

CANADA / JUDGMENT

Bartsch v. Mowll

2020 BCSC 202

COURT

Supreme Court of British Columbia

DECIDED

18 February 2020

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2020 BCSC 202 Bartsch v. Mowll

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bartsch v. Mowll,

2020 BCSC 202

Date: 20200218

Docket: E14833

Registry: Chilliwack

Between:

Daphne June Bartsch

Claimant

And

Sheldon Kirk Mowll

Respondent

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Claimant:

D.R. Klassen

The Respondent, appearing in person:

S.K. Mowll

Place and Date of Trial:

Chilliwack and

New Westminster, B.C.

July 29, 30, 31, 2019

January 20, 2020

Place and Date of Judgment:

Chilliwack, B.C.

February 18, 2020

- [1] The trial in this matter proceeded before Mr. Justice Brown on July 29, 30 and 31, 2019, but he was unable to complete the trial. On July 31, 2019, Brown J. granted the parties a divorce subject to s. 12 of the Divorce Act.
- [2] Because Brown J. was unable to complete the trial on the issue of the division of family property, I assigned the case to myself, pursuant to Rule 22-2(10) of the Supreme Court Family Rules, B.C. Reg. 169/2009. I read the evidence adduced before Brown J., and heard further evidence on January 20, 2020.
- [3] The only issue for me to determine is the division of family property.

Background

- [4] The parties were married on June 10, 1995, and separated in or about April of 2006, when the claimant left the matrimonial home ("home").
- [5] Other than the mortgage on the home, which I will discuss below, neither party led evidence to suggest that there were other family debts to be apportioned, so I need not undertake that task.
- [6] During their marriage, the parties purchased various assets including a boat, a 2006 Ford Mustang motor vehicle, and the home. As all other relief claimed in the notice of family claim and the counterclaim have been resolved between the parties, it is only these three assets that need to be addressed in my reasons for judgment.
- [7] During the trial, the parties agreed that the boat in issue will be given to the respondent's son, Brad Mowll, and it is therefore unnecessary for me to deal with it.
- [8] The claimant has possession of the Ford Mustang to which she attributed a value of \$5,000 in her Financial Statement filed on June 6, 2019, which I accept as a reasonable value.

- [9] The respondent has occupied the home since the parties' separation, and for some of that time the parties' daughter lived there as well. Brown J. ordered an appraisal of the home, which was performed by a member of the Appraisal Institute of Canada, Mr. Jesse Arenson.
- [10] Mr. Arenson completed his appraisal report on August 13, 2019. He described the home as "an average quality bi-level home built in 1978", noting that the updates to the home included "exterior vinyl siding, newer laminate flooring, vinyl windows, main bathroom with updated soaker tub and newer vanity, updated interior doors and trims." He assessed the value of the home at \$565,000 after taking into account the cost of needed work to a wall and the chimney flashing. I accept his estimate.
- [11] Mr. Arenson also stated that a typical real estate commission for the sale of the home would be \$18,000.
- [12] The home is encumbered by a mortgage, the principal of which is now \$17,000. The mortgage and insurance premiums for house insurance have been paid exclusively by the respondent since the parties' separation.
- [13] The respondent has made improvements to the home since the parties separated. The work was done for the most part by his son, who has not asked to be paid for the work. The respondent purchased supplies and materials for the home improvements. He produced receipts totalling \$14,877.41, and I accept that these receipts represent expenditures by the respondent for renovations to the home.

Legal Principles

- [14] Section 81 of the Family Law Act, S.B.C. 2011, c. 25 ("the FLA") provides that spouses are presumed to be entitled to an equal division of family property and to be equally responsible for family debt:

Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

- [15] Section 87 of the FLA sets out the general rules for valuing family property:

Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date

- (i) an agreement dividing the family property and family debt is made, or
- (ii) of the hearing before the court respecting the division of property and family debt.

[16] Since there is no agreement nor order providing otherwise and Part 6 of the FLA does not apply, the value of the home must be determined as of the date of the trial.

[17] Section 95 of the FLA permits the unequal division of family property if it would be "significantly unfair" to order equal division of family property or family debt. It provides in part that:

95(1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both,
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
 - (a) the duration of the relationship between the spouses;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

[18] The general rule is that equal division should be ordered unless it would result in "something objectively unjust, unreasonable or unfair in some important or substantial sense": *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 42.

[19] In order to determine whether it would be significantly unfair to order equal division of family property, I must "notionally divide the family property, taking into account the exclusions, in accordance with the provisions of the FLA": *Remmem v. Remmem*, 2014 BCSC 1552 at para. 47.

Discussion

[20] The duration of the marriage between the parties was 11 years, but that does not persuade me that it is a factor of significance entitling either party to avoid the application of the FLA.

- [21] I am satisfied the Ford Mustang is family property subject to the presumption of equal division. Having accepted the claimant's valuation of the Ford Mustang at \$5,000, the respondent's share of the motor vehicle is valued at \$2,500.
- [22] The respondent agrees that the claimant is entitled to a share of the home, but contends that her share should be of the value of the home at the time of their separation. Otherwise, he argued that she would be unjustly enriched. I do not agree.
- [23] The claimant argues that she is entitled to an undivided one half interest in the home, valued as of the date of trial.
- [24] In *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254 at para. 120, Mr. Justice Punnett considered a claim for reapportionment by a respondent for expenses incurred by him after the parties separated. Like the respondent in this action, the respondent in *D.M.B.* resided in the property while he renovated it. Punnett J. held that renovation costs cannot be considered "family debt" for the purposes of the FLA if the renovations are done for improvement, rather than for maintenance. He found they may nevertheless be considered as a basis for reapportionment if the improvement increased the value of the property beyond market trends in accordance with s. 95(2)(f) of the FLA. Punnett J. stated as follows:
- [118] These expenses do not fall into the s. 86 definition of family debt as they were incurred not for the maintenance of the former family home but rather for improvements and renovations. Therefore s. 94 of the FLA applies.
- [120] The valuation of contributions post-separation is not determined by the funds expended on family property. Rather it is determined by the increase in value beyond market trends due to the work carried out and considered in the context of reapportionment (see: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 39-44).
- [121] The respondent has not shown there was an increase in value due to his post-separation expenditures. He has not established it would be significantly unfair to equally divide family property.

(Emphasis added)

- [25] Mr. Arenson described the parties' home as being in average condition. Notwithstanding the respondent's stewardship of the home, if all else were equal, I would divide the value of the home equally between the parties. As I will explain below, I am not persuaded that all else was equal.
- [26] I am satisfied that the renovation done at the direction of Mr. Mowll, and the cost of the materials bought to complete those renovations are beyond normal maintenance of a home, and were undertaken as improvements which increased the market value of the home beyond the increases attributable to market forces. I have reached this conclusion, in part, on the evidence of Mr. Mowll, but as well on the report of Mr. Arenson who recognized the renovations, or updates as he described them, as contributing to the value of the home.

- [27] I am satisfied that it would be significantly unfair to ignore the expenses incurred for materials to renovate the home, when apportioning the parties entitlement to the value of the home. In the result, I find that Mr. Mowll is entitled to a reapportionment of the value of the home pursuant to s. 95(2)(f) of the FLA.
- [28] The only debt to be considered is the mortgage.
- [29] The respondent has had the use of the home since the parties' separation. There is no evidence of rental expenses, if any, incurred by the claimant since the separation. While I would have been prepared to attribute some notional occupational rent to the claimant, I would offset that to take into account that the respondent made mortgage payments and paid the municipal taxes for almost 14 years. As I have no comparable expense for the claimant against which to determine if she has been disadvantaged by not living in the matrimonial home, I am prepared to treat the mortgage and tax payments as an offset to notional occupational rent to date, and in the future if Mr. Mowll remains in the home.
- [30] In the result, I find that the respondent should receive \$17,377.41 more than the claimant for his interest in the home. This represents the total of the respondent's post-separation expenses for renovating the home and half the value of the motor vehicle.
- [31] In the event that the respondent wishes to remain in the home, he will have to pay the claimant \$264,754.59.
- [32] I have not taken the notional real estate commission into account in reaching this figure, given the guidance that it should not be considered in *Willie v. Willie*, 2013 BCCA 318.
- [33] In the event that the respondent does not wish to remain in the home, then the home should be listed for sale within three months of these reasons for judgment at \$565,000, with joint conduct of the sale to be shared by the parties. In the event of a sale, the proceeds, net of real estate commission, will be split between the parties, with the respondent to receive \$17,377.41 more than the claimant.

The Honourable Chief Justice Hinkson

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