
CANADA / JUDGMENT

Murphy v. Murphy

2015 BCSC 408

COURT

Supreme Court of British Columbia

DECIDED

17 March 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCSC 408 Murphy v. Murphy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Murphy v. Murphy,

2015 BCSC 408

Date: 20150317

Docket: 00-0288

Registry: Victoria

Between:

Barbara Joan Murphy

Claimant

And

Douglas Brian Murphy

Respondent

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for Claimant:

C. Gordon

Counsel for Respondent:

P. Schmit, Q.C.

Place and Date of Hearing:

Victoria, B.C.

September 16, 2014

Place and Date of Judgment:

Victoria, B.C.

March 17, 2015

- [1] The respondent has applied for an order under s. 17 of the Divorce Act, R.S.C. 1985 c. 3 varying a consent order of September 12, 2005 to cancel or reduce his obligations to pay spousal support as of March 1, 2014 and to dismiss any further claims of the claimant for spousal support.
- [2] The relationship between the parties lasted for 25 years before their separation in 1996. The respondent, now 73 years of age, retired on February 26, 2014 as a military lawyer employed by the Appeals and Legal Issues Directorate, Veterans' Affairs. He deposes that he has paid spousal support to the claimant for a period of 18 years, up to and including March of 2014, however the claimant has deposed that the claimant only began to pay regular support after she commenced legal proceedings in 2000.
- [3] The claimant is now 66 years of age and takes the position that the consent order of 2005 called for permanent spousal support [referred to in the order as "maintenance"]. She contends it included a clause entitling the respondent to a review of the amount of spousal support upon his retirement or if his annual gross income of T4 earnings fell below \$60,000 per year, but did not contemplate cancellation of spousal support.

Background Facts

- [4] These parties married in 1971, separated June 18, 1996 and were divorced by way of an order granted in August of 2010.
- [5] During the 25 year marriage, the claimant raised their two children and maintained the household but did not work outside the home save for occasional bookkeeping jobs and for a short time operated a small business in 1993. Prior to the marriage, the claimant had been employed by the Canadian Forces as a finance clerk and due to Canadian Forces' policy that married couples could not serve together if one was enlisted and the other was an officer, the claimant was released from duty. The respondent takes the position that the claimant was able to work or re-train after the children left school and when the parties separated but elected not to do so in order to pursue her interest in horses.
- [6] The family had settled in Edmonton in 1987 after several years of relocation as is common with members of the armed forces. During the time in Edmonton, the respondent worked as a lawyer with Veterans' Affairs, save for a ten year period when he was in private practice.

They remained in Edmonton until their separation in 1996 when the claimant left and moved to Salt Spring Island to live in the home of her mother, who suffered from dementia. Her father had passed away earlier in 1996. At the time of her move, the claimant was 49 years of age. The claimant's mother passed away in 2006.

- [7] All other issues between the parties were resolved in the consent order of September 12, 2005. Those provisions of the consent order applicable to this application are as follows:
1. The defendant, Douglas Brian Murphy, shall pay to the plaintiff, Barbara Joan Murphy, for permanent spousal maintenance the sum of \$1,140 bi-weekly, commencing on August 10, 2005 and on each bi-weekly pay period thereafter.
 2. The defendant, Douglas Brian Murphy, shall be entitled to a review of the amount of spousal maintenance payable upon the defendant, Douglas Brian Murphy's, retirement or his annual gross income of T4 earnings falling below \$60,000.
 5. The benefits accrued by the defendant, Douglas Brian Murphy, (the "Pension") under the Canadian Forces Superannuation Plan ("the Plan") are a family asset.
 6. The plaintiff, Barbara Joan Murphy's, share of the Pension is 50% of the Pension that accrued between February 6, 1971, the date of the marriage, and June 1, 2000, the entitlement date.
 7. The plaintiff, Barbara Joan Murphy's, share of the Pension will be satisfied by a transfer of an amount from the Plan to the credit of the Plaintiff, Barbara Joan Murphy, in accordance with the Federal Pension Benefits Division Act and the Pension Benefits Division Regulations.
- [8] The order also provided for the parties to equally share the unadjusted pensionable earnings of the respondent under the Canada Pension Plan ("CPP") and provided for liberty to apply to this court for directions with regard to any term of the consent order.
- [9] At the time of the consent order, the claimant's only income was spousal support. She was also the owner of a one-half interest in the Salt Spring Island property which had belonged to her parents.
- [10] Pursuant to the consent order, the claimant received her share of the respondent's Veterans' Affairs Canadian Forces Superannuation Pension Plan (the "Plan") by way of a cash transfer to her locked in RRSP. The amount of the transfer was \$157,735.90.
- [11] The respondent has also deposed that he postponed retirement from age 65 to age 72 "so he could meet the support obligations as well as pay off the spousal debt that he was obligated by virtue of the settlement to pay, leaving the claimant debt free". At the time of the order, the respondent was earning approximately \$120,000.

- [12] Upon receiving her share of the Plan, the claimant invested the funds in a Life Income Fund, commonly referred to as a "LIF" which by regulation remained locked in. Depending on the balance in the fund, the owner's age and the reference rate, a portion was accessible each year. The fund was managed by an investment company, Franklin Templeton, to earn income. From 2005 to 2007 the claimant received approximately \$800 per month from the LIF without reducing the principal amount. After the economic downturn in 2008, the claimant's LIF declined in value from \$152,201 to \$106,000. Subsequently, the claimant transferred \$43,300 to a Retirement Income Fund ("RIF") from which she has withdrawn funds. The RIF was exhausted by July 2013. She retains a balance in the LIF of \$63,000 from which she was entitled to withdraw a maximum of \$2,500 in 2014; she anticipates to be entitled to withdraw a maximum of approximately \$4,400 in 2015.

Current Positions of the Parties

The Claimant

- [13] The claimant's current income is \$13,199 consisting of Old Age Pension, CPP and the funds she draws from her LIF. She is in poor health and has not worked at all since before the consent order of 2005. It is submitted on her behalf that she will never be self-sufficient and will continue to need spousal support for her lifetime.
- [14] As stated above, her remaining interest in her LIF is approximately \$63,000 from which she will be able to extract a maximum of approximately \$4,400 next year. Her other assets have nominal value.
- [15] The claimant has a one-half interest in the rural property on Salt Spring Island which she inherited in 2006 after the death of her mother. The property consists of 10 acres and includes a house, a barn converted to a residence and other outbuildings. She has lived in the house on that property since 1996. Her one-half interest is assessed by the Assessment Authority at \$254,000. There is no other evidence before me relating to the value of the Salt Spring property and residence, however, I am advised that it is in need of significant repair.
- [16] The other one-half interest in the Salt Spring Island residence was owned by the claimant's brother who died in 2012. Neither her brother nor his estate has contributed to the maintenance of the residence since 2006. Her brother had lived in the converted barn from 2002 until his death in 2012. Her brother died intestate and his interest in the property will pass to her brothers' four sons, one of whom is disabled and under the care of the Public Guardian and Trustee and another of whom is the administrator of the estate of the disabled brother.

- [17] Her brother's sons have not agreed on the sale of the property and have not contributed funds for taxes or maintenance of the property. Taxes on the property for 2013 and 2014 have not been paid. There is no further evidence before me as to how the Salt Spring Property could be sold so as to allow the claimant to receive some equity out of the property and reduce her expense burden.
- [18] The claimant has approximately \$91,000 of unsecured debt which has accumulated since 1996 for the payment of \$24,000 in legal fees, \$3,000 travel to Korea, \$3,000 for cancer treatment and the balance for living expenses, maintenance of the Salt Spring Island property and payment of interest.

The Respondent

- [19] The respondent has deposed that his income for 2013, the last full year before his retirement, was expected to be \$156,951. His estimated income from his Veterans' Affairs Pension will be approximately \$28,990. In addition, the respondent receives CPP benefits of \$11,356 per annum, however, as the claimant has applied to divide his CPP benefits, he anticipates annual income from CPP of \$6,000. The respondent also received an annual pension of \$19,751 under the Plan, the other half of the same having been divided with the claimant. His anticipated income for 2015 for the total of Old Age Pension, CPP, the Plan and the Veterans' Affairs Pension is anticipated to be slightly over \$61,000.
- [20] The respondent owns a one-quarter interest in a condominium at Bear Mountain near Victoria with three other individuals. It was purchased as an investment and is now worth much less than its purchase price. The evidence supports the finding that the condominium is currently a financial liability to the respondent.
- [21] The respondent and his current wife have purchased a condominium for their retirement in Canmore, Alberta. Funds used to purchase the Canmore residence included funds from the sale of the respondent's wife's residence in Edmonton.
- [22] As of March 18, 2014, the respondent has unilaterally ceased paying spousal support. At the date of the hearing, the arrears owing amounted to \$14,820.

The Issues

A. Is entitlement to spousal support reviewable under the consent order or are both entitlement and quantum reviewable? ("Entitlement")

B. Paraphrasing counsel for the claimant in his written submissions, if the respondent is obligated to pay spousal support, should the claimant be allowed to "double dip", ie. should the quantum of spousal support be based on the respondent's full income or should his pension income from the portion of the Plan that was divided with the respondent be excluded? ("Double Dipping")

Entitlement

- [23] The claimant submits that para. 2 of the consent order is clear and specific as to what aspect of the order is reviewable, ie. "the amount of spousal maintenance" and not entitlement.
- [24] The claimant refers to the decision of *Jordan v. Jordan*, 2011 BCCA 518 in which Madam Justice D. Smith stated, at para. 34:
- [34] It is therefore important to clearly identify the issue to be reviewed so that the party seeking a change in the order does not interpret the review hearing as a right to reargue their position on the order sought to be changed. An ambiguous review provision may present difficulties, as occurred in *Leskun v. Leskun* 2006 SCC 25, [2006] 1 S.C.R. 920 where Mr. Justice Binnie observed:
- [39] The more precise condition stated in the reasons of the trial judge was excessively broadened in the formal order. This resulted in a measure of avoidable confusion in the subsequent proceedings.
- [25] It is submitted by the claimant that the words in para. 2 of the consent order are specific as to what is reviewable and that there is no ambiguity as was the case in the *Leskun* decision.
- [26] Further, the claimant submits that entitlement was established in the consent order in 2005 which referred to "permanent spousal maintenance" and that there has been no material change in circumstances since that time. Considering that the marriage spanned a period of 25 years during which the respondent had not worked since 1971, had spent several years raising the children and is now 65 years of age, it is submitted that even without the reference to "permanent spousal maintenance", she has been and continues to be entitled to support on a compensatory basis.
- [27] The respondent submits that he has paid non-compensatory spousal support, based upon the needs of the claimant for eight years beyond when he could have retired. He further submits that the claimant still had plenty of time as of separation, when she was 48 years of age, to train for an occupation or refresh her training from many years before when she was a financial clerk. Instead, says the respondent, the claimant moved to Salt Spring Island upon separation to assist and care for her parents, i.e. she chose not to make an effort to be self-sufficient.
- [28] The respondent has referred the court to several authorities to support his position that the review in this case should include entitlement. Those cases include the following:
- a) *Powell v. Levesque*, 2014 BCCA 33 which involved an eight year relationship and a consent order entitling the payee spouse to non-compensatory or needs-based spousal support. The payee in that case was disabled. The payor was a member of the Canadian Forces and had suffered injuries and other health issues which forced her to retire. The consent order included a clause for spousal support to be varied upon the payment of specific debts after which time there would be a cost of living increase in support of four percent annually. In

that case, the court found a material change in the circumstances of the payor spouse and terminated the entitlement of the payee spouse to continuing spousal support.

- b) In *Peters v. MacLean*, 2014 BCSC 990, the order found the claimant entitled to spousal support on "either the compensatory or need based model of support" and ordered spousal support payable "until further order of the court". The application to vary was brought pursuant to s. 17 of the Divorce Act and Mr. Justice Joyce found a material change in circumstances. There was no specific clause in the order in that case calling for a review of spousal support in certain circumstances. Support was cancelled as the payor was found to have a "modest income since retirement" and the payee had returned to employment in a field in which she had considerable experience.
- c) In *Raymond v. Raymond*, 2012 BCSC 1747 the parties had been together for 14 years. After a trial in which the claimant was found unable to work at all due to her multiple medical problems, Mr. Justice Romilly ordered spousal support of \$1,500 per month "subject to review five years from today". Although there appeared to be conflicting evidence as to whether the claimant had become able to work, on a review application by the respondent after five years of spousal support payments, Mr. Justice McEwan ordered a qualified termination of support after a period of transition on the basis that the claimant had taken a passive approach to the application for review. Mr. Justice McEwan found no basis in the evidence for compensatory support nor evidence of a contractual basis for support and stated, at para 34:
 - [34] The claimant's entitlement to ongoing support therefore rests on whether there is a non-compensatory basis for support.
 - [29] In my opinion, each of the above cases can be distinguished from the case before me for several reasons. Firstly, I agree with the submission of the claimant that the review clause in this case is very specific and relates only to a "review of the amount of spousal maintenance". The review clause followed the clause entitling the claimant to "permanent spousal maintenance". The only rational conclusion I can apply to the terms of the consent order is that the claimant was entitled to compensatory support, not having worked or at least rarely having worked over the 25 year relationship in which she raised their two children, and that it was anticipated the respondent would retire which would require an adjustment to his monthly support obligations.
 - [30] I also find that there has not been a material change in circumstances since the consent order of 2005. The respondent submits that his retirement constitutes a material change; however, retirement was contemplated at the time the consent order was agreed upon. In the decision of *L.M.P. v. L.S.*, 2011 SCC 64, Justices Abella and Rothstein stated at para. 31, with reference to *Willick v. Willick*, [1994] 3 S.C.R. 670, and *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370:

[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 of 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.

With retirement contemplated and specifically referred to in the consent order, retirement could not possibly constitute a "material change". Otherwise, the income of the claimant was not significantly changed between the date of the consent order and the date of this order nor were any other significant matters the subject of change.

[31] Considering all of the evidence, this review is strictly a review of the quantum of spousal support to be paid by the respondent subsequent to his retirement.

Double Dipping

[32] In *Peters v. MacLean*, "Double dipping" was described as follows at para. 34:

where the payee spouse would receive a double benefit from assets that have already been divided between the parties. Double-dipping in the most classic sense occurs where, as in *Boston*, the payee spouse has received her interest in the payor's pension and the payor is required to continue to pay spousal support based on the income he receives from the pension when he retires. In *Boston* at paras. 63-64, Major J. stated:

[63] It is generally unfair to allow the payee spouse to reap the benefit of the pension both as an asset and then again as a source of income

[64] To avoid double recovery, the court should, where practicable, focus on that portion of the payor's income and assets that have not been part of the equalization or division of matrimonial assets when the payee spouse's continuing need for support is shown.

Boston is a reference to *Boston v. Boston*, 2001 SCC 43.

[33] The *Peters* decision at para. 36 also referred to *Boston* in stating that "double-recovery" cannot always be avoided. Joyce J. stated:

[36] This does not mean that "double-recovery" is never permitted. In *Boston*, Major J. stated at para. 65:

[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.

[34] Also in Boston, Major J. stated, at para. 55:

[55] This requirement is based on the principle that, as far as it is reasonable, the payee spouse should attempt to generate economic self-sufficiency. Self-sufficiency is only one factor of many that is weighted. It is obvious that in most cases of long-term marriage, the goal of self-sufficiency is decidedly difficult to maintain, particularly for spouses who remained at home during the marriage. Self-sufficiency will often not be practicable largely due to the residual effects of being outside the labour market for a protracted period of time. In addition, there are factors to consider such as age, education, and parenting responsibilities. Consequently, it is often unreasonable to expect the payee spouse to earn an income from employment after separation or divorce.

[35] As mentioned earlier in these reasons, in 2005 the claimant received \$157,735.90, being her one-half interest in the respondent's Canadian Forces Superannuation by a way of a cash transfer which she initially invested in a LIF. Approximately \$63,000 of those funds remain in the possession of the claimant in the LIF after she incurred substantial losses due to the economic downturn in 2008, drew some funds on the original investment and transferred \$43,000 into a RIF which has been depleted by the claimant to pay for living expenses and maintaining her residence on Salt Spring Island.

[36] Considering the factors permitting "double-dipping" as referenced in para. 65 of Boston, firstly, the respondent does have the ability to pay support. Furthermore, the claimant is continuing to suffer an economic hardship since the breakdown of the marriage and is not able, especially considering her age and absence from the workforce for many years to obtain gainful employment. The one factor which is difficult to assess is whether the claimant was prudent and made reasonable efforts to use her portion of the respondent's pension to allow for the production of income. The major cause of the reduction of the pension funds was the economic downturn of 2008 and following. There is no evidence to indicate that the claimant did not use reasonable efforts to preserve the asset as she placed the funds with an established investment firm.

[37] However, once the parties have equalized one party's pension upon separation and divorce, should the payor bear the risk of losses on the investment once the payee has received the same and begins to make investment decisions? I think not. Once the payor transfers over part of the pension, he or she no longer has any control over the funds. To have the transferor spouse continue at risk is not a risk that person should be ordered to assume.

- [38] To conclude on the issue of "double-dipping", approximately \$46,000 was lost due to investment choices by the claimant. Another \$43,600 of the pension funds was used by the claimant to cover living expenses including the costs to maintain her residence on Salt Spring Island and was not used to generate income. The respondent should not be required to bear some portion of that loss as at the same time, he was making all of his spousal support payments to the claimant. The balance, however, can be counted towards income for the purposes of calculating spousal support.
- [39] In the end, approximately 60% of the value of the pension funds received by the claimant should not be factored into the spousal support which the respondent will continue to pay.

Conclusion

- [40] The claimant remains entitled to spousal support for the reasons given in the "Entitlement" portion of these reasons for judgment and this review is limited to a review of the amount of spousal support payable by the respondent.
- [41] For the purpose of determining the income of the respondent, 60% of the anticipated income the respondent will be receiving from his portion of the equalized pension should not be factored into his total income. Again, approximating an adjustment, 60% of the anticipated income from the respondent's portion of the equalized pension, estimated at \$19,751, i.e. \$11,850, leaves income from the

pension of (\$19,751-\$11,850) \$7,901. The income of the respondent for the purposes of the Spousal Support Guidelines is therefore comprised of the following approximate amounts:

OAP

\$6,510

CPP

6,000

The Plan

(Equalized)

\$7,901

Veterans' Affairs Pension

\$28,990

Total

\$49,401

- [42] The approximate income of the claimant is \$13,199.

- [43] In accordance with the Spousal Support Guidelines, the spousal support payable by the respondent, by my calculations, at the mid-range is \$1,320.
- [44] The respondent is also ordered to pay arrears of spousal support from March 2014 at \$1,320 per month to the date of this decision, i.e. 12 months, for a total of \$15,840.
- [45] Based upon the material before me, I consider the claimant has likely achieved substantial success on this application, however, there may be factors of which I am not aware and the parties may wish to make submissions on costs should they be unable to reach an agreement on costs.

"Jenkins J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/15/04/2015BCSC0408.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/murphy-v-murphy-2015>

Prepared on 29 October 2026 · Esheria