
CANADA / JUDGMENT

Baryla v. Baryla

2019 BCCA 22

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 22 Baryla v. Baryla

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Baryla v. Baryla,

2019 BCCA 22

Date: 20190118

Docket: CA44857

Between:

Lorraine Marie Baryla

Respondent

(Claimant)

And

Gordon Paul Baryla

Appellant

(Respondent)

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Savage

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

September 29, 2017 (Baryla v. Baryla, 2017 BCSC 1759, Vernon Registry 51304).

Counsel for the Appellant:

N. Davies

Counsel for the Respondent:

R.S. Tretiak, Q.C.

B.D. Hastings

Place and Date of Hearing:

Vancouver, British Columbia

October 29, 2018

Place and Date of Judgment:

Vancouver, British Columbia

January 18, 2019

Written Reasons by:

The Honourable Mr. Justice Savage

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Butler

Summary:

The appellant challenged the amount of a compensation payment, the failure to deal with distributive taxes, and the awarding of spousal support after an equal division of assets. Held, appeal allowed, new trial ordered. It was necessary for the court below to determine whether the registration of title in joint tenancy was an inter vivos gift to the husband, and to account for distributive taxes upon division of the assets. The question of spousal support after an equal division of assets must consider whether an award would amount to "double dipping".

Reasons for Judgment of the Honourable Mr. Justice Savage:

- [1] This appeal arises out of a family proceeding in which the appellant, Gordon Paul Baryla, was ordered to pay a compensation payment and spousal support to the respondent, Lorraine Marie Baryla.
- [2] Mr. Baryla challenges the amount of the compensation payment and the order for spousal support. He says the compensation payment should be reduced by the value of his mother's interest in a property that he received by right of survivorship. He also says the trial judge erred by failing to consider the tax consequences of disposing of certain family assets. After

the family assets were divided equally, Mr. Baryla says there was no basis for the judge's order that he pay spousal support, or for the particular quantum ordered by the judge. Ms. Baryla supports the trial judgment.

[3] For the reasons that follow, I would allow the appeal in part, and direct a new trial.

I. Background

- [4] In December 2014 the parties agreed to end their marriage of nearly 40 years. The parties were financially successful, having been able to retire in their mid-40s and thereafter live off their investments, which were managed by Mr. Baryla.
- [5] On January 1, 2015, the parties entered into a letter of intent agreement to dissolve their marriage and split their assets (the "Letter Agreement"). Among other things, Mr. Baryla agreed to transfer a house (the "1513 Property") into Ms. Baryla's name. The 1513 Property had originally belonged to Mr. Baryla and his late mother in joint tenancy, but Mr. Baryla had acquired full title through the right of survivorship upon her death.
- [6] The parties only partially performed the Letter Agreement. On June 29, 2015, Ms. Baryla brought the underlying action, claiming, inter alia, spousal support and an equal division of family property. The matter proceeded to trial in September 2016. During closing argument, the parties raised several technical tax issues.

A. 1513 Property

- [7] The basic facts concerning the 1513 Property are not in dispute. In 2004 Mr. Baryla's mother, Helen Baryla, sold her home and purchased, as joint tenants with Mr. Baryla, the 1513 Property for \$242,000. The 1513 Property was next door to the parties' family home (the "1511 Property").
- [8] Mr. Baryla says the judge misapprehended one aspect of the evidence. The judge held that Mr. and Ms. Baryla contributed \$169,605 of their own funds towards the purchase price of the 1513 Property since Helen Baryla had insufficient funds from the sale of her home. Mr. Baryla says the opposite is true: that most of the purchase price (\$169,605) came from the sale of Helen Baryla's former home and the balance came from the parties' funds.
- [9] Helen Baryla died in 2013. Upon her death, Mr. Baryla became the sole owner on title of the 1513 Property by right of survivorship. After signing the Letter Agreement in January 2015, Mr. Baryla transferred title to the 1513 Property into Ms. Baryla's name. The parties also agreed that Ms. Baryla would retain a cabin at Mabel Lake (the "Mabel Lake Property").
- [10] As I have said, the Letter Agreement was never fully implemented. Mr. Baryla claims, as he did at trial, that part of the 1513 Property should be excluded from property division.

B. Tax Issues at Trial

- [11] During submissions at trial, the mechanics of property division and the tax issues relating to property division were raised by counsel and the judge.
- [12] The judge requested that the parties retain a joint expert to address tax issues. Although the parties duly retained an expert (Cheryl Schmidt of KPMG) who prepared seven reports dated February 6, March 3, 13, 24, April 5, 17 and May 23, 2017, the expert's reports were not formally entered as exhibits at trial.
- [13] On September 18, 2017, the judge ordered the parties to disclose their 2016 tax returns and notices of assessment.
- [14] The judge released her reasons, indexed as 2017 BCSC 1759 ("RFJ"), on September 29, 2017. The reasons were released before the parties had submitted their 2016 tax information. The judge received and reviewed the seven expert reports, which were not formally entered into evidence, but rejected them all because they did not comply with the requirements of the Supreme Court Family Rules, they went beyond the scope of an expert report, and they included some unproven assumptions.
- [15] The judge ordered an equal division of family property to be effected by a compensation payment from Mr. Baryla to Ms. Baryla. Having rejected the expert reports, the judge said, "I confess not to know the answer to the tax issues that the parties raised in closing argument" (RFJ at para. 106). Apart from two exceptions, she found that she was "not in a position to make any allowances for taxes" (RFJ at para. 114).
- [16] The exceptions were for the sale of the 1511 Property (the family home) and the sale of the Mabel Lake Property. The judge ordered that "the parties equally share in the tax cost of each of them disposing of, or selling their respective interest in [the 1511 Property] and the cabin at Mabel Lake" (RFJ at para. 112).
- [17] The 1511 Property was the parties' principal residence and its sale would not attract tax. Ms. Baryla sought and received the Mabel Lake Property in the division of family assets and does not intend to sell it. On the other hand, the 1513 Property was not the parties' principal residence and it would attract tax consequences on disposition. The same applies to a property the parties acquired in Arizona (the "Arizona Property"), which Mr. Baryla retained in the property division.

C. Property Division and Spousal Support

- [18] The judge ordered an equal division of family property with a total net value of \$5,015,728.44 and a compensation payment of \$641,772.54 (increased to \$828,829.38 after correction of a calculation error) to accomplish equal division. Ms. Baryla also sought spousal support.

- [19] Neither party has had employment for many years. The parties retired in 1999 when Mr. Baryla was 46 years old and thereafter lived off income from their investments. Mr. Baryla managed the financial assets during the parties' marriage. At the time of trial Mr. Baryla was 63 years old and Ms. Baryla was 62.
- [20] After ordering the equal division of family property, the judge noted that Mr. Baryla "will continue to have the income earning capacity to make investments and profit from his capacity to do so" (RFJ at para. 101). On the other hand, she found that Ms. Baryla does not have that capacity.
- [21] The judge ordered that Mr. Baryla pay spousal support to Ms. Baryla at \$2,650 per month for ten years, after which there would be a review.

II. Issues

- [22] The parties raise the following issues on appeal:
- (1) Did the judge err in law in calculating the compensation payment by:
 - (a) failing to find that a portion of Mr. Baryla's interest in the 1513 Property was excluded property; and
 - (b) failing to consider the tax implications of disposing of family property?
 - (2) Did the judge err in law in ordering Mr. Baryla to pay spousal support, or alternatively in ordering the particular quantum of spousal support, by:
 - (a) failing to provide adequate reasons;
 - (b) failing to consider the respective incomes of the parties after property division; and
 - (c) failing to consider the current income of the parties, especially after ordering disclosure of their 2016 incomes?

III. Discussion and Analysis

A. Did the Judge Err in Determining the Compensation Payment?

- [23] The two issues concerning the compensation payment are whether the judge erred in her treatment of the 1513 Property and whether tax implications beyond those addressed by the judge should have been considered. With respect to the treatment of the 1513 Property, Mr. Baryla says the judge erred in failing to find that part of the property was excluded property as a gift or inheritance. He says the judge also erred in her alternative findings that the 1513 Property ceased to be excluded property when Mr. Baryla transferred it to Ms. Baryla and that its exclusion from property division would be significantly unfair.
- i. 1513 Property

[24] Mr. Baryla agrees that Ms. Baryla has a part interest in the 1513 Property, since family funds contributed to the purchase. Mr. Baryla says, however, that his mother's half-interest, which he obtained by right of survivorship, is excluded property under s. 85 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] as a gift or inheritance.

[25] Section 85 reads as follows:

85 (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
- (b) inheritances to a spouse;
- (b.1) gifts to a spouse from a third party;
- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
- (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the spouse;
- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

[Emphasis added.]

[26] Joint tenancy and tenancy in common constitute the main forms of co-ownership in Canadian law. A defining characteristic of joint tenancy is the right of survivorship, whereby when a joint tenant dies, his or her interest in the property is extinguished, and the surviving joint tenant obtains the full interest to the property: *Zeligs v. Janes*, 2016 BCCA 280 at para. 41.

[27] The right of survivorship in a joint tenancy is discussed in D.W.M. Waters, M.R. Gillen & L.D. Smith, eds., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 404-405:

When property is bought by one person and title taken in joint names, a joint tenancy will arise, which confers upon each party an equal entitlement to the property, which includes a so-called right of survivorship. This right, which is not a separate right but merely an incident of joint tenancy, will cause the whole property to vest in the survivor. The reason is that in a joint tenancy, if one joint tenant dies, his interest simply disappears and nothing passes to his estate. The result is that the interest of the surviving joint tenant is effectively converted into sole ownership. It is this effect which is often described as a right of survivorship. If A supplies the purchase money and conveyance is taken in the joint names of A and B, B during the joint lives will hold his interest for A; B will also hold his right of survivorship -- again by way of a resulting trust -- for A's estate, because that right is merely one aspect of B's interest. In other words, the starting point is that B holds all of his interest on resulting trust for A, or A's estate. However, evidence may show that, while A intended B to hold his interest for A during the joint lives, it was also A's intention that, should he (A) predecease, B should take the benefit of the property. The presumption of resulting trust would then be partially rebutted, in relation to the situation that has arisen, so that B would not hold his interest (now a sole interest and not a joint tenancy) on resulting trust. He would hold it for his own benefit.

[Emphasis added.]

[28] In *Pecore v. Pecore*, 2007 SCC 17, the Supreme Court of Canada considered the nature of rights of survivorship in the context of joint bank accounts. The Court concluded that since the right of survivorship vests when a joint account is opened, the right of survivorship is an inter vivos gift, rather than a testamentary gift. Justice Rothstein explained:

48 the rights of survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore inter vivos in nature. This has also been the conclusion of the weight of judicial opinion in recent times: see e.g. *Mordo v. Nitting*, [2006] B.C.J. No. 3081 (QL), 2006 BCSC 1761, at paras. 233-38; *Shaw v. MacKenzie Estate* (1994), 4 E.T.R. (2d) 306 (N.S.S.C.), at para. 49; and *Reber v. Reber* (1988), 48 D.L.R. (4th) 376 (B.C.S.C.); see also *Waters' Law of Trusts*, at p. 406.

50 Some judges have found that a gift of survivorship cannot be a complete and perfect inter vivos gift because of the ability of the transferor to drain a joint account prior to his or her death: see e.g. *Hodgins J.A.'s dissent in Re Reid*. Like the Ontario Court of Appeal in *Re Reid*, at p. 608, and *Edwards v. Bradley*, at p. 234, I would reject this view. The nature of a joint account is that the balance will fluctuate over time. The gift in these circumstances is the transferee's survivorship interest in the account balance -- whatever it may be -- at the time of the transferor's death, not to any particular amount.

[29] This Court reviewed Pecore and the earlier authorities on the characterization of the right of survivorship in *Bergen v. Bergen*, 2013 BCCA 492. Madam Justice Newbury summarized that "all of these cases in my view turned on the donor's intention to make a gift of the 'right of survivorship' -- which I understand to mean an immediate gift of a joint interest consisting of whatever balance exists in the account on the transferor's death, assuming he or she dies first" (at para. 37, emphasis in original).

[30] The Court in *Bergen* endorses the proposition that:

[41] "The gift of a joint interest in real property is an inter vivos rather than a testamentary gift and cannot be retracted by the donor. It is a 'complete and perfect inter vivos gift' ..." [citation omitted].

The Court explained, however, that "[a]t the same time, in cases where the property was provided by the transferor, the transferee must still prove that a gift was intended – i.e., he or she must rebut the presumption of resulting trust" (at para. 41).

[31] Applying this reasoning to the 1513 Property, by registering the property in the joint names of Mr. Baryla and Helen Baryla, Helen Baryla gifted the right of survivorship--but to whom? If Helen Baryla made the gift to Mr. Baryla, then on its face it would qualify as excluded property under s. 85(1)(b.1) of the FLA as "gifts to a spouse from a third party". However, arguably it is not clear to whom Helen Baryla gifted the right of survivorship. Was the gift to Mr. Baryla alone, or to both Mr. Baryla and Ms. Baryla as both had contributed to the purchase price? The judge did not undertake the analysis necessary to dispose of this issue.

[32] The next question that arises is whether the transfer of the 1513 Property to Ms. Baryla extinguished Mr. Baryla's excluded property claim. If it did then the question of to whom the inter vivos gift was made would be academic. In my view, it did not.

[33] The FLA does not eliminate common law and equitable concepts relating to property but rather builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement. Thus, excluded property, or the proceeds thereof, that is gratuitously transferred between spouses during the course of a relationship may lose excluded status unless the presumption of advancement is rebutted: *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 74.

[34] The trial judge relied on *V.J.F.* and held that the 1513 Property was not excluded property because Mr. Baryla had voluntarily transferred it to Ms. Baryla (RFJ at para. 63). In my view, however, the presumption of advancement does not apply in this case. The parties were separated at the time of the transfer. The transfer of the 1513 Property to Ms. Baryla by Mr. Baryla was not a gift between spouses; it was in partial fulfillment of the terms of the Letter Agreement. That said, after the fact conduct may be relevant to the parties' understanding of the intent behind Helen Baryla's gift.

[35] Mr. Baryla also challenges the judge's alternative holding that it would be significantly unfair to exclude the value of the 1513 Property from property division since a significant portion of the purchase price came from the parties' joint funds. In my view, this argument cannot be considered until the parties' actual contributions to the purchase price are ascertained.

ii. Tax Costs of the Disposition of Assets

[36] The parties brought tax information to the judge by filing with the court seven tax opinions of an accountant, which sought to address questions raised by the parties and the judge. The judge found that information unhelpful for various reasons, as mentioned, and inadmissible for technical reasons.

[37] The judge then made an order limiting the sharing of tax burdens to an asset not subject to tax on disposition (the 1511 Property, the parties' principal residence) and an asset that was not intended to be sold (the Mabel Lake Property, a recreational property). The judge did not determine the tax issues on which professional opinions had been sought. There is no explanation for the judge's failure to consider tax implications associated with the 1513 Property, the Arizona Property or the parties' investment accounts.

[38] This Court has held that corporate and distributive taxes can and should be taken into account where there is appropriate evidence: *Maguire v. Maguire*, 2016 BCCA 431 at paras. 38--39; *Sinai v. Mahmoud*, 2017 BCCA 155 at paras. 31-35. Simply put, if some assets have inherent tax liabilities and others do not, it could be unfair to allocate the assets "equally", without taking into account the tax liabilities.

[39] In this case the parties made significant efforts to bring before the judge the necessary information to take tax considerations into account. While the judge may have had justification for rejecting some of the opinions before her, in my view there was not justification for substantially abandoning the effort to take tax consequences into account, on which both parties made submissions.

[40] Although Mr. Baryla would have this Court make orders to facilitate property division by asset class to address some of these concerns, those are matters for the trial court to determine on receipt of appropriate evidence. The same would apply to his related submission that the court place a temporal limit on any obligation to share in the tax consequences of the disposition of property. That too is a matter for the trial court.

B. Did the Judge Err in Ordering Spousal Support?

[41] The judge ordered that Mr. Baryla pay Ms. Baryla spousal support of \$2,650 per month for ten years. She also made the order for spousal support retroactive to January 1, 2015.

- [42] As mentioned, the order for spousal support was in addition to the order for a substantial compensation payment to effect equal property division. The family assets included typical things a family acquires: a home, chattels and investments. Investments formed a large part of their asset base. In this case the family had lived for many years on their investment income.
- [43] I would not interfere with the order for spousal support pending the new trial. I have agreed with Mr. Barylka that the judge was obliged to consider the tax implications of property division. Determining whether spousal support is payable does not only involve determining whether there is a significant disparity in income but also: (1) whether in principle, having divided assets equally, there should be an order for spousal support at all, and (2) how the fact that Mr. Barylka has the capacity to manage financial assets himself should impact the amount, if any, of spousal support payable.
- [44] That would comport with this Court's decision in *Puiu v. Puiu*, 2011 BCCA 480, where Mr. Justice Groberman cautioned against awarding spousal support pursuant to the Spousal Support Advisory Guidelines in cases where the parties' income was derived from assets, and those assets had already been divided. The Court held that such a practice would improperly facilitate "double dipping" on family assets. Groberman J.A. explained:
- [15] Neither of the parties, then, has any income other than from their accumulated assets. Those assets were divided by consent in a manner fully consistent with the provisions of the Family Relations Act, R.S.B.C. 1996, c. 128.
- [16] Ms. Puiu has received her share of family assets. To allow her now to seek a share of the income from Mr. Puiu's assets would be to allow the sort of "double dipping" that was found to be improper in *Boston v. Boston*, 2001 SCC 43. In the circumstances, allowing Ms. Puiu's claim for ongoing support would be tantamount to re-dividing assets that have already been divided.
- [17] Caution must be exercised in applying the formulas set out in the Spousal Support Advisory Guidelines to a case such as the present, where the sole source of income for the parties is income from assets that have been divided under the Family Relations Act. Section 12.6.3 of the Guidelines provides as follows:

12.6.3 *Boston v. Boston*

... [T]he Advisory Guidelines on amount and duration do not change the law from *Boston v. Boston* governing double-dipping, mostly from pensions. That law remains in place, as a possible constraint upon the amount of support, determining if some portion of income should be excluded from the formula because it has been previously shared under property division.

[Bold in original.]

- [45] In *Boston v. Boston*, 2001 SCC 43, Justice Major described "double dipping" as follows:

1 "Double recovery" or "double dipping" are terms that have come to describe the situation where, after an equal division of assets on marriage breakdown, one spouse claims continued support from the previously divided or equalized assets of the other spouse.

[46] In my view, in this case, it was incumbent on the trial judge to address the issue of "double dipping", which she failed to do. The judge noted that Mr. Baryla had skill in managing financial assets whereas Ms. Baryla did not. However, it does not follow from that observation that ten years of spousal support is payable, rather than, say, an allowance for a management fee. By that, however, I am not suggesting any particular outcome to this issue.

[47] As I have found that the judge erred in failing to consider the effect of property division on Ms. Baryla's claim for spousal support, I find it unnecessary to consider Mr. Baryla's remaining two arguments that the judge erred in providing inadequate reasons and in failing to consider the parties' current income in awarding spousal support.

[48] I would vary the order for spousal support to make spousal support in the amount determined by the judge payable until the new trial.

IV. Conclusion

[49] In my view, the judge erred in her analysis of whether the 1513 Property was excluded property, in failing to properly consider and apply the tax implications of property division, and in ordering ongoing spousal support, for the reasons I have given. I would allow the appeal in part and direct a new trial.

[50] I would not interfere with the order that family property be divided equally or that spousal support as determined be payable from January 1, 2015, but only until the new trial.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Butler"

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