

CANADA / JUDGMENT

Poon v. Poon

2005 BCCA 60

COURT

British Columbia Court of Appeal

DECIDED

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2005 BCCA 60 Poon v. Poon COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Poon v. Poon, 2005 BCCA 60 Date: 20050204 Docket: CA031389 Between: Wai Ching Poon also known as Linda Poon Appellant (Plaintiff) And Calvin Poon Respondent (Defendant) Before: The Honourable Mr. Justice Lambert The Honourable Madam Justice Newbury The Honourable Madam Justice Saunders R.N. Stewart Counsel for the Appellant K.F. Nordlinger, Q.C. Counsel for the Respondent Place and Date of Hearing: Victoria, British Columbia December 8, 2004 Place and Date of Judgment: Vancouver, British Columbia February 4, 2005 Written Reasons by: The Honourable Madam Justice Saunders Concurred in by: The Honourable Mr. Justice Lambert The Honourable Madam Justice Newbury Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] The appellant Ms. Poon appeals an order dismissing her application to vary spousal support ordered, after a nine-day trial, to be paid in the amount of \$675 a month.
- [2] The reasons for judgment dismissing Ms. Poon's application to vary may be found at 2003 BCSC 1883. The reasons for judgment of the learned trial judge, Madam Justice Quijano, awarding spousal support may be found at 2002 BCSC 280.
- [3] In her application to vary, and before this Court, Ms. Poon (also known as Ms. Lee and referred to by the learned chambers judge, Mr. Justice Shaw, as Ms. L.) sought a significant increase in the spousal maintenance in response to a decrease in her income and an increase in her expenses since the date of the support order. It is clear on the materials that Ms. Poon's income is down and her expenses are up since the trial judge's order. The issue is whether those changes are changes within the meaning of s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2d Supp.).
- [4] Both the decrease in Ms. Poon's income and the increase in her living expenses derive primarily from her purchase of a condominium residence at Shoal Point, Victoria, British Columbia. In order to purchase the residence Ms. Poon applied \$160,000 of the funds available to her at the time of trial, then in her hands as a result of the parties' agreed division of family assets, towards the purchase price and assumed a mortgage in the principal amount of \$100,000, amortized over ten years. On the income side of her situation, that application of funds left Ms. Poon with a reduced amount from which to derive income.

Using the assumptions of investment return of the trial judge, removal of \$160,000 from her investment pool had the effect of reducing her annual income by about \$7,360 before taxes.

- [5] In addition to purchase of the residence, Ms. Poon has spent, calculated on the basis of the sum of \$325,000 said by the trial judge to be available to her and her evidence that she now has left about \$111,000, about \$54,000 which has not been fully accounted for. The expenditure of those funds, too, has had the effect of reducing her income.
- [6] On the expenses side, Ms. Poon's assumption of the mortgage and the other carrying costs of her new residence - strata counsel fees and property taxes - has increased Ms. Poon's annual housing expenses by about \$7,000 above the rent she was paying at the time of trial.
- [7] Mr. Justice Shaw concluded that the changes to Ms. Poon's circumstances resulted from choices made by Ms. Poon outside the bounds contemplated by the trial judge. He dismissed the application, saying:
- [4] Counsel have reviewed the substance of the admittedly increased expenses by Ms. L. I have reviewed them. I am satisfied that what occurred here was simply a matter of Ms. L. choosing a way of life that stepped well outside the bounds set by Madam Justice Quijano when she rendered her judgment. I will give some examples.
- [5] The condominium purchased by Ms. L. is a luxury condominium in a luxury area. Had Ms. L. wished to purchase a modest home, which she had indicated to Madam Justice Quijano that she wished to purchase, she could have got a modest home at a price well under the price which she in fact paid.
- [6] Another example is that she chose to finance the purchase in part by a mortgage with a 10-year amortization period. Had she acted prudently, she could have got a mortgage with a 25-year amortization period, which is quite a normal mortgage. The difference in monthly payments between the two mortgages is approximately \$475; in other words, \$475 per month higher than what the monthly payment could have been had she acted prudently. When I say "prudently," I mean within the general confines of the ruling made by Madam Justice Quijano.
- [7] The evidence before me as to her monthly expenses is that they are well in excess of those found by Madam Justice Quijano. Madam Justice Quijano in her ruling found that the reasonable expenses were considerably under what she termed as the "inflated expenses" offered by Ms. L. at the trial. The difference between the expenses found by Madam Justice Quijano as reasonable and those which Ms. L. is offering at this point to this court is approximately \$17,000. It is evident to me that Ms. L. has opted for a way of life that she wishes to have, but which outstrips considerably that which was considered by Madam Justice Quijano to be reasonable when she made her ruling. . . .

- [11] In all the circumstances, I can come to no other conclusion but that Ms. L. has chosen a way of life which outstrips the prudence required by Madam Justice Quijano's order in this case. I cannot escape the conclusion that it is Ms. L.'s decision to opt for her concept of equality as between herself and her former husband, rather than Madam Justice Quijano's concept and the prudence required by Madam Justice Quijano's order for Ms. L. to set up her way of life within the confines of the order.
- [8] The circumstances in which a court may vary a spousal support order are set out in s. 17 of the Divorce Act:
17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
- (a) a support order or any provision thereof on application by either or both former spouses; (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration. . . .
- (7) A variation order varying a spousal support order should
- (a) recognize any economic advantages or disadvantages to the former spouse 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.
- [9] The principles applicable to a variation application are, as observed by Rowles J.A. in *Haigh v. Haigh* (1997), 31 R.F.L. (4th) 435 (B.C.C.A.), those set out by Macfarlane J.A. in *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 (B.C.C.A.) at 313:
- [16] An application to vary or rescind maintenance payments will proceed on the basis of the following principles; the court is to take the amount of maintenance originally ordered as the correct amount at the time the order was made and then to consider to what extent the circumstances of the parties have altered or changed since the decree nisi was granted. The onus to show that such changes have occurred lies on the applicant.

- [10] The nature of the change that engages s. 17 was described in *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688, in the context of a variation of a child support case. The description there found at para. 21 was said by the Supreme Court of Canada, in *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370, to apply as well to variation of a spousal support order: In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation. . . .
- [11] Of significance to this case, is the observation above that a matter known when the support order was made cannot form the basis for a variation. I agree with Newbury J.A. in *T.(L.A.T.) v. T.(W.W.)* (1996), 24 R.F.L. (4th) 51 (B.C.C.A.), that the description by Proudfoot J.A. in *Carter v. Carter* (1991), 34 R.F.L. (3d) 1 (B.C.C.A.) of a change that is "substantial, unforeseen and of a continuing nature" may be close to the mark.
- [12] The question is whether the changes in Ms. Poon's income and expenses are a change in her "condition, means, needs or other circumstances" since the date of the order sought to be varied. In my view they are not. A review of the reasons for judgment of Quijano J. reveals that she anticipated Ms. Poon's purchase of a residence, although, I think, not on the scale effected by Ms. Poon. In them she stated:
- [33] However, a portion of that \$400,000 is represented by the plaintiff's RRSP of \$73,300. The amount remaining is approximately \$325,000 and the plaintiff intends to purchase a modest home for herself using this money. In all of the circumstances it is not unreasonable for the plaintiff to utilize her share of the property settlement to acquire a home. During the marriage the parties shared a very comfortable home which they owned. The defendant retained the home as a part of the property settlement. . . .
- [37] If Mrs. Poon uses the \$325,000 to purchase a home for herself her shelter expenses will change, because at present she is renting an apartment. It is likely that her shelter expenses will decrease in that event. However, I can only base a determination of the appropriate amount of support on the circumstances as they presently exist. Therefore I find that Mrs. Poon has established need for spousal support in the amount of \$8,100 per year before taxes, or \$675 per month. [emphasis added]
- [13] Those passages reflect the trial judge's expectation that some of the investment monies would be spent upon a 'modest' residence, as well as her expectation that Ms. Poon's housing costs would diminish as a result. A purchase within those expectations is not a change that would have resulted in different terms at trial.
- [14] We know, however, that Ms. Poon has purchased a residence that did not meet that expectation, and in fact caused her housing expenses to rise, not fall. Given that result, I think one is bound to ask whether it was possible for her to meet the expectations of the trial judge that she would purchase a modest residence that would reduce her housing expenses,

as it may be, in the appropriate case, that housing market or other post-trial changes prevent those expectations from being realized. If that were the case here, it would be open to Ms. Poon to contend that the circumstances are now other than contemplated at the time the support order was made. However, the evidence here before the chambers judge was to the effect that the price of other residences in the Victoria area was between \$150,000 and \$200,000, bracketing the sum of money Ms. Poon withdrew from her investment pool for this purchase.

- [15] In this case, it is clear that the residence purchased was beyond that contemplated by the trial judge, and that a purchase of a more modest residence would have produced savings in rent greater than the lost investment income. For example, and on the trial judge's assumptions of rates of return and tax brackets, had Ms. Poon purchased a home in the range of \$175,000 rather than \$260,000 as appears was reasonably possible on the evidence, and without borrowing to do so, her housing costs would have been limited to taxes, strata fees and some maintenance costs. In this scenario, Ms. Poon's annual income would have been further reduced by \$690, to bring her total income lost as a result of the purchase to \$8,050. Assuming, as Ms. Poon has in her factum, that taxes and strata fees would reduce in the same proportion as the reduction in the purchase price and including the maintenance she has estimated, her monthly housing expenses would reduce to about \$240 a month. In that case, her housing expenses would have been reduced by more than \$500 a month from those at trial, or more than \$6,000 a year. On the assumptions of the trial judge regarding tax, \$6,000 is a saving roughly equivalent to gross income of \$8,500, demonstrating that the savings that would have been realized by Ms. Poon had she purchased a less expensive property would have more than compensated for the loss of income. Thus, I consider not only that the evidence supported the conclusion of Shaw J. that Ms. Poon purchased a residence beyond that contemplated by the trial judge, but that the circumstances had not altered to make the trial judge's expectations incapable of realization.
- [16] In these circumstances, Ms. Poon has not established a change within the meaning of s. 17.
- [17] Further, in asking this Court to consider her income and expenditures, Ms. Poon ignores consideration of the value of her entire estate. In reality, the changes she relies upon reflect a reallocation of her assets from cash or investment funds to real property. There is no evidence that her estate has diminished in a way that one would say is a material change in her circumstances. Rather, Ms. Poon has elected to apply her assets in a way that has both diminished her income and increased her expenses in order to acquire an asset of considerable value. Such a choice is not, in my view, one that bears upon Mr. Poon's obligations.
- [18] Lastly, the elevation in Ms. Poon's expenses caused by the shortened amortization period she selected requires comment. Ms. Poon chose the shortened amortization period to reflect the ages of the parties, particularly Mr. Poon who is 51 years old and is likely to retire (and thereby likely to receive a reduced income) before a longer amortization period would be completed. But accepting Ms. Poon's submission would have the effect of requiring Mr. Poon

to contribute to the capital appreciation of her estate beyond that agreed upon when the family assets were divided. That is not the purpose of s. 17.

[19] In summary, in my view, it is clear that the requisite change has not been shown. Madam Justice Quigano determined what was a reasonable and appropriate amount of maintenance in all the circumstances of the case, including Mr. Poon's means and needs. The amount of maintenance so determined was sufficient to give Ms. Poon a reasonable standard of living and it was left to her to make reasonable choices within her means. The fact that she has exercised her discretion in a manner that varies somewhat from what was expected by the trial judge or what a more prudent person would have done, does not place her in "need" or in circumstances that justify an increase in the spousal maintenance to which she is entitled. One cannot, as Ms. Nordlinger argued, spend one's way into a "change in circumstances" for purposes of s. 17.

[20] In the result, I conclude that the chambers judge did not err in declining to vary the spousal support. I would dismiss the appeal. "The Honourable Madam Justice Saunders" I AGREE: "The Honourable Mr. Justice Lambert" I AGREE: "The Honourable Madam Justice Newbury"

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