Date: 1997
Docket: D071224
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MARILYN NORMA VLAHOVIC

PETITIONER

AND:

JACK CHURCHILL VLAHOVIC

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE LYSYK

(IN CHAMBERS)

Counsel for the Petitioner: S. Lawton

Counsel for the Respondent: F.G. Potts

Dates and Place of Hearing: November 21 and December 5, 1997
Vancouver, British Columbia

1. Nature of the proceedings and principal issues

[1] The parties bring competing applications under s. 17(1) of the Divorce Act. 1985 relating to spousal maintenance.

[2] On October 19, 1990, Dohm J. (now A.C.J.) granted a divorce to the petitioner, Marilyn Vlahovic, and ordered, among other things, that the respondent, Jack Vlahovic, pay her periodic maintenance in the amount of $900 per month. Under the terms of the order, such spousal maintenance was to commence on November 1, 1990 and to be paid on the first day of each month thereafter "until the Petitioner reaches the age of 55 years or remarries, whichever first occurs, at which time there will be a review."

[3] The petitioner has not remarried. Her 55th birthday fell on May 29, 1997.

[4] By her present application, filed on June 13, 1997, the petitioner seeks continuation of periodic maintenance and asks that it be increased to $1,200 per month. While she claims lump sum maintenance in the alternative, she acknowledges that the respondent lacks sufficient liquid capital assets to make a substantial lump sum payment at this time. She also claims interest on arrears of maintenance payable under the order made by Dohm J., as detailed below.

[5] By his application, the respondent seeks to have periodic maintenance terminated. As well, he states that he could not come up with money to comply with a judgment for lump sum maintenance.

[6] As to review of his order for periodic maintenance and the option of lump sum maintenance, Dohm J. made the following observations in his oral reasons for judgment (at pp. 6 and 7 of the transcript):

> .... The payment of maintenance for Mrs. Vlahovic is made on a periodic basis and is to be, in effect, until Mrs. Vlahovic reaches age 55 or is remarried, when, at which time, there will be a review and at that time consideration will be given to a lump sum award. I think it is premature to be talking lump sum for the wife. Her situation is, I suppose, stable but it does not produce a great deal of income per month. It is

> about $1,000 a month, net. She is endeavouring to increase the number of hours which she works as a dietary aid at St. Vincent Hospital, and I have no doubt whatsoever that if employment becomes available which will produce a greater income that Mrs. Vlahovic will take full advantage of it. But I think that for the time being at least, and for sometime certain, we ought to provide some security by way of monthly maintenance, rather than lump sum.
>
> . . . .
>
> Now, of course, it is open to the parties on a material change in circumstances to come back to the Court. That is a gimme, so to speak, but unless there is a material change, I do not expect that there will be a review until Mrs. Vlahovic either remarries or reaches age 55 years.

The reasons of Dohm J. provided for equal division of family assets (at p.6).

2. Other proceedings between the parties

[7] As noted in the above quoted passage from the reasons of Dohm J., it was open to either party to return to court at any time on the basis of a material change in circumstances. In November 1992, the parties were before Macdonald J. of this court, the wife seeking payment of arrears and the respondent seeking a reduction of maintenance on the basis of changed circumstances. The petitioner's application was successful and the respondent's application to vary was dismissed.

[8] The order of Dohm J. made on October 19, 1990 had also provided for child support for the two children of the marriage, Jaki and Jeni, whose respective dates of birth are November 21, 1971 and June 28, 1973, in the amount of $550.00 per child per month. In a judgment issued on December 6, 1991, the Court of Appeal, while sustaining the level of spousal maintenance ordered by Dohm J., reduced child support to $450.00 per month per child.

[9] On December 4, 1996, Coultas J. of this court made an order terminating child support for the two children. Counsel advise that the order has not yet been entered, but it appears to be common ground that the respondent's obligation to pay maintenance for Jeni was terminated as at July 31, 1995 and for Jaki as at August 31, 1996.

[10] A consent order made by Gillis, P.C.J. on May 30, 1997 fixed arrears of maintenance owed to the petitioner as of May 30, 1997 at the sum of $18,962.56 plus interest in the amount of $440.00. The order directed that payments toward arrears be made at the rate of $175 every two weeks commencing June 11, 1997. It is common ground that the entered order erroneously states that the arrears are owing under an order made by Master Doolan, whereas the reference ought to have been to the order of Dohm J. of October 19, 1990. It is agreed, as well, that the figure representing interest was calculated only for the period commencing January 1, 1997.

[11] The proceedings before Gillis, P.C.J. were pursuant to the Family Maintenance Enforcement Program ["FMEP"]. There, the petitioner was represented by counsel for FMEP, Mr. Dumont, and the respondent acted for himself. The latter relies on the order of Gillis, P.C.J. as resolving the matter of interest owed on arrears up to May 30, 1997. The petitioner disputes this and claims interest for the period commencing August 1, 1993 (arrears prior to that date having been paid off) to December 31, 1996, in the amount of $3,275.85.

3. History of the relationship and financial situation of the parties

[12] The parties were married on December 17, 1966. This was, therefore, a marriage of almost 24 years. For several years prior to the marriage, and afterward until their first child, Jaki, was born, Mrs. Vlahovic was employed as a radiographer or X-ray technician. She did not re-enter the workforce until after the parties separated in 1989. In November of that year she found employment as a food services worker at St. Vincent's hospital, where she continues to work. Initially employed as a

casual worker, she was later engaged on a part-time basis and now works at 80% of full-time, earning approximately $31,500 per year in this position. Her gross income at the time of the divorce is not in evidence, but Dohm J. noted that Mrs. Vlahovic's net income then was approximately $1,000 per month.

[13] The respondent worked for the Teamsters' Union for most of the duration of the marriage and is now employed by that Union in an executive position. At the time of the divorce his income was somewhere in the neighborhood of $60,000. His present salary is approximately $70,000 and he receives, in addition, certain allowances and benefits. He has remarried and his present wife, Marika, earns a salary of approximately $48,000 per year.

[14] The petitioner says that she was unable to return to work as a radiographer in 1989 since the nature of work in that profession had changed dramatically and she would have had to upgrade her skills. Her evidence is to the effect that at the time of the separation she required income immediately and could not afford to undertake the required eight-month re-training programme. She says that then and subsequently she was unable to rely on receiving maintenance from the respondent. She says, and the respondent admits, that his record of compliance with court-ordered maintenance over the years has been very poor.

[15] Under cross-examination on her affidavit, the petitioner stated that another reason why she did not seek re-certification as a radiographer is that she had had some problems with her back and was concerned that the need to wear a lead apron in that job might cause difficulty. An additional twelve-month training programme could lead to a further qualification that would permit her to administer CAT Scans and ultrasound testing for which a lead apron would not be required. Again, a deterrent would be the time and cost involved in undertaking such additional training. In her responses under this cross-examination, she stated that she did not have plans to seek other employment or upgrade her skills.

4. Spousal maintenance

[16] The petitioner says that she continues to need financial support from the respondent. She continues to live in rental accommodation and her evidence generally is to the effect that she follows a frugal lifestyle. She says that given the respondent's sorry record of paying support for her and the children, she has not felt secure enough to invest the limited amount of capital available to her in the purchase of a town house or condominium. The apartment she has is a two- bedroom apartment and one of the daughters is living with her at the present time. The petitioner says she should not be obliged to move into smaller one-bedroom accommodations and that so long as the daughter living with her is employed, she (the daughter) contributes toward rent and other household expenses.

[17] The respondent's position is that if expenditures of one sort or another by the petitioner on the two daughters are taken out of the equation, then the petitioner has not demonstrated need. He says that in fact her income is enough to cover her own living expenses. His position is that even if it is found that he has the ability to pay some periodic spousal maintenance, he should not be obliged to pay it because the petitioner has not shown need.

[18] The respondent says further that there is no sufficient evidentiary basis for ordering continued spousal support on the basis of economic disadvantage arising from the marriage or its breakdown. In particular, he points out that there is no evidence before the court as to the level of earnings of radiographers in 1997 to permit a comparison with her actual present income as a food services worker.

[19] The position taken on behalf of the respondent, at least initially, was that the order of Dohm J. calling for a review at a specified time terminated the obligation to pay any maintenance after the material date, being the petitioner's 55th birthday. The authorities do not support that position: see, e.g., Koppang v. Taves (1994), 9 R.F.L. (4th) 414 (B.C.C.A.) and McMahon v. McMahon (1990), 25 R.F.L. (3d) 357 (Ont. S.C.). The following passage from Payne on Divorce (4th ed,; 1996) is pertinent (at 326):

> Where an order for periodic spousal support is declared

> subject to review after one year, the word "review" does not imply termination of the order. A change of circumstances need not be proved where the original order provided for review after a fixed time. In such a case, any necessary modification is triggered by the direction of the court, not by a change of circumstances. An order for spousal support that is declared "reviewable" after a designated period of time is not an order "for support for a definite period or until the happening of a specified event" such as triggers the severe restrictions on variation that are imposed by section 17(10) of the Divorce Act. A spousal support order that was declared subject to review may be continued where the obligee has not achieved self-sufficiency but is striving to do so".

The respondent's obligation to pay maintenance under the order of Dohm J. did not terminate on the respondent's 55th birthday.

[20] On the question of whether the petitioner has demonstrated "need", it is important to keep in mind that this is a flexible concept. Particularly in the case of a long-term marriage where there is ability to pay, support is not confined to a subsistence level or to be determined without reference to accustomed or relative standards of living. This is made clear in decisions that precede, as well as those which follow, Moge v. Moge, [1992] 3 S.C.R. 813. Thus, in Linton v. Linton (1990) 30 R.F.L. (3d) 1 (Ont. C.A.), Osborne J.A., delivering the judgment of the Court stated (at 33):

> In my view, there is an almost presumptive economic disadvantage arising upon the breakdown of a long-term marriage where the claimant spouse has been absent from the work-force for a lengthy period. There is an element of economic disadvantage arising out of the roles assumed in the marriage and a further economic disadvantage arising from the breakdown of the marriage.

On the issue of the wife's "needs", Osborne J.A. continued (at 35):

> . . . In this case, it is clear that the trial Judge viewed the parties' accustomed standard of living as the appropriate context in which Mrs. Linton's needs should be assessed. I think he was correct in his conclusion on this issue and in recognizing that Mrs. Linton had, over 24 years of marriage, established needs which were directly related to the marital standard of living. It seems to me that, when viewed in this way, the support payment recognizes the economic advantages and disadvantages of the marriage and its breakdown, and is not to be rejected by a pejorative reference to Mrs. Linton being the beneficiary of a pension for life.

The reasoning in Linton was applied by the British Columbia Court of Appeal in Anderson v. Anderson (1991), 37 R.F.L. (3d) 317 and in Touwslager v. Touwslager (1992), 63 B.C.L.R. (2d) 247.

[21] The Court of Appeal of this Province more recently addressed the issue of the supported spouse's needs in Myers v. Myers (1995), 17 R.F.L. (4th) 298. Several elements of the fact situation are, coincidentally, quite similar to those in the present case. The parties in Myers were married for 24 years and had two children. The wife was trained as an X-ray technician prior to the marriage and worked as such at various periods of the marriage. Finch J.A., for the Court, stated (at 301):

> The appellant contends that the learned trial judge erred in treating the objective of economic self-sufficiency in s. 15(7)(d) of the Divorce Act as secondary to recognition of economic disadvantage and economic hardship in subss. 15(7)(a) and (c). Counsel says the judge failed to identify the duration of any period for which any economic disadvantage to the wife

might continue. He says the learned trial judge failed to give consideration to s. 15(5) of the Act, in that he did not identify any "needs" of the wife for which spousal support was required. He says that there must be proof of "need" or "needs" before any support order can be made. Counsel argued that the law does not require equalization of the parties' incomes, and that the judge overlooked the importance of encouraging independence and bringing the relationship of financial dependence to an end.

I find myself unable to accede to these submissions. There was evidence upon which the learned trial judge could reasonably conclude that the wife had been economically disadvantaged by the marriage and its breakdown. She was educated and qualified to pursue a career in her own right. By agreement of both parties she did not abandon her profession completely during the marriage, but she did not pursue it in the way in which she might have done had the parties chosen to treat it as their primary source of income, rather than as supplemental to that of her husband. I am unable to see any basis upon which the finding of economic disadvantage to the wife can be successfully challenged.

As to the contention that the wife failed to establish any "needs" within the meaning of s. 15(5) of the Act, counsel suggests an interpretation of the section which, in my respectful view, is not supportable. "Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income, or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

Nor do I consider that the learned trial judge failed to give adequate weight to the objective of self-sufficiency. At p. 281 of the Appeal Book he said:

> In my opinion, although all four factors or objectives under s. 15(7) are to be considered, the factors in (a) and (c) are most relevant.

The judge clearly did not overlook the objective of economic self-sufficiency as set out in subs. (d). As I apprehend his reasons as a whole, he took that objective into account, along with the other factors he was required to consider.

[22] Applying these principles to the evidence in this case, I am satisfied that an order for continuing maintenance is appropriate.

[23] I accept the submission made on behalf of the respondent to the effect that the petitioner cannot indirectly obtain the equivalent of child support through "needs" based on expenditures for Jaki and Jeni, who no longer qualify for child support.

[24] On the other hand, there is merit in the argument advanced on behalf of the petitioner to the effect that the need of the latter is not to be equated to a subsistence level standard of living or to be considered necessarily to have ended when her income is sufficient to meet basic outgoings. Further, I find that the respondent has ability to pay.

[25] On the whole of the evidence, I conclude that fairness is achieved by fixing permanent maintenance at the reduced level of $750 per month, effective January 1, 1998.

5. Interest on arrears of maintenance

[26] The position of the petitioner is simply that the governing enactments clearly reserve to her, as creditor for these arrears,

entitlement to interest owed up to January 1, 1997, and that it was only interest accruing after the latter date that could be claimed and was claimed in the proceedings before Gillis, P.C.J.

[27] I do not understand counsel for the respondent to contest that proposition as a matter of law. What is suggested is that the respondent, who was not represented by counsel in those proceedings, did not understand the situation with respect to interest when he agreed to the terms of the consent order. However, it is not suggested that the respondent was in any way misled by anything done or said to him at the time. Nor do I understand his counsel to suggest that the respondent was prejudiced by the terms of that order in the sense that it somehow departed from what the law required.

[28] I conclude that the petitioner's claim for simple interest owing on arrears prior to January 1, 1997 is soundly based in law and that she is entitled to recover the amount specified above (para. 11).

6. Costs

[29] With respect to the principal issue, spousal maintenance, success is divided. Accordingly, there will be no order as to costs.

"Lysyk, J."
Lysyk, J.

Vancouver, British Columbia
December 18, 1997