

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Burke v. Bouris, 2016 NSSC 113

Date: 2016 - 05 - 05

Docket: SFH-MCA 085404

Registry: Halifax

Between:

Sheila Joan Burke

Applicant

v.

John Mark Bouris

Respondent

Judge:

The Honourable Justice Elizabeth Jollimore

Heard:

January 5, 2016 and April 14, 2016

Counsel:

Patrick MacMillan for Sheila Burke

Heather McNeill, Q.C., and Klaryssa Archibald and Michelle Cicchino, students-at-law, for John Bouris

By the Court:**1. Introduction**

[1] John Bouris has applied to vary a spousal maintenance order granted by the Honourable Justice B. MacDonald on May 22, 2014 arising from a trial on April 15 and 16, 2014. His application is under section 37 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160.

2. The order Mr. Bouris wants to vary

[2] Justice MacDonald determined that Mr. Bouris had an annual income of \$67,764.00 and ordered him to pay spousal maintenance of \$1,300.00 to Sheila Burke. The parties had lived together as common law partners for almost seventeen years, during which Mr. Bouris was the breadwinner in the family, running a construction business he owned called On The Level Construction Limited. Ms. Burke had little employment during the relationship and was financially dependent on Mr. Bouris.

[3] Mr. Bouris filed his variation application in December 2014, less than nine months after Justice MacDonald heard Ms. Burke's application for spousal maintenance.

3. The variation

[4] To vary the current order, I must find there's been a change in circumstances since the order was made. The change must be significant and long-lasting; real and not one of choice: *Smith v. Helppi*, 2011 NSCA 65 at paragraph 21.

[5] Mr. Bouris identified two changes: a series of health setbacks; and the "poor economy". In closing argument, Mr. Bouris raised the issue of Ms. Burke's efforts to become self-sufficient, arguing that she had pursued training and this should be considered a change in circumstances.

[6] Mr. Bouris bears the burden of proving that these changes (or any one of them) is significant and long-lasting, real and not of his choice. If he does not prove this on a balance of probabilities, his application must fail.

3.1 Are Mr. Bouris' health setbacks a change in circumstances?

[7] Mr. Bouris had surgery to repair a detached retina on May 29, 2014 and again on July 31, 2014. Each time, he was told not to return to work for six weeks. Ms. Burke agrees that Mr. Bouris was appropriately off work for this period of time. Mr. Bouris also had surgery to repair a detached retina prior to Justice MacDonald's order.

[8] Regardless of his absences from work, Mr. Bouris' 2014 income tax returns (pre- and post-bankruptcy) prepared by his trustee in bankruptcy show his 2014 income was \$60,000.00.

[9] Mr. Bouris had surgery to repair a hernia on May 19, 2015. He was off work for six weeks. Mr. Bouris has had hernia surgery in the past according to the report prepared by his

surgeon. Mr. Bouris testified that the second of his three hernias developed in 2012.

[10] Dr. Valerie Ross provided a report dated December 9, 2015, stating that a neck x-ray showed that Mr. Bouris has a narrowing of the disc spaces in his cervical spine. She said this “will be a life long condition as there is no cure for degenerative changes”. She said that this prohibits him from “doing labour that involves neck extension combined with overhead reaching” and “working on ladders or at heights that would put him at risk of a fall.”

[11] Mr. Bouris said that he first noticed the dizziness problem over ten years ago.

[12] Mr. Bouris’ health problems are real and not of his choice. However, the temporary work absences caused by the eye and hernia surgeries were not “significant and long-lasting” changes. They were transitory conditions which have been remedied. As well, Mr. Bouris had experienced these very health problems in the past.

[13] This leaves the question of whether the degenerative change to Mr. Bouris’ cervical spine is a change in circumstance. I conclude it is not for two reasons.

[14] First, when Justice MacDonald made her decision in 2014, Mr. Bouris was sixty years old. He is now sixty-two. It is completely foreseeable – in fact, it would be expected – that there would be degenerative changes in his physiology at his age. As Mr. Bouris said, the problem was first noticed over ten years ago. In plain terms: he is aging. This is normal and predictable.

[15] Second, in this company and in his recent work for its predecessor, Mr. Bouris has not worked as a physical labourer. Ms. Burke testified that Mr. Bouris hadn’t been “on the tools” in over a decade before they separated in 2012. Mr. Bouris said that he does most of the managerial tasks at his current job. Ms. Burke and Mr. Bouris agreed that when their home in Portuguese Cove was rebuilt, the work was “hired out” and Mr. Bouris was not involved in the labour. Mr. Bouris testified that in terms of carpentry and fine work, he can do some of it but he “takes forever” and he is not qualified as a carpenter.

[16] I conclude that the degenerative change to Mr. Bouris’ spine is not a relevant change because its impact on him (prohibiting him from reaching overhead and extending his neck or working on ladders) does not affect his ability to do the sort of work he does.

[17] None of Mr. Bouris’ health setbacks are a change in circumstances.

3.2 Is the “poor economy” a change in circumstances?

[18] Through the parties’ relationship, Mr. Bouris owned a company called On the Level Construction Limited. He testified that over the course of a decade or so the company spiraled into bankruptcy, taking him with it. Mr. Bouris testified that during this decade, he realized he couldn’t take vacation because he was always waiting for some deposit to come in to pay something from the past. He said that some winters they worked through, but some winters they didn’t.

[19] Mr. Bouris said that the company had done a big job in 2012-2013 for which it wasn't paid and this was "the last straw". Ms. Burke disagreed. She said the bankruptcy was "an easy way out of a client situation".

[20] In the summer of 2013, OTL Renos Ltd. was incorporated. According to Mr. Bouris, Cyril Blake owns this company: "It's on paper only ownership." Mr. Blake has no involvement in the company. Mr. Bouris is explicit that he has no ownership interest in OTL Renos Ltd. Mr. Bouris said that he, Greg Sutherland and Mike MacPhee are "the directing mind" of OTL Renos. Mr. Bouris worked at OTL Renos Ltd. when the original spousal maintenance order was made.

[21] Mr. Bouris described his work for OTL Renos in his cross-examination, saying:

- he mostly did estimating
- he collected bills
- he consulted with clients and workers
- he coordinated the deliveries of supplies
- he ordered items
- he organized the "invoices and hours to hand over to the accounting people who do the invoicing and payroll"
- he took calls for OTL Renos because the address and phone number on the company's website are his.

[22] In his affidavits, Mr. Bouris said he:

- scouted for jobs
- drafted proposals for prospective customers
- worked with Cambridge Financial to permit client billing and prompt payment of OTL Renos' bills.

[23] Mr. Bouris admitted that while receiving Employment Insurance benefits, he continued to prepare estimates for jobs OTL Renos wanted to do.

[24] Significantly, Mr. Bouris testified that most of the tasks he performed are not billable. Of the tasks he listed, only consulting with clients and workers on the worksite are billable – but not always. If a task was not billable, Mr. Bouris was not paid for doing it. He testified that in the last several months before he testified on January 5, 2016, the hours each week for which he was paid were "in the teens".

[25] In contrast, Greg Sutherland and Mike MacPhee were paid for the work they did. Mr. Bouris was the only one who dedicated fifty percent or more of his working time to unpaid work. When asked why he wasn't paid more, Mr. Bouris said "until we can rebuild and get it turned around" that wouldn't happen. He didn't want to take an income for the non-billable work because the company "will be back in the hole." In his affidavit, Mr. Bouris said he does unbillable work so "the company can get back on its feet again". He said that OTL Renos is failing and that he would not like this company "to go under like On The Level Construction Ltd. did."

[26] Mr. Bouris is putting his hopes for the future of OTL Renos ahead of his obligation to pay spousal maintenance to Ms. Burke. He is dedicating himself to a company in precarious position and in which he has no legal ownership interest.

[27] I conclude that the “poor economy” is not a real change: it is a circumstance of Mr. Bouris’ choice. This is not a basis for varying Ms. Burke’s spousal maintenance payments.

3.3 Are Mr. Bouris’ other financial circumstances a change in circumstances?

[28] Justice MacDonald ordered spousal maintenance payments based on Mr. Bouris having an annual income of \$67,764.00.

[29] On March 7, 2014, just prior to the hearing before Justice MacDonald, Mr. Bouris entered into bankruptcy proceedings. He was discharged on December 8, 2015.

[30] As a result of his bankruptcy, Mr. Bouris filed two tax returns in 2014, each prepared by his trustee in bankruptcy. According to his pre-bankruptcy tax return, Mr. Bouris earned total income of \$11,737.00 as of March 7, 2014. His post-bankruptcy return shows he earned \$48,263.00 during the remainder of 2014. His total income in 2014 was \$60,000.00. This is only \$7,764.00 less than the amount on which his spousal maintenance payments were based, even though he was off work, recovering from eye surgery, for twelve weeks.

[31] Mr. Bouris’ discharge from bankruptcy in December 2015 means his debt situation is now better than it was when Justice MacDonald heard Ms. Burke’s original application for spousal maintenance, and Mr. Bouris had proven secured debt of \$113,950.79 and proven unsecured debt of \$88,147.44. He owed debts of \$202,098.23. He was discharged from all of his debts on December 8, 2015 because none of his debts fell within subsection 178(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[32] Mr. Bouris’ bankruptcy has improved his financial situation by freeing him from over \$200,000.00 in debt.

[33] Mr. Bouris was laid off for a number of months in 2015 and is now laid off again. He testified that his layoff in 2015 was due to the winter weather. A large number of significant snowstorms meant there was no work. Mr. Bouris testified that On the Level Construction, his company prior to Justice MacDonald’s order, also experienced winters when there was no work. The seasonality of the construction industry is not a change in circumstances.

3.4 Is Ms. Burke’s situation a change in circumstances?

[34] A change in the circumstances of someone receiving maintenance can be the basis for a variation order. However, an improvement in the recipient’s financial circumstances does not require a variation if the recipient shows a continued need for maintenance: *Fowler*, 2010 ONCA 328 and *LeClair*, 2005 NBCA 107 at paragraphs 7 and 8.

[35] Ms. Burke is fifty-three years old. Justice MacDonald found Ms. Burke had an annual

income of \$6,000.00 when she determined Ms. Burke's spousal maintenance entitlement.

[36] After Ms. Burke and Mr. Bouris separated, Ms. Burke took a course in hair styling to update her credentials and circulated resumes, but she didn't find work. She tried to market the weaving she did, but this, along with her ventures in making chocolate truffles, bookkeeping and working in a café "didn't pan out".

[37] Ms. Burke said that in a good year she would make \$6,000.00 cutting hair from home. This is consistent with the figure Justice MacDonald used.

[38] After Justice MacDonald's decision, through August, September and October, 2014, Ms. Burke stayed in Moncton and took a course in dog grooming. This cost her \$5,000.00 for tuition and tools. She found her first job grooming pets at PetSmart in December 2014. Shortly after she began this job, Mr. Bouris applied to vary her spousal maintenance.

[39] Grooming opportunities at PetSmart were first directed to those staff who had taken the PetSmart pet grooming course, so Ms. Burke found herself stocking shelves, working cash, mopping and doing other tasks around the store. The promise of a raise after three months was not kept. She left PetSmart on March 24, 2015. In three months, she had earned \$5,628.21.

[40] Within two weeks of leaving PetSmart, Ms. Burke found work, on a commission basis, at Sittin' Pretty, a dog daycare and spa. At this job, she felt she would be able to develop her skills and reduce the time it took her to groom dogs. From April 11, 2015 to November 14, 2015, she earned \$5,270.00 at Sittin' Pretty; she earned less than she had at PetSmart but she was gaining experience.

[41] In December 2015, when she realized she wasn't making enough, Ms. Burke started looking for a part-time job. She didn't return to any of the endeavors (hairstyling, weaving, truffles, bookkeeping and working in a café) that had previously failed.

[42] By the time she testified on April 14, 2016, Ms. Burke had been laid off from Sittin' Pretty and had decided to work grooming at pet owners' homes.

[43] According to Ms. Burke's 2014 Notice of Assessment, she had total income of \$18,859.00. Mr. Bouris paid monthly maintenance of \$1,300.00 throughout 2014 and I assume that \$15,600.00 of her income was spousal maintenance while she earned only \$3,259.00. Her income would have been reduced because she was out of the province training.

[44] According to Ms. Burke's 2015 income tax return, she had total income of \$19,077.00. Spousal maintenance comprised \$11,685.00 of this: Mr. Bouris underpaid her spousal maintenance by almost \$4,000.00. Ms. Burke had earnings of \$4,859.00 from employment and net "business income" of \$2,533.00 from hair styling. She managed to earn \$7,392.00 in 2015, approximately \$1,400.00 more than the amount Justice MacDonald found was her income.

[45] Ms. Burke gave evidence of her efforts to support herself, through retraining. Her efforts are reasonable. I do not find that the modest increase in Ms. Burke's income constitutes a

change in circumstances. She continues to work toward making a reasonable contribution to her own self-sufficiency. Given her work history, it is to be expected that she would not achieve self-sufficiency quickly.

Conclusion

[46] Mr. Bouris' variation application is dismissed. The collection of arrears and costs was suspended by a partial consent order dated November 17, 2015 and Mr. Bouris' monthly spousal maintenance payments for December 2015 and January 2016 were reduced, by consent, from \$1,300.00 to \$800.00.

[47] The suspension on collection of arrears and costs is lifted and Mr. Bouris' monthly spousal maintenance obligation for December 2015 and January 2016 is restored to \$1,300.00.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia