

CANADA / JUDGMENT

O'Sullivan v. O'Sullivan

2020 BCSC 2164

COURT

Supreme Court of British Columbia

DECIDED

9 October 2020

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2020 BCSC 2164 O'Sullivan v. O'Sullivan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

O'Sullivan v. O'Sullivan,

2020 BCSC 2164

Date: 20201009

Docket: E52002

Registry: New Westminster

Between:

Carrie O'Sullivan

Claimant

And:

John Robert O'Sullivan,

CJJ Holdings Ltd. and EPS Westcoast Construction Ltd.

Respondents

Before: The Honourable Madam Justice Adair

Oral Reasons for Judgment

In Chambers

Counsel for Claimant (by telephone):

A.M. Ouellet

Counsel for the Respondents (by telephone):

M. Katsionis

Place and Date of Hearing (by telephone):

New Westminster, B.C.

October 9, 2020

Place and Date of Judgment (by telephone):

New Westminster, B.C.

October 9, 2020

- [1] THE COURT: This is a family law case in which, after three years of litigation, the parties entered into a comprehensive order whereby a divorce order was pronounced and a number of orders were pronounced by consent relating to the corollary relief matters that were in issue in this action. Those were limited to spousal support and property issues. That order was pronounced on October 2, 2019, by Mr. Justice Harvey, and I will refer to it as the "Harvey Order."
- [2] We have been dealing today with a notice of application that was filed by the claimant on July 20, 2020, and the specific matters that have been argued today concern, in Part 1 of the notice of application, the orders sought in paragraph 2, paragraph 3 and paragraph 7. I am going to paraphrase to a very large degree what is sought in those paragraphs.
- [3] Essentially, the claimant is seeking an order varying paragraph 16 of the Harvey Order concerning spousal support, such that the personal respondent, Mr. O'Sullivan, be required to pay the claimant lump-sum spousal support in the amount of (and I am just going to read the original amount in the notice of application) \$425,000 in full and final satisfaction of his ongoing obligations to pay spousal support. The claimant is seeking further an order that the lump-sum spousal support would be remitted directly to her from the respondent's interest in two assets: the net sale proceeds of the property that has been referred to as the "110 Property" and/or alternatively Mr. O'Sullivan's inheritance on the death of his mother.
- [4] In paragraph 7 of the notice of application, the claimant sought a further order enjoining the respondents from transferring or disposing of property with respect to which the lump-sum spousal support would or might attach, and the claimant sought an order that 100% of any equity remaining on the sale of the 110 Property, after all charges were discharged, be paid into the trust account of her counsel, or, alternatively, into court pending resolution of her claims and as security for her claim for lump-sum support.
- [5] The claimant says that the orders that she is seeking are justified because she is in a position of financial vulnerability arising out of: the role that she had during the parties' marriage, which was a long marriage, and that was the basis for her entitlement under the Harvey

Order to spousal support on both compensatory and non-compensatory grounds; and that the former family home was sold for an amount that was less than what she had hoped at the time the Harvey Order was pronounced. I will just note in that regard that paragraph 2 of the Harvey Order deals with the sale of the former family home and provides that the net sale proceeds from the sale of that property would be retained by the claimant free and clear of any claim by the respondent Mr. O'Sullivan.

- [6] Ms. O'Sullivan says further, in support of her application for a variation of the Harvey Order, that Mr. O'Sullivan did not pay the spousal support that was ordered pursuant to paragraph 16 of the Harvey Order until FMEP became involved earlier this year.
- [7] Next, Ms. O'Sullivan says that, with the pending sale of the 110 Property, Mr. O'Sullivan will have the means to pay lump-sum spousal support, and that there is a real risk of non-payment of the periodic support payable pursuant to the Harvey Order, given what Ms. O'Sullivan says are the precarious financial circumstances of the respondent EPS Westcoast Construction Ltd. In that respect, Ms. O'Sullivan has argued that EPS's business is not stable and there is a real risk that the business will fold or be forced into bankruptcy or insolvency.
- [8] I will note that, as of today, there are no arrears outstanding of spousal support. There was a period following pronouncement of the Harvey Order when the monthly spousal support was not being paid. FMEP then became involved. That is consistent with the specific provisions in paragraph 17 of the Harvey Order. Once FMEP became involved, the arrears that were outstanding for spousal support were paid up, and since then, the spousal support payment of \$5,000 a month has in fact been made. Based on the evidence that is before me, the \$5,000 per month is actually coming out of income that is being earned by EPS.
- [9] The test to vary a spousal support order is set out under s. 17 of the Divorce Act. The test is whether there has been a material change in circumstances since the Harvey Order was pronounced. The court must treat the Harvey Order as correct at the time it was made and confine its role to examining whether there are subsequent changes that would justify the variation of that order under s. 17.
- [10] The test for material change is based not on what one party knew or reasonably foresaw, but rather on what the parties actually contemplated at the time the order was entered. The function of the material change threshold is to prevent parties from relitigating issues that were already considered and rejected. In such cases, an application to vary would amount to an appeal of the original order, which is not permitted.
- [11] In my opinion, Ms. O'Sullivan has failed to demonstrate any material change that would justify variation of the Harvey Order.
- [12] At the time the Harvey Order was made, the only reasonable conclusion is that the parties contemplated that the former family home would be sold at market value. That, in fact, is what happened. That the market value turned out to be less than what Ms. O'Sullivan hoped is not, in my view, a material change that would justify variation of the Harvey Order.

- [13] In my opinion, the parties specifically addressed in paragraph 17 of the Harvey Order what would happen if the spousal support ordered to be paid in paragraph 16 of the Harvey Order was not paid in accordance with the terms of paragraph 16. What has happened in this case, where FMEP became involved earlier this year, is not, in my view, in the circumstances and given the terms of the Harvey Order, a material change such as would justify variation of the Harvey Order.
- [14] I disagree with Ms. Ouellet's submission that the parties could not have contemplated that there might be a month or months in which the support payments Mr. O'Sullivan was ordered in paragraph 16 of the Harvey Order to pay would not be made. In my view, paragraph 17 of the Harvey Order was included in the Harvey Order specifically to address that prospect.
- [15] I agree with the submissions of Mr. Katsionis on behalf of Mr. O'Sullivan and the respondents that, pursuant to paragraph 3 of the Harvey Order, the 110 Property was to be retained by EPS, free of any claim by Ms. O'Sullivan except pursuant to the Harvey Order. The proceeds from the sale of the 110 Property, which is scheduled to complete next week, are required not only to satisfy the obligations set out in paragraph 5 of the Harvey Order, which include an obligation to pay Ms. O'Sullivan \$165,000 on a net-of-tax basis, but those proceeds are also required to pay the debts of EPS and also to keep EPS's business running. Diverting the amount requested by Ms. O'Sullivan for lump-sum support or as some form of security for ongoing support would have a very serious negative impact on the ability of EPS to continue its business as a going concern and allow the company's activities to carry on.
- [16] I do not accept what I consider essentially Ms. O'Sullivan's speculation that the business is in serious financial trouble and likely unable to continue. On the evidence before me, EPS's business is in much improved shape as compared with the years prior to the Harvey Order. Mr. Kevin O'Sullivan, in his affidavit, has explained some of the changes that have been made to refocus the nature of the business and allow the financial fortunes of the business to improve and improve quite significantly.
- [17] I accept the evidence of Kevin O'Sullivan that he intends to continue to operate the business going forward. I note in particular - and this is significant, in my view - that the continuing operations of the business and EPS's ability to use the net proceeds of sale from the 110 Property are an important source of income and cash flow for the ongoing operations of the business, and, as well, to ensure that the spousal support of \$5,000 per month, pursuant to the terms of the Harvey Order, continues to be paid to Ms. O'Sullivan. There is no reason to conclude on the facts that that will not continue.
- [18] However, the request by Ms. O'Sullivan for lump-sum support, or for some substantial amount of the net proceeds from the sale of the 110 Property to be placed in trust as security, would seriously jeopardize the company's ongoing business and its ability and Mr. O'Sullivan's ability to continue to make the periodic support payments.

- [19] In my view, the failure on the part of Ms. O'Sullivan to demonstrate any material change that would justify a variation of the Harvey Order is sufficient to dismiss paragraphs 2 and 3 of Part 1 of her notice of application. However, Ms. Ouellet argued that no material change is required to justify the relief that is sought by Ms. O'Sullivan in paragraph 7 of her notice of application.
- [20] In my view, and I have already touched on some of this in my previous remarks, Ms. O'Sullivan has not justified such an order on the facts that are before me in the record. The evidence does not support a conclusion that continuing payments of periodic support in accordance with the terms of the Harvey Order are at any risk at this time. As I noted, there are no arrears of spousal support and, on the evidence, every indication that spousal support in the amount owing of \$5,000 per month will continue to be made. On the other hand, the orders sought by Ms. O'Sullivan would place the ability of the respondents to continue to make the periodic payments of spousal support at serious risk.
- [21] Accordingly, I would not grant the relief that is requested in paragraph 7 of Part 1 of the notice of application.
- [22] That is sufficient, in my view, to deal with the relief that is requested and that was argued before me today.
- [23] In that light, I am just going to deal very briefly with the request for lump-sum support. Since, in my view, Ms. O'Sullivan has failed to establish that there is a material change, and that is required as a threshold issue, it is unnecessary for me to deal on the merits with the request for lump-sum support, so I will simply say that I agree with the submissions of Mr. Katsionis that Ms. O'Sullivan has not satisfied the test to convert periodic payments into payment of lump-sum support.
- [24] The law in this respect is summarized by Madam Justice Watchuk *Robinson v. Robinson*, 2011 BCSC 1489 at paragraph 96. An important consideration in determining whether to make a lump-sum spousal support award is whether the payor has the ability to make a lump-sum payment without undermining the payor's future self-sufficiency.
- [25] In my view, and as I have already commented, that is not the case here. Mr. O'Sullivan does not have the ability to make the lump-sum payment requested without undermining his future self-sufficiency, since the lump-sum payment would require funds to be diverted from the sale proceeds of the sale of the 110 Property.
- [26] At present, as I have already mentioned, there is no evidence that Mr. O'Sullivan's ability to continue to pay periodic spousal support is at any risk. The court, in these circumstances, is often asked to weigh the perceived advantages and disadvantages of making a lump-sum award. As has been noted in the cases, the advantages of making such an award are highly variable and case specific. They can include such things as:

- terminating ongoing contact or ties between the spouses for any number of reasons - that is not a consideration here;
- providing capital to meet an immediate need on the part of the dependant spouse - that is not a consideration here;
- ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support - for the reasons I have already stated, I do not consider that a factor here;
- where the payor has the ability to pay lump-sum support but not periodic support - that is not a factor here; and
- satisfying immediately an award of retroactive spousal support - again, that is not a factor here.

[27] So in my view, there are no advantages in this case in making an award of lump-sum spousal support.

[28] Disadvantages can include such things as a real possibility that the means and needs of the parties will change over time leading to a need for a variation. I will say that the Harvey Order to some extent in paragraph 16 already addresses that matter. Paragraph 16, in fact, contemplates the possibility of a variation, but only on a material change in circumstances.

[29] One of the other difficulties noted in the cases is difficulties inherent in calculating an appropriate award of lump-sum spousal support. In this case, that was an issue raised during the hearing. All that was provided to me, and it was only for illustrative purposes, was the calculation that Mr. Katsionis had run through DivorceMate. So I do not, in that light, have a proper calculation on which to arrive at an appropriate award of lump-sum support.

[30] Had I been required to make a final ruling with respect to lump-sum support, I would have concluded that the disadvantages of doing so outweigh the advantages. As noted, there is no ongoing contact between the parties that would be in favour of an award of lump-sum support. There is no evidence that Ms. O'Sullivan has immediate or greater need for lump-sum rather than for periodic support, and there is no evidence that Mr. O'Sullivan has a greater ability to pay lump-sum support rather than periodic support. Finally, in my view, there is, on the evidence, no risk of non-payment of periodic support.

[31] For those reasons, I would not have made an award for lump-sum support.

[32] That concludes my ruling then with respect to paragraphs 2, 3, and 7 of the notice of application. The application for the relief requested in those paragraphs is dismissed.

[33] I am going to adjourn generally paragraphs 5 and 6 of the notice of application. Those were items that we did not have time to get to today, so those items are adjourned generally.

- [34] The one paragraph that it seems to me - it was not argued expressly today, I am speaking of paragraph 4, it was not argued expressly today. But it seems to me, based on my rulings with respect to paragraphs 2, 3, and 7, that that paragraph should also be dismissed. Do counsel have a view on that? Ms. Ouellet, I will ask you first.
- [35] MS. OUELLET: So, My Lady, I don't think that -- I think that paragraph is likely to be moot. If something falls through, I -- we have your reasons as to what you think should occur, so whether we would reset that seems unlikely. But since it hasn't been argued, I think it should just be adjourned generally, since we didn't proceed with it. It's really a moot issue at this point but if, for some reason, the seller defaults or something, there is always that remote possibility, and so I don't think it should be dismissed, given we didn't really address it.
- [36] THE COURT: Mr. Katsionis, do you have a view?
- [37] MR. KATSIONIS: I think it's fair to say, My Lady, that it just be adjourned generally. At this point, the sale looks like it's going to be going through, and barring any unforeseen issues, the parties can revisit the listing. It is a joint sale currently. They did manage to get it altogether between them, so I would anticipate it's probably not an issue going forward, but adjourned generally keeps the issue available in the event we have to come back to it.
- [38] THE COURT: All right, then I will also adjourn generally paragraph 4 of the notice of application.
- [39] So, do counsel have submissions that they wish to make on costs, and if you do, you are going to have to be very brief, because we are already at four o'clock.
- [SUBMISSIONS ON COSTS AT 4:00:05 P.M. TO 4:01:49 P.M.]
- [40] THE COURT: All right, I am going to deal with costs now. I consider that the respondents were the successful party today and they are entitled to their costs, once that -- in accordance with the tariff, that will be \$2,000. And Mr. Katsionis, are you asking me simply to fix that as a lump sum, because there would be taxes and disbursements. I am not sure if --
- [41] MR. KATSIONIS: I think the way that the Supreme Court Family Rules have changed over the last couple of years, it's sort of a schedule, I think it's just \$2,000 flat, as I understand it, and correct me if I'm wrong, My Lady. That's my understanding of it.
- [42] THE COURT: I do not have occasion to look at this very often or ever really.
- [43] MR. KATSIONIS: Yes, so the --
- [44] THE COURT: All right, then the order that I am -- are you satisfied to have lump-sum costs set at \$2,000 inclusive of disbursements and costs?
- [45] MR. KATSIONIS: Yes, My Lady.

[46] THE COURT: All right, I am going then to order that there be lump-sum costs payable to the respondents in the sum of \$2,000, that is inclusive of taxes and disbursements, and that amount can be deducted from the \$165,000 that is payable to Ms. O'Sullivan pursuant to paragraph 5 of the Harvey Order.

[47] That concludes the hearing.

[48] MR. KATSIONIS: Thank you, My Lady.

"Adair J."

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Prepared on 25 October 2026 · Esheria