
CANADA / JUDGMENT

D.O.D. v. N.V.D.

2016 BCSC 458

COURT

Supreme Court of British Columbia

DECIDED

16 March 2016

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2016 BCSC 458 D.O.D. v. N.V.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.O.D. v. N.V.D.,

2016 BCSC 458

Date: 20160316

Docket: 17159

Registry: Terrace

Between:

D.O.D.

Claimant

And

N.V.D.

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Claimant:

T.E. Hudson

Counsel for the Respondent:

W.C. MacGregor

Place and Date of Trial:

Terrace, B.C.

January 26 & 27, 2016

Place and Date of Judgment:

Terrace, B.C.

March 16, 2016

- [1] The respondent applies to set aside a separation agreement. If successful she seeks orders dividing the claimant's employment pension and for spousal support.
- [2] Both parties wish to be divorced. At the time of the hearing the clearance certificate had not yet been received. I heard the necessary evidence to grant the divorce but did not make the order pending receipt of the clearance certificate. The granting of the divorce is therefore adjourned pending receipt of the clearance certificate.

Background

- [3] The parties commenced dating in October 1996. Between 1996 and 1998 their relationship was off and on but in 1998 it recommenced and they began living together in February 1999. They married on October 15, 2004 and separated on April 1, 2008. They have two children, namely B.D. born November 21, 1998 who is now 17 years of age and C.D. born October 30, 2003 who is now 12 years of age.
- [4] The parties have resolved parenting and child support matters in Provincial Court proceedings. The children reside with the respondent. The claimant has parenting time with the children and pays child support.
- [5] When the parties commenced living together in February 1999 the claimant was working as a casual Canada Post employee. After they commenced cohabitation he obtained employment in a video store working 3-4 shifts a week. The respondent at the commencement of cohabitation was working part-time at two daycares and at Athletes World, all at minimum wage.
- [6] After about a year at the video store the claimant obtained full-time employment with Canada Post where he remained until Rio Tinto Alcan hired him for part-time work in November of 2002. His position became full-time on January 15, 2003 at which time he began earning an interest in his employment pension.
- [7] Rio Tinto Alcan originally employed the claimant as a general worker but on January 20, 2007 he started an apprenticeship to become a millwright. He completed his apprenticeship and became a journeyman millwright on January 20, 2011.

- [8] After leaving her employment at Athletes World the respondent was employed at a video store until early 2003 when she was three months pregnant with their second child. She went on medical leave in May of 2003 and then maternity leave for a year. She returned to work in January 2005 at a cold beer and wine store in Kitimat, British Columbia working eight hours a day 3-4 days per week for \$8 per hour.
- [9] The respondent's employment was a source of conflict between the parties. The claimant objected to the respondent working as it inhibited his ability to work available overtime. Despite the respondent reducing her work to two days a week it remained a source of contention. As a result she ceased working in August 2006. She had no regular employment thereafter until she obtained employment after they separated.
- [10] The parties do not agree on what their respective roles were during the marriage. The claimant asserts they shared all parenting including assisting their children with their homework, preparing meals and housework. The respondent disputes that and states that she was the main caregiver and when not with her the children were in day care or at her mother's. Neither party provided further evidence respecting their respective roles in the marriage nor details of the use of day care or relatives for childcare.
- [11] After their separation in April 2008 they prepared their own separation agreement based on a pre-printed form.
- [12] At the time of separation the respondent was being treated for depression. The respondent testified that she was severely depressed and suicidal at the time that she signed the separation agreement. The claimant was aware that the respondent suffered from depression and that she was taking prescription medications for it. He states he was not aware of the extent of her depression.
- [13] The agreement was completed jointly with the respondent filling in blank portions of the form. She asserts the claimant told her what to fill in while the claimant states they jointly discussed matters and completed the form accordingly.
- [14] The agreement is fraught with problems. The parties failed to delete inapplicable portions of the agreement and they failed to delete portions that gave the option of the wife or husband fulfilling certain obligations. The provisions relating to their home and debts are completed in such a fashion that they are contradictory. For example, the parties agree that the home had no or minimal equity but the claimant then agreed to be responsible for the mortgage and debts yet pay the respondent \$35,000 for her equity in the property. The respondent agreed not to seek spousal support. The claimant's employment pension was not addressed, as neither party was aware that it was divisible.
- [15] However, as the property division is not in issue and given the conclusion I have reached that the agreement is not enforceable, I need not attempt to resolve the problems with the agreement.

- [16] After their separation the claimant purchased a new home. The respondent's parents purchased the parties' former matrimonial home in June 2008 for the amount owing against it. The respondent moved into it in June 2008.
- [17] On July 15th, 2008 the respondent was involuntarily committed under the Mental Health Act, R.S.B.C. 1996, c. 288, after attempting suicide. She was discharged on July 21, 2008. The claimant took her to his new home. Their children were in the care of her parents. The respondent asserts she and the claimant reconciled and that she remained at the claimant's new home until November 2008 when they finally separated. She then moved back to the former matrimonial home with their children.
- [18] The claimant states that they did not reconcile and that at the beginning of September when the children returned to school he asked the respondent to leave. He stated the only reason he had taken her into his home was that she had been through an ordeal and he believed he was one of the reasons for her attempting suicide. He felt an obligation to be there to support her. He stated that by September she seemed back to normal and he asked her to move out which she did.
- [19] The respondent remained on medication for her depression until November 2011 and under the care of a psychiatrist until the fall of 2014.
- [20] After November 2008 the respondent worked in her mother's business until 2012. In 2012 she entered into a relationship with a new partner and moved to Terrace, BC. Commencing in October 2012 she found work part-time at Shoppers Drug Mart and then part-time at Safeway and after that full-time at Winners. She was off work from March 2012 to July 2012 on medical leave. She returned to work at Winners but then took maternity leave given the birth of her and her new partner's child on May 15, 2015. At the time of trial she was receiving \$189 per week in maternity benefits.
- [21] The respondent's new spouse is a CN track foreman earning approximately \$75,000 to \$80,000 a year. They have purchased a home registered in his name alone and valued at approximately \$369,900. It is encumbered by a mortgage but the mortgage amount is not in evidence.
- [22] Also in 2012 the parties' children moved from living with the respondent to residing with the claimant with whom they remained until December 2014. The respondent did not pay any child support to the claimant during that period.
- [23] From 2012 to 2015 the parties were in litigation in the Provincial Court culminating in a consent order dated June 26, 2015 providing that each continued as guardians of their children, that they shared parenting responsibilities and that the children's primary residence would be with the respondent with parenting time to the claimant. Extraordinary expenses were also addressed and the existing order for child support of \$1,050 per month remained in force.

[24] The children remain with the respondent and no change in that arrangement is expected.

[25] After separation the claimant purchased his own home. He continued to work at Rio Tinto Alcan although as of trial he was no longer a journeyman millwright. He is now employed in a staff position as a mechanical technician earning \$86,000 to \$90,000 annually. He has resided with his new common law spouse for 7 years.

[26] The earnings of the parties since 2010 are:

YEAR

CLAIMANT

RESPONDENT

2010

\$76,434

\$10,166

2011

\$90,079

\$11,682

2012

\$102,755

\$10,333

2013

\$115,914

\$13,814

(including EI)

2014

\$89,273

\$12,159

2015

\$100,807

\$9,828

2016

(estimated)

\$89,273

\$13,000

[27] On cross-examination the respondent was asked about her alleged failure to pursue this litigation expeditiously. The notice of family claim filed by the claimant on August 9, 2010 relied on the separation agreement and as a result only claimed for a divorce. The response to family claim of the respondent was filed on September 14, 2010 indicating child support, spousal support, division of family assets and other property were in issue. The respondent also filed a counterclaim on September 14, 2010 seeking a divorce, child support, spousal support, division of family assets and costs. Until this point the respondent was acting on her own behalf. On October 23, 2013 with the assistance of legal counsel, the respondent filed an amended response to family claim claiming the separation agreement was unfair and that the parties had reconciled on July 14, 2008 and finally separated on November 1, 2008. On January 6, 2016 the claimant filed a response to the counterclaim denying any period of reconciliation, that all property matters were resolved by way of the separation agreement and that the respondent was not disadvantaged by the marriage and therefore was not entitled to spousal support.

[28] As will be apparent from this chronology the respondent took no steps in this proceeding from the fall of 2010 until October of 2013. Her explanation for this was that the parties were involved in the ongoing Provincial Court proceedings and she understood that the issue of custody of the children had to be resolved first. In addition she stated that while she could afford to pay her lawyer in the Provincial Court matter she could not afford to retain her counsel in the Supreme Court proceeding as well. No explanation was given as to why the issue of spousal support was not pursued in Provincial Court. She testified that she had sought but been unable to obtain legal aid. She also stated she did not know how to pursue these proceedings on her own.

Position of the Claimant

[29] The claimant submits that the separation agreement is binding and that while poorly drafted it is clear what the parties' intentions were. He also submits that the respondent was not a traditional stay at home mother and that neither of them was disadvantaged by the marriage. He refers to the respondent's failure to move the matter forward. He concedes however that the respondent has some entitlement to support and that the failure to deal with that in the agreement may mean the agreement is not fair.

[30] He states that any claim for compensatory support is of limited duration given, according to him, there was only a period of one and one half years during which the respondent was required to stay home for child care and that after that the older child could have cared for the younger while she worked. He submits any needs base claim is limited given the respondent has a new relationship and has chosen not to work to capacity but instead to

have a child and to remain at home. He notes as well that when she does work it is in retail sales just as she did when the parties met and as she did during the marriage.

- [31] The claimant concedes that his employment pension is to be divided from the date his interest in it commenced (January 15, 2003) until the triggering event although the date of that event is not agreed to.

Position of the Respondent

- [32] The respondent submits that the separation agreement is void because she was not mentally healthy at the time it was executed, she signed it in haste without the benefit of legal advice, it is grossly unfair, the claimant failed to make a settlement payment as required by the agreement and because the parties reconciled for in excess of 90 days.

Law and Discussion

- [33] This action was commenced under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). The respondent counter-claimed under both the Divorce Act and the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. Section 252 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] is the transitional provision that applies to property division. Unless the parties otherwise agree the provisions of the FRA apply to proceedings for property division started under that Act. The parties have not agreed to the FLA applying. As a result the FRA applies. The issue of spousal support however is to be resolved under the Divorce Act (R.G.N. v. R. H.N., 2003 BCSC 333 at para. 15).

Is the Separation Agreement Enforceable?

- [34] In *H.J.S. v. K.C.S.*, 2013 BCSC 998, Mr. Justice Barrow addressed the applicable principles relating to setting aside a separation agreement as follows:
- [40] In *Miglin*, the court was concerned with the effect of a prior separation agreement on a subsequent application for spousal support. Notwithstanding that specific context, the decision has application more generally to separation agreements. That was made clear by the court's decision in *Rick v. Brandsema* at paragraph 39. *Miglin* established a two-stage analysis for the assessment of agreements in the context of spousal support. In the first stage "the court should first look to the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it" (*Miglin* at paragraph 80). This inquiry involves a consideration of both the circumstances surrounding the signing of the agreement and an examination of the degree to which the agreement complied with the applicable legislation.
- [41] The second stage of the *Miglin* analysis is a result of s. 15.2 of the Divorce Act. Section 65 of the Family Relations Act, if invoked, provides a basis for a second-stage analysis in relation to a separation agreement dealing with the division of property. It provides that if "the provisions for division of property between spouses under ... their marriage agreement ...

would be unfair" having regard to various factors set out in the section, then, on application, the court can order a division different than the presumptive equal division or a reapportionment. The unfairness may lie in the agreement assessed as of the time the agreement was drawn or in its subsequent operation (see generally *D.K.N. v. M.J.O.*, 2003 BCCA 502).

- [35] The evidence does not establish the respondent was not competent to sign the agreement nor that her capacity was diminished to a significant degree or that as a result she was vulnerable when the agreement was signed. However, the only significant asset of the parties at the time of the agreement was the claimant's pension and as a result of both parties failing to appreciate it could be divided it was not included in the agreement. In addition, the purported agreement that there would be no spousal support payable ignored the history of the marriage, the income of the claimant, the respondent's lack of income and her need. It fails to be in substantial compliance with the factors and objectives of the Divorce Act: *Miglin v. Miglin*, 2003 SCC 24. In particular it fails to consider the "conditions, means, needs and other circumstances of each spouse" and fails to recognize "any economic advantages or disadvantages to the spouses arising from the marriage breakdown". In addition it does not apportion "any financial consequences arising from the care of any child of the marriage" nor does it relieve "any economic hardship of the spouses". (Divorce Act. s 15.2). As a result I find the agreement was unfair. The agreement is set aside.

Triggering Event for Separation

- [36] The respondent concedes that if the agreement is set aside then notwithstanding being found to be unenforceable it was a triggering event. The claimant does not oppose that concession. As a result the claimant's pension shall be equally divided for the period January 15, 2003 to May 12, 2008 being the date the separation agreement was signed.

Spousal Support

- [37] Spousal support is claimed on the basis of both compensatory and non-compensatory entitlement. In addition the respondent seeks retroactive spousal support commencing October 1, 2010 being the first full month after she filed her counterclaim for spousal support on September 15, 2010.
- [38] The submission that the respondent was in the same financial position at separation as she was at the commencement of their relationship fails to recognize the marital standard of living and the claimant's enhanced earning capacity: *W. v. W.*, 2005 BCSC 1010; *R.S.R. v. S.M.R.*, 2006 BCSC 1404.
- [39] The foundation for entitlement to compensatory support is established both by the respondent's role in the marriage with respect to childcare and by her ceasing employment in order that the claimant's earning capacity could be enhanced. The claimant did not dispute the respondent's claim that she ceased working to enable him to work overtime. It is

not clear if his willingness to work overtime affected his acceptance into the apprenticeship program however that is what occurred. He has not only become a journeyman millwright but currently is in a management position. I am satisfied that her role in the marriage contributed to the earning capacity of the claimant. Clearly, during the relationship the skills and earning capacity of the claimant improved markedly while those of the respondent remained the same.

- [40] The evidence however does not establish that the respondent sacrificed her career opportunities in order to carry out her role in the marriage. Her employment prior to, during the marriage and after separation has been one of retail sales at minimum wage. No evidence that her role in the marriage frustrated her career path was adduced.
- [41] As a result, upon the breakdown of the marriage the economic consequences of the marriage and its end engage her entitlement to compensatory spousal support although not to a substantial degree: *Moge v. Moge*, [1992] 3 S.C.R. 813.
- [42] With respect to the respondent's claim for non-compensatory support, the means of the respondent and her earning capacity in comparison to that of the claimant is limited. The breakdown of the marriage imposed economic hardship on her. Particularly as after separation she was responsible for the children and remains so. The length and nature of their relationship also supports entitlement to non-compensatory support. The respondent is entitled to support on this basis as well in order to promote her self-sufficiency.

Retroactive Spousal Support

- [43] The considerations that apply to retroactive child support are relevant when addressing retroactive spousal support claims: *Hausmann v. Klukas*, 2011 BCSC 1753 at para. 173.
- [44] A claim for retroactive spousal support raises the issues of notice, delay and misconduct. As noted in *Kerr v. Baranow*, 2011 SCC 10:
- [208] there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support
- [45] In *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175 (C.A.), the Ontario Court of Appeal held that the date proceedings for support are initiated is the usual or ordinary date upon which payments should commence unless there is a good reason not to make the order effective as of that date. Mr. Justice Fitch in *Chapman v. Glenn*, 2013 BCSC 657, noted at para. 112 that Cromwell J. in *Kerr* appeared to approve *MacKinnon* on this point.
- [46] Upon receipt of the counter-claim the claimant was on notice that the respondent was advancing a claim for spousal support. He asserts that the respondent is not entitled to retroactive support because she failed to advance the claim. As noted earlier no steps were taken in this proceeding from 2010 to 2013. The respondent explained that she was involved

in the Provincial Court proceedings from 2012 to 2015, that she could only afford to pay a lawyer to conduct that proceeding, and that she was of the understanding that resolution of the parenting dispute should occur first. She also did not feel capable of pursuing the claim in this Court on her own. Given her extremely limited income I accept her inability to retain counsel earlier in this matter. As a result the respondent has provided an excuse for her delay in advancing her claim for retroactive spousal support. However, the length of the delay is of concern as it raises issues of unfairness as notwithstanding the claim and the interactions of the parties in Provincial Court the claimant has moved on with his life including purchasing a home and entering into a new relationship.

- [47] As to blameworthy conduct by the claimant there is no evidence of a failure to provide financial disclosure. However, given his knowledge of the respondent's income and her reliance on the assistance of her parents (who provided her with the use of the former matrimonial home after its purchase) he has privileged his own position over that of the respondent.
- [48] Finally with respect to hardship the resources of the claimant must be considered in fixing the amount of any order for retroactive spousal support. The financial statement of the claimant sworn in January 2016 reveals minimal financial assets (under \$10,000) unsecured debts of \$36,439 and a mortgage of \$141,227.56 registered against his home that has a 2014 BC Assessment value of \$217,000.
- [49] While I am satisfied that the respondent is entitled to both compensatory and non-compensatory support the length and quantum of that entitlement is affected by the history of the marriage, her efforts to be employed, the lack of any significant efforts to become self-supporting and her new relationship and child.
- [50] The assertion that the respondent is now enjoying a lifestyle better than the one enjoyed during the marriage cannot be assessed. Her new spouse earns an income similar to that of the claimant. While they have purchased a new and more expensive home than that of the claimant there is no evidence of the mortgage nor is there evidence of the new spouse's other debts except that his truck is encumbered. In addition the respondent has no financial assets and the only other asset disclosed is her 2008 Jeep Wrangler. Likewise there is no evidence respecting the earnings, assets and liabilities of the claimant's new spouse.
- [51] The Spousal Support Advisory Guidelines (the "Guidelines") indicate, assuming entitlement, the respondent's claim for spousal support given the nine-year relationship is to be determined for a period between 4.5 to 9 years from the date of separation. While the new relationship of the respondent does not disentitle her to spousal support it does affect its length and amount.

- [52] She has now been in a relationship for approximately three and a half years. They purchased their new home in anticipation of having children. By all accounts their relationship is long-term. They now have a child. She has voluntarily removed herself from the workforce while on maternity leave. The responsibilities for that child will likely also affect her ability to work.
- [53] As noted by Madam Justice Martinson in R.S.R. at para. 38 the formation of another relationship is "just a factor to be considered in determining an appropriate amount of support".
- [54] In addition while remarriage may not have much impact on compensatory support, it may have considerable impact on non-compensatory or needs-based support. If the parties are not married but in a long-term emotional and financial relationship the same principles apply: *Hutchen v. Hutchen*, 2014 BCSC 729 at paras. 61-62.
- [55] In *Kelly v. Kelly*, 2007 BCSC 227, Barrow J. noted that when addressing the issue of remarriage the burden is on the party claiming continued support after remarriage to show that there is a continuing basis for such support (para. 15). He stated:
- [49] Re-marriage does not compensate the receiving spouse for that which was foregone during an earlier marriage. To that extent and for that reason, its effect on spousal support may not be significant. Needs based support, however, rests on what McLachin J. termed the "basic social obligation model of marriage" (Bracklow, at para. 26). The social obligation of marriage has, as one of its central tenants, the notion that where a former spouse has a demonstrated need the "primary responsibility falls on the former spouse to provide for his or her ex-partner, rather than on the government" (Bracklow, at para 23). It follows in my view that when a spouse with a demonstrated need remarries, the social obligation model casts the burden of meeting that need on the new spouse. The burden does not shift in its entirety at the moment of remarriage but it begins to. The longer the subsequent marriage, the greater the obligation of the new spouse of the needs of his or her partner.
- [56] In *Kelly* the Court ordered further support to a specific date noting that by then the parties would have been in a marriage-like relationship for over five years and responsibility for the wife's ongoing need would properly be that of the new spouse.
- [57] I note that the claimant and the respondent have now been separated for almost eight years, which is close to the length of their relationship.
- [58] In my view the respondent has established entitlement to spousal support from October 1, 2010 to September 1, 2014. During those years she was either employed at minimum wage varying from part-time to full-time or on Employment Insurance. She ceased or reduced her employment in 2014 as a result of her pregnancy when medically advised to work part-time.
- [59] I am satisfied, taking into account the various considerations referred to, that the maintenance for the four year period noted will satisfy any compensatory claim of the respondent and address her needs based claim as well, particularly in light of her new

relationship and decision to start a new family, the latter affecting her ability to become self-sufficient. In deciding this I note in particular the fact that both parties were working throughout much of the marriage and sharing child care, that the career path of the respondent was not greatly interfered with by the marriage and that from 2006 the respondent remained home at the claimant's request. In setting this time period I take into account the length of the parties separation and the issue of hardship for the claimant given the issue of spousal support was not actively pursued for several years.

- [60] The Guidelines reveal that support over the four years noted would be approximately \$1000 per month if averaged out or the lump sum of \$48,000.
- [61] Any support payable after the respondent entered into her new relationship should, in my view, be a declining amount as her new spouse's responsibility for her increases.
- [62] In addition I must take into account the fact that a lump sum payment denies the claimant the benefit of deductible periodic payments and benefits the claimant with an after tax sum.
- [63] The claimant incurred his mortgage debt shortly after the parties separated and before the respondent advanced any claim for spousal support. At the time the claimant was under the impression they had resolved matters by way of the separation agreement. It is not clear when his other debts were incurred.
- [64] In all of the circumstances I conclude that a lump sum payment of \$30,000 by the claimant to the respondent is appropriate in satisfaction of her compensatory and non-compensatory spouse support claim. Given the length of her present relationship, the birth of their child and their apparent long-term relationship no ongoing spousal support is payable.

Summary

- [65] The application for a divorce order is adjourned pending receipt of the necessary clearance certificate.
- [66] The claimant's employment pension with Rio Tinto Alcan shall be divided at source for the period January 15, 2003 to May 12, 2008.
- [67] The claimant shall pay to the respondent lump sum spousal support of \$30,000.
- [68] The respondent's name shall be changed pursuant to the Name Act, R.S.B.C. 1996, c. 328, from N.V.D. to N.V.T.

Costs

- [69] The parties did not address the issue of costs. Subject to matters I am not aware of or further submissions from counsel, in my view the respondent has been substantially successful and is entitled to her costs at Scale B.

"Punnett J."

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Prepared on 25 October 2026 · Esheria