SUPREME COURT OF NOVA SCOTIA

Citation: *Oderkirk v. Oderkirk*, 2014 NSSC 37

Date: 20140129
Docket: Tru No. 1207-003713 (080645)
Registry: Truro

Between:

Alexander H. F. Oderkirk

Applicant

v.

Paulette B. Oderkirk

Respondent

Judge: The Honourable Justice Denise M. Boudreau

Heard: January 6, 2014, in Truro, Nova Scotia

Written Decision: January 29, 2014

Counsel: Lloyd Berliner, for the Applicant
Bradford Yuill, for the Respondent

By the Court:

[1] This is an application by Alexander Oderkirk, requesting a variation to the consent corollary relief judgement relating to his divorce, dated June 24th, 2013. This order provides, among other things, for a spousal maintenance payment to the respondent Paulette Oderkirk in the amount of $1700 monthly. The applicant seeks to be relieved from further payment of spousal maintenance, as well as the further obligation to provide health benefits, as are provided for in paragraphs 1 and 2 of the order.

[2] The applicant submits that he has retired from his employment effective December 31, 2013, and that such constitutes a material change in circumstances pursuant to s. 17 the *Divorce Act*, R.S.C. 1985 c. 3, as amended, thereby permitting an amendment to the order.

[3] This matter was heard on January 6th, 2014. Each party testified on their own behalf, both by providing *viva voce* testimony and affidavit evidence.

History of Relationship

[4] Certain portions of the evidence are not in dispute. The applicant and respondent are both 61 years of age. They were married in 1976 and their marriage produced five children, born between 1979 and 1986. All five children are currently independent, and were, in fact, already independent by the time of the filing of the petition for divorce in 2012.

[5] The parties had what is often called a "traditional" marriage. The applicant worked outside the home throughout the marriage, while the respondent was a stay-at-home mother, with responsibility for the home and children. The respondent briefly worked outside the home for five months in 2006, as a part-time lunch duty monitor.

[6] The applicant was continuously employed throughout the marriage in the agricultural industry, commencing in 1976. He first worked for a private company (1976-1981), then as a civil servant with the Nova Scotia Department of Agriculture (1981-2001), later he had his own consulting firm (2001-2003), and

most recently (2003 to 2013) was employed with a Crown Corporation. The applicant indicates that in 2012 his annual income was approximately $82,000.

Litigation History

[7] The parties separated in early 2012. The respondent sought interim spousal maintenance, which was contested by the applicant. Following a hearing, spousal maintenance was ordered in the amount of $1700/month commencing October 2012. The divorce was granted in June 2013, along with a consent corollary relief judgement providing for continued spousal maintenance as noted.

[8] At the time of the divorce, the parties were also granted an equal division of the applicant's RRSP account. As a result, each party presently holds half of the RRSP funds at the time of separation (approximately $172,500). The parties also equally divided the equity remaining from the sale of their home.

The Current Application

[9] The present application is based on the 2013 decision of the applicant to retire from his employment. The applicant provided the Court with some background for this decision, as well as his reasoning.

[10] The applicant testified that a number of years prior to the parties' separation, he and the respondent had discussions about his plans to retire. He acknowledged that this discussion occurred prior to any indications that the marriage would fail. The applicant did not tell the respondent about his actual decision to retire, until the present application filed and dated September 2013. He indicated that it was his belief that she would be expecting it, based on these past discussions.

[11] The applicant made the decision to retire during the year 2013. He testified that in January or February of 2013, he met with his employers in the context of a performance evaluation. During that meeting, he made a number of requests for certain benefits; the applicant testified that he thought, unless these requests were met, he "might leave at the end of the year". The company did not meet his requests, and the applicant sent a formal letter on July 31st, 2013, giving the company 6 months notice of his retirement, to take place on December 31, 2013. I note that this timing coincides, to some extent, with the court matters that were taking place in 2013 between the parties. I shall say more about this later.

[12] The applicant also told the court he had some health concerns that arose over the past number of years. In 2007 the applicant had cancerous polyps removed from his colon, as well as part of his lower intestine removed. The applicant states that he has now been cancer free for 2 years. He has also, in the past, had occurrences of skin cancer. The applicant acknowledged that at no time did these health issues prevent him from working.

[13] The applicant indicated that "the stress of the past years has taken its toll"; I am presuming he is referring to the marital breakdown and divorce. These consequences were also a factor in his decision to retire.

[14] The applicant indicated in his evidence that "most" persons who were once his co-workers at the Nova Scotia Department of Agriculture, retired 5 or 6 years ago. He advised that they were able to do so because of the provincial rule of "85" (age plus years of service = 85). The applicant acknowledged that, as a contract employee of a Crown Corporation, he did not have that benefit.

[15] In his evidence, the applicant conceded that it would be possible for him to continue working; however, he had made the personal decision to retire. He testified that due to his present circumstances he had decided that now was the appropriate time. These circumstances included his age, his health concerns, his stress level, his desire to have more time to enjoy life, along with the direction of the company as described. The applicant agreed that his decision to retire was a voluntary one.

[16] The applicant acknowledges that if he is successful in his application to discontinue spousal support the respondent will lose access to that amount. However, the applicant notes that the respondent has access to CPP and RRSP income, in the same amounts as he does, since they were equally divided.

[17] The applicant indicates that, at the time of the hearing, he has not yet withdrawn from his RRSP. At present he plans to live off savings from sale of home, from which each party received about $12,000. He also has further savings (also from the house sale) to live on (about $35,000). Following the exhaustion of those savings, he will then be drawing from the RRSP's. The respondent testified that at present, the spousal maintenance payment is her only income. She acknowledges having access to RRSPs and CPP amounts, in equal amounts to the

applicant's funds. The respondent indicated that she has not drawn from those funds, nor does she want to at this time. The respondent opposes the present application to vary.

Analysis

[18] An application to vary a corollary relief judgement in relation to maintenance is made pursuant to section 17 of the *Divorce Act*. As a first step, the Act provides that a person seeking such a variation has the burden of showing that the change constitutes a material change in circumstances, such as to give the court jurisdiction to allow a variation to the order:

> 17(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 to that Order, and, in making the variation order, the court shall take that change into consideration.

[19] Therefore, the first issue to be decided, is whether the circumstances in the case at bar, constitute a "material change in circumstances" as required by the *Divorce Act*. Only if the answer to that question is yes, could I then move to the next stage of the analysis, and decide whether the spousal support should terminate or be adjusted.

[20] As to this first issue, it is the position of the applicant that his decision to retire should be considered a material change in circumstances. Further his position is not that spousal support should be adjusted, but that it should end. The respondent's position is that the applicant's decision to retire was voluntary and unilateral, and therefore should not be considered a material change in circumstances.

[21] I find that the applicant's choice to retire in this particular case was voluntary. This was acknowledged by the applicant. He testified that the decision to retire was a personal choice, one made by him for numerous reasons. While health issues were a factor in the decision, the applicant is able to work. I note that there was no medical evidence provided to the Court.

[22] This, of course, does not end the analysis. A voluntary retirement can possibly constitute a material change in circumstances, depending on the facts of the case. Upon a review of the caselaw I find that the question to be asked is whether the court finds that the decision to retire is reasonable, given all the circumstances.

[23] In *Bullock v. Bullock* [2004] O.J. No. 909, the issue of whether voluntary retirement could qualify as a "material change of circumstances" was addressed. The applicant in *Bullock* was 62 years old, seeking to withdraw from the workforce despite a support order granting spousal support to the respondent. The court found that the applicant had withdrawn from the workforce voluntarily. The court acknowledged that retirement was a "deeply personal decision", that in theory, the applicant could make. On the other hand, as to the question of whether it was a material change in circumstances was another matter. The court found that it was not.

[24] In *Francis v. Logan*, 2008 BCSC 1028, 57 R.F.L. (6th) 352, the 63-year-old defendant retired, decreasing his income from $100,000 to $27,400. The existing spousal support order was based on an income of $100,000. The defendant applied to terminate or reduce the maintenance payable. The plaintiff was 57 years of age. The Court at paras. 34-36 stated:

> [34] With the greatest of respect, the decision to take early retirement was not, in this case, dictated by medical needs, or economic exigencies but rather personal preferences and choices.
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> [35] This decision was also taken in the face of a permanent spousal support order and with full knowledge that his decision to voluntarily reduce his income from employment would also reduce his pension benefits.
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> [36] In my view, in the circumstances of this case, the defendant's voluntary early retirement was not a material change of circumstances. This conclusion flows from the fact that it was not the result of a reduced ability to earn income or medical uncertainty but rather personal preferences and decisions.

[25] I further note *Szczerbaniwicz v. Szczerbaniwicz,* [2010] B.C.J. No. 562:

> 27 If the retirement is not voluntary because of economic circumstances, medical reasons, or an employer's actions and the payor is unable to work, the court will tend to reduce the maintenance payable; otherwise, if the payor is still capable of earning an income, his application to terminate or vary spousal support will likely fail: *Bentley v. Bentley*, 2009 CanLII 3779 (Ont. S.C.J.); *Bullock v. Bullock*, 2007 BCSC 318, 36 R.F.L. (6th) 150 at para. 7.

[26] In *Hesketh v. Brooker* [2013] ONSC 1122, the 56 year old applicant sought to vary a support order to his 62 year old ex-spouse, on the basis that he had terminated his employment and started collecting his pension. It was the applicant's contention that his health was too poor to continue working in his previous employment; however, no medical evidence was filed to support that claim. The Court stated:

> [31] I have no doubt that Mr. Hesketh has experienced significant health problems in the past five years. However, I am not satisfied on a balance of probabilities that he has satisfied the Court that there has been a material change of circumstances such as to warrant a variation of the order of Heeney J. There is no doubt that there has been a change in his circumstances. The issue is whether it is a material change as recognized in law.
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> [32] The change in circumstances he relies on is his voluntary retirement from his job at the first possible date he could do so without any reduction in his pension benefits. In circumstances such as these, the applicant has a positive duty to provide evidence that his decision was made in good faith and on appropriate grounds. The voluntary, unilateral retirement from his job was his decision which he made knowing very well that his decision would significantly impact Mr. Brooker.

[27] The court held that the applicant could not simply "sidestep" his obligations by deciding to retire.

[28] The same conclusion was reached by the court in *Innis v. Innis* [2013] ONSC 2254. The court again found that a voluntary, early retirement, done for "lifestyle reasons" did not constitute a material change of circumstances.

[29] I also note the very recent decision of the Ontario Superior Court of Justice *Walts v. Walts* 2013 ONSC 6787. This was a 28 year marriage, producing three

children. The husband worked throughout the marriage; the wife started working outside the home when the youngest child started school. The following year she suffered a stroke, and received long term disability benefits after that time. At the time of the divorce spousal maintenance was set at $1584/month, on the basis of his income of $88,000 and her income of $25,000.

[30] The applicant husband had a heart attack in 2012. At that time evidence showed a medical recommendation that he work part time; however, no medical evidence was brought forward to show that he was unable to work. The applicant testified that he had always dreamed of retiring at age 55, and that the respondent had been told this during the marriage.

[31] The court, again, found that it was not reasonable for the applicant to retire in those circumstances, and that his decision did not constitute a material change in circumstances.

[32] In the case at bar, and in support of his position that his retirement is reasonable, the applicant notes in his evidence that his "peers" have all retired approximately 5 or 6 years ago. I do not find this statement helpful for a number of reasons: it was, quite rightly, pointed out that those other persons were civil servants, employed by the provincial government, whose benefits and retirement entitlement realities would potentially be quite different from those of the applicant herein. Further, I have no evidence as to the circumstances of those people. The applicant may be in the position of having obligations that those other people do not have, or vice versa.

[33] The parties' marriage in this case was long term, approximately 35 years. The applicant worked outside the home and the respondent was primarily tasked with the responsibilities of the home and children. In such cases, I note that the spousal support advisory guidelines suggest long term, if not indefinite, maintenance. The corollary relief order dated June 24, 2013, provides for spousal maintenance with no end date.

[34] There can be no doubt that the respondent in this case was entitled to spousal maintenance, and continues to be. She is in a position of economic disadvantage, flowing from the marriage. I refer to the Supreme Court of Canada's decision in *Bracklow v. Bracklow* [1999] S.C.J. No. 14. By any measure, the respondent meets the requirements of entitlement as referred to by the Supreme Court.

[35] It is clear from the evidence that there was an understanding between the parties as to their respective roles during their marriage; now that the marriage has failed, it is not realistic or equitable to expect the respondent to, this quickly, make a "clean-break" from this relationship and move on. Having said that, I do note that these parties were separated and divorced at a time in their lives when retirement was an approaching reality.

[36] It is clear in this case that the applicant has chosen to retire early for "life-style" reasons. The caselaw shows that such reasons have generally not been sufficient to constitute material changes in circumstances. I agree with the reasoning I have quoted in all of these cases.

[37] Furthermore, as to whether the applicant's decision to retire was reasonable in the circumstances, I consider the timing of events to be a very significant consideration. In this case, the spousal award had barely been in place for 1 year when the applicant moved to end it by retiring early. In the face of a 35 year marriage, I cannot help but find that this is an unreasonable position to take. I acknowledge that the applicant is 61, and that retirement is an approaching reality for anyone of that age. Having said that, I also note that the order was granted in June 2013, at which time all involved, including the judge and the parties, were well aware of the parties' age and circumstances. The order was made in that context.

[38] Secondly, and perhaps more importantly, I am very troubled by the timing of the decisions of the applicant, in the face of ongoing court proceedings and orders, some of which he consented to.

[39] The parties separated in early 2012. The respondent applied, and following a contested hearing, was granted interim spousal maintenance to commence October 1, 2012. The parties were divorced in June 2013 at which time a corollary relief judgement was issued, by consent, continuing the spousal maintenance in the same amount.

[40] As I noted earlier, there was evidence from the applicant that as early as January or February of 2013, he was considering leaving his employment, if certain requests were not met. He further testified that he provided formal written notice to his employers in July 2013 of his intention to retire at the end of

December 2013. This event occurred approximately 1 month after the order of June 2013.

[41] This timeline is, frankly, disturbing. I am led to the conclusion that the two events were linked. I do understand and appreciate the applicant's wish to retire at this time, and I do find that the reasons he lists (health issues, fatigue, etc.) were legitimate factors in his decision. However, given the totality of the evidence before me, I also make the inference that the applicant's decision was motivated, in part, by a desire to end the spousal maintenance payment. This is a significant and legitimate consideration for the court in such matters.

[42] I would refer to similar cases where such circumstances existed. In *Szczerbaniwicz v. Szczerbaniwicz*, *supra*:

> 29 The reasons for retirement given by the defendant all involve his personal wishes. He does not recognize or acknowledge the effect of his decision on his ongoing obligation to the plaintiff. He did apply prior to his retirement to vary his spousal maintenance obligation but that application did not proceed. At the time of his retirement, he was required to pay spousal maintenance of $3,300 per month pursuant to an interim consent order. He was frequently in arrears and stopped paying spousal support entirely after November 1, 2008.
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> 30 I have no hesitation in finding that the defendant's reasons for taking early retirement do not relieve him of his obligation to pay spousal maintenance. His decision to retire was purely personal. It is of note that he retired shortly after he ceased paying spousal support and the plaintiff's counsel initiated an application to have his pay garnished. Given his history of failing to meet his maintenance obligation, the supposed reasons for his early retirement and the timing of his retirement, I infer that, in part, his motivation was to avoid his court-ordered (and I note consented to) obligation to his wife.

[43] In *Vennels v. Vennels* (1993), 76 B.C.L.R. (2d) 69 at paras. 31, 34, (S.C.), Justice Coultas stated:

> Retirement of a payor under a maintenance order usually results in a significant reduction of income; that is so in this case. Courts are not guided by legislation to enquire into the circumstances of retirement. Courts have no power to compel people to work. However, courts should, in the interests of justice, refuse to consider a reduced income resulting from retirement to be a material change in

> circumstances justifying a variation of a support order, where a payor spouse has intentionally put him or herself out of the money in order to frustrate a maintenance order. Any such deliberate self-induced impecuniosity constitutes deceit.... When voluntary retirement is advanced as a reason for seeking a reduction in maintenance, a court must consider the circumstances of the retirement carefully and ensure that the payor has not been prompted by deceit to avoid support orders.

[44] And in *Gajdzik v. Gajdzik*, 50 R.F.L. (6th) 390[54], the British Columbia Supreme Court stated:

> With respect to Mr. Gajdzik, the first thing to be considered is his motivation for retirement, and whether it is reasonable in light of his ongoing obligation to Ms. Gajdzik. As pointed out in such cases as *Vennels*, when voluntary retirement is advanced as a reason to terminate the spousal support, the circumstances must be considered carefully to ensure that the application has not been prompted by a desire to avoid the support order. I do not consider that to be Mr. Gajdzik's sole reason for retiring in this case, although I do consider it as a factor.

[45] Similarly, while I cannot say that the support order was the sole reason for the applicant's decisions here, I do conclude that it was a factor.

[46] Thirdly, it is clear to me from the evidence of the applicant that, at the time of the consent corollary relief order in June 2013, the applicant was already formulating a possible plan for retirement. Despite that, he agreed to the consent order. I find it difficult to reconcile those two events. I find that retirement cannot be a change in circumstances where an applicant is aware of and/or planning a retirement at the time of the order.

[47] I do understand the applicant's wish to retire, and I understand that it is a sincere wish on his part. It must be said that, were the facts and circumstances that were before this Court different, particularly in relation to the timing of the applicant's decisions, it is possible that this Court's decision would have been different. But that is not the case before me.

[48] Given my findings as to the facts, I find that the decision of the applicant to retire at the present time is not reasonable and does not constitute a material change in circumstances in this particular case. The corollary relief judgement dated June 24, 2013, in relation to spousal support shall not be varied at this time.

[49] Having said this, I acknowledge that the applicant is 61 years of age, and the time is coming where his retirement will be reasonable, and will then constitute a material change in circumstances.

[50] It would be in the best interests of the respondent that she acknowledge this coming reality as well, and prepare herself accordingly. I was struck by the evidence of the respondent as to her lack of efforts, or even interest, in her own self-sufficiency. The respondent testified that she had health issues which limit her ability to work, but it would appear from a review of her lifestyle that she is a very active person and contributes to her community and family in a myriad of ways. In her personal life, she seems physically able to do everything she wishes.

[51] Since the separation the respondent's only source of income has been the spousal support amount, and she has not sought out any other source of income. While the respondent notes in her affidavit that she has applied for positions as a receptionist, nothing was presented to the court in support of this. During her testimony, it was evident to me that the respondent has made almost no efforts to look for employment, even in areas where she would have marketable skills. For example, it was noted that the respondent has some skills and training in the area of cosmetics, as a result of her involvement with Mary Kay Cosmetics, but she has made no effort to seek out a paying job with those skills. The respondent also refuses to access CPP funds which are or will soon be available to her.

[52] The respondent would be well advised to recognize that, given the circumstances, she will not likely be able to rely on the spousal support indefinitely, as she might have wished. She has an obligation to seek some measure of economic self-sufficiency and make some efforts to participate in her own future.

Boudreau, J.