SUPREME COURT OF YUKON

Citation: *Torres v. Marin*, 2012 YKSC 97

Date: 20121129
S.C. No. 02-D3490
Registry: Whitehorse

Between:

MARIO RAUL RAYO TORRES

Plaintiff

And

BLANCA DE LAS MERCEDES MARIN MARIN

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Mario Raul Rayo Torres	Appearing on his own behalf
Kimberly Hawkins	Counsel for the Respondent

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral) This is a somewhat unusual application seeking the enforcement of a spousal support order.

[2] The parties were divorced by an order granted April 27, 2007. They had been married for 39 years, but separated for the last 7 ½ years. Prior to the divorce proceedings being commenced, an order was made by this Court in March 2000 requiring the husband to pay $200 a month in spousal support, based upon an imputed annual income of $32,000. Following the commencement of divorce proceedings, a second order was made in January 2003, again imputing an annual income to the

husband of $32,000 and requiring him to pay interim interim spousal support of $200 per month. That order was made on consent.

[3] In 2007, the husband applied for a termination of his obligation to pay spousal support, either immediately or, in the alternative, upon his turning 65 years old, which occurred on February 8, 2011. The application was before me. I found that the husband's gross annual income for 2006 was $19,625. I recognized that this income was below the $20,000 "floor" referred to in the *Spousal Support Advisory Guidelines.* However, given that the wife then had no income whatsoever, and that the husband continued to have an ability to pay, I concluded that there were exceptional circumstances to continue the husband's obligation to pay spousal support at the rate of $200 per month. The husband's counsel urged that, if I was to deny the termination of spousal support, then it should only be payable until the husband stops working. I agreed with that submission in principle, but the way that it was reflected in the eventual order was that the husband's obligation to pay spousal support would continue until he "ceases to earn employment income, as defined by the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.)". It was also a term of that order that the spousal support was to be paid and enforced through the Director of Maintenance Enforcement.

[4] In late 2010, the now ex-husband attended at the office of the Director of Maintenance Enforcement to indicate that he would be turning 65 on February 8, 2011, that he was no longer working and that he intended to leave Canada for an unspecified number of months. He provided a copy of his application for Canada Pension Plan benefits, but no other documents were requested by the Director to support his claim that he was no longer working.

[5] On October 21, 2011, a Maintenance Enforcement Officer wrote to the now ex-wife to indicate that the 2007 spousal support order had expired and would no longer be enforced by that office.

[6] On October 25, 2012, over a year later, the ex-wife filed the current application to have the 2007 spousal support order enforced.

[7] In response to that application, the ex-husband, who is now 66 years old, filed an affidavit attaching his 2011 Income Tax Return, showing that his gross business income of $15,000, combined with his Old Age Security (OAS) and Canada Pension Plan (CPP) benefits resulted in a total income of $22,876.95. He also deposed that he expected to receive $1500 minimum monthly in OAS and CPP benefits upon his retirement, but was surprised to learn that he is receiving significantly less than that because his ex-wife is receiving a portion of his CPP benefits. He admitted that he continues to work part-time in his painting business during the summer months to cover his basic monthly expenses.

[8] As I noted in my reasons for judgment preceding the 2007 spousal support order (2007 YKSC 29), the *Spousal Support Advisory Guidelines* suggest that the "floor" for spousal support, that is, the income level for the payor spouse below which zero support is to be paid, should be $20,000 per year. The 2008 *Guidelines* also discuss annual incomes slightly above and slightly below $20,000 and suggest as follows:

> "For spouses with low incomes, we must be particularly concerned about work incentives, welfare rates and net disposable incomes. There may be compelling arguments for low-income payors to pay child support at very low income levels, but the same arguments cannot be made for support for adult spouses."

The *Guidelines* also suggest that for marriages of over 20 years, the duration of spousal support should be “indefinite”. This does not mean forever, but it does mean that no fixed term should be assigned.

[9] Interestingly, the ex-husband’s current annual income ($22,876.95, according to his 2011 Tax Return) is not only slightly higher than the $20,000 floor, but it is also higher than the income I imputed to him at the time of the 2007 spousal support order ($19,625). Therefore, at first glance, it would appear that the ex-husband continues to have an ability to pay spousal support. On the other hand, he is now 66 years old and claims to have medical problems including osteoarthritis and high blood pressure, which limits his ability to do heavy work as a painter.

[10] Further, at the time of the 2007 spousal support order, it was presumed that then wife had no income. However, she turned 65 on November 16, 2008 and, according to the ex-husband, has been collecting CPP and social assistance benefits since then. Indeed, he alleges that she is receiving over $1500 per month in social assistance, CPP and OAS benefits, as well as undeclared income from her daughter’s day home of $1600 monthly. On the other hand, the ex-wife has deposed on this application that, due to her degenerative arthritis, she “cannot earn income”. However, the medical report she submitted in support of that assertion is now over 5 ½ years old, and is therefore quite dated. If the ex-wife does indeed presently have an income, then it would seem fair to take that into account in determining the disparity between the incomes of the respective ex-spouses. Unfortunately, the ex-wife did not file any financial information of her own on this application. There is also no explanation from her as to why she delayed for over a year before bringing this application.

[11] Once again, at first glance, it would appear that the Maintenance Enforcement Office may have acted somewhat prematurely in ceasing to enforce the 2007 spousal support order based on the scanty information provided by the ex-husband. The fact that he was about to turn 65 was irrelevant to the enforcement of the order, as the obligation to pay spousal support was to continue until the ex-husband "ceases to earn employment income". The Maintenance Enforcement Office did not require the ex-husband to provide proof that he in fact had ceased to earn employment income.

[12] Further, it is now obvious that the ex-husband continues to earn employment income, if only on a part-time basis. At the hearing, I asked the ex-husband what he expected to earn from his painting business in 2012, and he replied that it would be about the same as 2011, which was $15,000 gross. However, after the hearing was adjourned, the ex-husband filed a supplementary affidavit in which he deposed that he did not expect his painting income from 2012 would be more than $5000. Obviously, there is a significant inconsistency here.

[13] Section 17(4.1) of the *Divorce Act*, R.S.C., 1985, c. 3, governs this application. It provides:

> "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."

[14] In short, I conclude that I am unable to decide this matter on the basis of the information provided to date. I am therefore adjourning the matter generally and directing

the parties to file the following supplementary materials:

1) each party is to file a sworn financial statement in Form 94 of the *Rules of Court*;
2) the ex-wife is to file a copy of her 2011 Income Tax Return;
3) the ex-wife is to file a supplementary affidavit explaining her delay in bringing this application; and
4) if the ex-wife continues to assert that she is totally unemployable due to her medical disability, then she is to provide an updated medical report to support that claim.

[15] For greater clarity, because the ex-wife has the onus of proof on this application, once she has complied with these directions, she may file and serve a new notice of hearing. If the ex-husband fails to file an updated sworn financial statement, the application may nevertheless proceed, but it may be to the ex-husband's detriment.

Gower J.