

1997 CarswellAlta 445, 29 R.F.L. (4th) 38

Mayotte v. Salthouse

Diane Mayotte, Appellant (Respondent) and Stephen Salthouse, Respondent (Applicant)

Alberta Court of Appeal

Conrad J.A., Chrumka and Murray JJ. (ad hoc)

Oral reasons: April 28, 1997

Docket: Calgary Appeal 14627

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Counsel: *D. Castle*, for appellant (respondent).

*A.M. Grobman*, for respondent (applicant).

Subject: Family

Family Law --- Support — Spousal support under provincial statutes — Variation or termination — General

Applicant applied successfully for reduction of maintenance and arrears while he was in school and on unemployment insurance — Respondent appealed — Appeal allowed — Variation order only considered where former spouse establishes he or she cannot pay now or in future — Applicant had increased training, past income level was high, and no reason to expect he would be unable to meet obligations — Arrears reinstated.

Maintenance --- Variation — Arrears

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The applicant successfully applied for a reduction of his \$600 monthly maintenance obligation and arrears owed to the respondent spouse. At the time, he was in school and on unemployment insurance. His income for the past several years had been \$40,000. The respondent appealed the order.

**Held:** The appeal was allowed.

In the absence of a special circumstance, a variation order is only considered where the former spouse establishes on a balance of probability that he or she cannot pay and will not be able to pay in the future. The only reason given for the reduction was the fact that the budget did not show that the respondent was spending any

more. If a person is without funds, their actual spending may be less than that to which they are reasonably entitled. The applicant's income was high for the past several years and his increased training meant there was no reason to expect he would be unable to pay in the future. The original order was reinstated but the arrears were to be paid over a period of time.

**Cases considered by *Conrad J.A.*:**

*Haisman v. Haisman* (1994), 22 Alta. L.R. (3d) 56, 157 A.R. 47, 77 W.A.C. 47, 7 R.F.L. (4th) 1, 116 D.L.R. (4th) 671 (Alta. C.A.) — applied

APPEAL of variation order.

**The judgment of the court was delivered by *Conrad J.A.*:**

1 We are all of the view that this appeal should be allowed. Mrs. Mayotte appeals from an order reducing maintenance and arrears. We are satisfied her appeal should be allowed with respect to both issues.

2 Dealing firstly with the question of arrears, we are of the view that either the Trial Judge failed to apply *Haisman v. Haisman* [(1994), 7 R.F.L. (4th) 1 (Alta. C.A.)] or, if he did, the conclusion that arrears should be vacated on the facts of this case, was unreasonable. It may justify suspension of enforcement in relation to the arrears for a limited period, or an order providing for periodic payments on the arrears. However, in the absence of some special circumstance, a variation order should only be considered where the former spouse has established on a balance of probability that he or she cannot pay and will not in the future be able to pay the arrears. In our view, the standard set out in *Haisman* has not been met in this case and the arrears should not have been reduced. The Appellant applied for the reduction while he was attending S.A.I.T. and was on unemployment insurance. However, his income had averaged approximately \$40,000 for the past several years prior to the application and his increased training should mean there is no reason to expect he cannot pay in the future. Thus, there will be reinstatement of the arrears but in view of the fact that he has been attending S.A.I.T., we will allow those arrears to be paid over a period of time at \$100 per month commencing April 30th, 1997 and continuing until all arrears outstanding as of this date have been paid in full. In the event he defaults on any payment, then all arrears will become payable forthwith. There will be no interest.

3 With respect to the application to reduce maintenance, this poses some difficulty for the Court because there are no reasons for the reduction and, in fact, it is difficult to tell whether there is, in fact, a reduction in the result. The payment went from being \$600 monthly (before tax) to being a payment of \$500 per month net to the Appellant. The Appellant is quite happy to return to the original order and, in fact, appealed to resort to the original \$600 payment. We cannot see that that will do anything but be to the Respondent's advantage so long as he is making the types of income he has been making in the past. Accordingly, we will allow the appeal, and vacate the order of the Chambers Judge, reinstate the original order, and, just for purposes of clarity, the next payment on that order will be due on April 30th, 1997 and payable on the last day of each and every month thereafter.

4 We do not intend by this order to double-up the payments for the month of April. In other words, if the order of Mr. Justice Prowse would have had a payment on May 1st, then that May 1st payment date will be April 30th. The intent of this award is to ensure that the payments remain tax deductible to the Respondent.

5 The only reason given for any reduction (if it was a reduction) was the fact that the budget of the Appellant apparently did not show that she was spending any more. As everyone appreciates, if a person is without funds,

their *actual* spending may be less than that to which they are reasonably entitled.

(Discussion as to costs)

6 The appellant has been successful in this appeal and she is entitled to her costs. However, in view of all of the circumstances, we will make them payable as follows:

- disbursements will be payable forthwith;
- the balance of the fee will be payable in the same manner as the arrears after the arrears have been paid, assuming they are paid, on a timely basis. If not, that payment will accelerate to the same date as the default.

*Appeal allowed.*

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