
CANADA / JUDGMENT

Forster v. Forster

2020 BCSC 2212

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 2212 Forster v. Forster

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Forster v. Forster,

2020 BCSC 2212

Date: 20201204

Docket: E041616

Registry: Vancouver

Between:

Morag Douglas Forster

Claimant

And

Bradley Burton Forster

Respondent

Before: The Honourable Mr. Justice Basran

Oral Reasons for Judgment

Counsel for Claimant:

G. Lang

Counsel for Respondent:

P. Daykin, Q.C.

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 4, 2020

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Overview

- [1] Dr. Forster applies to stop paying spousal support to his former spouse, Mrs. Forster. He retired from practising dentistry on October 8, 2020.

- [2] On March 1, 2005, after their 22 year relationship ended, the parties entered into a Separation Agreement (the "Agreement"). The Agreement included:
- a) an equal division of their \$3.85 million in family property; and
 - b) spousal support of \$15,000 per month payable to Mrs. Forster, subject to review on the occurrence of several prescribed events including Dr. Forster's retirement.
- [3] The issues to be determined are:
- a) what amount of spousal support was payable from August 1, 2019 to October 8, 2020; and
 - b) whether Mrs. Forster is entitled to spousal support after Dr. Forster's retirement.
- [4] For the reasons that follow, I have concluded that Dr. Forster should have paid \$15,000 per month until he retired but that his retirement ends his obligation to pay further spousal support.

Relationship History

- [5] Dr. Forster was born on May 16, 1955 and is currently 65 years old. Mrs. Forster was born on November 27, 1957. She is 63 years old.
- [6] The parties married on May 17, 1980, separated on October 27, 2002, and divorced on April 25, 2005. They were 25 and 22 years old when they married and 47 and 44 when they separated. They have two grown children who live independently.
- [7] Until his recent retirement on October 8, 2020, Dr. Forster was a dental surgeon. He owned his own practice until 2018 when he sold it to Dr. Richard Chau.
- [8] Prior to their marriage, Mrs. Forster worked at an accounting firm and obtained a bookkeeping certificate. She has no further post-secondary education.
- [9] Aside from some limited work as Dr. Forster's office manager, Mrs. Forster did not work outside the home during their marriage. As a stay at home mother, she was primarily responsible for raising the couple's two daughters.

The Separation Agreement

- [10] Clause 9 of the Agreement requires that Dr. Forster pay \$15,000 per month in spousal support to Mrs. Forster. This is subject to review on the occurrence of several events including a decrease in Dr. Forster's billings of no less than 40% of \$1.7 million for any fiscal period ending April 30th.
- [11] Clause 11 of the Agreement anticipated Dr. Forster's retirement. It states:

11. The Parties acknowledge and agree that it is contemplated by them at this time that the Husband may retire or semi-retire some time after seven (7) years from the date of this Agreement and that if he chooses to do so that he shall be at liberty to make an application (to vary spousal support pursuant to the relevant provisions of the Divorce Act), it being agreed and understood by the parties that such an occurrence would constitute a material change of circumstances. (emphasis added)
- [12] The Agreement also provided for an equal division of the parties' assets such that each of them received net assets of \$1,924,600. Dr. Forster was required to pay child support of \$6,000 per month for the period when both children were eligible for this support and \$4,500 per month when one of them remained so eligible. He also paid all of their special and extraordinary expenses.
- [13] The terms of the Agreement were incorporated into a divorce order dated April 25, 2005.

Relevant Post-Separation Events

- [14] Aside from a short period after their separation, the children who were 12 and 10 lived with Mrs. Forster full-time and she was their primary caregiver.
- [15] Dr. Forster continued working and subsequently remarried.
- [16] There is no evidence that Mrs. Forster sought work or undertook further training or education following the parties' separation in 2002.
- [17] As expected, Dr. Forster fully complied with his child support obligations under the Agreement. He also paid spousal support of \$15,000 per month to Mrs. Forster from March 1, 2005 to July 2019. At that time, the parties agreed, on a without prejudice basis, that Dr. Forster could reduce his spousal support payments to \$10,000 per month. The parties disagree on the duration of this agreement. Dr. Forster asserts that they agreed to this reduction pending a further agreement on the reduction or elimination of spousal support payments. Mrs. Forster believes that the reduction was only for the month of August 2019 and that the parties intended to either agree to future spousal support payments or apply to court for a variation of spousal support in September 2019.

Sale of Dr. Forster's Practice

- [18] In August 2016, Dr. Forster advised Mrs. Forster that he intended to sell his dental practice, work during a transitional period after the sale, and retire thereafter.
- [19] On July 17, 2018, Dr. Forster sold his practice to Dr. Chau. As part of the conditions of sale, and to facilitate the transition, Dr. Forster agreed to work for Dr. Chau for two years as an associate with the option of reducing his hours by 50% in the second year of this term.
- [20] On July 9, 2019, Dr. Forster notified Mrs. Forster of the sale of his practice, his plan to semi-retire on August 13, 2019 and fully retire on August 13, 2020.

- [21] Dr. Chau's dental office shut down from March to June 2020 due to COVID- 19. Accordingly, from January to June 2020, Dr. Forster, through his company, received income of \$19,671, \$38,172, 0, 0, 0 and \$24,152 for each of these months, respectively.
- [22] In order to comply with his contractual obligations to Dr. Chau, Dr. Forster continued working until October 8, 2020 to account for the period of time lost due to the COVID-19 shut down.
- [23] Dr. Forster fully retired on October 8, 2020.

Mrs. Forster's Illness

- [24] In the summer of 2016, Mrs. Forster was diagnosed with colorectal cancer. She underwent treatment that included radiation, chemotherapy and surgery.
- [25] On July 7, 2019, Mrs. Forster underwent a second cancer surgery. She remained in hospital until November 25, 2019 due to complications from this surgery.

Current Financial Circumstances

Dr. Forster's Assets and Income

- [26] Dr. Forster's asset base has grown considerably since separation. He has approximately \$7.25 million in net assets, excluding vehicles. He attributes the growth in his assets to market forces, savings, and blending assets with his wife. His assets include a condominium in North Vancouver that he and his wife live in as well as a vacation property that together are worth approximately \$2 million.
- [27] Following his retirement, Dr. Forster expects to earn approximately \$160,000 per year in investment income from \$4.37 million in invested assets. He also has approximately \$410,000 in cash assets

Mrs. Forster's Assets and Income

- [28] Mrs. Forster owns net assets of approximately \$4.05 million, not including her vehicle. This includes a condominium in Vancouver and a vacation property that together are worth approximately \$2,276,000. She has invested assets of approximately \$1.36 million and about \$419,000 in cash assets.
- [29] Applying the same rate of return assumed by Dr. Forster to Mrs. Forster's invested assets, 3.7%, she would receive approximately \$50,320 per year in investment income.
- [30] In 2017, Mrs. Forster gifted \$242,529 to one of her daughters.

What amount of spousal support was payable from August 1, 2019 to October 1, 2020?

- [31] On July 30, 2019, the parties agreed, on a without prejudice basis, to reduce the amount paid by Dr. Forster for spousal support to \$10,000. They disagree on the intended duration of this reduction. Commencing August 1, 2019 to November 1, 2020, Dr. Forster paid spousal support of \$10,000 per month.
- [32] On June 24, 2020, Mrs. Forster advised Dr. Forster that she would not agree to a further reduction in spousal support to \$5,000 per month and would be seeking retroactive spousal support of \$15,000 per month from August 2019 forward.

Position of the Parties

- [33] Dr. Forster submits that he gave appropriate notice to Mrs. Forster of his intention to semi-retire. He expected his income would decrease and correspondingly believed that his spousal support obligations should reduce to \$10,000 per month.
- [34] Mrs. Forster acknowledges receipt of the August 2016 letter in which he described his retirement plans. In that same year, she received a diagnosis of colorectal cancer and underwent extensive treatment.
- [35] In July 2019, when Dr. Forster advised Mrs. Forster that he had sold his practice, she was hospitalized for a second cancer surgery and was not able to challenge the reduction of spousal support to \$10,000 per month. However, she asserts that this reduction was only to be for the month of August 2019 and the parties were supposed to review the quantum of spousal support to be paid in September 2019. Mrs. Forster asserts that Dr. Forster breached the spousal support order by paying only \$10,000 per month from August 2019 to October 1, 2020 instead of the \$15,000 per month amount set out in the Agreement.

Findings of Fact and Analysis

- [36] Dr. Forster's July 13, 2020 Form 8 financial statement discloses total income of \$506,364. This amount is based on the income he reported on his 2019 income tax return. Information on his 2020 income is incomplete because he only provided monthly income for January to June of this year that included three months of zero income during the COVID shutdown. He did not provide income information in respect of July to September of 2020.
- [37] Based on the information disclosed in Dr. Forster's most recent Form 8 financial statement, I am not satisfied that his income decreased in 2019 and 2020. The companies he controls earned substantial pre-tax corporate income in 2018 and 2019, largely from the sale of his dental practice and the building in which it took place. These sales added to his asset base, which is approximately \$7.5 million. While he may have earned less employment income in 2019 and 2020, I am not satisfied that his total income decreased in a manner that warrants a reduction of his spousal support obligations in the period leading to his retirement.

[38] The July 2019 agreement to reduce spousal support was made on a without prejudice basis. Whether it was intended to last for only the month of August 2019 or until a subsequent agreement or order of the Court is therefore immaterial. In my view, Dr. Forster was required to continue paying spousal support at a rate of \$15,000 per month until he retired because the evidence of his income in 2019 and 2020 does not support a reduction of this amount. He was therefore required to pay \$15,000 per month from August 1, 2019 to September 1, 2020 and $\frac{1}{4}$ of this amount, \$3,750, for October 2020.

Is Mrs. Forster entitled to spousal support after Dr. Forster's retirement?

Relevant Legal Principles

[39] The spousal support order was made pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] so it applies to this application.

[40] The variation of spousal support orders is governed by s. 17 of the DA.

[41] Section 17(1) of the DA permits the court to vary, rescind or suspend, a spousal support order prospectively or retroactively.

[42] Section 17(4.1) of the DA sets out the factors the Court must consider in varying a spousal support order:

Factors for spousal support order

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[43] Section 17(7) of the DA sets out the objectives of a variation of a spousal support order:

Objectives of variation order varying spousal support order

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

- [44] The legal entitlement to spousal support can be based on compensatory or non-compensatory principles. It can also be contractual: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 25.
- [45] Compensatory support "is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse": *Chutter v. Chutter*, 2008 BCCA 507 at para. 50.
- [46] Non-compensatory spousal support is based on "the 'social obligation model' of marriage in which marriage is seen as an interdependent union" or a "joint endeavour" such that "the default presumption of this socioeconomic partnership is mutuality and interdependence": *Chutter* at para. 54 and *Bracklow* at para. 20.
- [47] The court must consider compensatory factors as well as the means and needs of the parties then apply the relevant factors and strike a balance that best achieves justice: *Bracklow* para. 32. Need is therefore only one of several factors a court must take into account in determining if a spousal support order is required: *Bracklow* at para. 54.
- [48] Self-sufficiency is a relative concept "informed by the standard of living previously enjoyed by the parties": *Chutter* at para. 56.
- [49] "the DA promotes the objective of economic self-sufficiency only if it is practicable to do so and where the objective can be realized 'within a reasonable period of time'": *Fisher v. Fisher*, 2008 ONCA 11 at para. 52
- [50] The Court of Appeal has "repeatedly observed that after a long marriage, spouses should have approximately the same standard of living upon separation without unreasonably encroaching on capital": *Nicholl v. Nicholl*, 2020 BCCA 173 at para. 49 citing *McKenzie v. McKenzie*, 2014 BCCA 381 at para. 108; *Bell v. Bell*, 2009 BCCA 280; and *Chutter*.
- [51] Where a corporation is owned and controlled by the payor spouse, there is a presumption that pre-tax corporate income will be available to a payor in the absence of evidence to the contrary: *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-52.

Positions of the Parties

- [52] Dr. Forster asserts that the compensatory objective of spousal support has been achieved because Mrs. Forster received half the value of his dental practice when they divorced and a share of his professional income via spousal support since then. He also points out that Mrs. Forster has not provided any evidence to support the assertion that she is entitled to further compensatory spousal support.
- [53] On non-compensatory spousal support, Dr. Forster believes that Mrs. Forster is entirely capable of supporting herself, in a manner akin to their marital standard of living, with her own resources. Her assets include a condominium and vacation property that are unencumbered as well as investments and savings of approximately \$1.7 million. Dr. Forster

suggests that her investment base would be \$243,000 higher had she not gifted this amount to her daughter but that in any event, she is able to meet her monthly expenses based on income from her investments.

- [54] While acknowledging that he has a larger asset base than Mrs. Forster, Dr. Forster thinks this is because of his own hard work, savings and the merger of his assets with those of his wife. He does not believe that Mrs. Forster's failure to work over the past 15 years should be rewarded with a subsequent division of his assets.
- [55] Alternatively, Dr. Forster suggests that if spousal support is not terminated immediately, it should be paid on a transitional basis for one year at the rate of \$5,000 per month. He bases this amount on his estimated retirement income of \$160,000 per year that is used to support him and his wife, and an imputation of approximately \$3,000 of monthly income to Mrs. Forster based on the lack of evidence of her efforts to become self sufficient.
- [56] Mrs. Forster believes that she should permanently receive \$15,000 per month in spousal support. She asserts that her circumstances are analogous to those in *Story v. Story* (1989), 42 B.C.L.R. (2d) 21 (B.C.C.A.). In that case, Mrs. Story was 20 years old at the date of marriage. She had worked as a postal clerk and secretary for a short time before the marriage but did not work during it. By mutual agreement with her husband, she remained at home to raise their children. At the date of divorce, she had not worked for 20 years and therefore had minimal employment skills and experience. The Court of Appeal found that it was not practicable to expect Mrs. Story to become self sufficient because of her diagnosed mental illness, lack of experience and training, and long absence from the workforce. The breakdown of the marriage left Mrs. Story "seriously disadvantaged economically" (para. 36) and led to an indefinite "substantial economic hardship" (para. 37).
- [57] In commenting on the relationship between economic dependency and obligations arising from marriage, Justice Proudfoot observed:
- [81] There may be cases where self-sufficiency is never possible due to the age of the spouse at the marriage breakdown. It is often, in my opinion, totally unrealistic to expect that a 45 or 50-year-old spouse who has not been in the job market for many, many years to be retrained and to compete for employment in a job market where younger women have difficulty becoming employed. Employment and self-sufficiency are simply not achievable. In those cases, the obligation to support must surely be considered to be permanent. That obligation must flow from the marriage relationship and the expectations the parties had when they married.
- [58] In the circumstances of that case, Justice Proudfoot concluded that the obligation to provide permanent spousal support arose from the marriage relationship, the economic dependency when it broke down, and because economic self-sufficiency was not attainable: para. 82 *Story*. Mrs. Forster argues similarly and believes that it is not practicable for her to become economically self-sufficient.

- [59] Mrs. Forster contends that Dr. Forster has understated his income because he had substantial pre-tax corporate income in 2018 and 2019. These were the years in which he received payments from Dr. Chau in respect of the sale of his dental practice and the building in which it took place. It is her view that this income suggests that his income will be much higher than \$160,000 during his retirement because he will continue to receive passive sources of income from the incorporated entities he controls.

Findings of Fact and Analysis

- [60] I am satisfied that Dr. Forster is entitled to a review of the spousal support order. Clause 11 of the Agreement provides that his retirement will be a material change that will enable a review of spousal support. Dr. Forster could have triggered this clause in 2012, seven years after the parties entered into the Agreement, but instead, he chose to continue working full time until 2019 then part-time until his retirement in October 2020. Dr. Forster turned 65 earlier this year. I am satisfied that this is both a reasonable retirement age and one that was entirely foreseeable.
- [61] In considering the condition, means and needs of Mrs. Forster since the Agreement, she will have received spousal support of \$15,000 per month for over 15.5 years. I am satisfied that these amounts served to recognize the advantages that Dr. Forster received during the 22 year marriage, most importantly the opportunity to complete his professional training and devote himself to a career in dental surgery. Correspondingly, the spousal support order in the Agreement recognized the disadvantages suffered by Mrs. Forster from the marriage breakdown and the consequences arising from her role as the primary caregiver to the couple's two children. This order also ensured that Mrs. Forster did not sustain any economic hardship as a consequence of the marriage.
- [62] Mrs. Forster led no evidence whatsoever of her efforts to become self-sufficient. The Court is unable to determine if she pursued further vocational training or other post-secondary education, upgraded her bookkeeping or office management skills, or applied for part-time work while the children were young or full-time work when they were older. It is possible that she would have been unable to find work that accommodated her needs but in the absence of evidence of her attempts to obtain employment, I cannot make this determination. It is also possible that she could have earned some income, and generated some savings, that would have contributed to the funds available to her at retirement. Mrs. Forster provided none of this information to the Court. I am unable to determine if it is practicable for Mrs. Forster to become self-sufficient because she did not provide any evidence on this issue. I must therefore conclude that over the past 15 years, Mrs. Forster could have taken steps to become self-sufficient but chose not to do so.
- [63] Mrs. Forster's circumstances are not analogous to those in *Story* because the spousal support she received ensured that she was not seriously disadvantaged economically and would not suffer indefinite economic hardship. Presumably, she used these funds to accumulate the substantial assets she has at her disposal, including investment and cash

assets of approximately \$1.7 million in addition to her unencumbered condominium and vacation property. There is also no evidence to suggest that she suffered from a health issue that prevented her from working from the date of separation until 2016, when she received a cancer diagnosis.

- [64] I accept that there are cases where self-sufficiency may be impossible but in the absence of relevant evidence, I cannot make this determination. In *Bredenkamp v. Bredenkamp*, 2020 BCSC 730 at para. 62 and 63, this court terminated spousal support because the evidence showed that the recipient made very little effort towards becoming self-sufficient and instead travelled extensively and for long periods of time. In *Cramer v. Cramer*, 2000 BCCA 272, the Court of Appeal terminated spousal support in circumstances where the recipient had not pursued retraining or employment and used her resources imprudently. In those cases, there was some evidence of the spousal support recipient's activities in the years between the onset of spousal support and the application to terminate it. In this matter, I am unable to determine if Mrs. Forster could have become economically self-sufficient or if it was not practicable for her to do so, because of her failure to adduce any evidence on this issue.
- [65] I am satisfied that the parties have comparable standards of living, equivalent to the one they enjoyed during their marriage. Both live in condominiums in the Vancouver area and each has a vacation property. These real estate holdings are almost entirely unencumbered. Dr. and Mrs. Forster have sufficient assets to generate enough retirement income to meet their monthly expenses. Dr. Forster's income is undoubtedly higher but this amount supports him and his wife. It is also a consequence of the investment decisions and savings he has generated since separation.
- [66] At separation, Dr. and Mrs. Forster equally divided their assets, including the value of his dental practice. Mrs. Forster is not entitled to a second division of assets based solely on the fact that his current assets are higher than hers are and in the absence of any evidence regarding her efforts to become self-sufficient.
- [67] I am not satisfied that a transitional period is appropriate or necessary in the circumstances of this case. Mrs. Forster knew in 2005 that pursuant to the Agreement, spousal support could have been reviewed as early as 2012. In 2016, Dr. Forster told her that he intended to sell his practice and eventually retire. By 2019, he advised her that he had sold his practice and set a retirement date in 2020. Mrs. Forster had substantial notice of Dr. Forster's intention to retire. Moreover, the Agreement contemplated this foreseeable and reasonable eventuality. In my view, she had ample time to prepare for this inevitability. The rationale for a transitional period, described *Lee v. Lee*, 2014 BCCA 383, does not apply in circumstances where over four years notice was given, the payor spouse is approaching a reasonable retirement age, the recipient spouse received sufficient spousal support for over 15 years, and she provided no evidence of her efforts to become self-sufficient.

[68] In my view, terminating spousal support as of the date of Dr. Forster's retirement properly balances the interests of justice by considering the circumstances of this case in relation to the relevant factors and balancing compensatory considerations with the means and needs of the parties.

Conclusion

[69] Dr. Forster should have paid \$15,000 per month in spousal support from August 1, 2019 to September 2020 and $\frac{1}{4}$ of this amount, \$3,750, for October 2020. He must pay Mrs. Forster the difference between these amounts and the \$10,000 per month that he paid.

[70] Mrs. Forster is not entitled to spousal support as of the date of Dr. Forster's retirement, October 8, 2020.

Costs

[71] If the parties wish to file submissions on costs, they must do so by December 11, 2021. If no submissions are received, the parties shall each bear their own costs.

"Basran, J."

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