

CANADA / JUDGMENT

Prendergast v. Prendergast

2015 BCSC 293

COURT

Supreme Court of British Columbia

DECIDED

28 January 2015

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2015 BCSC 293 Prendergast v. Prendergast

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Prendergast v. Prendergast,

2015 BCSC 293

Date: 20150128

Docket: 11938/87

Registry: Prince George

Between:

Veroica Aivlys Prendergast a.k.a. Veronica Prendergast

a.k.a. Veronica Aivlys Prendergast

Claimant

And

Keith Prendergast a.k.a. Keith Milton Prendergast

Respondent

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

J.H. Cluff

Counsel for Respondent:

S.E. Elson

Place and Date of Hearing:

Prince George, B.C.

January 27, 2015

Place and Date of Judgment:

Prince George, B.C.

January 28, 2015

[1] THE COURT: Dr. Prendergast brings this application to vary his obligation to pay spousal support. He seeks to terminate his obligation entirely. His application is founded on s. 167 of the Family Law Act, S.B.C. 2011, c. 25.

Legal Principles

[2] Before making an order to vary, I must be satisfied that at least one or more of the following conditions exists, and if that is the case, then I must take it into consideration:

167 . . .

(2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:

- (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
- (b) evidence of a substantial nature that was not available during the previous hearing has become available;
- (c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

[3] In *Walters v. Walters*, 2011 BCCA 331, the Court of Appeal considered, when determining whether there was a material change in circumstances, whether the change in circumstances was unknown and unforeseen at the time of the original order: para. 36. The court noted at para. 48 the principles applicable on an application to vary described in *Oakley v. Oakley*:

[48] The principles upon which an application to vary an order for support were set out in *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 (B.C.C.A.) at 313:

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. Maintenance will be varied where the balance between the parties has become so distorted that it has become unjust. Where a decree nisi is obtained by consent or where the decree nisi has incorporated maintenance provisions contained in the separation agreement made between the parties the court should not lightly disturb the order and the party seeking the variation must show not only some changes in circumstances, but conditions which arouse the conscience of the court and call for action.

Background Facts

- [4] The parties were married on December 14, 1957. They separated in 1987. and then divorced in November 1988 after living together in a traditional marriage for approximately 30 years. Although they were able to reach agreement and settle the division of their assets by an equal division, they were unable to agree on spousal support. The issue was determined at trial before Mr. Justice Curtis in July 1989. He ordered Dr. Prendergast to pay \$4,800 per month and to provide a life insurance policy to his ex-wife in the amount of \$180,000. He has been paying the ever-increasing premiums on that policy ever since.
- [5] The decision of Curtis J. is unreported but may be found at Prince George Registry, release date October 18, 1991, No. 11938/87.
- [6] Dr. Prendergast's monthly support obligation was reduced by Mr. Justice Chamberlist on September 17, 2004, to \$2,661 after finding a material change in circumstances arising from Dr. Prendergast's retirement. No claim was made to vary the obligation to provide the life insurance policy on the application before Chamberlist J. A useful and detailed description of the parties' financial assets and means are set out in his decision which is reported at 2004 BCSC 1213; I do not propose to reiterate all of them here.
- [7] The order made by Curtis J. in 1991 was pursuant to the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. In his reasons issued in respect of the application in 2004, Chamberlist J. described it as made under the Divorce Act. Ms. Prendergast's counsel did not take issue with the submissions of Dr. Prendergast's counsel on this application to the effect that for this application, there is no difference in approach to be taken whether the instant application is treated as under the Divorce Act or the Family Law Act. I would add that it was likely a mis-description in 2004 because, properly, the application was to vary the original order made under the FRA.
- [8] Dr. Prendergast and his ex-spouse are elderly. He is 82 years old. He retired from his medical practice as an ear, nose, and throat specialist in 2004. His ex-wife is 81 and suffers from significant debilitating medical issues, including type 1 diabetes and significant and life-threatening heart and lung disease. She has had two heart operations, she is left with stents,

and suffers from sarcoidosis. Medical evidence provided in a medical report dated November 26, 2014, advises that she is "expected to die from one or more complications related to her medical conditions in the not-too-distant future."

- [9] Ms. Prendergast now lives in a seniors' home and is considerably restricted in her lifestyle.
- [10] Dr. Prendergast remarried in 1989. He has lived a modest lifestyle since retiring. His second wife, who paid for their current matrimonial home, is 65 years old.
- [11] The core basis of Dr. Prendergast's application is that his support should be terminated because (a) his income is now nearly the same as the income received by Ms. Prendergast, and (b) the capital from which he has been able to provide support to Ms. Prendergast is so reduced that to continue to pay spousal support in the amount ordered would mean that his ex-wife will effectively have the benefit of most of what remains of the money he put away for retirement. He says that a capital amount of over \$730,000 that was extant at the time the application was heard by Chamberlist J. now stands at approximately \$167,000. Dr. Prendergast has paid to Ms. Prendergast close to \$330,000 since the order of Chamberlist J. was made. He also had a greater annual income at the time of the hearing of that application by some \$35,000 as a result of dividends received from his professional corporation which was collapsed in 2013 on the advice of his accountants.
- [12] I am satisfied that it is only through Dr. Prendergast's prudent fiscal planning that he has been able to provide support to his ex-wife.
- [13] On this application, Dr. Prendergast points to critical remarks made by Chamberlist J. of Ms. Prendergast's failure to prudently manage the money she received from the divorce. Looking forward, he says enough is enough, and without a termination of the support, he will not be able to support himself.

Determination

- [14] The onus is on Dr. Prendergast to demonstrate a material change in circumstances. In looking at the parties' expectations when Curtis J. made his order, it was clear that the parties expected that Dr. Prendergast would likely have to pay his ex-wife spousal support for the rest of her life. The reasons of Mr. Justice Curtis note Dr. Prendergast's admission to that effect. There was no departure from that viewpoint when the matter was heard by Mr. Justice Chamberlist, and in fact, I would not have expected anyone to suggest it because by then some of Ms. Prendergast's medical issues had substantially worsened, much more so than when Curtis J. heard the evidence at trial.
- [15] I agree with the parties' submissions that Chamberlist J. found a material change of circumstances arising from Dr. Prendergast's retirement and the corresponding reduction in his income. I find myself in agreement with Ms. Prendergast's submissions that Chamberlist J. found Dr. Prendergast's obligation to continue to pay spousal support because the capital he had accumulated afforded him the means to do so: paras. 36 to 38.

- [16] As for the proper amount of support, he focused on the necessary expenses required by Ms. Prendergast to support herself and then fixed the amount of support in relation to the parties' means and expenses. He ultimately determined what amount of spousal support was necessary to add to her pension and assistance income of approximately \$1,100 per month so as to produce a global net income that would cover her expenses of some \$3,000 per month.
- [17] I also agree with her counsel's submission that the absence of revenue from dividends from Dr. Prendergast's professional corporation since he collapsed the company in 2013 for tax reasons is not a material change because the funds spun out on winding up should have increased Dr. Prendergast's asset position.
- [18] What has changed since 2004, and is it material?
- [19] I am in agreement with Ms. Prendergast that a proper interpretation of the decision of Chamberlist J. leads to the conclusion that he anticipated that Dr. Prendergast's capital would be sufficient if properly invested to support Ms. Prendergast (during her life) until it was exhausted.
- [20] In the absence of evidence showing me that the anticipated return on that capital has decreased in any material way since 2004, I cannot find that the depletion of the capital to its present level is a material change in circumstances that was not anticipated by the court and the parties in 2004. Nor do I find that a 40 percent increase in her income due to an increase in her pension amounts to a material change in circumstances. That increase represents the cost of living, which would have been anticipated at the time the application was brought in 2004. Dr. Prendergast's pension income has also increased as well, close to the same amount.
- [21] Ms. Prendergast's significant financial imprudence and mismanagement of the assets she received from the matrimonial settlement were known to the parties on the 2004 application. It was the subject of much judicial criticism and also taken into account by Chamberlist J. in determining the application. He was also alive to avoid a result where Ms. Prendergast's needs trumped the court's obligation to ensure that double-dipping, as contemplated by the Supreme Court of Canada in *Boston v. Boston*, 2001 SCC 43 did not occur. I am not able to find that her imprudence has worsened so as to constitute a material change in circumstances.
- [22] In assessing the amount of support required, Chamberlist J. took a detailed look at Ms. Prendergast's claim for monthly expenses and reduced them to what he found to be necessary to support her needs. That amount, \$3,201.82, has not changed since 2004 in any material way.
- [23] In submissions, the parties each tried to paint the other as enjoying a greater lifestyle or asset position than otherwise explained in their affidavit evidence. Although I found I did not have sufficient evidence from either party to determine whether their relative standard

of living has changed in any material way since 2004, I will say that I found Dr. Prendergast was candid and forthright about his present financial circumstances, including ownership of the home in which he and his second wife currently reside. As I have noted, Dr. Prendergast remarried years before the 2004 application, and his financial circumstances were well known at that time. I do not find any unexpected circumstance that has changed that would benefit Ms. Prendergast in the analysis required for this application.

- [24] At the same time, I am troubled by the lack of evidence concerning property that Ms. Prendergast owned and then transferred to her daughter after the 2004 application was heard. The minimal information provided in her evidence raises a concern that she might have received a financial benefit that is relevant to this application. Having said that, however, I am unable to make that finding and instead can only say, in the absence of more fulsome evidence, the circumstances and the brevity of the explanation raise troubling questions.
- [25] In summary, and except for the life insurance issue which I shall come to in a moment, I am unable, despite the very able submissions of Ms. Elson, to find a material change in circumstances, nor do I, in the circumstances that exist on this application, and again, except insofar as the life insurance policy is concerned, find the balance between the parties to become so distorted as to be unjust.
- [26] The life insurance obligation was not dealt with on the application brought in 2004. Both parties agree that it remains open for me to consider whether there has been a material change in circumstances since the obligation to provide the policy was ordered by Mr. Justice Curtis. I have determined that circumstances changed in a material way when Dr. Prendergast retired. His income has reduced substantially, as has his capital position. At the same time, the cost of the insurance has increased dramatically so that it now costs over \$6,500 per year. The premiums are anticipated to rise again, given his age. The purpose of the life insurance policy was to provide security for the spousal support obligation in the event of Dr. Prendergast's premature death. At the present time, and assuming no unexpected change in Dr. Prendergast's financial circumstances, and assuming an equal drawing of the remaining capital by both parties to support themselves, there are sufficient funds to provide spousal support for Ms. Prendergast for approximately three years. I find that to be an appropriate amount and fair in the circumstances of this case, especially in light of the medical evidence. Looking at it in another way, it would, in my opinion, distort the balance between the parties that arises from the decision of Chamberlist J. It would be unfair and unjust to force Dr. Prendergast to continue to pay for that obligation.
- [27] Accordingly, I have determined that Dr. Prendergast should no longer be obliged to provide life insurance.

(SUBMISSIONS RE COSTS)

[28] THE COURT: Very well then. Costs of the application to the respondent. Lastly, I wish to thank counsel for their excellent and most helpful submissions.

"Walker J."

The Honourable Mr. Justice Walker

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