
CANADA / JUDGMENT

Spence v. Spence

2021 BCSC 2159

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Supreme Court of British Columbia

DECIDED

4 November 2021

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2021 BCSC 2159 Spence v. Spence

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Spence v. Spence,

2021 BCSC 2159

Date: 20211104

Docket: E60597

Registry: New Westminster

Between:

Joan Elyza Spence

Claimant

And

David Neil Spence

Respondent

Before: The Honourable Madam Justice Walkem

Reasons for Judgment

Counsel for the Claimant:

R.W. Krentz

Counsel for the Respondent:

E.K. Chhina

Place and Date of Hearing:

New Westminster, B.C.

June 24, 2021

Place and Date of Judgment:

New Westminster, B.C.

November 4, 2021

- [1] This is an application on behalf of the respondent to vary a Final Order of Mr. Justice G.C. Weatherill made on January 13, 2016 (the "2016 Order"). The variation sought would reduce the amount of monthly spousal support payable from the respondent to the claimant, from \$7,000 per month to \$1,500 per month and end spousal support in three years. The current spousal support order has no end date. The respondent also seeks an order for the Family Maintenance Enforcement Program ("FMEP") to release \$200,000 held to guarantee spousal support.

Background

- [2] The parties started their relationship in January 1990 and married on October 13, 1990. According to the respondent, the parties separated in January 2009. According to the claimant, the parties separated in November 2010. The total length of the relationship was approximately 19-20 years, depending on whose dates are accepted. For the purposes of these reasons, I accept that the relationship was 20 years in length, as argued by the claimant. The parties have four adult children, none of whom are currently children of the marriage.
- [3] The 2016 Order was a consent order where the parties agreed that spousal support should be set as follows:
5. Pursuant to the Divorce Act (Canada), the Respondent shall pay to the Claimant spousal support in the sum of \$7,000 per month ("Spousal Support"), commencing February 1, 2016 and payable on the 1st of each and every month thereafter.
- [4] The respondent is seeking a variation such that paragraph 5 of the 2016 Order be deleted and replaced with the following:

Pursuant to the Divorce Act (Canada), the Respondent shall pay to the Claimant spousal support in the sum of \$1,500 per month ("Spousal Support") commencing January 1, 2021 and payable on the 1st of each and every month thereafter for a period of 3 years when spousal support shall terminate.

- [5] The FMEP is holding \$200,000 as security for spousal support from when the respondent sold his residence in 2020. During COVID-19, the respondent unilaterally reduced his spousal support because his income was reduced. He has subsequently resumed payment, and the payments are up-to-date. The respondent seeks an order that FMEP release the \$200,000 that they are holding as security for spousal support. FMEP did not appear, and I understand that application is uncontroversial.
- [6] The 2016 Order imputed Federal Child Support Guidelines [Guidelines] income to the claimant of \$45,000 and to the respondent of \$350,000.
- [7] The parties' RRSPs and Canada Pension Plan credits, family assets and debts, were divided upon divorce.
- [8] The 2016 Order ordered spousal support begin on February 1, 2016. However, the respondent points out that he paid \$550,000 through a consent order as equalization and satisfaction of all retroactive spousal support. Based on this, I find that the respondent paid spousal support from the date of separation. Accepting the date the claimant proposes the parties separated of November 2010, the respondent has paid spousal support for 11 years.

Claimant

- [9] When the parties first got together, the claimant was working with the Roots & Wings Montessori Day Care and Preschool as an Early Childhood Educator. She worked in that area for approximately nine years. She holds an advanced certificate in Early Childhood Education and a certification in Montessori techniques.
- [10] During their marriage, the respondent argues he encouraged the claimant to work part-time. The claimant says that she was taking care of their children and the home and that the respondent did not want, or encourage, her to work outside of the home. The respondent argues the claimant attempted to start businesses selling quilts, and also tutored dyslexic children during their marriage. The claimant argues the quilting was more in the nature of a hobby than a business, but agrees she did some tutoring.
- [11] Despite suffering from dyslexia, the claimant has completed a Master's degree and has enrolled in a PhD program. The claimant is a registered clinical counsellor. She operates her own counselling and coaching business. The claimant claims that the COVID-19 pandemic has impacted her business and that she can only see counselling or coaching clients on an online basis. She argues her dyslexia diagnosis poses some challenges for her employment. The claimant's income was: in 2017 - \$13,443; in 2018 - \$33,851; and in 2019 - \$25,316.

Respondent

- [12] The respondent worked for CISCO for approximately 24 years. In his job with CISCO, the respondent earned a base salary of \$140,951 with bonuses on top of that amount depending on his performance. The respondent's income, including bonuses, prior to his leaving CISCO, was: in 2017 - \$362,227; in 2018 - \$414,090; and in 2019 - \$402,334.
- [13] The respondent argues that there has been a material change in his circumstances. Due to the COVID-19 pandemic, the respondent's long-term employment with CISCO ended.
- [14] In the summer of 2020, CISCO laid off between 5,000 to 6,000 employees due to the economic downturn. In August 2020, the respondent was offered a severance package, along with many other employees. The package would pay him approximately \$546,000, plus assorted benefits. This amount is the equivalent of approximately 18 months of income. The respondent was afraid that, if he did not take the severance package, he might be terminated on less beneficial terms. The respondent accepted the severance package.
- [15] In 2018, the respondent re-partnered. His new spouse has health concerns which cause her to being unemployed. The respondent is solely responsible for household expenses.
- [16] The respondent has started a real estate course and intends to pursue real estate as a line of employment in the future. He argues that it will take a while to establish himself in his new career and that his income will be lower at first.
- [17] Given that he is no longer employed with CISCO and is embarking on a new career, the respondent argues that his spousal support obligations should be reduced. He argues that he should pay \$1,500 a month in spousal support, commencing January 1, 2021, for three years. The respondent argued that the claimant should be working toward becoming self-sufficient and that her education and experience should make it possible for her to do so. The respondent argues that he wants to retire at age 60, and that he is now in his 50s (as is the claimant) and should not be expected to pay spousal support indefinitely.

Financial Disclosure

- [18] Each party sought broad disclosure of the financial assets of each other to show the relative means and circumstances of the other party. Each argued that the other had significant financial assets which should be taken into account in determining their overall means and circumstances. For example, the respondent sold his residence in 2020 for \$1.3 million (a separate application concerning which accounts for the \$200,000 FMEP holds in trust to secure spousal support). There are real estate development properties held by the Spence Family Trust of which the respondent is a beneficiary. Additionally, the respondent owns shares in a destination wedding business impacted by COVID-19, but which will likely do better in the future. The claimant has significant RRSPs and owns real property, with a suite rented to their daughter which could be rented on the market for a greater amount.

[19] After the division of assets following their marriage, intended to equalize finances between the parties, each made their own investments. Each appears to be doing relatively well.

Issues:

[20] Should spousal support payable from the respondent to the claimant be varied or terminated? If so, in what amount?

Law

[21] The spousal support order was made pursuant to the Divorce Act, R.S.C., 1985 (2nd Supp.), c. 3 [DA] and so must be varied under that act. Section 17(1) provides for the variation of orders under the DA:

Variation order

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

- (a) a support order or any provision of one, on application by either or both former spouses;
- (b) a parenting order or any provision of one, on application by
 - (i) either or both former spouses, or
 - (ii) a person, other than a former spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent; or
- (c) a contact order or any provision of one, on application by a person to whom the order relates.

[22] Section 17(4.1) sets the conditions for a court to make an order varying spousal support:

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. [Emphasis added].

[23] Under the DA, a variation may only be ordered if the applicant establishes a material change in the circumstances since the order that they seek to vary was made: L.M.P. v. L.S., 2011 SCC 64 at paras. 29-46. A "material change in circumstances" may be found where there is a change that, if known when the original order was made, would likely have resulted in different terms of the order made.

- [24] The respondent relies on *Yeung v. Silva*, 2016 BCSC 1682, for the proposition that the claimant has an obligation to move toward self-sufficiency and make reasonable efforts to support herself. Under the DA, the relevant provision guiding self-sufficiency is s. 17(7)(d), which lists an objective of spousal support as including to, "in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time".
- [25] The Supreme Court of Canada has been explicit that there is no general duty of self-sufficiency. Rather, self-sufficiency is one of many objectives of spousal support that should guide a court's decision: *Leskun v. Leskun*, 2006 SCC 25 at paras. 25-27; *L.M.P. v. L.S.*, at para. 59. Further guidance comes from the Spousal Support Advisory Guidelines [SSAG]. Per SSAG, requests to end spousal support because the recipient has become "self-sufficient" should be understood as "questions about whether the initial basis for entitlement continues to exist. Self-sufficiency can be interpreted differently depending on the initial basis of entitlement": Department of Justice Family, Children and Youth Section, Spousal Support Advisory Guidelines: The Revised User's Guide, by Carol Rogerson & Rollie Thompson (Ottawa: Department of Justice Canada, 2016) at 11.
- [26] The Court of Appeal in *Jendruck v. Jendruck*, 2014 BCCA 320 [Jendruck], cited its earlier discussion of self-sufficiency in *McEachern v. McEachern*, 2006 BCCA 508, as including "the responsibility to seek remunerative employment" at para. 15:
- [43] The primary objectives of a support order in this case, therefore, must be to relieve, to the extent possible, the economic hardship suffered by Ms. McEachern as a result of the marriage breakdown (s. 15.2(6)(c)) [now s. 17(7)(c)], and "in so far as practicable" promote her economic self-sufficiency within a reasonable period of time (s. 15.2(6)(d)) [now s. 17(7)(d)]. In that regard, the following passage from this Court's decision in *Tedham v. Tedham*, [2005] B.C.J. No. 2186, 2005 BCCA 502 (at para. 33) is apt:
- ... s. 15.2(6)(d) of the Act does not require self-sufficiency, but simply seeks to promote self-sufficiency "in so far as practicable". In determining what is practicable, regard must be had to all of the circumstances, including the age and gender of the spouse, her/his skills and education, or lack thereof, the opportunities for retraining, and the realistic prospect of the spouse being able to find not just a job, but one which enables her/him to become self-sufficient, which may be quite a different matter.
- [27] In *Jendruck* at para. 16, the Court recognized the importance of "striving for economic self-sufficiency, while recognizing that attainment of full economic self-sufficiency may not be practicable". The Court stated at para. 16:

To the degree effort could be made by a party to contribute to his or her own support in the circumstances, and effort has not been made, the courts have said the consequences of that party's choice falls on them. The courts do not, and cannot, say a person must take up any particular employment. It is a free society in which people may choose how to spend their hours. However, where the effort to contribute to one's own support is deemed insufficient in all the circumstances, the court will place the consequence of the inadequate effort on the person

whose choice it is, and may do so by the vehicle of imputing income for under-employment.

[28] The claimant argues that the spousal support that was ordered was compensatory, or had strong compensatory elements, and relies on *Chutter v. Chutter*, 2008 BCCA 507 at para. 49 [Chutter], as follows:

Although the compensatory and non-compensatory grounds for spousal support are animated by different models of marriage, the case authorities hold that there is no single basis of support or objective under the Divorce Act that supersedes the other, and that many claims involve aspects of both compensatory and non-compensatory principles (Bracklow, at para. 27; Moge, at 852). A court is not called upon to decide on one basis for support to the exclusion of the other but rather to "[apply] the relevant factors and strik[e] the balance that best achieves justice in the particular case" (Bracklow, at para. 32). Moreover, the doctrine of equitable sharing is the overarching principle that must be borne in mind (Moge, at 864).

[29] The claimant highlights this portion of the Supreme Court of Canada's decision in *Moge v. Moge*, [1992] 3 S.C.R. 813 at 867-868, 99 D.L.R. (4th) 456 (as cited at para. 50 in Chutter):

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

[30] In essence, compensatory spousal support is meant to account for the different financial positions that spouses find themselves in at the dissolution of a long marriage, particularly where one spouse gave up a career or educational opportunities to care for the children or household. Per *Zacharias v. Zacharias*, 2015 BCCA 376 [Zacharias], the claimant argues that the compensatory features of spousal support must be borne in mind when considering a variation application, and should guide a determination of what is reasonable in the circumstances.

[31] The facts show that the existing spousal support order, to some degree, is compensatory. I am conscious of the Court's direction in *Zacharias* about the impossibility of dividing what portion was intended to be compensatory versus non-compensatory.

[32] Where the court is satisfied that there is an obligation on the recipient spouse to move toward self-sufficiency, but acknowledges the compensatory aspects of the original spousal support award, steps such as imputing income to the recipient spouse, or a time-limited or step-down approach in spousal support payments, may be tools used to allow for a transition to self-sufficiency.

Discussion

- [33] So far, the respondent has paid spousal support for a period of approximately 11 years for a relationship that lasted approximately 20 years.
- [34] I am satisfied that there is a change in the material circumstances of the respondent which impacts his ability to pay spousal support on the terms ordered. As a result of an economic downturn linked to the COVID-19 pandemic, the respondent lost his employment.
- [35] The claimant argued that this was voluntary, because he chose to take a severance package offered. I do not agree. I find the respondent's decision to accept the severance package was a reasonable choice in the circumstances. The respondent is an older employee and feared he would be laid off, with less remuneration, if he did not accept the severance package offered. Thousands of other CISCO employees were also laid off. He is now in his 50s, faced with the prospect of retraining and seeking alternative employment.
- [36] The termination of the respondent's employment is a material change in circumstances which has altered his ability to pay spousal support at the level he had previously. This change is permanent, though he is seeking to establish other employment.

Spousal support payable under severance payment

- [37] The respondent argues that, after taxes, the severance amount was actually \$260,000, as he received the settlement in a lump sum which was subject to a higher tax rate. He argues he invested \$180,000 of this amount and that therefore his "income" from the amount should be set at \$80,000, divisible over 18 months.
- [38] The claimant disagrees that the respondent can reduce his salary flowing from his settlement by investing it. Instead, she argues that the settlement should be viewed as replacement income for the period it covers (18 months), though agrees that the amounts could be adjusted somewhat for increased taxes. The respondent argues that the amount of severance, even after taxes, should be discounted, as this amount was intended to help him seek retraining and put himself in a position to become employable again.
- [39] Severance payments are presumptively included as income, but can be imputed/projected over time depending on the factual context. In terms of spousal support, the Court of Appeal canvassed the issue in *McKenzie v. Perestrelo*, 2014 BCCA 161 at paras. 92-100 [McKenzie]. At issue was an appeal from a spousal support order where the judge had declined to include a severance (and RRSP) payment in calculating income. At para 99, the Court held that the non-recurring nature of a severance payment, on its own, is not sufficient to exclude it from Guideline income:

Severance packages are obviously different from RRSP withdrawals in that they represent substitution for a temporary loss of income stream and should be considered to be available to pay support. Subject to a sound argument to the contrary, I can see no reason why severance packages should not generally be included in Guideline income.

- [40] Accordingly, there is "a presumption that severance payments should be included in Guideline income because severance payments are a direct substitute for employment income": McKenzie, at para. 94.
- [41] I find it is appropriate to impute the respondent's income at a reduced amount to reflect the severance package amount accounting for the higher tax rate. The respondent only asked for a reduction from January 2021. Accordingly, for the period that the respondent is seeking a reduction from January 2021 to August 2021. I find that spousal support should be set based on a consideration of the amount the respondent actually received of \$260,000, roughly apportioned over 18 months, for the equivalent of \$173,000 per annum. The respondent argues that, for purposes of calculating spousal support, the claimant's income should be imputed at \$45,000, as it was when the original support order was calculated. I agree.
- [42] I am also satisfied that the claimant has the ability and obligation to move toward self-sufficiency. Additionally, that the value of family assets was equalized upon separation. In the circumstances, spousal support should be set at the low end of the Guidelines range.
- [43] Spousal support from January 2021 to August 2021 should be calculated based on the low end of the Guidelines, based on an imputed income to the respondent of \$173,000 and \$45,000 to the claimant. This amount is \$3,200 per month.

Spousal support moving forward

- [44] The additional question to be addressed is whether the spousal support obligation should end after a set time, as proposed by the respondent.
- [45] A general rule is that spousal support may be ordered for 0.5 years to one year for each year of a relationship. When a relationship reaches 20 years the presumption shifts to spousal support being paid for an indefinite period. Indefinite does not mean forever, however. Factors such as the relative financial positioning of the parties, whether assets were equalized upon separation, and the impact of one party in caring for children or the home at the expense of their own career development are factors to be weighed. Important factors are options for self-sufficiency open to each of the parties.
- [46] I am conscious that both parties are in their 50s, and each moving closer to retirement. However, I do not take into account the respondent's desire to retire at the early age of 60 as a factor in reducing the length of time spousal support should be paid. He has not yet retired. There were no submissions on the point of whether or not his income should perhaps be imputed to the age of 65, for example.

- [47] Here, the fact that the spousal support was partially compensatory leans towards a longer period for spousal support to be paid. The fact that the equalization of assets left both parties in relatively equal positions on divorce leans toward a shorter period. The fact that the claimant has not become self-sufficient, despite her training and education, is a factor as well.
- [48] In the overall circumstances, I am satisfied that spousal support should end at a definite date of 18 years, as set out below. Further, that spousal support payable by the respondent should be subject to a step-down reduction to reflect the reduced income of the respondent, and the need to encourage self-sufficiency on the part of the claimant.

Disposition

- [49] The claimant has an obligation to become self-sufficient. She has a counselling and coaching business and prospects for greater income from that. She also owns real estate which could be rented out at a greater rate of return.
- [50] Spousal support payable by the respondent to the claimant, payable on the 1st of each month in which it is due, should be set as follows:
- a) From January 2021 to August 2021 should be calculated based on an imputed income for the claimant at \$45,000 and \$173,000 for the respondent. The amount payable is \$3,200 per month.
 - b) From September 1, 2021, and for the following four years, spousal support payable by the respondent to the claimant, should be set at half of that amount, at \$1,520 per month.
 - c) From September 1, 2025, until September 1, 2028, spousal support payable by the respondent to the claimant should be set at half of that amount, at \$760 per month.
- [51] At the end of that time, the spousal support obligation of the respondent to the claimant will end. This stepped-down approach recognizes the respondent's changed circumstances and continuing obligation to pay spousal support, the partially compensatory nature of the original award, but also the claimant's obligation to move towards self-sufficiency.
- [52] The FMEP is ordered to release the \$200,000 held in security for spousal support.
- [53] As neither party was completely successful in their positions on this application, I am of the opinion that each should bear their own costs.

"A. Walkem J."

WALKEM J.

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Prepared on 29 October 2026 · Esheria