
CANADA / JUDGMENT

McArthur v. Besier

2010 BCSC 265

COURT

Supreme Court of British Columbia

DECIDED

1 March 2010

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2010 BCSC 265 McArthur v. Besier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McArthur v. Besier,

2010 BCSC 265

Date: 20100301

Docket: E22765

Registry: New Westminster

Between:

Beverly Ann McArthur

Plaintiff

And

Bernard Philip Besier

Defendant

Before: The Honourable Mr. Justice Saunders

Reasons for Judgment

Beverly Ann McArthur

In Person

Bernard Philip Besier

In Person

Place and Date of Hearing:

Chilliwack, B.C.

February 1, 2010

Place and Date of Judgment:

New Westminster, B.C.

March 1, 2010

- [1] The plaintiff, Beverly McArthur, applies for variation, by way of extension or restructuring, of an award of spousal support that had been made by way of a consent order issued by Wilson J. on October 7, 2005; and for review of the present child support.
- [2] At the time of this hearing the registry file had not yet been transferred from New Westminster to Chilliwack, so judgment was reserved in order to give me the opportunity to review the file, in particular the defendant's Form 89.

Background and Previous Orders

- [3] The parties were married in October 1999. Their first child, a daughter, was born in November 2001. They separated in June 2005, and their son was born six months later, in December 2005.
- [4] On September 28, 2005, the parties consented to an order made by Master Tokarek, providing, among other things, for the interim payment of \$532 a month in support of their daughter.
- [5] In October 2005, the parties negotiated an agreement, the terms of which were reduced to writing in the form of a consent order pronounced by Wilson J. on October 7, 2005. That order made provision for the payment by the defendant of child maintenance, extraordinary expenses, and spousal maintenance. Spousal support was set at \$900 per month until the birth of the second child and \$610 per month thereafter until September 2009, with the defendant being liable for no further spousal maintenance after that date.
- [6] Upon a Judicial Case Conference being heard before Williams J. on December 2, 2005, it was ordered that the matrimonial home be sold, with all net proceeds of sale, after discharge of a mortgage and payment of certain other family debts, to go to the plaintiff.
- [7] Following an application before Brine J. on December 11, 2006, the guideline income of the defendant was set at \$63,000 and the child support payment was varied accordingly to \$952 per month.

Spousal Support

- [8] I have reviewed the plaintiff's affidavits dated November 27, 2009 and January 20, 2010, which were filed in support of the present application, and the previous affidavits on file. The plaintiff has not worked since she became pregnant with the parties' first child in 2001. She has been out of the work force for nine years. She points to learning difficulties and issues with motor control which her daughter is having, and she describes her young son's hyperactivity. She deposes that she believes that it would be in the best interests of her children for her to be able to stay at home.
- [9] The plaintiff is entitled to seek variation of the order; but such an application must be supported by evidence. I must proceed on the basis that the order was correct in the circumstances which then prevailed: *Haigh v. Haigh*, [1997] B.C.J. No. 1587 (C.A.). The plaintiff must show that there have been changes in circumstances which are significant, unforeseen, and of a continuing nature: *Murphy v. Murphy*, 2000 BCSC 974 at para. 19.
- [10] The plaintiff relies upon two cases, *Miglin v. Miglin*, 2003 SCC 24, and *Tedham v. Tedham*, 2005 BCCA 502.
- [11] *Miglin* concerns the factors which the court may consider on an initial application to vary spousal support arrangements put in place under a pre-existing agreement containing a clause providing for full and final release of spousal support. The Supreme Court of Canada held that there is to be a two-stage process in evaluating such applications. First, the court is to consider, with broad regard to the circumstances, whether the conditions under which the agreement had been negotiated were satisfactory. Second, the court is to consider whether the agreement is consistent with the purposes of the Divorce Act, R.S.C. 1983, c.3 (2nd Supp.). Intervention may be warranted when the agreement's terms are not in substantial compliance with the Divorce Act, but only where there is a significant departure from the legislation's general objectives.
- [12] The circumstances of the *Miglin* case are very different than the matter before me, which is a variation application in respect of a consent order. However, if by analogy, the fairness considerations in *Miglin* could be applied to the present situation, I would give due consideration to the following passages from the majority judgment at paras. 88-89:

The parties' intentions, as reflected by the agreement, are the backdrop against which the court must consider whether the situation of the parties at the time of the application makes it no longer appropriate to accord the agreement conclusive weight. We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a

situation that cannot be condoned.

We stress that a certain degree of change is foreseeable most of the time. The prospective nature of these agreements cannot be lost on the parties and they must be presumed to be aware that the future is, to a greater or lesser extent, uncertain. It will be unconvincing, for example, to tell a judge that an agreement never contemplated that the job market might change, or that parenting responsibilities under an agreement might be somewhat more onerous than imagined, or that a transition into the workforce might be challenging. Negotiating parties should know that each person's health cannot be guaranteed as a constant. An agreement must also contemplate, for example, that the relative values of assets in a property division will not necessarily remain the same. Housing prices may rise or fall. A business may take a downturn or become more profitable. Moreover, some changes may be caused or provoked by the parties themselves. A party may remarry or decide not to work. Where the parties have demonstrated their intention to release one another from all claims to spousal support, changes of this nature are unlikely to be considered sufficient to justify dispensing with that declared intention.

- [13] The plaintiff also relies upon *Tedham*, in which the BC Court of Appeal allowed an appeal from a chambers order under which time-limited spousal support with a three-year termination date had been granted, notwithstanding that the appellant had been unable to find work in the previous two years. The original order in that case had been for spousal support of a fixed amount reviewable in two years' time. It was that review which resulted in the chambers order under appeal. The appeal was allowed. The Court of Appeal reasoned that the time limitation on the spousal support had been based upon an unrealistic assumption that the appellant was capable of becoming economically self-sufficient within that limited time period.
- [14] There is a real distinction to be made between the present case and *Tedham*, in that the October 2005 order of Wilson J. was made by consent. In *Morgan v Morgan*, 2001 BCSC 874, it was held that the failure of a spouse to obtain self-sufficiency, within the limited time period of spousal support granted by a consent order, may constitute a material change sufficient to lead to variation, where the original order was made on the assumption that self sufficiency would be reached. Smith J. stated, at paragraphs 25-26:

The failure of a spouse to achieve self-sufficiency before the expiry of a time-limited order for spousal support can amount to a material change of circumstances justifying a variation where it was anticipated at the time of the order that the spouse would become self-sufficient within the time fixed: see *Therrian-Cliché v. Cliché*, (1997), 30 R.F.L. (4th) 97 (Ont. C.A.); *Ammann v. Ammann* (1996), 23 R.F.L. (4th) 459 (B.C.C.A.); *Da Costa v. Da Costa* (1999), 46 R.F.L. (4th) 355 (B.C.S.C.). As was observed by Professor James G. McLeod in his annotation to *Therrian-Cliché*, at p. 98:

There are two kinds of changed circumstances: 1) something happens that was not taken into account when the prior order was made; and 2) something that was expected to happen does not occur. Applications to vary indefinite support orders usually involve the former type of change, while applications to extend limited-term support usually involve the latter type.

Therefore, the question for decision may be stated in this way: Did the parties intend by their agreement that the wife's waiver of claims for spousal support beyond that set out in the agreement was conditional upon her achieving anticipated economic self-sufficiency by February 2001, or did they intend that her spousal maintenance should come to an end in February 2001 whether or not she should attain that status?

In Morgan, the consent order had embodied the terms of a separation agreement, which included a clause specifically stating that the wife would be fully self-supporting by the end of the support period. The court therefore concluded that the parties' intention had been to make termination of support conditional upon her having achieved self-sufficiency.

[15] In the present case, there is no evidence of a similar presumption underlying the October 2005 consent order. I therefore cannot treat the plaintiff's present employment status as grounds for varying the termination which the parties previously agreed to. That would be unfair to the defendant, who is entitled to some degree of finality.

[16] The plaintiff's affidavit materials do not disclose any other evidence sufficient to support a claim for variation of spousal support. There is no evidence of continuing hardship arising from the breakdown of the marriage. None of the affidavit materials demonstrate that the children have particular needs that require the plaintiff to remain outside the workforce. The plaintiff has already had the benefit of approximately four years of spousal support, following the break-up of a marriage which lasted less than six years. By this point, steps ought to have been taken by the plaintiff to move towards economic self-sufficiency. If that would entail incurring child care expenses, she might then exercise her right to apply for an order that the costs associated with child care be shared between her and the defendant as extraordinary expenses. A desire to remain at home and nurture one's children may be admirable, but not necessarily realistic in economic terms. In this case it is a personal choice, the cost of which should not be borne by the defendant.

[17] The plaintiff alternatively seeks restructuring of the spousal support. Ongoing support arrangements may be restructured in appropriate cases by trading off amounts against duration. But in this case, spousal support ceased as per the terms of the 2005 order in September 2009; there is no remaining duration which may be traded to increase the amount payable.

[18] The plaintiff's application in respect of spousal support is denied.

Child Support

- [19] The defendant has been paying the maximum child support payable under the Guidelines, plus an extraordinary expense amount.
- [20] I find that the defendant's guideline income is now \$65,100. Under the child support tables, the defendant is liable to pay to the plaintiff the sum of \$983 per month.
- [21] I order that the defendant's child support payments to the plaintiff be increased to the sum of \$983 per month, payable on the first day of each month, retroactive to July 1, 2009.
- [22] Success has been divided. Each party will bear their own costs of this application.

"Saunders, J."

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Prepared on 29 October 2026 · Esheria