
CANADA / JUDGMENT

Dobson v. Dobson

2017 BCCA 390

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 390 Dobson v. Dobson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dobson v. Dobson,

2017 BCCA 390

Date: 201711101

Docket: CA44043

Between:

Malgorzata Dobson

also known as Margaret Dobson

Appellant

(Claimant)

And

Simon Richard Meikle Dobson

Respondent

(Respondent)

Corrected Judgment: The front cover was corrected on November 27, 2017.

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Savage

On appeal from: October 13, 2016 (Dobson v. Dobson, 2016 BCSC 1874, Vancouver Registry No. E064287)

Oral Reasons for Judgment

Counsel for the Appellant:

M.R. Slay

K. Simington

Counsel for the Respondent:

J.L. Straith

Place and Date of Hearing:

Vancouver, British Columbia

October 30, 2017

Place and Date of Judgment:

Vancouver, British Columbia

November 1, 2017

Summary:

Trial judge did not err in ordering a compensation payment from wife to husband in order to give effect to marriage agreement that called for family home to become wife's sole property; nor in declining to order spousal support to wife, in case where both were doctors and wife's financial position was equal to or superior to that of husband.

- [1] NEWBURY J.A.: Since each of the parties is a medical doctor, I will refer in these reasons to Dr. Margaret Dobson as "Ms. Dobson" and to Dr. Simon Dobson as "Mr. Dobson".
- [2] Ms. Dobson appeals a final order of Madam Justice Griffin in this family matter, which was heard over 13 days of trial, followed by further submissions in writing. The first day of trial was October 5, 2015; last submissions were received on September 1, 2016; and reasons for judgment were issued on October 13, 2016.
- [3] The overarching issue at trial was the validity and effect of a Marriage Agreement entered into by the parties in 1997, 19 years into their marriage. The trial judge found that Ms. Dobson had insisted on the Agreement after Mr. Dobson had assaulted her. Without the Agreement, she would have left the marriage. Mr. Dobson signed it against independent legal advice he obtained. The Agreement was unusual. It called for the wife to become sole owner of the parties' home in West Vancouver and contemplated that if and when the parties separated, the division of their assets would be carried out without regard to the

wife's ownership of the house and her shares in her professional corporation ("MDI"), and indeed on the basis those assets did not exist. (At paras. 119-20.)

- [4] Griffin J. considered all the evidence at length and made adverse findings of credibility against Ms. Dobson for reasons discussed at paras. 24-30 of her reasons. At para. 30, she stated:

I have chosen not to detail each dispute or bare allegation in the evidence. When it came to a contest in the evidence, I preferred the respondent's evidence over that of the claimant. Frequently the claimant's evidence was inconsistent with the documentary evidence. When self-serving assertions were made by the claimant without corroborating evidence, I was unable to give them much or at times any weight due to my observation that the claimant had a tendency to exaggerate and to distort the facts.

- [5] At the time the marriage agreement was entered into, the family home was valued at \$763,000 for property tax purposes and had a mortgage against it of approximately \$180,000, yielding net equity of some \$583,000. The judge accepted Mr. Dobson's evidence, which the judge said was "not seriously challenged", that he had contributed more of his income towards this asset than had Ms. Dobson. (At para. 134.). The judge also found that following his execution of the Agreement and the transfer of his share thereof to Ms. Dobson, Mr. Dobson continued to pay the mortgage payments on the house until the mortgage was paid off in late 2003. (At para. 172.).
- [6] Mr. Slay, on behalf of the wife, objected that this finding was incorrect, because in para. 171, the trial judge stated that Mr. Dobson deposited all of his income from time to time into the parties' joint account, and that the mortgage payments were made from that account. Counsel could not, however, tell us approximately how much Ms. Dobson had put into the account over the relevant period. Consequently, I am not persuaded that the judge erred in reaching the conclusions she did at paras. 171-173 of her reasons. She calculated the amount Mr. Dobson had contributed to the mortgage between the marriage agreement and the date of separation at approximately \$237,000.
- [7] Once the mortgage had been paid out, Ms. Dobson decided it would be a good investment to buy a commercial property to be the "base" for her medical practice. For this purpose, she incorporated a second company ("HPHC"), which acquired a commercial strata unit in North Vancouver and charged rent to MDI for its use of the space. The purchase of the property was financed in part by \$40,000 from the parties' joint bank account and a mortgage loan secured by a mortgage on the family home. The judge disbelieved Ms. Dobson's contention that the \$40,000 was money her mother had given in cash to Mr. Dobson, who then put it in his bank account and transferred it from there into the joint bank account. (See paras. 236-8.) Once the family home had been mortgaged again, the trial judge found that:

the mortgage payments initially were paid out of the joint account as they had been before. The [husband's] income was the main source of money in the joint account during this period and funded these mortgage payments from January to July 2004 at \$2084 per month for a total of \$14,588.

After that the mortgage payments were directed to an account that the claimant [wife] funded. The entire purchase price of the HPHC property was some \$562,000. [Paras. 239-40]

- [8] Griffin J. found that the property owned by HPHC would be a family asset if owned directly by the wife and thus held that the HPHC shares were a family asset in light of Mr. Dobson's "substantial contribution to the acquisition of the property" held by HPHC.
- [9] HPHC's balance sheet as of December 31, 2006 showed that the value of the shareholder loan owing to Ms. Dobson was some \$409,000. By December 31, 2014, this had grown to some \$667,000, plus a shareholder's loan of \$20,597 due to MDI by HPHC.
- [10] The judge set out at length the relevant circumstances of the parties' marriage and separation, details of acquisition and value of the family assets and other assets held personally, and examined the purpose and circumstances of various debts secured on their assets. At paras. 255-9, she found that:
 - [255] It appears as though all or the majority of the loans taken on the family home are treated for accounting purposes by the claimant as loans from the claimant to HPHC, and due from HPHC to her. However, the claimant has agreed that some of the lines of credit were to pay for her legal expenses in this proceeding and her living expenses. She did not identify how much in this regard, but her revenues within MDI have been over \$300,000 in recent years and so it is difficult to see how it is that loans were needed to finance the practice or the property.
 - [256] In my view it is fair to assume that at a maximum the loans related to HPHC would be that shown on the December 31, 2014 balance sheet. This is an approach which favours the claimant because it gives her the benefit of the doubt even though she has not clearly identified which loans relate to personal living expenses including legal fees in relation to this proceeding.
 - [257] In my view the claimant's argument that she has paid all the expenses on HPHC does not go far, given that the financial statements take account of amounts due to the shareholder.
 - [258] The evidence is less than ideal but in my view a conservative approach to valuing HPHC would be to consider that MDI will continue to occupy the property, and to take the value of \$1.1 million for the property less the amount shown on the financial statement as due to shareholder as of the end of December 2014 of \$667,185 for a net value of \$432,185. I have not considered amounts due to MDI in either MDI or HPHC, as basically it is an accounting wash.

[259] The remainder of the claimant's debt can be considered personal debt which she has secured with the family home. The evidence was difficult to sort in this regard but a fair estimate would be that she incurred personal debt, in the range of another approximate \$100,000, on top of the debt incurred for HPHC taken into account in valuing HPHC.

[11] Returning to the Marriage Agreement, the Court noted the "conundrum" created by its language and its inter-relationship with s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"):

The Marriage Agreement prohibits consideration of the family home and MDI, as sole assets of the claimant, in determining appropriate division of property; yet, s. 65 of the FRA requires consideration of these things in order to determine whether division under the agreement would be unfair. I pause to reiterate that the respondent does not contest the enforceability of the Marriage Agreement, but seeks reapportionment on the basis of unfairness pursuant to s. 65. [At para. 306.]

[12] At para. 307, the trial judge formulated two "fairness questions" which had to be answered, namely whether it would be unfair to apply the terms of the Marriage Agreement and ignore its impact in allocating valuable property to Ms. Dobson when assessing the fairness of the presumptive equal division of other family assets under s. 65; and whether the Agreement, by treating the family home as the sole property of the wife and not a divisible family asset, was unfair. The judge concluded that at a minimum, the answer to the first question was 'yes'. The family home was not a "trivial asset", and even if the Agreement was otherwise enforced, it would be unfair "to not take this into account in determining what would be fair division of other family assets. This is so given the duration of the marriage, the extent of [the husband's] contribution to the family home and its significant value." (At para. 308.)

[13] The judge provided a table of the parties' assets at trial, setting out their respective values, as well as the values of their "non-family assets", which were not insubstantial. Importantly, by the time of trial, the family home was valued at some \$3.4 million, so that even if full debt secured against the property was considered, Ms. Dobson held net equity of some \$2.6 million in the house. The growth in value, the judge found, was largely attributable to the nature of the investment as real estate in West Vancouver and neither party had suggested he or she had anticipated that values would rise as much as they had. (At para. 317-8.)

[14] The judge quoted from para. 43 of *Hartshorne v. Hartshorne* [2004] 1 S.C.R. 550, the seminal case in Canada on marriage agreements. At para. 43, the Supreme Court had quoted a passage from *Miglin v. Miglin*, 2003 SCC 24, dealing with changes in the relative values of assets between the time of execution of a marriage agreement and trial. The Court stated in *Miglin* that where the parties have demonstrated their intention to release one another from all claims to spousal support, changes in the valued property are "unlikely to be considered sufficient to justify dispensing with that declared intention." Nevertheless, the Court observed, a judge is not bound by the strict *Pelech* standard to intervene only once a change is shown to be "radical". The question in each case "is the extent to which the unimpeachably

negotiated agreement can be said to have contemplated the situation before the court at the time of the application."

- [15] Having calculated the relative values of the parties' assets, both family and non-family, the judge noted that if the Marriage Agreement was applied and other assets were not reapportioned, Ms. Dobson would be "substantially better positioned" than Mr. Dobson, even taking into account his non-family assets (valued at approximately \$1.5 million). (At para. 326.) At the same time, the judge acknowledged that it was not correct to compare the husband's non-family assets to the value of the family home as if comparing apples to apples, since he had contributed to the family home and Ms. Dobson had not contributed to his non-family assets. The judge continued:
- [329] But it also has to be remembered that when the respondent signed away his equity in the home, that equity was worth only in the range of \$300,000 to \$600,000. To be sure, he contributed another significant amount by continuing to pay the mortgage, approximately another \$237,000, and then after separation, by paying another \$334,000 for the education expenses of the parties' children.
- [330] An important factor here is the claimant's evidence that she relied on the Marriage Agreement in ordering her own financial affairs and thus will be seriously disadvantaged if it is not followed. I do not accept this as entirely reasonable, given that she threatened divorce as her bargaining chip to have the respondent sign the Marriage Agreement and she subsequently accepted that he would continue to pay mortgage payments.
- [16] Griffin J. also acknowledged that it would be "extremely disruptive" to Ms. Dobson to divide the family home now or to order a compensation payment for half of its value, since this would necessitate the sale of the home and possibly HPHC, "given how the claimant [wife] has leveraged the debt on the family home." On the other hand, if the Marriage Agreement were followed and the family home treated as Ms. Dobson's asset, it would be possible to divide the other family assets equally and leave both parties in a reasonable position. The judge observed that given the "windfall rise" in the value of the house, Ms. Dobson had "more than enough equity" to be able to pay Mr. Dobson for one-half of the value of HPHC and the HPHC shareholder loan, totalling \$550,000. In the Court's analysis:
- [350] I have therefore concluded that the Marriage Agreement is not unfair in allocating the family home and MDI to the claimant's own use solely. However, it would be unfair to not recognize the large windfall received by the claimant in this regard due to the rise in property values. It would be unfair not to recognize that due to the family home being her asset, the claimant does have the ability to make a compensation payment to the respondent for his equal share of HPHC and his equal share of the shareholder loan due from HPHC to the claimant.

- [351] I will therefore order the claimant to make a compensation payment of \$550,000 to the respondent for HPHC and the shareholder loan due to her, and these assets will then otherwise remain in her own name.
- [17] In the result, the trial judge ordered that Ms. Dobson make a compensation payment to Mr. Dobson totalling \$624,000 comprising \$550,000 relating to the HPHC family assets and \$74,000 relating to the "financial" assets. (This latter amount was half of the amount by which the wife's financial assets exceeded the husband's financial assets in value at the time of trial.) Mr. Dobson was in turn ordered to transfer certain shares to Ms. Dobson; otherwise, the parties were entitled to keep for their sole use the assets currently in their own names. Obviously, this meant that Ms. Dobson would retain sole ownership of the family home, which she had wished to retain.
- [18] At the end of her reasons, Griffin J. addressed the matter of spousal support. She found that Ms. Dobson had not sacrificed her career in order to advance Mr. Dobson's career; nor taken on a greater share of family responsibilities than did her husband in any meaningful way during the marriage. While Ms. Dobson had made some "accommodations" in order to move location with her husband early in the marriage in order to advance his education, these decisions had been jointly made and there was no evidence to suggest they had been detrimental to the wife's career or earning capacity "in the long run". She had not, for example, decided not to pursue a specialty that she would otherwise have pursued. The judge also noticed that no reference had been made in the Marriage Agreement to any such detriment or disadvantage assumed by the wife. Indeed, the Agreement stated in a recital that both parties were "established physicians and each is economically independent and self-sufficient."
- [19] Both parties were to found to have benefited from the moves they had made to further Mr. Dobson's career and both parties were found to have contributed "roughly equally" to parenting. In short, the trial judge said, the parties had been "equal partners in the marriage":
- [381] The claimant has not been disproportionately disadvantaged by the marriage breakdown. The claimant's standard of living has been equal to or superior to that of the respondent.
- [382] I find that the claimant is self-sufficient and independent, and she has been since before and after the marriage breakdown. I find that she did not suffer disproportionate adverse financial consequences from the marriage or its breakdown or bear a disproportionate share of the burden of caring for the children during the marriage. I find no basis for spousal support.
- [20] On appeal, Ms. Dobson has sought to show that the trial judge made various errors in fact and in principle in reaching the conclusions she did. I am not persuaded any material error of fact has been shown or that the judge erred in principle in allocating the family assets and ordering the compensation payment she did. In particular, I am not persuaded the judge erred in finding that Mr. Dobson had contributed "all" of his income to family

expenses, including the mortgage on the family home; nor in finding that he had continued to pay the mortgage payments due on the family home until it was paid off completely; nor in finding that he continued to make mortgage payments for some time on the loan that Ms. Dobson took out to finance the purchase of the commercial real estate of HPHC. (It is also worth noting that Mr. Dobson had paid all expenses relating to the education of the parties' children at medical school in the U.K., to the tune of some \$334,000. Obviously, this did not create a "family asset" for purposes of the FRA, but it was of indirect benefit to the family, including Ms. Dobson.)

- [21] Counsel for Ms. Dobson spent a great deal of time in challenging various findings of fact concerning who had paid what during and after the marriage, but nothing he said cast doubt on the trial judge's findings or conclusions. Griffin J. was not engaged in a process of tracing who paid for what during the marriage. She was concerned with relative fairness according to the factors set out in the FRA. She also sought to respect the wife's desire to be the sole owner of the family home, thus achieving financial security; and sought to ensure fairness between the parties at the same time. In my view, ordering a compensation payment was an appropriate resolution of this "conundrum" and as the trial judge found, Ms. Dobson will still be "significantly ahead of [the husband] in terms of assets, even taking into account his inheritances on his side of the ledger to which he did not contribute. However, the respondent [husband] does have a greater income-earning capacity." (At para. 366.) Counsel did not suggest a better solution that would be fair to Mr. Dobson as well as Ms. Dobson.
- [22] Turning last to spousal support, I again see no error in the Court's conclusion that no basis for support was made out. Ms. Dobson's standard of living was found to be "equal to or superior to" that of Mr. Dobson, and Ms. Dobson stands to continue to see her assets appreciate in a way that her husband is unlikely to see.
- [23] Finally, Mr. Slay sought to persuade us that the trial judge had erred in her approach to Hartshorne. In counsel's submission, Hartshorne requires that the judge first apply the terms of the marriage agreement, then determine the need for spousal support, and then return to the question of whether reapportionment of property is warranted. On this point, Mr. Slay cited para. 56 of Hartshorne, in which Bastarache J. stated in part:

In my view, the trial judge should have first applied the Agreement, then determined the need for spousal support, which was preserved under the Agreement, and finally decided whether the result warranted a different apportionment of property in light of s. 65 factors.

- [24] This rule is consistent with the long-standing approach of Canadian courts to deal first with assets and second with spousal support. That is the order in which the Griffin J. proceeded in this case. In Hartshorne, the agreement in question called for spousal support; in this case, it did not. Nothing would have been accomplished if the trial judge had first "applied the agreement", then determined that there was no need for spousal support, and then returned to the question of whether a different reapportionment of property was required by s. 65.

[25] In summary, I see no error in the judge's proceeding in the order she did and I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

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