The plaintiff received roughly \$400,000 by equal cheques from PRC in December 2008 and January 2009 for her interest in that business. She paid income tax on the amount she received in 2008 of \$49,000 and she will incur a similar amount of tax for the payment she received in 2009. The plaintiff has invested the funds in a business buying and selling Icelandic horses. She says she has not yet received any income from the sale of horses but expects to in the next short while.
- [5] The only issue which remains outstanding under the November 3, 2008 order relates to the payment by the defendant of an amount to Revenue Canada for taxes incurred on a dividend issued to the plaintiff in 2006. The dividend payment was used, in part, to enable the plaintiff to purchase a home in Ladysmith, B.C. The November 3, 2008, provided that the tax on the dividend be paid by the defendant. He has lodged the funds in his solicitor's trust account and at the time of trial the parties expected the matter to be resolved shortly.

## Application to reduce or vary spousal support

- [6] The defendant's motion to reduce or terminate spousal support is founded on an assertion that his circumstances have undergone a fundamental change since the 2007 Order. The issue for the Court is whether such relief should be granted and if so, in what manner.
- [7] As stated, the original 2007 Order was a comprehensive consent order under which the parties were divorced and under which they settled their various claims against one another. The significant parts relevant to the present application are the clause which imputed a Guideline income to the defendant of \$70,500 per annum, "based on an average of the last three years (2004, 2005 and 2006)" and paragraphs 8 and 9 which read:
8. the Defendant, MICHAEL PETER RICE, shall pay spousal support to the Plaintiff, CHRISTINE RICE, in the sum of \$800.00 per month, commencing on the 1st day of November, 2007, and continuing for each and every consecutive month thereafter, and reviewable on the fifth anniversary of the date of this Order;
9. either of the Plaintiff, CHRISTINE RICE, or the Defendant, MICHAEL PETER RICE, shall be at liberty to apply to vary spousal support after the fifth anniversary date of this Order.
- [8] Notwithstanding the provisions in paragraphs 8 and 9 of the 2007 Order, the defendant now applies for a review because he says his circumstances have fundamentally changed.

## Discussion of law

- [9] Authority for the making of an application to vary a maintenance order is found in both the Family Relations Act, R.S.B.C. 1996, c. 128 and the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Section 96 of the former reads:

## Variation proceedings

96 (1) If an application is made to vary or rescind a maintenance order not described in subsection (1.1), the court must consider changes in the needs, means, capacities and economic circumstances of each person affected by the order and make the appropriate change, if any.

- [10] Section 17 of the Divorce Act reads:

Order for variation, rescission or suspension

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

- (a) a support order or any provision thereof on application by either or both former spouses; or

...

...

## Factors for spousal support order

(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.

...

## Objectives of variation order varying spousal support order

(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.

(8) [Repealed, 1997, c. 1, s. 5]

...

[11] In *T.(T.L.A.) v. T.(W.W.)* (1996), 24 R.F.L. (4th) 51, the British Columbia Court of Appeal considered the proper test to be applied on an application to vary a maintenance order. After considering the decision of the Supreme Court of Canada in *Willick v. Willick*, Newbury J.A. stated at pp. 64 and 66:

34. ... Thus it appears that the formula enunciated by this Court in *Dickson v. Dickson* (1987), 21 B.C.L.R. (2d) 69 - that the change be "catastrophic, radical and unforeseen" - has been superceded by the less onerous formulation of "material change" adopted by the majority in *Willick* and *B.(G.) c. G.(L.)*. Closer to the mark, perhaps, is the formulation given by Proudfoot, J.A. in *Carter v. Carter* (1991), 34 R.F.L. (3d) 1 (B.C.C.A.), where she stated that a court will vary a support order only where it finds a change that is "substantial, unforeseen and of a continuing nature."

...

38. Thus while the court is required in an application under s. 62 to consider changes related to the marriage, the Act also mandates consideration of unrelated changes in the circumstances of the parties and others in their families.
- [12] Accordingly the applicable test on the present application is whether the defendant has demonstrated that there have been substantial, unforeseen changes in his circumstances that will be of a continuing nature. Were the test otherwise, parties could not organize their affairs and plan for the future.
- [13] At the same time, this test recognizes that the Court will not lightly interfere with the terms of a separation agreement or consent order, particularly one in which the parties have set a review date. A change in material circumstance must mean that, had the parties been aware of such material change at the time of the original agreement or order, the terms would likely have been quite different: *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370. The order should not be disturbed lightly: *Friedman v. Friedman* (1987), 8 R.F.L. (3d) 83 (B.C.S.C.) where the court considered the comments of the Court of Appeal in *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 (B.C.C.A.) at 313:

Where a decree nisi is obtained by consent or where the decree nisi has incorporated maintenance provisions contained in the separation agreement made between the parties, the court should not lightly disturb the order and the party seeking the variation must show not only some changes in circumstances, but conditions which arouse the conscience of the court and call for action.

### **In Friedman, this Court said (paragraphs 13 and 14)**

The maintenance order sought to be varied here was made by consent. Both parties had competent legal advice and assistance. The Court of Appeal directs, and I agree, that such an order should not be lightly disturbed. The time to vary the maintenance order set out in the order nisi herein has not yet arrived.

The petitioner's application is dismissed, with costs.

Has the defendant established a substantial, unforeseen change in circumstances which is likely to be of a concerning nature?

- [14] The defendant resides in Port McNeil, British Columbia, a small coastal community on northern Vancouver Island heavily reliant on the forest and fishing industries. At the time the 2007 Order was made, he was employed in the forest industry as a contract tree faller and machine operator. Most if not all of his employment income was derived through contracts PRC obtained with major logging firms.

- [15] In the 2007 Order the Guideline income of \$70,500 was based on the defendant's average income for the 2004, 2005 and 2006 taxation years. An average of three years was used to determine the defendant's Guideline income because the forest industry on Vancouver Island has been in significant economic decline over the preceding number of years.
- [16] While the decline in the industry was known at the time of the 2007 Order, the full extent of the impact of continuing decline and consequent impact on the defendant's ability to earn income was not known. Although the plaintiff doubts the defendant's evidence about his and PRC's future employability in the industry, I am satisfied the defendant's income from contracting in the industry has continued to decline significantly from the date of the 2007 Order.
- [17] The defendant has tried to mitigate his income loss from forestry by running chartered fishing excursions. He deposed in an affidavit filed in support of the motion:
14. As far as the work that I did through the forestry industry, I can advise that my major contracts used to be with Wey[e]rhauser and MacMillan Bloedel. Neither of those companies are in operation now. There are large numbers of forestry workers competing for the very limited jobs that are left. I am not physically able to do the work that is needed but, beyond that, I doubt that there would be any work available to me.
15. Following the crash in the forestry industry, I did attempt to create a new business for myself through running charter fishing excursions. However, even at first, there was a large amount of competition for that work as many of the other displaced forestry workers had the same idea. At this point, the number of people who are interested in fishing charters have almost disappeared. We used to get a lot of American, Canadian and B.C. tourists who would come up to go fishing. That is no longer occurring.
16. I live in Port McNeill, British Columbia. It is a community in crisis. Many of the people in town do not have jobs or income. Those who are getting employment are usually leaving town to go to Alberta and the north to find the jobs (although that has even slowed down.) Even if I was capable of working full time hours I would not choose to leave Port McNeill for employment. I am the primary caregiver to my 16 year old daughter and it is best for her to complete school in Port McNeill.
- [18] The evidence contained in affidavits filed by the defendant demonstrates that his income has declined significantly since 2006. His income, as declared on his income tax returns, from all sources since the 2007 Order has been as follows:

2006 - \$61,468.66

2007 - \$42,771.46

2008 - \$3,692.16

- [19] The defendant's primary source of income is derived through business done or contracts obtained by PRC. The financial statements of PRC show a similar decline in income. The statements, prepared by the company's accountant, show that in 2006 PRC's gross revenue was \$115,729. In 2007 gross revenue declined to \$82,630 (\$64,816 to May 31st and \$7,814 to December 31st). Of this amount \$3,814 came from the fishing charter business. According to the company's books this gross revenue in 2007 produced a net loss after expenses of \$7,529. By 2008 gross revenue declined to \$39,515 (\$4,762 from the fishing charter business) and resulted in a net loss of \$48,851.
- [20] The plaintiff questions a number of expense entries in PRC's financial statements. She points out the 2008 expenses include: \$11,946 (fuel and oil); \$8,113 (insurance); \$12,852 (professional fees); \$12,873 (purchases); \$38,914 (repairs); and \$11,936 (supplies) which she argues are well out of proportion to the revenue earned. The plaintiff says it is not credible PRC would incur such large expenses if it was not actively conducting business. She submits the defendant is "padding" his expenses or charging personal expenses to PRC in order to deflate his income for the purposes of this application.
- [21] In addition to the reduction in his income as a result of surrounding economic circumstances the defendant also asserts he is not able to work for physical and mental reasons. He says that he is "physically unable to do the work that is needed" in the forestry industry and that he suffers from depression which has become significantly worse over the years. He has produced two letters from his attending physician, Dr. Avery, dated July 2, 2008 and May 15, 2009. Dr. Avery has treated the defendant for depression since December 2007. In his May 15, 2009 letter, Dr. Avery made the following statements:

It is of note that he had a significantly bad reactive episode around the time that his daughter was with his wife (end of 2006/early 2007) and not surprisingly, has had recurrent episodes of depression around the times of stress, particularly around the court attendances.

He has been treated with ongoing CBT and counseling provided by myself and other professional counsellors during this intervening period.

He is still taking anti-depressant medication which has had to be increased recently.

His work has been severely compromised and he is now unable to return to his work as a faller and a machine operator and takes intermittent and part time work where he can.

Mr. Rice has been severely affected by this with an increase in his depressive illness to the point of suicidal intention in the Fall of 2006. Fortunately, the close follow up and his own fortitude has been able to bring him past this and he is now no longer suicidal.

In summary, Mr. Rice has had a severe reactive depression lasting, in retrospect, 14 or 15 years and consequent upon the bad relationship between his wife and himself, and the concerns that he has had surrounding his daughters custody and her health and upbringing.

- [22] In his letter of July 2, 2008, Dr. Avery stated:

In summary, Mr. Rice has been quite severely affected by his acute reactive depression consequent upon the breakup between himself and his wife and about the concern he has had surrounding his daughter's custody and her health.

He has, as a consequence, been off work from the 17th of May 2006 to date, with previous episodes of work absence for the same reasons but for shorter periods of time.

...

- [23] I do not consider the letters from Dr. Avery to satisfy the legal tests for whether there has been a change in the defendant's circumstances, and therefore do not take this evidence into account in varying or terminating his spousal maintenance obligations. The defendant was treated for depression for a number of years prior to the date of the 2007 Order. Several of the significant events triggering his depressive condition had occurred well prior to the date of the order. In other words, the basis of Dr. Avery's opinion was known at the time the defendant entered into the agreement to pay the amount of maintenance set out in the 2007 Order. Dr. Avery's two medical letters contain no information which would, per se, justify terminating the order for spousal support.
- [24] The evidence indicates the defendant does continue to work. He continues to operate his charter trips as and when the business is there. PRC also purchased an excavator and trailer in 2008. The defendant uses the latter to bring hay from Alberta to British Columbia which he sells locally and uses for his own purposes for several horses he owns. PRC continues to derive a major part of its income from its contracting business.
- [25] Nevertheless, I am satisfied the defendant's ability to earn income has changed materially since 2007 Order. That is, I am satisfied there has been a substantial, unforeseen change in the defendant's earning prospects which are not likely to be of a temporary nature.
- [26] The defendant argues the plaintiff should be doing more to search out work and to better her position. He points to the fact she has received substantial sums under both the divorce order and settlement of her claim to an interest in PRC. He says her net worth is larger than his and that she has done little if anything to look for work and become self sufficient. In my view those are not issues which I should take into account on the present application. When the parties entered into the agreement resulting in the 2007 Order they were both represented by experienced counsel and, by incorporating the provision that maintenance was "reviewable on the fifth anniversary of the date of this Order" it is premature at this time to consider those factors which must have been in the reasonable contemplation of the parties at the time they consented to the 2007 Order. The time to vary spousal maintenance to account for circumstances other than the defendant's unexpected decline in annual income has not yet arrived.
- [27] The next question is what income I should ascribe to the defendant going forward. He is 53 years of age. He continues to be actively involved in work through PRC, in his charter business and in hay sales. In recognition of the variable nature of his income, and

particularly in his declining earning ability the parties used an averaging formula when they settled spousal support in the 2007 order. I consider that same method to be appropriate when determining the amount of varied spousal support. I am also cognizant of and accept the plaintiff's position concerning the nature and amount of the expenses accounted for in PRC's 2008 financial statements. I set the defendant's annual Guideline income at \$45,000 and, given my conclusions concerning the plaintiff's guideline income to discussed later in this decision, and the provisions of s. 15.2 of the Divorce Act, I order spousal support be reduced from \$800 per month to \$450 per month effective January 1, 2010.

### Child Support for Kelsey

- [28] In clause 4 of the 2007 Order the parties consented to the claim for Kelsey's child support being "adjourned generally". The defendant faces no legal impediment to apply now for child support for Kelsey. The parties placed no time parameter around when such application could be made in the 2007 Order, which provided that "all claims ... for support for the child of the marriage are hereby adjourned generally". The plain language of this provision, particularly when read in conjunction with the provision concerning spousal support, which provided for a review on the fifth anniversary of the 2007 Order leaves this outstanding issue open for the court to address at any time on application.
- [29] Sections 15.3(3) of the Divorce Act and 88(1) of the Family Relations Act, provide both parents have a joint and ongoing and primary obligation to support a child of the marriage.
- [30] Section 26.1(2) of the Divorce Act sets out the principle upon which the Guidelines for child support are based:
- (2) The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.
- [31] What is the income upon which such child support payments should be determined for the plaintiff? While the 2007 Order imputed Guideline income to the plaintiff of \$18,000 per annum, the evidence filed on this application showed a lower income. The Financial Statement Form 89 filed by the plaintiff anticipates income in 2009 of only \$203.34 for purposes of child support payments. This is the amount she anticipates receiving as interest on various investments she owns. The plaintiff owns some \$744,000 in various assets (most of which were transferred to her as a result of a division of family assets or as reimbursement for her interest in PRC. She has an income tax liability which will be due in 2010 for receipt of the second payment from the company.
- [32] The plaintiff is currently 54 years of age. Prior to the marriage she was employed for some 12 years between 1978 and 1990 as a veterinary assistant. She remained at home and had no paid employment between 1992 after Kelsey was born until the parties separated in 1994. Following this, she has subsisted on spousal support and some income from doing lawn care for her parents and doing other odd jobs. She had a vocational assessment done in October,

2006 which rated her as a poor candidate for employment given a physical problem as well as lack of education and poor academic skills.

- [33] While the defendant has deposed she has applied for every veterinary assistant's position that she has seen advertised and that she has not been offered any jobs, I am not satisfied she is doing what is necessary to become self-sufficient to fulfill her obligations to pay child support for Kelsey. There are other reasonable efforts the plaintiff could take to find gainful employment in other areas than as a veterinary assistant. It seems to me much of the plaintiff's efforts and resources are going into the establishment of her horse raising business. I also have considered the business is at or very near the stage where it will be producing income. Given the plaintiff's circumstances I am of the view the figure agreed to by the parties imputing an income of \$18,000 to the plaintiff in the 2007 Order is the figure I should use as a basis for determining child support. Presumably when the parties chose that figure they had in mind the plaintiff would be using reasonable efforts to find employment and would be putting her portion of the family assets to work for her. Accordingly I order the plaintiff pay child support to the defendant the amount of \$160.00 monthly commencing January 1, 2010.
- [34] The defendant requested such child support order be retroactive. I decline to make such an order. The 2007 Order adjourned the issue of child support and accordingly there is no basis for making a retroactive order.

### Summary

[35] In conclusion, I have made the following orders:

1. The defendant's spousal support payment to the plaintiff is reduced from \$800.00 per month to \$450.00 per month commencing January 1, 2010;
2. The plaintiff will pay child support in the amount of \$160.00 per month commencing January 1, 2010;
3. The terms of the Order made October 29, 2007 by the Honourable Mr. Justice Romilly remain otherwise unchanged;
4. The parties may speak to the issue of costs if they cannot otherwise agree.

"B. Greyell J."

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Prepared on 29 October 2026 · Esheria