
CANADA / JUDGMENT

Hanan v. Anderson

2014 BCSC 828

COURT

Supreme Court of British Columbia

DECIDED

15 April 2014

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2014 BCSC 828 Hanan v. Anderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hanan v. Anderson,

2014 BCSC 828

Date: 20140415

Docket: 04-2557

Registry: Victoria

Between:

Elizabeth Mona Hanan

Claimant

And:

George Anderson

Respondent

Before: The Honourable Mr. Justice Macaulay

Corrected Judgment: The front page of the judgment
now shows the correct counsel.

Supplementary Reasons Notice: These Oral Reasons
for Judgment are supplemental to the Reasons for Judgment,
Corrected Reasons and Corrigendum, 2014 BCSC 96.

Supplemental

Oral Reasons for Judgment

(In Chambers)

Counsel for the Claimant:

A.J. Duncan

Counsel for the Respondent:

M.L. Warsh and L.K. Taylor

Place and Date of Hearing:

Victoria, B.C.

April 15, 2014

Place and Date of Judgment:

Victoria, B.C.

April 15, 2014

- [1] THE COURT: These reasons are supplemental to my Reasons for Judgment indexed at 2014 BCSC 96, in respect of which the final order has not been filed and entered. Two issues have arisen: the limits, if any, to be placed on the amount of Ms. Hanan's RRSPs that she intends to roll over to Mr. Anderson to pay out his interest in the Tattersall Drive property, their former matrimonial home; and entitlement to costs of the proceeding.
- [2] By way of brief background, the only significant contested issues by the conclusion of the trial related to the division of matrimonial property. Ms. Hanan sought an unequal division, entirely in her favour, pursuant to the terms of a marriage agreement or, alternatively, reapportionment pursuant to s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"). Under the terms of the marriage agreement, it was arguable that Mr. Anderson was not entitled to any share of any family assets unless he had contributed financially to their acquisition.
- [3] Mr. Anderson also raised other issues in his pleadings, including claims for an interest in the Tattersall Drive property, based on unjust enrichment and constructive or resulting trust. He also claimed spousal support. He did not pursue any of those claims in his final submissions and, as a result, they were all dismissed.
- [4] Mr. Anderson contended that the marriage agreement was unfair with respect to both its formation and operation. Much of the trial focused on his contention that Ms. Hanan exerted a form of undue influence, such that the agreement should be set aside on that basis.

- [5] In the end result, Mr. Anderson sought an undivided one-half interest in the family assets, with the exception of the Tattersall Drive property, which he suggested should be reapportioned 60 percent in favour of Ms. Hanan. The trial lasted six days.
- [6] In my reasons for judgment, I found that the marriage agreement was unfair at the time that it was made, largely because the drafter relied on the parties' earlier cohabitation agreement, entered into when they were living together but not married, as a template, without regard to the change relating to property division that applied under the FRA after marriage. Further, the agreement as drafted, taking into account the length of the marriage and the increase in value of the Tattersall Drive property over time, did not, at the time of the trial, adequately provide for a fair division.
- [7] In the result, family assets totalling \$1,137,000 were subject to division. That amount consisted of the following: Tattersall Drive property, \$810,000; Discovery Optical investment gain, \$41,000; Hanan RRSP, \$286,000. Ultimately, I reapportioned those assets in favour of Ms. Hanan as follows: Tattersall Drive property, 75 percent; Discovery Optical investment gain, 50 percent; Hanan RRSPs, 90 percent. In the result, Mr. Anderson's entitlement to 25 percent of the value of the Tattersall Drive property was \$202,500, based on the valuation evidence accepted at trial. His 10 percent share of the Hanan RRSPs was valued at \$28,600.
- [8] Ms. Hanan successfully obtained an order entitling her to pay Mr. Anderson \$251,600 and, in exchange, receive Mr. Anderson's interest in the Tattersall Drive property. If Ms. Hanan chooses not to buy out Mr. Anderson's interest, the Tattersall Drive property will be listed for sale and eventually sold under the terms of an order set out in my reasons for judgment. In that event, the amount to which Mr. Anderson is entitled under the judgment will be adjusted to reflect his share of 25 percent of the net sale proceeds, rather than the amount set out above.
- [9] Unfortunately, the parties did not make submissions at trial on the extent to which Ms. Hanan could rely on a spousal rollover of her RRSPs to generate the payment due to Mr. Anderson under the terms of the judgment. Although I anticipated that Ms. Hanan would roll over some of her RRSPs, I did not set a limit on the amount. This raises the possibility that Ms. Hanan would seek to transfer more than Mr. Anderson's share in her RRSPs, that is, \$28,600.
- [10] Because a spousal rollover transfers the delayed tax burden inherent in a registered investment like an RRSP, Mr. Anderson would be obligated to pay all income tax due upon any collapsing of the amount rolled over. Viewed another way, to the extent when Ms. Hanan rolls over more than \$28,600, she would be using her pre-tax RRSP contributions to pay the amount due to Mr. Anderson for his interest in an unregistered asset, the Tattersall Drive property.

- [11] In *Xu v. Leung*, 2001 BCCA 163, the Court of Appeal held that it is an error to, in effect, intermingle RRSP and non-RRSP investments in ordering a compensation payment in such circumstances. I agree that the court must take the differing tax implications into account.
- [12] Ms. Hanan contends that if she cannot pay the entire \$251,600 by way of a spousal rollover of her RRSP, it is a certainty that, in order to pay Mr. Anderson, "she will have to sell the Tattersall property." Of course, properly understood, the property is not just hers to sell, as Mr. Anderson has an undivided quarter interest.
- [13] If Ms. Hanan considers it beneficial to do so, she may, of course, cash in her own RRSP to whatever extent may be realistic and then use after-tax funds to pay Mr. Anderson. Alternatively, she and Mr. Anderson may agree to gross-up the amount of the spousal rollover to cover his anticipated tax liability. It is not necessary that I make any orders in such regard and absent the parties consenting to a particular order, I decline to do so.
- [14] My conclusion is as follows. Absent some new agreement between the parties, which at the moment, appears unlikely, Ms. Hanan shall only transfer \$28,600 by way of a spousal rollover from her RRSPs. If she wishes to retain the Tattersall Drive property for herself, she must then pay the additional balance owing to Mr. Anderson under the judgment in cash. If she cannot do so, the Tattersall Drive property will be sold under the terms of my order and, subject to adjusting the amount to which Mr. Anderson will ultimately be entitled, he will receive payment for his interest at that time.
- [15] It is unfortunate that the parties waited so long after receiving my reasons for judgment to speak to this matter. In the circumstances, the parties will only have a limited amount of time to determine whether Ms. Hanan will buy out Mr. Anderson's interest in the Tattersall Drive property.
- [16] Ms. Hanan shall have until May 15, 2014, in which to complete her purchase of Mr. Anderson's interest in the Tattersall Drive property, unless the parties otherwise agree or the court orders. If Ms. Hanan does not complete the purchase, I order the sale of the Tattersall Drive property in accord with my previous orders. I am not seized of any future applications that may be necessary with respect to any of the above.
- [17] I turn to the question of costs. Each party claims to have substantially succeeded and thereby to be entitled to costs. *Gold v. Gold*, 1993 CarswellBC 216, is a well-known decision of the Court of Appeal respecting the principles applicable to costs in a property division case. It stands for the principle that costs should normally follow the event, as in other civil litigation, unless the court otherwise orders. See Supreme Court Family Rule 16-1(7). The rule preserves the residual discretion of the court to deny costs to a successful party. Although the parties exchanged offers to settle before trial, the respective amounts do not come close to reflecting the trial outcome.

- [18] Viewed globally, the essential issue in the present case was whether Mr. Anderson was entitled to any share of the family assets, given the provisions of the marriage agreement. Ms. Hanan sought, unsuccessfully, to deny any entitlement. Having lost that battle, she succeeded in obtaining a significant reapportionment in her favour. From Mr. Anderson's perspective, he ends up with an entitlement to \$251,600 if Ms. Hanan purchases his interest in the Tattersall Drive property. If the property is sold instead, he will still receive a sizeable award. Overall, I conclude that Mr. Anderson won the war. He was the successful party, but that is not the end of the matter.
- [19] This trial could and should have focused on the obvious failing that was evident on a facial review of the marriage agreement. Instead, that issue received minimal attention, even in final submissions. Regrettably, rather than focusing on the defects apparent on the face of the marriage agreement, which might well have been addressed by way of a summary trial, or by a very short trial, Mr. Anderson chose instead to fight a scorched-earth war at trial by advancing positions, in his pleadings, during the trial, and even in final argument, that were unnecessary, time-consuming, and unsuccessful. I further find that Mr. Anderson deliberately lied during his evidence to advance his position.
- [20] Finally, in reaching my conclusion respecting entitlement to costs, I take into account that awarding costs to either party would upset the division of assets that I have ordered. In the circumstances, I order that the parties shall bear their own costs.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

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