

CANADA / JUDGMENT

Kormendy v. Kormendy

2018 BCSC 342

COURT

Supreme Court of British Columbia

DECIDED

7 March 2018

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2018 BCSC 342 Kormendy v. Kormendy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kormendy v. Kormendy,

2018 BCSC 342

Date: 20180307

Docket: E26324

Registry: New Westminster

Between:

Leslie Kormendy also known as Leslie Ann Kormendy

Claimant

And

Richard Kormendy also known as Richard Edward Kormendy

Respondent

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Claimant:

T. Macdonald

Counsel for the Respondent:

E.K. Chhina

Place and Date of Hearing:

New Westminster, B.C.

January 17, 2018

Place and Date of Judgment:

New Westminster, B.C.

March 7, 2018

Introduction

- [1] This is an application by the respondent to reduce his obligation to pay spousal support retroactively for the period between April and August 2017 and to terminate his obligation to pay spousal support commencing September 1, 2017. Alternatively, the respondent seeks an order that his obligation to pay spousal support is reduced to \$700 per month commencing September 1, 2017 and that spousal support shall terminate upon the respondent's retirement without the necessity of further order.
- [2] As well, the respondent seeks an order that his employment pension income, Canada Pension Plan ("CPP") benefits and Old Age Pension ("OAP") benefits be excluded from the calculation of his income.
- [3] For the reasons set forth below, I have come to the conclusion that the applications of the respondent be dismissed with costs to the claimant.

Background

- [4] These parties separated in 2006 after almost 36 years of marriage. At the time of separation, the claimant was approximately 53 years old and the respondent was 55 years old. Recently, the respondent, Mr. Kormendy, turned 66 years of age and Ms. Kormendy, now known as Ms. Buss, turned 65 years age in February 2018.
- [5] During the marriage, the claimant worked at a bank but also took a seven year leave of absence from the bank to care for the couples' two young children. Due to health concerns, the claimant has not worked since 1993.
- [6] In August 2008, the parties entered into a final order which included a divorce, an equal division of assets including an equal division of pensions and, regarding spousal support, the following:
 - 14. the Defendant shall pay to the Plaintiff for her support the sum of \$3,892 each month, commencing August 1, 2008 and continuing on the 1st day of each and every month thereafter pursuant to the Divorce Act (Canada).

The above order remains in effect. There were no provisions in the order relating to variations in the spousal support payments and no applications by either party to vary the amount of support have been made. There were considerable increases in Mr. Kormendy's income for several years following the order, however the amount paid in spousal support did not change to match these income increases.

- [7] The equal division of pensions resulted in Ms. Buss taking a lump sum payment of her portion of the respondent's pension from his employment at Western Pulp Limited ("WP Ltd.") which she invested in 2008 in a locked-in RRSP. That RRSP currently has a value of approximately \$517,000.
- [8] The respondent had been employed by WP Ltd. for many years until 2006 when WP Ltd. ceased to exist, following which he was retained as a contractor by the successor to WP Ltd., ie. Western Forest Products Limited ("Western Forest Ltd").
- [9] As of August 2008, the respondent was earning \$104,157 while employed by Western Forest Ltd. and the claimant was unemployed and receiving long term disability benefits from SunLife and CPP Disability benefits through her former employer which together totalled approximately \$23,900.
- [10] In 2015, Western Forest Ltd. was sold to Woodfibre LNG ("Woodfibre") which retained the respondent as a full-time employee. He found the employment at Woodfibre to be physically demanding and stressful. He has deposed as to health problems which include a "hereditary heart problem" which was exacerbated by stress and, he deposes, resulted in "sensations like depression, sweating, racing of heart, sleep difficulties, headaches and tense muscles due to the stress" encountered in his job. His physicians have opined that he has complex cardiovascular disease and will require surgery. His health concerns resulted in him leaving Woodfibre in April 2016 and accepting a job offer with Fraser Health as a Chief Power Engineer where he continues to work as of the date of this application at an annual salary of slightly over \$69,000 per annum.
- [11] As of July 2017, the respondent deposed that he was advised by an orthopaedic surgeon that he will require knee surgery.
- [12] According to Mr. Kormendy, the position with Fraser Health was less stressful and less demanding than his employment with Woodfibre.
- [13] From 2014-2016, Mr. Kormendy's total incomes were: \$284,801, in 2014; \$244,587 in 2015; and \$151,978 in 2016 (which was the year in which he left his position at Woodfibre). His Financial Statement sworn July 25, 2017, indicated an income of \$106,198. In each of the four years referred to, in addition to his employment income and income on a contract basis, he received CPP and "other pension income". He also deposed to annual expenses in 2017 of \$75,000.

- [14] Counsel for Ms. Buss points out that Mr. Kormendy's income is currently stated to be \$106,198, which is similar to his 2006 income of \$108,422 and his income for 2007 which was \$128,000. Counsel for Mr. Kormendy refers to Mr. Kormendy's health problems and his intention to retire as a result of those problems which will leave him with a substantially reduced income.
- [15] Regarding assets, Mr. Kormendy owns a home in Langley which has an assessed value of \$961,000 as of 2017, financial assets of \$230,690 and a pension valued at \$506,000 plus his pension with WP Ltd. which has an unknown value. He deposes to having no debts.
- [16] Correspondence was initiated in 2016 by the respondent through his lawyer to attempt to reduce his spousal support obligation due to the decrease in his income occasioned by his change in employment which eventually led to this application.
- [17] In November 2016, the claimant, Ms. Buss, was hospitalized and with serious health issues which continue. She continues to receive SunLife and CPP disability payments monthly which total annually to approximately \$26,000 but which will be discontinued when she turns 65 years of age in the current month, ie. February 2018. After her disability payments discontinue, Ms. Buss will receive CPP and OAP benefits in amounts to be determined, as well as a pension from her former employer which was divided with the respondent in 2008. The amount of her pension from her former employer is not currently known, however, it is estimated to be in the range of just over one-half of \$600 per month since division of her pension in the divorce. As well, she retains her portion of Mr. Kormendy's pension which was divided in 2008 and currently is invested in a lock-in RRSP with a value approximating \$517,000.
- [18] On March 1, 2017, Mr. Kormendy unilaterally reduced his spousal support payments to \$1,473 per month from \$3,892 per month as ordered in 2008. In total, the respondent has paid spousal support for approximately 9 years.
- [19] Ms. Buss' health issues have continued to the extent that she relies upon home support for meals and personal care. She also received assistance from her 87 year old father who lives nearby and cares for her for two hours per day until the care workers arrive and again in the late afternoon and evening after the care workers leave. At 9:00 pm another care worker arrives. All of this care, covering nine hours per day, seven days per week has resulted in payments to the care providers of as much as \$11,000 per month, although more recently she has been able to reduce her costs of care. She is also responsible to pay for medical supplies over and above her medical insurance coverage. In order to pay for her care, she has used approximately \$40,000 funds from her savings, which have been rapidly depleting. She has also sold her car.

- [20] In her financial statement of September 7, 2017, Ms. Buss deposes to an income of \$47,761 which includes long term disability income and CPP disability of \$27,000 which terminate when she reaches the age of 65, \$9,392 from RRSP income and a lump sum, non-recurring income of \$9,500. Upon reaching 65 years of age, Ms. Buss will receive OAP, CPP, the remaining portion of her Royal Bank pension which she anticipates to be less than \$600 per month and will have her portion of the respondent's pension.
- [21] Mr. Kormendy has not retired as of the date of hearing, however, proposes to do so depending in particular on his health.

Applicable Law Regarding Variation of a Support Order

- [22] The Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), provides in s. 17(4.1) that a court of competent jurisdiction "may make an order varying, rescinding or suspending, prospectively or retroactively" a support order upon being satisfied "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".
- [23] In *L.M.P. v. L.S.*, 2011 SCC 64, the Supreme Court of Canada discussed "The Threshold for Variation" commencing at para. 29:
- [29] In determining whether the conditions for variation exist, the threshold that must be met before a court may vary a prior spousal support order is articulated in s. 17(4.1) . A court must consider whether there has been a change in the conditions, means, needs or other circumstances of either former spouse since the making of the spousal support order.
- [30] In our view, the proper approach under s. 17 to the variation of existing orders is found in *Willick v. Willick*, [1994] 3 S.C.R. 670, and *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370. Like the order at issue in this case, *Willick* (dealing with child support) and *G. (L.)* (dealing with spousal support) involved court orders which had incorporated provisions of separation agreements. Both cases were decided under s. 17(4) of the Divorce Act, the predecessor provision to s. 17(4.1) .
- [31] *Willick* described the proper analysis as requiring a court to "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" (p. 688). In determining whether the conditions for variation exist, the court must be satisfied that there has been a change of circumstance since the making of the prior order or variation. The onus is on the party seeking a variation to establish such a change.
- [32] That "change of circumstances", the majority of the Court concluded in *Willick*, had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" (p. 688). *G. (L.)* confirmed that this threshold also applied to spousal support variations.

- [33] The focus of the analysis is on the prior order and the circumstances in which it was made. Willick clarifies that a court ought not to consider the correctness of that order, nor is it to be departed from lightly (p. 687). The test is whether any given change "would likely have resulted in different terms" to the order
- [34] The decisions in Willick and G.(L.) also make it clear that what amounts to a material change will depend on the actual circumstance of the parties at the time of the order.
- [35] In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances (see *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40, at para. 49). Certain other factors can assist a court in determining whether a particular change is material. The subsequent conduct of the parties, for example, may provide indications as to whether they considered a particular change to be material (see *MacPherson J.A.*, dissenting in part, in *P. (S.) v. P. (R.)*, 2011 ONCA 336, 332 D.L.R. (4th) 385, at paras. 54 and 63).
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- [41] Finally, an agreement incorporated into a s. 15.2 order may simply include a general term providing that it is final, or finality may be necessarily implied. But even where an agreement incorporated into an order includes a term providing that it is final, the court's jurisdiction under s. 17 cannot be ousted (*Miglin; G. (L.); Leskun*). A provision indicating that the order is final merely states the obvious: the order of the court is final subject to s. 17 of the Divorce Act. Courts will always apply the Willick inquiry to determine if a material change of circumstances exists.
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- [46] The examination of the change in circumstances is exactly the same for an order that does not incorporate a prior spousal support agreement as for one that does. A general statement that the agreement must be accorded "significant weight", even though its implications in a concrete case are unclear, in effect raises the threshold necessary to establish a "material change" under s. 17 when there is an agreement, and emphasizes legal certainty and finality at the expense of the statutory requirements of s. 17
- [67] It is thus clear from Willick that a matter known at the time of the original order cannot provide the basis of a material change in circumstances. But what about matters that were simply foreseeable at that time? According to *L'Heureux-Dubé J.* in *G. (L.)*, the question is whether the parties must be taken to have actually contemplated the matter in question; as she put it at para. 51, simple foreseeability does not bar a variation finding under s. 17 because "the fact that a change was objectively foreseeable does not necessarily mean that it was contemplated by the parties": citing Willick, at p. 734 (emphasis added). Thus, changes which the parties actually contemplated or that must have been in the parties' contemplation cannot constitute material changes.

[24] Has the respondent establish, on a balance of probabilities, that there has been a "material change in circumstances"?

Analysis

"Double Dipping"

[25] The first issue to be addressed is Mr. Kormendy's argument that his pension income should not be used to impute the income on which his spousal support variance request is calculated. It is his position that because Ms. Buss received an equalization payment for her share of his WP Ltd. pension, as well as her half of his CPP and OAP, including his pension income into the imputation of his income for the purposes of determining spousal support would amount to "double dipping"

[26] Double dipping was described in *Boston v. Boston*, 2001 SCC 43 [Boston]. There the court described double dipping or double recovery as occurring when "the wife is permitted to seek further support from her former husband where the ability to pay support is determined by included the same pension, the value of which was previously used to determine the value of the husband's net family property, and to calculate the equalization payment owing to the wife": see para 37. The reason for avoiding double dipping is basic fairness. The Supreme Court made it clear it is "unfair to allow the payee spouse to reap the benefit of the pension both as an asset then again as a source of income": see para. 63.

[27] The Court went on to say however,

65 Despite these general rules, double recovery cannot always be avoided. In certain circumstances, a pension which has previously been equalized can also be viewed as a maintenance asset. Double recovery may be permitted where the payor spouse has the ability to pay, where the payee spouse has made a reasonable effort to use the equalized assets in an income-producing way and, despite this, an economic hardship from the marriage or its breakdown persists. Double recovery may also be permitted in spousal support orders/agreements based mainly on need as opposed to compensation, which is not the case in this appeal.

[Emphasis added.]

[28] Mr. Kormendy's CPP pension is split with Ms. Kormendy. She immediately receives half of his pension entitlement each month. As such it should not be included in his income imputation. If it were she would receive more than one half of her share of his pension.

[29] With respect to Mr. Kormendy's OAP, I note that while he has received benefits from this pension, he must pay them back as a result of his income being over the OAP cut-off. As such, this amount should not be include in the imputation of his income.

- [30] Finally, Mr. Kormendy's WP Ltd. pension was accounted for when the parties entered into the consent order in 2008. Ms. Kormendy received a lump sum payment which is currently in a locked in RRSP worth \$517,000. As such, his WP Ltd. pension payments should not be included in the imputation of his income.
- [31] Absent pension incomes, Mr. Kormendy's salary is \$69,030. He submits that his deteriorating health was the reason for taking this pay cut. This income is significantly less than the income he had when the consent order was entered into. However, as noted above the Supreme Court's analysis in *Boston*, supra allows for double recovery in instances of need. Such an instance was discussed by this court in *V.A.P v. K.P*, 2006 BCSC 1213, where the wife had considerable health issues requiring ongoing support after her husband's retirement despite the fact she had received significant equalization payments upon separation.
- [32] At para. 33 the court noted:
- [33] The reality of the situation here is that there must be an order that will effectively have the result of Ms. V.P.'s need trumping the court's obligation to ensure that double-dipping does not occur, as contemplated by the Supreme Court of Canada in *Boston*. However, in my view, the result should only be to the extent required to meet the needs of Ms. V.P. as demonstrated by a review of those needs from the perspective of needs that are absolutely necessary to provide for her welfare.
- [33] Ms. Buss's assets are greater than they were in 2008, however her personal circumstances are significantly worse than they were in 2008, especially since her health problems which arose in November 2016 and continue with her needing considerable and expensive home care, the cost of which has been depleting her savings. Additionally, Ms. Buss invested her lump-sum payment wisely (unlike Ms. V.P) in an attempt to become more self-sufficient.
- [34] Ms. Buss will lose the CPP Disability Benefits and Royal Bank Disability pension through SunLife as she reaches age 65 and will instead be receiving her portion of the Royal Bank pension, OAP and CPP, the amounts of which were not determined as of the date of hearing, but which will likely be less than the pensions she has received up to her 65 birthday.
- [35] Now however, her health requires homecare at a very high cost. I have taken Ms. Buss's total medical expenses from April, 12, 2017 to July 23, 2017 and averaged them to come the total she spends per month on health care costs not covered by her medical. The claimant included a list of miscellaneous medical expenses that was not itemized which I have not included in these calculations.

Item

Cost (\$) per month

ABC Home Care (day time home care)

7,650.40

Paramed (evening home care

1,200.00

Bedside Table

31.50

Medication

44.91

Total:

12,084

[36] On January 8, 2018 Ms. Buss filed an affidavit updating her medical costs. She lists ABC Home support costs at \$4,830.58 per month. While previously her Father had been able to assist her with meals, she now requires Meals on Wheels at \$7.25 per day for a monthly cost of approximately \$217.50. As a result I have updated her monthly costs as follows:

Item

Cost (\$) per month

ABC Home Care (day time home care)

\$4,830.58

Bedside Table

31.50

Medication

44.91

Meals on Wheels

217.50

Total:

5092.99

[37] These calculations leave Ms. Buss with \$61,115.88 in annual medical expenses. Contrast this with her income of \$47,761.18 as provided in her 2017 sworn financial statement. Prior to the changes in her pension which have not yet been accounted for, this left her with a need of \$13,354.70 per year or \$1,112.89 monthly without considering expenses other than for her direct care. As I do not have sufficient detailed information to determine what Ms. Buss's financial need will be when the changes to her pension occur, only that it will likely be

greater to compensate, I dismiss the application of Mr. Kormendy with the result that he continue to pay \$3,892 per month as ordered in 2008.

- [38] I have considered Mr. Kormendy's ability at least to meet his current spousal support obligation of \$4,400 and conclude that he has the ability to do so. In *Leskun v. Leskun*, 2004 BCCA 422, the court considered capital as part of a spouses' "means" and the Divorce Act requires the means of each party to be addressed. Mr. Kormendy owns a home in Langley worth approximately \$1 million, his portion of the pensions divided in 2008 and other financial assets worth at least \$230,000 and he has no debt. His assets are many times more in value than they were in 2008.
- [39] I conclude the means of Mr. Kormendy, including his significant assets and low debt levels, are such that he has the ability to meet this ongoing spousal support obligation at this time.

Mr. Kormendy's Retirement

- [40] With respect to Mr. Kormendy's argument that his pending retirement is a material change, I note that Mr. Kormendy has not yet retired. As such, there has been no material change in circumstance as a result of his retirement.
- [41] Second, whether or not Mr. Kormendy's retirement will constitutes a material change depends on whether or not the parties contemplated the likelihood of his retirement when they entered into the consent order. While the parties knew or ought to have foreseen that Mr. Kormendy would be reaching retirement age in nine years after entering into the consent order, there is no evidence before me that they contemplated this when drafting their consent agreement. As such, when Mr. Kormendy does retire, this issue may need to be revisited. If his retirement does not result in a marked decline in his income, it may well be the case that his support obligations continue. That evidence is not before me now and therefore I make no determination on this matter. I note only that Mr. Kormendy is of retirement age, and whether his health requires him to retire is of no consequence in this instance.
- [42] To conclude the issue of whether or not there has been a material change in the circumstances of the parties, I conclude that the respondent, Mr. Kormendy, has failed to establish a material change in circumstances as required for an alteration of his spousal support obligations and so his application is dismissed with costs to Ms. Kormendy.
- [43] As Mr. Kormendy has unilaterally reduced his support payments, the difference between what he had been ordered to pay in 2008 and the amount he has paid since the reduction would constitute arrears. Ms. Kormendy is entitled to receive the difference in spousal support she is owed since this unilateral reduction.
- [44] Mr. Kormendy is entitled to costs of this application under Appendix "B".

"Jenkins J."

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