CANADA / JUDGMENT

Duursma v. Duursma

2020 BCSC 667

COURT
Supreme Court of British Columbia

DECIDED
30 April 2020

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2020 BCSC 667 Duursma v. Duursma

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Duursma v. Duursma,

2020 BCSC 667

Date: 20200430

Docket: E12751

Registry: Smithers

Between:

Barbara Duursma

Claimant

And

John Duursma

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraphs 8 and 18 on February 1, 2021

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Claimant:

G. Greene

Counsel for Respondent:

B. Haberstock

Place and Date of Trial:

Smithers, B.C.

March 9-12, 2020

Place and Date of Judgment:

Smithers, B.C.

April 30, 2020

I. Introduction

[1] In the trial before me the parties seek to finally determine the outstanding issues in their matrimonial litigation. This matter has been outstanding for 18 years. The only matters remaining to be determined are property issues and the order for divorce.

[2] Specifically, the claimant, Mrs. Duursma, seeks an order for divorce, an order that the family home be sold and the proceeds be divided equally, an order dividing the respondent's pension at the date of trial, and an order that four life insurance policies bought for the children be assigned to the children. The respondent, Mr. Duursma, seeks an order for divorce, an order that the family home be valued at the date of trial and the value be divided unequally, an order dividing his pension at the date of separation, and an order dividing the life insurance policies for the children equally between the spouses.

[3] As both parties consent to an order for divorce, and have met the test for divorce under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), I order the parties are divorced within 31 days of this order. The remaining issues are in dispute.

II. Background

[4] In December 1985 the parties became engaged. They were married in October 1986. Mr. Duursma was 24 years old when they married, and Mrs. Duursma was 19 years old.

[5] In February 1986 the parties found a home located in Telkwa, BC where they intended to live once they were married. Mr. Duursma paid the down payment for the house. The family lived in the home in Telkwa until their separation in 2002. Mr. Duursma continues to live in the family home today.

[6] The parties had four children: twin daughters born in 1992, a daughter born in 1995, and a son born in 1996.

[7] Mr. Duursma began working in 1987 in the Telkwa area and in 1989 he began working for Pacific Inland Resources (now West Fraser Mills Ltd.), where he continues to work today.

[8] Mrs. Duursma worked at a number of different positions from 1987 until the children were born in 1992. After the children were born Ms. Duursma was the primary caregiver for the children, including assuming responsibility to homeschool them. Their youngest child, J, was born with a significant health condition described as Shwachman-Diamond Syndrome, a condition which makes the child very vulnerable to infections. As such, he required ongoing monitoring and was kept home for schooling to avoid risk of infection. After J was born, Mrs. Duursma began assisting in a tax preparation business. This required to her to complete a tax preparation course and then allowed her to complete the work at home.

[9] Prior to separation, Mrs. Duursma began experiencing health problems of her own including ulcerative colitis and pituitary adenoma.

[10] In 2002 the parties separated. Mrs. Duursma moved into a rental home with the four children.

[11] In 2003 Ms. Duursma applied to the court to move with the children to Ontario. The reasons for judgement were issued by Madam Justice Brown on January 13, 2003 [B.D. v. J.D., 2003 BCSC 469]. Mrs. Duursma was permitted to move to Ontario with the children and Mr. Duursma was ordered to pay approximately $1,000 a month in child support.

[12] Mrs. Duursma had found employment in Ontario which was anticipated to pay her $80,000 a year. At that time, Mr. Duursma was making considerably less, just over $59,000 a year.

[13] In the first few years following the move to Ontario Mr. Duursma had several weeks of parenting time with his children each year. Gradually, however, his contact with his children diminished. Between 2007 and 2014 he only saw them four times. In 2014 the children returned to the Bulkley Valley to visit with their grandmother, as she was in declining health. That was the last time Mr. Duursma saw his children.

[14] Contact between Mr. and Mrs. Duursma also was extremely limited following her move to Ontario.

[15] No applications were made to vary child support or seek spousal support by either party. In respect of the litigation, no steps were taken until 2015, when Mr. Duursma took some steps to begin resolution of the property claims. Once the action was brought back to life, the parties attended a judicial case conference in December 2016. At that hearing an order was made increasing child support payable by Mr. Duursma to $1,272 per month in relation to the two youngest children.

[16] Mrs. Duursma gave evidence at trial that following the move to Ontario she suffered a severe decline in her health. Without reviewing in detail all of her medical issues, I set out some of the more significant issues here. She was diagnosed with narcolepsy which, although she is treated with medication, continues to affect her. She is tired all the time, and sleeps through her lunch hour because of this condition. She has been diagnosed with biliary cirrhosis, which is an autoimmune liver disease. She continues to suffer from ulcerative colitis, which has had a very significant impact on her life. This condition impacts her eating and her

digestive system. She suffers from severe diarrhea on an ongoing basis as a result of this condition, and it has resulted in her being hospitalized at times. She has Cushing's Syndrome. For a period of time she was suffering severe pain in her abdomen which was eventually diagnosed as parasites of the pancreas. She also had to have her gallbladder removed. She has suffered from a number of serious infections over the years, which required emergency treatment and IV antibiotics. She was diagnosed with diabetes in 2012. She has suffered a number of fractures and has been told that problems with her bones are to be expected as a result of her illnesses.

[17] Mrs. Duursma testified that all of her different medical problems have impacted her ability to work over the years. At times she could not maintain employment. She also had to be careful about what kind of employment she could take given her washroom needs associated with her ulcerative colitis, her strength, her pain, and her other medical needs. Since 2018 she has been working as a property manager and her current income has stabilized at approximately $78,000 a year. Prior to that she held a number of different positions and her income varied quite a bit. For example, while she made between $70,070 and $77,000 a year between the years 2003 and 2005, in 2006 her income dropped to $32,000. Her income hovered around $60,000 between the years 2007 and 2009, and then in 2010 it dropped back down to $34,000 a year. Between 2011 and 2014 her income ranged between $11,000 and $25,000 a year. Between 2015 and 2017 her income went from $41,000-$48,000. In 2018 Mrs. Duursma's income moved to $60,000, and in 2018 it moved up to $78,000.

[18] In addition to all of Mrs. Duursma's health complaints, Mrs. Duursma continued to care for her four children and, in particular, dealt with the ongoing health problems related to her son's condition. At times he was hospitalized in relation to this condition. At other times he could not go to school because of the risk of infections. For example, in grade 7 he missed 40 days of school, in grade 8 he missed 100 days of school. During these times Mrs. Duursma homeschooled him. In addition, J had anaphylactic allergies which required extra care from his mother, including preparation of all of his food including for activities where food would otherwise be provided.

[19] Mr. Duursma's income has increased steadily over the years. In 2003 his income moved up to approximately $66,000 a year, and by 2006 it had increased to $72,000 a year. From 2010 to 2016 his income generally ranged between $81,000 and $88,000. In 2017 he earned $91,000, and in 2018 he earned $103,000. However, in 2019 his income had dropped to $83,000.

[20] Since the parties separated, Mr. Duursma has accumulated $180,640 in financial assets, including RRSPs, TFSAs, and a whole life insurance policy.

[21] Mrs. Duursma has accumulated no financial assets since separation. All of her income has been spent on the family. When she moved to Ontario she had an RRSP and her own whole life policy. In the years when her income was greatly reduced, she cashed in those assets which had a combined value of approximately $29,000.

[22] When the parties separated, there was a line of credit balance on the family home in the amount of $94,000. Since separation, Mr. Duursma has been solely responsible for retiring that debt, which was accomplished in 2011. Mr. Duursma has paid property taxes and insurance each year on the family home. The combined cost of these expenses increased each year. In 2002 the combined yearly cost was approximately $1,100, and by 2019 the combined cost was approximately $3,300.

[23] Mrs. Duursma has lived in rental housing since 2002. Her current monthly rental cost is $1,680.

III. Issues

[24] The issues in this case relate to the value of the family home, the division of Mr. Duursma's pension, and the treatment of the four whole life policies taken out in the names of the children. There is no dispute that the family home and the pension are family property subject to division.

[25] The issues before me can be described as:

a) How should the value of the family home be divided?

b) At what date should Mr. Duursma's pension be divided?

c) Should the four whole life policies be transferred to the children, or divided between the spouses?

[26] In addition, because this case was commenced before the enactment of the Family Law Act, S.B.C. 2011, c. 25 [FLA], I must consider to what extent the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] has application in the case before me.

A. How should the value of the family home be divided?

[27] The original claim was filed in December 2002. At that time, the FRA was the governing legislation. In 2011 the FLA was enacted. The claim was amended to comply with the FLA in September 2016. While the response filed to the amended claim did not dispute the application of the FLA, the counterclaim continued to seek relief in relation to property division pursuant to the FRA.

[28] At trial, it became apparent that the claimant did not appreciate the respondent was continuing to rely on the FRA. However, the respondent conceded at trial that the trial was the triggering event, and he was not arguing an earlier triggering event. As such, the claimant submitted that there was no material difference in the application of the two Acts to the property division claims.

[29] Section 252 of the FLA sets out the transitional provisions respecting property division. Pursuant to s. 252(2)(b), a proceeding respecting property division started under the FRA must be continued under the FRA as if it had not been repealed, unless there is an agreement between the parties to apply the FLA. In this case there is no such agreement and the FRA applies to property division between the parties.

[30] Pursuant to s. 56 of the FRA, each spouse is entitled to an undivided one half interest in a family asset as at the triggering event, subject to adjustment pursuant to s. 65. In the case before me, the triggering event is the order dissolving the marriage, which will occur as a result of my orders made herein.

[31] The family home remains in joint tenancy at the date of trial. Mrs. Duursma seeks a sale of the home, and says that she is entitled to 50% of the net sale proceeds.

[32] Mr. Duursma seeks an unequal division of the family home, relying on s. 65 of the FRA. Mr. Duursma bases his claim on the following facts:

a) he provided the down payment for the house, which was purchased in 1986,

b) he paid off the line of credit on the home after separation, which was a family debt, and

c) he paid all utilities, taxes and maintenance on the home after separation.

[33] Mrs. Duursma says an equal division at the date of trial is fair because no spousal support was paid over the last 18 years, she remains an owner of the home but has been paid no rent for Mr. Duursma's continued use of the home, and that if she had received 50% of the value of the family home on separation she would have had an asset she could have invested and received a return on over the last 18 years. Mrs. Duursma does not seek an order for retroactive spousal support, but refers to the fact that no spousal support was paid over the years in support of her position that equal division of the family home is fair.

[34] The presumption under the FRA is that family property will be divided equally. For the reasons set out below, I am satisfied that there is no unfairness in applying this presumption to the division of the family home.

[35] While the home was purchased in 1986 for approximately $79,000 with a down payment of approximately $20,000 provided by Mr. Duursma, during the 16 years they lived together, both parties worked and contributed to the family finances. The first mortgage was paid off, and later a line of credit was registered against the home to allow for some renovations to be made. Both parties were liable under the line of credit. The assessed value of the home in 2003 was $140,200. In 2018 the appraised value of the home was $289,000.

[36] With respect to the family debt on separation, Mrs. Duursma argues that while Mr. Duursma paid the line of credit and the insurance and taxes on the house over the last 18 years, those expenditures must be considered in light of the fact that she was required to pay rent for the accommodation for her and the children over the last 18 years.

[37] Mr. Duursma paid the $94,189 line of credit, plus a total of $10,181 in taxes, and $25,929 in insurance. The total of all three is $130,299, or an average of less than $7,300/year. While I do not have evidence relating to the cost of rent for Mrs. Duursma over the years, her current annual rent is over $19,000/year. I have no doubt that over the last 18 years, Mrs. Duursma's average rent exceeded $7,300/year. This is consistent with a review of the assets currently held by the parties. Mrs. Duursma has been able to save nothing, while Mr. Duursma has been able to save over $180,000.

[38] When Mrs. Duursma left Mr. Duursma, she left behind all family property except for her RRSP and a life insurance policy. She took with her their four children and raised them on her own in Ontario. She did not claim an increase in child support until 2017, although a review of her income over the years shows that Mr. Duursma would have been required to make higher payments under the Federal Child Support Guidelines, S.O.R./97-175 for a number of years. She did not claim from Mr. Duursma reimbursement for additional child related expenses. In 2018 Mr. Duursma unilaterally stopped making all child support payments. Mrs. Duursma had severe health problems. She was clearly in a disadvantaged position. She did not claim spousal support from Mr. Duursma, although there were years when she would likely have been successful in such a claim had she advanced it. She was required to liquidate her RRSP and life insurance to cover her expenses in the years her income dropped to very low levels.

[39] Mr. Duursma, on the other hand, was left in a financially advantaged position, and he remained so over the 18 years following separation. He has been able to maintain his RRSPs, life insurance, and save $180,000. While he did assume all of the family debt, he remained in possession of the largest family asset - the family home - and has remained living in it paying only taxes and insurance, less than $300 each month, since 2011.

[40] However, this is not a case where Mr. Duursma knew of the financial difficulties of his wife. When she left for Ontario, he understood she was going to a well paying job. He was not told that her situation changed. Therefore, while the fact of the disparity in financial circumstances is relevant to my assessment of the appropriate division of family property, I do not find that his failure to increase child support or pay spousal support was deliberate or malicious.

[41] This is not a case similar to the case of Kirkwood v. Kirkwood, 2018 BCSC 197. In Kirkwood the parties only lived together in the family home for three years, and separated after eight years. The triggering event in Kirkwood was 17 years before trial. In the case before me, the parties lived together in the family home throughout the entire 16 years they lived together, and the triggering event is the date of trial, some 34 years after they were married. The factors in Kirkwood which justified an unequal division, namely the short marriage, the financial settlement Mrs. Kirkwood received from her first divorce which she used to purchase the family home, and Mrs. Kirkwood's payment of Mr. Kirkwood's outstanding debt, are not present in the case before me.

[42] In the circumstances of this case, I am satisfied that an equal division of the family home is fair to both parties. Subject to any other arrangements the parties may choose to make to equally divide the value of the home, the family home will be listed for sale within three months of this decision and the proceeds of sale will be divided equally.

B. At what date should Mr. Duursma's pension be divided?

[43] The transitional provisions in the FLA relating to pension division state that if forms prescribed under the FRA were delivered to the administrator before Part 6 of the FLA came into force, the FRA applies. In the case before me, no forms were delivered to the pension administrator before the FLA came into force. As such, Mr. Duursma's pension is family property subject to division in accordance with Part 6 of the FLA.

[44] Pursuant to s. 111 of the FLA, a spouse's entitlement to a share of pension benefits must be determined under Part 5 of the FLA. Because the FLA expressly deals with pensions separately from other family property, I find the legislative intention was to determine entitlement to a pension pursuant to Part 5 of the FLA regardless of whether other family property entitlement is dealt with under the FRA. Section 81 of Part 5 states that a spouse is entitled to an undivided one half interest in family property on separation. Therefore, in this case, while entitlement to the family home must be determined in accordance with the FRA and the triggering event described in the FRA, a spouse's entitlement to pension benefits must be determined as of the date of separation as set out in the FLA.

[45] Mrs. Duursma relies on ss. 129 and 131 of the FLA to argue that a reapportionment of the pension benefits is warranted to provide her with a source of income, and to compensate her for the fact that she has received no spousal support from Mr. Duursma.

[46] While I find the financial circumstances of Mrs. Duursma to be relevant to the question of division of the family home, I am not satisfied that a reapportionment of Mr. Duursma's pension is appropriate to provide Mrs. Duursma with an independent source of income. While she suffered from a low income in the past, she now has a good stable job from which she earns approximately $78,000/year. I find that providing her with an equal share of the family home is adequate to compensate her for her financial disadvantage in the previous years.

[47] As such, I order Mr. Duursma's pension to be divided in accordance with Part 6 of the FLA, without any reapportionment pursuant to s. 129.

C. How should the whole life policies be divided?

[48] Mr. and Mrs. Duursma are joint owners of Canada Life policies on all four of their children. These are whole life policies and have a cash value. It was the intent of both parties that those policies would be signed over to the children when they were 18 years old. Since separation, Mr. Duursma made all payments on the policies until two years ago when he instructed Canada Life to take the payments out of the policies themselves.

[49] Mrs. Duursma seeks an order that the policies be transferred to the names of the children, so that they can use them as was originally intended.

[50] Mr. Duursma seeks to have the policies divided equally between him and Mrs. Duursma.

[51] The policies are family property and, therefore, will be dealt with under the FRA. Section 66(2)(e) provides the court with the authority to "order that property forming all or a part of the share of either or both spouses be transferred to a child".

[52] It is clear from the evidence that the policies were originally purchased for the benefit of the children to be signed over to them when they reached the age of 18. Mrs. Duursma says that intention never changed. At trial Mr. Duursma stated his intention has changed. He now says that he and Mrs. Duursma had the option to take the policies for themselves.

[53] I am satisfied that the intention of both parties at the time the policies were purchased and up until trial was that the policies would be transferred to the children and not to either Mr. Duursma or Mrs. Duursma. While it may be technically possible to transfer the policies to Mr. or Mrs. Duursma, I am satisfied this would not be an appropriate order to make. I find that the policies were intended to benefit the children, and this intention should be respected.

[54] Pursuant to s. 66(2)(e) of the FRA, the policies in the names of the children will be transferred to each of the children, as originally intended.

D. Costs

[55] The parties have liberty to make submissions on costs within 30 days of this decision, which may be made in writing through the registry.

"Baker J."

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