
CANADA / JUDGMENT

Whiting v. Berry

2016 BCSC 695

COURT

Supreme Court of British Columbia

DECIDED

20 April 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCSC 695 Whiting v. Berry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Whiting v. Berry,

2016 BCSC 695

Date: 20160420

Docket: E72414

Registry: Nanaimo

Between:

Hilary Anne Whiting also known as Hilary Anne Berry

Claimant

And

Anitra Michelle Berry

Respondent

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Claimant:

K.A. Sugiyama

Appearing on her own behalf:

The Respondent, A. Berry

Place and Date of Hearing:

Nanaimo, B.C.

March 22, 2016

Place and Date of Judgment:

Nanaimo, B.C.

April 20, 2016

- [1] These parties separated in November 2013 following a 12 ½ year cohabitation. They have two children, both seven years of age.
- [2] In December 2014 the parties entered into a comprehensive settlement, the terms of which were incorporated into a consent order entered March 19, 2015.
- [3] The consent order provided for shared custody of the children. A structure of support payments was agreed to. The order provided for the respondent making child support payments to the claimant of \$500 per month commencing January 1, 2015. This was less than the Guideline amount payable on the parties' incomes; the parties are in agreement that this adjustment was made to facilitate a 50/50 sharing in the parties' resources.
- [4] The order provided that for the calendar year 2015, the respondent would pay the claimant spousal support of \$2,233 per month. This figure was based on the respondent's reported 2014 income of \$93,000, and the claimant's reported 2014 income of \$10,000.
- [5] The order further provided that effective January 1, 2016 and continuing to the end of 2019, the respondent would pay the claimant spousal support of \$2,079 per month, subject to a review provision. This figure was based on the respondent's estimated 2016 income of \$93,000, and the claimant's imputed income of \$15,000.
- [6] The order provided for a review of the quantum of spousal support at the request of either party every two years, with the first review to take place no earlier than January 1, 2017.
- [7] The respondent brings this application seeking variation of the spousal support provisions of the consent order, asking that her monthly spousal support obligation be reduced to \$1,648 for 2015, and \$1,259 for 2016.
- [8] The application is premised on the respondent's submission that there has been a three-fold material change in circumstance:
 - a) as of August 2015 she has not been able to receive Child Tax Credits;
 - b) she did not appreciate that her spousal support obligation would be based on her gross income including mandatory retirement pension plan deductions;

- c) when the settlement between the parties' was concluded, the respondent had been on medical leave from her employment due to injuries received in a motor vehicle accident, but was contemplating a return to full-time status including the right to earn overtime. Her medical condition, however, is still guarded and, contrary to her expectations, she is not able to earn a reasonable amount of overtime.
- [9] As to the latter two points, the respondent says that her expected income of \$93,000 has been reduced by \$4,000 approximately due to lack of overtime income, and by a further \$7,000 approximately given her mandatory pension contribution, leaving her with her base salary of \$82,108.
- [10] As to the issue of the Child Tax Credit entitlement, the respondent says that at the time of the settlement she had been operating under the assumption that the claimant's Child Tax Benefits amounted to \$87.78, the amount disclosed in the claimant's financial statement. The respondent says that the claimant, by the time the settlement was concluded, had in fact begun to receive more in Child Tax Credits, and that if this information had been disclosed the support payments agreed to would have been lower.
- [11] However, the respondent's contention that she relied on the Child Tax Credit figures disclosed in the financial statement is contradicted by the software calculations utilized when the parties entered into a Spousal Support Release in January 2015. The Support Scenarios printed out on the DivorceMate printouts attached to the Release clearly show the mid-range spousal support figures of \$2,233 and \$2,079 for the years 2014 and 2015 respectively to have been based on the claimant receiving Child Tax Credits of \$254 and \$207.
- [12] I find no merit in this submission.
- [13] As to the second issue raised by the respondent, the unanticipated impact of the pension plan contributions, this is not a change in circumstances. The Basic With Child Support Formula in the Spousal Support Advisory Guidelines explicitly includes pension contributions in a payor's income. The rationale for this is as stated in the Department of Justice publication, "The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version", at s. 8.3.1:

Clearly permissible deductions are federal and provincial income taxes, as well as employment insurance premiums and Canada Pension Plan contributions.

More contentious are deductions for mandatory pension contributions. We concluded that there should not be an automatic deduction for such pension contributions, but the size of these mandatory deductions may sometimes be used as a factor to justify fixing an amount towards the lower end of the spousal support range.

We reached this conclusion after considerable discussion. Like E.I., CPP and other deductions, pension contributions are mandatory deductions, in that the employee has no control over, and no access to, that money. But, unlike other deductions, pension contributions are a form of

forced saving that permit the pension member to accumulate an asset. Further, after separation, the spouse receiving support does not usually share in the further pension value being accumulated by post-separation contributions. Finally, there are serious problems of horizontal equity in allowing a deduction for mandatory pension contributions by employees. In the end, we decided it was fairer and simpler not to allow an automatic deduction for pension contributions.

- [14] The respondent had the benefit of legal advice when the settlement agreement was concluded and the terms of the consent order drafted. The respondent could have attempted to negotiate a spousal support payment towards the lower end of the range provided for in the Guidelines, to recognize her lower take-home income. She did not do so. This is not a change in circumstances that justifies the agreement being re-opened.
- [15] As to the third ground of the respondent's application, the respondent's 2015 income, as evidenced by her T4 slip, including her mandatory pension contributions and not including any overtime - which she was unable to earn - amounted to \$89,143.15. This represents a 4.15% shortfall from the \$93,000 income on which the support payments were premised.
- [16] A shortfall of this very modest magnitude is not a material change in circumstances. Notwithstanding the parties' desire to achieve a perfectly even split in their resources, it is not the function of variation applications to make fine recalibrations of support awards based on minor fluctuations in income.
- [17] The respondent's application for variation is dismissed.
- [18] There will, by consent, be an order amending the support payment schedule to correspond with the respondent's pay periods. There will also be a further order by consent varying para. 38 of the March 19, 2015 order, deleting the reference to the respondent being barred from claiming Child Tax Benefits for the year 2014, and providing that for the year 2014 and thereafter the parties shall both claim the Child Tax Benefit and shall equally share in the total benefits received by them.

"A. Saunders J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/06/2016BCSC0695.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/whiting-v-berry-2016>

Prepared on 29 October 2026 · Esheria