
CANADA / JUDGMENT

Fogal v. Fogal

2006 BCSC 1104

COURT

Supreme Court of British Columbia

DECIDED

17 July 2006

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2006 BCSC 1104err2 Fogal v. Fogal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fogal v. Fogal,

2006 BCSC 1104

Date: 20060717

Docket: E10499

Registry: Duncan

Between:

Gerald Clarence Fogal

Plaintiff

And

Terry Lynn Fogal, aka Terry Lynn Wake

Defendant

Before: The Honourable Master A.N. Patterson

Reasons for Judgment

Counsel for the Plaintiff

V. Desjardins

Counsel for the Defendant

B.R. Vining

Date and Place of Hearing:

June 22, 2006

Nanaimo, B.C.

- [1] The defendant, in her notice of motion, applies for interim spousal maintenance. The plaintiff opposes her application for two reasons. First that there is a prenuptial agreement which governs and second, that the defendant is not in need of interim spousal maintenance.
- [2] The parties were married July 24, 1997, and moved to Duncan shortly thereafter when the plaintiff was appointed principal of a private school. This was a second marriage for both parties. There is a disagreement between them about the period of cohabitation prior to their marriage. The defendant maintains that they cohabited from 1992 to 1997, the plaintiff, however, denies this. This argument appears to be somewhat peripheral to the issues before the court.
- [3] On or about July 21, 1997, the parties executed a prenuptial agreement in Saskatoon, Saskatchewan, which was their residence at the time. Both parties signed at the time acknowledgments to the effect that they were aware of the terms of the agreement and that they intended to give up claims under the agreement. Both parties had legal advice and there are certificates from the solicitors attached stating that the parties were aware of the terms of the agreement.
- [4] According to the defendant she received advice from her solicitors that the agreement was not favourable to her, but despite this advice she signed it anyway.
- [5] In the pleadings the plaintiff seeks a declaration that the agreement is a valid marriage agreement. The defendant, on the other hand, in her statement of defence pleads in paragraph 7 "that the marriage agreement is unfair and is seeking variation of same." In her counterclaim she again seeks a variation of the agreement.
- [6] The prenuptial agreement itself provides that the contract is governed by the laws of the Province of Saskatchewan. There was no evidence tendered to the court concerning those laws, but for the purpose of this interim application the parties argued the case on the basis of the laws of the Province of British Columbia.
- [7] The section of the agreement which is in issue contains a hand written amendment initialled by both parties and their solicitors. The clause reads as follows:

III. MAINTENANCE

5. The parties further hereto agree that they shall forever waive any claim for spousal maintenance from the other party whether pursuant to The Divorce Act, The Family Maintenance Act, or any successor thereto or legislation of similar effect, provided the parties remain capable of self-sufficiency.
- [8] The parties arrived in Duncan in August, 1997, and purchased a home in May, 1998. They finally separated on or about January 7, 2006.
- [9] The defendant has been employed through most of the marriage as a hairdresser, which had also been her pre-marriage employment. Starting in September, 1998, the defendant began working in Duncan and in March, 2003, became self employed as a hair stylist. She currently rents a chair in a salon and remains self employed and has done so since March, 2003.
- [10] In her Form 89, sworn June 6, 2006, the defendant declares her income to be \$22,683.89, which is about the same as her Line 150 income in her 2005 tax return. The defendant, when confronted, acknowledges that these income figures are incorrect and that they omit approximately \$11,850 of unreported income. Her income for the purposes of this application should be set at \$34,500.
- [11] The defendant in her Form 89 has set out her annual expenses as \$64,418.64. This is clearly an unrealistic amount and includes a number of expenditures which she is not incurring and which are not appropriate. For example, \$1,400 per month for housing and \$286 per month for utilities are both being paid for by the plaintiff. The defendant lists \$416.66 per month for vacation; \$100 per month for RRSP; \$70 for alcohol and \$37.50 for MSP. These amounts total \$2,310 per month or \$27,720 per year.
- [12] In addition, there are a number of other expenses which are overstated taking into account her income. Her remaining expenses approximately equal her income.
- [13] The plaintiff, who is aged 61, is employed as a school principal. His salary is approximately \$134,000 per year. He is currently on medical leave, which will continue until the end of August this year. There is some question whether he will return to full employment with the school in September. His income has been reduced significantly while he is on disability payments.
- [14] According to the plaintiff the defendant has been spreading rumours about his behaviour which may have a significant impact on his ability to maintain his position as a school principal. It would be most unfortunate for both parties if unfounded rumours circulating in a small community caused the plaintiff to lose his position and consequently his income.

- [15] The defendant relies on a number of cases and particularly a decision of Sinclair-Prowse J. in *Desimone v. Desimone* 1993 BCJ No.1480. In that case the plaintiff sought interim spousal maintenance despite the existence of a separation agreement which provided for spousal maintenance for a period of two years after the two-year period expired. The court held that the separation agreement itself did not preclude an award of interim spousal maintenance in certain circumstances.
14. The issue in this application is whether Mrs. Desimone has established that she is entitled to be paid interim maintenance until these issues are resolved at trial.
15. Although there is a separation agreement which, on its face, appears to conclusively and finally preclude any further spousal maintenance claims, that fact alone will not result in the dismissal of a claim for interim spousal maintenance provided that the applicant is seeking to have the separation agreement set aside at trial (*Thompson v. Thompson*, [1987] BCJ No.2339, [1987] BCD Civ. 1621-03 (SC) and *Louvros v. Louvros*, [1987] BCJ No.1275 (May 15, 1987 Kamloops Registry No.06882 (SC)). In this case, Mrs. Desimone is seeking to have at least some provisions of the separation agreement set aside or overridden at trial.
16. It is not disputed that the granting of interim maintenance is discretionary (*Milkovich v. Milkovich* (supra)). For the most part, once the aforementioned preliminary requirement is met, interim maintenance will be awarded if the court is satisfied that the applicant has demonstrated a need for financial support and that the respondent has the capacity to pay (*Thompson v. Thompson* (supra)).
- [16] In *Lodjn v. Lodjn* [1997] BCJ No.2834 Master Chamberlist (as he then was) dealt with an application for interim spousal maintenance in the face of a prenuptial agreement barring any claim for spousal maintenance. The court found that there was a material change in circumstances not contemplated in the agreement after it was signed and the application for interim spousal maintenance was granted.
- [17] In *Dion v. Dion* [1998] BCJ No. 648 Ralph J. heard an application for interim spousal maintenance in the face of a prenuptial agreement waiving any rights by the spouse to maintenance. The wife was awarded maintenance applying the usual standards but the prenuptial agreement was apparently not considered by the court.
- [18] In *Collins v. Collins* 2004 BCSC 94 Master McCallum dealt with an application for interim spousal maintenance when a separation agreement provided for maintenance for a limited period which had expired. The application was dismissed for two reasons. First, because the grounds of attack on the agreement were weak and there was no ability to repay any amount awarded if the trial judge upheld the agreement and second, because the husband had no ability to pay.

- [19] In this case, there is no question the court has the discretion to award interim spousal maintenance despite the prenuptial agreement if several criteria are met. The defendant must demonstrate need and the plaintiff must have the ability to pay, she must show the terms of the agreement are vulnerable to attack and that she has the ability to repay any amount over paid and finally, that there has been a material change in circumstances.
- [20] The grounds of attack on the agreement are not that strong. Both parties have throughout the term of the marriage abided by the agreement by keeping their finances separate. Both parties had independent advice, in fact the defendant was advised against signing the agreement but signed anyway. The defendant, in her pleadings, seeks to vary the agreement not to set it aside entirely, thus implicitly recognizing the validity of the agreement itself.
- [21] There are no material changes in circumstances on the part of the defendant. She is working now at that which she was working before and during the marriage. There is no evidence of the defendant suffering any disability unlike the plaintiff who is currently on medical leave. There is no great evidence of need at this time once the defendant's expenses have been adjusted.
- [22] The terms of the agreement provide for no maintenance provided the parties remain capable of self sufficiency. There is no evidence the defendant is incapable of self sufficiency. She continues to work at her profession as she has throughout the marriage.
- [23] The parties referred to the spousal support guidelines and there is no question that for determining the amount of maintenance those are an important factor to consider but they are not binding on the court. Especially in applications for interim spousal maintenance where there has not been an exhaustive review of financial information. The classic test still remains, in the short term, what are the applicant's needs and the respondent's means.
- [24] The circumstances in this case, are that there is an apparently unassailable prenuptial agreement, no material change in circumstances, and evidence that the defendant is continuing in her professional employment with the capability to be self sufficient. Consequently, it is my view there should be no award for interim spousal maintenance. The issue of spousal maintenance should be dealt with by the trial judge at trial after a determination of the validity of the agreement.
- [25] The defendant's application for interim spousal maintenance is therefore dismissed. It is appropriate that this case proceed to trial as quickly as possible. No judicial case conference has been held and I direct that one be set down as soon as possible, particularly to address the question of trial dates and length of trial.

"Master A.N. Patterson"

August 8, 2006 - Revised Judgment

On page 3, paragraph 9, the first sentence should read:

"The defendant has been employed through most of the marriage ."

August 31, 2006 - Revised Judgment

The docket number should read:

"E10499"

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