

CANADA / JUDGMENT

Derksen v. Derksen

2002 BCSC 1049**COURT**

Supreme Court of British Columbia

DECIDED

25 July 2002

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Source record**2002BCSC1049****Citation:** Derksen v. Derksen**Date:** 20020725
2002 BCSC 1049**Docket:** E1147
Registry: Chilliwack
IN THE SUPREME COURT OF BRITISH COLUMBIA**BETWEEN:** BARBARA ANNE DERKSEN
PLAINTIFF**AND:** WALTER MURRAY DERKSEN
DEFENDANT**REASONS FOR JUDGMENT****OF THE****HONOURABLE MR. JUSTICE RALPH**

Counsel for the plaintiff

Gordon N. Beebe

Counsel for the defendant

J. Gareth Morley

Date and Place of Hearing/Trial:

June 21, 2002

Chilliwack, BC

- [1] Mr. and Ms. Derksen were married in 1988 and separated in 1997. They are the parents of three children who are now aged 12, 9 and 6. On February 26, 2001, the parties were divorced. At that time all other claims were adjourned generally. Those claims are the subject of this application.
- [2] The parties have now been separated for 5 years. Ms. Derksen is 35 years of age; Mr. Derksen is 38. The children's primary residence is with Ms. Derksen and they reside in the former matrimonial home in Yarrow. Mr. Derksen has remarried and resides in New Westminster. He has regular and substantial access to the children.
- [3] On January 31, 2000, Master Joyce (as he then was) made a number of interim orders. The parties consented to an order that Ms. Derksen would have interim custody of the children and Mr. Derksen would have reasonable and generous access. Orders were also made concerning child support and interim use of the former matrimonial home. Mr. Derksen was ordered to pay interim spousal support of \$200 per month.
- [4] The issues raised in this application are:
1. whether the parties should be joint guardians of the children;
 2. settling the terms of Mr. Derksen's access to the children;
 3. a determination of Mr. Derksen's income for Child Support Guideline purposes;
 4. the division of family assets - essentially whether there should be a reapportionment of the former matrimonial home; and
 5. whether Mr. Derksen should be required to pay spousal support.
- [5] Mr. Derksen does not oppose an order granting custody of the children to Ms. Derksen. He does, however, seek joint guardianship. Mr. Derksen has maintained frequent and regular access to the children. Ms. Derksen has expressed concern that there have been communication problems between her and Mr. Derksen. On the evidence before me, however, I am satisfied that it is in the best interests of the children that Mr. Derksen have the opportunity to receive information about the children and to be involved in significant decisions that might affect their lives. Ms. Derksen will continue to have custody of the children but the parties will have joint guardianship of the children. The terms of the joint guardianship will be in the form known as a "Master Joyce order".
- [6] For the most part the parties have worked out arrangements to provide for Mr. Derksen's access to the children. They agree that Mr. Derksen will have reasonable and generous access to the children including access every other weekend from 7:00 p.m. on Friday to 7:00 p.m. on Sunday. They also agree that the children will be with Mr. Derksen for three weeks each summer on dates to be agreed to between the parties. They also agree that the children will be with Mr. Derksen for one week during the Christmas vacation and for a further

period during the school spring break at times to be agreed to between the parties. There will therefore be access orders in these terms. In addition there will be such additional access or variations of the above-described access as the parties may agree upon from time to time.

- [7] Mr. Derksen also seeks an order that on the alternating weekends when he has access Ms. Derksen be required to drive the children either to or from Mr. Derksen's residence. Part of Mr. Derksen's concern is that his obligation to pick up the children on Fridays results in the loss of his opportunity to obtain additional afternoon shift work as a bus driver.
- [8] Ms. Derksen, however, has recently increased her part time employment and it frequently requires her to work on Friday afternoons and evenings. In addition she says that there has been a long-standing arrangement where Mr. Derksen does the driving of the children both ways on the weekends when the children are with him.
- [9] Ms. Derksen has agreed, however, that she will drive the children to Mr. Derksen's residence on those Friday evenings when she is not required to work. There will be an order to that effect.
- [10] Mr. Derksen deposes that his anticipated income in 2002 is \$48,000. Mr. Derksen is employed full time as a bus driver. His total income in 2001 was \$36,335, a lower than usual amount caused by a strike during the year. His total income in 2000 was \$49,619 and in 1999 it was \$45,790. Ms. Derksen submits that Mr. Derksen has the potential to earn overtime indirectly through the trading of shifts with other drivers. Mr. Derksen says that such a practise has been ended by his employer and the potential is no longer there. I find Mr. Derksen's income for Guideline purposes is \$48,000 and that he must pay child support based upon this amount.
- [11] Ms. Derksen also seeks an order that Mr. Derksen pay to Ms. Derksen an additional amount of child support based on undue hardship by the plaintiff. The basis for Ms. Dersken's application for such an order appears to have been based upon the fact that Mr. Derksen has remarried and his wife is employed. This additional order was not actively pursued and I do not find a sufficient evidentiary basis to make such an order.
- [12] Mr. Derksen consents to an order that he maintain the children on his medical, dental and extended health policies available to him through his employment. He also consents to an order that he pay the proportionate share of any extraordinary expense for the children that is reasonable and necessary upon receipts for such expenses being provided by Ms. Derksen.
- [13] Turning to the division of family assets, Mr. Derksen consents to an order that his pension plan with the B. C. Government Superannuation Plan be divided pursuant to Part 6 of the Family Relations Act from the time of the marriage to the date of the divorce.

- [14] The former matrimonial home in Yarrow was purchased in October 1992. The parties had purchased and lived in two previous homes which they repaired and renovated and then sold. The assessed value of the home is \$173,500. The balance of the mortgage owing on the property is approximately \$105,300. Ms. Derksen seeks a reapportionment of this asset and says that it should be divided 70% in her favour.
- [15] Ms. Derksen also holds in her name a term deposit of approximately \$3,300 and a registered retirement savings plan of approximately \$3,195. Both are family assets.
- [16] In examining Ms. Derksen's claim to reapportionment, there are a number of factors to consider. Before the marriage Ms. Derksen graduated from high school and then worked as a cashier. That employment continued after the marriage. Following the birth of the parties' first child, Ms. Derksen primarily remained at home as a homemaker and undertook very little paid work outside the home. This arrangement continued after the separation of the parties until recently when Ms. Derksen has undertaken some part time work outside the home. She is employed part time in a shop selling chocolates and also does some part time house cleaning. At the present time Ms. Derksen's monthly net income is \$800-\$900.
- [17] It is Ms. Derksen's plan to pursue training as a medical office assistant. The training consists of a 14-week course at University College of the Fraser Valley and begins in January 2003. Before taking the course Ms. Derksen may be required to take a course in computer skills. As she has not yet taken the entrance exam for the medical office assistant program, the need for the computer skills course has not been finally determined. The cost of the two programs is \$2,800.
- [18] Section 65 of the Family Relations Act provides for judicial reapportionment of family assets where an equal division would be unfair having regard to the factors set out in that section. The parties separated after 9 years of marriage and have been separated approximately 5 years. Their youngest child turned 6 years old in May 2002 and will enter grade one in September. As noted above, the family home was purchased in 1992 and Ms. Derksen and the children continue to reside there.
- [19] Mr. Derksen remained employed throughout the marriage and continues in that employment today. While he is not a wealthy man, Mr. Derksen is employed and economically self-sufficient. During the course of most of the marriage, however, Ms. Derksen was out of the workforce and had substantial responsibility for the care of the children. While it has been argued that Ms. Derksen has been separated from her husband for almost five years and could have taken some steps to upgrade her education and skills, I note that the youngest child of the marriage has only recently turned 6. In my view it can be said that, as a result of the roles each of them carried out in the course of the marriage, Ms. Derksen suffered a disadvantage in not becoming economically independent and self-sufficient. This disadvantage has been recognized as a capital loss in *Lodge v. Lodge* (1993), 48 R.F.L. (3d) 365 (B.C.C.A.).

- [20] I have concluded that, having regard to the relative degrees of economic independence and self-sufficiency of Mr. and Ms. Derksen and the extent to which that difference is attributable to their marriage, an equal division of the family assets would be unfair.
- [21] It is Ms. Derksen's hope that, with the assistance of some members of her family, she may be able to remain in the family home. Whether she can achieve that goal is not certain. Counsel for Ms. Derksen has said the goal can likely be achieved if the division of the matrimonial home was reapportioned 70/30 in favour of Ms. Derksen. Despite that goal, it is my view that a fair division of the family home is 65/35 in favour of Ms. Derksen and there will be an order that the matrimonial home be divided in that ratio. I find the value of the home to be \$173,500. This division creates a capital adjustment of approximately \$20,000 in Ms. Derksen's favour.
- [22] The RRSP and the term deposit will be divided such that one spouse receives the RRSP and the other the term deposit. If the parties cannot agree on who should receive which asset, Mr. Derksen will have the right to possession of the term deposit and Ms. Derksen to the RRSP.
- [23] Ms. Derksen will be granted 60 days or such additional time as the parties may agree upon to purchase Mr. Derksen's interest in the family home and remove him from liability for the mortgage. In the event that Ms. Derksen is unable to arrange the purchase, the property must be listed for sale and the proceeds of sale divided between the parties in the proportions of 65/35 in favour of Ms. Derksen. The parties may apply to the court for further directions concerning the conduct of the sale if necessary.
- [24] There remains the issue of whether spousal support for Ms. Derksen should continue. Having regard to the needs of Ms. Derksen and the fact that she currently holds only part time employment I am satisfied that spousal support should continue. The reapportionment of the family home in her favour does not, in my view, require Ms. Derksen to deplete that capital as a means of meeting her ongoing living expenses. Her continuing responsibilities for the care of the children have an impact on her capacity to fully support herself.
- [25] I recognize that Mr. Derksen continues to pay spousal support 5 years after the parties separated and that Ms. Derksen is a relatively young person. I am satisfied, however, that Ms. Derksen requires further time to become self-sufficient. Having regard to her plan for vocational training described above, Ms. Derksen will be entitled to spousal support in the amount of \$200 per month. This should further enable her to undertake her vocational plan. It is reasonable at this time to think that Ms. Derksen can become self-sufficient in 18 months. For that reason her continuing entitlement to spousal support must be reviewed in 18 months.

[26] As success on the application was divided and because an award of costs might alter the balancing of support and division assets it is my view that the parties should bear their own costs. As counsel did not speak to the issue, however, written submissions may be made if necessary.

"Bryan F. Ralph, J."

The Honourable Mr. Justice Bryan F. Ralph

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