

CANADA / JUDGMENT

Podgorenko v. Podgorenko

1999 BCCA 52

COURT

British Columbia Court of Appeal

DECIDED

22 January 1999

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COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT:

Before:

THE HONOURABLE MR. JUSTICE LAMBERT January 22, 1999 THE HONOURABLE MR. JUSTICE
ESSON THE HONOURABLE MADAM JUSTICE PROWSE Vancouver, B.C.

BETWEEN:

DARLENE PODGORENKO

PLAINTIFF (RESPONDENT)

AND:

PETER PODGORENKO and JOAN BARNETT

DEFENDANTS (APPELLANTS)

F.C. Loewen appearing for the Appellant P. Darren Hart appearing for the Respondent

- [1] PROWSE, J.A.: Mr. Podgorenko is appealing from the order of a chambers judge made December 16, 1997 dismissing his application pursuant to the Family Relations Act (the "Act") to terminate spousal maintenance, but reducing the amount of his monthly payments.
- [2] Mr. Podgorenko submits that the chambers judge erred in failing to terminate his obligation to pay maintenance, or, in the alternative, in failing to further reduce his payments. At the very least, he submits the court should have terminated his payments upon Ms. Podgorenko turning 65, at which time she will come into receipt of Canada Pension Plan benefits and also Old Age Security benefits.

[3] During the course of the appeal, this Court learned for the first time that Mr. Podgorenko had not paid the arrears owing to Ms. Podgorenko which he had been ordered to pay "forthwith" by the chambers judge. Further, Mr. Podgorenko had not made the monthly maintenance payments required by the order. Rather, Ms. Podgorenko was forced to garnishee his pension to obtain payments, and even then she was only successful in obtaining payments in the amount of \$226 per month. Mr. Podgorenko's failure to make these payments is exacerbated by the fact that he purchased a \$40,000 truck four months prior to the chambers hearing and by the fact that he was in receipt of a \$21,000 lump sum payment from his pension shortly after the hearing. These facts and others indicate that Mr. Podgorenko simply chose to ignore the court order and leave Ms. Podgorenko to her own devices.

[4] If this point had been brought to our attention at the outset of the appeal, we would have refused to hear the appeal. A similar situation arose in *Elensky v. Elenskaya* (1993) 50 R.F.L. (3d) 231, a decision of this Court. In that case, Mr. Justice Lambert, speaking for the Court, stated at p. 232:

In those circumstances, it has been the practice of this Court not to hear appeals unless a convincing explanation is given of the impossibility of compliance with the court order. No such convincing explanation has been given in this case. If Mr. Elensky is going to make his own decisions about what to pay without regard to the court order, then there is no purpose in this Court striving to achieve the best balancing of the interests of justice for the parties only to find that Mr. Elensky substitutes his view of that balancing for any view we may reach.

[5] In this case, however, as the appeal was well underway before we learned of Mr. Podgorenko's default, and since we were of the view that the appeal could not succeed, we determined to deal with the appeal on its merits. I will, therefore, turn to the merits.

[6] By way of brief background, Mr. and Ms. Podgorenko were married for 31 years prior to separating in 1983. Throughout the marriage, Ms. Podgorenko worked in the home and was the primary caregiver to the couple's five children. Mr. Podgorenko worked as a longshoreman to support the family.

[7] At the time the parties separated, Ms. Podgorenko was 49 years of age, with a grade 10 education and no specific job-related skills. Her only employment before and after the separation was for 6-8 weeks each spring in a local greenhouse operation. As of the time of the chambers hearing she was earning approximately \$7,400 gross per year from this source, which was supplemented by income from Employment Insurance and \$1,000 per month in maintenance payments. There is evidence that she endeavoured to improve her skills to find other forms of work following the separation, but without success. Ms. Podgorenko is now 64 years of age.

- [8] At the time of the separation, Mr. Podgorenko was 51 years of age and steadily employed as a longshoreman. In 1995, he was forced to have recourse to disability benefits because of job-related illness, and his income was reduced from approximately \$80,000 per year to approximately \$45,000 per year. In May 1997, Mr. Podgorenko retired at the age of 65, at which time his income was further reduced.
- [9] A brief chronology of the prior legal proceedings between the parties is as follows:
- December 1, 1983 Interim support order of \$1,000.00 per month.
- February 26, 1986 Order of Mr. Justice Gow continuing interim support of \$1,000.00 per month.
- January 5, 1987 Final Order of Mr. Justice Melvin for spousal support of \$1,000.00 per month.
- March 22, 1989 Variation application of Mr. Podgorenko dismissed by Mr. Justice Drake.
- January 16, 1996 Variation application of Mr. Podgorenko dismissed by Mr. Justice Hutchison.
- [10] At the time of Mr. Podgorenko's application to terminate maintenance, Ms. Podgorenko was not in receipt of any income except the \$1,000 per month maintenance payment from Mr. Podgorenko. Her Employment Benefits had terminated and she had no employment income. As earlier noted, as of May 1999, she will receive Old Age Security in the amount of \$407 per month and Canada Pension benefits in the amount of \$304 per month. She elected not to receive her Canada Pension benefits prior to age 65, since to do so would have resulted in a reduction in the amount of the monthly payment to her.
- [11] According to Ms. Podgorenko's Property and Financial Statement dated November 21, 1997, her only assets were a 1991 vehicle and modest furnishings, plus her interest in Mr. Podgorenko's employment pension. Her rights under that pension ultimately provided her with a lump sum payment of approximately \$7,800 and periodic payments of \$460 per month.
- [12] Mr. Podgorenko, on the other hand, had net monthly income of approximately \$1,900, including his pension income from employment. As earlier noted, he also received a lump sum of approximately \$21,000 from his pension. He owns 160 acres of land in Lac La Hache, which he values at \$125,000, and upon which he is constructing a residence. He also owns the 1997 Dodge Ram, to which I earlier referred, which he purchased for \$40,000 and upon which he is apparently making monthly payments of \$800.
- [13] The chambers judge did not provide reasons for his decision. He ordered Mr. Podgorenko to pay Ms. Podgorenko maintenance in the amount of \$323 for the months of June to October, 1997, inclusive; \$789 per month for the months of November 1997 to and including April, 1999; and \$421 per month thereafter. As counsel for Mr. Podgorenko noted, the effect of this order was to approximately equalize the income of the parties at about \$1250 per month until May, 1999 and at about \$1620 thereafter.

- [14] Because the chambers judge did not provide reasons for his decision, it was difficult for counsel to identify precisely how the chambers judge had erred in making the order under appeal. Counsel suggested several bases upon which the chambers judge may have erred. For example, he submitted that the chambers judge erred in principle in approaching the matter of maintenance from the point of view of equalizing the incomes of the parties. He also submitted that the chambers judge erred in the manner in which he took into account Mr. Podgorenko's pension income. He suggested that the chambers judge had failed to appreciate the impact of the order on Mr. Podgorenko and had not given enough weight to the reduction in Mr. Podgorenko's income from the time the original order was made.
- [15] This is a difficult case in which the financial resources available to the parties are limited. In the result, however, I am not persuaded that the chambers judge erred in principle, or in the exercise of his discretion, in the manner in which he dealt with the issues before him. The order he made gives credence to the fact that the parties were married for 31 years during which Ms. Podgorenko devoted herself to homemaking and child-raising, thereby leaving herself at a significant economic disadvantage upon the breakdown of the marriage. The order also recognizes that, if maintenance were terminated or significantly reduced, Ms. Podgorenko would be forced to live a marginal existence in her retirement years.
- [16] This is a case in which the length of the marriage, the role the parties played in the marriage, the age of the parties at the time of their separation and at the time of the application, and the significant economic disadvantages suffered by Ms. Podgorenko as a result of the marriage breakdown and thereafter, justified ongoing maintenance payments. The chambers judge was clearly endeavouring to ensure that the economic consequences of the marriage breakdown continued to be shared in as equitable a manner as possible. I am not satisfied that he erred in so doing. In my view, it cannot be said that the economic disadvantages which Ms. Podgorenko suffered as a result of the breakdown of a 31-year marriage have been adequately compensated by the maintenance paid to date. The only case which I need cite in support the decision of the chambers judge in this case is *Moge v. Moge*, [1993] 3 S.C.R. 813, a decision which has been cited countless times in this court and in other appellate courts across the country.
- [17] In the result, I would dismiss the appeal.
- [18] LAMBERT, J.A.: I agree.
- [19] ESSON, J.A.: I agree.
- [20] LAMBERT, J.A.: The appeal is dismissed.
- "The Honourable Madam Justice Prowse"

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