

CANADA / JUDGMENT

Dobie v. Rautenberg

2008 BCSC 826

COURT

Supreme Court of British Columbia

DECIDED

26 June 2008

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2008 BCSC 826 Dobie v. Rautenberg

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dobie v. Rautenberg,

2008 BCSC 826

Date: 20080626

Docket: ED 50066

Registry: Nanaimo

Between:

SHANAHAN DOBIE

PLAINTIFF

And

DEIDRE MAE RAUTENBERG

DEFENDANT

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Plaintiff

S. McPhee

Counsel for Defendant

J.A. Anthony

Dates and Place of Hearing:

June 10 & 11, 2008

Nanaimo, B.C.

- [1] The plaintiff and defendant were divorced in 2007 after a 13-year marriage, during which they had two children. Prior to the divorce, they negotiated a separation agreement that the defendant wife now says is unfair. This is an application for interim spousal support pending the trial of her action to set aside or vary the separation agreement.
- [2] The parties separated in June 2006. The separation agreement at issue is dated March 23, 2007. The defendant alleges the plaintiff did not disclose the full amount of his income and says that, even on the basis of the income that was disclosed, the agreement calls for spousal support far below what she would be entitled to receive under the Spousal Support Advisory Guidelines: A Draft Proposal, (Ottawa: Dept. of Justice, 2005). She says she negotiated and signed the agreement without legal advice.
- [3] For purposes of this application, the relevant provisions of the separation agreement are:
- The plaintiff's annual income is stated as \$128,000, while the defendant's is stated as \$3,300.
 - The defendant has custody of the children and the plaintiff is to pay child support of \$1,794 a month - the amount required by the Federal Child Support Guidelines, S.O.R./97-175, based on his stated income.
 - The plaintiff is to pay spousal support of \$1,700 a month for five years. At the end of that period, the amount and duration of spousal support is to be reviewed, with a possible extension for a maximum of seven more years.
 - Net proceeds from the sale of the family home were divided unequally with the defendant receiving \$45,000 and the plaintiff receiving \$15,000. The plaintiff assumed debt worth \$37,250 while the defendant assumed debt worth \$11,250.
- [4] On February 15, 2008, the parties consented to an order setting the plaintiff's Guidelines income at \$140,000 and retroactively increasing child support to \$1,940 a month. The defendant relies on the plaintiff's consent to that order as an admission that he did not fully disclose his income at the time of the separation agreement. She also relies on the fact that, after the separation agreement was signed, the Canada Revenue Agency apparently re-assessed the plaintiff's 2006 income at \$151,500. The plaintiff says this was the result of certain one-time payments and does not reflect his ongoing income.
- [5] The defendant says that if the plaintiff's income is \$140,000 a year, the minimum amount she should be receiving pursuant to the Spousal Support Advisory Guidelines is \$2,667 and even the \$128,000 income declared in the separation agreement should result in minimum spousal support under the guidelines of \$2,289. She says that when she signed the agreement, "I simply did not realize how much I was entitled to in terms of spousal support."

- [6] The parties began negotiations leading to the separation agreement in August of 2006. At or shortly before the time those negotiations began, the defendant saw a lawyer on one occasion and received some general advice, but did not retain the lawyer. The defendant's affidavits do not explain why, having received initial advice, she did not to retain that lawyer to act for her in negotiating the separation agreement.
- [7] When the separation agreement was concluded, the defendant signed it in the presence of another lawyer, who made clear at the time he was only witnessing her signature, not giving advice. The certificate of independent legal advice attached to the draft agreement was never signed. Again, there is no evidence from the defendant about whether she asked for legal advice at that stage and, if so, why she did not go elsewhere when one lawyer was not in a position to provide it.
- [8] In order to set aside the separation agreement at trial, the defendant will have to prove either:
- (a) There was a fundamental flaw in the negotiating process, such as one party taking advantage of the other's vulnerability or unequal bargaining power; or
 - (b) The provisions of the agreement are not in compliance with the principles of the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.), either at the time of the agreement or because of changed circumstances at the time of trial: *Miglin v. Miglin*, 2003 SCC 24.
- [9] On the first issue, the fact the defendant signed the agreement without legal advice will not, in and of itself, prove the agreement was unfair. Legal advice may be necessary to overcome one party's vulnerability, but the existence of that vulnerability must be proved. Bastarache and Arbour J.J. for the majority of the Supreme Court of Canada said in *Miglin* (at para. 83):

Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere.

[emphasis added.]

- [10] On the second issue, lack of compliance with the Spousal Support Advisory Guidelines will not necessarily be a sufficient basis for setting aside the agreement. The court made clear in *Miglin* that a "mutually acceptable agreement negotiated by the parties will not necessarily mirror the spousal support that a judge would have awarded" (at para. 66). In *Yemchuk v. Yemchuk*, 2005 BCCA 406, the Court of Appeal said the Spousal Support Advisory Guidelines are not intended to deal with situations where there has been a prior agreement between the parties dealing with spousal support (at para. 63).

- [11] Neither of the above issues can be determined on this application. I expect the trial judge will have more evidence than is before me and I will not comment on the strength or weakness of the defendant's case. This application is for interim spousal support, which can only be based on the current needs of the applicant and the current means of the respondent: See *Fogal v. Fogal* 2006 BCSC 1104, and the cases cited therein.
- [12] Applications for interim spousal support usually arise in situations where the applicant (most commonly, but not always, the wife) is receiving no money from the other party and there are issues about her entitlement to spousal support. That is not the case here. The plaintiff concedes that the defendant is entitled to spousal support and he is paying it in accordance with the agreement.
- [13] The defendant is receiving spousal support of \$1,700 a month, as provided for in the agreement, along with a further \$1,940 in child support. In an affidavit dated March 31, 2008, the defendant also said that she was about to start a part-time job. I am advised by counsel that she did in fact start that job, but there is no evidence of her earnings and therefore no evidence of her total household income.
- [14] Counsel for the defendant argues that there is clearly a large disparity in the standard of living of the parties. The reduction of such disparities that result as a consequence of the marriage or its breakdown is one of the goals of spousal support set out in s. 15.2(6) of the Divorce Act. The defendant relies on *Yemchuk*, where the Court of Appeal gave particular weight to that consideration. However, the court in *Yemchuk* was dealing with a decision made on summary trial, not an interim order. It will be for the trial judge in this case to fully consider all the evidence of the circumstances of these parties in relation to the considerations set out in the Act.
- [15] I agree with counsel for the plaintiff that the defendant has not provided sufficient evidence of her current circumstances and needs to permit the court to determine if an interim order for additional spousal support is required. Counsel advise that a trial date may be available as early as the fall of this year. If the agreement is set aside at trial and increased spousal support ordered, it will be open to the trial judge to make any such increase retroactive.
- [16] The defendant's application for interim spousal support is therefore dismissed.

"N. Smith J."

The Honourable Mr. Justice N. Smith J.

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