Date: 19980716
Docket: D100049
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

D[redacted] Y[redacted]

PETITIONER

AND:

M[redacted] Y[redacted]

RESPONDENT

1998 CanLII 5846 (BC S.C.)

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE OPPAL

(IN CHAMBERS)

Counsel for the Petitioner: Robert D. Brajovic

Counsel for the Respondent: Angela E. Thiele

Place and Date of Hearing: Vancouver, B.C.
July 3, 1998

1998 CanLII 5846 (BC S.C.)

[1] On March 27, 1996, under a consent order for divorce, the respondent, M████ Y████, agreed to pay his petitioner wife, D████ Y████, the sum of $2,500 per month as spousal maintenance. He now seeks a review of that order. At the same time, the petitioner makes a cross application for retroactive spousal maintenance on the grounds that the respondent did not fully disclose his financial circumstances at the time of the making of the order.

[2] The parties were married in 1958. They separated in 1994. On September 14, 1995 they entered into a separation agreement under which their family assets were divided, as well the respondent agreed to pay $2,500 per month as spousal maintenance.

[3] The divorce order, into which the agreement was incorporated, reads, in part, as follows:

> 4. AND THIS COURT FURTHER ORDERS that while the Respondent is obligated to pay spousal support
>
> (a) ....
>
> (b) If the Petitioner's gross annual income (other than spousal support) exceeds $14,400, it shall be deemed to be a material change in the Petitioner's circumstances and as such constitute grounds for the Respondent to apply for a review of the spousal support failing an agreement between the parties in

> the manner as set out in paragraph 5 hereof.
>
> 5. AND THIS COURT FURTHER ORDERS that the provision for maintenance set out in paragraph 2 hereof shall be final except for variation by reason of a material change in the circumstances of either the Petitioner or the Respondent. ...
>
> (emphasis added)

1998 CanLII 5846 (BC S.C.)

[4] It is useful to examine the relative circumstances of the parties. This was a so-called traditional marriage. The petitioner, who is 59, was a homemaker and raised the couple's children. From time to time she did work outside the home for somewhat modest salaries. At the date of separation she had no income. However, by the time the separation agreement was signed in September 1995, she had an annual income of $13,742 including unemployment insurance benefits of $4,500. It should be noted that the agreement stated that she had no income.

[5] In September 1994 she had enrolled in and passed a hospitality opportunity training programme for persons interested in working in the hospitality industry. Shortly after the completion of the programme, she commenced to work with B.C. Ferries, where in 1996 she earned $27,882. During that year she also received $935 in unemployment insurance benefits for a total income of $28,817. In 1997 her total gross earnings were $33,212. Her present income with the Ferry Corporation for this

year is projected to be $32,400. In her property and income statement she states that her gross monthly income from her employment is $2,700 and her monthly expenses are $3,032. Counsel have pointed out that that figure should be $140 less at $2,932. With the maintenance payment of $2,500 and interest income, she has a monthly surplus.

1998 CanLII 5846 (BC S.C.)

[6] She has deposed that her future employment with B.C. Ferries is uncertain since she has low seniority. She bases this assertion on the fact that there are impending cancellations of ferry runs. However, to date this has not materialised and she is working on regular basis. She has also expressed concerns about her health in that she suffers from depression and anxiety, for which she is receiving treatment.

[7] When the parties separated, each received approximately $183,000 cash from the sale of the family assets. With those and other funds, the petitioner purchased a condominium on Comox Street in Vancouver. Its value is approximately $150,000 and it is unencumbered. She owns a 1995 Ford Taurus valued at approximately $15,000. She has savings and a R.R.S.P. valued at approximately $163,000. She also contributes jointly with her employer to a superannuation fund. She has no debts.

[8] The respondent is 62 years old. He is a longshoreman. In 1994, when the parties separated, he earned $86,000. In 1995, when the agreement was signed, he earned $111,000. However, that

figure is somewhat misleading in that a significant portion of that sum is attributable to a one-time retroactive wage increase. It is not in dispute that in 1996 and 1997 his earnings were $87,194.47 and $92,746.03 respectively.

[9] The respondent's net monthly income is approximately $5,300. He lists his monthly expenses at approximately $6,000. His residence in Port Coquitlam is valued at $197,000. However, he has a mortgage with a balance of approximately $120,000, on which he pays $1,100 per month. He also has a 1995 Dodge Truck valued at $15,000. He has savings and R.R.S.P.s valued at approximately $102,500.

[10] He has deposed that he achieved his present levels of income by working overtime. He states that after 41 years he wants to stop working overtime. However, if he did cease working overtime his salary would drop to between $65,000-$75,000. He is said to be greatly concerned about this retirement plans. According to the separation agreement, the petitioner was to retire on May 31, 1998, at the age of 62. However, he has deposed that his financial circumstances will not permit him to do so. If he were to retire today at the age of 62, his monthly pension from his employment will $1,375.69. It will increase at $10 per month per year.

[11] Since the date of the order he has remarried. His present wife is on a disability pension of $611.

1998 CanLII 5846 (BC S.C.)

[12] Ms. Thiele, counsel on behalf of the respondent has argued that the petitioner's financial circumstances are better than the respondent's, accordingly some form of balance is needed. She has also argued that the sum of $2,500 spousal maintenance is extremely generous and has cited a number of authorities wherein under similar circumstances lesser amounts were ordered by courts. See ***Vlahovic v. Vlahovic*** (1997), 34 R.F.L. (4th) 282 (B.C.S.C.); and ***Stamberg v. Stamberg*** (1990), 26 R.F.L. (3d) 297 (B.C.S.C.); and ***Rose v. Rose*** [1994] B.C.J. No. 1835.

[13] On the other hand, Mr. Brajovic, counsel for the petitioner, has argued that the fact of the petitioner's earnings exceeding $14,400 alone is insufficient to warrant a decrease in maintenance. He has argued that the word "review" in the agreement is merely a convenient term to describe the process and does not in and of itself mean that the respondent is entitled to a decrease in the amount of monthly maintenance. Moreover, it is argued that the word "deemed" contemplates a threshold test that the applicant must meet. The Court must then go on to determine whether the material change warrants a variation. He has forcefully argued that factors such as the length of the marriage, the traditional nature of the marriage and the economic disparities between the parties ought to preclude any review.

1998 CanLII 5846 (BC S.C.)

[14] Counsel for the petitioner has also argued that this is a case for compensatory maintenance in that the petitioner, by assuming the role of a traditional wife, had given up a career in the workforce. The respondent's counsel has disagreed with that by submitting that there is no evidence of any alternative form of employment that the petitioner had sought during the course of the marriage. Ms. Thiele has also suggested that even if this maintenance is considered compensatory, the amount still ought to be decreased.

[15] The relevant parts of s. 17 of the ***Divorce Act*** R.S.C. 1985, c. 3, reads as follows

17. ....

Factors for 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.

....

1998 CanLII 5846 (BC S.C.)

Objectives of variation order varying spousal support order

(7) A variation order varying a spousal support order should

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

....

(c) relieve any economic hardship of the former spouses arising from breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse with a reasonable period of time.

[16] Counsel have produced a number of authorities. They are of some assistance. However, it should be noted that the authorities for the most part are confined to their particular facts. In ***Rose v. Rose***, *supra*, the parties had been married for 25 years. A spousal support order of $600 per month was reduced to $200 because at the time of the making of the order it was anticipated that the petitioner wife would have a regular income in six months. That had materialised. Thus, Boyle J. found there had been a material change in circumstances justifying the reduction.

1998 CanLII 5846 (BC S.C.)

[17] In ***Shabaga v. Shabaga*** (1987), 6 R.F.L. (3d) 357 (B.C.S.C.), Proudfoot J. (as she then was) dealt with a case wherein a 54 year old husband was ordered to pay his 54 year old wife of 31 years the sum of $1,300 per month. In the husband's application for a review, she reduced the sum to $900 per month. At the time of separation the wife earned no income. After upgrading her skills, she found employment that paid her $750-$800 per month. It should be noted that the wife had no home of her own and spent the evenings on a cot in the living room of a friend. The husband had made an application to terminate the maintenance. Proudfoot J. noted that the wife may need some financial assistance from her former husband for the rest of her life.

1998 CanLII 5846 (BC S.C.)

[18] In ***Touwslager v. Touwslager*** (1992), 63 B.C.L.R. (2d) 247 (B.C.C.A.), the Court again noted the difference between a so-called modern marriage and a traditional marriage where the wife is out of the workforce for a lengthy period of time. The wife was 49 years old, had been married for 31 years and had been out of the workforce for 23 years. The Court, in noting that there is "an almost presumptive economic disadvantage arising from the breakdown of a long term traditional marriage", increased spousal maintenance from $400 to $1,200 per month. In concluding that $400 per month awarded by the trial judge was inadequate, Hinkson J.A., at p. 252, stated as follows:

> .... Rather than simply adopting that figure as the appropriate amount, the trial judge ought to have considered the income, expenses

> and a reasonable standard of living to which the wife was entitled having regard to the means and circumstances of the husband.

1998 CanLII 5846 (BC S.C.)

[19] In ***Vlahovic v. Vlahovic***, *supra*, Lysyk J., in following ***Touwslager***, *supra*, and ***Linton v. Linton***, (1990) 30 R.F.L. (3d) 1 (Ont. C.A.), held that a review of an order does not mean termination and that in any review a court in achieving fairness must consider the needs of the parties as set out in s.15(5) of the ***Act*** as well as the financial and capital positions of both parties.

[20] The law is not in dispute. In determining whether this application should succeed, I must take into consideration the factors set out in s. 17 of the ***Divorce Act***. I must also consider the financial means and circumstances of both parties and, in particular, consider the reasonable standard of living to which the petitioner is entitled. In attempting to achieve a measure of balance and fairness between the parties, it is of course important to consider the economic or financial disadvantages resulting to either party "arising from the marriage or its breakdown" (s. 17(7)(a)).

[21] I must accede to the respondent's application for a variation. The parties no doubt after careful consideration agreed that if the petitioner earned more than $14,400 per year, the respondent would be entitled to a review as of right.

Moreover, they agreed that if her earnings exceeded $14,400, that would constitute a material change that would entitle the respondent to a review of the order. However, as stated above, any variation must take into consideration the factors out in s. 17. In this case, the review contemplated by the parties clearly calls for a reduction in the respondent's maintenance obligations. That was the obvious intent of the parties.

[22] I accept the respondent's argument that he is in need of financial relief in order to achieve a better economic and financial balance with his former wife and to better plan for his retirement. Clearly, in spite of the disparity in their respective incomes, her financial and capital position is better than his. By reducing his monthly maintenance obligations by $1,000 per month, the petitioner's gross income would still exceed $50,000. That reduction would assist the respondent in planning for his future. Thus, the respondent has met the threshold test for a review of the order. The petitioner is earning more than double the $14,400 set out in the order. The respondent is earning approximately the same amount. There is no good reason why the maintenance in the circumstances ought not to be varied.

[23] In the circumstances, having regard to the financial circumstances of each of the parties, the respondent's maintenance obligations will be decreased to a monthly payment of $1,500 per month commencing August 1, 1998.

1998 CanLII 5846 (BC S.C.)

[24] The petitioner's cross application for retroactive maintenance is based on the argument that the respondent did not fully disclose his financial circumstances at the time of the making of the agreement. It is argued that since the base figure used in the agreement for the respondent's income was $78,000 a year, it misrepresented his actual income and therefore the initial maintenance payment must be higher. With respect, there is no basis for this argument. The evidence relating to the respondent's income was available to the petitioner's counsel at the time of the agreement. It has never been in dispute. Accordingly, the petitioner's application is dismissed.

"W.T. Oppal, J."

W.T. OPPAL J.

1998 CanLII 5846 (BC S.C.)