

CANADA / JUDGMENT

Hayes-Holgate v. Hayes-Holgate

2000 BCSC 1156

COURT

Supreme Court of British Columbia

DECIDED

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2000 BCSC 1156

Citation: Hayes-Holgate v. Hayes-Holgate Date:

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2000 BCSC 1156 Docket:

E001163

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CHRISTINE HAYES-HOLGATE
PLAINTIFF

AND:

DEREK EDWARD HAYES-HOLGATE
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE madam JUSTICE boyd

(IN CHAMBERS)

Counsel for the Plaintiff: R. Taylor

Counsel for the Defendant: K. Fong

Date and Place of Hearing: Vancouver, BC

July 4, 2000

Introduction:

[1] While the parties have been divorced for a number of years, I will refer to them throughout as "husband" and "wife". The husband applies for several orders:

- (1) cancellation of the Order of Dillon J., requiring that he pays spousal support of \$900 per month;
 - (2) cancellation or reduction of outstanding arrears of spousal support;
 - (3) the discharge of any attachment order on the defendant's wages;
 - (4) an order entitling the defendant to payment out of certain funds held in Court; and finally,
 - (5) a lump sum payment from the plaintiff to compensate for her failure to provide him with his share of the household contents or to share in the family debts.
- [2] The wife opposes each ground of relief sought and seeks a dismissal of the entire application.

Background Facts:

- [3] The husband is 63 years of age. The wife is approximately 61 years of age. They were married in England in 1962. They were married for 34 years and separated in April 1993. This was a traditional marriage in which the wife assumed the role of full-time homemaker, managing the home and raising the parties' three children. In the early 1980's the wife worked at the jewellery department in Eaton's Store for approximately two years at an hourly rate of \$4.00. She says the interest rates were high and the family was in "dire financial need". Although it is not entirely clear, it appears that in the latter years of the marriage she worked for approximately 3 1/2 years as a Community Home Support Services careworker. She apparently worked with rape victims and individuals suffering cancer. The work was extremely emotionally stressful and she eventually quit.
- [4] She was apparently involved in a motor vehicle accident in August 1994 and thereafter suffered what is described as "total body pain". She now suffers from fibromyalgia and is unable to work. The husband has produced a medical legal report authored by a Dr. Malone dated November 1998. In that report Dr. Malone opines it is highly unlikely the motor vehicle accident caused the injuries and he concludes she has no significant disability and should be able to pursue "any activity that interests her". The wife insists she is physically unable to work although there is no evidence to support her statement. I find nevertheless that given her age and her physical complaints, any prospect of employment is very likely unrealistic.
- [5] The parties were divorced in October 1996, at which time Rowan J. ordered that the husband pay the wife spousal maintenance in an amount equal to the first and second mortgages on the matrimonial home in Qualicum Beach, B.C. It was further ordered that the husband's employment pension would be divided in accordance with Part 3.1 of the Family Relations Act. The Order further provided that upon the sale of the home (ordered September 1996), the husband would thereafter pay spousal support of \$1000 per month. The earlier September Order also provided that from the sale proceeds, the parties would satisfy the real estate commission, outstanding municipal taxes and rates as well as the first and second

mortgages. It was also ordered by consent that the husband would pay the wife \$90,000 and that any net proceeds of sale would be paid to the husband.

- [6] Since the time those orders were made, both the matrimonial home and the parties' Burnaby townhouse have been sold, with no equity remaining. The anticipated equity of \$90,000 which it was expected would be available on the Qualicum Beach property was never available and accordingly, no such funds have been paid out to the wife. The Burnaby townhouse was ultimately sold by way of foreclosure, again with no remaining equity for division.
- [7] At the time the September 1996 Consent Order was made, the assessed value of the Qualicum Beach property was \$250,000 with a mortgage balance of \$130,000. The Burnaby property on Belfriar Drive was valued at \$180,000 with a mortgage balance of \$115,000.
- [8] The husband says that at the time the October 1996 Order was made, his understanding was that while he was to make payment on the two mortgages on the Qualicum Beach property, it was the wife who was to pay the taxes and all other expenses as she resided there. The Order itself is silent on this matter. The 1996 Notice of Real Property Tax levies indicates that as of July 1996, the outstanding taxes stood at \$6,173. Without informing him, the husband says the Royal Bank paid off the property taxes and then increased the amount of the mortgage from \$1,300 per month to \$1,900 per month. He says that such payments were beyond his means, that the mortgage thus went into foreclosure and that the entire property was eventually lost to foreclosure. The husband suffered a heart attack in November 1997 and was off work for several months.
- [9] The parties appeared before Shabbits J. on March 2, 1998 on the husband's application to vary the spousal maintenance order. The Court ordered that the husband pay spousal maintenance of \$900 per month and further that the issue of maintenance would be dealt with at the time of the resolution of the property matters.
- [10] Notwithstanding the foreclosure, the wife apparently remained on at the Qualicum property until it was sold in May 1999. It was sold for approximately \$162,000 with no remaining equity. The outstanding loan on the property nevertheless survives the sale and stands at approximately \$7,000. The husband faces collection proceedings arising from that debt.
- [11] On November 23, 1998, Dillon J. addressed the matter and ordered that the Burnaby property be sold and that the husband continue to pay spousal maintenance of \$900 per month. Up to this point, the husband had rented out the Burnaby property, which rental covered the first mortgage on the Qualicum Beach property. There is an issue as to whether the wife harassed the tenant and caused her to move out, thereby resulting in a loss of rental income and a consequential inability to cover the Qualicum Beach mortgage. I am unable to resolve that issue here. The husband says that after the tenant left, he moved in to prevent the wife from doing so herself.

- [12] In any case, the Burnaby property was eventually foreclosed and sold, with no remaining equity. The husband says that he has covered all costs in connection with that condominium—the outstanding maintenance fee arrears of some \$550, the BC Hydro bills totalling \$277.75, and the second mortgage payments to Beneficial Realty totalling some \$12,614 from separation until September 1999 when the property was sold.
- [13] In May 1999, the husband applied to vary spousal maintenance. He also sought permission to obtain his share of the household possessions from the Qualicum Beach home. Shabbits J. ordered that the husband had the right to attend at the Qualicum Beach property to obtain possession of the items listed on pages 2 and 3 of the Order dated September 5, 1996. As to the application to vary spousal maintenance, Shabbits J. rejected the suggestion that there had been any change of circumstances since the date of Dillon J.'s Order made November 23, 1998. As he noted:

...I do not see that any circumstances have changed since November of 1998. Matters at the moment rest as they are, pending sale of the Burnaby townhouse, and, accordingly, I do not propose to make any order changing Madam Justice Dillon's order. But I adjourn the matter until such time as the Burnaby townhouse property has either been foreclosed or sold, and it will be at that time that a final determination of the petitioner's ongoing right to maintenance, if any, can be finally reviewed.

...It seems to me that once the Burnaby townhouse property is disposed of, that that is the time at which the matter of the maintenance entitlement to the petitioner, if any, can be finally addressed and dealt with. But be that as it may, at the moment things are exactly as they were when Judge Dillon made her order just a few months ago. I make no order today changing it. It is not the case that these orders should be changed every few months without a significant and material change of circumstance.

- [14] In the course of his Reasons for Judgment, Shabbits J. acknowledged that the original Order appeared to be premised on the expectation that some equity would be realized from the sale of both properties. He notes:

In the consent order of September 5, 1996, the parties agreed that the Qualicum Beach residence would be sold, and that after satisfying the first and second mortgages, both to the Royal Bank of Canada, the petitioner would receive the sum of \$90,000, and the respondent would receive any balance. The order then provided by consent that following receipt and distribution of the proceeds from the sale of the Qualicum Beach residence, the respondent would be entitled to a transfer of the petitioner's one-half interest in the Burnaby townhouse.

That order contemplated and seems to be predicated on the petitioner's equitable interest in the Qualicum Beach residence at being no less than \$90,000, and it seems also to have been predicated on the basis that the petitioner's interest in the Burnaby townhouse was such that her transfer of a one-half interest in the whole of the townhouse would act as an appropriate quid pro quo for her receipt of the first \$90,000 from the Qualicum Beach residence. I say that because certainly in 1996, matters between the parties were such that each of them considered that they

had equities of significance in each of the Qualicum Beach residence and the Burnaby townhouse.

- [15] In December 1999, the Family Maintenance Enforcement Program advised the husband he was in arrears in the sum of \$10,000. The husband believes this is an accounting error.
- [16] The wife has received her share of the husband's employment pension which is now paid out to her at the rate of approximately \$199 per month. In addition she now receives a British Government pension of \$145 per month and her CPP pension of \$304 per month. The husband says she has received an inheritance of her late father's estate but there is no evidence to this effect.
- [17] He seeks compensation for his half of the contents of the Qualicum Beach property which the wife was ordered to keep and deliver to him. He says this was a fully furnished three-bedroom home with household contents insured at a value of \$92,000. Following Shabbits J.'s order, when he went to pick up his household items after the sale of the home, he says the wife never delivered the items specified in the Court Order. He says he received no more than a kitchen table, four chairs, a waterbed mattress and some family photographs and videos. He has provided photographs taken of these items sitting in a dishevelled pile outside the home for pickup.
- [18] He says he is suffering from financial hardship and that he does not have sufficient means to continue the spousal maintenance payments as well as the loan payments. He has a \$1500 overdraft on a Van City account, which is somewhat tied to the mortgage in the sense that when he could not afford the mortgage payment he drew on this account. He works as an independent contractor appliance technician, earning a net salary of approximately \$327 per week or a net salary of \$17,004 per year. This represents a substantial reduction from his 1999 net income of approximately \$29,000. He says there has been a 20% reduction in the number of working hours in the current year.
- [19] The wife's counsel has submitted that the losses of the Qualicum Beach property and the Burnaby property were caused by the husband's failure to continue with the mortgage payments. She says that the wife was held entitled to \$90,000 from what was expected to be the equity in the Qualicum Beach property, which amount never materialized. She suggests that the court transfer the husband's half of the Camco employment pension to her in lieu of the \$90,000 equity she never received due to the husband's failure to pay the mortgages. She estimates he has approximately \$40,000-\$50,000 left in the pension fund which she suspects he will move to liquidate or hide outside the jurisdiction to avoid payment.
- [20] She provides very little information concerning her circumstances. She says she is no longer on social assistance and that this was "stopped" in 1998. Since that time she says she relies on payments from the Family Maintenance Enforcement Program for her support. She has received approximately \$484 to \$800 per month which often fails to even cover her rent of \$550 per month. She insists that she returned all of the household items to the husband with the exception of certain items which were either lost during the move, or are in the

possession of a granddaughter or which were earlier destroyed by the husband.

Conclusion:

- [21] On earlier applications, the Court was reluctant to address the application for variation since it was unclear whether the Burnaby property would produce any equity. It is now clear that with the exception of the few funds in trust, no equity has been realized. The husband was unable to carry the full mortgage debt load with the resulting foreclosures. The extent to which this situation was partially caused by the wife's failure to carry the taxes or to allow a rental of the Burnaby property is not clear. In my view, it is impossible in the circumstances to attribute the resulting financial meltdown to any particular fault on the part of either spouse.
- [22] As Shabbits J. earlier noted, the consent order which provided for a payment of \$90,000 to the wife was predicated on the Qualicum Beach property having equity of at least that amount. The Order also contemplated that the husband would ultimately gain title to the Burnaby title. Neither of these events occurred since ultimately, no equity could be realized on either property. In these circumstances, I do not consider the \$90,000 as a debt outstanding to the wife. Thus I see no foundation for an order transferring what remains of his employment pension into the wife's name. Rather that part of the earlier order relating to the \$90,000 payment must either be vacated or varied.
- [23] At the time the last spousal maintenance order was made, the husband was suffering the effects of the heart attack and his gross monthly income had been reduced. Unfortunately, neither the respondent nor the petitioner's counsel have been able to produce to me the materials then before the Court, that is the materials verifying the respondent's precise circumstances at the time the order was made.
- [24] The wife's counsel says that the husband's gross salary is approximately \$49,000 gross per year, and that regardless of whether there has been a 20% reduction in working hours, this is nevertheless substantially more than his earnings were at the time the March 1998 Order was made. She submits that at that time the husband earned \$2500 gross per month in disability income. I have no evidence before me as to what his earnings were at that time. I note his own evidence that he was off work until March 1998 and I must presume that the maintenance order was predicated on what his earnings would be post-March 1998. At this time his pay stubs establish a substantial drop in income.
- [25] For her part, the wife's circumstances are somewhat better than at the time the last order was made. She now receives payments from the husband's pension, the British government pension as well as the CPP. In all of the circumstances, I find it appropriate to reduce the maintenance to \$500 per month commencing July 1, 2000.

- [26] As to the cancellation or reduction of arrears, I note that the husband contributed substantial funds attempting to retain the parties' interest in the Qualicum Beach and Burnaby properties. Even now, after the foreclosure, he continues to pay towards the outstanding balance of the second mortgage. I understand that debt presently stands at \$7,543.59.
- [27] I also accept that contrary to her allegations, the wife has indeed retained the lion's share of the household furnishings. While it is not clear what the value of those items may be, I roughly estimate that she has retained approximately \$20,000-\$30,000 of his assets. Finally, I believe that of the approximately \$10,000 in F.M.E.P. arrears, \$2,824.00 ought to be credited to the account, to reflect the fact that during the period July 1, 1997 to March 1, 1998, the Royal Bank did not accept mortgage payments. The October 1996 Order contemplated that after the sale of the property the maintenance would drop to \$1000 per month. Instead, the F.M.E.P. debited the husband's account by \$1,213.91 plus \$139.18 per month. In my view, he was overcharged some \$2,824.56.
- [28] Given this combination of factors, I am persuaded there ought to be a cancellation of arrears and a discharge of the garnishment order. However, regarding the monies which remain in trust in Action No. S053283 (New Westminster Registry), which I understand to be \$1,714.41, those monies shall be paid out to the wife.

Summary:

- [29] In summary:
- [1] The wife's monthly spousal maintenance shall be reduced from \$900 per month to \$500 per month commencing July 1, 2000;
- [2] The arrears of maintenance which stand at approximately \$10,824.56 shall be cancelled and the garnishment order shall be discharged;
- [3] The wife's application to increase her maintenance or to transfer the husband's share of his employment pension to her by way of compensation, are dismissed; and
- [4] The funds held in trust in Action No. S053283 (New Westminster) shall be paid out to the credit of the wife.
- [30] Each party will bear his or her own costs.

"M.E. Boyd, J."

The Honourable Madam Justice M.E. Boyd

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