SUPREME COURT OF YUKON

Citation: *Janiga v Janiga*, 2015 YKSC 29

Date: 20150610
S.C. No. 13-D4549
Registry: Whitehorse

Between:

DIANE CINDY JANIGA

PLAINTIFF

And

GREGG PATRICK JANIGA

DEFENDANT

Before: Mr. Justice J.Z. Vertes

Appearances:

Debbie P. Hoffman — Counsel for the Plaintiff
Kelly McGill — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the defendant to vary a consent order for spousal support dated April 1, 2014. The defendant seeks to vary that order on the basis that there has been a material change of circumstances due to the remarriage of the plaintiff.

BACKGROUND

[2] The parties were married in 1988. At the time, the plaintiff (wife) was twenty-three years old and the defendant (husband) was twenty-five years old. They have two children, both now grown and financially independent. The marriage was described as a

"traditional" one with the defendant earning income and the plaintiff caring for the home and children. The parties separated in 2013 and eventually divorced on April 1, 2014.

[3] The defendant has been employed as an elevator technician for the past thirty years. The plaintiff did not work outside the home until 2009. In 2013, she started courses at Yukon College to become a medical healthcare assistant.

[4] Prior to the divorce, the parties engaged in a judicial settlement conference which resulted in a consent order addressing the financial issues between them. By that order, the parties divided their real and personal property. The plaintiff retained a mobile home; the defendant retained land at Squanga Lake and assumed the mortgage on it; the defendant assumed liability for a joint line of credit debt; the defendant made cash payments to the plaintiff to equalize their respective equities in the real and personal properties divided between them; and the defendant's employment pension was divided. The order also provided as follows for spousal support:

> (a) The Defendant shall continue to pay spousal support in the amount of $3,240.00 per month to the Plaintiff until the Plaintiff has obtained full time employment, or until April 2015, whichever comes first, after which date the Defendant shall pay spousal support in the amount of $2,500.00 per month to the Plaintiff until the Defendant retires or attains the age of 60 years … whichever occurs second.
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> (b) If the Defendant retires prior to the Plaintiff attaining the age of 60 years … then from the date that the Defendant retires until the date that the Plaintiff attains the age of 60 years, the Defendant shall pay spousal support in the amount of $500.00 per month to the Plaintiff.
>
> (c) The Defendant's obligation to pay spousal support shall terminate when the Plaintiff attains the age of 60 years, or the Defendant retires, whichever occurs later.

[5] The initial support amount of $3,240 was based on spousal support guideline calculations premised on the parties' respective incomes at the time. The parties recognized, however, that the support payment of $3,240 would only last until April 2015 because the plaintiff was expected to complete her healthcare training course in May 2015 at which time she would seek full-time employment in that field. Hence the negotiated reduction to $2,500 per month. It is not clear from the evidence whether the plaintiff actually completed the course. In any event, she has not obtained full-time employment and works minimally in private home care.

[6] The plaintiff is now living in a new relationship. She started dating a man after the divorce and they are now married. The combined annual household income for the plaintiff and her husband is approximately $120,000 (including the spousal support being paid by the defendant); the defendant's income is approximately $133,000. Calculations done with these figures under spousal support guidelines result in a range for spousal support of $266 to $355 per month.

[7] The defendant seeks to vary the spousal support order on the basis of the plaintiff's remarriage and the increase in her standard of living. He submits that these amount to a material change in circumstances justifying a fresh analysis of the need for, and the amount of, spousal support.

[8] The plaintiff's position is that the spousal support order is compensatory in nature and therefore the change in her circumstances is irrelevant to the defendant's ongoing obligation to pay support. In her submission, the support payments were front-loaded to take account of her need at the time – a non-compensatory factor – and the lower level of payment kicked in in April regardless of her circumstances, i.e., whether or not she had obtained full-time employment. Therefore this lower amount is purely compensatory

in nature, in recognition of a twenty-five year marriage where the wife had no career or economic prospects.

ANALYSIS

[9] The *Divorce Act (Canada)* (the "*Act*") enables a court to vary, rescind or suspend, prospectively or retroactively, a spousal support order: s. 17(1). An application to do so engages a two-step process.

[10] First, the *Act* stipulates that, before a court may vary a support order, the court must be satisfied that "a change in the condition, means, needs or other circumstances of either former spouse has occurred": s. 17(4.1). The change in circumstances must be substantial, unforeseen and continuing, and one that, if known at the time the order was made, would likely have resulted in a different order: *K.D. v. N.D.*, 2011 BCCA 513 (para. 22). If, at the time of the original order, the fact that is being relied on as a change of circumstance was known or was reasonably foreseeable, then there is no change of circumstance that can be relied on to base a variation application: *L.G. v. G.B.*, [1995] 3 S.C.R. 370 (at para. 74).

[11] Second, and only if the evidence establishes a material change in circumstances, the court must then consider whether that change justifies variation of the earlier support order by reference to the four objectives set out in s. 17(7) of the *Act*:

> 17(7) A variation order varying a support order [that provides for the support of a former spouse] should
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> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
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> (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
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> (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[12] As noted in *Moge v. Moge*, [1992] 3 S.C.R. 813 (at p. 852), all of these objectives must be taken into account. No single objective is paramount.

[13] Respecting the first step, I accept the plaintiff's evidence that, at the time of the judicial settlement conference, she was not in a relationship with the man who is now her husband. So it cannot be said that remarriage was contemplated when the support was negotiated. In addition, there is no question that the plaintiff's means, as that term is used in s. 17(4.1) of the *Act*, have changed. As a result of her remarriage her standard of living has improved. As noted in *L.J.H. v. J.A.Z.*, 2014 BCSC 1384 (at para. 17), the word "means" has been broadly interpreted so as to include all financial resources available to the plaintiff, including the income of her new spouse. Therefore, the first step has been satisfied.

[14] The real issue in this case, however, is the analysis in the second step, and particularly the characterization of the support payment.

[15] It is established in the jurisprudence that spousal support can be based on one of three models: compensatory; non-compensatory; or contractual. Support may, however, be based on more than one of these foundations. Indeed, most orders will be a combination of compensatory and non-compensatory objectives. Compensatory support is based on the economic disadvantages experienced by one spouse arising from the marriage and its breakdown. Non-compensatory support is meant essentially

to remedy the need of one spouse as a result of the marriage breakdown: see *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

[16] The jurisprudence, however, has not been consistent in the treatment of remarriage and how that affects a prior support order. That can be due to the fact that most orders do not differentiate as between the compensatory and non-compensatory aspects of the order. But, generally speaking, remarriage has not been considered a decisive factor on a variation. Indeed, in those cases where it can be said that a support order was compensatory, courts have been reluctant to vary based on remarriage. This is because compensatory orders are based on the recipient spouse's economic loss or disadvantage due typically to the roles assumed during the marriage.

[17] This was explained by Professor James McLeod in an annotation quoted by Kirkpatrick J.A. in the recent case of *Morigeau v. Moorey*, 2015 BCCA 160 (at para. 36):

> …When a payee forms a new relationship, he or she usually receives economic benefits under that relationship. Should such benefits be taken into account in deciding whether to vary a prior support order? The answer depends on the objective of the prior support order. If the order is to assist the dependant to maintain a reasonable standard of living, then any benefit which reduces the amount the payee needs to maintain the appropriate standard of living should be relevant. However, if the order is to compensate the payee for a particular economic loss incurred or benefit conferred, windfall benefits should not be considered in reducing support.
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> …
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> If the original order or agreement was primarily compensatory in nature, windfall benefits are not relevant. This is because the award is not focused primarily on need, but rather on the equitable sharing of the economic consequences of the marriage or its breakdown.

[18] In this case, there are several factors that lead to the conclusion that the support order, at its current level of $2,500 per month, is primarily compensatory. This was a twenty-five year marriage. The plaintiff was out of the work force for twenty-one of those years caring for the home and the children. She had no opportunity to develop the income security that a long-term career could have provided. The fact that the consent order also took into account the division of real and personal property reinforces the notion that the support was meant to be compensatory in nature since the entire arrangement had, as its objective, the equalization of the economic advantages and disadvantages of the marriage. A remarriage and the subsequent improvement in the plaintiff's standard of living have no bearing on that objective.

[19] Furthermore, the two levels of support – the "front-loading" as plaintiff's counsel put it – also suggests that the current level is aimed at compensatory objectives. The higher level of $3,240 was to stay in place only until April 2015, or the plaintiff became employed, whichever came first. So, even if the plaintiff became employed, and irrespective of what income she might earn, the $2,500 monthly payment would continue. This has the attributes of compensation not as a payment due to need.

[20] The defendant's counsel asserted that it would be unreasonable to think that the difference between the two levels of support, i.e., the $740 difference in the support paid before and after April 2015, is all that would be directed to the plaintiff's need at the time of separation. That is a good point but the amount is less important than the apparent intention of the parties when the agreement was negotiated. The entire amount was meant to address both need and compensation. The amount going forward, however, is still primarily compensatory.

[21] This type of situation was addressed at length in the above-referenced *Morigeau* decision. That case was one of “re-partnering” but it applies all the same. Kirkpatrick J.A., writing on behalf of the court, said (at paras. 37-39):

> 37 It is now well-established that a compensatory spousal support order should continue until the economic consequences flowing from the marriage are redressed, even if the spousal support payee has, in the interim, achieved a measure of self-sufficiency: see e.g. *Tedham v. Tedham*, 2005 BCCA 502 at paras. 58-60. The discussion by the Ontario Court of Appeal at para. 22 of *Allaire v. Allaire* (2003), 35 R.F.L. (5th) 256 (Ont. C.A.) of this principle, cited with approval in *Tedham*, is apposite to the case at bar:
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> > [22] ... It is recognized that in situations such as this, "where a former spouse will continue to suffer the economic disadvantages of the marriage and its dissolution while the other spouse reaps its economic advantages", long-term compensatory support is appropriate regardless of the self-sufficiency of the disadvantaged spouse: *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.), at 383. Where, as here, the award is crafted to compensate Ms. Allaire for the long-term impact of the marriage on her career advancement and earning capacity, the trial judge was within her discretion in declining to limit her support to a defined period.
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> 38 In *Tedham*, this Court summarized the principle from *Allaire* as follows at para. 60:
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> > [60] While *Allaire* is what I will refer to as a "non-interference" case, it makes the point that an order of spousal support which is based on compensatory principles should continue until adequate compensation has been made, even if the spouse has achieved a degree of self-sufficiency ...
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> 39 In my view, this principle applies to an application to vary a primarily compensatory spousal support order in the case of "re-partnering". This is because the mere fact that the recipient of spousal support enters into a new relationship does not alter the economic disadvantage incurred by the payee spouse who assumed family obligations in the marriage or the corresponding economic

> advantage conferred on the payor spouse. The potential new relationship, which arises after the breakdown of the marriage, generally does not redress economic consequences that flow from the adoption of certain roles during marriage or from its breakdown.

[22] Finally, I must still consider the objectives set forth in s. 17(7) of the *Act* to determine if a variation would be justified. The current support order was clearly directed toward three of those objectives: (i) recognition of the economic disadvantages to the plaintiff arising from the breakdown of the marriage; (ii) relief of economic hardship; and (iii) promotion of self-sufficiency.

[23] While the objective of relieving from economic hardship can arguably be said to have been met by the plaintiff's remarriage, the objective of redressing economic disadvantage continues to be valid. Remarriage did not alter that aim. I therefore find no cause to interfere with the order.

CONCLUSION

[24] For these reasons, the application to vary the spousal support order is dismissed with costs.

VERTES J.