
CANADA / JUDGMENT

Chutter v. Chutter

2007 BCSC 814

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 814 Chutter v. Chutter

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chutter v. Chutter,

2007 BCSC 814

Date: 20070607

Docket: E031652

Registry: Vancouver

Between:

Heather Jane Chutter

Plaintiff

And

Geoffrey Paul Chutter and

Chutter Developments Ltd.

Defendants

Before: The Honourable Mr. Justice E. R. A. Edwards

Reasons for Judgment

Counsel for the Plaintiff

P. Daltrop

Counsel for the Defendants

G. Lang

Date and Place of Trial/Hearing:

May 28-31, 2007

Vancouver, B.C.

- [1] I refer to the plaintiff, age 54, as the "wife" and the personal defendant, age 56, as the "husband". They were married May 31, 1975. Their son, born in 1982, no longer resides with either party.
- [2] The husband left the matrimonial home in September 2003. The wife still resides there.
- [3] The parties agree that an order for divorce should be granted. I so order.
- [4] After three days of trial the parties agreed to a division of family assets which will be reflected in the order for divorce by consent.
- [5] The remaining issue is the wife's claim for spousal support.
- [6] The wife's 2006 income was \$88,691, of which \$39,000 was interim spousal support paid pursuant to an order effective March 1, 2006.
- [7] The remainder of her 2006 income, about \$49,000, was employment income earned by her working three days per week as a dental hygienist and 2 days a month as an adjudicator of Employment Insurance disputes.
- [8] The husband's income in 2006 was about \$156, 000. He manages the Whitewater Group, which produces recreational waterslides.
- [9] The wife claims permanent spousal maintenance in the range of \$4,000 per month, applying the Spousal Support Advisory Guidelines to the current employment incomes of the parties.
- [10] From the time of their marriage until 1981 the husband trained and worked as a chartered accountant and the wife worked as a dental hygienist. They then moved to Penticton where they purchased and operated a trailer park and campground and developed and ran a waterslide park which they sold in 1983.
- [11] From that time, the husband's business interest turned to the design and manufacture of waterslides. The business currently has about 200 employees and annual sales of over \$70 million.
- [12] After their son started school, the wife returned to her job as a dental hygienist, while the husband earned his income from the waterslide business.
- [13] The waterslide business and the parties' real estate, apart from the family home and the husband's part interest in a property at Langdale, are owned by companies organized as follows:

Whitewater West Industries Ltd., which deals in the design, engineering and sale of waterslides and related products;

Whitewater Composites Ltd., which manufactures waterslide components in Kelowna;

398314 B.C. Ltd., which owns the Kelowna plant;

Chutter Recreations Ltd., which owns an office building, part of which is rented to Whitewater West Industries Ltd.;

Chutter Developments Ltd., which owns a residential property in Mission.

[14] The husband currently owns all the shares of Chutter Recreations Ltd. The husband and Chutter Recreations Ltd. each own half the shares of Chutter Developments Ltd.

[15] Chutter Recreations Ltd. owns 50.04% of the shares of Whitewater Industries Ltd.; the other 49.94% are owned by persons not party to the litigation who are at arm's length from the parties.

[16] The wife owns 50.04% of the shares of 398314 B.C. Ltd.; the other 49.94% are owned by persons not party to the litigation who are at arm's length from the parties.

[17] All the shares of Whitewater Composites Ltd. are owned by 398314 B.C. Ltd.

[18] Under the terms of the settlement the wife will transfer all her shares in 398314 B.C. Ltd. to the husband. The wife will have all of the shares of Chutter Developments Ltd. and 30% of the shares of Chutter Recreations Ltd. The wife will also become sole owner of a 1/6 share (half of the husband's 1/3 share) as tenant in common in the Langdale property. The Langdale property is subject to a life estate to the husband's parents.

[19] Although I was not required, in light of the settlement, to determine the value of the shares of the companies which own the business assets at the date of the trial (the triggering event), I infer that the parties agreed to a roughly equal division of all the assets comprehended by the settlement.

[20] The value of the wife's portion of these assets is something over \$4 million, divided as follows:

Family Home

\$1,950,000

RRSPs

\$1,006,000

Chutter Developments

\$157,500

30% Chutter Recreation

\$800,000

1/6 Langdale Property

\$125,000

½ Line of Credit

(\$25,000)

Total

\$4,013,500

- [21] The wife will receive, through her ownership of Chutter Developments Ltd., the \$4,367 annual rent from the residential property which is its sole asset.
- [22] The husband acknowledges that the wife is entitled to receive 30% of the rental income of Chutter Recreations Ltd., which shall never be less than \$29,000 per year, paid quarterly, and he agrees this should be stipulated in the divorce order.
- [23] The husband agrees to arrange a spousal roll over of his \$484,000 RRSP so that the wife will have all of the parties' RRSPs, totalling approximately \$1 million.
- [24] Counsel for the husband submitted that the wife's income should be determined on the basis of her employment income as a dental hygienist of \$49,000 plus her \$9,600 income as an EI adjudicator, her rental income from the two Chutter companies, about \$34,000, and \$50,000 annual interest on her RRSPs, plus imputed income of \$14,000 in rental income from a potential basement suite in her home, for a total of about \$157,000.
- [25] Since the wife testified she had security concerns about renting out the basement of her home, the husband's counsel argued in the alternative that she could relocate to a more modest home and invest the balance of the capital to earn enough to bring her total annual income to \$168,000, in order to help meet her obligation to become self-sufficient.
- [26] The wife's counsel pointed out two flaws in these figures. First, the wife's EI adjudicator and dental hygienist income are not cumulative because she works at the EI job two days a month when the dentist's office is not open, in effect maintaining her income, not adding to it. Second, if the Chutter Recreations Ltd. rent is to be attributed to the wife as income, then the husband's share of that rent, about \$58,000, should also be added to his annual income even though he returns it to the waterslide business.
- [27] I accept these points as valid for purposes of comparing their respective incomes post settlement, which are \$214,000 (employment income and rent) and \$133,000 (employment income, rent and investment income on the RRSP at 5%) for the husband and wife respectively, without imputing any income to either and without including the wife's earnings from the EI job as extra income. Interest on the RRSP is income. The fact it is tax sheltered does not exclude it from consideration as such.

- [28] The wife's counsel argued that substantial income should be attributed to the husband on the basis that he has the means to borrow from Whitewater Industries Ltd. to effectively create income for himself.
- [29] I do not accept this argument. Retained earnings are not cash. Whitewater Industries Ltd. has other shareholders who are entitled to demand any loans from the company be repaid. The company has never paid a dividend nor bonuses to its shareholders who are its key managers. As the wife's counsel pointed out, Whitewater Industries Ltd.'s net earnings are "plowed back" into the company.
- [30] The husband's income from Whitewater Industries Ltd. is not high in relation to the annual sales of the group. Eventually the husband will have to provide for his own retirement from whatever capital can be raised from selling the shares or assets of the Whitewater group of companies.
- [31] The wife, who contemplates retirement by age 60, and because of health issues is unable to increase her work as a dental hygienist, does not want to encroach on her capital, which apart from the \$1 million in RRSPs is all real property, to provide current income.
- [32] The wife's claim for spousal support is based on both "need" and entitlement to a compensatory award to maintain the marital standard of living she enjoyed before the parties separated and has enjoyed since.
- [33] The "need" aspect of the claim is based on annual expenses of about \$95,000, about double her current annual employment income of \$49,000. None of her expenses is exceptionally high or unreasonable. Her debt is \$58,000, including her half share of the parties' \$50,000 line of credit.
- [34] The comparable figures for the husband are current income of \$156,000 and expenditures of \$166,000 (including \$39,000 in spousal maintenance). The husband has mortgage and other debt of \$1,055,000, including his share of the line of credit.
- [35] In *W. v. W.*, 2005 BCSC 1010, Martinson J. found (at para. 42) that the wife, whose income was \$57,000 compared to the husband's \$125,000, had a "strong claim for spousal support, primarily on a compensatory basis" after a 22-year marriage and that (at para. 46) because their lives were "significantly intertwined financially over many years", the wife was "entitled in the particular circumstances of this case to a roughly equal standard of living, assessed against her marital standard of living".
- [36] Martinson J., using the Advisory Guidelines as a "check" awarded spousal support. The wife's role as primary caregiver for two children was a factor in favour of the award.
- [37] At paras. 36-37, Martinson J. noted that asset division must "be dealt with before support because a person's asset base is relevant to support" and that the law of British Columbia "allows for both reapportionment and spousal support but says that there cannot be double recovery".

- [38] In *W. v. W.*, the parties' total family assets of \$600,000 were divided equally, including the wife's pension. The wife's claim for reapportionment in her favour was apparently rejected on the basis that the husband had "no funds set aside for retirement" (at para. 40).
- [39] In *W. v. W.*, the primary asset was the family home which had been sold. Even if it had all been reapportioned to the wife, the additional \$300,000 at a return of 10% would not have equalized the parties' incomes. An award of spousal support was the only means of ensuring the wife a roughly equal standard of living.
- [40] Because of the parties' settlement of the asset issues in this case, the court was not asked to ascribe a value to the business assets (apart from real estate which was agreed), nor to consider reapportionment.
- [41] Because of the presumption of equal division of family assets after a long marriage, I have inferred that the parties divided the assets on what they regarded as a roughly equal basis. In any event, there was no reapportionment agreed expressly as an alternative to spousal support.
- [42] As *W. v. W.* shows, an equal division of family assets does not foreclose a claim to spousal support. By agreeing to the settlement, the wife did not implicitly abandon her claim to spousal support.
- [43] Because the settlement was not conditional on the court making an award of spousal support, I infer the wife concluded she could live at an appropriate standard if the court did not award her spousal maintenance.
- [44] Conversely, I infer the husband concluded that because the wife's claim for spousal maintenance was not dismissed as part of the settlement, an award of spousal maintenance might still be made.
- [45] On that basis I infer that neither party considered spousal support a "deal breaker", in light of their settlement of what both apparently regarded as the more important issue of division of family assets, independent of the resolution of the spousal support claim.
- [46] I find on the basis of the wife's post settlement income and current expenses that "need" does not arise in this case. Even without attributing any income to the wife on the basis of her renting part of her house or withdrawing capital from it by selling it and moving to a less expensive one in order to invest the proceeds in income generating investments, her post settlement income of \$133,000 exceeds her expenses by nearly \$40,000.
- [47] I infer the wife correctly concluded that she could maintain the standard of living to which she is accustomed by relying on the assets she agreed to accept as her share of the settlement, even in the event her claim for spousal support was denied.
- [48] That leaves the issue of a compensatory award aimed at addressing any economic disadvantage to the wife resulting from the marriage and its breakdown.

- [49] The assets (roughly \$4,000,000 each) held by the parties in light of the settlement are capable, if utilized to provide housing and income in some combination, of providing both parties with a comfortable standard of living equivalent to the marital standard of living.
- [50] With his \$58,000 share of the Chutter Recreations Ltd. rents included for comparison purposes, the husband earns about 1.6 times the income of the wife.
- [51] The issue is whether the wife is entitled to be compensated for that discrepancy when the husband uses almost all his assets to earn income and she uses only about half of hers (the RRSP and rents from the Chutter Development Ltd. and Chutter Recreations Ltd. properties) to generate income.
- [52] Where, as here, there is a rough equality in the division of assets, it is relevant to consider the quality and use of the assets held by each party in determining whether an award of compensatory spousal support aimed at maintaining a rough equivalence in their respective standards of living by equalizing their incomes should be made.
- [53] Both parties are in their fifties. These are most income earners' peak earning years. The wife's ability to earn as a dental hygienist is constrained at its current level by health issues. She has no enthusiasm for retraining for another career and expects to retire by age 60. There was no evidence the husband intends to end his involvement in the waterslide business.
- [54] The wife, who was qualified as a dental hygienist when the parties married, interrupted her career for several years to act as primary caregiver to the parties' son. She resumed her professional career years ago and there is no basis to conclude that she lost the opportunity to train for a higher paying job because of her contribution to the marriage.
- [55] The wife's assets are secure and relatively risk free. Neither the real estate nor the RRSPs require full time attention to maintain their value and over time these assets should appreciate.
- [56] The husband is purchasing a new home and will have to replace his RRSPs with a source of income for his retirement.
- [57] The husband works full time to manage the business assets to provide income, maintain their value as a going concern and attempt to increase their value. The business is not risk free. While there is some risk the business could fail, there is also the prospect it could appreciate significantly in value.
- [58] *W. v. W* is not analogous to this case because it involved relatively modest family assets of \$600,000 which did not have the capacity to sustain both parties at or near their marital standard of living.
- [59] Further, in *W. v. W.*, the fact two children were still residing with the wife was a factor in the wife's entitlement to spousal support.

- [60] In the present case there is no basis to conclude that the husband's employment income is higher, or the wife's employment income is lower than either would otherwise have been because of the interruption in the wife's career while she was primary caregiver for their son, or that her role as such reduced her present earning capacity or boosted that of the husband.
- [61] Nor is the present case parallel to *J.W.J. McC. v. T.E.R.*, 2007 BCSC 252, also cited by the wife's counsel. That case was a review of spousal support after five years under an agreement. At the time of the agreement the wife had three children in her care and no income, and the husband had an income of \$400,000.
- [62] On the review, the court found that the wife had depleted the 16% of the parties' approximately \$2 million in assets reappportioned in her favour under the agreement, some \$325,000. On the review, the court found this reappportionment had been inadequate to compensate the wife for the economic disadvantage she had suffered as result of the marriage and its breakdown.
- [63] As a result, the wife was entitled to indefinite spousal support until the depletion of her reappportioned share was restored. The court also awarded indefinite spousal support to compensate for the wife's inability to earn an income over \$30,000 per year, which resulted from her loss of opportunity to improve her employment skills during and after the marriage because of her childcare responsibilities. This too was a continuing economic disadvantage resulting from the marriage and its breakdown.
- [64] To similar effect is the decision in *Scott v. Scott*, 2007 BCSC 234, in which spousal support was awarded to a 53-year old wife after a long marriage where the reappportionment of the modest family assets could not maintain the parties' marital standard of living for both and the wife had no prospect of earning the same income as the husband from the combined income from her share of the family assets and employment during her remaining working years.
- [65] Two cases cited by counsel for the husband are more closely analogous to the present case. In both *Laxton v. Coglon*, 2003 BCSC 11, and *Hodgkinson v. Hodgkinson*, 2003 BCSC 1538, substantial family assets were equally divided.
- [66] In *Laxton*, each of the parties received about \$3.5 million in assets. The 38-year old wife's claim for spousal support was denied on the basis that her share of the assets and her prospects for employment were together adequate to make her self-sufficient.
- [67] Ms. Laxton stated she intended to stay at home to be an attentive mother to three young children and would not return to work unless she grew restless or bored. She acknowledged she was capable of living on her current means, without employment income, even if it meant a reduced lifestyle.

- [68] In Hodgkinson, each of the parties received about \$3.3 million of family assets. The 44-year old wife's claim to spousal support was denied by the trial judge despite the fact she had primary childcare responsibilities for the parties' ten-year old daughter. The trial judge found that Mrs. Hodgkinson had been financially advantaged by the marriage and its breakdown and that while unemployed at the time of trial she was capable of earning income both from investments and employment.
- [69] The Court of Appeal at 2006 BCCA 158 awarded Mrs. Hodgkinson \$150,000 lump sum spousal support on the basis that the trial judge had not taken into account the fact that she would require time to restore her career as a chef and caterer before earning income after the divorce. That consideration does not arise in the present case because the wife has been continuously employed for many years.
- [70] In the present case, the wife is capable of earning income from employment and investments substantially in excess of her expenses. I find that on the facts of the present case, the wife has failed to show that spousal support is appropriate either on the basis of need or to ensure that she can maintain the marital standard of living.
- [71] There is no authority which states that the parties are presumptively entitled to equality of income post divorce, regardless of how they choose to utilize their share of family assets. The Divorce Act mandates self-sufficiency, where possible. The Family Relations Act presumes an equal division of family assets, with exceptions. The cases indicate that after a long marriage the parties are entitled to continue to enjoy their marital standard of living, where possible. All three of these criteria for a fair resolution of the parties' divorce have been achieved by the asset settlement agreed to by the parties in the present case. It follows that there is no entitlement to spousal support. The wife's claim for spousal support is dismissed.
- [72] In light of the settlement at mid-trial, the parties should bear their own costs except for the final day of trial, which I award to the husband as costs of a one-day hearing with no costs for preparation, unless the parties have otherwise agreed on costs.

"Edwards J."

The Honourable Mr. Justice E. R. A. Edwards

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