In the Court of Appeal of Alberta

Citation: Caldwell v. Caldwell, 2013 ABCA 268

Date: 201300723
Docket: 1201-0293-AC
Registry: Calgary

Between:

Tracy Lynne Caldwell

Respondent (Plaintiff)

- and -

James Oliver Caldwell

Appellant (Defendant)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice R.E. Nation
Dated the 24th of August, 2012 and the 1st day of November, 2012
Filed on the 7th day of November, 2012
(Docket: 4801-090523)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellant, James Oliver Caldwell, appeals the dismissal of his application for an order ending spousal support for the respondent, Tracy Lynne Caldwell, and an order directing that their child, Veronica Caldwell, is no longer a child of the marriage. In addition, he seeks to set aside a declaration of retroactive support arrears.

II. Facts

[2] The parties were married 1983 and separated in 1995, after 12 years of marriage and four children, who then ranged in age from 12 years to one year. The four children are James, born in 1983; Ashley, born in 1984; Veronica, born 1991; and Russell, born in 1994.The divorce and corollary relief order were granted in 2000. The corollary relief order directed the father to pay child support and spousal support of $790 per month, and there was no end date in that decree.

[3] The relationship between the parties has, and continues to be, contentious. Initially, the mother obtained a restraining order against the appellant father. The father applied to set aside that order only recently. The father lives in the United States and has not exercised access, with the result that the mother has had the sole day-to-day responsibility for the care of the children.

[4] The father is currently a president of a university in the state of Oregon, USA. His income in 2011 was approximately $185,000. The mother works part time. In 2011, her income was less than $40,000.

[5] In 2008, the mother sought a variation of child support. Two orders were granted but, unfortunately, never reduced to writing. Those orders, discussed in more detail below, resulted in the oldest two children no longer having the status of children of the marriage, and the amount of child support was recalculated (in accordance with the Child Support Guidelines) due to the father's increased income.

[6] The father had paid spousal support and child support for the two youngest children of the marriage until January 2012, when he unilaterally terminated child support for Veronica, who was then 20 years of age. She had previously been a full time university student but had quit taking a full course load due to migraine headaches and stress induced health problems. Since 2011, her university has allowed her to take her program part time. Russell, born in 1994, attends post-secondary education at a reduced class load because of a learning disability.

[7] In June 2012, the father sought to terminate spousal support and sought determination of whether the two youngest children remained children of the marriage. At the hearing in August 2012, the mother raised the issue of quantum of child support and arrears for support including

section 7 expenses. No formal application had been filed requesting those matters but the chambers judge gave the parties time to attempt to work out those issues, failing which she would resolve them. They failed to do so and the chambers judge took the time to resolve the outstanding issues.

III. Decision of the Chambers Judge

[8] The chambers judge found the 21-year-old daughter remained a child of the marriage as long as she remained enrolled part time at the University of Calgary taking at least a minimum 40 percent course load or until she reached age 25. She also found the son will take longer than usual to complete his post-secondary education because of his learning disability and therefore, remains a child of the marriage as long as he is carrying a 40 percent course load until he completes his first degree or reaches the age of 24. There is no appeal from the finding with respect to the son.

[9] Arrears of child support, including section 7 expenses, from January 1, 2009 to August 31, 2012 were calculated at $48,609.00.

[10] The chambers judge ordered spousal support of $790.00 per month to continue until the mother reaches her 60th birthday, subject to a variation order on the basis of a significant change of circumstances.

IV. Grounds of Appeal

[11] The father appeals on the grounds the chambers judge erred in failing to properly consider the variation of spousal support, in accepting limited evidence of the daughter's inability to withdraw from the charge of her parents, and in ordering retroactive child support when the mother had not made a formal application and in the amount ordered, or in any event for a period in excess of three years from the date the mother filed her letter brief seeking recalculation.

V. Standard of Review

[12] The chambers judge's decision is discretionary. Unless the appellant shows the chambers judge made an error in principle, significantly misapprehended the evidence, or unless the award is clearly wrong, an appellate court will not intervene: *Hickey v Hickey*, [1999] 2 SCR 518 at paras 10-11, 240 NR 312.

VI. Decision

A. Spousal Support

[13] The appellant father argues that this was only a twelve-year marriage, and he has been paying support for the respondent mother for 18 years. He submits that support should end now that the children are adults. The respondent mother argues that this is a very unusual situation in that she had the four children to look after entirely on her own; and she and the children have had emotional

difficulties resulting, at least in part, from the marriage breakdown and the absence of the father. While she works part time, she argues that she has several medical conditions requiring extensive medication which interfere with her ability to earn. She submits her medical conditions are partially attributable to the marriage and prevented her from being able to pursue her career earlier.

[14] The starting point for determining spousal support is found in the *Divorce Act*, RSC 1985, c 27, section 15.2 which provides:

> 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
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> Interim order
> (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).
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> Terms and conditions
> (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
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> Factors
> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
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> (*a*) the length of time the spouses cohabited;
> (*b*) the functions performed by each spouse during cohabitation; and
> (*c*) any order, agreement or arrangement relating to support of either spouse.
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> Spousal misconduct
> (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

> Objectives of spousal support order
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
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> (*a*) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
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> (*b*) apportion between the 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;
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> (*c*) relieve any economic hardship of the 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 spouse within a reasonable period of time.

[15] The Supreme Court of Canada in *Moge v Moge*, [1992] 3 SCR 813, 99 DLR (4th) 456, provided directions for the interpretation of the four objectives. At para 52 the Court noted that all four of the objectives must be taken into account when awarding spousal support and no one objective is paramount. The Court stated at para77:

> The four objectives set out in the Act can be viewed as an attempt to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown. At the end of the day however, courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act.

[16] The question is one of balancing the factors and objectives. The chambers judge did just that. She was alive to the changed circumstances of each party before and since the marriage. She specifically noted the obligation to consider the factors under the *Divorce Act*, including the objective of self sufficiency.

[17] We agree that the spousal support advisory guidelines provide a useful tool in assessing spousal support. Normally, a long term spousal support order would not be granted for a 12 year marriage. This case is unusual, however, in the sense that the father played no role, apart from financial, in raising the four children. The father did not exercise any access to the children. As a result, this is a highly unusual situation where the mother has had total responsibility for the day to day care. Also, there was evidence the mother had been suffering from depression, diagnosed in 1986, and post traumatic stress disorder for some time. In addition the reports suggest she suffered

from GERD (gastroesophageal reflux disease) and inflammatory arthritis, with systemic lupus erythematosis recently diagnosed. She is on extensive medication.

[18] The father argued that the recent outbreak of lupus is unrelated to the marriage. The mother argues that in addition to the more recent ailments, the mother had been under a psychiatrist's care and suffered from anxiety, depression and post traumatic stress from an early date, which she alleges was in part attributable to the marriage. In addition, counsel argued that as a result of the strained relationship between the father and the children, particularly the older two, therapy and counselling were required for the children.

[19] The chambers judge assessed and took account of the relevant considerations under the *Divorce Act*. In particular, she noted that the mother has carried an extra burden as the sole caregiver for four children who have learning, emotional and physical disabilities. She found the sole care of the children impacted the mother's ability to make gains in employment or achieve retraining which directly affected her earning power. She also considered the objective of self sufficiency and concluded that spousal support should terminate at age 60.

[20] The order for spousal maintenance is a discretionary order, requiring deference by this court, absent an error in law or an unreasonable finding. We cannot say that the chambers judge erred in the unusual circumstances of this case. In arriving at our decision, we take into consideration that the amount of spousal support is not high and that it has not changed since the divorce.

[21] In the result, considering the standard of review, we cannot say that this discretionary order is wrong in law or unreasonable, and we dismiss this ground of appeal.

B. Child of the marriage

[22] Similarly, the chamber's judge did not err in accepting evidence adduced of the daughter Veronica's dependence and in concluding that she was still a child of the marriage. The chambers judge had evidence of Veronica's enrollment in University, her progress towards her degree, her work during summer breaks, and her medical condition. The chambers judge also directed that the two youngest children should be working during non-school time, with the right of the father to reapply if they are making no effort. We confirm that this finding requires that the mother and children keep the father informed of the details surrounding their employment during those times.

[23] Although it was not set out explicitly in the chambers judge's order, the daughter Veronica is expected to contribute to her section 7 costs. The chambers judge ordered the children to be employed during semester and summer breaks. She gave the father leave to reapply for reconsideration of the children as dependents if little or no effort was made by the children to work when they are not attending school. Thus, for the sake of clarification, it is clear the chambers judge viewed Veronica's continued support as dependant upon Veronica seeking employment in order to contribute to her costs as well as satisfactorily continuing her studies.

[24] In conclusion, the chambers judge did not err in principle and the standard of review prevents appellate interference with her finding that Veronica is a child of the marriage.

[25] We are concerned, however, with the lack of notice that appears to be a continual pattern of behaviour. Notice and information with respect to section 7 expenses appears to have been continually late, if it was given at all. Section 7 expenses appear to have been incurred without consultation or notice for many years. In particular, we note the fact that the father was not informed that the older daughter Ashley had not been attending university for over a year, despite the fact the father had been paying for her. Thus, we agree with the time limits imposed by the chambers judge relating to notice of section 7 expenses, and the requirement to provide information relating to university courses and their completion.

[26] During argument, the court was directed to evidence suggesting that notwithstanding Veronica is only required to take a 40 percent course load (about two courses per semester), she enrolled as a full time student with intentions to withdraw. The father was concerned that he was paying his share for a full time course load, including the courses that were later dropped with no refund to the father. In our view, however, the chambers judge was very clear that his obligation was limited to those taken with a minimum of a 40 percent course load. Thus, if full time fees were incurred for courses not taken, they are not to be paid by the father.

[27] The chambers judge carefully set out the type of section 7 expenses contemplated with respect to Veronica. She required notice of section 7 expenses be provided to the Director of Maintenance enforcement and the father no later than 30 days after the expense is incurred. For sake of clarity and to prevent unnecessary applications, failure to so file will result in forfeiture of the right to payment for those section 7 expenses. The father shall be notified by registered mail.

[28] In our view, there is no basis for appellate intervention in the finding that Veronica is a child of the marriage. Our additional directions are intended to help eliminate further conflict and avoid further court proceedings with respect to these issues.

C. Retroactive support

[29] The father argues that the retroactive support order should be set aside, or at the very least, reduced. The issue of retroactivity was canvassed by the Supreme Court of Canada in appeals from four cases from Alberta, namely *DBS v SRG*; *LJW v TAR; Henry v Henry; Hiemstra v Hiemstra*, 2006 SCC 37, [2006] 2 SCR 231. The majority of the Supreme Court set out the principles to consider when dealing with an application for retroactive support. In doing so, it noted at paras 131-135 that child support is a recognized obligation that parents owe to their children. This involves a shift in the child support paradigm from a need-based approach to a child's right to increased support payments given a parental rise in income. This means that parents will not have met their obligations if they do not increase their maintenance when their income increases significantly. At paras 133-134 the Court stated:

> In determining whether to make a retroactive award, a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his /her delay, the conduct of the payor parent, the circumstances of child, and the hardship the retroactive award might entail.
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> Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.

[30] While the Court accepted that generally the date when effective notice was given to the payor parent would be the date to which an award should be retroactive, it did, however, note at para 123 that once the recipient raises the issue of child support, the responsibility is not automatically fulfilled. Discussions should move forward and if they do not, legal action should be contemplated. The Court set out that it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor.

[31] The facts of this case are somewhat complicated due to a failure to enter the earlier 2008 orders. At that time, the father applied for an order seeking reimbursement of money paid for the second oldest child, Ashley, who had attained the age of majority and without the father's knowledge had not been attending post secondary school. In her reasons for judgment of November 19, 2008, Strekaf J. stated, "If Mr. Caldwell wished to challenge whether Ashley qualified as a 'child of the marriage' during the period of 2003 through 2005, he should have done so earlier instead of applying [sic] child support for her without objection and applying 3-5 years after the fact to recover back payments he made."

[32] In addition, Strekaf J. made a retroactive support order to account for the father's increase in income over the years. Unfortunately, the parties could not agree on the method of calculation to convert the father's income earned in United States dollars, and the order was never reduced to writing.

[33] The father argues, however, that each year by June 30, he provided his income tax returns, or W2(t-4), through counsel to the mother, and a calculation in accordance with his lawyer's advice to reflect the increase in his income and payments on the increased amounts were made at the beginning of each year. Meanwhile, the retroactive support under the 2008 order went unresolved. The father takes the view that he had made full disclosure and that from 2009 through 2012, the

mother never protested the quantum of section 3 support. Nor did she make an application to recalculate. While the parties could not settle the terms of the order, no steps were taken by the successful party ("the mother") to reduce the earlier order to writing or resolve the outstanding issues. The father says he assumed the mother was content and that this is not a case of bad faith. He had relied on advice in making what he thought were appropriate payments throughout.

[34] The father explained that his reason for making the current application relating to Veronica and Russell was not due to an unwillingness to pay for their support if they were in school, but due to a lack of proper information regarding Veronica's status at university, having regard to Justice Strekaf's earlier ruling which refused a return of his overpayment for his oldest daughter, Ashley. It was only when he brought this application did the mother write a letter and file an affidavit alleging that he was in arrears of $55,747 owing from January 2009 to August of 2012. Of those arrears, $15,340 related to section 7 expenses.

[35] The only information the father had received re section 7 expenses came in mid-2009 when he received three receipts for Veronica's tuition, and Russell's orthodontia and his extracurricular fencing enrollment. At that time, no income tax return for the mother was included so that the proportionate share could be calculated. Moreover, notwithstanding Justice Strekaf's directions to the mother to give notice of section 7 expenses, no other receipts were provided to the father for the $15,340 claimed. Justice Strekaf had stated:

> I find that there is less excuse for Ms. Caldwell's delay in seeking recovery for section 7 expenses going back to 2005, without evidence that the amounts were previously sought from Mr. Caldwell, as the information as to the nature and quantum of such expenses was solely within her knowledge. While I am prepared to permit recovery in this case, in the future such claims should either be raised with Mr. Caldwell on a prospective basis before they are incurred or be promptly disclosed to him.

[36] The father requested information regarding Veronica's attendance at school in mid-2011, when the demand for tuition was made, and again in January of 2012. He was advised in October 2011 that because of the death of a close friend, Veronica had not been attending full time for the entire 2011 year. He provided post-dated cheques for Veronica until February 2012, but sent no cheques for her after that. He was advised in late February 2012 that she was enrolled in three courses for the winter term, and her transcripts and record were provided on August 2012.

[37] The chambers judge ordered that Veronica's section 7 expenses should be paid, notwithstanding that she had withdrawn from half of her 10 classes since the fall of 2010. The father was ordered to pay full educational expenses for those four terms. In addition, following the hearing, the mother's counsel sent the daughter's full tuition expense but noted that she was going to be dropping some courses. Upon further inquiry by the court, the mother's counsel was directed to advise what the part time fees would be and prove that Veronica was actually attending so that the

father would only be paying his share of the part time fees. To date, counsel advises no such information has been received.

[38] When the issues of the appropriate section 3 and section 7 expenses were raised for the first time at the hearing, as already noted, the chambers judge gave the parties time to deal with these, failing which she would deal with all outstanding issues.

[39] The father argues that the order of retroactivity should not have gone back prior to the notice, and, in any event, not earlier than three years. He has paid support for the mother and the children for the last 18 years to date. Following the 2008 hearing, he sent his counsel his tax returns and asked what he should be paying. He was advised by his counsel and made his payments regularly, without any objection being taken over those three years. Moreover, despite Justice Strekaf's admonition that he was to receive notice of section 7 expenses, he still did not receive notice of the majority of those claimed expenses.

[40] The major points of disagreement relating to section 3 amounts dealt with tax treatment and conversion from American to Canadian currency. Counsel for the wife argued that the disagreement was known because of the earlier disagreements relating to settlement of the Strekaf J. order.

[41] We agree with the chambers judge that she was certainly entitled to deal with the issue of retroactivity despite the lack of formal application, and we applaud her efforts at sorting out this contentious matter. The chambers judge gave few reasons for her decision to order retroactive support and no reasons why she was going beyond the three year period. Her reasons seemed to indicate that the outstanding issues should not have been difficult to resolve. She found that child support had been the subject of two orders in 2008 and the father knew arrears were accruing.

[42] She did not, however, consider and address the length of the period for retroactive support having regard to all of the circumstances, including the failure to give the notice of section 7 expenses as specifically directed by the earlier chambers judge.

[43] The issue of the increase in the section 3 retroactive awards deals with the parental obligation to support one's children . As the Supreme Court of Canada noted in *DBS v SRG* at para 2, where an order to pay what, in hindsight , should have been paid implicates the "delicate balance between certainty and flexibility in this area of he law." At para 6, the majority of the Court stated:

> Courts must be open to ordering retroactive support where fairness to children dictates it, but should also be mindful of the certainty that fairness to payor parents often demands. *It is only after a detailed examination of the facts in a particular case that the appropriateness of a retroactive award can be evaluated.*
>
> (Emphasis added)

[44] The claimed section 7 expenses here are, on the other hand, a claim for enforcement of an existing order and we note that the husband properly takes no issue with paying the section 7 expenses ordered.

[45] In our view, this is a case where all of the circumstances should have been examined when ordering retroactivity. Having regard to the totality of this case, and the total failure to have this matter determined in a timely manner, we are of the view that the award of retroactivity is too long. We say this for several reasons.

[46] First, while this is a case where the parties were aware of the issue, and the issue could have been easily resolved, the fault of that failure to determine process and amount does not lie solely with the father. The mother was successful in the 2008 application. As counsel for the mother acknowledged during argument, "I take my share of blame of that but it wasn't all my fault". We agree. Some of the blame must rest with the mother. Had she applied to resolve the terms of the earlier order, that order could have solved the issues relating to calculation, and would have gone a long way to prevent the need for the impugned retroactive order because the formula would have been determined. Of course, the father could also have applied to settle the earlier order, and that too must be considered.

[47] Second, the father had been sending his income tax results to his lawyer for advice and paying on the basis of her advice. While counsel's position on the conversion issues was not accepted, one cannot find that the father was not acting in bad faith in paying based on the advice of his lawyer.

[48] Third, if the mother was discontent with the increased payments the father was making, she could have taken out an application much earlier than occurred here. As suggested in *DBS,* the formal application, while not determinative, is important.

[49] Fourth, notwithstanding Justice Strekaf's clear oral direction to the mother to forward section 7 expenses on a timely basis, with a few exceptions, that was not done.

[50] Fifth, the father had paid both section 3 and section 7 expenses for over a year for the older daughter, Ashley, when she was over 18 and unbeknownst to the father was not attending school. Although Justice Strekaf recognized the problem, she refused to order that money already paid to the mother be returned to the father due to the hardship that it would create for the mother. Nonetheless, this overpayment is a valid consideration here.

[51] In summary, a full examination of the circumstances here leads us to conclude that an adjustment should be made.

[52] In our view, it would be appropriate to set aside the award of any retroactive section 7 expenses for which notice had not been given as that seemed to be the intent of Justice Strekaf's reasons. We note, however, that the father is willing to pay those expenses and they were expenses

that have been incurred. As a result, we do not interfere with the retroactive order relating to section 7 expenses.

[53] In our view, however, both parties are at fault for what has occurred with the section 3 underpayment. As a result, and in the consideration of the reasons as set out above, we reduce the father's section 3 payments to one and a half years retroactive. Thus, instead of owing $34,533 from January 1, 2009 to August 31, 2012, we calculate the retroactive section 3 support from March 1, 2011 to August 31, 2012 to be $13,435.

VII. Conclusion

[54] The appeal is allowed in part. In view of our decision, we direct that each party bear their own costs.

Appeal heard on June 10, 2013

Memorandum filed at Calgary, Alberta
this 23rd day of July, 2013

Conrad J.A.

Authorized to sign for: Berger J.A.

O'Ferrall J.A.

Appearances:

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