
CANADA / JUDGMENT

B.A.A. v. S.R.A.

2004 BCSC 1594

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.A.A. v. S.R.A.

2004 BCSC 1594

Date: 20041206

Docket: 01 5309

Registry: Victoria

Between:

B.A.A.

Plaintiff

And:

S.R.A.

Defendant

Before: The Honourable Madam Justice Baker

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff

Nicholas W. Lott

Counsel for the Defendant

Angela Atwood-Brewka

Date and Place of Hearing:

September 14, 2004

Victoria, B.C.

- [1] In this summary trial, Mr. S.R.A. seeks to dispose of all remaining issues arising out of this divorce proceeding. Ms. B.A.A. submits that the matter is unsuitable for disposition by summary trial, but I am satisfied that I can find the necessary facts and law to decide this matter justly without putting the parties to further delay and the expense of a trial. There are few disagreements on the facts, and none that cannot be resolved by reference to the evidence and the probabilities. Credibility is not in issue. Examinations for discovery have been conducted. The amounts involved are not substantial and the family's assets, which can be best put to use for the support of the couple and their children, would be eroded by the costs of further litigation. In addition, although only one of the three children continues to reside in Ms. B.A.A.'s home, the Family Maintenance Enforcement Program continues to pursue Mr. S.R.A. for support payments at the level ordered when both K.1 and T. were living with Ms. B.A.A. and they are garnisheeing Mr. S.R.A.'s wages. Ms. B.A.A. maintains that she has informed FMEP of the change in K.1's status, but either her communication has gone astray, or FMEP is disregarding this new information. Accordingly, it is important for this matter to be resolved.
- [2] The parties were married on November 19, 1988. They separated for about a year in 1998, reconciled and then separated a final time on January 1, 2001. On September 16, 2002, Master McCallum made an order that there was no reasonable prospect of reconciliation between the parties, and on August 1, 2003, Justice R. Holmes granted a divorce.
- [3] The parties have three children - K.1, age 17; T., age 15; and K.2, age 13. They agree that there should be a permanent order that they share joint custody and joint guardianship of the three children, and I make that order.
- [4] When the couple separated, the three children initially remained with Ms. B.A.A. in the family home on S.[] Island. Mr. S.R.A. moved to Sidney. He currently resides in Sidney with a new partner, C.S., in a home the couple purchased together, but which is registered in Ms. C.S.'s name as Mr. S.R.A. was unable to contribute to the down payment.
- [5] Although the A. children initially remained with Ms. B.A.A. in the former family home on S. [] Island, the parties agreed to allow the children to decide in which parent's home they would primarily reside. In September 2002, K.1 moved to his father's home in Sidney, and remained there until January 2003, when he returned to S.[]. In July 2003, K.2 moved to her father's home, where she has continued to live. On April 1, 2004, K.1 returned to Mr. S.R.A.'s home. T. has lived with his mother throughout. Both parties have ongoing access to the child or children resident with the other parent.

- [6] Although Mr. S.R.A. has always considered K.1 to be his son, he is not Mr. S.R.A.'s biological child, and he was eight months old when Mr. and Ms. B.A.A. began their relationship in the fall of 1987. Ms. B.A.A. was then in receipt of social services benefits. Mr. S.R.A. had been working for the B.[] Corporation for a number of years, and he began supporting Ms. B.A.A. and K.1 when they began living together as a family. Ms. B.A.A.'s affidavits do not refer to her work experience before her marriage to Mr. S.R.A.. Mr. S.R.A. says that Ms. B.A.A. had secretarial training, and had worked as a secretary, and as the manager of a brake and muffler shop before K.1 was born.
- [7] Mr. S.R.A. has continued to work with B.[] Corporation throughout the marriage and since separation to the present, with several promotions along the way. He began as a casual catering attendant, then worked as a regular cleaner and currently holds the position of head steward. In the summer of 2004, he was temporarily promoted to the position of Chief Steward, but was scheduled to return to his regular position as head steward on September 14, 2004. It is probable that he will be promoted to the position of Chief Steward in the future.
- [8] Ms. B.A.A. worked periodically during the marriage, and always on a part-time basis. She worked for her father as a secretary. She worked for the G[]; did some landscape design work; worked at an antique store, and as an assistant Saturday market coordinator. She also worked as an assistant secretary, bookkeeper and delivery person with a communications company; and as assistant manager of a brake and muffler shop.
- [9] In 1999, Ms. B.A.A. began working full time with the B.[] Corporation. She took a Marine Emergency Duties course, paid for by the defendant. Her first position with the Corporation was as a catering attendant. She was promoted to deck hand, but continues to work as a casual and part-time employee. At first, she was working only about 12 days a month, but her working days have increased over time. In order to advance to the position of watch keeping mate, she will need to acquire a bridge watchman ticket, which requires her to take a six and one-half month course. With this qualification, she would be able to work more hours. Some B.[] Corporation employees receive financial assistance from their employer to take the course. Some take the course while continuing to work. Ms. B.A.A. would like to take a leave of absence to take the course, and would suffer a loss of income during the time she was off work.
- [10] Unfortunately, Ms. B.A.A.'s employment has been interrupted as a result of various injuries. Ms. B.A.A. was involved in a motor vehicle accident in October 1999, and has had back problems as a result. She is pursuing a personal injury lawsuit that is scheduled to go to trial early in 2005, and is making a claim in that lawsuit for loss of income.
- [11] On August 7, 2001, Ms. B.A.A. left work because of pain in her knee. She is of the view that the knee pain is a work-related injury and she submitted a claim to the Workers' Compensation Board. The Workers' Compensation Board denied her claim for benefits, and she has appealed the denial. Her employer began paying disability benefits in December

2001, and she returned to work on January 8, 2002. In June 2002, she was again off work, due to back problems that she attributes to the 1999 motor vehicle accident. She received disability benefits from her employer while off work. The evidence is not complete concerning when she returned to work. She remained on disability in September 2002. Sometime after that date, but before July 2003, she had to have two surgeries for ruptured ovarian cysts, and also had her gall bladder removed. She returned to work in April 2003. However, she had become pregnant with the child of K.G., the man with whom she has been living since September 2003. Sometime after she returned to work in April 2003, she had a miscarriage, after which she was again hospitalized for a short time. Mr. K.G. also works for the B.[] Corporation.

- [12] Mr. S.R.A. had some assets that he brought into the parties' marriage - a Camaro motor vehicle, a Lund boat, and a small business he had been operating. He sold these assets to finance the couple's purchase of their first home. His family gave the couple an interest-free loan, which was later repaid.
- [13] During the marriage, the couple also acquired some rental properties. Mr. S.R.A. did much of the renovation and repair work on these properties, and he and Ms. B.A.A. shared responsibility for cleaning the homes. Initially, Ms. B.A.A. also assisted in dealing with tenants and potential tenants, but she tired of this, and Mr. S.R.A. became solely responsible for dealing with tenants.
- [14] In 1993, Ms. B.A.A. received a small inheritance, in the range of \$6,000 to \$8,000, from her mother's estate. In 1997, she received another smaller inheritance from her grandmother's estate. These funds were used to purchase items for the home and for other family purposes.
- [15] In 1997, Ms. B.A.A. received the sum of \$52,500 from the settlement of a personal injury claim arising from a 1993 motor vehicle accident. Some of these funds were used towards the cost of a \$90,000 renovation of the family home, and the money was also used to purchase items for the home and family. The balance of the renovation costs were financed through a mortgage. Mr. S.R.A. paid all of the mortgage payments during the marriage. He also did some of the renovation work himself, although a contractor was hired as well.
- [16] The parties disagree about the extent to which Mr. S.R.A. provided care for the three children. Since he worked full-time, and Ms. B.A.A. worked only part-time outside the home, or, at times, did not work outside the home at all, it would seem reasonable that she carried the heavier load of homemaking and child care. However, I accept Mr. S.R.A.'s evidence that he also cared for the children, did cooking, baking, laundry, grocery shopping and housework.

DETERMINATION AND DIVISION OF FAMILY ASSETS

- [17] The family assets include the former family home, both parties' B.[] Corporation pensions, Mr. S.R.A.'s RRSPs, two motor vehicles, some airline plan points, and the chattels that were in the family home as of the triggering event on September 16, 2002. The parties are agreed that there are some debts that were incurred during the marriage or prior to the triggering event that should fairly be shared between them. I shall refer to these debts as "the family debts".
- [18] Ms. B.A.A. is seeking reapportionment to retain more than one-half of the family assets - in particular, a disproportionate share of the value of the former family home - either by way of reapportionment of assets, or as lump sum compensatory spousal support.
- [19] Mr. S.R.A. submits that the assets and the family debts should be divided and allocated equally between the parties.
- [20] The parties are agreed that each shall retain the motor vehicles they have had in their possession since separation, and I so order. Their pensions should be divided based on the pension values at the date the summary trial commenced. Mr. S.R.A. shall arrange to pay to Ms. B.A.A., by way of spousal roll-over, one-half of his RRSPs at the value they were at the date of trial. Mr. S.R.A. shall be entitled to use the remaining 6,000 airline plan points.
- [21] There is a dispute about whether the parties have divided up all of the chattels that were in the family home. A document is in evidence indicating the manner in which some of the chattels were divided, and a second document indicates that Mr. S.R.A. received additional chattels on a second occasion. Ms. B.A.A. maintains that there has already been an agreed upon division of the chattels. Mr. S.R.A. says that there are other chattels which have not been dealt with and he seeks an order that the couple take turns picking the chattels they wish to have, or alternatively, that the chattels that have not already been allocated be sold, and the parties split the proceeds.
- [22] I am of the view that the document the parties signed is consistent with Ms. B.A.A.'s assertion that the parties have already divided those chattels over which there was any claim, to their satisfaction. Each party shall retain the assets currently in his or her possession, free of any claims by the other party.
- [23] Ms. B.A.A. bases her claim for reapportionment of the family home on several grounds. She submits that she made a significant financial contribution to the home - part of each of her two small inheritances, and the use of a portion of the \$52,500 personal injury settlement she received in 1999 for the renovations the couple made to the home. She also points out that since December 2001, when Mr. S.R.A. ceased paying the mortgage, she has made all of the mortgage payments on the home.

- [24] Mr. S.R.A. points out that during the marriage, he was the primary breadwinner. He sold several of the assets he brought into the marriage in order to finance the purchase of the couple's first home. The present family home was purchased using the proceeds of sale of the previous family home. Mr. S.R.A. also did much of the renovation work on the home himself. The couple also financed the renovations through a mortgage, and he paid all of the mortgage payments during the marriage, and until November 2001.
- [25] Mr. S.R.A. also submits that Ms. B.A.A. has had the benefit of sole occupancy of the home throughout the years since separation, while he has had to pay for accommodation for himself and the children who have lived with him from time to time. He has been unable to acquire title to a new property, and requires the funds from the sale of his share of the family home to re-enter the real estate market.
- [26] The issue is, of course, whether it has been demonstrated that an equal division of the home would be unfair, having regard to those factors identified in s. 65(1) of the Family Relations Act. The parties assisted the court on this issue by reference to several authorities, including *Grove v. Grove*, cited by the plaintiff as: (1996-03-27) B.C.S.C. D091687; *Witges v. Witges*, (1998-11-16) B.C.S.C. 32012; *Wundele v. Wundele* (1994), 8 R.F.L. (4th) 325 (B.C.C.A.); *Palmer v. Gutsche*, (1998-05-26) B.C.S.C. D1005529; *Jardine v. Jardine*, [2003] B.C.J. No. 1013 (S.C.); *Jorgenson v. Jorgenson*, [1998] B.C.J. No. 1683 (C.A.); *Murchie v. Murchie*, [1984] B.C.J. No. 1582 (C.A.); *Pasnak v. Pasnak*, [2000] B.C.J. No. 1863 (S.C.); *Smith v. Smith*, [1990] B.C.J. No. 1205 (S.C.); *Stark v. Stark*, [1990] B.C.J. No. 1392 (C.A.); *Stojanovic v. Stojanovic*, [1994] B.C.J. No. 1625 (C.A.); and *Warner v. Warner*, [1991] B.C.J. No. 976.
- [27] Based on the factors identified in s. 65, and the reasoning in these authorities, I am not persuaded that the proceeds of sale of the family home should be reapportioned in the plaintiff's favour. The financial contributions made by Ms. B.A.A. from her two small inheritances and her personal injury settlement are entirely offset by the assets Mr. S.R.A. contributed when the couple purchased their first home, and from the ongoing contributions he made from his salary during the marriage and for the first 11 months after separation.
- [28] While Ms. B.A.A. did pay all the mortgage payments after that date, she was in receipt of spousal support payments for some of the time, and she had the use of the home throughout, while Mr. S.R.A. had to pay for accommodation elsewhere. The children have resided part of the time in each parent's home, so Ms. B.A.A. has not been solely responsible for providing a home for the children. In fact, two of the children have now resided in Mr. S.R.A.'s home for some time.
- [29] Ms. B.A.A. has had boarders in the home from time to time since separation, from whom she has had the ability to derive some income. Mr. K.G., who is Ms. B.A.A.'s common law spouse, has been residing with her since September 2003, and spent substantial amounts of time in the home before he officially moved in. He earns a good income and the court is entitled to assume that he has been making a financial contribution to the expenses of the

home, including the mortgage. There is no evidence that Ms. B.A.A. has made substantial improvements to the home during her occupancy - indeed she asserts that some aspects of the home remain unfinished - and the evidence leads to the conclusion that any increase in the value of the home since separation has been due to an increase in real estate values and inflation.

- [30] Both spouses are employed and both require their equity in the family home to be financially independent in future. For all of these reasons, I am of the view that it has not been shown that an equal division of the family home would be unfair.

VALUATION OF THE HOME

- [31] The parties do not agree on the value of the home, or the date on which that value should be determined. Ms. B.A.A. relies on an appraisal of the property at August 8, 2001 that indicated the market value at that time was \$240,000. She also relies on the B.C. Assessment Authority valuation. The 2004 B.C. Assessment value was initially set at \$342,000 but Ms. B.A.A. appealed and it was reduced on appeal to \$286,000. This value represents, of course, the value at July 1, 2003. There is also an appraisal valuing the property at \$285,000 at April 18, 2003.
- [32] Mr. S.R.A. asks the court to accept the most recent valuation of the property, based on an appraisal done on April 8, 2004 that indicates a market value of \$355,000 to \$360,000.
- [33] Mr. S.R.A. has deposed that the real estate market on S.[] is a rising market and Ms. B.A.A. has not disputed this assertion. She points out that the appraiser retained by Mr. S.R.A. did not view the interior of the home on April 8, 2004. However, the same appraiser - R.W. Thomas did both the April 18, 2003 and April 8, 2004 appraisals, so he had seen the interior of the premises at the earlier date. There is no evidence that the condition of the interior had significantly deteriorated in the interval.
- [34] I see no good reason to reject the most recent valuation of the property, and I find the market value of the home to be \$355,000. There is a mortgage on the property. Each party is entitled to one-half of the equity. If Ms. B.A.A. wishes to retain the home, she has 60 days to arrange to purchase Mr. S.R.A.'s one-half interest in the home and obtain his release from liability on the mortgage. If she chooses not to, or is unable to arrange financing, the home shall be listed for sale and be sold, and the proceeds, after payment of the usual and necessary charges, and the mortgage, shall be divided equally between the parties, subject to any allocation directed later in these Reasons. The parties shall jointly list the property on a multiple listing with an agent of their choosing. If they cannot agree on an agent, each shall provide a list of two names and one name shall be selected at random from among the four names by a draw, and the property shall be listed for sale with that agent. Either party is at liberty to apply to court for an order approving a sale if the other party withholds consent.

- [35] The parties agree that a loan of \$22,000, taken out to consolidate debts at the time of separation, is a family debt. Mr. S.R.A. has made all of the payments on this loan, amounting with interest to the sum of about \$20,000, but he has recently fallen into arrears and the Bank of Montreal has commenced an action against both Mr. and Ms. B.A.A. to collect the outstanding balance of approximately \$8,000.
- [36] Ms. B.A.A. proposes that she be responsible for only one-half of the remaining balance of this debt. Mr. S.R.A. seeks an order that she be responsible for one-half of the entire debt and that she compensate him in the sum of \$14,000 for one-half of the total cost of the loan, which is expected to be \$28,579.68 by the time it is repaid.
- [37] Mr. S.R.A. also paid debts owing to BC Hydro, Star Choice and Mastercard. There is a dispute about the extent to which the Mastercard debt was a family debt, or was a debt incurred by Mr. S.R.A. for his own personal purposes, after separation.
- [38] I see no reason why Ms. B.A.A. should not be liable to pay one-half of the consolidation loan expense and find that she is liable for the sum of \$14,250.

CHILD SUPPORT - ARREARS AND OVERPAYMENT

- [39] The first court order dealing with child support was the interim order made by Master McCallum on September 16, 2002. He ordered Mr. S.R.A. to pay \$507 a month for the support of the three children, commencing October 1, 2002. He also ordered spousal support in the amount of \$500 per month. This order was varied by Justice Holmes on August 1, 2003. He ordered that spousal support cease as of June 1, 2003. He varied child support and ordered that Mr. S.R.A. pay the sum of \$890 a month for the three children commencing August 1, 2003. He also ordered Mr. S.R.A. to pay \$2,681, as "retroactive interim child support" for K.1 for the period January 1, 2003 to and including July 1, 2003. This sum has been considered "arrears" of child support.
- [40] The Family Maintenance Enforcement Program did not appear at the hearing of this application, but the parties filed documents from FMEP showing that they calculated Mr. S.R.A. to owe a total of \$4,344.91 in arrears as at March 22, 2004, made up of the original \$2,681 for retroactive support for K.1, plus ongoing arrears and interest.
- [41] These calculations do not take into account, however, the correct dates for K.2's move to her father's home and the fact that K.1 has also been residing with his father for many months now. Mr. S.R.A. prepared his own calculations showing that if these moves are taken into account, he has actually overpaid the sum of \$2,917 to the plaintiff up to and including the August 1 payment. This sum does not include Ms. B.A.A.'s share of the extraordinary expenses that Mr. S.R.A. has paid in full, despite Justice Holmes' order that extraordinary expenses be shared in proportion to the couple's incomes.

- [42] Mr. S.R.A. is certainly entitled to a declaration that there are no arrears of maintenance owing by him, and any ongoing enforcement activities by the FMEP should cease. I decline, however, to order Ms. B.A.A. to compensate Mr. S.R.A. for overpayments of child support up to and including the payment made on August 1, 2004. Mr. S.R.A. was earning slightly more than the figure on which the payments were based in 2003 and 2004. In addition, there is the fact that for some months in 2001 and 2002, Mr. S.R.A. did not pay adequate support, and Ms. B.A.A. was placed in great financial difficulty. To order Ms. B.A.A. to compensate Mr. S.R.A. for current overpayments, and ignore the financial hardship she endured earlier in the separation would be unjust. It would be unfair, however, to allow Ms. B.A.A. to retain any overpayments of child support paid from and after September 1, 2004 and I order that Ms. B.A.A. compensate Mr. S.R.A. for any overpayments from and after September 1, 2004, based on the Guidelines Incomes I have set out in the next paragraph of these Reasons.
- [43] According to the most recent income tax returns of the parties, Mr. S.R.A.'s Guideline income was \$51,323.26 in 2003. Ms. B.A.A. did not file a new property and financial statement. However, her tax return indicates that she earned \$31,740 from employment and employment benefits in 2003. I find these to be the parties' Guidelines Incomes.
- [44] The parties' counsel should apply the Child Support Guidelines to determine what each party owes to the other based on these incomes and the fact that two children reside with Mr. S.R.A. and one child resides with Ms. B.A.A.. The amount found to be owing should be considered to be payable commencing September 1, 2004 and on the first day of each month thereafter.
- [45] The parties should also account to each other for any extraordinary expenses - in particular, dental expenses, incurred from and after August 1, 2003 and compensate each other for their respective shares of these expenses based on the Guideline Incomes referred to above.
- [46] It is probable that both Mr. and Ms. B.A.A. may have earned more in 2004 than they did in 2003, and may earn more in future. Ms. B.A.A.'s income has been depressed by reason of her surgeries and the lingering effects of her motor vehicle accident injuries, and the fact that she took a months' holiday in January 2004. Mr. S.R.A. had a temporary promotion in 2004 and may soon be promoted permanently, according to Ms. B.A.A.'s information. It is important, therefore, that the parties Guideline Incomes and the appropriate level of support be calculated based on current information, after the parties tax returns are filed for the 2004 tax year.
- [47] The parties shall each file their respective income tax returns no later than April 30, 2005 and on or before April 30 of each year thereafter, and each party shall provide a copy of his or her return to the other party within 14 days after filing. Based on the information contained in the tax returns, the child support amounts and sharing of extraordinary expenses shall be adjusted as of June 1 in each year hereafter. If any notice of reassessment is subsequently received, it shall be delivered to the other party within fourteen days of receipt and if the reassessment results in a change to the Guidelines income, the payment of

child support and any extraordinary expenses shall be adjusted as of the first day of the month following the receipt of the notice of reassessment.

- [48] If any child changes residence, not including a temporary and brief change of residence resulting from vacation, the amount of support to be paid shall be changed on the first day of the month following the month in which the change of residence occurs.

SPOUSAL SUPPORT

- [49] Ms. B.A.A. concedes that she is not in need of periodic spousal support, but she seeks an award of compensatory support, in the form of a lump sum award, to compensate her for disadvantages resulting from the break-up of the marriage and the role she played in the marriage.
- [50] There is a dispute between the parties about whether they moved from Surrey to Nanaimo, and from Nanaimo to S.[] Island, during the marriage, to further Mr. S.R.A.'s career, or for other reasons. There is also a dispute about whether these moves had a negative impact on Ms. B.A.A.'s employment or whether she would, in any event, have continued to work part-time. I accept Ms. B.A.A.'s evidence that she did not pursue full-time employment because of child-rearing responsibilities, until 1999, when, with Mr. S.R.A.'s full support and at his urging, she sought and obtained employment with the B.[] Corporation.
- [51] Mr. S.R.A. also provided child care during the marriage, although I conclude that Ms. B.A.A. was the primary caregiver. At present, Mr. S.R.A. is the primary caregiver for two of the three children of the marriage; including the youngest of the three children, K.2, who is 13 years old.
- [52] Mr. S.R.A. has worked for the Corporation almost all of his working life and his financial independence appears to depend on his continuing employment with that employer. Ms. B.A.A. has had a more varied employment history, and may have more employment options open to her, but her history indicates that the kinds of jobs she held before her present job did not offer high salaries.
- [53] Despite her relatively short period of employment, and the fact that she has yet to secure a permanent position, Ms. B.A.A.'s ability to earn income at the Corporation has proved to be impressive. She earned over \$30,000 working part-time and on an on-call basis in 2003, despite several months off the job. She has deposed that but for illness and surgeries, she could have earned \$4,000 a month, or \$48,000. Mr. S.R.A. has worked for the Corporation since 1984, and earns only a few thousand dollars more than Ms. B.A.A. would have earned last year, but for her illnesses and surgeries.

- [54] This does not take into account, however, the fact that Mr. S.R.A. has far greater job security, at least at present, and the potential to continue to advance to the position of Chief Steward. Ms. B.A.A.'s employment security and employment prospects would be enhanced if she was able to take and pass the course that would lead to her obtaining her "watch keeping mates' certificate". She estimates that she would lose approximately \$15,000 in gross pay while she pursues this course of study.
- [55] I have determined that Ms. B.A.A. is entitled to an award of compensatory spousal support to assist her in pursuing the course of study that will assist her in consolidating the financial independence she has achieved to date. I therefore order that Mr. S.R.A. pay to Ms. B.A.A. the sum of \$15,000 in lump sum compensatory spousal support. He may, however, set off this award against the sums owed to him by Ms. B.A.A. for overpayment of child support and for payment of her share of the Bank of Montreal consolidation loan. There shall be no other order for spousal support.

LIBERTY TO APPLY

- [56] If the parties require clarification of any of the matters arising out of these Reasons, or assistance with the calculations, they are at liberty to apply, in writing, for further directions.

COSTS

- [57] I consider there to have been divided success on this summary trial and direct that each party bear his or her own costs.

"W.G. Baker, J."

The Honourable Madam Justice W.G. Baker

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