

CANADA / JUDGMENT

Bustamante-Araya v. Bustamante-Araya

2016 BCSC 2122

COURT

Supreme Court of British Columbia

DECIDED

16 November 2016

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2016 BCSC 2122 Bustamante-Araya v. Bustamante-Araya IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bustamante-Araya v. Bustamante-Araya, 2016 BCSC 2122 Date: 20161116 Docket: E1240652 Registry: Prince George Between: Tina-Lela Bustamante-Araya Claimant And Cristoberly Antonino Bustamante-Araya Respondent Before: The Honourable Madam Justice Church Reasons for Judgment In Chambers Counsel for claimant: S.E. Elson Appearing on his own behalf : C. Bustamante-Araya Place and Date of Hearing: Prince George, B.C. October 24, 2016 Place and Date of Judgment: Prince George, B.C. November 16, 2016

Introduction

- [1] The claimant, Tina-Lela Bustamante-Araya, now known as Tina-Lela Aulenback, has applied pursuant to Rule 11-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009 and Parts 5 & 6 of the Family Relations Act, R.S.B.C. 1996 c. 128 [repealed] for the following relief:
1. An order for equal division of family assets as set out in the Schedule attached to the amended notice of application filed October 17, 2016;
 2. An order that any funds due to the respondent be paid to the claimant as a credit toward child supports arrears owed by the respondent; and
 3. Costs.
- [2] The respondent, Cristoberly Antonino Bustamante-Araya, indicated in his application response that he is in general agreement that the family assets should be divided equally, although he takes issue with the valuations that the claimant has ascribed to certain assets and he is essentially seeking re-apportionment of other assets in his favor. The respondent represented himself throughout these proceedings. He has not filed a counterclaim seeking an unequal division of family assets.
- [3] The respondent agrees that any funds due to him should be paid to the claimant and credited towards his child support arrears.

Background

- [4] The claimant is 36 years of age and the respondent is 45 years age. They were married on July 10, 1999 and separated on November 1, 2010. This family proceeding was commenced on February 22, 2012 under the Family Relations Act. On May 8, 2012, a declaration was made pursuant to section 57 of the Family Relations Act that there was no reasonable prospect of reconciliation between the claimant and the respondent. An order for divorce was granted on February 25, 2013.
- [5] The parties have five children who were born between May 24, 2000 and November 22, 2007 and are now between the ages of 8 years and 16 years. The children have resided primarily with the claimant since the parties separated.
- [6] The claimant and the respondent are parties to Action No. 1139001 in the Provincial Court of British Columbia in relation to matters involving the children. Pursuant to an order of the Provincial Court granted October 17, 2012, the parties share joint custody and joint guardianship of the children and the children reside primarily with the claimant. The respondent was ordered to pay child support to the claimant commencing on November 1, 2010. Although the respondent has paid child support to the claimant since the date of the order, there were arrears of child support that arose as a result of the order for support being retroactive to the date of separation. The respondent has also occasionally underpaid support since that time and, as at the date of hearing of this application, there are arrears of child support owed by the respondent to the claimant in excess of \$53,815.93.
- [7] The claimant is a licensed practical nurse and at the time of the parties' separation, she was employed by the University Hospital of Northern British Columbia ("UHNBC") and the Prince George Regional Correctional Centre ("PGRCC"). The claimant declared bankruptcy in June 2011 and was discharged from bankruptcy on February 12, 2012.
- [8] During the parties' marriage, the respondent worked for Canadian Forest Products ("CANFOR") at Rustad Mill in Prince George as a first aid labourer. He left work in 2009 due to an injury and the mill closed permanently while he was still off work and before the parties separated. After the parties separated, the respondent worked for Industrial Paramedic Services as a paramedic in Tumbler Ridge and since the spring of 2015, he has been employed as a corrections officer at PGRCC.
- [9] The parties also operated two small businesses during their marriage, namely Progressive First Aid Training and Progressive Edge Photography. These business ceased operation after the parties' separation. Retention of Family Assets after Separation
- [10] At the time of separation, the parties each agreed to retain certain assets in their possession and be responsible for certain family debts. The claimant ultimately retained the following family assets:
- a. Campion Boat;

- b. 2005 Terry Travel Trailer;
- c. 1948 Ferguson Tractor;
- d. 2007 Honda Shadow motorcycle;
- e. 1992 Suburban truck; and
- f. Household goods and furnishings

[11] The claimant also took over the HSBC loan associated with the 2005 Travel Trailer, with an outstanding balance of approximately \$10,000.

[12] The respondent ultimately retained the following family assets:

- a. 1980 Toyota truck;
- b. 2009 GMC Yukon XL;
- c. Dodge Neon car;
- d. Ford 8N tractor;
- e. 2006 Honda Shadow motorcycle;
- f. Riverboat;
- g. Equipment related to Progressive First Aid;
- h. Equipment related to Progressive Edge Photography;
- i. World War 2 and hunting rifles and Nikon Camera; and
- j. Household goods & furnishings

[13] The respondent also took over the TD personal loan associated with the 2009 GMC Yukon XL and the Scotiabank personal line of credit with an outstanding balance of \$23,209.00 at the date of separation.

[14] In addition to the above-mentioned assets, the parties also have the following assets:

- (a) **Family Home Proceeds** The family home located at 3008 Thee Place, Prince George was purchased by the respondent several months prior to the parties' marriage on July 10, 1999 and registered solely in the name of the respondent. When the parties separated, the respondent continued to live in the family home until it was sold in May 2012. The net proceeds of sale, totalling \$34,559.06 ("Family Home proceeds") continue to be held in trust by Linda A. Manning, Notary Public.
- (b) **CANFOR Severance Package** As a result of the permanent closure of the CANFOR Rustad Mill, the respondent became entitled to a severance package totalling \$42,986.34 ("CANFOR Severance Package"). Although the mill closed prior to the parties' separation, the severance package was not paid to the respondent until after the parties' separation. The CANFOR

Severance Package was paid in two equal instalments in January 2012 and December 2012 and was subject to withholding tax. The first instalment was paid directly to the respondent and was retained by him. The second instalment, totalling \$14,959.38 was paid into Court pursuant to an order dated November 26, 2012.

- (c) UHNBC Employment Pension The claimant has an employment pension as a result of her employment with UHNBC during the parties' marriage ("UHNBA Employment Pension"). She acknowledges that her employment pension is a family asset and should be divided in accordance with Part 6 of the Family Relations Act. Position of the Parties

[15] The claimant is seeking an accounting and equalization payment in her favour to ensure equal division of the family assets and debts that were retained by each of the parties. She is also seeking equal division of the Family Home Proceeds, the CANFOR Severance Package and the UHNBC Employment Pension. The claimant submits that any funds that are due to the respondent as a result of the division of family assets should be applied to the outstanding arrears of child support.

[16] The respondent takes the position that:

- a. The claimant has overvalued the assets retained by him and undervalued the assets retained by her;
- b. The claimant should not be entitled to an interest in the Family Home Proceeds or the CANFOR Severance Package due to her intervening bankruptcy;
- c. He should be reimbursed for costs he incurred to repair the 2009 GMC Yukon XL as a result of damage caused by the claimant prior to the respondent resuming possession of that vehicle; and
- d. He should be reimbursed for half of the \$9,283.94 he has paid in interest on the Scotiabank Personal Line of Credit since separation.

[17] The respondent does agree, however, that any funds due to him as a result of the division of family assets should be paid to the claimant and credited towards the arrears of child support. Valuation of Assets

[18] Counsel for the claimant candidly admitted that there is little evidence before the Court regarding valuations for the various family assets. For the most part, the claimant and the respondent have simply estimated the value of the various assets in their respective possession. The parties have also each "sold" or transferred some of these assets to family members for amounts that may or may not be reflective of market value.

[19] Counsel for the claimant submitted that the assets of the parties are fairly modest and neither party is in a position to incur the cost of appraisals for the various items. She submitted that the claimant is essentially seeking some "rough justice" in order to bring this action to a conclusion.

- [20] I note that the respondent has never filed a financial statement in this action, although the affidavit of the claimant #6 dated June 2, 2016 deposes to the respondent having filed financial statements in the Provincial Court proceeding.
- [21] I agree with the submission of counsel that there is very little evidence before me with respect to the value of the parties' various assets and that there is little point in requiring the parties to incur further expense to obtain formal appraisals of the few remaining assets. I also agree with the submission of the respondent that the claimant has overvalued some of the assets retained by him and undervalued some of the assets retained by her, which distorts the division of family assets. Accordingly, I have made the following determinations of values for the most contentious assets in a manner that is consistent with what little evidence there is. Where there is no evidence of value, I have attempted to reach a fair assessment of value based on the parties' submissions.
- (a) **Campion Boat** The claimant acknowledges in her affidavit #6 that she retained this asset and estimates its value to be \$500. The respondent submitted in his application response that the 1985 Campion boat and motor are valued at approximately \$2,500. I have valued the Campion boat and motor at \$1,250.00
- (b) **2005 Terry Travel Trailer** The claimant estimates that the value of this asset at the time of separation was \$8000. The respondent, in his affidavit dated September 15, 2016, estimates that this asset was worth in excess of \$11,800 and he attached an Autotrader.ca printout from 2012 for a similar trailer. I note that the parties purchased the Terry Travel Trailer new in 2005 for \$18,426.70 plus taxes. For the purposes of this application, I have valued the 2005 Terry Travel Trailer at \$10,000, which is the mid-point between the estimates of value of the claimant and the respondent and is also the amount that was owed on the Travel Trailer loan at the time of separation.
- (c) **2009 GMC Yukon XL** The claimant estimates that this vehicle was worth \$35,478.00 in May 2012 and she has attached a used vehicle estimate for that specific vehicle from Gustafson's Kia, Prince George in support of this value. I note that estimate includes an "average book value" of \$31,425.00 and a "net value" of \$35,478.00 but does not indicate the reason for the difference between the two values. The respondent submits that the vehicle was worth considerably less than this amount and he has attached to his affidavit an ADESA Market Guide, showing an average price for a vehicle of this type of \$23,900. It is not clear whether this is a wholesale or trade-in value. I also note that this is a value based on a vehicle of a similar type, rather than an appraisal of the actual vehicle. I have valued the 2009 Yukon XL at \$33,458.87, which is the mid-point between the average book value and the net value identified by Gustafson's Kia and is also the amount that was owed on the TD personal loan for the vehicle at the time of separation.
- (d) **1948 Ferguson Tractor and Ford 8N Tractor** The claimant estimates that the Ford 8N tractor retained by the respondent is valued at \$2,000, based on an estimate of value used by the respondent in a financial statement filed in the Provincial Court action. The claimant

deposes that she sold the 1948 Ferguson Tractor for \$1,800. There is no supporting documentation with respect to such a sale. The respondent does not take issue with the value of the tractor retained by him but he estimates that the value of the tractor in the possession of the claimant is \$4,300.00. In support of this submission, he has attached to his affidavit, as part of Exhibit "D", two receipts for the purchase of both tractors. The copies of the receipts are faint and almost illegible and they are undated. The receipt for the 1948 Ferguson tractor indicates a "total sale price" of \$4,300.00 while the receipt for the purchase of the Ford 8N tractor indicates a "sale price" of \$2,200.00. I have valued both tractors at \$2000.00 each.

- (e) 2006 and 2007 Honda Shadow Motorcycles The claimant estimates that the value of the 2006 Honda Shadow motorcycle retained by the respondent is \$4,000.00, based on the estimate of value used by him in a financial statement filed in the Provincial Court action. She estimates the value of the 2007 Honda Shadow motorcycle retained by her to be \$3,500.00. I note that in her affidavit #7 filed September 29, 2016, the claimant deposed that: "The respondent advised me that he traded our jet boat for my motorcycle". The respondent estimates the value of the 2007 Honda Shadow motorcycle to be \$5,000.00. I have valued each of the Honda motorcycles at \$4,000.00.
- (f) Riverboat The claimant estimates the value of this asset to be \$10,000.00. The respondent claims that he sold the riverboat to his father for \$5,000.00 and he has attached as Exhibit "E" to his affidavit a bill of sale dated July 15, 2009. I accept the respondent's evidence regarding the sale price of the riverboat as it is consistent with the evidence of the claimant that the boat was transferred in order to acquire her 2007 Honda Shadow motorcycle and would likely be close in value. I have therefore valued the riverboat at \$5,000.00.
- (g) 1992 Suburban The claimant deposes that she transferred this vehicle to her brother as it was not running and had no value. The respondent estimates the value of the 1992 Suburban to be \$4,500.00. There is no evidence to support the respondent's estimate of value. As at the date of separation, this vehicle was 20 years old and I accept the evidence of the claimant that it was not running and had no value.
- (h) First instalment of the CANFOR Severance Package Counsel for the claimant submits that the respondent retained the first instalment of the CANFOR Severance Package in the amount of \$21,493.17 and he should be credited with this amount in any division of family assets. She does, however, acknowledge that this is likely the gross amount of the payment made to the respondent prior to tax being withheld but suggests there is no information before the Court about the amount actually paid to the respondent. While the respondent submitted that he received roughly the same as the amount that was paid into Court pursuant to the Order dated November 26, 2012, there is nothing in his affidavit in support of this submission. I note that Exhibit "A" to the affidavit #6 of the claimant is the CANFOR Severance Payment Form indicating payment of half of the total amount of the severance payment to the respondent on January 20, 2012 and that "payment of gross pay less statutory deductions will be made payable to the employee". It is also apparent from Exhibit "C" to the

affidavit #6 of the claimant that the second half of the severance package that was paid into court resulted in a net payment of \$14,959.38. From those two documents, I have concluded that it is more probable than not that the respondent received the same net amount for the first half of the severance package, namely \$14,959.38.

- (i) World War 2 Rifles, Hunting Rifles and Nikon Camera The claimant estimates the value of these assets to be a total of \$8,500.00 based on the respondent's financial statement dated May 4, 2012 filed in the Provincial Court action. She deposes in her affidavit #6 that the respondent estimated the value of his World War 2 rifles to be \$3,500.00 and his other hunting rifles and Nikon camera to be \$5,000.00. The respondent submits that he sold the Nikon camera to this current spouse, Hannah Grenon for \$1,400.00 and he has attached, as part of Exhibit "D" to his affidavit, a receipt dated December 10, 2010 in support of this submission. I have some doubts about the respondent's evidence with respect to the value of these assets, given the date of the "receipt" is some 18 months prior to the date of the sworn financial statement filed in the Provincial Court action, which contains the higher values. I therefore accept the evidence of the claimant that the total value of these assets is \$8,500.00. Is the Severance Package a Family Asset?

- [22] Counsel for the claimant provided me with two relevant cases on the issue of whether the respondent's CANFOR Severance Package is a family asset. She referred me to the case of *Davies v. Davies* 1995 BCSC 2298 in which Mr. Justice McKinnon reviewed the case law and noted that whether a severance payment constitutes family property for the purposes of equalization is a fact sensitive enquiry. The language of the severance package may indicate that it has one or more aspects. It may represent a reward for past services and/or compensation for lost future wages. McKinnon J found that the case law at that time seemed to suggest that where a portion of the severance package recognized past services and was earned during the parties' cohabitation, it was family property for the purposes of equalization. On the other hand, where a portion of the severance package represented compensation for future earnings, it was not family property.
- [23] In the later decision of *Davies v. Davies* 1999 BCSC 2298, Madam Justice L. Smith followed the same reasoning and found in that case that the portion of the severance package recognizing past service was a family asset. She noted in the circumstances of that particular case that there was no evidence of any of the lump sum payment representing a future component or inducement to accept the package, which resulted in the entire amount being characterized as a family asset.
- [24] In this case, there is very little information about the characterization of the CANFOR Severance Package. One would assume that the respondent has documents in his possession with respect to this transaction but they have not been produced by him in this proceeding. In the absence of any evidence from the respondent, I cannot conclude that any of the CANFOR Severance package represents compensation for lost future wages. The entire CANFOR Severance Package represents recognition for past service and that past service was rendered during the parties' marriage. The CANFOR Severance Package is therefore a

family asset. The Effect of the Claimant's Bankruptcy

- [25] The respondent takes the position that the claimant's bankruptcy disentitles her to share in the Family Home Proceeds or the CANFOR Severance Package. He submits that the claimant did not disclose any interest in those assets in the course of her bankruptcy and she should not be allowed to pursue such an interest now that she is discharged from bankruptcy.
- [26] Counsel for the claimant provided me with some helpful case law that addresses this issue in the context of actions under the Family Relations Act for the division of property. In the case of *Boyd v. Boyd* 2003 BCSC 1470, Mr. Justice Crawford found that despite the defendant's bankruptcy, he was still entitled to an interest in the family home. Crawford J. found that the defendant's interest in the family home was quiescent at the time of his bankruptcy because the home was registered solely in the name of the plaintiff and there had not been a triggering event as described in section 56 of the Family Relations Act. He concluded that the defendant's interest in the family home did not crystallize until the triggering event, which occurred after his discharge from bankruptcy.
- [27] Those facts are remarkably similar to this case. The Family Home was registered solely in the name of the respondent and he was the sole recipient of the CANFOR Severance Package. The parties separated on November 1, 2010 and the claimant declared bankruptcy in June 2011. She was discharged from her bankruptcy on February 12, 2012. The triggering event in this case was the section 57 declaration that was made on May 31, 2012. The claimant's interest in the Family Home Proceeds and the CANFOR Severance Package did not crystallize until that date, by which time the claimant was discharged from bankruptcy. On the evidence before me, the claimant is entitled to a one-half interest in the Family Home proceeds and the CANFOR Severance Package. Division of Family Assets
- [28] Although the respondent suggested in his submissions that there should be reapportionment of certain family assets in his favor, he did not file a counterclaim seeking reapportionment under section 65 of the Family Relations Act. Even had he done so, I would have concluded, after consideration of the factors in section 65 of the Family Relations Act, that equal division of family assets would not be unfair. Accordingly, the claimant and the respondent are entitled to an equal division of the family assets.
- [29] While they disagree about the values of the various assets, the parties are generally in agreement that they will retain the various assets in their respective possessions and continue to be responsible for the debts in their own names. I have therefore concluded that the family assets will therefore be divided as follows: ASSETS Retained by Claimant Retained by Respondent Family Home proceeds \$17,279.53 \$17,279.53 Campion Boat \$1,250.00 2005 Travel trailer \$10,000.00 1980 Toyota truck unknown 2009 GMC Yukon XL \$33,458.87 Dodge Neon car unknown Tractors (2) \$2,000.00 \$2,000.00 2006 Honda Shadow \$4,000.00 2007 Honda Shadow \$4,000.00 Riverboat \$5,000.00 1992 Suburban Nil UHNBC Pension divide equally divide equally CANFOR Severance \$14,959.00 \$14,959.00 World War 2 rifles \$3,500.00 Rifles/Nikon Camera \$5,000.00 Progressive Photography unknown Progressive First Aid

unknown Household furniture divided equally divided equally TOTAL ASSETS \$49,488.53
\$85,197.40 DEBTS Trailer Loan \$10,000.00 GMC Yukon Loan \$33,458.87 Scotia Line of Credit
\$23,209.96 TOTAL DEBTS \$10,000.00 \$56,668.83 NET ASSETS \$39,488.53 \$28,528.57

- [30] Given the disparity between the net asset positions of the claimant and the respondent following this division, the claimant will be required to make an equalization payment to the respondent in the amount of \$5,479.98 from her share of the Family Home proceeds.
- [31] Although the respondent sought reimbursement for the insurance deductible for repairs to the 2009 GMC Yukon XL and for half of the interest he has paid on the Scotiabank Line of Credit, I have concluded that such reimbursement is not appropriate or necessary as the respondent has retained the 1980 Toyota Truck, the Dodge Neon Car and the business equipment for Progressive Photography and Progressive First Aid for his sole benefit. The asset division and the equalization payment in favor of the respondent are sufficient to achieve an equal division of family assets and account for the family debt responsibilities of each of the parties.
- [32] As I have already noted, the respondent agrees that any portion of the Family Home proceeds payable to him should be paid to the claimant as child support arrears, provided that he receives a credit for any such payment. Given the significant arrears of child support that have accumulated since the parties' separation, I agree that this would be appropriate.
- Summary

- [33] In order to give effect to this division of family property, I make the following orders:
1. The funds paid into Court in the approximate amount of \$14,959.00 shall be paid out to the claimant and retained by her as her sole property.
 2. The Family Home Proceeds held in trust by Linda Manning, Notary Public shall be divided as follows:
 - a. \$11,799.55 to the claimant; and
 - b. \$22,759.51 to the respondent.
 3. The respondent's share of the Family Home Proceeds will be paid to the claimant as child support arrears and the respondent will receive a credit against arrears in the amount of \$22,759.51
 4. The claimant shall retain the Campion Boat, the 2005 Terry Travel Trailer, the 1948 Ferguson tractor, the 2007 Honda Shadow motorcycle, the 1992 Suburban and any household furniture in her possession as her sole property;
 5. The respondent shall retain the 1980 Toyota truck, the 2009 GMC Yukon XL, the Dodge Neon car, the 2006 Honda Shadow motorcycle, the Riverboat, the World war 2 Rifles, the Hunting Rifles and Nikon Camera, the Progressive Photography equipment, the Progressive First Aid equipment and any household furniture in his possession as his sole property;

6. The claimant shall be solely responsible for the HSBC Loan for the Terry Travel Trailer;
 7. The respondent shall be solely responsible for the TD Personal loan for the 2009 GMC Yukon XL and the Scotiabank Personal Line of Credit;
 8. The claimant's UHNBC Employment Pension shall be divided pursuant to Part 6 of the Family Relations Act.
- [34] As success has been divided, each party will bear their own costs. "The Honourable Madam Justice Church"

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