"If I knew then what I know now . . ."

Varying Spousal Support

Rosemarie Boll

When L.M.P. (I will call her Lisa) married L.S. (I will call him Leonard) in 1988, she was a 23-year-old cosmetics company representative and he was a 27-year-old lawyer. A year later, she was diagnosed with multiple sclerosis. She stopped working and began receiving permanent disability benefits. When they divorced in 2003, they had two children, Lisa was still on disability and Leonard earned about $165,000 per year. They signed an Agreement on spousal support – Leonard would pay Lisa $3,688 per month with no set time limit. This Agreement later became part of a court order. Four years later Lisa wanted more child support, and Leonard cross-applied to reduce spousal support. When Leonard succeeded, Lisa appealed to the Supreme Court of Canada. (SCC)[1]

Meanwhile, another case was winding its way through court. R. P. ('Ruth') married R.C. ('Robert') in 1958. Ruth was 10 years older than Robert, and like most wives of the time, Ruth stayed

home and raised two children. They divorced 25 years later, and Robert didn't oppose an order to pay monthly child and spousal support totalling about $2,000. When the kids moved out, Ruth still needed the money – it was clear she could never earn enough to support herself. The court granted her application for more money, but Robert was dissatisfied and appealed to the Supreme Court of Canada.[2]

When two cases have different facts but raise the same legal issues, the SCC regularly hears them together. Here, the common issue was the interpretation of Section 17 of the *Divorce Act*. Section 17 has two parts – when is a spouse entitled to apply for a variation? And how does the court decide what the new order should say? The SCC also had to decide if there was a difference between varying a 'regular' order, and varying an order based on an Agreement.

A spouse can apply for a variation only when there has been a ***material*** change in one of their circumstances since the prior order. Not every change is a material change. The test is: if we knew then what we know now, would the order have been different?

1. Entitlement to apply – Section 17(4.1) Factors

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2. What should the new order say? – Section 17(7) Objectives

The variation order should:

(a) recognize any economic advantages or disadvantages arising from the marriage or its breakdown;
(b) apportion the financial consequences arising from the care of any child of the marriage;
(c) relieve any economic hardship arising from the marriage breakdown; and
(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable time.

3. The Result

Both husbands lost in the Supreme Court of Canada.

4. Insufficient Evidence

Neither husband could meet the Section 17(4.1) requirement – both of them lacked the evidence needed to prove that there had been a material change in circumstances.

Leonard and Lisa – When they divorced, Leonard *agreed* that his wife had MS and couldn't work. He had helped her get disability, pension, and tax benefits. When he applied to vary the order,

he didn't produce *any* evidence that showed that Lisa's condition had improved. There was no change in her circumstances, let alone a material one. Leonard couldn't turn around five years later and simply change his mind about Lisa's employability.

Rita and Robert – Robert's application was based on three changes in his own circumstances. He had retired several years earlier, the downturn in the economy had had a negative impact on his investments, and his son from a second marriage needed money to go to university. The SCC found two fatal flaws in Robert's case. First, he didn't produce any evidence about his finances at the time of the initial order. It's impossible to measure a change without knowing the starting point. Second, it was common knowledge that stock markets went down in 2008, but Robert didn't prove that he had sold any investments or actually lost any money. Markets go down, markets go up. Market fluctuations mean nothing unless they have a concrete and lasting impact on an applicant's finances.

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5. The Law

The majority of the SCC judges (two disagreed) said initial applications (Section 15.2(4)(c)) are different from variation applications (Section 17). On an initial application, the judge *must* consider any Agreement the parties reached. On a variation application, there is only *one* factor – material change. Whether or not a prior Agreement existed is irrelevant. In other words, the same standard applies to all variation cases, no matter how the initial order came about.

Conclusion

Evidence is key in every step in a divorce. Initial orders must be founded on detailed, unambiguous evidence. Variation applications need solid, reliable evidence to prove a material change in circumstances. Be thorough and precise, or be prepared to lose.

Notes

1 *L.M.P. v. L.S.*, 2011 SCC 64

2 *R.P. v. R.C.*, 2011 SCC 65

Rosemarie Boll is Staff Counsel with the Family Law Office of Legal Aid Alberta in Edmonton, Alberta.