

CANADA / JUDGMENT

Dunphy v. Boulard

2023 BCSC 1231

COURT

Supreme Court of British Columbia

DECIDED

18 July 2023

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2023 BCSC 1231 Dunphy v. Boulard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dunphy v. Boulard,

2023 BCSC 1231

Date: 20230718

Docket: 181960

Registry: Victoria

Between:

Tina Louise Marie Dunphy

Claimant

And:

Dale Boulard

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Claimant:

N. Picard

Counsel for the Respondent:

E. Kahs

Place and Date of Hearing:

Victoria, B.C.

May 9, 2023

Place and Date of Judgment:

Victoria, B.C.

July 18, 2023

Introduction

- [1] In this family proceeding the respondent applies for an order that the claimant Tina Louise Marie Dunphy is a trustee in his favour of moneys she will receive from the division of his Canada Pension Plan ("CPP") benefits. His claim arises from the dismissal of the claimant's family claim against him for being out of time and her consenting to an order for costs against followed by her subsequent filing of a consumer proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. The dismissal is reported at 2021 BCSC 2506.

Background

- [2] The parties cohabited in a marriage-like arrangement between May 2008 and March 2016. The claimant filed her notice of family claim on April 23, 2018, seeking spousal support and property division. The respondent filed his response to family claim on April 16, 2019, agreeing inter alia to an order under s. 91 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. However, no such order was ever made.
- [3] On April 24, 2019, the claimant made a request for pension benefits division and signed a statutory declaration under the Pension Benefits Division Act, S.C. 1992, c. 46, Sch. II. She received letters from Public Works and Government Services Canada prepared May 1, 2019 for the respondent and July 3, 2019 for the claimant with a pension division statement of reduction and pension benefits report. The letters indicate that either spouse could apply for a division of their former spouse's Canada Pension Plan.
- [4] On February 10, 2020, the claimant applied for a division of the parties' pension credits under the Canada Pension Plan, R.S.C. 1985, c. C-8. The CPP credit division was approved on June 30, 2021.
- [5] On September 30, 2021, the statutory window for a party to appeal or apply for reconsideration regarding the CPP division closed. After this date, the respondent was time-barred from preventing or reversing the CPP division.
- [6] From November 16-18, 2021, a summary trial on the date of the parties' separation was held. On December 23, 2021, the FLA claims were dismissed by Justice Murray and costs were awarded to the respondent.

- [7] On October 20, 2021 and February 9, 2022, the respondent sought a reconsideration of the decision of Service Canada to accept the claimant's application for CPP credit splitting for the period from January 2008 to December 2015. On June 29, 2022, Service Canada declined to change its decision to approve the claimant's pension split request.
- [8] On January 24, 2022, counsel for the respondent presented his bill of costs. The claimant had concerns regarding the sums claimed however she approved the bill of costs and her former counsel advised counsel for the respondent in an email dated February 8, 2022:

Although she is aware of the concerns I have raised about your Bill of Costs, Ms. Dunphy will approve it on the understanding that no further steps will be taken by you or your client with regard to the division of the CPP unadjusted pensionable earnings."

[Emphasis added.]

- [9] The offer was accepted on July 11, 2022 in an email from counsel for the respondent, however it raised the issue of payment of the costs not simply approval of the Bill of Costs:

I confirm Mr. Boulard's instructions to accept Ms. Dunphy's offer of her paying the entire Bill of Costs, in exchange for his not taking any further steps will be taken [sic] by you or your client with regard to the division of the CPP unadjusted pensionable earnings.

[Emphasis added.]

- [10] On July 12, 2022, then counsel for the claimant responded:

As I advised on February 8, 2022, Ms. Dunphy will approve the Bill of Costs, upon the understanding that no further steps will be taken by your client with regard to the division of the CPP pensionable earnings."

[Emphasis added.]

- [11] On July 12, 2022, counsel for the respondent replied:

I can confirm that Mr. Boulard will not take any further steps with regard to the division of the CPP pensionable earnings.

You may find a draft copy of the Certificate of Costs for your review and client's execution.

- [12] The respondent's counsel did not address the issue of approving the certificate of costs as opposed to payment of the costs.
- [13] On July 13, 2022, both parties signed a certificate of costs. The certificate was entered by the court registry on July 18, 2022.
- [14] On July 19, 2022, the claimant made a consumer proposal under the Bankruptcy and Insolvency Act. On or about August 15, 2022, the respondent received a notice to creditors of consumer proposal respecting the claimant's declaration of bankruptcy.

[15] On September 20, 2022, the respondent asked the claimant to withdraw her CPP division application, alleging she had breached her costs proposal. She refused.

Suitability for Summary Trial

[16] Suitability for resolution of the matter is not in issue. The evidence is sufficient to find the facts necessary to give judgment. Credibility is not in issue and the amount involved favours summary resolution.

Position of the Respondent

[17] The respondent submits the claimant deceived him, alleging that when she accepted his bill of costs and executed the certificate of costs, she intended to declare bankruptcy. He argues she should not be allowed to benefit from her deception by obtaining the CPP division but avoiding the payment of the bill of costs.

Position of the Claimant

[18] The claimant submits the Court has no jurisdiction to reopen proceedings because the claimant has made a consumer proposal pursuant to the Bankruptcy and Insolvency Act. She submits the respondent's recourse, if any, is through the mechanisms provide for in the Bankruptcy and Insolvency Act.

Law and Analysis

[19] It is apparent from the correspondence that there was no commitment by the claimant to pay the certificate of costs. She approved the certificate of costs but did not commit to its payment.

[20] A separated common-law partner does not require an agreement or court order to divide unadjusted pensionable earnings under the Canada Pension Plan, which provides:

55.1 (1) Subject to this section and sections 55.2 and 55.3, a division of unadjusted pensionable earnings shall take place in the following circumstances:

- (c) in the case of common-law partners, following the approval by the Minister of an application made by or on behalf of either former common-law partner, by the estate or succession of one of those former common-law partners or by any person that may be prescribed, if
- (i) the former common-law partners have been living separate and apart for a period of one year or more, or one of the former common-law partners has died during that period, and
- (ii) the application is made within four years after the day on which the former common-law partners commenced to live separate and apart or, if both former common-law partners agree in writing, at any time after the end of that four-year period.

[21] In addition, a court order regarding the division of unadjusted pensionable earnings under the CPP is not binding on the Minister's CPP division decision:

55.2(2) Except as provided in subsection (3), where, on or after June 4, 1986, a written agreement between persons subject to a division under section 55 or 55.1 was entered into, or a court order was made, the provisions of that agreement or court order are not binding on the Minister for the purposes of a division of unadjusted pensionable earnings under section 55 or 55.1.

[22] In *Coulter v. Coulter*, 60 B.C.L.R. (3d) 6, 1998 CanLII 5677 (C.A.), the independence of the Minister was confirmed:

[10] Section 55.1 of the Canada Pension Plan sets out a formula for the division [of] unadjusted pensionable earnings, as defined, and s. 55.2(2) provides that a court order is not binding on the Minister with respect to a division. The wife is entitled to the share of the husband's unadjusted pensionable earnings determined by the formula, independently of any court order

[23] The division of the CPP is therefore not affected by the dismissal of the claimant's FLA claim. As a result, a former common-law partner, such as the respondent, who is dissatisfied with an application for CPP division under s. 55.1 of the Canada Pension Plan must apply within 90 days for reconsideration unless the Minister allows an extension:

81 (1) Where

(a) a spouse, former spouse, common-law partner, former common-law partner or estate is dissatisfied with any decision made under section 55, 55.1, 55.2 or 55.3,

the dissatisfied party or, subject to the regulations, any person on behalf thereof may, within ninety days after the day on which the dissatisfied party was notified in the prescribed manner of the decision or determination, or within such longer period as the Minister may either before or after the expiration of those ninety days allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination.

[24] As noted earlier in these reasons, the claimant applied on February 10, 2020 for division of the parties' pension credits under the Canada Pension Plan as she was facing a deadline of March 29, 2020, being a possible four years from the date of their separation. The CPP credit division was approved on June 30, 2021. The 90-day statutory window for an appeal or a reconsideration expired on September 30, 2021. The respondent did not appeal or file for reconsideration until after he received the December 2021 decision dismissing the claimant's FLA claim. In early July 2022, he was informed his application for a reconsideration had been dismissed. Only then did he accept the February 2022 offer of the claimant to settle the bill of costs provided he did not pursue the CPP claim. That is, it was only after his CPP claim was denied that he agreed to accept the claimant's offer.

- [25] The respondent now claims he would have sought a further appeal or a judicial review of the Service Canada decision to split their CPP benefits but for his understanding that the claimant not only settled the bill of costs but agreed to pay them. However, as noted, when he eventually accepted the offer on July 11, 2022, he had been time-barred from appealing the CPP division for almost a year.
- [26] The respondent submits the claimant has been deceitful by agreeing to pay the costs while intending to declare bankruptcy. The respondent relies on *Fredette v. Fredette*, 31 B.C.L.R. (2d) 178, 1988 CanLII 3159, where a husband and wife entered into a written separation agreement which stated that each party would keep their respective "pensions and the like". The issue was whether she waived her right to CPP benefits by that agreement and whether recent legislation would be "effective to grant her such benefits notwithstanding".
- [27] The solicitor for Ms. Fredette was aware that the amendments allowed division of the CPP benefits notwithstanding an agreement to the contrary, while the solicitor for Mr. Fredette was not aware of the changes and proceeded on the basis that the wording of the agreement would protect his client.
- [28] Judge McKinnon then a local judge of the Supreme Court found the CPP benefits had been discussed and it was clear Mr. Fredette would not agree to their division and concluded:

The practice of law has always been a trap for the unwary and this is particularly evident in the case at bar. I am satisfied that had the solicitor for the Plaintiff been aware of the Canada Pension Plan legislation, he would have refused to complete the separation agreement, or would have inserted a particular reference to a division of unadjusted pensionable credits as provided for in the legislation. The defendant was well aware of the plaintiff's refusal to adjust his pension and as a consequence, instead of meeting the problem head on, resolved to do an end run by appearing to give up any claim in the agreement, but in reality fully intending to make the application once all assets agreed to be transferred pursuant to the agreement had been completed.

The defendant argues that any judgment directed to her would be an interference with the Minister's discretion, but I disagree. I am satisfied on these particular facts that the defendant was deceiving the Plaintiff when she entered into this separation agreement. She was aware, or ought to have known, that the plaintiff considered all pensions resolved, and assumed there would be no application for any share. She signed the agreement fully intending to make the claim, and in my view she ought not to be permitted to benefit from such activity.

The plaintiff is entitled to a judgment which will make the defendant a trustee for the plaintiff in an amount received each month from Mr. Fredette's Canada Pension. In the event counsel cannot agree on the form of the order they may speak to same. The plaintiff is entitled to his costs.

- [29] The allegation of deceit in this case arises from the respondent's assertion the claimant agreed to approve and to pay the costs. However, that is not the case. It is clear from the correspondence between counsel for the parties that while counsel for the respondent sought agreement the claimant would pay the costs, counsel for the claimant made it very

clear she was only agreeing to settle the bill of costs. The claimant never agreed to pay the costs nor indicated she had the ability to pay them. There was no agreement made regarding payment. This distinguishes the present application from that in *Fredette*.

- [30] The respondent may have assumed the claimant would pay the costs but that was his assumption, not a representation from the claimant. Given he had already chosen not to appeal or seek judicial review of the Service Canada decision for a period of almost a year and was time-barred, he was not deceived by the claimant into not doing so. In any event, he has not established his alleged pursuit of an appeal or judicial review has any merit or chance of success, hence there is no evidence he gave up anything of value in agreeing not to pursue the CPP issue.
- [31] I am satisfied that all the claimant agreed to do was accept the respondent's bill of costs as drawn. That benefited the respondent as he obtained a certificate of costs in the amount claimed without having to tax his costs.
- [32] The respondent's application attempts to obtain a court order that would in effect reverse the CPP division, something he previously was unsuccessful in doing and chose not to pursue further.
- [33] In addition, the Court has ordered the costs as agreed. Their collection is now governed by the Bankruptcy and Insolvency Act, not an indirect attempt to have the Court, based on its inherent jurisdiction, somehow reopen a matter which has concluded.

Conclusion

- [34] The application of the respondent is dismissed with costs to the claimant.

"The Honourable Mr. Justice Punnett"

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