
CANADA / JUDGMENT

Fedyk v. Fedyk

2018 BCSC 2120

COURT

Supreme Court of British Columbia

DECIDED

13 November 2018

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2018 BCSC 2120 Fedyk v. Fedyk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fedyk v. Fedyk,

2018 BCSC 2120

Date: 20181113

Docket: E1751870

Registry: Prince George

Between:

Geoffrey Brian Fedyk

Claimant

And

Carol Frances Fedyk

Respondent

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

Counsel for the Claimant:

Richard C. Gibbs, Q.C.

Counsel for the Respondent:

Charles G. Fletcher

Place and Date of Hearing:

Prince George, B.C.

November 6-9, 2018

Place and Date of Judgment:

Prince George, B.C.

November 13, 2018

- [1] The principal issue in this family dispute is the amount of the spousal support Mr. Fedyk will pay. A secondary issue, relevant to pension allocation, is when the Fedyks began to cohabit.
- [2] Before I introduce the parties, and the facts of the case, I will record here the orders the parties agreed to on the eve of trial or during the trial:
1. I granted the parties' divorce, by consent, on November 6, the first day of the trial. The divorce order is to become effective 31 days after that order is entered. The parties are permitted, if they wish, to have the divorce order entered as a stand-alone order.
 2. Second, Mr. Fedyk is entitled to a credit of \$45,000, representing an inheritance he received, which formed the basis of his investing in a tax-free savings account. After the \$45,000 is removed, the balance of that account is to be divided equally between the parties.
 3. Mr. Fedyk owes Ms. Fedyk \$20,000 to balance their interests in motor vehicles owned at the end of the marriage.
 4. A separate \$20,000, being the proceeds from the sale of a trailer, are to be divided equally. Mr. Fedyk controls the account where those funds are held. He will pay \$10,000 to Ms. Fedyk forthwith.
 5. Ms. Fedyk is entitled to \$135,000 from the equity in the matrimonial home at Nixon Crescent in Prince George. That is agreed as being one-half the value of that property after adjusting for the funds Mr. Fedyk invested to buy the property before he and Ms. Fedyk began their relationship.
 6. All family photographs, and external hard drives containing photos or videos, which Mr. Fedyk has, will be provided to Ms. Fedyk forthwith. She will copy any photos or videos that she wants, and return the original photos and hard drives to Mr. Fedyk within 45 days of having received them.
 7. Mr. Fedyk will pay to Ms. Fedyk \$1,000 in outstanding court costs forthwith.
 8. The process for annual reviews of support payments will be as follows:
 - a) by July 1 of each year, the parties will exchange their T1s with all attachments, their tax assessments and reassessments, and their end-of-year and year-to-date paystubs;

- b) by July 15 of each year, the parties will each send to the other what they say is the appropriate adjustment in spousal support payments;
 - c) failing agreement by July 30, either party can apply to court for an adjustment. Until there is a new court order, the pre-existing spousal support amount will prevail;
 - d) in the first five years, the annual review is confined to examining quantum, in the sixth year and after, both quantum and entitlement are reviewable.
- [3] Mr. Fedyk, who is now 56, and Ms. Fedyk, now 52, married in Prince George on July 16, 1988. They were both born in Prince George, and had known each other nearly all their lives. She was 19 and he was 23 when they started dating.
- [4] An issue noted above, relevant to pension allocation, is when the Fedyks began to cohabit.
- [5] Mr. Fedyk submits cohabitation began on the day of the marriage.
- [6] Ms. Fedyk says it started earlier, when her parents were on a trip to Europe, in the second half of August and all of September in 1987.
- [7] Ms. Fedyk testified that she "basically" lived with Mr. Fedyk when her parents were away on that trip. Mr. Fedyk's evidence was that in those six weeks, she did not stay with him, but instead returned home at nights. Ms. Fedyk testified further that by the time her parents were back from Europe, she was feeling hypocritical because she and Mr. Fedyk were having sexual relations. In October of 1987, Ms. Fedyk's sister was moving out to live with a man. Ms. Fedyk's testimony was that her mother turned to her to enquire when she, that is the Respondent, was moving out. That conversation was "good natured". Ms. Fedyk also testified that she was changing into her Halloween costume while staying at Mr. Fedyk's house October 31, 1987, and that the two of them bought a Christmas tree and decorations for his house during Christmas, 1987, when, she says, Mr. Fedyk gave her a microwave oven as a Christmas present.
- [8] The evidence went no further than that on the question of cohabitation, and I heard no corroborating evidence.
- [9] The indicia for determining whether there is cohabitation are listed in the British Columbia Family Law Practice 2018, at pages 144 and 145. Not surprisingly, one sees listed there all the indicia of two people living together as an established couple. It would serve no purpose to list the indicia here because a refined analysis, in my view, is not called for. The evidence summarized above falls short of supporting any finding of cohabitation. These were two young people from traditional and disciplined upbringings who had some sexual relations and other intimate time alone together before marriage. They may have slept in the same bed in Mr. Fedyk's house, even for a few weeks, when Ms. Fedyk's parents were out of town, and from time to time after her parents returned from Europe. But it would be an error to view them as having established anything like cohabitation from the evidence that was presented.

- [10] After their marriage, in 1988, the Fedyks had three children. They are now 28, 26, and 23, and there are no claims in this proceeding regarding them.
- [11] The Fedyks separated on December 27, 2016, when Ms. Fedyk announced that she was leaving. Mr. Fedyk was shocked and devastated, and remained so for a considerable time. He remains single and is now dating people. Ms. Fedyk lives with another man.
- [12] The couple in 2016 had prepaid for a trip together to Jamaica in or about February 2017. They took the trip notwithstanding their recent separation. Mr. Fedyk still hoped for a reconciliation, but when he asked Ms. Fedyk if she was seeing someone, she said that she was. That was the man she lives with now.
- [13] A traumatic incident occurred between the Fedyks on May 2, 2017. Mr. Fedyk assaulted Ms. Fedyk by hitting her once. I would describe that event further, except that neither party in their closing submissions asked me to make any finding from that unfortunate incident which would impact upon any of the requested relief. I believe the parties were correct in taking that approach. Mr. Fedyk had never assaulted his wife in their 28 years of marriage. He was deeply sorry, both at the time, and at trial, for what he did on May 2. Wisely, in my view, and fortunately for all concerned, Ms. Fedyk did not press charges, despite the assault having been serious.
- [14] Throughout their marriage, the Fedyks appear to have been good parents, and both of them were capable and industrious in their working lives, inside and outside the home. Ms. Fedyk also pursued higher education, as I will describe later in these reasons.
- [15] Mr. Fedyk started working, in a pulp mill in Prince George, after high school, when he was still in his teens. He has remained at the mill to this day. He started as a general labourer. He applied for work in the steam plant, and earned his third class steam certification. In 1992, he began his four-year apprenticeship as a steamfitter, working on valves and pipes from one-half-inch to 36-inch diameter. He was on day shift in that time. Sometime in the early 2000s, Mr. Fedyk went on to shift work to accommodate his wife going into the workforce. Shift work permitted him more time to look after the children and attend to household matters. Mr. Fedyk remains on shift work at present as a maintenance steam pipefitter. I will discuss Mr. Fedyk's earnings in the consideration of spousal support later in the reasons.
- [16] Ms. Fedyk had intended to become a teacher. To that end, she studied for two years after high school at the College of New Caledonia, in Prince George, and then planned to study for one year at SFU to qualify as a schoolteacher. However, she and Mr. Fedyk were dating in Prince George, and she had a good job there as a manager in retail sales.
- [17] After the Fedyks' first child was born, in May 1990, Ms. Fedyk remained at home through the birth of the two later children in 1992 and 1995. She opened a licensed daycare facility at the Fedyk home in 1993, and ran that until 2000, when her youngest child was almost five.

- [18] The University of Northern British Columbia (UNBC) began in Prince George in 1990. Ms. Fedyk enrolled there in September 2000 to complete her BA in English, which she did in May 2003. In 2005, she began full-time work in Prince George for a chartered accountant and for a financial planner. She began as a receptionist for both businesses and her work responsibilities expanded. Latterly, she worked for the financial planner only. That work ended in 2010.
- [19] In 2010 and 2011, Ms. Fedyk worked in the finance department at UNBC. In May 2011, she added weekend work at the UNBC Sports Centre. In December 2012, she began full-time work at UNBC's School of Education. The work included placing teaching students in their practicums. Ms. Fedyk's present job started in 2015, still at the School of Education, with her responsibilities still including practicum teacher placements.
- [20] The Fedyks as a couple discussed and accommodated these work and education steps by Ms. Fedyk. They agreed it was not worth Ms. Fedyk sacrificing earning income to study full-time for two years to obtain her bachelor of education degree. Instead she pursued a master's degree at UNBC part time, while maintaining her full-time employment. Only one child was still at home. The couple shared the responsibilities of household work.
- [21] There was debate in the evidence about whether Mr. Fedyk's agreement to Ms. Fedyk pursuing her master's was based on her being able to earn more money from teaching work that would result from her getting that degree. He testified that Ms. Fedyk assured him of her being able to earn significantly more money with that degree. Ms. Fedyk testified that extra revenue from teaching was no more than a hope. Ms. Fedyk obtained her master's degree, but it has not thus far led to higher income. She testified about several obstacles to her being able to teach, including her lack of teaching experience and lack of seniority, or even membership, in the relevant teachers' union. I need not resolve what the understanding was between the Fedyks about Ms. Fedyk earning more money from getting her master's degree. In the future, Ms. Fedyk's earnings should increase at least somewhat from her having her master's qualification, but it would be speculative at this stage to make any real allowance for that prospect.
- [22] Both of the Fedyks, as I noted earlier, have been diligent in advancing their employment prospects while also maintaining the family home. Until their separation in December 2016, each generally supported the other in their domestic and career obligations and educational pursuits.
- [23] I turn now to addressing spousal support. There is no dispute that Ms. Fedyk is entitled to periodic support for an indefinite term.
- [24] It is common ground that Ms. Fedyk earns approximately \$59,000 per year from her employment. She also receives \$1,000 a month from the man she lives with in her townhouse condominium. The \$1,000 a month payment is characterized by Mr. Fedyk as rental revenue for Ms. Fedyk, bearing in mind that other household and living costs are shared separately by Ms. Fedyk and her common-law partner. I accept that characterization.

Increasing the value of the \$1,000 a month, for the fact that it is tax free, and adding it to the \$59,000, I find that Ms. Fedyk's Spousal Support Guidelines income will be \$73,000. I believe that conclusion finds support in this Court's decision in *D.S. v. E.P.S.*, 2011 BCSC 1102 at para. 42. The attribution of \$14,000 begins as of June 1, 2018, when Ms. Fedyk began receiving the \$1,000 monthly payment. Before June 1, 2018, her Spousal Support Guidelines income is only \$59,000.

- [25] When, in future years, the parties exchange financial information for adjusting Mr. Fedyk's support payments, he will be credited \$14,000 as long as Ms. Fedyk receives the \$1,000 monthly payment from her partner.
- [26] The first part of the spousal support calculation is for the period from the time Ms. Fedyk filed her counterclaim seeking spousal support, on July 21, 2017, to the present, which will be November 15, 2018.
- [27] I have addressed above Ms. Fedyk's Guidelines income for that period.
- [28] Mr. Fedyk gave oral evidence, which was accepted, that his base income is \$90,000. However, for various reasons over the years, he has also earned substantial amounts from overtime work. In earlier years, overtime was undertaken largely to earn money for the family. Since separation, in December 2016, he worked overtime, at least in part, to bury himself in his work after the burden from separation.
- [29] Mr. Fedyk's income in 2017 was \$137,000. That will be his Guidelines income for spousal support from July 21, 2017, the date the claim for spousal support was filed, to December 31, 2017, subject to one adjustment I address in the immediately following paragraph of these reasons. Similarly, Mr. Fedyk's Guidelines income to November 15, 2018, will be his actual 2018 earnings to that date, again subject to one adjustment I address in the immediately following paragraph of these reasons.
- [30] The adjustment to Mr. Fedyk's spousal support Guidelines income in 2017 and 2018 and after stems from the fact that his non-taxable benefits from employment exceed the non-taxable benefits from employment received by Ms. Fedyk. Calculating that difference is difficult because adjustments are necessary to account for the fact that some of the non-taxable benefits do not equate to economic benefits. Ms. Fedyk's counsel calculated the increase to Mr. Fedyk's Guidelines income at \$10,000 for 2017, representing the net difference between the Fedyks' respective non-taxable economic benefits, plus a tax gross-up. I am selecting \$8,500 for 2017 and \$8,500 for 2018 and after as the total increase to Mr. Fedyk's income for Guidelines purposes based on the difference between his and Ms. Fedyk's non-taxable economic benefits for those years and for the period until spousal support is periodically reviewed and adjusted in the future.
- [31] For spousal support from November 15, 2018, until spousal support is adjusted as a result of a periodic review, Mr. Fedyk argued for a smaller income figure for him, much closer to his base earnings of \$90,000 annually. His rationales were, first, that at his age the physical toll

from his work increases, and thus the will to work overtime declines, and second, that he needs to get on with forming a new life outside of work. Both of those explanations make sense, but I doubt that Mr. Fedyk's earnings will plummet that steeply in 2019 and up to the time of the first review. I am fixing Mr. Fedyk's Guidelines income for November 15, 2018, to the time of the first review adjustment or to the end of 2019, whichever comes first, at \$120,000 plus \$8,500. That conclusion, in my view, accords with the reasonableness test expressed by this Court in *Vosburgh v. Vosburgh*, 2015 BCSC 2580, at paras. 38 and 39.

[32] All of the Guidelines incomes discussed above will be applied at the mid-range in the Guidelines.

[33] Mr. Fedyk will probably sell his house to pay out to Ms. Fedyk the monies he owes her pursuant to these reasons. If he does not sell, he will probably have to substantially encumber the house title with mortgage debt.

[34] Counsel for Ms. Fedyk based his submissions for spousal support on s. 15.2(1),(4), and (6) of the Divorce Act, R.S.C. 1995, c. 3 (2nd Supp.), and our Court of Appeal's decisions in *McKenzie v. McKenzie*, 2014 BCCA 381; *Lee v. Lee*, 2014 BCCA 383; and *Chutter v. Chutter*, 2008 BCCA 507. I believe that the spousal support calculations under the Guidelines which flow from my findings above accord with the principles and requirements expressed in the Act and in those cases.

[35] The parties have liberty to apply through the registry for directions from me by telephone as required for implementing these reasons.

"MACINTOSH J."

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