

CANADA / JUDGMENT

Burgess v. Schock

2001 BCSC 1235

COURT

Supreme Court of British Columbia

DECIDED

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Citation: Bonitta Goldie Josephine Burgess v. Robert Allan Schock Date: 20010828

2001 BCSC 1235 Docket:

E5845

Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BONITTA GOLDIE JOSEPHINE BURGESS
PLAINTIFF

AND:

ROBERT ALLAN SCHOCK
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE GRIST

(IN CHAMBERS)

Counsel for the plaintiff Barbara L. Bergen

Counsel for defendant Gordon N. Beebe

Date and Place of Hearing/Trial: March 29th, 2001

Chilliwack, BC

- [1] This matrimonial action was heard as a summary trial. Both parties agreed that this was an appropriate method of disposition. The grounds for divorce are well established. The two outstanding issues are entitlement to family assets and maintenance for the plaintiff's twenty-three year old daughter, who is in the third year of a degree program at Simon Fraser University.
- [2] The plaintiff and defendant are forty-nine and forty-eight years of age respectively. They married in July of 1989 and separated in December of 1998. At the time of marriage the plaintiff owned a home in Abbotsford, which then had a value of \$140,000. The mortgage registered against the property had \$22,000 outstanding. The mortgage has been paid off and the premises presently have a value of \$205,000.
- [3] At the time of marriage, Ms. Burgess was a childcare worker. During the course of the marriage she took courses to obtain a teaching certificate. She completed her professional development program in August of 1998, after completing a one-year term as a full-time student at Simon Fraser University. Subsequent to obtaining her certificate she was employed as a substitute teacher. Her latest property and financial statement indicates she now receives a regular salary and is paid \$3,800 per month.
- [4] Mr. Schock has been steadily employed as an adjuster with the Insurance Corporation since the date of marriage. His present base salary is \$55,800 per year.
- [5] Both parties were divorced at the time of their marriage. Ms. Burgess received the former matrimonial home as part of the settlement from her husband. The parties entered into a marriage agreement, which dealt almost exclusively with Ms. Burgess's equity in the matrimonial home. The agreement provided:
- (5a) Upon the occurrence of any of the events enumerated in Section 43 of the Family Relations Act, before any division of assets under the Family Relations Act occurs, Bonitta (Burgess) shall be entitled to a return of her \$118,000/\$140,000 interest in the family residence.
- [6] In the recital to the agreement, the sum of \$118,000 was identified as Ms. Burgess's equity in the family residence and the remaining \$22,000 of the value of the property accounted for as the amount owing on the mortgage. Recital K. of the agreement stipulated:

It is the further mutual intention of the parties that Bonitta (Burgess) and Robert (Schock) will contribute equally to the monthly payments of principal and interest outstanding on the family residence and that they will share jointly in a \$22,000/\$140,000 interest in the family residence.

- [7] Ms. Burgess was living with her daughters, then aged twelve and sixteen, at the time of marriage and the youngest of these girls, now twenty-three years of age, remained dependent on the parties at the time of separation. Madam Justice Martinson ordered that Mr. Schock provide interim maintenance for Tara on the 21st of July 1999 in the sum of \$300 per month. Mr. Schock discontinued payment of this maintenance in April of 2001, contending that Tara was no longer a child of the marriage.
- [8] Each party contributes to an eventual pension. Mr. Schock has eleven years of pensionable service with the Insurance Corporation. Ms. Burgess has just begun to contribute to the Teachers' Pension Plan. Ms. Burgess is the registered owner of an RRSP purchased for \$15,000 in 1995. Her affidavit indicates that this was purchased with funds borrowed, and still owed, to her mother.

DIVISION OF FAMILY ASSETS:

- [9] The parties indicated the intention of having the current pension entitlement determined in accordance with Part VI of the Family Relations Act. If Mr. Schock remains employed with the Insurance Corporation to age sixty-five, this will result in equal sharing of approximately 40% of his eventual pension payments. Ms. Burgess's contributions to her pension plan have only recently begun. Her period of potential contribution will be limited, but payments will not be much reduced by application of Part VI.

THE MARRIAGE AGREEMENT

- [10] No case is made out for setting aside the marriage agreement as unfair at the time the contract was signed. Both parties had independent legal advice and the obvious intent was to protect Ms. Burgess's interest in the matrimonial home. Mr. Schock's contention is that with the effluxion of time, and in light of his contributions to support of the family unit, the disposition indicated under the agreement is now unfair.
- [11] The marriage agreement stipulates a settlement of 84.3% of the value of the matrimonial home in Ms. Burgess's favour. This would indicate that she is separately entitled to approximately \$173,000 of its present value. The balance of the value in the home, approximately \$32,000, is not determined under the agreement. The recital to the agreement implies the intention to eventually divide the balance evenly, but the agreement itself does not speak to the matter. Accordingly, I consider this portion of the equity as a family asset for distribution under the Family Relations Act. In determining division of assets under Section 65 of that Act, the most relevant considerations are those found at Sections 65(e) and (f). Section 65(1)(e) refers to the needs of each spouse to become or remain economically independent and self-sufficient. Section 65(1)(f) refers to any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse. In this case subsection (e) looks ahead to the parties' circumstances in the future. Subsection (f) refers primarily to the acquisition of the home. 85% of this equity was brought to the marriage by Ms. Burgess.

- [12] This is a marriage of nine years and cannot be considered to be one of short duration. The evidence would indicate that through those nine years Mr. Schock's contributions to the family income were a sustaining source of support to the family. Ms. Burgess's affidavit indicates that his contributions were minimal and that he applied his income to his own pursuits and his obligations to his children of his former marriage. In fact she argues he did not contribute his share to the pay out of the mortgage. The fact is, however, that through the greater part of the term of their marriage Ms. Burgess's income was modest and a more objective view of the situation would acknowledge a greater contribution by Mr. Schock.
- [13] Both parties are presently self-supporting and have good prospects for the future. Mr. Schock has been in his position for eleven years, which may speak to a greater security of tenure, however, I don't consider Ms. Burgess much disadvantaged in comparison.
- [14] Mr. Schock's argument in support of a greater share in the equity in the home is that the application of the formula to the enhanced value of the home creates an unfair disposition. This argument has support in that the other asset which has increased in value during the currency of the marriage is the contribution to pension entitlement, which is to be shared equally under the provisions of part VI.
- [15] As acknowledged in *Gold v Gold* [1993] B.C.J. No. 1799, an agreement fair at inception may subsequently be determined to be unfair when judged under the criteria stipulated in Section 65, upon dissolution of the marriage. The point was made explicitly by Sigurdson, J. in *Atkinson v. Klassen* [2000] B.C.J. No. 2555:

Finally, I think that a marriage agreement that was fair at the outset might become unfair over time, having regard to the factors listed in Section 65 of the Act.

- [16] In this case, the marriage agreement has the unusual feature of leaving approximately 15% of the equity in the home for eventual distribution under Section 65. In such a circumstance, the ability to redistribute through a finding of unfairness should not be exercised unless the ability under the section to redistribute is not sufficient to effect an appropriate distribution.
- [17] Here, I would not find the marriage agreement unfair in present circumstances if the balance of the equity, not determined by the agreement, was determined in favour of Mr. Schock. He is in a similar position for consideration under Section 65(1)(e) and his contributions should have significance in this distribution. Accordingly, I view a fair distribution under Section 65 to be payment to Mr. Schock of \$32,000, failing which, there should be payment to him of a 22/140 interest in the net proceeds of the sale of the home. The RRSP will remain Ms. Burgess's property and she will be solely responsible for the debt to her mother.

CHILD MAINTENANCE

[18] The evidence indicates that Tara is in her third year at Simon Fraser University. She has not taken a maximum course load during the time she has been at the University, however, she has also had health difficulties and travels a considerable distance to attend the Burnaby campus. I have considered the specific expenses required for her to attend University and consider that some of this obligation should fall on her through acquisition of student loans. Notwithstanding this form of contribution, I consider there to be a continuing obligation to provide maintenance. The sum fixed by Madam Justice Martinson appears to be the appropriate sum. This sum should remain payable for the time anticipated until she obtains her degree. This is likely to happen in September of 2001. I think this would be the appropriate date for determination of maintenance, however, there should be liberty to apply.

"W.G. Grist, J."

The Honourable Mr. Justice W.G. Grist

This Judgment was released from the New Westminster Registry on August 30, 2001 and is date stamped accordingly.

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