
CANADA / JUDGMENT

McPherson v McPherson

2019 BCSC 933

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 933 McPherson v. McPherson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McPherson v. McPherson,

2019 BCSC 933

Date: 20190611

Docket: E1347

Registry: Courtenay

Between:

Cindy Gayle McPherson

Claimant

And

Douglas Alexander McPherson

Respondent

Further Corrected Judgment: The front page of the judgment was corrected on October 1, 2019

Corrected Judgment: The text of the judgment was corrected at paragraph 27 on June 17, 2019

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the claimant:

B.R. Vining

Counsel for respondent:

A. Marsden

Place and Date of Chambers Hearing:

Courtenay, B.C.

March 14, 2019

Place and Date of Judgment:

Courtenay, B.C.

June 11, 2019

INTRODUCTION

- [1] The parties to this matrimonial litigation began living together on May 12, 1983, married on March 5, 1986, separated on April 4, 2004 and were divorced by order of this court on September 6, 2005. Both are now 60 years of age. Their divorce order incorporated the terms of a mediation agreement settling all matters between them. The respondent is bound thereby to pay the claimant the sum of \$1,200 per month in spousal support. No end date was specified. The parties were represented by counsel throughout.
- [2] The Minutes of Settlement drawn up after the parties' mediation provided that "Either party shall be entitled to make application for a review of the spousal maintenance obligation following January 15, 2007 in any event of a material change in the financial circumstances of either party." This same language was incorporated into the divorce order, but for unexplained reasons the review entitlement was reserved to the respondent alone. The divorce order was approved and signed by the parties and countersigned by the same lawyers who assisted them at mediation.
- [3] On April 2, 2007, the respondent brought an application to terminate spousal support. The claimant filed a cross-claim for increased support. Both of these applications were dismissed. Except as it related to the practicalities of pension division the provisions of the divorce order were confirmed. The respondent has paid \$1,200 per month in spousal maintenance ever since. He has come back to court 12 years on seeking termination of this obligation. The claimant filed a cross-application seeking increased support, but she abandoned it at the hearing.
- [4] The claimant's position expressed in oral argument is that the respondent's application is premature. She claims to be entitled to ongoing support at current levels until she becomes eligible to receive her Canada Pension Plan payments at age 65. She maintains that the objectives of spousal support referred to in the Divorce Act, R.S.C. 1985 (2nd Supp), c. 3 (the "Act") have not yet been achieved, namely to:

- (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.
- [5] The respondent argues that his recent decision to take voluntary retirement from employment is a material change in circumstances justifying termination. He argues, as well, that over the years he has fulfilled his compensatory obligations to the claimant and should be relieved of further liability.

BACKGROUND

- [6] The parties were both 25 when they met. The claimant came to the relationship with a two-year-old daughter from a previous relationship. Together the parties raised this child to adulthood without much support from her natural father. The parties have a son together who is now 34 years old. Both of their children are self-supporting.
- [7] The parties' marriage was more or less a traditional one. The respondent worked outside the home and earned most of the family income while the claimant was the primary caregiver for the children. The claimant is a hairdresser by vocation. She appears to have worked full-time outside the home in the early years of the parties' relationship, but she was primarily a homemaker during the final decade of the marriage. She earned only modest sums through part-time hairstyling work in those years. I am satisfied that family obligations were the cause of her limited income and that her homemaking role was a matter of mutual consent between the parties.
- [8] The claimant was 46 years old when the marriage broke down. Since separation she has continued working as a hairdresser and has held down other jobs from time to time. Her earning power has never been great and spousal support has made up a substantial portion of her income year on year. Her present day employment income is exceedingly modest, partially due to the development of certain medical problems that limit her physical capacity to work. There was an argument about the admissibility of her medical evidence which I dismissed. The evidence was not sworn, but it was a proper medico-legal opinion in the form specified in the Rules of Court, and it seemed to me to be objective and reasonable. I accept its contents in the absence of contrary evidence.

- [9] When the parties met the respondent was an undischarged bankrupt. I find as a fact that the claimant helped him get back on his feet financially. She assisted him in the establishment of an eaves trough installation business. Her father bought him the necessary supplies and a trailer to get started. In 1987 the respondent established a residential construction company and operated it with the claimant's support and assistance. In 1991 the respondent parlayed his construction experience into secure and remunerative employment as a building inspector with the City of Courtenay. It was at this new workplace that he met the woman for whom he eventually left the claimant.
- [10] In short, the divorce order was made after the breakdown of a long, traditional, rule of 65-compliant marriage during which the claimant made economic sacrifices that enhanced the respondent's career prospects and earning power. This provided a strong basis for long-term compensatory support - and yet the respondent's right to review the claimant's eligibility for such support became exercisable from January 2007, less than eighteen months after the order was made. The unusual brevity of this interval was not explained. If, as is usually the case, it was based on some specific short-term uncertainty in the parties financial affairs, I will proceed on the basis that the uncertainty must have been removed, as the respondent has continued paying support ever since.
- [11] It is notable, as well, that claimant has not sought an increase of maintenance payments since 2007. It seems to me that she would have been on solid ground asking for it on the basis alone of inflation: see *Hickey v. Hickey*, [1992] 2 S.C.R. 518; *Lepp v. Lepp*, 2008 BCSC 448). More importantly, she might well have argued, in the circumstances, that she was entitled to a proportionate share of the respondent's rising prosperity because she helped to create it. On this subject I remind myself of the following passage in *Zacharias v. Zarcharias*, 2015 BCCA at para. 44.

During a marriage, a couple typically operates in a financial partnership. Each partner will take on roles that support mutual goals. If one partner makes economic sacrifices, it will usually be with a view to improving the financial position or quality of life of the family as a whole. Upon the breakdown of a marriage, the situation of mutual benefit is substantially disturbed. The financial sacrifices that a spouse has made will, absent some form of compensation, be borne exclusively by that spouse in the form of diminished earning capacity. Equally, the financial benefits conferred on the other spouse will, absent compensation, exclusively benefit the advantaged spouse. The goal of compensatory support is to ensure that, going forward, the economic consequences of choices made by the couple during the course of the marriage will be shared equitably. [My emphasis]

- [12] Let us consider the figures. At separation in 2005 the respondent's income was approximately \$56,000 per year. The support provision in the divorce order was agreed on this basis. In 2014, by which time the respondent had moved to a position as a building manager with the Comox Regional District, his income had risen to \$96,198. In 2015, the respondent and his new partner moved to Spruce Grove, Alberta, and the respondent re-established himself in local government employment, this time as a Safety Codes

Supervisor, where his income climbed to \$112,039. This is what he was earning at his voluntary retirement in December 2018. I note, as well, that the respondent's spouse earns approximately \$120,000 per annum.

- [13] In my view, if anything, the respondent has paid quite a modest amount of support over the years, especially considering the length of the marriage, the claimant's sacrificial home-making role within it, the obvious long-term economic and vocational advantages redounding to the respondent from their joint arrangements, and the significant economic disadvantages caused to the claimant by their dissolution. I have concluded that the respondent owes the claimant additional compensation. It follows that I reject his argument that he has fulfilled his support obligations. I will proceed now to consider whether his voluntary retirement constitutes a material change in his financial circumstances justifying termination.
- [14] The respondent says that his was not "early" retirement because by the end of last year he had 24 years of contributory service and was eligible for an unreduced pension. His pension income will be \$2,331.00 per month until he reaches age 65 and \$1,761.00 per month thereafter. The claimant is entitled to her divided share of that same pension amounting to \$808 per month to the respondent's 65th birthday and \$611.00 per month thereafter. The respondent maintains that because he has "no other source of income and no intention of obtaining regular employment", any further spousal compensation would amount to "double-dipping": see *Boston v. Boston*, 2001 SCC 43 and related authorities.
- [15] Unlike the claimant, however, the respondent enjoys good health and undiminished capacities. He is only 60 years old. I have no reason to think that he could not have continued working for at least a few more years in his previous position earning more than four times his pensionable income. It is quite clear, as well, that he quit the world of paid employment for purely personal and lifestyle reasons. He made this explicit in a letter to his employer announcing his retirement effective December 31, 2018. "At this point in my life", he wrote, "I wish to focus on my passion volunteering as a dog handler with the Canadian Search Dog Association."
- [16] The question to be judged here, fundamentally, is whether the respondent was entitled to make such a choice in the face of what I have found to be his ongoing financial obligations to the claimant.

REVIEW OR VARIATION?

- [17] There was some argument about whether the present application is for a "review" under s. 15.2 or a "variation" under s. 17 of the Act: see *Morck v. Morck*, 2013 BCCA 186 at paras. 16 and 17 for a discussion of the distinction between these two things. While I am persuaded that it must be a review, I have decided that it makes little practical difference. While a s. 15.2 review provision will usually identify a specific triggering date or event leading to a de novo assessment of entitlement, quantum, or both, in the present case the language chosen by the parties imports the threshold "material change" requirement referred to in the many

authorities interpreting s. 17(4.1) of the Divorce Act, and I will determine the matter accordingly.

- [18] The term "material change" has a specific meaning in Canadian family law: see *Willick v. Willick*, [1994] 3 S.C.R. 670 at 732 and *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370 at para. 52, and many other cases. It signifies a change that, if known at the time of settlement, would likely have resulted in different terms. The parties' inclusion of this term in their spousal support arrangements is now incorporated in a final order of this court. It falls to me to determine its meaning in the ordinary way by examining the language of the order and the circumstances in which it was made: *Yu v. Jordan*, 2012 BCCA 367 at para. 53.
- [19] If the respondent is able to demonstrate a material change in either party's financial circumstances, he will have met the threshold for both a review and a variation of the divorce order. I will likewise consider a variation if he persuades me that there has been some other material change - apart, that is, from a change in financial circumstances - in either party's condition, means, needs or circumstances.

MATERIAL CHANGE IN CIRCUMSTANCES

- [20] The respondent's main argument is that his retirement and the consequent drop in his income constitutes a material change in his finances. It is well-established, however, that his voluntary withdrawal from paid employment does not automatically excuse him from continuing to pay spousal support: see, for example, *Boston* at para. 61. To the contrary, given his ongoing obligations to the claimant, his motivation for taking voluntary retirement must be closely scrutinised in light of various factors. In my view these ought legitimately to include his age, the state of his physical and mental health, his occupational and employment history, and his residual income earning capacity.
- [21] Law courts have no power to compel people to work: *Vennels v. Vennels*, [1993] B.C.J. No. 378 (BCSC). This is a free country and people may configure their economic lives however they please. However, when a person with spousal support obligations retires - particularly at an earlier-than-expected age - the direct and simple question to be determined is whether the decision to do so is reasonable in the circumstances: see, for example, *Jordan v. Jordan*, 2011 BCCA 518 at para. 40; also *Gajdzik v. Gajdzik*, 2008 BCSC 160 at para. 54. If such a decision is found to be unreasonable, then as a matter of law it comprises no material change in circumstances and will not affect support obligations: see *Szczerbaniwicz v. Szczerbaniwicz*, 2010 BCSC 421 at paras. 25-25, citing *Francis v. Logan*, 2008 BCSC 1028 at paras. 34-36.
- [22] In *Francis*, for example, this court held that the defendant's voluntary retirement at the age of 63 in the face of a permanent spousal support order was not a material change because it was dictated by personal preferences and choices rather than medical needs, economic exigencies, or a reduced ability to earn income. The same conclusion was reached in *Bullock v. Bullock*, [2004] O.J. No. 909, where the court held that a payor spouse with ongoing

earning capacity could not avoid his support obligations through voluntarily underemployment whether by retirement or otherwise.

- [23] In the present case, as previously observed, the respondent's decision to retire had nothing to do with exogenous economic circumstances. It did not follow a corporate restructuring, dismissal or layoff. It was not brought on by declining physical or mental health. The respondent merely wished, at the age of only 60, to leave the working world behind and pursue his "passion" for rescue dog training. I have concluded that, in light of his ongoing support obligations to the claimant, this was not a reasonable decision. Accordingly it does not constitute a material change in circumstances, financial or otherwise. I would note, finally, that the claimant gave early and unequivocal notice to the respondent that his avowed motivation for retiring was unreasonable and that she would affirm her entitlement to ongoing support. The respondent went ahead with his plans in any event. He was free to do this, as I have said, but at his own risk entirely.
- [24] The respondent set considerable store in his argument that his retirement, though clearly voluntary, could not be characterised as "early" because he had qualified for an unreduced pension. He relied heavily on *Powell v. Levesque*, 2014 BCCA 33, but that decision does not stand for the proposition that retirement will automatically be considered reasonable if the payor is eligible for a full pension. Each case must be evaluated independently. All of the circumstances surrounding a particular decision to retire must be must be considered and measured against the recipients ongoing entitlement or need for support.
- [25] In *Powell*, the payor spouse retired from military service at the age of 44. This had much to do with a work related injury and other medical problems that negatively affected her ability carry on as a soldier. In fact, the court's discussion of her retirement was prefaced with the observation that cases involving sick or disabled spouses are challenging because recipient spouses may continue to require support whatever the payor's state of health. There is no such challenge in the present case. There is no question of illness or infirmity here, or any need for anguish over diminished capacity in the face of ongoing entitlement or need.
- [26] In *Powell*, moreover, the applicant had paid 12 years of support after a marriage of only eight years, and the court held, as I have declined to do here, that she had discharged her obligations to her spouse in full. The fact that the applicant had served a full term of military service and was eligible for a full pension was a factor, to be sure, but it was combined with others leading the court to answer positively the only question that matters: was the payor's decision to retire reasonable in all of the circumstances?
- [27] The case before me is quite different from *Powell*. Here the claimant continues to be entitled to support and the respondent, given his age, good health, occupational history, and other circumstances, is fully capable of paying it. To permit him to do otherwise in my view would be unreasonable and unfair. I would add that the question of what constitutes "early retirement" was addressed in *Spousal Support Advisory Guidelines: The Revised User's Guide* (Canada, Department of Justice: April 2016) at p. 101, where Professors Carol

Rogerson and Rollie Thompson, two of our country's pre-eminent family law scholars, made the following observations:

When will a retirement be described as "early"? The courts are not always clear. For our purposes, an "early" retirement is either a retirement on a reduced pension or a retirement on a full or unreduced pension before 65 years of age, in the absence of health issues or other special circumstances. If the court sees the early retirement as "voluntary" and not necessary or reasonable, then it is likely that spousal support will not be changed. ... [My emphasis]

In my view this formulation accords with the authorities cited above. Entitlement to a full pension is but one factor to consider in evaluating the overall reasonableness of an individual's decision to retire from the workforce. It is not determinative on its own.

- [28] In summary, the respondent has ongoing support obligations to the claimant. Notwithstanding those obligations he has retired from employment prematurely, voluntarily, unnecessarily and unreasonably. This does not constitute a material change in his financial or other circumstances. I conclude that he must continue paying in accordance with the divorce order. Whether he does this by returning to work, or paying over his pension income, or a combination of the two, is entirely up to him.
- [29] I should clarify, moreover, that if the respondent decides to pay his ongoing obligations from pension income, it will not be a case of "double-dipping". By receiving income from her share of the respondent's divided pension income, the claimant is getting no more than she bargained for in her matrimonial property settlement: see generally *Malbon v. Malbon*, 2017 BCCA 427. The respondent had and continues to have the capacity to pay for his remaining spousal support obligations through employment. If he decides, instead, to tap his pension income as the source from which to discharge this obligation, it will be a matter of choice and not double recovery.
- [30] To finish up, I will deal with secondary arguments raised by the respondent in his pleadings that were not much emphasised at the hearing.
- [31] He argued that the claimant's inheritance in 2016 of approximately \$400,000 from the estate of her late father constituted a material change in her financial circumstances. I disagree. This eventuality was anticipated at the time the divorce order was made. The parties settled their financial affairs in 2005 on the understanding that the claimant would inherit this wealth from her father. It was a contingency that formed part and parcel of their negotiated settlement, thus it cannot qualify as a material change.
- [32] More importantly, as the respondent's spousal support obligations are primarily compensatory, they are not extinguished by the claimant's inheritance from her father: see *Murphy v. Murphy*, 2000 BCSC 974; *Rozen v. Rozen*, 2014 BCSC 2426 aff'd 2016 BCCA 303. The respondent raised the point that the claimant has used some of this money to acquire a revenue condominium, but the income produced is minimal and the claimant's monthly revenue picture is but marginally improved. In any event, the claimant is not be penalised

for making capital investments with her inheritance to secure her long-term self-sufficiency, nor should she be obliged to impinge upon her assets or savings to maintain herself in amounts that the respondent should be paying to her instead.

- [33] Finally, the respondent argued that account should be taken somehow of the fact that the claimant re-partnered for a time after her marriage to him ended. In my view this has no bearing on anything. I have already made the point that an order of spousal support which is based on compensatory principles continues until adequate compensation has been paid irrespective of such intervening factors as re-partnering. In any event, the claimant deposed without contradiction that the relationship in question is over and will never be re-established. Her former partner earns a minimal income and has no assets to speak of. They own no property in common. The claimant has no prospect of any financial benefit arising from dissolution of the relationship. This issue is entirely irrelevant.

CONCLUSION

- [34] The respondent's application to terminate spousal support is dismissed with costs on Scale B. The support provision of the divorce order will continue in force. In accordance with the claimant's position taken at the hearing, which I consider to be reasonable, I hereby order that support payments will terminate on the first day of the month following the claimant's 65th birthday.

"Baird J."

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