
CANADA / JUDGMENT

Griffin v. Boeda

2015 BCSC 1674

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Supreme Court of British Columbia

DECIDED

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2015 BCSC 1674 Griffin v. Boeda

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Griffin v. Boeda,

2015 BCSC 1674

Date: 20150917

Docket: E093720

Registry: Vancouver

Between:

Sherry Griffin

Plaintiff

And

Peter Boeda

Defendant

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiff:

K. Thompson

Counsel for the Defendant:

M. Lecovin

Place and Date of Hearing:

Vancouver, B.C.

May 27 - 28, 2015

June 15, 17 and 18, 2015

Place and Date of Judgment:

Vancouver, B.C.

September 17, 2015

- [1] These are reasons for judgment on the claimant's application for continuing and retroactive spousal support.
- [2] The parties began to cohabit in 1989 or 1990. The date is not agreed. They were married on November 26, 1991. They separated in October 2008. This proceeding was commenced on November 19, 2009 by writ of summons and statement of claim. The claimant (then a plaintiff) sought various relief including a divorce, spousal support and division of family assets. In a statement of defence and counterclaim the respondent (then a defendant) also sought a divorce, division of family assets and opposed an order for spousal support. The claimant is now 57 years old and the respondent is 63.
- [3] With the assistance of counsel and the benefit of a mediator, the parties entered into minutes of settlement dated July 19, 2010 ("Minutes of Settlement"). They were divorced on September 3, 2010. The Minutes of Settlement provide in para. 3 for spousal support as follows:

The Parties agree that Peter shall pay to Sherry spousal support of \$8,000 per month for a period of three (3) years, commencing 1 September 2010 and concluding on 1 August 2013 and spousal support of \$7,500 per month for one (1) additional year commencing 1 September 2013 and concluding on 1 August 2014. Spousal support, if any, payable by Peter to Sherry after 1 July 2014 shall be determined by a review. Financial documentation relevant to the review will be exchanged commencing 1 January 2014 and the review itself may be held at any time on or after 1 June 2014.

- [4] The Minutes of Settlement value the claimant's net assets at \$1,377,300 and the respondent's net assets at \$1,878,409. The total was \$3,255,709 which was agreed to be divided equally. To achieve equality the respondent agreed to pay the claimant \$250,544.50. The respondent assumed sole responsibility for family debts of \$208,000.
- [5] The largest single asset which remained with the claimant was Pinecrest Ranch which was valued at \$1,100,000, and the largest single asset which remained with the respondent was Cowboy Coffee Roasting Ltd. ("Cowboy Coffee"), which was valued at \$1,200,000.

- [6] The respondent ceased making monthly spousal support payments following the August 1, 2014 payment as provided in the Minutes of Settlement. The claimant now applies for an order for continuing spousal support "in an amount and for a duration determined by the court", and retroactive support from the beginning of September 2014.
- [7] In paragraphs 2, 3 and 4 of Part 3 of her amended notice of application the claimant describes the basis on which she submits she is entitled to retroactive and continuing spousal support as follows:
2. The parties cohabited for 19 years, from October 1989 to Oct. 2008. At the time of separation the Claimant was 50 years old and, under the Rule of 65, was entitled to spousal support for an indefinite period.
 3. The review mandated by the Minutes of Settlement addresses both entitlement and quantum.
 4. Entitlement is established on both a compensatory and non-compensatory basis. Firstly, the claimant devoted her energies primarily to the ranch and businesses other than Cowboy Coffee and the respondent focused on Cowboy Coffee. Secondly, the claimant has obviously suffered a financial detriment as a result of the separation, as the business that generates income was apportioned to the respondent. The claimant has no income to speak of while the respondent earns a substantial income.
- [8] The claimant submits the division of assets agreed in the Minutes of Settlement gave the respondent part ownership of Cowboy Coffee and an annual income exceeding \$300,000 whereas she kept Pinecrest Ranch which provides a meagre income. The claimant also refers to the depression from which she has suffered, which she attributes to the breakup of the marriage. Her claim for spousal support is on both a compensatory and non-compensatory basis.
- [9] The claimant deposes she has listed the Pinecrest Ranch for \$1,598,000 but because "the market for Ranch property in [the Clinton] area is depressed [she is advised to] wait to sell until the market improves". In the meanwhile, she must pay the annual property taxes, insurance premiums and maintenance costs for fencing, for example, on which she expects "to spend \$20,000 to \$25,000 in the next year or so".
- [10] The claimant's evidence is that the ranch generates little revenue, most of which is from hay sales and grazing rights which total perhaps \$13,000 annually at most. She also rents the ranch house to friends for \$900 per month. In an affidavit made on November 21, 2014 the claimant deposes that the income derived from the ranch enables her "to maintain [the ranch] and to keep it without eroding [her] capital". She believes the ranch will increase in value over time and she is "prepared to treat it as a long-term investment if [she] cannot obtain a fair price". In an affidavit made on May 11, 2015 the claimant is less optimistic about her ability to sustain the ranch than she was in her November 2014 affidavit. She believes she does not have sufficient income to repair fencing, prevent flooding, nor replace an

expensive fridge in the ranch house and she cannot pay the property taxes, nor insurance premiums. She expects annual hay sales of only \$8,500 gross and has "a few bed and breakfast weekends". She does not specify what "a few" means and she gives no details of her efforts to pursue that type of business. Apparently to pay expenses she has sold considerable farming equipment since her separation from the respondent.

- [11] The claimant deposes she cannot find remunerative work in the Clinton area. She has taken online university courses but was not able to complete them as she was struggling with "confidence and depression". On an examination for discovery on April 29, 2010 the claimant gave evidence that "in the last two years" she had taken a psychology and a writing course through Thompson Rivers University. She testified that she completed the psychology course and "did well". The claimant is a trained chef. On her examination for discovery she agreed that she could "go somewhere and become a cook today" but that she had not "look[ed] into becoming a cook".
- [12] In her most recent tax return for 2014 the claimant reported income of \$57,844. She had received \$60,000 in that year for spousal support and reported a small farming income loss.
- [13] In a letter dated September 25, 2014 Dr. S.A. Weimar, the claimant's family physician, opines that the claimant "suffers from depression" and when depressed is "unable to work". Dr. Weimar does not comment on the cause of the depression but reports that the claimant told her that she "had never suffered from depression prior to her husband leaving her". The letter does not provide the certification required by R.13-2 of the Family Court Rules to be admissible as opinion and its contents do not conform with the mandatory requirements of R. 13-6(1)(a). I accept that the claimant found the breakup of her marriage depressing but the letter of Dr. Weimar is not admissible evidence that the plaintiff has suffered from a clinical depression caused by the failure of the marriage and which disabled her from seeking remunerative employment following her separation from the respondent.
- [14] In her affidavit made on November 21, 2014 the claimant deposes to conversations she has had with "my therapist Elaine Connolly" who informed her that "it could be 5 -7 years" to be over the depression. Ms. Connolly's evidence is not part of the record. Fortunately, the claimant believes that in "mid to late 2012, [she] emerged from the worst of [her] depression and began to heal".
- [15] In the respondent's F8 financial statement made on February 3, 2015, he deposes to an annual income for spousal support purposes of \$198,250. The claimant submits this is not accurate and puts the respondent's annual guideline income to calculate spousal support at \$318,000.

The Employment of the Parties During their Relationship

- [16] When the parties began to cohabit, the claimant left her secretarial employment with the Bentall Group and together with the respondent opened a coffee shop known as "Bean Around the World". The coffee shop was initially financed to a large extent with the respondent's cash contribution and his borrowing. The claimant also contributed cash.
- [17] The claimant worked in the coffee shop until 1993, then attended a culinary school for five months and on concluding that training, opened a bakery adjacent to the coffee shop.
- [18] In 1994 Cowboy Coffee was incorporated. Both parties were shareholders along with another couple. Cowboy Coffee was successful and provided a substantial income to its shareholders.
- [19] In 1994 the parties purchased a guest ranch and worked together on the ranch for approximately the next five years with the respondent also playing an active role in Cowboy Coffee.
- [20] That guest ranch was sold, and in 2001 Pinecrest Ranch near Clinton, B.C. was purchased by the parties and they worked together on the ranch until their separation in October 2008. Throughout that time the respondent continued to play an active role in Cowboy Coffee.
- [21] At the time of the separation the respondent moved permanently to Vancouver. The claimant remained at Pinecrest Ranch but has spent considerable time living in North Vancouver in a townhouse which she purchased in 2011.
- [22] Pinecrest Ranch comprises 240 acres on which there are a number of buildings, including a substantial house. While the parties were together they both worked on the ranch which had paying guests and a number of other activities which generated revenue.
- [23] The claimant asserts that the respondent was mostly involved in ranching work and only to a limited extent in Cowboy Coffee in the later years of the marriage. The respondent deposes that on the contrary he has continuously been much involved with Cowboy Coffee in "financial administration, coffee buying, development of coffee blends, overseeing equipment maintenance, purchasing and quality control". I accept that his involvement in Cowboy Coffee has been substantial.
- [24] Pinecrest Ranch operated as a guest ranch mostly in the summer months. It never generated sufficient revenue to provide a reasonable income and its operations were subsidized through the income generated by Cowboy Coffee.
- [25] The respondent's evidence is that in recent years the revenue of Cowboy Coffee has declined. In 2011 it ceased contributing to the respondent's pension, and to the pension of the other substantial shareholder. It reduced the number of its employees to accommodate the decline in revenue. The respondent took on additional duties and his salary was increased.

- [26] On separation, the claimant, who had not been directly involved in the coffee business for a number of years, sought to keep Pinecrest Ranch in which she had been heavily involved. Her apparent hope was to operate it as a paying business but that has been achieved only to a limited extent.
- [27] The respondent's evidence is that when he was involved in the operation of Pinecrest Ranch it earned income from 120 acres of hay field, through cattle grazing, through a "bed and bale" operation for horses and from rents derived from a guest house, a caretaker cabin and perhaps from the main house which has 4000 sq.ft. His estimate is that haying could generate annually \$15,000 - \$20,000 in revenue, grazing \$1,000, the bed and bale operation \$5,000, and rent upwards of \$2,600 each month.
- [28] The respondent enjoys ranching and was able to derive a reasonable income through Pinecrest Ranch. In my view it is not realistic, however, for the claimant to duplicate the necessary effort and expertise to achieve a reasonable income on her own from the ranch. Her expectation, when agreeing to the Minutes of Settlement, that she could manage Pinecrest Ranch and generate an income to meet its overhead and live at a reasonable level herself has turned out to be unrealistic.
- [29] The claimant submits she has suffered a significant "financial detriment as a result of the separation" because Cowboy Coffee, which generates substantial income, was apportioned to the respondent and that "under the Rule of 65 [she is] entitled to spousal support for an indefinite period".

The Law in Relation to Compensatory Support

- [30] In *Chutter v. Chutter*, 2008 BCCA 507 at para. 50 Rowles J.A., with whom the other judges concurred, wrote:
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (Bracklow, [[1999] 1 S.C.R. 420] at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (Moge, [[1992] 3 S.C.R. 813] at 861-863; Bracklow, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

[31] In Chutter the parties were married for 28 years. The appellant was 54 years old at the time of the trial. As a result of an agreed division of assets the appellant received about \$4 million. She sought spousal support on a compensatory basis "because she was economically disadvantaged by her role in the marriage and by its breakdown". The claimant before me takes the same position. The applicant in Chutter also asserted need on the basis that her standard of living "was not equivalent to that which she enjoyed in her marriage and was far below that of the respondent's because of his ability to earn and the nature of the assets he received" following the separation of the parties (para. 34).

[32] Rowles J.A. in Chutter observed that:

[52] [t]he Court in Moge discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement . As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[Emphasis in original. Citations added]

[53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:

[11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945

(S.C.); O'Neill v. Wolfe (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); Walton v. Walton, [1997] B.C.J. No. 1089 (S.C.); Ulrich v. Ulrich, 2003 BCSC 192; and Carr v. Carr (1993), 46 R.F.L. (3d) 326 (B.C.S.C.).

[Emphasis in original.]

The Law in Relation to Non-compensatory Support

[33] Madam Justice Rowles, again in Chutter, observed at paras. 54 and 55:

[54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in Myers v. Myers (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

Findings on Compensatory Support

[34] In my opinion, the present application does not lend itself to a compensatory award of spousal support. One of the salient factors in such awards is the constraints placed on the applicant's ability to engage in remunerative employment during a lengthy "traditional marriage". This frequently arises because of the need to raise children which deprives the mother of the ability to remain in remunerative employment to her detriment when the marriage ends. That factor is not present in this application. The claimant submits that she raised the respondent's niece in her younger years and, therefore, the relationship between the parties ought to be looked upon as "traditional". I do not view the relationship of the parties as a traditional marriage in the sense described in the governing cases. The claimant remained in the workforce in a variety of capacities throughout her married life. Nor can I conclude the respondent's business activities took precedence over those of the claimant. It is true that the respondent was much more active in Cowboy Coffee than the claimant, but in my view, the claimant made a choice to become more heavily involved in Pinecrest

Ranch. Both parties worked outside the home and I can see no distinction to be made between them which would meet the test for compensatory spousal support. In short, the claimant did not play a role in a marriage of moderate length that disadvantaged her in the workforce when the marriage came to an end. I decline to make an award of spousal support based on the compensatory criteria.

Findings on Non-compensatory Support

- [35] The principle involved in non-compensatory support is "need" measured against the standard of living enjoyed during the marriage. As I have indicated earlier in these reasons, the division of assets agreed between the parties has left the claimant in "need" as that word is used in the context of spousal support applications. The claimant left the marriage with a valuable asset, Pinecrest Ranch, but its value as a ranch has not and probably cannot translate into substantial income. Pinecrest Ranch cannot place the claimant's standard of living on a footing of even approximate equality with that of the respondent who left the marriage with a valuable income generating asset. The claimant was optimistic of generating a reasonable income from the ranch but there is no evidence she has the ability to use the ranch to its potential to earn income. Even if she could, that potential is well below the income of the respondent. The respondent left the marriage with an asset capable of generating a substantial income. The evidence is uncertain, but based on the respondent's financial statement sworn on February 3, 2015 I find his annual income is \$200,000.
- [36] I recognize that in order to earn that income the respondent must work in Cowboy Coffee. Nevertheless, he enjoys a substantial advantage over the claimant in his capacity to earn income. That factor militates in favour of a non-compensatory spousal support award.
- [37] I am persuaded, however, that the claimant has not made appropriate efforts to obtain remunerative employment. She cannot expect indefinitely, as she puts it in her affidavit made on November 21, 2014, "to treat [Pinecrest Ranch] as a long-term investment if [she] can obtain a fair price for it". The claimant is capable of earning some income through the ranch if she decides to keep it and can now earn income from other employment which she has not pursued. In my opinion she is not entitled to rely indefinitely on the respondent while leaving her "investment" fallow.
- [38] The income the ranch is capable of earning for the claimant is vague. I am satisfied, however, that for the purpose of calculating spousal support I should impute an annual income to the claimant of \$50,000. That is necessarily a somewhat arbitrary assessment, but in my view is reasonable.

The Implications of the Minutes of Settlement

- [39] The parties have differing interpretations of the meaning of para. 3 of the Minutes of Settlement. The claimant submits the use of the word "concluding", to describe the respondent's obligation to pay monthly spousal support of \$8,000 until August 1, 2013 and \$7,500 monthly "commencing 1 September 2013 and concluding on 1 August 2014", cannot mean that spousal support would cease altogether, subject to a review, with the payment of \$7,500 at the beginning of August 2014. The respondent submits that "conclude is synonymous with cease" and the phrase "spousal support, if any, payable after 1 July 2014 shall be determined by a review" contemplates that no further support is payable after July 2014 unless the claimant is successful in reinstating support on a review.
- [40] The Concise Oxford Dictionary, 11th ed, defines "conclude" to mean "bring or come to an end". The Carswell Dictionary of Canadian Law, 1st ed, defines "conclude" to mean "to finish; to bar or estop".
- [41] In my opinion the Minutes of Settlement evidence an agreement that from August 1, 2014 the respondent's obligation to pay spousal support ended, unless on "a review" a court ordered otherwise.
- [42] This present application does not involve the review of a court order providing for spousal support. It is an application for a review of spousal support provided for in a separation agreement, namely, the Minutes of Settlement. It is not necessary for either party to establish a material change in circumstances. Instead, this Court must determine on the present facts whether the claimant is entitled to spousal support and, if so, the appropriate quantum and duration of that support having regard to the factors and objectives of spousal support set out in ss. 15.2(4) and 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3. Those subsections read as follows:
- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- ...
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[43] Those provisions are echoed in s. 161 of the Family Law Act, S.B.C. 2011, c. 25 on which the claimant also relies.

[44] I have considered *Miglin v. Miglin*, 2003 SCC 24 in which Bastarache and Arbour JJ. writing for the majority at para. 4 observed that:

[W]e believe that a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the Divorce Act as a whole should receive considerable weight. In an originating application for spousal support, where the parties have executed a pre-existing agreement, the court should look first to the circumstances of negotiation and execution to determine whether the applicant has established a reason to discount the agreement. The court would inquire whether one party was vulnerable and the other party took advantage of that vulnerability. The court also examines whether the substance of the agreement, at formation, complied substantially with the general objectives of the Act. As we elaborate later, these general objectives include not only an equitable sharing of the consequences of the marriage breakdown under s.15.2, but also certainty, finality and autonomy. Second, the court would ask whether, viewed from the time the application is made, the applicant has established that the agreement no longer reflects the original intention of the parties and whether the agreement is still in substantial compliance with the objectives of the Act.

[Emphasis added.]

[45] In my opinion, the claimant has established that the Minutes of Settlement, viewed at the time of this present application, are not in substantial compliance with the objects of the Divorce Act, ss. 15.2(6)(c) - (d). The divided assets gave the respondent a pronounced advantage from an income earning asset while disadvantage to the claimant has become increasingly apparent with the passage of time. I find the claimant is entitled to retroactive and continuing spousal support.

[46] That support, however, should not be indefinite. The claimant ought to increase her efforts to become self-sufficient and, if she is unable to make Pinecrest Ranch into a more substantial generator of income, she may need to make more active efforts to market it at a price which is attractive to potential purchasers. As I have mentioned above, she cannot continue to look on the ranch as a long-term investment which someday will bear fruit, but which in the meantime provides her with no income of consequence. If the ranch is converted to cash which is invested, it would provide further income in the reasonable near

future.

- [47] I do not read the cases on spousal support to require that the income of the former spouses must be equalized by a support payment. I do recognize, however, that in the present instance there is such a wide disparity between the incomes of the parties that the gap must be narrowed. Applying the Spousal Support Advisory Guidelines to a cohabitation of 18 years, the mid-range of support is \$3,938 monthly. If the period of cohabitation has been 19 years, the mid-range is \$4,156. On the evidence I cannot determine the precise length of cohabitation.
- [48] I calculate the appropriate level of monthly support from the beginning of July 2014 to be \$4,000. The approximate "mid-range" of spousal support is not a default option and I consider it to be reasonable.
- [49] The respondent will pay \$48,000 in retroactive support to the claimant for the period from September 2014 to September 2015 and \$4,000 monthly thereafter until the last payment is made on August 1, 2017, at which time his obligation to pay spousal support will cease. My intention in limiting spousal support to a two-year period is to provide to the claimant with the necessary time to enhance her income either through Pinecrest Ranch or some other remunerative activity or to sell Pinecrest Ranch and invest the proceeds of sale to generate income which will satisfy the requirements of s.15.2 of the Divorce Act and s. 161 of the Family Law Act.
- [50] The claimant is entitled to the costs of the application.

"Affleck J."

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