
CANADA / JUDGMENT

Munro v. Munro

2006 BCSC 1758

COURT

Supreme Court of British Columbia

DECIDED

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2006BCSC1758

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Munro v. Munro,

2006 BCSC 1758

Date: 20061129

Docket: 02 5031

Registry: Victoria

Between:

Michael John Bryan Munro

Plaintiff

And

Shirley Louise Munro

Defendant

Before: The Honourable Mr. Justice Brine

Reasons for Judgment

Counsel for the plaintiff:

C.H. Tyhurst

Counsel for the defendant:

J.C. Gallie

Date and Place of Trial/Hearing:

October 18, 2006

Victoria, B.C.

- [1] This is the plaintiff's application to review an order of this court, made by consent, and to terminate support payable to the defendant.

Background

- [2] The parties were married on August 20, 1983. The plaintiff was 19 years old and the defendant was 31 years old when they married. They are now 43 and 54 years of age respectively. They had two children who are no longer children of the marriage.
- [3] The plaintiff attended university and graduated with a law degree in 1990. He has developed a relatively thriving criminal practice since.
- [4] While the plaintiff was at university, the defendant worked as a licensed practical nurse in a long term care facility. When the plaintiff's criminal law practice commenced, the defendant worked as his bookkeeper until January 2002. She took only brief periods of time from work with the birth of the children.
- [5] During the latter years of the parties' marriage they had significant difficulties and a number of separations.
- [6] Following the parties' final separation on March 1, 2001, the children resided with the plaintiff who provided all of the financial support for them. Indeed, the plaintiff continues to support the children periodically as required.
- [7] The defendant has provided no financial assistance to the plaintiff for the support of the children since separation.
- [8] An order of divorce was granted on November 19, 2004.
- [9] By way of spousal support the plaintiff paid to the defendant \$1,700 per month from March 1, 2001 to December 1, 2002. Commencing January 1, 2003, the plaintiff paid support of \$4,000 per month for approximately one year. Thereafter, he has paid support pursuant to consent orders in the amount of \$2,500 per month. The order of November 19, 2004, provided that this support could be reviewed after June 2006. From separation until September 15, 2006, the defendant has received some \$166,000 in spousal support. He continues to pay \$2,500 per month. It is this order which the plaintiff seeks to have reviewed and to have his support obligation reduced to zero.
- [10] The plaintiff has, since the disintegration of the marriage, remarried and now has a family with two young children. His income is the sole source of financial support for the family. Some income (\$36,000) is paid to his current wife for services she provides to the practice.

- [11] The defendant was, apparently, a very good bookkeeper while working in the plaintiff's practice. It appears from the evidence that the plaintiff made no efforts of significance at embarking upon a separate career until 2003 when she took training to become a reflexologist. She did this despite no indication from any inquiries as to what level of income she might expect to receive at such an occupation. She subsequently abandoned her career in reflexology, choosing a career in electrolysis. For that purpose, she redeemed \$10,000 of her RRSP to finance the training required. The defendant anticipates that she will have net earnings of approximately \$7,800 for this year.
- [12] With respect to the possibility of working as a bookkeeper, the defendant deposed that she had: "No training in accounting with minimal and limited experience. I have no interest in it and therefore did not want to waste time and money getting educated in a field I had no interest in."
- [13] The plaintiff discloses a line 150 income of \$157,367 in 2003, \$188,653 in 2004 and \$113,345 in 2005. The average of these amounts is \$153,121. From this amount he must pay approximately \$3,500 in Law Society fees and dues.
- [14] Following the sale of the parties' matrimonial home in 2005, the defendant received approximately \$84,000 together with RRSPs of almost \$35,000. Of the property sale proceeds the defendant contributed to the plaintiff the sum of \$10,000 and the plaintiff assumed liability for the family's debts which exceeded \$140,000.
- [15] Roughly the plaintiff departed the marriage with net debt of almost \$50,000. The defendant, on the other hand, left with almost \$120,000 in equity.
- [16] The plaintiff also points out that the defendant lived in a relationship which he believed to be common law for a period of time that was not disclosed to the plaintiff until after the application was commenced. It is unknown what measure of assistance she may have received from that relationship.
- [17] I am satisfied that there has been a reapportionment of the family's assets substantially in the defendant's favour as a result of the aforementioned financial arrangements.

The Law

- [18] A review of spousal support pursuant to court order is a fresh application. The usual threshold test for variation applications, i.e. a material change in circumstances, does not apply to review proceedings: *Xu v. Leung*, (2002), 162 B.C.A.C. 315, 2002 BCCA 53; *Rogers v. Rogers*, (1999), 67 B.C.L.R. (3d) 113, 1999 BCCA 238; *Schmidt v. Schmidt*, (1999), 71 B.C.L.R. (3d) 113, 1999 BCCA 701. A reapportionment of family assets does not necessarily eliminate the requirement for an award of spousal support: *Tedham v. Tedham* (2005), 47 B.C.L.R. (4th) 254, 2005 BCCA 502.

[19] The relevant provision of the Divorce Act is s. 15.2. Review applications are to be conducted in accordance with that section of the Act which provides, in part, as follows:

15.2(1) Spousal support order

A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

(3) Terms and conditions

The court may make an order under subsection (1) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

(4) Factors

In making an order under subsection (1) the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

(6) Objectives of spousal support order

An order made under subsection (1) that provides for the support of a spouse should

- (a) recognise any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the 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 spouses arising from the breakdown of the marriage; and
- (d) insofar as is practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[20] In this review proceeding, I will be required to determine entitlement to spousal support, quantum of support, and duration of support.

1. Entitlement

- [21] Following Moge [1992] 3 S.C.R. 813, and Bracklow [1999] 1 S.C.R. 420, there is a broad basis of entitlement to spousal support recognized in Canada both based on a compensatory or a non-compensatory model.
- [22] When assessing the entitlement for spousal maintenance, the Court must inquire into the effect of the marriage in either impairing or improving the economic prospects of each spouse: Moge, supra.
- [23] Compensatory maintenance is premised on the principle that the financial cost to one spouse of the loss of economic opportunities as a consequence of a decision, for example, for one spouse to remain at home and raise children, should be borne equally by the spouses when the marriage disintegrates: Moge, supra. The most common circumstance that triggers the compensatory grounds for spousal support is where one spouse has assumed a disproportionate share of child care responsibilities to the cost of their full potential to develop a career.
- [24] The economic disadvantage suffered by one spouse may be remedied by an award of long term maintenance or by an alternative property settlement or a combination thereof: Moge, supra. Similarly, in Toth v. Toth (1995), 13 B.C.L.R. (3d) 1 (C.A.), asset reapportionment in the favour of the home-maker spouse was considered sufficient to meet the objectives of spousal support.
- [25] Spouses are entitled to a standard of living that is reasonable in light of their economic expectations during the marriage: Moge, supra, and Nelson v. Nelson, (2001), 162 B.C.A.C 297; 2001 BCCA 682. L'Heureux-Dubé J. stated for the majority in Moge, supra, at ¶ 47:

What the Act requires is a fair and equitable distribution of resources of marriage or marriage breakdown for both spouses, regardless of gender.

- [26] A spouse has a positive obligation to make reasonable efforts to become self-sufficient, but does not have an absolute obligation to become self-sufficient: Rogers, supra. The goal of self-sufficiency is to be accorded equal weight and consideration among the objectives set forth in the Divorce Act. No single objective should take precedence over the others: Moge, supra; Newson v. Newson (1993), 78 B.C.L.R. (2d) 35 (C.A.)
- [27] The duty to become self-sufficient is never extinguished, however, the courts have recognized clear evidence of an inability to become self-sufficient in certain circumstances and have made adjustments to spousal support accordingly. In Rednall v. Rednall (1986), 4 R.F.L. (3d) 337, [1986] B.C.J. No. 839, Boyd L.J.S.C. (as she was) stated at ¶71 and ¶72:

In these circumstances, while I consider it to be in the spirit of the Divorce Act to promote the concept of self-sufficiency, I cannot ignore that the achievement of such a state will be thwarted firstly, by the realities of the market place and more subtly, by her own diminished level of self-confidence. Training may overcome the first hurdle, but some determined effort will be required to overcome the more subtle problem of asking a 50 year old woman, with no real history in the work force, to muster the courage and confidence to strike out on her own.

In stating that a spouse has an obligation to become economically self-sufficient, I do not believe that either the Parliament or the Legislature simply contemplated a situation in which a spouse could earn sufficient income to provide for his or her own basic needs. Rather, in my opinion, the Parliament and the Legislature contemplated a situation in which a spouse could earn a level of income such as to cover the costs incurred in living a lifestyle not unlike that which that spouse would have enjoyed had the parties continued to live together.

[28] In that regard, the following passage from Tedham, *supra*, at ¶33 is apt:

[S]. 15.2 of the Act does not require self-sufficiency, but seeks to promote self-sufficiency "in so far as practicable." In determining what is practicable, regard must be had for all the circumstances, including the age and gender of the spouse, her/his skills, or lack thereof, the opportunities for retraining, and the realistic prospect of the spouse being able to find not just a job, but one which enables her/him to become self-sufficient, which may be a different matter.

[29] The non-compensatory basis for spousal support examines mutual obligations and needs. These are related to the pre-separation standard of living and the loss of access to the former spouse's economic resources and income. This model recognizes that there may be an entitlement even in the absence of compensatory factors.

2. Quantum and Duration

[30] On a review of spousal support, the Court may, in determining the appropriate quantum and duration of spousal maintenance, consider the age of the spouses and the opportunity of each to earn income and to gain advancements in employment: *Bellman v. Bellman* (1996), 46 R.F.L. (4th) 414, [1999] B.C.J., No. 1196 (S.C.)

[31] This analysis requires the Court to consider each party's overall condition, needs and other circumstances which include the length of cohabitation and the functions performed by each during that cohabitation.

[32] *Prowse J.A. in Yemchuck v. Yemchuck* (2005), 44 B.C.L.R (4th) 77, 2005 BCCA 406, recognised at ¶64 the Spousal Support Advisory Guidelines: A Draft Proposal (Ottawa, Dep't of Justice: 2005) [the "Advisory Guidelines"] as, "A useful tool to assist judges in assessing the quantum and duration of spousal support."

- [33] In *McEachern v. McEachern*, 2006 BCCA 508, released on November 14, 2006, the Advisory Guidelines were utilized to develop a suitable range for the spousal award, and then the court provided factual reasons why such award would be at the lower end of the range. The Advisory Guidelines provide a base-line range of quantum and duration of spousal support that can be varied by taking into account the relevant circumstances of the particular case. One such circumstance is where capital asset reapportionment has occurred.
- [34] In *McEachern*, supra, when assessing the quantum and duration calculation of the spousal support award, the trial judge found that the efforts of the payee spouse to become self-sufficient were "less than whole-hearted." In assessing the appeal, Prowse J.A. determined at ¶41, that the appropriate manner to deal with this finding was to impute income to her for a portion of the period in issue. In that case, the payee had worked part-time in an interior décor shop and part-time trying to establish her own design business. Prowse J.A. stated at ¶57, that the payee "should have realised that her design business was not going to flourish as she had hoped, and that she was going to have to redirect her efforts." The court imputed income as if the payee had worked fulltime at the interior décor shop during the period in question.

Discussion

- [35] The Munros had a relatively long marriage of approximately 18 years which cannot be described as traditional in the sense that Ms Munro was not strictly the homemaker and primary caregiver. Except for brief periods following the births of their children, she worked throughout the marriage.
- [36] At the time of the parties' marriage in 1983, Mr. Munro was attending university and worked part-time. Ms Munro worked as a long term care aide.
- [37] Following the plaintiff's graduation from law school and call to the bar he commenced practice as a sole practitioner. From the start of the practice until separation the defendant was the plaintiff's bookkeeper.
- [38] I am satisfied that the marriage did not, therefore, result in a disadvantage, economic or otherwise to the defendant. She entered the marriage without particular skills and left the marriage in relatively the same position except for the fact that she had considerable experience as a bookkeeper in, what I understand to be, a busy law practice. These skills are practical in nature rather than academic.
- [39] On the other hand Mr. Munro, who entered the marriage with few skills, left the marriage with a significant benefit, i.e. a law degree and a thriving legal practice.
- [40] Therefore, while the defendant may not have suffered economic disadvantage as a consequence of the marriage the disparity between the parties' positions was far greater at the end of the marriage than it was at the start.

- [41] I consider that it is unlikely that the defendant could ever be expected to enjoy a standard of living comparable to that which she enjoyed during the marriage without financial assistance from Mr. Munro.
- [42] I turn now to consider the objectives of spousal support.
- [43] As to economic advantages or disadvantages, I consider that while the defendant has not suffered a disadvantage from the marriage the plaintiff has clearly suffered an economic advantage from it.
- [44] I consider as well that following the disintegration of the marriage the financial consequences which arose from the care of the children of the marriage were borne entirely by the plaintiff without any contribution by the defendant except insofar as the plaintiff had, in effect, access to the defendant's capital in the form of her share of the interest in the matrimonial home.
- [45] In that latter respect, I consider that the actual contribution of the defendant to be somewhat minimal in that the plaintiff continued to pay down the mortgage (including the defendant's portion), attending to all household upkeep and maintenance expenditures and realised an increased value for the investment when the property was eventually sold.
- [46] With respect to economic hardship accruing to the parties from the breakdown of the marriage, this has largely been addressed by the reapportionment of family assets noted previously. Following the sale of the matrimonial property following separation and the subsequent sale of the matrimony property, I accept that the burden of debt responsibility was borne primarily by the plaintiff. The capital he received from the sale of the home was consumed entirely by the debt.
- [47] The defendant, on the other hand, was allocated no debt but rather received the parties' RRSP as well as her share of the net proceeds of the matrimonial home less \$10,000.
- [48] I do not consider this allocation to be in any way unfair to the plaintiff. He clearly had the greater capacity and ability to attend to the debt. Nevertheless it did, in my view, assist the defendant in terms of dealing with the economic hardship which otherwise might have arisen to her as a result of the marriage breakdown.
- [49] With respect to the question of self-sufficiency of the defendant, I note that for a considerable period of time following the parties' separation she took no steps whatsoever to become self-sufficient. In my view valuable time was lost. No adequate explanation for this failure has been advanced.

- [50] Furthermore, I consider that the one economic advantage that the defendant had upon the dissolution of the marriage was considerable experience as a law office bookkeeper. While the defendant may have preferred not to have pursued such an occupation it seems to me that it would not have been unreasonable for her to at least have explored the possibility of upgrading her formal academic skills to follow a career in bookkeeping or accounting. There is, at least, some easily ascertainable measure of income earning potential.
- [51] I was provided no evidence as to the rationale behind the defendant's choices of reflexology followed by electrolysis. Indeed, it appears that, at least insofar as reflexology is concerned, that there was never a reasonable prospect of being able to become economically independent.

Decision

- [52] How, then, are all of these considerations to be appropriately balanced?
- [53] The plaintiff clearly has the greater means or ability to withstand the economic consequences of a support order being made in favour of the defendant. However, I must take into account the fact that he has, appropriately, moved on with his life and has a new family for whom he is entirely responsible.
- [54] On the other hand, the defendant has not, insofar as it was practicable, taken all of the necessary steps in order to become self-sufficient. In my view, it would have been practicable for her to have explored options particularly as a bookkeeper/accountant upon the dissolution of the parties' marriage. She did not do so. Indeed, she effectively did nothing until the review date began to draw near.
- [55] The choices that she has made since separation have, in my view, prejudiced her ability to become self-sufficient.
- [56] We have then a situation where the plaintiff has honourably and faithfully complied with all of his obligations to the defendant since separation. The defendant, meanwhile, has not, in my view, fulfilled such obligations as were imposed upon her.
- [57] I have concluded that the most appropriate way to rectify this matter is to impute income to the defendant.
- [58] One possible measure of the income which ought to be imputed to the defendant is the income which she might reasonably have been able to earn as a bookkeeper. The only evidence of such income is the amount that the plaintiff attributes to his current wife for the bookkeeping and other services she renders to his legal practice. This amounts to \$36,000 per annum.

- [59] Another possible measure is the income that the defendant might be expected to be earning currently, had she commenced her electrolysis career in a more timely manner. The defendant expects to earn some \$7,800 this year from her present career. Presumably, this will increase in time. It is not unreasonable to expect earnings in the order of \$2,000 per month, which is perhaps less than that which she might have expected to earn as a bookkeeper.
- [60] I consider that, had the defendant embarked upon a career path earlier than she did, she ought to have been capable of earning \$24,000 per annum by the present time.
- [61] I have concluded that it is not, in the circumstance of this case, appropriate to apply the Advisory Guidelines. The factors which I have taken into account for not doing so include:
1. the limited or no economic disadvantage arising to the defendant from the marriage;
 2. the significant asset and debt reapportionment in the defendant's favour;
 3. the lack of financial contribution by the defendant toward child support;
- the defendant's delay in pursuing her obligation to become economically self-sufficient;
4. the plaintiff's increased expenses associated with his new family; and
 5. the limited need for support demonstrated by the defendant.
- [62] The defendant's reasonable expenses from her most recent financial statement are approximately \$36,000 per annum. It is of note that she has been able to essentially preserve or even increase her net worth while in receipt of support from the plaintiff - such support being her only source of income.
- [63] Taking into account the length of the marriage, the economic circumstances of the parties arising as a result of the marriage, and their current earning capacities, I consider that it would not be appropriate to reduce the defendant's support to zero. Rather, I consider that ongoing support in the amount of \$1,200 per month is appropriate in the circumstances of this case. This will commence January 1st, 2007.
- [64] I do not propose that there should be a review date of this order but rather that it is subject to review upon a material change in circumstances.
- [65] With respect to costs my view is that, subject to matters which are at present unknown to me, in light of the divided success of the parties, each party should bear their own costs of the application. If counsel wish to make further submissions in that regard they are at liberty to do so.

"D. Brine, J."

The Honourable Mr. Justice D. Brine

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