
CANADA / JUDGMENT

Kennelly v. Kennelly

2013 BCSC 1663

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Supreme Court of British Columbia

DECIDED

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2013 BCSC 1663 Kennelly v. Kennelly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kennelly v. Kennelly,

2013 BCSC 1663

Date: 20130802

Docket: E42121

Registry: New Westminster

Between:

Michael Thomas Kennelly

Petitioner

And

Carol Lynne Kennelly

Respondent

Before: The Honourable Madam Justice Warren

Oral Reasons for Judgment

In Chambers

Petitioner, Appearing on his own behalf:

Michael Thomas Kennelly

Respondent:

No Appearance

Place and Date of Hearing:

New Westminster, B.C.

July 29, 2013

Place and Date of Judgment:

New Westminster, B.C.

August 2, 2013

- [1] THE COURT: The applicant/petitioner in this case, Mr. Kennelly, is applying to provisionally vary an order of the Ontario Superior Court of Justice in court file No. V1348/93 made on January 31st, 1995 (the "Original Order").
- [2] He seeks first to terminate the provision of the Original Order requiring him to pay to his former spouse, Ms. Kennelly, spousal support of \$400.00 per month, and second to cancel all arrears of spousal support.

Procedural matters

- [3] Mr. Kennelly lives in British Columbia and Ms. Kennelly lives in Ontario. The Original Order was made under the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.). Sections 5(1), 17, 17.1, 18 and 19 of the Divorce Act provide two alternative processes for former spouses who live in different provinces to apply to vary a support order in the province in which the applicant former spouse lives. The applicant can apply in his/her home province for a final variation order and if the respondent accepts the jurisdiction of the court in the province where the applicant lives, or consents to the process set out in s. 17.1 of the Divorce Act (which contemplates an order being made on the basis of oral or written submissions or telecommunication), the court may make the final variation order. However, if the respondent does not accept the jurisdiction of the court in the province where the applicant lives and does not consent to the s. 17.1 process, the court of that province makes a provisional order which does not come into effect until it is confirmed by a court of the province in which the respondent lives.
- [4] Mr. Kennelly filed his petition in this matter on September 14, 2012. In it he expressly stated that his application was for a provisional variation order. He served Ms. Kennelly and she filed a response together with a document in the form of an affidavit that was witnessed, although not properly sworn or affirmed. Ms. Kennelly's response and unsworn affidavit are both dated October 5, 2012 and were filed in this Court on October 11, 2012. They respond substantively to Mr. Kennelly's application.

- [5] Mr. Kennelly's application was originally scheduled for hearing on January 10, 2013. He provided Ms. Kennelly with notice of the hearing date and she filed another witnessed but unsworn affidavit. In this second affidavit, Ms. Kennelly confirmed having received notice of the January 10, 2013 hearing date and then advised as follows:
3. While I have been informed it is in my best interests to attend in person for this hearing, I am advising the Court that due to unforeseen medical issues, I am unable to attend.
 4. I have previously submitted my response to the petition before the Court. My position remains the same.
 5. I am not financially in a position to hire legal representation to swear to my documents or to represent me in the Court. I am respectfully requesting the presiding justice/judge take this into consideration at the time of the hearing.
- [6] Mr. Kennelly's application came on for hearing on January 10, 2013 but there was insufficient time for it to be heard that day and it was adjourned generally. Mr. Kennelly re-scheduled the hearing for July 29, 2013. He provided Ms. Kennelly with notice of the new hearing date. By email to Mr. Kennelly she acknowledged receiving notice of the new date and indicated that she continued to object to any variation of the spousal support order. She did not appear in person, by agent or by counsel at the hearing on July 29, 2013.
- [7] As set out by Ferrier J. in *Dent v. Flynn*, [2005] O.J. No. 1728 (S.C.J.) at para. 21:
- A court can make a provisional order under ss. 18 and 19 of the Divorce Act only if:
- i. the respondent resides in a different province;
 - ii. the respondent does not accept the jurisdiction of the court where the applicant resides;
 - iii. both parties do not consent to proceed under s. 17.1 of the Act; and
 - iv. the presiding judge is satisfied that the matter can be adequately determined through the provisional/confirmation procedure.
- [8] In this case, Mr. Kennelly lives in British Columbia and Ms. Kennelly lives in Ontario, so the first condition is met. The next question is whether Ms. Kennelly has accepted the jurisdiction of this Court. As already noted, she did not appear at the hearing but she did file substantive responding material. In these circumstances, had the petition not expressly sought a provisional order, I would have concluded that she had accepted the jurisdiction of this Court to make a final order. However, given the petition expressly sought only a provisional order, Ms. Kennelly was not actually provided with notice of the prospect of a final order being made and as such I reluctantly conclude that she has not accepted the jurisdiction of this Court to make a final order. There is no evidence that Ms. Kennelly has consented to proceed under s. 17.1. I am satisfied the matter can be adequately determined through the provisional/confirmation procedure. Mr. Kennelly has filed an affidavit in support of his application and, as already noted, I have responding material from Ms.

Kennelly. If there is anything else that Ms. Kennelly thinks should be considered, she can make that known through the confirmation hearing in Ontario.

- [9] For the foregoing reasons I find that the provisional/confirmation process reflected in ss. 18 and 19 of the Divorce Act applies to this application. Any order I make will be a provisional one.

The merits of the applications

Background

- [10] This was a seven-year marriage. The parties were married in or about December 16th, 1986 and were divorced in or about December 1994 or January 1995, having separated approximately a year before. There are no children of the marriage.
- [11] At the time of the divorce, Mr. Kennelly was 45 years old. He had been working in the insurance industry and was earning approximately \$75,000 per year at the time the Original Order was granted. Ms. Kennelly was 53 years old. Throughout the marriage she had worked in a steel factory earning approximately \$40,000 per year. However, at the time the Original Order was granted, she was off work and receiving workers compensation benefits.
- [12] For approximately five years following the divorce, Mr. Kennelly continued to work in his insurance business, however, he said the business had changed significantly over those years and his income steadily decreased in material part due to an increased emphasis on commission sales. Eventually he lost his practice and then made the decision to embark on a new career path. He moved to Arizona in 2000 where he lived until 2010. While in Arizona, he worked as a management consultant in the financial planning area.
- [13] In 2010, Mr. Kennelly moved to British Columbia and he has since been semi-retired. He went back to school and completed an addiction counselling program. He currently receives Canada Pension Plan ("CPP") benefits of \$273.00 per month and he works on a part-time and casual basis as an addictions counsellor from which he earns between \$1,000 and \$1,200 per month. He said there is no prospect of him going back into the insurance business given he has been away from it for approximately 13 years, the changes in the industry since then, and his current age of 63 years. He lives in a room he rents in a house; his only asset is a 1999 Grand Am vehicle.
- [14] According to Mr. Kennelly's income tax returns, his income since 2001 has been as follows: in 2001 adjusted gross income (which is total income less business expenses) on his American tax return of approximately \$13,000; in 2002 adjusted gross income of approximately \$3,400; in 2003 adjusted gross income of approximately \$28,000; in 2004 adjusted gross income of approximately \$11,000; in 2005 adjusted gross income of approximately \$25,000; in 2006 adjusted gross income of approximately \$44,000; in 2007 adjusted gross income of approximately \$12,000; in 2008 adjusted gross income of approximately \$19,000; in 2009 adjusted gross income of approximately \$9,700; in 2010 total

income on his Canadian tax return of approximately \$5,700; and in 2011 total income of approximately \$20,000.

- [15] It is not clear from Ms. Kennelly's affidavit what income she has earned in the years since the Original Order was granted. She says that in late 2003 and into 2004 she worked as a cashier and netted approximately \$25,000. However, her Canada Revenue Agency Notice of Assessment for 2001 indicates she had total income of \$25,711 so it appears that this cashier work may have been in 2001 rather than in 2003 and 2004, or she may have had some other work in 2001. She has not said that she was unable to work since the Original Order was made but she did say she received Workplace Safety and Insurance Board ("WSIB") benefits from time to time.
- [16] Ms. Kennelly's affidavit states that she currently receives CPP benefits in the amount of \$486.00 per month plus Old Age Security in the amount of \$622.00 per month for a total of \$1,108 per month. She does not say when she began receiving these payments. She is now approximately 70 years old and according to Mr. Kennelly, she resides with her daughter.
- [17] As noted above, the Original Order required Mr. Kennelly to pay Ms. Kennelly \$400.00 per month in spousal support. Mr. Kennelly paid the support consistently until the end of 1997. Thereafter, he paid the support, although sometimes late, through to 2000. He fell into arrears after June 2000 although sporadic payments continued to be made.
- [18] The Original Order was registered with the Family Maintenance Enforcement Program ("FMEP") and between 2010 and early 2013 FMEP attached \$189.00 per month from Mr. Kennelly's CPP payments which were provided to Ms. Kennelly. During oral submissions, Mr. Kennelly advised that some months ago the FMEP agreed to retain the \$189.00 per month pending the outcome of this application and there is now approximately \$1,500 being held by FMEP as a result.
- [19] The evidence establishes that since the Original Order was granted Mr. Kennelly has made support payments totalling close to \$40,000. At \$400.00 per month this amounts to approximately eight years of support. Current arrears are approximately \$46,000.
- [20] Mr. Kennelly says that until 2010 he was under the misapprehension that he could not apply to vary the Original Order until he had paid off all arrears. However, in 2010 he learned that he could apply to vary notwithstanding the arrears. In September 2010 he applied to vary the Original Order in the Ontario Court of Justice under the Interjurisdictional Support Orders Act, 2002, S.O. 2002, c.13, but in May 2012 that application was dismissed by Justice Chappel because the Original Order was made under the Divorce Act and as such the variation could not be attained under the Interjurisdictional Support Orders Act.

The legislative scheme

[21] Section 17 of the Divorce Act, which governs the variation of the Original Order, provides that the court may make an order varying, rescinding, or suspending a support order and may do so prospectively or retroactively. Section 17(4.1) states the factors the court must consider and establishes as a threshold requirement that there has been a "change in the condition, means, needs or other circumstances" of either spouse since the making of the existing spousal support order. That section also directs the court to take that change into consideration in making a variation order.

[22] As stated by Justice Chappel in *Favero v. Favero*, [2013] O.J. No. 2882 (S.C.) at para. 67:

The condition of a spouse includes such factors as their age, health, needs, obligations, dependants and their station in life. A spouse's "means" encompasses all financial resources, capital assets, income from employment and any other source from which the spouse derives gains or benefits. The assessment of the "needs" of a spouse should take into consideration the accustomed lifestyle of the spouse, subject to ability to pay.

[23] In addition to determining whether there has been a change in circumstances, the court must also consider the objectives of spousal support variation orders which are set out in s. 17(7) of the Divorce Act as follows:

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.

[24] The Supreme Court of Canada summarized the general principles that apply to applications under the Divorce Act to vary support orders in *L.M.P. v. L.S.*, 2011 SCC 64 and in *R.P. v. R.C.*, 2011 SCC 65. Specifically, the court must first satisfy itself that there has been a material change in the condition, means, needs, or other circumstances of either spouse since the making of the existing order. Once this material change of circumstances has been established, the court must decide what variations, if any, should be made in order to reflect the objectives set out in s. 17(7).

Analysis

Has the applicant established a material change?

- [25] At the time of the Original Order, Mr. Kennelly was 45 years old and earning approximately \$75,000 per year. He is now 63 years old and semi-retired. His profession changed in the years following the Original Order and although he has tried to adapt by embarking on a new career, first in the financial planning area and now in addictions counselling, I find that his means have changed dramatically. In the years between 2001 and 2011 his income has ranged from a low of \$3,400 per year to a high of \$44,000 per year which averages out at approximately \$17,500 per year. This is obviously a very significant reduction in his means since the time the Original Order was made.
- [26] It has been held when voluntary early retirement is advanced as a reason to terminate spousal support the circumstances must be examined carefully to ensure that retirement has not been prompted by a desire to avoid the support order: *Vennels v. Vennels*, [1993] B.C.J. No. 378 (S.C.). In my view, it would not be accurate to characterize Mr. Kennelly's decision to leave the insurance business as akin to voluntary early retirement. He made the decision to change his occupation in the face of declining income and what he perceived to be bleak future prospects in the insurance industry. Although he has not been able to return to his former level of income, in my view this is not in and of itself a basis upon which to conclude that his decision was unreasonable. Further, there is no evidence upon which I could conclude that this decision was prompted by a desire to avoid his support obligations. It is my view that Mr. Kennelly's career decisions since the time of the Original Order have been reasonable and made in good faith.
- [27] For the foregoing reasons, I find that Mr. Kennelly has established a material change in his condition, means, needs, or other circumstances.

What variation, if any, should be made in order to meet the objectives of s. 17(7) of the Divorce Act?

- [28] As noted above, there are no children of the marriage. As a result, any variation should recognize the economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown, relieve any economic hardship arising from the breakdown of the marriage and insofar as practicable, promote the economic self-sufficiency of each former spouse within a reasonable time.
- [29] In my view, Ms. Kennelly's circumstances, now 19 years post-separation, cannot be attributed to the marriage or its breakdown. This is so particularly given the marriage was of only seven years' duration. Mr. Kennelly's evidence was that while Ms. Kennelly was not working at the time of the Original Order, she had generally worked throughout the marriage earning approximately \$40,000 per year. In the material filed in response to this application, Ms. Kennelly said she commenced receiving WSIB benefits in 2000 for two years and then a very small WSIB pension, however, she has not provided any evidence of an

ongoing inability to work. To the contrary, her evidence was that she did work as a cashier for a short period of time, but then lost that job. She has provided no evidence of any attempt to obtain alternate employment since then or any explanation for not having done so.

- [30] Given Mr. Kennelly's changed circumstances, there is now in my view a need to promote his self-sufficiency as well as that of Ms. Kennelly. In these circumstances, it is my view that a termination of the support obligations under the Original Order would reflect the considerations set out in s. 17(7) of the Divorce Act and as such I am granting an order rescinding that part of the Original Order requiring Mr. Kennelly to pay spousal support to Ms. Kennelly.

Should the arrears be cancelled or reduced?

- [31] The next question is whether the arrears should be cancelled or reduced. As noted above, the current arrears are approximately \$46,000.
- [32] In *Earle v. Earle*, [1999] B.C.J. No. 383 (S.C.), Martinson J. noted that on an application to cancel or reduce arrears there is a substantial onus on the applicant to show that there has been a significant and long-lasting change in circumstances.
- [33] At the same time, however, a support order must be realistic and if the magnitude of arrears is such that a payor will simply be unable to pay, a reduction in arrears is justified: *Birakowski v. Birakowski* (1987), 8 R.F.L. (3d) 176 (B.C.C.A.). This is so even where the reduction is substantial. For example, in *Rouleau v. Fawkes*, [2009] B.C.J. No. 361 (S.C.), child support arrears of \$200,000 were reduced to \$100,000 in a case where it was held that the circumstances were largely of the payor's own making.
- [34] As discussed above, Mr. Kennelly has established a material change in circumstances; it has been significant and long-lasting. Indeed, it arose back in 2000 when he decided to change his profession. Mr. Kennelly was current in his support payments until that time. The evidence establishes that since 2001 he has paid nearly \$13,000 under the Original Order which at \$400.00 per month amounts to about two and a-half years' worth of support since the material change.
- [35] Mr. Kennelly did delay, however, in bringing on an application to vary the Original Order. His explanation for the period up to 2010 was his misunderstanding that the existence of arrears precluded such an application. While I do not consider that explanation to be entirely reasonable, he did start the process three years ago and although he subsequently learned that he had used the wrong procedure, as a lay litigant trying to find his way through a fairly complex multi-jurisdictional procedure, I would not impugn those efforts. In my view, given the delay up to 2010, a complete cancellation of the arrears would not be appropriate. However, I do find that a substantial reduction is warranted.

[36] The reality in this case is that Mr. Kennelly will be unable to pay all of the arrears now or in the future. It is improbable that his financial situation will improve. In *Birakowski*, supra, the applicant husband earned \$8,000 per year and had accumulated arrears of over \$6,000 which represented 75 percent of his annual income. The Court of Appeal terminated the spousal support order and reduced the arrears to \$1,200, payable at not less than \$50.00 per month. Mr. Kennelly is earning approximately \$20,000 per year and the arrears of \$46,000 represent 230 percent of his annual income. In my view, it would be appropriate to reduce the arrears to \$10,000 which is roughly two years' worth of arrears. Mr. Kennelly has been paying through FMEP at a rate of \$189.00 per month and it would be reasonable for him to pay the remaining arrears at something close to that amount.

Conclusion

[37] In conclusion, for the foregoing reasons, I grant a provisional order rescinding that part of the Original Order requiring Mr. Kennelly to pay spousal support to Ms. Kennelly and reducing the arrears of spousal support to \$10,000. The funds being held by FMEP should be applied to that amount with the balance being paid to Ms. Kennelly at no less than \$200.00 per month.

"Warren J."

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