
CANADA / JUDGMENT

Threlfall v. Threlfall

2018 BCSC 1805

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 1805 Threlfall v. Threlfall

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Threlfall v. Threlfall,

2018 BCSC 1805

Date: 20181018

Docket: E003426

Registry: New Westminster

Between:

Linda Margaret Threlfall

Claimant

And

Barry Ross Threlfall

Respondent

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

Counsel for the Claimant:

R. Joubin

Counsel for the Respondent:

S. Bobb

Place and Date of Trial/Hearing:

New Westminster, B.C.

July 9 & 13, 2018

Place and Date of Judgment:

New Westminster, B.C.

October 18, 2018

I. BACKGROUND

[1] The respondent seeks the following orders:

- a) a final order terminating spousal support effective November 20, 2016;
- b) an order reducing or cancelling arrears retroactively; and
- c) an order cancelling any default payments, interest or fees assessed by the Family Maintenance Enforcement Program ("FMEP").

[2] The parties married on November 5, 1975. They separated in December 1995, when the claimant was 43 years of age and the respondent was 44.

[3] On April 1, 1996, the claimant obtained an order for interim spousal support in the amount of \$750 per month (the "1996 Order").

[4] On February 15, 2001, Master Joyce (as he then was) suspended the enforcement of the respondent's spousal support arrears, and directed the matter to be set for a registrar's hearing for an inquiry on the issue of spousal maintenance. As at February 14, 2001, the respondent was in arrears of spousal maintenance in the amount of \$6,362.76. This represents approximately 8.5 months of missed spousal support payments in the almost five year period following the making of the 1996 Order.

[5] On November 20, 2001, Mr. Justice Joyce reviewed the 1996 Order and set interim spousal support at \$650 per month starting January 1, 2001 (the "2001 Order"). The issue of spousal maintenance arrears was not addressed in the 2001 Order.

[6] On May 14, 2002, Mr. Justice Joyce ordered that the trial of this matter be set for four days, commencing September 23, 2002. However, the trial did not occur in 2002. Indeed, it has never occurred.

[7] Neither party sought a final order for spousal support or a variation of the 2001 Order until the filing of this application by the respondent in March 2018.

[8] The respondent continued to pay spousal support to the claimant at the rate of \$650 per month until the date of the hearing of this application. There were a few missed payments, resulting in arrears from ongoing maintenance of \$1,742.28, plus FMEP interest of \$11.50.

II. CONTINUATION of Spousal Support

[9] The Notice of Application filed March 22, 2018 (the "NOA") reads as follows:

1. Subject to section 12 of the Divorce Act (Canada), the claimant, Linda Margaret Threlfall, and the respondent, Barry Ross Threlfall, who were married at Calgary, Alberta on 05th November, 1975, are divorced from each other, the divorce to take effect on the 31st day after the date of this order;
2. An order dismissing or terminating the Claimant's claim to spousal support;
3. An order reducing or cancelling arrears retroactively;
4. An order canceling any default payments, interest or fees assessed by the Family Maintenance Enforcement Program;
5. Such other Orders or directions that the court finds appropriate; and
6. Costs payable by the Claimant to the Respondent.

[10] A divorce has never been granted, and the clause specifically seeking such an order in the NOA, has been crossed out. While a divorce order appears to have been contemplated by the respondent, none was sought at the hearing of the application.

[11] The respondent seeks a final order terminating spousal support pursuant to section 15.2 of the Divorce Act, R.S.C 1985, c. 3 (2nd Supp.) [DA]. As noted by the court in *Yu v. Jordan*, 2012 BCCA 367 at para. 47, in the absence of an order for divorce, an order for corollary relief in a divorce action must be an interim order, not a final order:

[47] It is common ground that an order for corollary relief in a divorce action that pleads both the Divorce Act and the FRA cannot be a final order for corollary relief under the Divorce Act absent the granting of an order for divorce. Such an order will remain an interim order under the Divorce Act until the divorce order is granted. Final corollary relief under the Divorce Act can be granted only upon the granting of an order for divorce: *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231 at paras. 91-92.

[12] The 2001 Order sought to be varied was itself an interim order made pursuant to the Family Relations Act, R.S.B.C. 1996, c. 128. Although the parties treated it as a final order, no variation was sought in the ensuing 17 years, and no trial was held to make a final determination on spousal support.

A. Legal Framework

[13] The provisions that govern spousal support and variation of spousal support orders are sections 15.2 and 17 of the DA.

[14] Section 15.2(6) of the DA sets out the objectives of spousal support as follows:

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the 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 spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[15] Section 15.2(4) of the DA states:

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.

[16] The factors set out in s. 15.2(4) of the DA require the judge to balance the circumstances of each spouse, bearing in mind the objectives of spousal support stipulated in s. 15.2(6) of the DA, to achieve an equitable alleviation of the adverse consequences of the breakdown of the marriage: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 36.

[17] Section 17(1) of the DA permits the court to vary, rescind or suspend, prospectively or retroactively, a spousal support order.

[18] Section 17(4.1) of the DA sets out the factors for consideration by the court in varying a spousal support order:

(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.

[19] Section 17(7) of the DA sets out the objectives of a variation of a spousal support order, which are essentially the same as the objectives for spousal support generally as set out in s. 15.2(6) of the DA.

- [20] A variation may only be ordered if the applicant has established that there has been a material change in the circumstances of either party since the original order or since the last variation order. A material change in circumstances is a change, such that, if known at the time, would likely have resulted in different terms: *L.M.P. v. L.S.*, 2011 SCC 64 at para. 66; *R.P. v. R.C.*, 2011 SCC 65 at para. 25; DA 17(4.1).
- [21] On a variation application, the court should consider the terms of the order and the circumstances of the parties at the time the order was made when determining if a change is material: *R.P.* at para. 25.
- [22] Both sections 15.2(5) and 17(6) of the DA prohibit the court from taking into consideration misconduct of a spouse in relation to the marriage.

B. Analysis

- [23] The Reasons for Judgment of Joyce J., indexed at 2001 BCSC 1592 (the "RFJ"), indicate that the following factors were relied upon by the court in determining entitlement to interim spousal support:

- ages of the parties;
- 20-year marriage during which the claimant was employed at various jobs;
- post-separation hospitalization of the claimant for a chronic depressive illness;
- exacerbation of the claimant's depressive illness by the death of the claimant's common-law spouse of four years;
- illicit drug use by the claimant resulting in admission into a detox facility;
- sporadic employment of the claimant from March 1997 until the date of hearing;
- a guarded prognosis as to the claimant's ability to maintain full-time employment due to her psychiatric illness;
- the claimant's inability to achieve economic self-sufficiency five years post-separation;
- attribution of income to the claimant of \$700-800 per month;
- the respondent's 2000 income of \$41,408; and
- the respondent's ability to share expenses with his new partner.

1. Circumstances of the Claimant

- [24] The claimant argues that she continues to be unable to become economically self-sufficient, and as such, spousal support should continue to be paid indefinitely into the future. The claimant is agreeable, however, to the reduction of spousal support to reflect the respondent's new income of approximately \$39,000.

- [25] The claimant is currently 66 years old. Following the parties' separation, she continued to reside in the Metro Vancouver area. In 2006, Ms. Threlfall moved to the Thompson-Okanagan region of British Columbia. She currently resides in Vavenby, BC.
- [26] Since the parties' separation, the claimant has only held part-time employment. Since July 2015, she has been employed by Strawberry Moose Snackery in Clearwater, BC. The work appears to be seasonal, with variable hours and days of employment. Ms. Threlfall avers that she has not worked any shifts in 2018, due to her inability to afford gasoline to drive to Clearwater.
- [27] In addition to her employment income, Ms. Threlfall receives \$894.97 per month from the Canada Pension Plan, and \$589.59 per month from Old Age Security. As noted elsewhere, Ms. Threlfall has also been receiving \$650 per month from Mr. Threlfall in spousal support payments.
- [28] The claimant's Form F8 financial statement made May 25, 2018, attaches assessment notices from the Canada Revenue Agency. They indicate the following line 150 income (rounded) derived from various sources including employment, CPP benefits, and disability benefits:
- 2015 - \$20,947 (no reported employment income);
- 2016 - \$24,168 (\$836 reported income);
- 2017 - \$28,229 (\$2,674 reported income); and
- 2018 - \$20,489 (\$2,674 projected employment income).
- [29] Ms. Threlfall's annual expenses in accordance with the Form F8 are \$23,703.36.
- [30] The claimant states that she continues to suffer from mental health issues including anxiety and depression which affect her ability to be gainfully employed.
- [31] The claimant is under the care of her family doctor, Dr. John Soles, who has prescribed her with anti-depressant medication and has provided a medical-legal report in these proceedings. Dr. Soles' undated report was provided to counsel for the claimant on May 25, 2018. It was filed in these proceedings a few days later. The report does not contain expert certification, and does not stipulate the facts and assumptions relied on in support of the opinion. Despite the report not being in compliance with Rule 13-6(1) and (3) of the Supreme Court Family Rules, B.C. Reg. 169/2009, counsel for the respondent does not object to its admissibility, but argues that it should be given little weight.
- [32] Dr. Soles opines that Ms. Threlfall has a "significant depressive illness compounded by a [sic] physical disabilities that limit her ability to function in a work environment as well as socially." The physical disabilities relate to childhood polio and fibromyalgia of long-standing duration.

- [33] According to Dr. Soles, Ms. Threlfall told him that she normally works 15 hours per week at the Strawberry Moose Snackery. In regards to her ability to work at her current job, Dr. Soles states, "I suspect that she would currently be unable to do this job because of her current mental status." Putting aside that this court does not make factual findings on "suspicion", this opinion is not supported by Ms. Threlfall's own affidavit evidence, in which she asserts that her inability to work at the Strawberry Moose Snackery is due to financial constraints.
- [34] There are also contradictions between Dr. Soles' report and the affidavit of Jason Allan Threlfall, the parties' 46-year-old son. Jason Threlfall states that he has seen the claimant "a few times over the past 20 years and he has never asked me how to get in touch with my mother or for me to relay a message to her in relation to spousal support." However, Dr. Soles states that "[i]n February 2009 [Ms. Threlfall] had a significant exacerbation related to a conversation with her son when he stated that her ex husband was looking for her and she told me that she was terrified of him."
- [35] In light of the contradictions between Dr. Soles' report and the affidavits of the claimant and her son, as well as Dr. Soles' failure to set out the facts and assumptions on which his opinion is based, I give his opinion little weight.
- [36] While I accept that Ms. Threlfall continues to suffer from a psychiatric illness, the evidence falls far short of establishing that she is unable to work and earn enough income to be economically self-sufficient. I find her evidence lacks credibility. The claimant's evidence is internally inconsistent, contradicted by other evidence, vague, and focussed almost entirely on showing Mr. Threlfall in a negative light, including numerous references to his alleged misconduct during the marriage. As noted above, the DA prohibits this court from considering misconduct during a marriage when determining spousal support obligations.

2. Circumstances of the Respondent

- [37] The respondent is currently 67 years old. Until a work place injury in 2016, he was employed as a professional chef.
- [38] Due to his work injury, Mr. Threlfall did not return to work until January 2018, at which time he commenced working at Value Village. Mr. Threlfall says that his earnings (rounded) are as follows:

2014 - \$57,672;

2015 - \$17,919 (CPP benefits only);

2016 - \$57,919 (includes a Worksafe BC claim payout of \$40,000);

2017 - \$17,919 (CPP benefits only); and

2018 - \$39,486 (CPP benefits \$17,919; projected income \$21,567).

[39] Mr. Threlfall's annual expenses in accordance with his Form F8 Financial Statement made December 7, 2017, with figures adjusted for a 2018 rent increase, are \$27,792.

[40] Mr. Threlfall has not provided any income tax returns for the 2015, 2016, or 2017 years. Counsel for the claimant argues that this should result in an adverse inference being made and income being imputed to Mr. Threlfall. He relies on *Poursadeghian v. Hashemi-Dahaj*, 2010 BCCA 453. However, as my decision is not dependent on the income earned by Mr. Threlfall, I do not need to make any findings in this regard.

3. Conclusion

[41] I am satisfied that there has been a material change of circumstances that warrants terminating spousal support effective November 20, 2016.

[42] By November 20, 2016, 15 years had transpired since the making of the 2001 Order and almost 21 years had passed since the parties' separation. In that time, Ms. Threlfall had ample opportunity to become economically self-sufficient.

[43] In addition, in 2016, Mr. Threlfall suffered a significant injury such that his ability to earn an income was affected. This, coupled with his age, reflects a material change in the circumstances of the respondent since the making of the 2001 Order.

[44] Mr. Justice Joyce found that both compensatory and non-compensatory support was payable. In *Chutter v. Chutter*, 2008 BCCA 507 at para. 50, leave to appeal to SCC refused, [2009] S.C.C.A. No. 41, Madam Justice Rowles discussed the purpose of compensatory support, saying that it "is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse."

[45] Non-compensatory spousal support is "grounded in the 'social obligation model' of marriage, in which marriage is seen as an interdependent union" (*Chutter* at para. 54) or a "joint endeavour" where the "default presumption of this socio-economic partnership is mutuality and interdependence" (*Bracklow* at para. 20). Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse, not the state: *Chutter* at para. 54.

[46] "Need" is a flexible concept and is one of several considerations which a judge must take into account in deciding whether any order for spousal support is warranted. Similarly, economic self-sufficiency is a relative concept, which is "informed by the standard of living previously enjoyed by the parties": *Chutter* at para. 56, quoting from the Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256.

[47] As the Court noted in *Fisher v. Fisher*, 2008 ONCA 11 at para. 52, "[s]ection 15.2(6)(d) of the Divorce Act promotes the objective of economic self-sufficiency only if it is 'practicable' to do so and where the objective can be realized 'within a reasonable period of time'."

- [48] In my view, more than a reasonable period of time had transpired between the parties' separation and November 2016.
- [49] Both parties submitted current DivorceMate calculations based on the ages of the parties, their incomes, and the length of the relationship (23 years including a period of cohabitation). According to the Spousal Support Advisory Guidelines [SSAG] if spousal support was awarded now, it would range from a low of \$546 per month to a high of \$728 per month for an "indefinite" duration. Counsel for the claimant argues that this means that spousal support ought to continue indefinitely. Putting aside the fact that the award made by Mr. Justice Joyce was an interim order and was silent as to duration, as noted by the Court in Chutter at para. 118, indefinite does not mean permanent. It simply refers to an order for support without a time limit at the time it is made.
- [50] The SSAG are not binding. They are a "useful tool" for determining amount and duration of spousal support: *Yemchuk v. Yemchuk*, 2005 BCCA 406 para. 64. The Court in *McEachern v. McEachern*, 2006 BCCA 508 noted as follows at para. 64:

As has been stated by this Court on prior occasions, the Advisory Guidelines are simply guidelines; they are not law. The formulas need not be slavishly adhered to by judges, who must always have regard to the particular facts before them. Those facts may disclose valid reasons why the Advisory Guidelines are not of particular assistance in a given case, or why an award may justifiably be greater or less than that set out in the applicable formula.

- [51] The duration of the compensatory award is determined not by when the spouse achieves economic self-sufficiency, but rather when compensation is achieved: Chutter at para. 79; *Tedham v. Tedham*, 2005 BCCA 502 at para. 60; *Morigeau v. Moorey*, 2015 BCCA 160 at para. 37.
- [52] As at March 2018, the respondent has paid spousal support for approximately 22 years. Even after taking into consideration the approximately 8.5 months in spousal support arrears as at February 2001, the total period paid is longer than the parties' marriage. In my view, the objectives of spousal support were fulfilled by the payment of spousal support until November 20, 2016.

III. cancellation of spousal support arrears

- [53] There are two types of arrears that the respondent seeks to have cancelled or reduced. The first are arrears arising from the February 15, 2001, order of Master Joyce (as he then was), which suspended the enforcement of the respondent's spousal support arrears in the amount of \$6,362.76 (the "suspended arrears"). The second are arrears flowing from the 2001 Order, which stood at \$1,753.78, including FMEP interest (the "current arrears").

- [54] Mr. Kooner, Articled Student appearing on behalf of Mr. Threlfall, did not make any submissions about Mr. Threlfall's ability to pay either the suspended arrears or the current arrears. Rather, Mr. Threlfall has stated in his affidavit that the suspended arrears are not payable on account of the suspension.
- [55] I agree with counsel for the claimant that the word "suspended" is intended to provide temporary relief as opposed to permanent relief: see *McDermott v. McDermott*, 2008 BCCA 166 at para. 29. However, an order suspending the enforcement of arrears does not preclude the court from making a subsequent order cancelling or reducing the arrears.
- [56] In determining an application seeking cancellation of arrears of spousal support, the court is to consider whether it would be grossly unfair not to reduce or cancel arrears. In *MacCarthy v. MacCarthy*, 2015 BCCA 496, the Court held at para. 54 that:

The factors to be considered in granting an order cancelling arrears are set out in *Burgie v. Argent*, 2013 BCCA 247, at paras. 15 and 23, namely, (a) whether there is a material change in circumstances, and (b) whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future": *Semancik v. Saunders*, 2011 BCCA 264 at para. 25. The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold".

- [57] In *Earle v. Earle*, 1999 BCSC 283, the Court stated at paras. 22-23:

Because cancellation or reduction of arrears is a form of variation, there is a substantial onus (a heavy duty) on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances.

The courts are generally reluctant to reduce or to cancel arrears. Under the Family Relations Act arrears will not be reduced or cancelled unless it is grossly unfair not to do so. This principle is similar to the one applied to the Divorce Act, which requires a material and long lasting change.

- [58] Mr. Threlfall has provided very little evidence regarding his current financial circumstances, such that it is difficult to determine whether he has the ability to pay the arrears now or in the future. While this court can infer that Mr. Threlfall's age, 2016 work injury, limited savings and substantial debts as reflected in his Form F8, will impact his ability to pay the arrears, the evidence falls short of meeting the heavy onus required to support an order cancelling or reducing arrears of spousal support.
- [59] However, in the circumstances, I find that it is appropriate to set off any arrears and interest owing against the spousal support paid by Mr. Threlfall between November 2016 and July 2018, when this application was set for hearing. In the 19 months from December 2016 until June 2018, a total of \$10,607.72 in spousal support was paid by Mr. Threlfall (\$12,350 - \$1,742.28 in arrears) which he would otherwise have not had to pay had he commenced this application much sooner. By setting off the \$8,116.54 in arrears against this amount, the respondent has paid \$2,491.18 more than he would otherwise have been required to pay.

- [60] I note also that both the claimant and the respondent have been delinquent in addressing issues in a timely manner with respect to spousal support. The claimant did not seek a variation of the suspension order until after 17 years from the date on which the order was made. The respondent did not seek a variation of the spousal support order until one-and-a-half years had passed since the circumstances leading to the application to vary arose (i.e. November 2016).
- [61] Although the respondent has sought a retroactive order terminating spousal support effective November 2016, he has not sought a declaration of an overpayment of spousal support. This is appropriate, given that the claimant has relied on the spousal support payments in the ensuing one-and-a-half years and her financial circumstances are such that she does not have the means to pay it. As such, no declaration of overpayments in relation to the \$2,491.18 is made. However, any further default payments, interest or fees assessed by the FMEP subsequent to June 2018 are to be set off against the \$2,491.18 in excess spousal support payments.
- [62] As the respondent has had substantial success, he is entitled to his costs of the proceeding. However, if the parties wish to make submissions with respect to the question of costs, they should provide their submissions in writing within 30 days of release of these Reasons for Judgment, such submissions not to exceed 5 pages in length.

Shergill J.

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