

CANADA / JUDGMENT

McLellan v. McLellan

2025 BCSC 573

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Supreme Court of British Columbia

DECIDED

28 March 2025

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2025 BCSC 573 McLellan v. McLellan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McLellan v. McLellan,

2025 BCSC 573

Date: 20250328

Docket: 173774

Registry: Victoria

Between:

Katherine Ann McLellan

Claimant

And:

Richard Thomas McLellan

Respondent

Before: The Honourable Justice LeBlanc

Reasons for Judgment

Counsel for the Claimant:

K. Gill

Counsel for the Respondent:

A. J. Duncan

Place and Date of Hearing:

Victoria, B.C.

March 10, 2025

Place and Date of Judgment:

Victoria, B.C.

March 28, 2025

Table of Contents

Introduction.. 3

Facts. 3

Summary of issues. 7

Is this application a review or a variation?. 7

Should the respondent's spousal support obligations be changed?. 8

Is the application premature?. 9

Should spousal support be varied?. 10

What should happen if the respondent secures work in the future?. 12

Summary of Orders Made. 13

Introduction

- [1] The respondent applies to vary his obligation to pay spousal support. The application is brought pursuant to a September 9, 2021 Order of Justice Power (the "Power Order"), which reads, in part, as follows:
9. The issue of spousal support may be reviewed at the time of the Respondent's retirement or upon a material change in circumstances.
- [2] As of July 2, 2025, the respondent is retiring; a decision made by his employer, and not the respondent.
- [3] The claimant opposes the application on the basis that it is premature. The claimant submits that we do not know if the respondent will find alternative employment by July 2, 2025 and that there may not be a change of income.

Facts

- [4] The claimant is 67 years old and the respondent is 65 years old.

- [5] The parties were married on July 18, 1981 and separated on December 18, 2016. They were married for over 35 years. The parties have three adult children.
- [6] Before the birth of their first child in 1987, the claimant left the workforce and has not returned to work. The parties agreed that having the claimant at home full time was best for their family. The respondent was the sole income earner for the family.
- [7] In 2018, the parties entered into a consent order, whereby the respondent paid the claimant interim, without prejudice, spousal support of \$13,169.00 monthly. This income was deemed to be the amount payable based on his employment salary and pension income, but excluding bonus income received. The bonus income, pursuant to the consent order, was allocated exclusively to paying off family debt. By March 2021, the family debt was paid in full.
- [8] In May, June and July, 2021, a four-day trial proceeded to determine property division and spousal support. This trial resulted in the Power Order.
- [9] The Power Order, among other things, requires the respondent to pay spousal support to the claimant in the sum of \$13,169.00 per month. In addition, the respondent is required to pay the claimant 35% of any bonus payment received from his employer.
- [10] The parties filed competing applications in the spring of 2024 which resulted in an order being pronounced by Justice Iyer on April 9, 2024 (the "Iyer Order"). By consent, this application was adjourned to a mutually agreeable date before March 31, 2025. Further, para. 3 of the Iyer Order provided that the respondent would pay to the claimant 50% of his net disposable income for the years 2022, 2023 and 2024 and will continue to do so until further court order or written agreement of the parties with the calculation of net disposable income excluding bonus income received by the respondent as that would continue to be paid pursuant to the Power Order.
- [11] Since trial, the respondent has paid spousal support pursuant to the Power Order and the Iyer Order: \$445,608.00 in 2021; \$181,043.67 in 2022; \$205,536.61 in 2023; and \$220,843.40 in 2024.
- [12] On February 7, 2024, the respondent received a letter from his employer advising that they would be transitioning him to retirement on the following terms:
- a) final day of work will be July 1, 2025 and retirement date will be July 2, 2025;
 - b) entitlement to full STIP payments for both the 2023 and 2024 calendar year and a pro-rated STIP payment for the six months worked in 2025 (to be paid at some point in Q1 of 2026);
 - c) entitlement to RSU payments for the 2023 and 2024 calendar year with no entitlement to RSU for 2025;
 - d) outplacement services to find alternative employment which will be available for six months commencing on September 1, 2024;

- [13] As of the date of this application, the respondent has not secured alternative employment or work. The respondent's efforts include:
- a) retaining outplacement services (provided by his employer);
 - b) contacting over 30 professional contacts in his network advising he is looking for a CFO position but is also prepared to do interim/contract/project work;
 - c) submitting his resume to 10 executive search firms;
 - d) applying to serve as a board member for a high-profile board of directors in Calgary, Alberta; and
 - e) applying for four senior management level positions.
- [14] If the respondent is unable to secure alternative employment, his sole source of income will be his employment pension which is currently \$52,877.28 gross per annum.
- [15] The claimant says her monthly expenses are approximately \$14,960.72, some of which she says are attributable to expenses paid on behalf of the party's daughter. The January 23, 2024 financial statement of the claimant attributes \$825 per month to Molly's medical and dental expenses and \$225 per month to the claimant's health expenses. The claimant says she relies on the spousal support received from the respondent to meet current and anticipated future expenses.
- [16] The respondent has provided a during and post employment breakdown of his expenses. The during employment breakdown of expenses is found in his financial statement sworn on March 20, 2024 and provides for monthly expenses of \$54,951.21 of which \$18,403.62 is attributable to payments to the claimant and \$16,893.30 to compulsory deductions from employment. The respondent has sworn a subsequent financial statement on February 12, 2025, which provides a breakdown of his expenses following retirement which are anticipated to be \$9,355.75, which includes \$2,212.25 to be paid to the claimant.
- [17] Both parties take issue with the other's spending habits asserting the monthly expenses continue to outpace the monthly income.
- [18] According to his property and financial statement dated February 12, 2025, the respondent currently has assets and debt consisting of the following:
- a) Assets:
- Financial Assets - 35% to be paid to Claimant & not yet received
- \$228,500.00
- Financial Assets - other
- \$907.77

C/C Pension - \$4,425.51/month

Unknown

E.W. Defined Contribution Pension Plan - notionally divided at trial

\$392,059.56

b) Debt:

Secured Debt: mortgage guarantor/contingent

\$802,397.11

Unsecured Debt

\$234,971.54

Anticipated Debt to Claimant (35% of financial asset as per assets)

\$123,156.00

[19] According to her property and financial statement dated January 23, 2024, the claimant had assets and liabilities, at that time, consisting of the following:

a) Assets:

Real Estate

\$1,012,000.00

Vehicles

\$25,000.00

Financial Assets - Chequing and Savings Accounts

\$140,300.00

b) Liabilities:

Mortgage/Line of Credit

\$770,000.00

[20] At trial, the claimant received real property with an appraised value of \$800,000 and a mortgage balance of \$566,000. As of February 21, 2024, according to the claimant, this property has increased in value to \$1,012,000 and the claimant has increased the mortgage balance from \$566,000 to \$770,000. The claimant does not explain what the additional mortgage funds were used for.

Summary of issues

[21] The following issues are to be decided on this application:

- a) Is this application a review of spousal support pursuant to the Power Order or a variation?
- b) Should the respondent's spousal support obligations be changed?
- c) If the respondent's spousal support obligations are changed, what provisions should there be in the event the respondent earns additional income in the future?

Is this application a review or a variation?

- [22] Different considerations apply to a review than they do for a variation. If the court order provides for a review, there is a burden to establish that the condition triggering the review has been established: *Hall v. Hall*, 2021 BCCA 115 at para. 33. Whereas, if the application is for a variation, a change of circumstances must be established: *Johnson v. Johnson*, 2023 BCSC 370 at para. 47.
- [23] Paragraph 9 of the Power Order allows for the issue of spousal support to be reviewed at the time of the respondent's retirement. It also allows review upon a change of circumstances.
- [24] It is clear that Justice Power was leaving open a review of spousal support upon the retirement of the respondent. At paras. 78 to 85 of her Reasons, Justice Power explains her decision with respect to ongoing spousal support and at para. 85 concludes by saying that the issue of spousal support can be reviewed at the time of the respondent's retirement or on a material change of circumstances.
- [25] Counsel for the claimant argued that this could only be a variation application as the respondent sought the following order: "that the respondent's obligation to pay spousal support be varied, effective June 30, 2025." I do not agree that the use of "varied" can be taken as limiting the respondent. It is clear from a review of the notice of application as a whole that the respondent was seeking a review, as para. 1 of Part 3 references the Power Order and seeks a review of the spousal support at the time retirement. I find that the use of "vary" in Part 1 is simply a reference to changing the amount of spousal support.
- [26] I find that the facts establish a retirement of the respondent and that this application may proceed by way of a review as permitted by the Power Order. If that were not the case, I would have still proceeded to consider a variation as I find there has been a change of circumstances arising from the end of the employment of the respondent. It was agreed by the parties that the respondent's employment is ending at the beginning of July 2025, and that fact is not in dispute.
- [27] Retirement from employment can be a material change in circumstances, even if clearly foreseeable, if the facts support it: *Stones v. Stones*, 2004 BCCA 99 at para. 15. The factors found in retirement cases negating a change of circumstances are not applicable here. For example, the respondent is not retiring early - the retirement has been forced upon him and he is beyond the age of 65. This is also not a case of double-dipping as the pension income was previously divided and/or accounted for in the Power Order. The respondent's change of income will constitute a change of circumstances such that he will be required to encroach

on his divided assets to continue paying the claimant ongoing spousal support.

Should the respondent's spousal support obligations be changed?

[28] In bringing this application, the respondent acknowledges the following obligations to pay the claimant, which he is not seeking to have changed:

- a) 50% of his gross C/C pension income as spousal support which is presently indexed at \$53,094 per annum with the claimant's half interest being \$2,212.25 monthly;
- b) 35% of his net bonus income as spousal support (for as long as that bonus income continues (which will be the first quarter of 2026); and
- c) Ongoing spousal support from employment income accrued up to July 1, 2025.

[29] The respondent seeks an order that he is not required to pay anything additional to the amounts set out above as he should be permitted to retire and not have to work past the age of 66. He acknowledges that should he find employment or work in the future that there would be an obligation to the claimant in the form of further support.

[30] The claimant's position is two-fold. First, that the application is premature as it is not yet known whether the respondent will find alternative work past July 2, 2025. Second, the application is premature as the event of retirement has not yet occurred and further information is required regarding the respondent's circumstances closer to July 2025.

Is the application premature?

[31] The claimant directed my attention to the decision of Mr. Justice Majawa in *Carey v. Carey*, 2021 BCSC 1537 [Carey], with respect to prematurity in a variation application:

[36] Although Mr. Carey's argument is attractive and it does seem somewhat practical to bring the application now, it is my view that an intention to retire does not equate to a material change in circumstances and that the application has been brought prematurely. First, the plain words of s. 17(4.1) require that a material change has already occurred before making a variation:

the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making the spousal support.

[Emphasis in original.]

[37] This follows from the well-established principle that a decision to vary or terminate support must not be based on events that may or may not occur. The Ontario Court of Appeal commented similarly on the prematurity of such applications in *Schulstad v. Schulstad*, 2017 ONCA 95 [Schulstad]. At para. 21, the Court of Appeal refers to the Supreme Court of Canada and appellate level cases in support of that proposition:

prematurity is an issue impacting the threshold question of whether or not there has been a material change in circumstances. It is well-established that any decision to vary must not be made in accordance with events which may or may not occur: *Messier v. Delang*, 1983 CanLII 31 (SCC), [1983] 2 S.C.R. 401, at p. 416. An application to vary will be premature if based on speculative or uncertain changes in circumstances: *Dufresne v. Dufresne*, 2009 ONCA 682.

[Emphasis in original.]

- [32] The situation in *Carey* is distinguishable from the facts here. Mr. Carey expressed a desire to retire; however, there was no evidence from Mr. Carey's employer confirming that Mr. Carey had expressed his intention to retire or that his employer was taking steps in contemplation of that occurring. Mr. Carey did not have a retirement date.
- [33] What distinguishes this case from *Carey* is the certain retirement date. The employer has hired a replacement for the respondent and settled all matters concerning his end of employment as represented in the February 7, 2024 correspondence.
- [34] The only speculative event is whether the respondent will work after July 2, 2025 and, if so, what that work might look like. Notwithstanding significant efforts over the course of many months, the respondent has not secured alternative work. Having not found alternative work, I find that the retirement of the respondent in early July 2025 is not speculative and the application is not premature.

Should spousal support be varied?

- [35] The respondent has paid substantial spousal support and he is current with his support payments. There is no evidence to suggest that the respondent is trying to evade obligations towards the claimant.
- [36] The respondent has recently developed atrial fibrillation and high blood pressure and seeks to care for himself by retiring. He expresses that while he may work in the future, he does not want to have the obligation to work at his pre-retirement levels, and if he works, the claimant should be entitled to further spousal support. The position taken by the respondent is reasonable and understandable. He has worked hard and should be entitled to retire at the age that is generally accepted as a "retirement age".
- [37] The respondent will receive a modest income post retirement from his pensions. To continue paying the claimant spousal support, at the rates she has been receiving, would require liquidation of the respondent's assets received as a result of the equal division. This would result in a double recovery to the claimant, and a financial disaster for the respondent when the assets are depleted.
- [38] The claimant says that she relies on the spousal support for her current and future obligations. I find this position to be unreasonable. Justice Power was extremely critical of both the party's spending habits finding them irresponsible and unexplainable. Notwithstanding receiving large sums in yearly spousal support, the claimant remortgaged

the real estate she received in the separation and does not explain where these funds went. Based on the Power Order, the claimant knew that spousal support was to be reviewed upon retirement of the respondent and she ought to have taken steps to plan financially for this eventuality. There is no evidence of the claimant taking such steps.

- [39] The evidence concerning the daughter's financial situation is scarce and does not explain whether assistance is available given her ongoing needs. In any event, the sums paid for the daughter's medical expenses represent only a small portion (approximately 5%) of the claimant's monthly expenses. The other expenses the claimant attributes to her daughter are expenses that would have been incurred regardless of whether the daughter lived in the residence or not, such as property taxes, utilities and the costs of maintaining a residence.
- [40] It is not apparent on the evidence that the claimant has curbed her spending habits.
- [41] The claimant has elected not to receive the Canada Pension Plan benefits available to her for which she is now eligible. This would represent further income available. Again, this is not explained by the claimant.
- [42] The respondent's standard of living is, at this time, less than that of the claimant. The claimant has a larger asset base than the respondent and the ability to cut discretionary spending. The claimant's financial situation is superior than that of the respondent.
- [43] Considering the current financial situation of the parties, upon retirement, the respondent will no longer be in a position of reaping the economic advantages of the marriage while the claimant suffers.
- [44] I am persuaded that, in the circumstances of this case, the respondent's obligation to pay spousal support should end on July 2, 2025, subject to payment of those amounts that he has agreed to pay and will be addressed in my order.
- [45] While each case will turn on its own individual facts, in making this determination, I have considered the cases of *Johnson v. Johnson*, 2023 BCSC 370, *Puiu v. Puiu*, 2011 BCCA 480, and *Kennett v. Kennett*, 2021 BCSC 2265 as providing guidance as to when termination of spousal support will be appropriate in retirement cases.

What should happen if the respondent secures work in the future?

- [46] The respondent suggests that if he secures work in the future, there should be a formula in place to address this future contingency. The respondent suggests payment at the low end of the range recommended by the Spousal Support Advisory Guidelines with any costs associated with tuition and training to be deducted from his income and imputing income to the claimant representing CPP and OAS available to her if she is not receiving it.
- [47] The respondent also seeks an order dealing with the future contingency of the respondent finding work and suggests a payment of 50%.

- [48] Both parties provided detailed rationale behind their proposals and argued that certainty will assist the parties as it would likely prevent future contested applications.
- [49] Whether the respondent finds future work is speculative. I would need facts that are not available to me on this application to determine what would be appropriate in the future. For example, I would require updated financial statements of the parties, the details surrounding the respondents work, and any other relevant evidence required to assess the respondent's obligation to pay spousal support.
- [50] While I agree that it may be beneficial to have certainty going forward, each party's proposal depends on very different factual scenarios that are not yet known and may never come to fruition.
- [51] For these reasons, I do not find it is appropriate to make the order urged upon me. However, I do find that it would be appropriate to address, in my order, a mechanism for dealing with that future event, should it occur.

Summary of Orders Made

[52] I make the following orders:

- a) The respondent will continue to pay the claimant 35% of his net bonus income pursuant to the Power Order;
- b) The respondent will continue to pay the claimant 50% of the gross monthly income received from his C/C pension as spousal support;
- c) Effective July 2, 2025, the respondent's obligation to pay spousal support to the claimant in the monthly amount of \$13,169.00 is terminated;
- d) The respondent will have an ongoing duty to disclose his earned income, that is not part of his pension income, to the claimant until he reaches the age of 70 (June, 2029);
- e) Between now and June 2029, if the respondent takes on new employment or consulting work, he will notify the claimant within 30 days;
- f) The issue of spousal support may be reviewed if the respondent earns new employment or consulting income after July 2, 2025; and
- g) As the successful party, the respondent will have his costs of this application.

"LeBlanc, J."

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Prepared on 25 October 2026 · Esheria