
CANADA / JUDGMENT

Wallace v. Cummins

2020 BCSC 2158

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 2158 Wallace v. Cummins

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wallace v. Cummins,

2020 BCSC 2158

Date: 20200204

Docket: E191478

Registry: Vancouver

Between:

Christine Denese Wallace

Claimant

And

Martin Andrew Cummins

Respondent

Before: The Honourable Madam Justice Matthews

Oral Reasons for Judgment - Application for an Increase in Interim Spousal Support

In Chambers

Counsel for the Claimant:

J. Lee

Counsel for the Respondent:

S.J. Roxborough

Place and Date of Hearing:

Vancouver, B.C.

February 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 4, 2020

- [1] I delivered these reasons for judgment orally. I have subsequently edited them without changing the substance.

Introduction

- [2] The claimant, Christine Denese Wallace, seeks an increase in the interim spousal support she receives as a result of an order made at a judicial case conference. The increase sought is from \$1,000 per month to \$4,881 per month, which she asserts is the midpoint amount determined when the Spousal Support Advisory Guidelines are applied to the circumstances of the parties. The respondent, Martin Andrew Cummins, opposes the application primarily on the basis that the amount is excessive, beyond that which he can afford and does not take into account his fluctuating income, his child support obligations and his debt.
- [3] The parties' relationship began in 2010 and ended in 2019. They were never married. Mr. Cummins contests that they had a marriage-like relationship during the entirety of this period, but for the purpose of this application, he does not contest that the parties were spouses within the meaning of s. 3 of the Family Law Act. The parties do not agree on the date of separation. Mr. Cummins asserts that it was in January 2019, and Ms. Wallace asserts it was in May 2019.
- [4] The evidence is uniform that Ms. Wallace was financially dependent on Mr. Cummins during most of the relationship and has not worked outside the home during that time. The evidence conflicts as to whether that was a situation of her choosing or at his insistence or encouragement.
- [5] On September 19, 2019, the parties attended a judicial case conference. They consented to an order that Mr. Cummins pay spousal support in the amount of \$1,000 per month commencing September 1, 2019, on an interim and without-prejudice basis. The parties agree that this application is properly seen as an application de novo, not an application to vary that order. The order at the judicial case conference was made at a time when Mr. Cummins' financial statement had not yet been delivered and was made on the understanding that an application for interim spousal support may be brought once that occurred, which it now has.

- [6] Accordingly, the issue is whether Ms. Wallace meets the test for compensatory or non-compensatory interim spousal support and if so, what the quantum of that support should be.

The Legal Framework

- [7] The Family Law Act, S.B.C. 2011, c. 25 sets out the circumstances in which spousal support shall be paid as follows:

Duty to provide support for entitled spouse

160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support].

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

- [8] Under s. 216(1) of the Family Law Act, the court can make interim orders for relief that the court may otherwise make under the Act as it considers appropriate. The purpose of an interim order for spousal support is to provide for relief prior to the trial, at which time the court will be in a position to make a decision on the merits, see: *M.(D.R.) v. M.(R.B.)*, 2006 BCSC 1921 and *Goriuk v. Turton*, 2011 BCSC 652. In *I.F. v. R.J.R.*, 2015 BCSC 793, Justice Ballance described interim spousal support orders as stop-gap orders which require a

cautionary approach because the evidentiary record may not be well developed, but the court should not be "so overly cautious as to be timid" (at paras. 13-15). Many courts have described the process as "rough justice at best", see: *Randhawa v. Randhawa*, [1999] B.C.J. No. 1082; 1999 CanLII 6377; *Newson v. Newson* (1986), 3 B.C.L.R. (2d) 1 B.C.C.A. at para. 11; *R.C.G. v. C.L.G.*, 2010 BCSC 1596, at para. 11; and *Johnson v. Johnson*, [1993] B.C.J. No. 2140 at para.16.

[9] In *Santelli v. Trinetti*, 2019 BCCA 319, the Court of Appeal summarized the law on interim spousal support orders as follows:

[121] In an interim application, a party seeking support must establish a prima facie case of entitlement, but the court ought not to embark upon adjudication of the issues or questions that need to be "thrashed out" at trial: *Newson v. Newson* (1998), 43 R.F.L. (4th) 221 at paras. 11-15 (B.C.C.A.). As set out in *Robles v. Kuhn*, 2009 BCSC 1163 at para. 12, when making an interim order for support, the needs of the applicant and the respondent's ability to pay assume greater significance and "the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial." The corollary to this proposition is that if a party does not accept the interim support order, he or she may present evidence at trial to allow the court to perform that in-depth analysis in order to make a final order that is different from the interim order.

[122] Where, as here, the pleadings raise an issue as to entitlement to spousal support, the making of an interim order for support does not resolve that issue. Quite simply, the order is interim, not final. The interim order did not specify whether it was made under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) or the FLA. However, the situation is the same under both statutes. Section 15.2(1) of the Divorce Act, allows a party to advance a claim or application for spousal support in the course of a proceeding, and s. 15.2(2) allows a court to make an interim order for spousal support which requires a payor spouse to make support payments "pending the determination of the application under subsection (1)." In other words, pending the making of a final order. Section 216(1) of the FLA similarly empowers the court to make interim orders for relief applied for under the Act as it considers reasonable.

[Emphasis placed by the Court of Appeal in *Santelli*]

[10] Because of the under-developed evidentiary context, the legal test governing interim support is not necessarily the same as the test applicable in reaching the final order: *Goriuk and I.F.* Where a marriage or marriage-like relationship is not in issue and need is proved, interim support should be ordered without adjudicating the issues unless the action is frivolous or vexatious: *Newson and Goriuk*. The other relevant factors should be considered to the extent possible, but the respective needs and means of the parties are the focus of the analysis: *Goriuk* at para. 5, citing *Loesch v. Walji*, 2008 BCCA 214, at paras. 19-20, in turn citing *Traber v. Traber*, [1998] B.C.J. No. 2195 (QL) (S.C.). Considerations such as compensatory factors and the need to achieve self-sufficiency often hold less significance:

R.C.G. v. C.L.G., 2010 BCSC 1596, at para. 11; Goriuk at para. 33.

- [11] In Santelli the Court of Appeal cited Robles v. Kuhn, 2009 BCSC 1163, with approval, a decision of Master Keighley, in which he set out several factors to consider on awarding interim spousal support:
- [12] On interim support applications, the application of these provisions must be qualified by certain established considerations:
1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: Gibb v. Gibb, [2005] B.C.J. No. 2730 (S.C.);
 2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: Grossi v. Grossi, [1993] B.C.J. No. 878 (S.C.);
 3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: Randhawa v. Randhawa, [1999] B.C.J. No. 3299; Newson v. Newson, 1998 CanLII 6440 (BC CA), [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);
 4. The courts should not unduly emphasize any one of the statutory considerations above others;
 5. On interim applications the need to achieve economic self-sufficiency is often of less significance;
 6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: Ladd v. Ladd, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.);
 7. Interim support should only be ordered where it can be said a prima facie case for entitlement has been made out: L.G.B. v. M.A.C.M., [2005] B.C.J. No. 2966, 2005 BCSC 1786 (S.C.);
 8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support: L.G.B.
- [12] Compensatory support relates primarily to the first two objectives of spousal support referred to in s. 161 of the Family Law Act, while non-compensatory support primarily relates to the third and fourth objectives in that section.
- [13] The leading case, Chutter v. Chutter, 2008 BCCA 507, describes non-compensatory spousal support in the following terms:

- [54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

Spousal Support

- [14] Ms. Wallace bases her claim on both compensatory and non-compensatory principles. Her compensatory-based claim is based on the assertion that she lost her financial independence and ability to earn a living due to decisions the parties made during the relationship, mostly at the behest of Mr. Cummins. She claims she stopped working and began bodybuilding at his request. She also claims she spent a good deal of time supporting his career, both by taking care of the household and his children, while they were with the parties, and by actively assisting him with his development as an actor.
- [15] Mr. Cummins asserts that Ms. Wallace was not employed outside the home at her own choice and insisted on a standard of living that was not affordable. He deposed that he strove, without assistance from her, to develop a remunerative and stable income as an actor and in the course of doing that, they lived beyond his means and he incurred debts to Canada Revenue Agency. He has children from previous relationships for whom he pays child support in the amount of \$2,100 per month. His counsel advised that there is an application upcoming to increase child support pertaining to one or more of those children.
- [16] The facts as to whether the parties jointly agreed that Ms. Wallace would not work outside the home or whether it was the sole decision of Ms. Wallace are strongly contested and will have to be addressed at trial. Because of that contest, it is appropriate to focus on non-compensatory spousal support on this application. Non-compensatory support does not require the court to resolve the evidence about the decision that Ms. Wallace would not work outside the home. Non-compensatory spousal supports causes the court to focus on the differing incomes of the parties without considering the reason for the differing incomes. It attempts, if possible, to restore the pre-separation standard of living.
- [17] The issue of whether the parties were in a marriage-like relationship, and therefore were spouses, is not contested for the purpose of this application.

Entitlement to Spousal Support

- [18] Ms. Wallace has provided calculations applying the Spousal Support Advisory Guidelines and assuming that she earns minimum wage income of \$28,000. Based on that, I presume she concedes she is capable of earning that amount. I accept that is appropriate. That income alone will result in a standard of living significantly below what she had when the parties lived together.
- [19] Mr. Cummins does not accept that Ms. Wallace has needs as she asserts because her father pays her rent of \$2,350 per month and because Mr. Cummins asserts that her inability to support herself is a problem of her own making. This latter issue relates to a compensatory support analysis. As I have already said, it is appropriate to focus on non-compensatory spousal support on this interim application.
- [20] Given that Mr. Cummins has significant income, Ms. Wallace has none, and that Ms. Wallace has not been gainfully employed for many years, I am satisfied she has established need.
- [21] Mr. Cummins is an actor. Mr. Cummins' income in the three years reported on his financial statements, adjusted to reflect his actual income in 2017 given that he split income with Ms. Wallace in that year by allocating \$217,000 of his income to her but not paying it to her, is as follows:
- 2018, approximately \$478,474.40;
 - 2017, approximately \$465,000; and
 - 2016, approximately \$135,000.
- [22] The Spousal Support Advisory Guidelines permit averages income in circumstances where income varies and the case law supports such an approach, including in cases involving actors: *Nash v. Olsson*, 2012 BCSC 1099. The three-year average is approximately \$360,000. Mr. Cummins asserts these years are much higher than his history of earnings and an inappropriate basis to determine his means, especially given what his counsel refers to as "crushing" Canada Revenue Agency debt.
- [23] Mr. Cummins' financial statement asserts a debt to Canada Revenue Agency but does not say what amount or that he is making payments on it. His financial disclosure does not list a monthly amount or any amount for servicing this debt. He has deposed that he "prioritizes" his debts, but there is no evidence to support that. He deposed that he pays a mortgage when his financial statement says he pays rent, and his counsel advises he does not own a house. Ms. Wallace also has a Canada Revenue Agency debt because of the 2017 income splitting when Mr. Cummins allocated \$217,000 of his income to her but did not transfer that income to her.
- [24] After considering his child support obligations, his income is much higher than what Ms. Wallace can earn. Mr. Cummins has the means to pay spousal support.

Quantum of Spousal Support

- [25] The case law, including Robles and other cases, support the use of the Spousal Support Advisory Guidelines to determine interim spousal support unless exceptional circumstances indicate otherwise.
- [26] The Spousal Support Advisory Guidelines calculations based on Mr. Cummins' 2018 income (before income-splitting), his child support payments of \$2,100 per month and imputing income of \$28,000 to Ms. Wallace, range from a low of \$4,184 per month, to a mid-range of \$4,881 per month, to a high range of \$5,579 per month.
- [27] Those calculations are based on an income that is higher than his three-year average, but I note that it does not include an amount for 2019 (likely because his 2019 income tax return are not yet available), nor an amount for 2015 when Mr. Cummins did not file an income tax return.
- [28] It is appropriate to take into account that the income used to produce that range is higher than a three-year average would produce unless his 2019 income is in line with 2018 and the low year, 2016, drops off the three-year average. I also take into account that Mr. Cummins has chosen not to provide any evidence of appropriate amounts based on the Spousal Support Advisory Guidelines. Instead, he simply states he cannot afford to pay more than \$1,000 per month but also suggests that \$2,000 per month would be more reasonable because that is what he paid when they separated for a period midway through their relationship.
- [29] I am not persuaded that Mr. Cummins' approach accords with the case law. It is not rational or evidence-based. He also argues this is an appropriate amount because there is a trial set for September 2020. I do not regard that as a compelling reason to set spousal support well below what the evidence indicates it should be. Setting interim spousal support too low sets up one spouse to be more financially vulnerable leading to trial. That risks a skewed outcome because the parties will not have comparable abilities to afford to live and pay for the expenses of litigation.
- [30] Taking all of this into account, I award \$4,000 per month in spousal support on a go-forward basis commencing March 1, 2020 to be paid on the first day of each month.

Retroactive Spousal Support

- [31] Ms. Wallace seeks retroactive spousal support from May 2019 calculated as the difference between what was awarded and the amounts that have been paid.
- [32] The leading case on retroactive support is D.B.S. v. S.R.G, 2006 SCC 37, which addresses child support. The court set out factors to be considered in determining whether to make such an award at paras. 100-116. Modified for spousal support, the factors are:

- a) whether the recipient spouse has a reasonable excuse for not seeking spousal support earlier;
- b) the conduct of the payor spouse;
- c) the circumstances of the spouses; and
- d) whether a retroactive award will occasion hardship on the payor.

[33] There has been no delay in seeking spousal support.

[34] With regard to the conduct of the payor spouse and the circumstances of the spouses, Mr. Cummins initially made a lump-sum payment. With that exception, his position since has been parsimonious given his income.

[35] As to hardship, Mr. Cummins' financial statement shows that is he spends more than \$5,000 per month on his own living expenses, including \$1,800 of entertainment and recreation expenses. He asserts he cannot afford to pay the \$1,000 in spousal support he is currently paying. His assertion makes no sense given his income and given that he does not apply his income to reduce the debt he characterizes as crushing.

[36] In my view, retroactive spousal support is appropriate. The problem is determining the amount given the differing evidence on whether lump sum payments that Mr. Cummins has made were all for spousal support. Mr. Cummins asserts he has paid \$14,000 in lump sum spousal support payments. Ms. Wallace asserts that Mr. Cummins made a single \$7,000 lump sum payment for spousal support. The calculation is also impacted by the differing positions about the date of separation.

[37] Mr. Cummins asserts that they separated in January 2019. Using that date, at \$4,000 per month the support he should have paid from February 2019 to February 2020 totals \$52,000. He asserts he has paid \$14,000 in lump-sum payments, and he has paid a total of \$5,000 in monthly support from September 2019 to February 2019. That totals \$19,000 in payments made and leaves \$33,000 in retroactive support owing. Ms. Wallace asserts that they separated in May 2019. Doing the same type of calculation, \$4,000 per month for eight months totals \$32,000 in support that ought to have been paid. Ms. Wallace asserts that Mr. Cummins paid a lump sum of \$7,000 in support. Adding that to the \$5,000 in monthly support that has been paid, Mr. Cummins would owe \$20,000 in retroactive spousal support.

[38] Given the circumstances, the rough-justice approach and that it is Ms. Wallace's application, I base the calculations on her approach without making any factual findings about the date of separation and the amounts paid to date. I order \$20,000 in retroactive support.

Medical and Extended Health Benefits

[39] Ms. Wallace also has sought an order that she be reinstated on Mr. Cummins' medical and extended health benefits pursuant to s. 218 of the Family Law Act. This order is not opposed, and I make the order so that that can be affected.

"Matthews J."

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