

CANADA / JUDGMENT

Sekhon v. Sekhon

2020 BCSC 1422

COURT

Supreme Court of British Columbia

DECIDED

25 September 2020

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2020 BCSC 1422 Sekhon v. Sekhon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sekhon v. Sekhon,

2020 BCSC 1422

Date: 20200925

Docket: E037094

Registry: New Westminster

Between:

Dhanjot Singh Sekhon

Claimant

And

Beant Kaur Sekhon aka Beant Kaur

Respondent

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Claimant:

G.K. Tiwana

Counsel for the Respondent:

S. Sihota

Counsel for the Family Maintenance

Enforcement Program

J. Anderson

Place and Date of Hearing:

New Westminster, B.C.

August 31, 2020

Place and Date of Judgment:

New Westminster, B.C.

September 25, 2020

INTRODUCTION

- [1] The parties filed competing applications relating to the retroactive and prospective child and spousal support payable by the claimant. The parties were married in February 1999, and divorced on October 17, 2012. The claimant is 46 years old, and the respondent is 48. The parties have two daughters, who are currently aged 19 and 17. The claimant's support obligations are set out in a final consent order granted by Master Caldwell, as he then was, on December 5, 2011 (the "Final Order").
- [2] The claimant seeks orders cancelling all or a portion of the support arrears that have accrued under the Final Order, terminating spousal support, and prospectively varying child support based on a re-determination of the respondent's income. The claimant also seeks orders suspending ongoing enforcement processes of the Family Maintenance Enforcement Program (the "FMEP"), and cancelling interest charges.
- [3] The respondent opposes all of the relief sought by the claimant. She has filed a cross-application seeking orders varying the Final Order to increase the claimant's imputed income for the purpose of his prospective child and spousal support payments. She also seeks an award of retroactive child support and an order directing the claimant to pay 70% of the children's s.7 expenses, including post-secondary tuition fees for the parties' eldest child. The respondent says the claimant should be assessed a fine of \$5,000, pursuant to s. 230 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], for his failure to make timely support payments.
- [4] The FMEP appeared through counsel at the hearing of these applications to address the Court's jurisdiction to make the various orders sought by the claimant in relation to the FMEP's ongoing enforcement processes.

PROCEDURAL ISSUES

- [5] Before turning to the substantive issues raised by these applications, I will briefly outline the procedural history of the litigation generally and these applications in particular. This context is important to my conclusion that I am unable to decide some of the issues raised on these applications without further evidence.

Procedural history of the action

- [6] On January 6, 2011, the claimant filed a notice of family claim under the Divorce Act, R.S.C. 1985, c. 3 (2nd. Supp.) and the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], seeking an order for divorce and orders related to parenting and child support. On January 27, 2011, the respondent filed a response to family claim and a counterclaim. The respondent sought, inter alia, orders for child and spousal support pursuant to the FRA.
- [7] There is dispute on the pleadings as to the date of the parties' separation. The notice of civil claim alleged that the parties separated on October 1, 2009. The respondent disputed this separation date in her response to civil claim. She alleged the parties had not lived together since October 6, 2009, rather than October 1, 2009, and that the claimant was still contemplating a return to the family home as recently as January 23, 2011.
- [8] The dispute over the date of separation continues in the materials filed on these applications. The claimant's evidence is that the parties separated on October 1, 2009. The respondent deposes the parties had a 12 and 1/2 year marriage, which would put the date of separation at around August 2011. She does not elaborate on her reasons for a later separation date. It appears that the claimant has not lived in the family home since October 2009.
- [9] On December 5, 2011, the parties agreed to the terms of the Final Order at a judicial case conference before Master Caldwell, as he then was. Both parties were represented by counsel. The Final Order includes the following recital:

AND ON the Court being advised that the Claimant has an imputed gross annual income of \$60,000 for the purpose of calculating child support and the Respondent has a gross annual income from social assistance benefits of approximately \$12,500 for the purpose of calculating child support pursuant to the Federal Child Support Guidelines.

- [10] The child and spousal support terms of the Final Order are as follows:

Term 6: the claimant shall pay the respondent child support in the amount of \$910 per month, commencing on January 1, 2012 and continuing until "the Children are no longer children of the marriage within the meaning of the Divorce Act (Canada)";

Term 7: the parties shall share, in proportion to their incomes, any special or extraordinary expenses for the children that are agreed between them, with consent not to be unreasonably withheld; and

Term 8: the claimant shall pay the respondent spousal support in the amount of \$1,109 per month commencing on January 1, 2012 and continuing on the first of every month thereafter.

- [11] There is no evidence before me on the present application of the factual background to the Final Order or the manner in which the spousal support payments were calculated. I do not know what the parties' circumstances were at the time of the Final Order, beyond that reflected on the face of the Order. The claimant asserts that various aspects of the Final Order were incorrect, including the statement in the recital that the respondent was in receipt of social assistance benefits at the time. However, there is no basis in the evidence for me to revisit such matters, nor would it be appropriate to do so on a variation application.
- [12] The Final Order did not include a term requiring the parties to exchange financial information, such as tax returns, on an annual basis. Pursuant to s. 25(1) of the Federal Child Support Guidelines, SOR/97-175 [Child Support Guidelines], the claimant would have been obliged to produce income information on written request by the respondent. It does not appear that the respondent ever made such a request.
- [13] Pursuant to Term 10 of the Final Order, either party was at liberty to apply for a divorce order by way of desk order application. The claimant subsequently applied for a divorce order, although the application appeared to have required an appearance in court by the claimant's counsel. The divorce order was granted by Justice B. Brown on October 17, 2012.
- [14] Other than in relation to the divorce order, this is the first occasion on which the parties have returned to court since the Final Order was granted on December 5, 2011.

The applications

- [15] The present applications were set for hearing in civil and family chambers with a two-hour time estimate. The affidavits filed by the claimant include a Financial Statement in Form F8, which the claimant swore on June 16, 2020. The respondent did not provide a Form 8 Financial Statement, although she did provide an affidavit which appends her 2017 and 2018 tax returns.
- [16] The claimant says that the respondent has not provided sufficient financial disclosure on these applications, and complains in particular about her failure to file a Form 8 Financial Statement as required by Rule 5-1(9) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR]. However, rather than adjourning his application pending further financial disclosure by the respondent, the claimant instead asks me to decide his application and also to order the respondent to produce various categories of financial records within 30 days. It is not clear to me what objective would be achieved by compelling the production of records relevant to a variation application after the application has been decided.

[17] In light of the limits of the record before me, I consider that the material is sufficient to allow me to fairly resolve some, but not all, of the issues raised. I will decide the claimant's application to reduce or cancel support arrears, the related issues regarding the enforcement processes of the FMEP, and the respondent's request for the imposition of a fine on the claimant under s. 230 of the FLA. However, for the reasons set out below I am not able to decide the parties' respective applications for a variation of the Final Order on the current record. Accordingly, I will adjourn the application of both parties for variation of the Final Order pending the production of further documents and evidence.

ISSUES

[18] The parties' applications raise overlapping issues regarding the imputation of income and the claimant's retroactive and prospective support obligations. The substantive issues raised on the applications are as follows:

- (1) Should the child and spousal support arrears owed by the claimant be reduced or cancelled?
- (2) What orders, if any, should be issued to the FMEP in relation to its ongoing enforcement action?
- (3) What additional sanction, if any, is appropriate for the claimant's failure to comply with his support obligation under the Final Order?
- (4) Should the provisions for child and spousal support in the Final Order be varied by:
 - (a) terminating the claimant's spousal support obligation;
 - (b) re-determining either parties' income for the purpose of calculating spousal support;
 - (c) re-determining the claimant's income for the purpose of retroactive and prospective child support; or
 - (d) requiring the claimant to pay 70% of post-secondary expenses for the parties' eldest child?

[19] There is, additionally, a preliminary issue as to whether these applications are governed by the FLA or the Divorce Act.

ANALYSIS

Preliminary issue: what statute governs these applications?

[20] Neither party addressed the issue of whether the Final Order was granted pursuant to the Divorce Act or the FRA. The application material references both the Divorce Act and the FLA (the statute that replaced the FRA) as the statutory basis for the parties' respective applications. It is necessary to resolve this question in order to know what statute governs the applications.

- [21] The meaning of a court order, including its statutory basis, is determined by the objective indicia found in the pleadings, the wording of the order, and the circumstances in which it was made. In the absence of such objective indicia, the doctrine of paramountcy applies such that the order will be founded in federal legislation: *Yu v. Jordan*, 2012 BCCA 367 at para. 1 [Yu].
- [22] In my view, the objective indicia in the present case point to the FRA as the statutory basis for the Final Order. Term 6 of the Final Order does refer to the Divorce Act definition of "child of the marriage". However, two objective indicia persuade me that, notwithstanding this reference, the Final Order was pursuant to the FRA and not the Divorce Act. First, in her counterclaim the respondent sought child and spousal support pursuant to the FRA and not the Divorce Act. Second, the Order on its face is a "Final Order". The law in British Columbia appears to be that a support order under the Divorce Act cannot be considered a final order if made before an order for divorce is granted: *Yu* at para. 47; *Chicoine v. Chicoine*, 2007 BCSC 735, at paras. 40-49.
- [23] I conclude, therefore, that the Final Order was made pursuant to the FRA, and the applications before me fall to be determined under the FLA.

Issue (1): Cancellation or reduction of arrears

Legal Framework

- [24] Section 174(1) of the FLA permits a court to reduce or cancel arrears owing under a child or spousal support order if satisfied that "it would be grossly unfair not to reduce or cancel the arrears." On such an application, s. 174(2) provides that the court may consider:
- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) any circumstances that the court considers relevant.
- [25] There is a high onus on an applicant seeking to cancel support arrears. The Court of Appeal provided the following summary of the law in *MacCarthy v. MacCarthy*, 2015 BCCA 496:
- [54] The factors to be considered in granting an order cancelling arrears are set out in *Burgie v. Argent*, 2013 BCCA 247, at paras. 15 and 23, namely, (a) whether there is a material change in circumstances, and (b) whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future": *Semancik v. Saunders*, 2011 BCCA 264 at para. 25. The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold".

- [26] In regard to the first factor - a material change in circumstances - the applicant must prove a "significant and long lasting change" that renders them unable to pay arrears now and in the future: *Earle v. Earle*, 1999 BCSC 283 at para. 46 [*Earle*]; *Semancik v. Saunders*, 2011 BCCA 264 at para. 25. The applicant must provide full and detailed financial disclosure of the alleged change in circumstances: *Earle* at para. 46.
- [27] As to the second factor, the question of whether it would be "grossly unfair" not to cancel arrears requires a case-specific contextual assessment. There is a high onus on the applicant to establish gross unfairness, and it is only in rare cases that arrears will be reduced or cancelled. The court must be satisfied that maintaining the arrears is "so unfair that it would serve to impose an injustice on the payor which the court could not countenance": *Ohlsen v. Chester*, 2016 BCSC 605 at para. 12.

Position of the parties

- [28] As of July 17, 2020, the claimant owed over \$55,000 in support arrears, including interest and fees owed to the FMEP. The claimant says, and the FMEP's account statements support, that the arrears accumulated primarily over the years 2012, 2013, and 2014.
- [29] The claimant is self-employed as the owner/operator of a truck and trailer. Since 2011, he has worked for a number of different companies. The claimant says he encountered financial difficulties in the years 2012 to 2014 as a result of two motor vehicle accidents, one in May 2012 and one in March 2013, that damaged his truck and trailer. He says that following the first accident, he went into debt to his then-employer G-Direct Freight Inc. ("G-Direct") for the deductible, repairs, and associated expenses. Following the second accident, he signed the truck and trailer over to G-Direct.
- [30] The claimant has produced his pay stubs from G-Direct for the period May 2012 to May 2013, which evidence the debt. From these records, it appears that the claimant did not earn any income over this period, at least from G-Direct. The claimant also produced his notices of assessment from the Canada Revenue Agency ("CRA") for the years 2012, 2013, and 2014, although the 2012 notice of assessment is missing the claimant's income information. In 2013 and 2014, the claimant earned Line 150 income in the amount of \$12,280 and \$25,840, respectively.
- [31] The claimant says he was unable to make support payments due to the financial hardship he faced. His history of accumulation of arrears is evidenced in the FMEP account statements, which are tendered in evidence on this application. The respondent enrolled with the FMEP on November 28, 2012. At that time, the claimant was \$15,043 in arrears. He paid support in the amount of \$8,076 in 2013, and \$4,019 in 2014, as opposed to the \$24,228 that he owed on an annual basis under the Final Order.

- [32] The claimant says that since July 2014, he has paid support to the best of his ability but has been unable to catch up on the arrears, including the accumulated interest on arrears. The FMEP records demonstrate that the claimant has paid support since 2015 at levels that are either close to or exceed the monthly payments required under the Final Order. He has not made progress in reducing arrears.
- [33] The claimant agrees that his annual income should be imputed at \$60,000 for the purpose of calculating prospective child support. He has been off work since March 2020 as a result of the COVID-19 pandemic, and is receiving \$2,000 per month through the Canada Emergency Response Benefit. He is hopeful he will return to work shortly and be able to resume his pre-COVID-19 income levels. The claimant's Line 150 income in 2017 and 2018 was \$38,208 and \$39,259, respectively. His gross income was considerably more, exceeding \$203,000 in 2018. That is only year for which the claimant provided a copy of his full tax return rather than a notice of assessment.
- [34] I note that there is some disconnect between the claimant's tax records and his sworn evidence as to the gross income he estimates he earned in 2018. The claimant's evidence is that he earned \$5,000-\$6,000 per month in gross income throughout 2018, working for Heartland Transport (until April) and then G-Direct. That would put his gross income at between \$60,000 and \$72,000 for 2018, as compared to the \$203,000 reported on his tax return. The reason for this discrepancy is not apparent to me on the application material.
- [35] The respondent opposes any reduction or cancellation of arrears. She says she was required to raise two children without any assistance from the claimant other than the support he has paid. She says the claimant's failure to exercise parenting time with the children has placed a disproportionate financial burden on her to cover the children's s. 7 expenses. There is a dispute in relation to whether and to what extent the claimant incurred s. 7 expenses. It appears that the respondent has not, to date, sought the claimant's agreement to any s. 7 expenses as required by Term 7 of the Final Order. They are not particularized in her affidavit evidence.
- [36] The respondent says the claimant has not provided financial disclosure over time, and the material he produced on this application supports an upward adjustment of his income for support purposes. I note, again, that the Final Order does not include a term requiring the production of financial records on an annual basis, and it does not appear that the respondent requested production under the Child Support Guidelines.
- [37] The respondent cross-applies for an order varying the Final Order to impute an income of \$100,000 to the claimant for the purpose of prospective child and spousal support. She also seeks retroactive child support back to 2015 based on an imputed income of \$100,000. The respondent says that the claimant's failure to disclose his financial records on an annual basis, and the gross earnings reflected in his 2018 tax return, are also relevant to his application to reduce or cancel arrears.

Discussion

- [38] I accept the claimant's evidence and argument that the support arrears he owes primarily accrued in the years 2012, 2013, and 2014, and that he faced financial pressure in those years. I also accept that he has made efforts since July 2014 to comply with his support obligations. In my view, however, these circumstances do not justify a reduction or cancellation of support arrears.
- [39] The first step of the test for reducing or cancelling arrears requires the claimant to show a material change in circumstance that is significant and long lasting. There are gaps in the evidence related to the claimant's ability to pay support over time. As I have noted, there is no evidence before me at all regarding the claimant's income in 2012. Further, in his affidavit (at paras. 15-16), the claimant deposes that he earned \$2,400 in monthly net income from July to October 2013, and \$3,500 in monthly net income from October 2013 to November 2014. However, he only paid \$4,019 towards support over that period. The claimant's material does not explain why he could only pay the equivalent of \$235 per month towards support over a period of time that he was earning \$2,500-\$3,500 per month in net income.
- [40] Even accepting that the claimant faced some financial difficulties in 2012, 2013 and 2014, I do not agree that this constitutes a material change in circumstance within the meaning of the test for reducing or cancelling arrears. The claimant has not shown a significant and long-lasting change to his income. The evidence establishes, rather, that he experienced a temporary disruption of income due to circumstances that have since resolved. The claimant considers the income imputed to him in the Final Order to be reasonable, and expects to earn that amount prospectively. The evidence does not support the conclusion that the claimant will be unable to pay his support arrears in the future.
- [41] Turning to the second step of the test, I do not consider that it would be grossly unfair not to cancel arrears. The children have been in the primary care of the respondent for the past 11 years. The claimant's only financial contribution to his children's upbringing, and the respondent's maintenance, is the monthly support payments he agreed to make.
- [42] In all the circumstances, I conclude that the claimant has not met his heavy burden to show that it would be grossly unfair not to cancel arrears. Requiring the claimant to fulfill his support obligation does not impose an injustice on him that the Court could not countenance.
- [43] Given that I am dismissing the claimant's application to reduce or cancel arrears on other grounds, I find it unnecessary to address the respondent's allegation that the claimant has hidden income over time.

Issue (2): Enforcement by FMEP

- [44] In light of the fact that I have dismissed the claimant's application to reduce or cancel arrears, it is unnecessary to address most of the consequential relief he seeks in relation to the FMEP's steps to enforce the support terms of the Final Order. It is necessary for me to address one form of relief sought, in the alternative, which is an order directing the FMEP to suspend its efforts to collect arrears and enter into a payment plan with the claimant. The claimant does not specify the terms of his proposed payment plan. The relief he seeks is most clearly set out in his affidavit, rather than his notice of application, as follows:
30. If the court is unable to cancel all or part of my arrears I am seeking an order that Family Maintenance Enforcement Program suspend any and all efforts to collect the arrears owing by me and set up a payment plan.
- [45] The claimant does not identify the statutory basis for an order suspending enforcement action by the FMEP and directing the FMEP to enter a payment plan. Counsel for the FMEP says there is no express power in the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 [FME Act], authorizing an order which generally stays enforcement action by the FMEP. The FMEP argues that the existence of specific statutory provisions for cancelling enforcement steps in prescribed circumstances points away from the existence of any implied power to generally direct a suspension of enforcement action by the FMEP
- [46] Section 4(a) of the FME Act empowers the Director of Maintenance Enforcement (the "Director") to take any steps the Director considers advisable for the enforcement of a maintenance order that has been filed with the Director. The Act does not include any power on the part of the Court to compel the Director to take, or not take, particular enforcement steps. Pursuant to s. 5 of the FME Act, the Director has the exclusive power to enforce a maintenance order once it is filed with the Director other than in prescribed circumstances that do not apply here.
- [47] I presume that the Director's broad discretion under s. 4(a) of the FME Act includes the power to enter into a payment plan with a payor spouse who is in arrears on his or her support payments. There is no evidence before me as to whether the claimant has requested a payment plan from the FMEP, and, if so, what the FMEP's response has been to any such request.
- [48] As counsel for the FMEP points out, there are provisions in the FME Act, and the FLA, which authorize the cancellation of specific enforcement action, including the cancellation of penalties and interest, in prescribed circumstances. For example, a notice of attachment may be set aside pursuant to s. 16 of the FME Act where the notice contains a material error. In the event that arrears are reduced or cancelled under s. 174(1) of the FLA, ss. 174(3) and (4) authorize the Court to cancel accrued and prospective interest on the arrears. There is, however, no general power to under either statute for the Court to order a suspension of enforcement action by the FMEP.

[49] The FMEP relies on *J.K.H. v. M.S.B.*, 2020 BCSC 96 at paras. 30-33 [*J.K.H.*], in support of the proposition that the court has no jurisdiction to stay enforcement by the FMEP in the absence of express statutory authority under the FME Act. In that case the applicant relied on R. 15-4(31) of the SCFR in support of his application to stay the enforcement of a support order. Rule 15-4(31) provides:

- (31) The court may, at or after the time of making an order,
 - (a) stay the execution of the order until such time as it thinks fit, or
 - (b) provide that an order for the payment of money be payable in installments.

[50] In *J.K.H.*, the Court held (at para. 31) that R. 15-4(31) is procedural only and that the Court requires additional legislative authority to make an order generally staying enforcement of support arrears.

[51] In my view, the issue in the present case is obscured by the manner in which the relief sought by the claimant was framed; that is, as an order suspending the FMEP's enforcement process and directing the FMEP to enter a payment plan. The FMEP's concerns about the jurisdictional basis for an order in those terms are well founded. As counsel for the FMEP points out, there is no statutory provision for a general stay of the FMEP's enforcement action. Furthermore, the Director exercises discretion in determining appropriate enforcement steps, including entering a payment plan.

[52] However, in my view the same jurisdictional issue may not have arisen if the claimant had framed the relief sought as an order staying the enforcement of the Final Order and/or providing for the payment of support owed under the Order by installment pursuant Rule 15-4(31) of the SCFR. While such an order may require an applicant to show exceptional circumstances, is difficult for me to see any jurisdictional impediment to the Court in granting an order in those terms.

[53] I acknowledge that the Court in *J.K.H.* appears to have reached a contrary conclusion about the scope of the Court's power in R. 15-4(31) of the SCFR to stay the enforcement of a support order that has been filed with the FMEP. As I ultimately find it unnecessary to decide the jurisdictional point, I will only say that I am unclear as to the basis for the conclusion in *J.K.H.* that the power to stay the enforcement of an order, as set out in R. 15-4(31) of the SCRF, can only be exercised where there is legislative authority for a stay. To the extent that the Court requires legislative authority to stay its own orders, R. 15-4(31) appears to provide such authority. The Rule codifies the Court's inherent jurisdiction to stay its own orders where it is considered necessary to do so to achieve justice in a particular case: *Canada (Attorney General) v. Lau*, [2002] B.C.J. No. 1815 (S.C.) at paras. 25-26. I accept that the power contained in the Rule cannot be exercised in a manner that would contravene a statute. However, that is not the case here.

- [54] I am doubtful that the Court can be deprived of the jurisdiction to stay the enforcement of its own order, on whatever terms it considers just, simply because a statutory tribunal has assumed responsibility for enforcement to date. The FMEP's enforcement responsibilities are defined by the Court order; the Court order is not defined by the FMEP. If the Court order changes, then the FMEP's enforcement duties may be altered on a prospective basis, but surely that is a matter of indifference to the FMEP.
- [55] It is unnecessary for me to finally decide the jurisdictional point, and I am reluctant to do so, in any event, in the absence of more fully developed arguments from the parties. Assuming the Court has the authority to stay enforcement of the Final Order and direct that amounts owing under the Order may be payable by installments, I would nevertheless decline to make such orders for the following reasons:
- i. As noted, there is no evidence that the claimant sought a payment plan from the FMEP in relation to the outstanding arrears, and was refused. The claimant has not explained his reasons for failing to invoke available statutory processes before seeking relief from the Court.
 - ii. There is insufficient financial disclosure by the claimant on this application to permit me to determine whether it is appropriate to stay enforcement of the Final Order, and if so on what terms. I have no information about the claimant's assets and debts, other than what is summarized in Part 3 ("Property") of the claimant's F8. No supporting documents - including such things as recent bank statements and pay records, and documents evidencing the claimant's estimated value of his assets - are included in his affidavit material.
 - iii. The claimant himself does not particularize the details of his proposed payment plan, including what monthly amount he considers reasonable. The claimant is accordingly asking that the Court to stay enforcement of the Final Order and set the terms of a payment plan in a vacuum.
- [56] For these reasons, I dismiss the claimant's application for alternative relief in the form of an order suspending the FMEP's enforcement action in relation to the support arrears and directing a payment plan.

Issue (3): Section 230 of the FLA

- [57] The respondent seeks an order requiring the claimant to pay a fine in the amount of \$5,000 pursuant to s. 230 of the FLA for his failure to comply with the support terms of the Final Order.
- [58] Section 230 of the FLA is designed to enforce and secure a party's compliance with court orders made under the FLA. Section 230 can be used where no other provision of the FLA provides an effective remedy to enforce the order. Among other remedies, the Court may require a party to pay an amount not exceeding \$5,000 for the benefit of the other party whose interests are negatively affected: *Ho v. Chu*, 2020 BCSC 927 at paras. 34-35.

- [59] In my view, it is not appropriate to order a fine in the circumstances in the present case. While the FLA may not provide an effective remedy to the respondent for the claimant's failure to pay his support arrears, she has invoked the available remedies under the FME Act. The FMEP is taking enforcement steps to recover the support arrears owed by the claimant, and also to recover interest on arrears which is payable to the respondent. For the reasons I have already reviewed, I accept that the claimant is not deliberately avoiding his support obligations. He faced financial pressure in the past which led to arrears accruing, and he has consistently made support payments for the past five years. I see no objectives that could be achieved by imposing a further financial penalty on him in these circumstances.
- [60] I therefore dismiss the respondent's application for an order imposing a \$5,000 fine on the claimant.

Issue (4): Variation of child and spousal support in Final Order

- [61] The remainder of the relief sought by the parties consists of orders varying the child and spousal support terms of the Final Order pursuant to ss. 152 (child support) and s. 167 (spousal support) of the FLA. In very general terms, the question for the Court on these applications is whether there has been a material change in circumstances warranting a variation of the Order, and, if so, what the variation should be.
- [62] The claimant says that there has been a material change in circumstances since the Final Order in that the respondent has re-partnered, having re-married in October 2019. In 2018, the respondent bought a townhouse that is valued at \$800,000. The respondent says that any compensatory objectives have been achieved through the spousal support he has paid to date, and it is evident that the respondent has achieved self-sufficiency so there is no non-compensatory basis for spousal support to continue.
- [63] The respondent disputes that she has achieved self-sufficiency. She says she is unable to work due to a variety of medical conditions and that she is on disability benefits, which will expire in 2021. The respondent has produced her income tax returns from 2017 and 2018, during which years she earned employment income of \$29,902 and \$25,096, respectively. She has provided a tax summary from 2019, but not her return, which indicates net employment income of \$2,373.
- [64] The respondent says she was able to purchase the townhome by borrowing money from a family member and working three jobs during a temporary period of relief from her medical issues. According to the respondent, she is in the process of "obtaining all documents relevant to the purchase of the home." The respondent acknowledges that she re-married in October 2019. She has provided no information about the employment or income of her new spouse.

- [65] In regards to the claimant's application to terminate spousal support, the issue is whether there is any continuing basis for his support obligation on either compensatory or non-compensatory grounds. While re-partnering by a recipient spouse does not, in itself, constitute a material change in circumstances in every case, it may constitute a material change in some cases. Where spousal support is based on the non-compensatory ground, re-marriage by the recipient spouse may be significant to the question of ongoing need: *M.H.W. v. D.K.W.*, 2019 BCSC 1011 at paras. 30-33.
- [66] In the present case, I understand the respondent's position to be that there is a continuing basis for spousal support on the non-compensatory ground. The income of her new spouse may, therefore, be relevant to the question of whether her re-marriage constitutes a material change in circumstances. However, there is no evidence before me of the income of the respondent's new spouse.
- [67] If spousal support does not terminate, the claimant still seeks a variation of the Final Order to impute additional income to the respondent. The claimant says the respondent should be imputed income of \$30,368, which is what she would earn at a minimum wage job. The respondent, for her part, also seeks a variation of the Final Order to impute a higher annual income of \$100,000 to the claimant. She disputes the legitimacy of the expenses he has deducted from his gross income, and says his net income is higher than he is reporting to the CRA. The respondent also seeks an order for retroactive child support from the claimant between 2017 and 2020, based on an imputed income of \$100,000.
- [68] As I have alluded to, there are significant evidentiary gaps in the record which prevents me from fully assessing the current circumstances of the respondent, in particular. The evidentiary gaps include:
- i. the respondent provided her 2017 and 2018 tax returns, but has not filed a Form 8 Financial Statement which would include a list of her assets and debt;
 - ii. the respondent has not produced the documents relevant to the purchase of the townhouse, including her mortgage application; and
 - iii. the respondent has not produced any medical evidence to support her assertion that she is unable to work due to physical disabilities.
- [69] While the claimant has provided more expansive financial disclosure to support his application to reduce or cancel arrears, there are gaps in his production as well. The claimant has only produced his full tax return, as opposed to his notices of assessment, for the year 2018. Neither party has produced a tax return for 2019.
- [70] The claimant's solution to the gaps in the evidence is to have the Court order the respondent to produce documents relevant to the variation application after the variation application has been heard and decided. I do not agree that this is a fair or practical way of resolving the problem. The Court cannot decide the variation in a factual vacuum.

- [71] Evidence regarding the respondent's current financial circumstances is of particular relevance to the claimant's assertion that she has achieved self-sufficiency and there is no longer a basis for non-compensatory support. The parties both agree, at a minimum, that the respondent should provide a form F8 Financial Statement and documents associated with the purchase of the townhouse, including the mortgage application. It is not clear to me why those documents were not produced before the hearing, or how either party considered it possible for a Court to resolve the variation applications without the necessary evidence.
- [72] A proper evidentiary record is particularly important in this case where there is no history to draw on, in the sense of a prior adjudication of any issue. This is the first time the parties have appeared in Court on a contested application since their separation. Any order I make varying the Final Order will prospectively bind the parties, subject to any future change in material circumstances.
- [73] For these reasons, I find myself unable to decide the balance of the relief sought in the applications. Instead, I will generally adjourn the parties variation applications, and order that they produce the following documents within 30 days of the date of this judgment:
- (1) The respondent shall produce:
 - (a) a sworn Form F8 Financial Statement, complete with attachments; and
 - (b) all mortgage documents related to the purchase of her townhouse, including the mortgage application.
 - (2) The claimant shall produce his tax returns from 2016, 2017, and, if available, 2019.
- [74] I will not order the respondent to produce her medical records supporting her claim of disability, but rather leave that to her own election. The respondent bears the practical onus of proving her claim that she is disabled from working as a basis for continuing support on non-compensatory grounds. If she does not produce supporting medical records, she runs the risk of having the Court reject her claim.
- [75] I have noted the absence of any evidence of the income of the respondent's new spouse, which is potentially relevant to the question of whether her re-marriage constitutes a material change in circumstances. However, there is no application before me for the production of income information from the respondent's new spouse. If the claimant seeks the production of such information, and the matter cannot be dealt with by consent, the respondent's new spouse should be given notice of any application for production.
- [76] Either party is at liberty to re-set these applications for hearing after 30 days from the date of this judgment. I will remain seized of the applications.

SUMMARY/ORDERS

- [77] In summary, I make the following Orders:

- a) The claimant's application to reduce or cancel support arrears is dismissed.
 - b) The claimant's application for an order staying enforcement by FMEP and directing the FMEP to enter into a payment plan is dismissed.
 - c) The respondent's application for an order that the claimant pay a fine in the amount of \$5,000 is dismissed.
 - d) The remaining relief sought by the parties on these applications in relation to the Final Order is adjourned generally.
 - e) Within 30 days of the date of this judgment, the respondent shall produce:
 - (1) a sworn Form F8 Financial Statement, complete with attachments; and
 - (2) all mortgage documents related to the purchase of her townhouse, including the mortgage application.
 - f) Within 30 days of the date of this judgment, the claimant shall produce his tax returns from 2016, 2017, and, if available, 2019.
 - g) Either party is at liberty to re-set this application down for re-hearing after 30 days from the date of this judgment.
 - h) I will remain seized of the applications.
- [78] The costs of these applications as between the parties will be left for determination at the further hearing which will resolve the remaining issues on the applications.
- [79] The FMEP did not seek costs and says that no costs should be awarded against the Director. I agree that the FMEP should not be subject to any costs order in this case. Counsel for the FMEP appeared only for the purpose of addressing issues related to the FMEP's enforcement processes. Counsel provided submissions that were both helpful and appropriate.

"Horsman J."

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