
CANADA / JUDGMENT

J.M. v. L.D.M.

2008 BCSC 1024

COURT

Supreme Court of British Columbia

DECIDED

31 July 2008

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2008 BCSC 1024 J.M. v. L.D.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.M. v. L.D.M.,

2008 BCSC 1024

Date: 20080731

Docket: E013106

Registry: Vancouver

Between:

J.M.

Plaintiff

And

L.D.M.

Defendant

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for Plaintiff

G.A. Lang

Counsel for Defendant

P.M. Daykin, Q.C.

Date and Place of Hearing:

May 14, 2008

Vancouver, B.C.

Written Submissions of the Defendant

June 11, 2008

Written Reply Submissions of the Plaintiff

July 9, 2008

- [1] The plaintiff J.M. applied for review of a spousal support order and I gave judgment in that matter on April 11, 2008, concluding that she should receive \$6,500 per month in spousal support, an increase over the previous amount. At the conclusion of the hearing, counsel for the plaintiff (Ms. Lang) advised that she wished to address the question of security for the spousal support payments. Counsel for the defendant advised that this issue had not been raised previously and caught him by surprise. I determined to give the defendant an opportunity to respond and the plaintiff a further opportunity to make submissions. I have now received oral and written submissions from both sides with respect to this and some other issues.
- [2] It appears that the plaintiff seeks two orders with respect to security for spousal support: (1) that spousal support be secured against the defendant's estate; and (2) that the defendant provide her with 12 post-dated cheques on June 1st of each year and that she be at liberty to apply, without the necessity of proving a change in circumstances, for an order for security for spousal support should such an order become necessary.
- [3] The plaintiff also asks for costs of the proceedings and that the commencement date for the spousal support payments of \$6,500 per month should be January 1, 2008 rather than May 1, 2008, as stated in my oral Reasons delivered on April 11, 2008. The order has not yet been entered.
- [4] The defendant's position is that the order for spousal support should not be secured against the defendant's estate. However, Mr. Daykin advised the Court that the defendant would cooperate in permitting the plaintiff to take out a life insurance policy on his life that would provide comparable security for her. The defendant says that the costs of the application should be awarded on the basis of divided success and that the plaintiff should not receive her costs for the pre-hearing applications. As for the commencement date, the defendant's position is that the commencement date should remain May 1, 2008.
- [5] In addition, the defendant requests that I reconsider my decision as to the quantum of spousal support in the light of what the defendant says are the accurate facts regarding the length of the relationship between the parties.

[6] I will deal with those matters in that order.

1. Security for the Spousal Support Order

[7] It is not wholly clear whether there is jurisdiction to make an order securing a spousal support order against the estate of the payor. The most recent statement from the Court of Appeal for this province, however, in *Waters v. Conrod*, 2007 BCCA 230, suggests that there is such jurisdiction. There, the Court stated at paras. 33 and 34:

The parties do not dispute the court's jurisdiction to secure an order for support enforceable after the payor's death in the proper circumstances. Rather, they disagree as to whether the circumstances of the instant case warrant such an order. In *Jackh v. Jackh* (1980), [1981] 1 W.W.R. 481 (B.C.S.C.), cited by this Court in *Hillhouse v. Hillhouse* (1992), 74 B.C.L.R. (2d) 230 at paras. 54-55, the court remarked as follows, at 499:

A number of cases have held that the court has power under s. 11 of the Divorce Act, R.S.C. 1970, c. D-8, to make maintenance orders which extend beyond the lifetime of the spouse ordered to pay maintenance. Three reported cases are: *Huff v. Huff* (1971), 4 R.F.L. 258, 16 D.L.R. (3d) 584 at 587 (Man. C.A.); *Snively v. Snively*, [1971] 3 O.R. 132, 6 R.F.L. 75, 19 D.L.R. (3d) 628 (Co. Ct.); *Sandeford v. Sandeford* (1977), 2 R.F.L. (2d) 330 (B.C.S.C.).

In *Sandeford v. Sandeford*, Spencer L.J.S.C. observed that the question of the court's jurisdiction to direct maintenance payments against the estate is not yet free from doubt and he went on to deal with the matter on the alternative course based on *Cotton v. Cotton* (1966), 58 W.W.R. 65, 60 D.L.R. (2d) 117 (B.C.C.A.).

Assuming that the power exists, I do not consider this to be an appropriate case in which to exercise it. The cases in which it has been exercised appear to have had the common elements of a wife in extremely necessitous circumstances and a husband in relatively affluent circumstances with assets available which could conveniently be charged with the payments

[Emphasis added.]

In *Ripley v. Ripley* (1991), 52 B.C.L.R. (2d) 362, this Court accepted *Jackh* as "the correct approach". In rejecting the submission that the maintenance award should be secured, the Court considered that the payee was not in extreme necessitous circumstances, and that the payor had responsibilities to both a second spouse and his child by that second spouse.

[8] Ms. Lang on behalf of J.M. referred to the fact that the defendant is 11 years older than the plaintiff and that if he predeceases her and the support payments are not secured, the plaintiff will suffer extreme hardship. Ms. Lang submitted that the defendant's estate is substantial and it is reasonable for the spousal support payments to be binding on it. She said that the jurisdiction to make a support order binding on the payor's estate is found in s. 15.2(6) of the Divorce Act, referring to *Linton v. Linton* (1990), 30 R.F.L. (3d) 1 (Ont. C.A.), as well as *Tyerman v. Tyerman*, [1999] B.C.J. No. 2327 (S.C.) and *Leckie v. Leckie*, [1995] B.C.J. No. 671 (S.C.).

- [9] The plaintiff's position is that there is some indication that the defendant may move to the Caribbean and that the protracted litigation between the parties shows his strong disinclination to pay spousal support.
- [10] Ms. Lang argued that in these circumstances, with the plaintiff being in poor health and in financial difficulty, and given the length of the marriage and that it was a "traditional marriage", it is appropriate to make the orders sought.
- [11] Mr. Daykin on behalf of the defendant argued that, as in *Waters v. Conrod*, where the Court of Appeal found it was inappropriate to order security for support, the plaintiff in this case is not in "extremely necessitous circumstances", given that the value of the plaintiff's home is over \$2,000,000. He also referred to *Burridge v. Burridge*, 2008 BCSC 588, where a conclusion was reached to similar effect.
- [12] Mr. Daykin suggested that there has been an unfortunate history of disputes between J.M. and her children over the management of the children's funds and that the last thing that the family needs is a dispute between J.M. and the children over the estate of L.D.M. He argued that an order for security for spousal support might prejudice the outcome of a later application for a variation. He urged that it is significant that the original settlement between the parties dividing the family assets, enshrined in the order of Mr. Justice Harvey pronounced December 2, 2002, did not contain a provision for security for support.
- [13] L.D.M. is 61 years of age and healthy. Mr. Daykin stated that it appears that the monthly premium for a life insurance policy covering L.D.M.'s life with a death benefit of \$550,000 is \$300 per month for a ten year term, providing approximately the commuted value of an income stream of \$6,500 a month for ten years.
- [14] Considering all of the circumstances, in particular the fact that the assets were divided by agreement in 2002, and that J.M. has a home of significant value, I have concluded that this is not an appropriate case in which to make an order securing spousal support payments against the defendant's estate. However, I will order that L.D.M. provide post-dated cheques for 12 months of spousal support payments by June 1st of every year, and that he provide such cheques for the 2008-09 year by September 1, 2008. As well, J.M. will be at liberty to apply for an order securing the spousal support payments against L.D.M.'s assets and for an increase in the monthly spousal support payments sufficient to cover one-half of the cost of a life insurance policy on L.D.M., without establishing a change in circumstances.

2. Costs

- [15] With respect to costs of the application, I find that the plaintiff was substantially successful and that she should have her costs, including the costs of the pre-hearing applications.

3. Commencement Date for the Increased Spousal Support

[16] As for the commencement date, the application was brought on in late November 2007 for a review hearing scheduled for December 2007 but the hearing could not proceed. In February 2007 it came on again but the assigned judge had to recuse himself or herself. In short, the delay cannot be laid at the door of either party. In these circumstances I will leave the commencement date at May 1, 2008.

4. Length of Relationship

[17] Finally, Mr. Daykin pointed out that there is evidence that for the first four or five years the relationship between the parties was "on again off again" and they did not continuously cohabit. He requested that I reconsider the quantum of support in the light of that, since the order has not been entered. Ms. Lang took issue with this as an attempt to re-open the hearing, and disagreed as to the conclusions to be drawn from the evidence.

[18] Whether the cohabitation lasted for 18 years or 23 years, it was still a long relationship, and it was an 18 year marriage. The economic circumstances of the parties were thoroughly intertwined by the time they separated, J.M. is unable to work due to illness, and I do not see a reason to alter the spousal support order.

"The Honourable Madam Justice Lynn Smith"

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