
CANADA / JUDGMENT

Wheeler v. Wheeler

2021 BCSC 1269

COURT

Supreme Court of British Columbia

DECIDED

29 June 2021

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2021 BCSC 1269 Wheeler v. Wheeler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wheeler v. Wheeler,

2021 BCSC 1269

Date: 20210629

Docket: E17397

Registry: Dawson Creek

Between:

Donald Gordon Wheeler

Claimant

And

Bonnie Colleen Wheeler

Respondent

Before: The Honourable Mr. Justice Edelmann

Reasons for Judgment

Counsel for the Claimant, via teleconference:

S. Elson

Counsel for the Respondent, via teleconference:

J. Duncan

Place and Date of Hearing:

Prince George, B.C.

March 10, April 6, 2021

Place and Date of Judgment:

Dawson Creek, B.C.

June 29, 2021

- [1] This is an application by the Claimant that a Consent Order made on June 30, 2015, be varied to cancel or reduce his obligation to pay spousal support to the Respondent retroactive to January 31, 2020. He also seeks a variation of his obligation to maintain a life insurance policy.

Material Change of Circumstances

- [2] This Court's jurisdiction to vary a spousal support order is set out in s. 17(1)(a) of the Divorce Act, (R.S.C., 1985, c. 3 (2nd Supp)). To vary a spousal support order, the court must first be satisfied that there has been a material change to the "condition, means, needs, or other circumstances of either former spouse" before making a variation order: s. 17(4.1) Divorce Act.
- [3] The parties were married in September 1978 and separated in June 2004. They have three children, all of whom are now adults and independent. The parties entered into a separation agreement in April 2008 ("Separation Agreement") which provided for the division of assets, child custody, child and spousal support.
- [4] Both the Claimant's and the Respondent's employment pensions were divided proportionately to the amount and years of the relationship. The Claimant had accrued 24 years 6.32 months of pension during the parties' relationship, which was divided equally between the parties.
- [5] On June 30, 2015, the parties entered a consent order which varied spousal support to \$2,500 per month commencing June 2015 and included a term requiring that the Claimant provide a life insurance policy for the Respondent(the "Consent Order"). At the time of the Consent Order, the Claimant was earning an annual income of approximately \$153,000 from his employment with Westcoast Energy and the Respondent was on medical leave from her employment as a teacher's aide.
- [6] The Claimant was notified on January 31, 2018, that his 40-year employment with Westcoast Energy was being terminated effective February 1, 2018. The Claimant received severance pay from his employer that provided payment of his regular salary until January 31, 2020, together with pay out of vacation pay and incentive payments.

- [7] The Claimant began drawing his employment pension of approximately \$46,000 per year in February 2020. He has been employed on a temporary basis as a security guard since February 2020, and earns approximately \$31,000 per year in addition to his pension income. The Claimant has not yet applied to receive Canada Pension benefits and says he does not intend to apply until he turns 65 in October 2021.
- [8] The Respondent largely concedes that the Claimant's termination from Westcoast Energy is a material change in circumstances. Although the Respondent suggested in argument that the Claimant should have been able to find comparable employment, I heard little if any evidence for that proposition. There is no indication on the record before me of the other types of employment that would be available in or around Chetwynd, nor was it suggested to the Claimant during his testimony that he should move to seek employment elsewhere. It is clear that both the Claimant and his current spouse are well established in Chetwynd. I am satisfied that the loss of the Claimant's long term employment is a material change in circumstances for the purposes of s.17 of the Divorce Act.

Variation

- [9] Once the material change threshold is met, the legislated criteria to guide the variation inquiry are found at s. 17(7) of the Divorce Act:

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.

- [10] The Court of Appeal in *Chutter v. Chutter*, 2008 BCCA 507 discussed the distinction between the compensatory and non-compensatory aspects of spousal support:

- [47] Based on the statutory provisions and the case authorities, the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support (*Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420 at paras. 15, 41-42, 44 R.F.L. (4th) 1).

[11] The Respondent argues support is warranted on both compensatory and non-compensatory grounds. The Court in Chutter summarized the law relating to compensatory support as follows:

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (Bracklow, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (Moge, at 861-863; Bracklow, at para. 39). In Moge, the Supreme Court of Canada observed, at 867-868:

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.

[12] The principles relating to non-compensatory support were also summarized:

[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.

[13] There does not appear to be much disagreement between the parties about ongoing entitlement to support on compensatory grounds. The primary divergence between the parties is with respect to the level of support given the change in the Claimant's circumstances.

[14] The parties had a traditional relationship of 26 years. The Claimant was the primary breadwinner for the family and the Respondent was the primary caregiver for the parties' children.

The Respondent

[15] The Respondent commenced casual employment as a teacher's aide in 1992, and earned about \$18,000/year from that employment at the time of the parties' separation in 2004.

- [16] The Respondent became permanently disabled in June 2015 due to medical issues, including fibromyalgia, osteoarthritis, and psoriatic arthritis. As a result of the conditions, there are times she cannot walk due to the amount of pain she experiences. She cannot work and receives disability benefits from her employer through Desjardins and from CPP.
- [17] The Claimant's decision to stop paying support as of February 2020 resulted in a significant deficit in the Respondent's income. She has had to make withdrawals from her RRSPs to make ends meet and has moved into a shared living arrangement with her current partner.
- [18] The Respondent has chosen not to draw from her pension until she is 65, because she would have to resign her position and would no longer obtain disability insurance payments or extended health benefits. The value of her pension would also be significantly less when she turns 65 if she begins drawing the pension now.

The Claimant

- [19] The Claimant was born in 1956 and is currently 63 years old. As noted above, he currently receives annual pension income of approximately \$46,000 and employment income as a security guard of approximately \$31,000. Although he is not guaranteed full-time hours in his current position, I am satisfied that employment at that level of remuneration is available to him.
- [20] The Claimant commenced living with his current spouse in 2005 and they were married in October, 2008. His spouse is 60 years old and had an annual income of approximately \$38,000 in 2018 and 2019, rising to \$48,000 in 2020. The Claimant and his new spouse share living expenses.
- [21] The Respondent placed quite a bit of emphasis on the decision by the Claimant not to work during the two years that he was receiving severance payments from Westcoast. It is unclear to me how this would affect my analysis. As I have noted above, I do not accept on the evidence before me that the Claimant would have been able to secure a position in or around Chetwynd paying significantly more than what he currently earns. Even if I were to impute two years of income at that level for 2018 and 2019, it would have limited if any effect the current ability to pay spousal support. The Respondent is not seeking retroactive support in relation to 2018 and 2019. I therefore give limited weight to this factor, although I accept that the Claimant's decision not to work during those two years has had some impact on his current financial situation.

Analysis

[22] I am satisfied on the evidence before me that the Respondent continues to have a strong case for compensatory support given the length of the marriage and the parties' respective roles in the relationship. I am also satisfied that there is a basis for non-compensatory support given the Respondent's current situation. I find that the relative financial circumstances of the parties also justify an ongoing support obligation on the part of the Claimant.

[23] One of the primary issues before me in establishing an adequate level of support is the manner in which the Claimant's pension income should be considered. Upon their separation, the Respondent received half of the value of the Claimant's pension accumulated during the marriage. In *Boston v. Boston*, 2001 SCC 43, the Supreme Court of Canada considered the issue of double dipping in spousal support cases. Double dipping occurs when a payor must annuitize already divided assets to pay ongoing spousal support obligations. According to the Court, double dipping should be generally avoided. On this issue, Justice Major wrote:

It is generally unfair to allow the payee spouse to reap the benefit of the pension both as an asset and then again as a source of income. This is particularly true where the payee spouse receives capital assets which she then retains to grow her estate. The comments of Walker, *supra*, at p. 233, bear echoing:

It is well-recognized that a borrower should not be compelled to continue monthly loan payments to the lender if the borrower has previously paid the full amount owing. "Double dipping" is analogous to such a situation and is logically and mathematically indefensible.

To avoid double recovery, the court should, where practicable, focus on that portion of the payor's income and assets that have not been part of the equalization or division of matrimonial assets when the payee spouse's continuing need for support is shown (see *Hutchison*, *supra*, at para. 9). In this appeal, that would include the portion of the pension that was earned following the date of separation and not included in the equalization of net family property.

Despite these general rules, double recovery cannot always be avoided. In certain circumstances, a pension which has previously been equalized can also be viewed as a maintenance asset. Double recovery may be permitted where the payor spouse has the ability to pay, where the payee spouse has made a reasonable effort to use the equalized assets in an income-producing way and, despite this, an economic hardship from the marriage or its breakdown persists. Double recovery may also be permitted in spousal support orders/agreements based mainly on need as opposed to compensation, which is not the case in this appeal.

[24] The Respondent has put forward calculations of the relative value of portion of the pension that was earned after the marriage, and I do not understand the Claimant to take issue with those calculations. According to those calculations, approximately 40% of the Claimant's pension entitlement was earned after separation, representing annual pension income of

just over \$18,000. In combination with the parties' other income, an application of the Spousal Support Advisory Guidelines would result in a range of monthly support between \$805 and \$1000.

- [25] In my view, given the clear disparity between the financial circumstances of the parties and the Respondent's strong compensatory claim, I find that support at the higher end of the range is appropriate in the circumstances. I do not, however, find that double recovery is warranted given the principles set out in *Boston*. The Respondent accepts that only some of her financial need is connected to the breakdown of the marriage, while a significant portion is related to health issues that arose after separation. On the evidence before me, I find that a variation of the Consent Order to provide for monthly support of \$1000 adequately balances both the compensatory and non-compensatory aspects of the Respondent's claim with the overall financial circumstances of the parties.

Life Insurance Policy

- [26] The Claimant also seeks a variation of the requirement in the Consent Order that he maintain a life insurance policy naming the Respondent as the irrevocable beneficiary as long as spousal support is payable. Given my findings with respect to the payment of spousal support, I find that it continues to be appropriate for the Claimant to maintain a life insurance policy. However, given the reduction in spousal support payable, I find that a commensurate reduction in the amount of the life insurance policy is warranted.

Retroactive Spousal Support

- [27] Unless there is reason to order otherwise, the commencement date of a variation should be the date of effective notice of an application to seek a variation of spousal support (see *Wilms v. Wilms*, 2020 BCCA 51, at para. 29). The scope of "effective notice" was discussed by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37:
- [121] By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached.
- [28] The parties appear to be in agreement that effective notice was provided in the present case in February 2020 when the Claimant raised the issue of a variation in spousal support with the Respondent. I find that the variation should be retroactive to February 2020.

Costs

[29] My initial view on costs is that the parties have had mixed success on this application and should each bear their own costs. However, should either party wish to make submissions on the issue of costs with the benefit of these reasons they may arrange to do so within 30 days.

"Edelmann J."

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