
CANADA / JUDGMENT

Aquilini v. Aquilini

2013 BCSC 217

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Supreme Court of British Columbia

DECIDED

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2013 BCSC 217 Aquilini v. Aquilini

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Aquilini v. Aquilini,

2013 BCSC 217

Date: 20130213

Docket: E120577

Registry: Vancouver

Between:

Taliah Aquilini

Claimant

And

Francesco Aquilini

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Claimant:

P. Daltrop

Counsel for Respondent:

K.S. Paterson

L.A Murphy

T. Dickson

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 22,23, 2013

Place and Date of Judgment:

Vancouver, B.C.

February 13, 2013

[1] This family law case is set for trial in September, 2013. The claimant Taliah Aquilini seeks a number of pre-trial orders relating to family assets and discovery. Those are:

- A declaration that a large wine collection is a family asset and an order for its immediate sale to finance the claimant's litigation costs;
- An expanded restraining order to prevent the respondent from disposing of or encumbering assets in which he has an "indirect" interest;
- An order giving the claimant access to a number of corporate benefits available to the respondent, including use of vacation properties, hockey tickets and access to a private suite at Rogers Arena;
- An order compelling the respondent to answer questions about alleged adultery on examination for discovery; and
- An order for further document production.

I. Background

- [2] The parties were married in 1994 and separated in January, 2011. They have four children who currently live with the claimant in the former matrimonial home. There is no order for interim child or spousal support, but the respondent makes monthly deposits into a joint bank account for use by the claimant and support of the children.
- [3] The respondent is a partner, along with his parents and two brothers, in the Aquilini Investment Group Limited Partnership ("AIGLP"), which is at the centre of a network of corporations, partnerships and trusts with extensive holdings. Those holdings include the Vancouver Canucks hockey team and the Rogers Arena in which the team plays.

- [4] I previously made an order appointing a joint expert to prepare an overall valuation of the Aquilini family businesses, excluding the hockey team and the arena. The parties have agreed to each appoint their own experts to prepare valuations of the hockey business and of the respondent's share of all the family enterprises.
- [5] At the hearing of these applications, I ordered the respondent to attend at two further days of examination for discovery. I adjourned applications for further production of documents from the various business entities and the National Hockey League ("NHL").
- [6] The respondent relies in part on a purported marriage agreement in which he says the claimant waived any claim to some of what she now says are family assets. The validity and effect of that agreement will be in issue at trial and I have not considered it in dealing with these applications.

II. The Wine Collection

- [7] The wine collection at issue is located in the former matrimonial home. The claimant has received an offer to purchase 1,930 bottles for a total price of \$615,000 U.S. A further 1,000 bottles are not included in that offer. The respondent has obtained an appraisal that puts the value of the entire collection at \$789,000 U.S.
- [8] The claimant says the wine collection is a family asset and she needs money from its sale to pay ongoing expenses, including the cost of obtaining expert evidence for use at trial. She asks that the full proceeds of sale be paid to her, subject to an accounting in the final division of assets at trial.
- [9] The respondent says he assembled the collection as a personal hobby and the claimant, who does not drink wine, has never had anything to do with it. He denies that the collection was used for family purposes, although he admits that some wine was sold at one point to pay family debts.
- [10] Under Part 5 of the Family Relations Act, RSBC 1996, c 128 [FRA], property is a family asset, and therefore divisible between spouses, if it was "ordinarily used ... for a family purpose". This is one of the significant differences between the FRA and the new Family Law Act that will come into force March 18, 2013. The new Act provides for equal division of "family property" which is defined, subject to some specific exceptions, as all property owned by at least one spouse at the date of separation.
- [11] It therefore appears that if this matter was to be decided under the new Act, the wine collection would be family property. But that is of only academic interest because, under the transition provisions in the new legislation, actions already underway will continue to be governed by the FRA. That means it will still be necessary in this case to consider whether the wine collection was used for family purposes during the marriage.
- [12] Section 66(1) of the FRA says:

66 (1) In proceedings under this Part or Part 6 or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 65, or under Part 6 and may make orders that are necessary, reasonable or ancillary to give effect to the determination.

[13] Rule 15-8(1) of the Supreme Court Family Rules, BC Reg 168/2009 [Family Rules], reads:

(1) If in a family law case it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

[14] The combined effect of those provisions is that the court has jurisdiction to order sale of property and distribution of sale proceeds at any time, provided that the property is in fact a family asset.

[15] In *Marzara v Marzara*, 2010 BCCA 287, there had been an interlocutory order for payments to one party from certain funds in trust. The trial judge said those funds had been derived from the sale of property that had been acknowledged to be family assets. While acknowledging that such an order could be made in appropriate circumstances, the Court of Appeal set it aside. The court said at paras 14-16:

[14] In appropriate circumstances, therefore, the judge could have made a determination that the funds held in trust constituted a family asset, and could have made an order dividing some or all of those funds. In order to do so, however, she would have to determine whether the fund is a family asset, and also whether Mr. Marzara is entitled to the asset in a division under the Family Relations Act.

[15] The reasons of the judge do not make a clear finding that the funds held in trust are a family asset. Her remark that they have, at times been acknowledged to be such may have been intended to be a finding, but the language used by the judge is equivocal.

[16] Equally, the judge has not made any clear finding that Mr. Marzara is entitled, on a division of property, to a portion of the trust funds equal to the draws that her order provides for him.

[16] In *Jiwa v Jiwa*, [1992] BCJ No 3024 at para 8 (SC), the court said that an advance payment against a spouse's share of family assets may be made where:

- 1) the advance is required to mount a challenge to the other spouse's position at trial; and
- 2) the advance will not jeopardize the other spouse's position at trial.

[17] The advance in *Jiwa* was found to be necessary so a wife with limited income could proceed with the action. The payment was to be made out of certain insurance proceeds that had already been found to be a family asset on a stated case and subsequent appeal.

[18] On an interim application for sale of assets, the onus is on the spouse seeking to change the status quo. Any doubt should be resolved in favour of the status quo until trial: *Bodo v Bodo*, [1990] BCJ No 346 (SC). Bodo dealt with sale before trial of the matrimonial home, which was the only significant family asset.

[19] In *Belzberg v Belzberg* (1991), 56 BCLR (2d) 325 (SC), the court ordered advance payment to the wife of one half of the proceeds of sale of a recreational property that had been registered in her name. Collver J. said at para 16:

At trial the wife will undoubtedly submit that the total sale proceeds are hers. The husband will likely argue that he only conveyed the property to his wife at her insistence, and the property is at least a family asset. In any event, it seems likely that the wife will be found to be entitled to at least one half of the sale proceeds. [Emphasis added.]

[20] In *Pierce v Pierce* (1994), 2 BCLR (3d) 31 (SC), an advance was held to be necessary to allow the wife to obtain a valuation of a company in which the husband held an interest. There was no jeopardy to the husband's position at trial because there was no real possibility that the wife's share of family assets would be less than the amount of the advance. However, the court did not order sale of any specific property to fund the advance. The husband was simply ordered to make a cash payment.

[21] None of these cases or any others cited provide authority for a pre-trial order for the sale of property and distribution of sale proceeds when there is conflicting evidence about whether the property is a family asset.

[22] There are a number of possible orders about the wine collection that could be made at trial. If the respondent is successful in arguing that it was not ordinarily used for family purposes and is not a family asset, he will be entitled to retain it to do with as he wishes. If it is found to be a family asset, there may be an order for sale and division of proceeds, or the respondent may still be able to retain it intact, provided that the claimant receives other assets of equal value. The eventual result will depend on full evidence, including oral testimony and cross-examination, about the history and use of the wine collection, along with consideration of its value in the context of all other property that may be found to be family assets.

[23] There is no doubt that valuation of other assets at issue will be a complicated and expensive process. However, nothing in the claimant's affidavit evidence suggests that she will be unable to obtain the necessary expert evidence without an advance payment. Even if she could establish the need for an advance payment, there is no authority for requiring that such a payment be funded by sale of a specific asset where, as here, there are multiple assets and potential sources from which the party paying the advance could potentially choose to obtain those funds.

- [24] In conclusion, I am not persuaded that I have the jurisdiction to order sale of the wine collection before trial in these circumstances or that the order would be necessary even if the jurisdiction existed.

III. The Restraining Order

- [25] A consent order previously pronounced by Master Tokarek restrains the respondent from disposing of or encumbering family assets, including business assets, in which he "has, or may have, a direct interest ... except in the ordinary course of business". Section 67 of the FRA requires the court to issue such a restraining order if one party applies for it, unless the other party can show that the applicant's claim will not be defeated or substantially impaired by disposal of the property.
- [26] The claimant now applies for an expanded order that would prevent the respondent from disposing of assets in which he may have an "indirect," as well as a "direct" interest. The respondent's counsel argues that a reference to "indirect" interests is too broad and vague to be included in an order.
- [27] It is certainly true that a restraining order is enforceable through contempt proceedings and should therefore leave no doubt or ambiguity about what can and cannot be done. But in the context of this case, I am not troubled by the references to direct and indirect interests. Direct interests clearly are those that the respondent holds in his own name and could dispose of unilaterally but for the order. That would presumably include his shares in the various family companies, partnerships and trusts that make up AIGLP. Indirect interests would clearly refer to property owned by those companies, partnerships and trusts.
- [28] The real difficulty with the proposed expanded order is that it would give the claimant no real protection and would be unenforceable. The evidence is that the respondent is one of a group of five that makes decisions for AIGLP--the others being his brothers and his parents. Decisions are made by a majority vote.
- [29] Section 67(1) does not give the court a general power to restrain disposition of property. It only allows for an order restraining a party to the proceeding from disposing of family assets or other property at issue: *Miklosko v Miklosko*, 2007 BCSC 524 at para 10. Neither the other members of the Aquilini family nor their corporate entities are parties to this proceeding and no order made under s. 67(1) would be binding on them.
- [30] The court may restrain a party, in his capacity as a director of a corporation, from causing the corporation to dispose of or deal with property, but such an order can be effective only where the party is the sole or majority shareholder or the directing mind of the corporation. That was apparently the case in *Simpson v Simpson*, 2009 BCSC 527, on which the claimant relies.

- [31] In this case, the order would, at most, prevent the respondent from participating in corporate decisions. It would not prevent the other partners from causing the companies or partnerships to do anything.
- [32] I see no prejudice to the claimant if the order is not made. By now the holdings of AIGLP should be well known to the joint valuation expert, who I understand has nearly completed his report. There is no evidence of any real possibility that AIGLP could dispose of assets in a way that would put them or the proceeds of their disposition beyond reach of the claimant if she establishes a claim to those assets at trial.
- [33] Having said that, I agree that complexity and extent of the business interests at issue are such that the claimant is entitled to be kept informed of any significant changes that may occur between now and the date of trial. I therefore order that the respondent provide her with a monthly list of all significant transactions made by or within AIGLP. That is essentially a continuation of an interim order that I made on October 24, 2012.
- [34] The documents evidencing any such transactions may be documents of AIGLP and as such may or may not be producible by the respondent. That is one of issues to be argued on the adjourned application for corporate documents. But the general information about transactions that take place is certainly within the respondent's means of knowledge and disclosure of that information is consistent with the ongoing duty of disclosure in the Family Rules, R. 5-1(15).

IV. Access to Benefits and Privileges

- [35] The claimant says that, prior to separation, she enjoyed certain benefits available to members of the Aquilini family, including:
- a) Tickets to Canucks hockey games and other events at Rogers Arena, including access to a private suite;
 - b) Canucks merchandise, including merchandise autographed by Canucks players;
 - c) Access to vacation properties;
 - d) Chauffeur services;
 - e) Beneficial rates at certain hotel chains;
 - f) Cellular phone services for herself and the children;
 - g) Use of an email address on the Aquilini.com domain;
 - h) Access to a server located in the former matrimonial home; and
 - i) Use of certain credit cards.

[36] The respondent says these benefits are controlled by the AIGLP and the partners have decided to end the claimant's access to them. As I said during argument, I have some difficulty with the suggestion that the respondent's parents and brothers would have made such a decision without at least consulting him. In any event, the claimant concedes that these benefits are controlled by AIGLP and not solely by the respondent. However, she argues that if the respondent continues to enjoy any of the benefits, she is entitled to half of whatever he receives.

[37] The claimant says these items come within the reference to "property" in s. 66(1) of the FRA, which reads:

66 (1) In proceedings under this Part or Part 6 or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 65, or under Part 6 and may make orders that are necessary, reasonable or ancillary to give effect to the determination.

[38] There is no doubt that the court's jurisdiction under that section includes the jurisdiction to make interim orders for the use of family assets by one party or another before trial. Such orders are most commonly made to provide for interim use and occupation of a matrimonial home.

[39] In *Christoffersen v Christoffersen* (1981), 28 BCLR 56 (SC), the court considered an application to share interim use of a boat. Dohm J. said at 61-62 that attempting to divide use would "create more difficulties than it would solve" and any loss to the plaintiff arising from lack of access to the boat could be subject of a credit or adjustment in the final division of family assets. He added at 62:

Without detracting from anything I have said, I think that, for the most part, in dealing with family assets on an interim basis, other than the matrimonial home, that the aspect of the use and possession of those assets ought more properly be reserved to the trial judge. Any injustice arising by reason of one spouse having a particular asset to the exclusion of the other spouse in the interim period can be remedied at that time.

[40] Although *Christoffersen* was a relatively early decision under the FRA, I have been referred to no contrary authority. The situation here is even more complicated than in *Christoffersen* because the boat in that case was at least agreed, for the purposes of the motion, to be a family asset.

[41] The alleged family assets in this case are not the tickets and other benefits, but the respondent's shares in the companies and partnerships that own and control those benefits. Whether the claimant has any continuing entitlement will depend on whether the shares are found at trial to be a family asset and, if so, the manner in which that asset is divided. I see no basis on which I can order interim use of them.

Discovery Question on Adultery

- [42] Both the claimant, in her notice of family claim, and the respondent, in his counterclaim, say they have been separated since January, 2011, and seek divorce on the basis of that separation of more than one year.
- [43] The claimant also alleges adultery and seeks an order compelling the respondent to answer questions on examination for discovery about whether he has committed adultery. He has refused, on the advice of counsel, to answer those questions, arguing that since both parties are seeking divorce on the basis of one year separation, the adultery allegation is unnecessary and irrelevant.
- [44] Family Rules, R. 9-2 (17)(a) says:
- (17) Unless the court otherwise orders, a person being examined for discovery
- (a) must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the family law case
- [45] The claimant says that the pleadings allege adultery and the respondent is therefore required to answer questions relevant to that issue. When adultery is alleged, it is frequently proved by admissions obtained at examination for discovery and the claimant says she is entitled to choose the grounds on which she seeks a divorce.
- [46] The ground on which the court may grant a divorce is set out in s. 8(1) and (2) of the Divorce Act, RSC 1985, c 3 (2nd Supp) [Divorce Act]:
8. (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.

Breakdown of marriage

- (2) Breakdown of a marriage is established only if
- (a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or
- (b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,
- (i) committed adultery, or
- (ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

- [47] Although one year separation, adultery and cruelty are still often referred to as separate grounds for divorce, that is not strictly correct. Since the enactment of the Divorce Act in its present form in 1985, there has been only one ground of divorce--marriage breakdown. The Act refers to one year separation, adultery and cruelty only as alternate factual circumstances by which marriage breakdown can be proved. The distinction is a subtle but important one. It indicates Parliament's intention to further de-emphasize considerations of fault in divorce proceedings wherever possible.
- [48] In *McPhail v McPhail*, 2001 BCCA 250, the trial judge granted a divorce on grounds of cruelty, although the parties had been separated for a year by the time the trial ended. The Court of Appeal did not set that order aside, but said at paras 10-11:

The clear trend of the law in domestic relations is to remove fault from most issues. As it usually takes a year to bring a contested matter to trial a divorce can usually be given on the ground of one-year separation. In those circumstances a cruelty allegation is unnecessary and will likely prolong the hostility between the parties. A cruelty finding bears a stigma; it should be avoided when no useful purpose is served....

In the present matter I think, with respect, that it would have been better if the trial judge had proceeded with the divorce on separation only and declined to hear the cruelty issue.

- [49] Counsel for the claimant relies on *YJE v YNR*, 2007 BCSC 509, where the court granted a divorce on grounds of adultery although the necessary one year had elapsed since separation. The reasons for judgment do not indicate whether the respondent opposed the granting of divorce on that basis. More important, the court does not appear to have been referred to *McPhail*.
- [50] Counsel argues that *McPhail* is distinguishable because it deals with cruelty, while adultery no longer carries a similar stigma. In *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, Cory J. said at 1343:

Although allegations of adultery and the misconduct of the parties may have been the height of scandal at the time of the passage of the legislation they can hardly raise an eyebrow today. Television in day-time soap operas and prime time programmes, the movies and magazines, all deal in considerable and colourful detail with every possible permutation and combination of human relationships. That is now the staple fare of society. By comparison the evidence of a matrimonial case is very tame fare indeed.

- [51] *Edmonton Journal* was a challenge to the constitutionality of Alberta legislation restricting what could be published about matrimonial proceedings. That is the legislation Cory J. was referring to in the above passage. The Court was not considering the rights of the parties to those proceedings as against each other.

- [52] While adultery may no longer carry a public stigma, it can still be a highly emotional issue for the parties. Like the cruelty allegation that was before the court in McPhail, continued reference to it is likely to increase hostility and make all issues more difficult to resolve.
- [53] There is no dispute on the pleadings that the parties have been separated for more than one year. Assuming one or both confirms that fact with sworn evidence at trial, marriage breakdown will be established and the court will be in a position to grant the divorce. Any evidence of adultery will be unnecessary. Counsel for the claimant has not suggested any other issue to which adultery evidence would be relevant.
- [54] I take McPhail to be a clear direction from the Court of Appeal that I should decline to hear evidence about the alleged adultery at trial. As the evidence will not be admissible at trial for the purpose of divorce and it has not been shown to be related to any other "matter in question", the respondent should not be compelled to answer those questions on discovery.

Document Production

- [55] The claimant seeks production of further documents, including records of the respondent's personal and travel expenses. On January 22, 2013, the first day of the hearing of this application, the respondent delivered a fourth supplementary list of documents. Understandably, counsel for the claimant was not in a position to advise the court of the extent to which that further production included documents being sought on this application. On reviewing the list, it appears to include at least some of them.
- [56] Counsel have scheduled a further appearance on February 18, 2013, to argue the adjourned application for corporate and NHL documents. Rather than rule on matters that may no longer be in issue, I will hear further submissions on the personal documents at the same time, if any issues about their production remain outstanding.
- [57] Costs of this application will be in the cause.

"N. Smith J."

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