
CANADA / JUDGMENT

Delege v. Delete

2016 BCSC 630

COURT

Supreme Court of British Columbia

DECIDED

12 April 2016

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2016 BCSC 630 Delege v. Delege

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Delege v. Delege,

2016 BCSC 630

Date: 20160412

Docket: 17155

Registry: Smithers

Between:

Norma Joan Delege

Claimant

And

Henry John Delege

Respondent

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Claimant:

James J. Fitzmaurice

Counsel for the Respondent:

Gordon L. Crampton

Place and Date of Hearing:

Smithers, B.C.

March 7, 2016

Place and Date of Judgment:

Smithers, B.C.

April 12, 2016

- [1] These are matrimonial proceedings. The claimant seeks spousal support. The respondent's position is that all issues between them including spousal support have been settled.
- [2] The claimant disputes that a settlement has been reached. Her alternative position is that the agreement should be set aside under s. 93 of the Family Law Act, S.B.C. 2011, c. 25
- [3] The parties were married on March 23, 1979 and separated on January 10, 2015. The claimant works part-time as a healthcare worker. She is employed by Northern Health Authority in Houston. The respondent is the parts manager for Brandt Tractor Ltd. in Terrace.
- [4] In the fall of 2015, the parties' legal counsel began negotiating a settlement of the issues between them. There was a series of offers and counteroffers.
- [5] Counsel for the claimant presented an offer with two options. The second option provided as follows:

...your client will pay to my client \$1500.00 per month in support without revisiting the quantum of support for a period of 3 years, at which point, your client's obligation to pay will end. Support will be payable beginning November 1, 2015, and my client will not claim retroactive support. The RRSP held by Mr. Delege will be transferred, in its entirety, to my client. Mr. Delege will have the truck, boat, trailer, and the Airmiles, and will transfer the family home into my client's name for her own use absolutely. Mrs. Delege will keep her car, and assume the Manulife debt.

- [6] The respondent's counsel made a counteroffer as follows:

Our client generally accepts the approach used in Option #2, with the following changes:

- a) He will pay \$1,000 a month spousal support commencing November 1, 2015 for 3 years until October 1, 2018, with the option of paying out your client in full for the balance owing if he is able to arrange a loan. The lump sum amount would not be taxable to your client or tax-deductible by mine. There would be no discounting of the lump sum payment for tax that would be payable if the support were paid on a periodic basis.

- b) The CI Investments funds will be transferred to your client in full by spousal roll-over. We understand that the funds are characterized as a RRSP and this should be able to be done using a T2220, but the mechanics of that transfer and the costs will have to be determined. My client will cooperate for that to be done, but will not pay the costs of the transfer.
 - c) You did not mention it in your letter, but he will also roll-over the Royal Bank RRSP to your client using a T2220.
 - d) My client will waive his claim to a division of your client's employment pension and there will be no division of the parties' unadjusted pensionable earnings under the Canada Pension Plan Act, R.S.C. 1985 Chapter C-8, as amended. As his share of your client's pension is more than \$18,000, this more than makes up for the reduced periodic spousal support payment.
 - e) My client has contacted his brother in Houston and he will arrange for the removal of the truck, utility trailer and boat from the property. The motorhome is in storage off the property. He will receive these free and clear of any claims by your client. He will keep the Airmiles. Your client will keep her vehicle.
 - f) He will transfer his interest in the Houston property to your client on the condition that she assumes the Manulife Bank of Canada mortgage and he is fully released from it.
 - g) There will be a full and final release of all claims between the parties, except for enforcement of the terms of the settlement agreement, which will include spousal support, past, present and future, whether on a compensatory, non-compensatory or contractual basis, and whether or not there is a material change of circumstances.
 - h) Each party will bear their own costs in the family law case. Your client will pay the costs of the transfer of the Houston property. My client will provide a registrable EFS Form A transfer of his interest in the Houston property at his cost to your client on proof that he will be released from the Manulife Bank of Canada mortgage on registration of the transfer.
 - i) There will be a settlement agreement incorporating these terms, which will include your client's agreement to apply for a Divorce Order only in the family law case within 30 days of 10 January 2016. The documents filed to apply for the Divorce Order will include a Supreme Court Family Rule 1-1 Statement of Settlement.
 - j) Time is of the essence and the terms of settlement, other than for the application for a Divorce Order, must be completed within 60 days of acceptance or the settlement lapses.
- [7] The claimant's lawyer then made a revised offer:

...my client is generally agreeable to the counter proposal you have provided, subject to the following modifications:

1. Should your client wish to satisfy his spousal support obligations by way of a monthly payment, the appropriate amount will be \$1250 per month (this being the middle ground between our clients respective positions regarding quantum);
2. Should your client instead wish to dispose of his spousal support obligation by way of a lump sum payment in lieu of monthly support payments (which will be characterized as an allocation of family assets either in an order or in an agreement), the amount payable will be calculated at the rate of \$1000.00 per month for the 3 year period, or \$36,000.00.
3. Your client will retain the 2nd payment of the IWA pension for his own use absolutely, free from any claim by my client.

All other terms set out in your counter-offer would remain the same. Would you prefer to deal with this by way of agreement or consent order?

[8] The respondent's counsel then responded to that proposal:

3. Your email of November 20 accepts our counter-offer of November 13, with the following highlighted changes. Our client has also altered his proposal for the vehicles slightly and we have countered on the credit for periodic payments and those are highlighted as well. This is our response to your November 20 email:
 - a) Our client will pay \$1,250 a month spousal support commencing November 1, 2015 for 3 years until October 1, 2018, with the option of satisfying his spousal support obligation by paying a lump sum amount of \$36,000, if he is able to arrange a loan, less a credit towards the lump sum payment of \$1,125 a month for payments made by him (even though he will pay \$1,250 a month on a periodic basis). The lump sum amount would not be taxable to your client or tax-deductible by mine. There would be no discounting of the lump sum payment for tax that would be payable if the support were paid on a periodic basis. You wish to characterise this lump sum payment as an allocation of family assets, rather than lump sum support. We know of no reason to do that. These payments, whether periodic or lump sum, are made in full and final satisfaction of your client's claim for spousal support, as indicated in your letter of November 9, so the agreement or court order should state that.
 - b) The CI Investments funds will be transferred to your client in full by spousal roll-over. We understand that the funds are characterised as a RRSP and this should be able to be done using a T2220, but the mechanics of that transfer and the costs will have to be determined. My client will cooperate for that to be done, but will not pay the costs of the transfer. You have agreed that our client can keep the Second Payment expected to be \$14,717.11 on August 22, 2017, as set out in the November 9 letter.
 - c) You did not mention it in your letter, but he will also roll-over the Royal Bank RRSP to your client using a T2220.

- d) My client will waive his claim to a division of your client's employment pension and there will be no division of the parties' unadjusted pensionable earnings under the Canada Pension Plan Act, R.S.C. 1985 Chapter C-8, as amended. As his share of your client's pension is more than \$18,000, this more than makes up for the reduced periodic spousal support payment.
- e) My client has contacted his brother in Houston and he will arrange for the removal of the truck and utility trailer from the property. He wishes to leave the boat and the golf cart (the latter of which was missed in our earlier correspondence) at the property until April 1, 2016, when they will be removed. He is going to try to sell them before that, but if they are not sold, they will be removed by April 1, 2016. The motorhome is in storage off the property. He will receive these free and clear of any claims by your client. He will keep the Airmiles. Your client will keep her vehicle.
- f) He will transfer his interest in the Houston property to your client on the condition that she assumes the Manulife Bank of Canada mortgage and he is fully released from it.
- g) There will be a full and final release of all claims between the parties, except for enforcement of the terms of the settlement agreement, which will include spousal support, past, present and future, whether on a compensatory, non-compensatory or contractual basis, and whether or not there is a material change of circumstances.
- h) Each party will bear their own costs in the family law case. Your client will pay the costs of the transfer of the Houston property. My client will provide a registrable EFS Form A transfer of his interest in the Houston property at his cost to your client on proof that he will be released from the Manulife Bank of Canada mortgage on registration of the transfer.
- i) There will be a settlement agreement incorporating these terms, which will include your client's agreement to apply for a Divorce Order only in the family law case within 30 days of 10 January 2016. The documents filed to apply for the Divorce Order will include a Supreme Court Family Rule 1-1 Statement of Settlement.
- j) Time is of the essence and the terms of settlement, other than for the application for a Divorce Order, must be completed within 60 days of acceptance or the settlement lapses.
- [9] On November 27, 2015, the parties' lawyers had a telephone conversation. The claimant's counsel accepted the revised counteroffer.
- [10] I am satisfied that the parties reached an agreement. All that needed to be done was to prepare documents for signature. All terms had been agreed to.
- [11] In the claimant's affidavit of February 10, 2016, she deposes as follows about the agreement that was reached:

15. In response to Henry's application to have the draft Agreement declared binding, I say that at no time did I fully, finally, or formally agree to the terms set out therein. I believed then, and still believe, that the Agreement was or is final once both Henry and I had signed off on it.
16. By November of 2015 I was getting financially desperate. Henry had refused to provide any support, and left me solely responsible for servicing our debts. I had to obtain a line of credit and borrow money from family, and I still wasn't able to make ends meet. In the meantime, Henry was insistent that I be solely responsible for liquidating the minimal amount of family assets that we had at the time.
17. We had made various proposals to settle the matter and Henry had made counter proposals. I proposed that I would take a lesser amount of spousal support for a short period of time, if Henry's CI Investments account were transferred over to me in its entirety. I knew that there would probably be tax consequences if I withdrew money from this account, but I couldn't see any other way to get the lump sum of money that would be required to pay off our existing mortgage to the point that I could remove Henry from title and refinance. I knew that I would need about \$150-160,000.00 to do so. The existing mortgage is at about \$180,000.00, and I believe the house to be worth approximately \$150-160,000.00.
18. I asked my lawyer to have a draft agreement drawn up, as any bank would need at least a draft of an agreement to be able to determine whether or not it would be possible to refinance.
19. After investigating possibilities with other banks, I ended up trying to refinance through Scotiabank in Smithers. This process took a while, and it wasn't until December of 2015 that I learned that it wasn't going to be possible to refinance the former family home and remove Henry from title.
20. As I learned in December of 2015, the CI Investments account is in fact a Locked-In Retirement Account, and while it may be transferred to me in its entirety, it is extremely restrictive insofar as withdrawing funds is concerned.
21. My banker at the Scotiabank, Kim Lloyd, advised that the most I would be likely to withdraw from the CI Investments account, once transferred to me, would be approximately \$5000.00, much less than I would need to remove Henry from title to the former family home.
22. Ultimately, If I signed the draft settlement agreement, I would have immediately been unable to comply with the terms of the agreement in that I would have been unable to have Henry released from the liability of the mortgage in any reasonable period of time, or at all. I would have likely been forced to sell the home, and there would have been a substantial shortfall, which, according to the draft agreement, would have been my responsibility alone. There would be no way for me to pay for the shortfall in the mortgage.

23. It is true that under the draft agreement I would have received the CI Investments account, and that this account has a value of approximately \$140,000.00. A[t] the time, I believed this asset to be worth more, but I am now told that it has devalued due to market conditions. In any event, this is not a 'liquid' asset by any stretch of the imagination, and is meant to be paid out until I am in my nineties.
24. It is also true that under the draft agreement, I would be assuming all of the family debt, and very few of the family assets. I would have also been agreeing to an amount of spousal support much less than what I am told I am entitled to, and for a much shorter period of time than what I am told I am entitled to.
25. Because of the nature of the CI Investments account, the draft agreement is simply unfair. I didn't understand exactly how unfair it was until after I learned more about the CI Investments account, well after the agreement was drafted.

[12] Section 93 of the Family Law Act provides:

93 (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

- (2) For the purposes of subsection (1), the same person may witness each signature.
- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
 - (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
 - (a) the length of time that has passed since the agreement was made;

- (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.
- (6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.
- [13] Section 93(1) requires that an agreement be witnessed as a prerequisite to the operation of the section. While this agreement was reduced to writing in draft form, it has not been reduced to a formal document and, of course, has been neither signed nor witnessed.
- [14] A policy of the Family Law Act is the encouragement of settlement. Section 4(b) states that a purpose of the Family Law Act is "to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court". From this overall objective, it follows that a liberal and purposeful interpretation of s.93 is warranted.
- [15] Section 93(6) permits the court to apply this section to an unwitnessed agreement if the court is satisfied that it would be "appropriate".
- [16] This is an appropriate case. The respondent is seeking to enforce an agreement that has not been reduced to a formal document. Because I have held that the agreement is otherwise enforceable, there is no reason in principle not to provide the claimant with the benefit of s. 93.
- [17] Applying s.93 to this agreement fits with the Family Law Act's aim of encouraging out of court settlements. Section 93 allows parties to be reassured that a court can set aside or replace an agreement respecting property division if the circumstances described in this section apply. This, in turn, encourages settlement.
- [18] The claimant did not understand that a binding agreement had been entered into. Her uncontradicted evidence is that she thought that the agreement was a draft that could be used for seeking refinancing. She believed that there would be no binding agreement until it had been formally signed by the parties.
- [19] The language of s.93(3)(c) specifically contemplates a situation where "a spouse did not understand the nature or consequences of the agreement". It is the understanding of the spouse that is of importance. The claimant did not understand that a binding agreement had been entered into by her lawyer. In addition, she did not understand the restriction on accessing the funds in the CI Investments account.
- [20] I am satisfied that the claimant did not "understand the nature or consequences of the agreement" within the meaning of s. 93(3)(c).

- [21] If this agreement had not been reached under the Family Law Act, there is little doubt that the agreement would bind Ms. Delege. Mr. Fitzmaurice had actual or apparent authority to bind his client. Any misunderstanding between the claimant and her lawyer about the nature of what he was negotiating would not affect the validity of the agreement reached by Mr. Crampton and Mr. Fitzmaurice.
- [22] The respondent submits that this misunderstanding should not affect his right to enforce a binding agreement.
- [23] Ms. Delege believed there was an agreement in principle. That enabled her, in her belief, to determine whether financing could be obtained. It could not.
- [24] This is not the fault of the respondent. But the effect of section 93(3)(c) is that an agreement is subject to being set aside if one of the parties does not understand the nature or consequences of it.
- [25] Section 93(3) is permissive. It empowers, but does not require the court to set aside all or part of an agreement or to replace it with an Order.
- [26] Here, the claimant, for the reasons she explains in her affidavit, would be unable to comply with the agreement as negotiated. This, then, is an appropriate case for the exercise of the court's discretion.
- [27] The claimant argues that the agreement should be set aside under s.93 because it is significantly unfair. Under the terms of the agreement, the claimant assumes all liability associated with the former family home and releases the respondent from this debt. The parties agree that the former family home is worth less than the mortgage. In order to comply with the terms of the agreement she would have to sell or refinance the home. The claimant has been told that the CI Investments will not allow her to refinance.
- [28] Under the terms of the agreement, the claimant has waived much of her entitlement to spousal support. Although the claimant would benefit from the CI Investments over time, it is of no assistance in refinancing. There was no evidence presented by either party to suggest another way the claimant might be able to refinance her mortgage. Without refinancing, the claimant is unable to remove her husband from title. She may be forced to sell the former family home.
- [29] The respondents canvassed case law decided under s. 93 of the Family Law Act. In *H.J.S. v. K.C.S.*, 2013 BCSC 998, Justice Barrow notes:
- [45] There are, therefore, two issues. The first is whether the evidence establishes "circumstances of oppression, pressure, or other vulnerabilities". If not, and if there is no other basis for setting aside the agreement, then generally the agreement will stand. I say generally, because at least under the Family Law Act, and specifically s. 93(5), the court may set aside an agreement, even if there are no legally vitiating circumstances surrounding its formation. It may do that if, in its operation, it is found to be "significantly" unfair.

- [30] It is at least arguable that the operation of the agreement would fit this criterion of significant unfairness. Retention of the former family home appears to have been a strong motivation for the claimant entering into the agreement and accepting limited spousal support. Operation of the agreement would, in essence, deprive her of one of the primary benefits she sought during formation of the agreement. However, as I am setting aside the agreement under s. 93(3)(c), any potential 'significant' unfairness is of little consequence.
- [31] The agreement contains many terms. As can be seen from the evidence of negotiations, it represents a significant amount of give and take. In these circumstances, both parties should have the ability to renegotiate new terms that are mutually acceptable.
- [32] For these reasons, and pursuant to Section 93(3), the agreement is set aside. The parties should renew their efforts at resolving the issues. If they are not successful, the claimant may proceed with her application for spousal support.
- [33] I am not seized of this matter.
- [34] Costs will be in the cause.
- "The Honourable Mr. Justice Kelleher"

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