
CANADA / JUDGMENT

Harder v. Harder

2010 BCSC 585

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Supreme Court of British Columbia

DECIDED

29 April 2010

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2010 BCSC 585 Harder v. Harder

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harder v. Harder,

2010 BCSC 585

Date: 20100429

Docket: E083817

Registry: Vancouver

Between:

Douglas Wayne Harder

Plaintiff

And:

Jill Audrey Madge Harder

Defendant

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Self-Represented:

D.W. Harder

Self-Represented:

J.A.M. Harder

Place and Date of Trial:

Vancouver, B.C.

April 6-9, 2010

Place and Date of Judgment:

Vancouver, B.C.

April 29, 2010

Introduction

- [1] This is a family dispute where the parties seek a divorce after a 30-year marriage and a determination of the financial issues arising from the marriage. Both represented themselves at trial.

Background

- [2] The parties were married on December 20, 1977, and separated on April 17, 2008. The plaintiff is 53 years old and the defendant is 52 years old. The parties have two daughters, now 30 and 31 years of age. The children are married and have two children each.
- [3] Mr. Harder is a construction manager and farm manager for the company in which he has been an employee since 1984. He is an experienced journeyman plumber and is also certified to operate various construction machines such as excavators. He has been involved primarily in the development and construction of many warehouse complexes. He has been a hard-working and dedicated employee. He has had two heart attacks, one in 1994 and the other in 2000. His last heart attack required triple bypass heart surgery. His employer has provided him with a \$3,000/year incentive to keep his weight below 220 pounds.
- [4] Ms. Harder is an office manager for a dental clinic. She has worked for the clinic for close to eighteen years and has been its office manager for the last five years.
- [5] The family enjoyed many vacations in the Caribbean and on cruises. There was no dispute between the parties that a significant portion of the family's funds went to supporting one daughter's dream of pursuing a career in ballet.
- [6] In 2004, Mr. Harder's employer made him an offer to manage the cranberry farm operations of the company. As part of the proposal, Mr. Harder was to live in the large four-bedroom house on the farm (the "farmhouse"). As part of the offer he would be placed on a fixed salary as opposed to an hourly rate. This would allow him to ease down his pace of work as well as earn a stable income; as construction activity was slowing down for his company. He accepted the offer and the parties moved into the house after renovating the premises.

- [7] The parties separated in mid-April 2008 after Mr. Harder told Ms. Harder that he had had an affair in January 2008. The event seems to be the culmination of many years of unhappiness in the marriage for Mr. Harder. He with some candour admitted that he was a "chicken" and "not man enough" to have ended the relationship in 2002 when the relationship had broken down. He said he stayed for the sake of the children. He stated that in April 2008 he told Ms. Harder that he had been with a lap dancer to end the relationship, as he knew that Ms. Harder would find it unacceptable and hate Mr. Harder forever. He said that it was a "chicken shit" thing to do but that he did it to get out of the relationship.

Issues

- [8] The issues are:

1. the division of family assets;
2. the level of annual income for Mr. Harder for determination of spousal support; and
3. the level of annual income for Ms. Harder for determination of spousal support.

- [9] Ms. Harder also alleges that Mr. Harder infected her intentionally or negligently with molluscum contagiosum, a viral skin disease and seeks damages for this. I discuss this claim as well.

Discussion and Analysis

- [10] The approach to financial matters is to first determine issues related to family assets and then to move to spousal support. Following the financial issues I will deal with Ms. Harder's claim regarding her contraction of molluscum contagiosum, a skin virus.

1. Family Assets

- [11] At the commencement of the trial, I was given the indication that there were several issues that would be hotly contested regarding family assets. However, by the middle of the trial I was advised that issues surrounding value would not be contested, leaving the key issue to be determined to be whether Ms. Harder is entitled to reapportionment of the family assets.

- [12] The key family assets are:

- (a) Saleen Ford Mustang: The vehicle is registered in the name of Mr. Harder. The parties agree that the value of this vehicle is \$32,500. There is no debt associated with this asset as it was provided to him by his employer.
- (b) Infiniti FX: The vehicle is registered in the name of Ms. Harder. The parties agree that the value of the vehicle is \$22,000. The current balance owing on the car loan is \$13,000. Ms. Harder does not wish to retain this vehicle. Mr. Harder says that Ms. Harder should sell the vehicle.

- (c) Home Furnishings: There are few furnishings of value. Ms. Harder has taken certain items from the farmhouse to the townhouse where she currently resides. The parties have agreed that the remaining issue on furnishings be settled in the following manner:
- (i) Mr. Harder is to receive from Ms. Harder the fireproof safe, the family videos and his old passport;
- (ii) Ms. Harder is entitled to copy the videos at her own expense; and
- (iii) Ms. Harder is to receive the family photographs that are stored in the garage of the farmhouse. Ms. Harder is to arrange for the pickup and attend with a daughter.
- (d) The Langley townhouse (the "townhouse"): The market value is agreed at \$385,000. The existing mortgage balance is \$82,265.11. The net equity is \$302,734.89.
- (e) RRSP: the parties agree that Mr. Harder is to pay Ms. Harder \$5,000 to equalize the division. Though Ms. Harder asserted that Mr. Harder had a pension from his employer, Mr. Grafton testified that this company did not provide a pension. In her final submissions, other than the \$5,000 mentioned, she did not seek a division of the asserted pension.
- [13] Ms. Harder also raised a suspicion that Mr. Harder has hidden assets. Mr. Harder has provided considerable financial disclosure in this litigation. His income went into the family joint account to which Ms. Harder had full access and utilized. I have also observed Mr. Harder throughout these proceedings and considered his testimony for consistency with the circumstances, including his denial of any hidden funds, and I find him credible. While I accept that Ms. Harder genuinely does not trust Mr. Harder and that she has been deeply hurt by Mr. Harder's decision to abandon the marriage, there is little to support her suspicion that he has hidden monies from her. The parties were able to have many nice vacations because of their saved air miles and were able to tag vacations on to business travel. A great deal of their monies were expended towards one daughter's career in ballet.
- [14] Though the topic of air miles points held in Mr. Harder's name was raised at trial, the parties did not specify a position in regard to these points. It seems that Mr. Harder has accumulated significant air miles points.
- (a) Division of Family Assets
- [15] On the question of dividing family assets, it is the position of Mr. Harder that the parties divide them equally.
- [16] Ms. Harder takes the position that she is entitled to reapportionment of the key family assets which are the two vehicles and the townhouse. The total value of these assets is \$343,500. Ms. Harder takes the position according to her final numbers that the value should be split 68/32 in her favour. More particularly, she says that Mr. Harder should receive the two vehicles and 43% of the value of the townhouse. She adds that Mr. Harder owes her \$5,000 as her share of redeemed RRSPs; \$10,000 for trips that Mr. Harder has taken since separation; \$20,000 for legal fees she has incurred; past spousal support of \$59,893; and \$50,000 for

emotional and physical trauma because of the skin virus that Mr. Harder is alleged to have transmitted to her. Totalling these amounts, Ms. Harder calculates that she should as a result be entitled to receive the full interest in the townhouse plus an additional \$14,643 from Mr. Harder.

- [17] In regard to her legal fees and Mr. Harder's trips there is no basis in this case for compensation for these items. In terms of past spousal support and personal injury, I discuss these claims below.
- [18] Section 56 of the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"), provides for equal division of family assets, unless it can be shown that such equal division would be unfair having regard to the factors set out in s. 65, namely:
- (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when the property was acquired or disposed of,
 - (d) the extent to which property was acquired through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.
- [19] The onus is on the party seeking to displace this presumption to demonstrate unfairness upon the factors set out above. It is only upon unfairness being established on the above stated factors that reapportionment is to be considered.
- [20] As I indicated to the parties, misconduct of a party is not a relevant factor to this issue in this case and I have not considered it. Ms. Harder has argued that she needs a greater apportionment because of her financial circumstances. However, the evidence shows that she has been gainfully employed for years with her current employer and that she is seen as a positive employee. There is evidence indicating that her employer would like her to work more hours. Her employment is stable. She is also in good health and appears fit. Her evidence indicates that she has since separation entered into intimate relationships which in my view belie the degree of loss of self-esteem that she spoke to in her testimony. On the other hand, the evidence shows that Ms. Harder had to subordinate her priorities to the demands of Mr. Harder's work and career. He is the one who obtained his journeyman plumbing ticket and developed other construction qualifications that positioned him well for opportunities. She was the primary caregiver in raising the children. She provided the traditional support to her husband as he developed his career. In recognizing that Ms. Harder has gainful employment as an office manager for many years, which has been and remains stable, her role in supporting Mr. Harder as his work and career came first, and Mr. Harder's agreement that Ms. Harder is entitled to spousal support, I find the appropriate

division is to apportion the proceeds from the sale of the townhouse 55/45 in favour of Ms. Harder. The remaining assets will be divided equally except where otherwise specified below.

[21] In this regard, the townhouse is to be sold, subject to Ms. Harder's right to purchase as set out below, and the net proceeds (after payment of mortgage, transaction fees and related costs) distributed as follows:

- (a) Ms. Harder is to receive 55% of the balance;
- (b) Ms. Harder is also to receive out of Mr. Harder's share the following:
 - (i) \$5,000 to Ms. Harder for her share of the RRSPs redeemed by Mr. Harder;
 - (ii) \$16,250 to Ms. Harder for her one-half interest in the Saleen Mustang;
 - (iii) \$13,600 for retroactive spousal support, discussed below;
- (c) The remaining balance is to be distributed to Mr. Harder.

[22] The property is to be listed within 45 days from the date of the issuance of these reasons for judgment. This is to afford Ms. Harder the opportunity to purchase Mr. Harder's net entitlement to the proceeds if the parties are able to agree on the value of the townhouse. The purchase by Ms. Harder must be able to close the purchase of Mr. Harder's interest within 45 days of these reasons (unless the parties agree otherwise) and Ms. Harder must provide notice within 30 days of these reasons of her intention to purchase; otherwise the townhouse is to be listed for sale.

[23] The Infiniti will be sold and the parties will share the net proceeds equally. Mr. Harder is to have conduct of sale, subject to approval of any final arrangement by Ms. Harder.

[24] The fireproof safe, videos, photographs and passport are to be delivered as mentioned earlier above.

[25] The air miles points to the date of trial held in the name of Mr. Harder are to be shared equally. Either Mr. Harder transfers one-half of the points into an account for Ms. Harder, the cost to transfer to be shared equally; or, Mr. Harder is to hold in trust Ms. Harder's points and will book any travel for her forthwith upon her providing him notice until her half share in the points are depleted. Ms. Harder is to provide Mr. Harder notice of the option she wishes within thirty days of the release of these reasons for judgment.

2. Spousal Support

[26] Mr. Harder agrees that Ms. Harder is entitled to spousal support. The issue for him is the amount to which she is entitled. Ms. Harder says that she does not have the lifestyle that she enjoyed during the marriage and points particularly to the many vacations they took. She also notes that Mr. Harder has taken several vacations since their separation. Mr. Harder pointed out the vacation Ms. Harder referred to occurred many years ago and were either

hosted by Mr. Harder's employer, who was also a close friend of the parties, or were adjuncts to Mr. Harder's business travel. He also noted family vacation travel was achieved through air miles points. More recently, Mr. Harder stated his vacations followed company management meetings and were purchased at very low prices.

(a) Mr. Harder's Income

- [27] Mr. Harder says that his income is \$103,000 per year. This amount includes a \$3,000 incentive from his employer to keep his weight down below a certain level, given his history of serious heart problems. His income level was most recently established in 2008 and he has provided documentation that establishes that amount. His income in the materials shows some fluctuations, as Mr. Harder is able to defer certain income from one year to the next. He also attributes some of his income to another entity to reduce the tax effect.
- [28] Ms. Harder argues that this amount is understated and should be in the amount of \$134,000. In support of her position she says that Mr. Harder has the benefit of very low rent in that his employer provides him a large four-bedroom home to live in as farm manager for the cranberry farm and only has to pay \$450/month. She says that the true rent should be in the area of \$2,500.
- [29] Mr. Harder disagrees and says that his residency on the farm is a requirement of his job as the farm requires a permanent resident to look after the crop and operations and a 24/7 presence is required. He further says that obtaining the type of rent that Ms. Harder submits should be imputed is not attainable as the house is in an industrial setting with reservoirs filled with stagnant water and fertilizers, as well as industrial machinery operating throughout the farm.
- [30] Ms. Harder also points out that Mr. Harder has the benefit of a gasoline credit card and cell phone which is provided by his employer.
- [31] In my view, Mr. Harder's income should be set at \$103,000, which is consistent with his pay documents from his employer. There has been no reassessment by the taxation authorities to impute a higher benefit to Mr. Harder. The only evidence that Ms. Harder adduced was an internet advertisement for a property that she says is similar; however, she did not account for the industrial setting in which the farm house is located or the fact that if Mr. Harder no longer resided on the property he would not be employed as a farm manager and may then have to return to hourly work in construction. As some measure of the lack of attractiveness of living on the farm, I note that Ms. Harder was not enthused about the prospect of moving to the farm and resisted the move but relented on the basis of affording Mr. Harder a less rigorous work life. I am also of the view that his salary reflects an aspect of the rent that he pays.

(b) Ms. Harder's Income

- [32] Ms. Harder is presently the office manager for a dental clinic. She has worked there for close to eighteen years. She has technical training for business as well as dental administration. For most of the years she was a receptionist at the clinic, however, for the last five years she has been the clinic's office manager. Her current income is \$34,632. She seeks to have her income set at \$35,000 for the purpose of determining spousal support. She works a four-day week, although she does work the odd Saturday.
- [33] It is the position of Mr. Harder that Ms. Harder, given her experience and training, is capable of working more hours with her current employer, or alternatively seeking additional work hours from another employer and is thus able to earn at least \$44,000 per year up to \$54,080 per year.
- [34] In my view, Ms. Harder is capable of working more hours and I find that she is capable of earning \$40,000 per year.
- [35] While not mandatory, the Spousal Support Advisory Guidelines ("SSAG") are a useful tool in determining the amount and duration of spousal support.
- [36] Based on the incomes of the parties as I have determined above, the range from the SSAG is as follows:

Range

Amount

Lower

\$1,984

Middle

\$2,314

Upper

\$2,630

- [37] In the circumstances, which includes the somewhat higher apportionment of family assets to Ms. Harder, I am of the view that Ms. Harder should be entitled to monthly spousal support on an indefinite basis of \$2,600.
- [38] The parties are directed to exchange their income tax returns and supporting documents to the other annual not later than May 31st of each year.

3. Retroactive Spousal Support

- [39] Ms. Harder seeks retroactive spousal support. She did not bring an application for spousal support prior to trial. I am told that her counsel at one time had prepared such an application but did not follow through with it; however, there is evidence that Mr. Harder knew that Ms. Harder was seeking more support than what Mr. Harder was indirectly or directly providing.
- [40] Since separation, Mr. Harder continued to either make payments or make monies available to Ms. Harder to pay for property taxes on the townhouse, the mortgage on the townhouse, strata fees, the car loan, and life insurance, all of which total \$1,834.23 per month. Ms. Harder contests this and argues that Mr. Harder has not paid her any support. The documentation suggests otherwise.
- [41] In addition, Mr. Harder made ten monthly payments of \$300 to Ms. Harder.
- [42] The considerations governing an award of retroactive spousal support include: (i) the extent to which the claimant established past need (including any requirement to encroach on capital) and the payor's ability to pay; (ii) the underlying basis for the ongoing support obligation; (iii) the requirement that there be a reason for awarding retroactive support; (iv) the impact of a retroactive award on the payor and, in particular, whether a retroactive order will create an undue burden on the payor or effect a redistribution of capital; (v) the presence of blameworthy conduct on the part of the payor such as incomplete or misleading financial disclosure; (vi) notice of an intention to seek support and negotiations to that end; (vii) delay in proceeding and any explanation for the delay; and (viii) the appropriateness of a retroactive order pre-dating the date on which the application for divorce was issued: *Bremer v. Bremer* (2005), 13 R.F.L. (6th) 89, [2005] O.J. No. 608 (C.A.).
- [43] Ms. Harder seeks retroactive spousal support in the amount of \$59,893. This figure is premised on her position that Mr. Harder has an annual income of \$134,000 and her having an annual income of \$35,000. She achieves this level of income for Mr. Harder by imputing benefits from his job, such as his low rent. Her calculation of spousal support under the SSAG using these income amounts is \$4,158 per month. She then multiplied this latter amount by 23.75 months, the period from when the parties separated, and deducted her calculation of monies that Mr. Harder has paid such as the mortgage, insurance, strata fees, and the car loan payments to arrive at the retroactive amount.
- [44] This amount does not reflect the incomes that I have found for the parties, nor is the amount she deducted accurate. The expenses paid by Mr. Harder paid are higher than what Ms. Harder has assumed in her calculation.

- [45] Based on the income that I have found for Mr. Harder and the income Ms. Harder earned in 2008 and 2009, being \$33,000 and \$35,000 respectively, I have determined the monthly spousal support to be \$2,570 and \$2,497. By multiplying the respective amounts by nine and fifteen months and deducting the monthly amounts that Mr. Harder has demonstrated he has paid, namely \$1,834.23 per month plus \$3,000 in cash contributions he paid directly to Ms. Harder, the resultant amount is in the order of \$13,600.
- [46] Taking into account Ms. Harder's financial needs, notice that she was seeking spousal support, and that the amount I am setting would not be of hardship to Mr. Harder, I am of the view that the amount of retroactive spousal support be \$13,600.
- [47] The amount will be paid out of Mr. Harder's share of the net proceeds from the sale of the townhouse.
- [48] Ms. Harder also seeks an order that she continue to remain the beneficiary under Mr. Harder's company life insurance plan. Mr. Harder did not take issue with this. Subject to plan requirements and his continuing as an employee, I would so order for a period of seven years.

4. Molluscum Contagiosum

- [49] Ms. Harder alleges that Mr. Harder intentionally or negligently infected her with mollusum contagiosum; a skin virus that shows up as a rash, bumps and lesions. She seeks non-pecuniary damages of \$50,000 for emotional and physical trauma.
- [50] Rule 60(16) of our Rules of Court permits claims such as this to be heard in a family proceeding if they are connected with relief sought in the family proceeding. I fail to see the connection between this issue and the family law issues before me. There is no claim that the skin infection had an effect that impacts on the financial issues between the parties. The medical report states that Ms. Harder is free of the virus and that there are no further consequences from the infection. To the extent that misconduct is the point, it is specifically excluded as a factor when it comes to division of family assets and maintenance. The proper approach would be to have this claim proceed separately.
- [51] Mr. Harder however, stated at the outset of his case that he wished to have this matter resolved, and tendered in his own case the medical letters, a medical report, and affidavits of the two children of the marriage, all of which had been obtained by Ms. Harder and were to be tendered as part of her case. Because both parties wished to have this matter determined I have included it as one to be dealt with in this proceeding.
- [52] The onus of proof is upon Ms. Harder to prove on a balance of probabilities each element of her claim.
- [53] Having scrutinized the evidence, I conclude that Ms. Harder has not established that Mr. Harder intentionally or negligently transmitted the skin infection to her.

- [54] There is no issue that Ms. Harder contracted the virus. Ms. Harder was found by Dr. De Gannes, her dermatologist, with a "recent onset" of the infection around her groin area (mons pubis, upper thighs, vulva) on March 20, 2008. Dr. De Gannes opined that "[t]he probable source of the disease in Jill Harder is from an infected person that she has had sexual contact with, as all lesions were seen the groin area." However, Dr. De Gannes also stated that "[t]here is a theoretical possibility that the virus can be transferred from an infected person through inanimate objects, such as towels or toys." Ms. Harder underwent ten liquid nitrogen cryotherapy treatments from March 2008 to September 2008.
- [55] Ms. Harder has asserted that Mr. Harder had been engaged in sexual relations with other women who had the virus and transmitted it to her. Mr. Harder denies he transmitted the virus to her because he never contracted the virus. He also stated that sexual relations with Ms. Harder ended in early January 2008, it was only thereafter that he had an affair, and that from late February to mid-March 2008, he was away sailing in a regatta in the Caribbean, his annual vacation. These facts were not disputed by Ms. Harder.
- [56] In any event, Ms. Harder had Mr. Harder attend their family doctor in March 2008 and then her dermatologist on March 31, 2008, to be examined to determine if he had the infection. The examinations were detailed and included his entire genital area being inspected by the physicians with a magnifying glass. Ms. Harder was present in the room while each examination took place. Dr. De Gannes wrote that "[o]n thorough examination, I could find no evidence of active molluscum contagiosum" on Mr. Harder.
- [57] These facts strongly militate against the claim of Ms. Harder.
- [58] At trial, Ms. Harder asserted that she had become infected in November 2007. This appears to have been a recent theory to Mr. Harder. I am not satisfied with the evidence of Ms. Harder in light of the medical finding of a "recent onset" of the infection in March 2008. I am also of the view, given the testimony of the parties, that had Mr. Harder had an infection during the fall of 2007, Ms. Harder would have detected it given her stated heightened concern over Mr. Harder. In terms of Mr. Harder engaging in an adulterous relationship during the fall of 2007, Ms. Harder acknowledged that Mr. Harder was experiencing erectile dysfunction September through November, which reduces the likelihood of Mr. Harder having engaged in adulterous relationships. My view of the evidence is that both parties understood that this was a difficult time for Mr. Harder.
- [59] There are some confusing statements made by Mr. Harder of having been with lap dancers and his equating them with the word "hookers" to explain his statement to one of his daughters that he had said he had been with "hookers". However, the absence of Mr. Harder having the virus and the limited medical evidence of how Ms. Harder could have contracted it from Mr. Harder in the circumstances, limits the ability to make the finding asserted by Ms. Harder. In assessing the evidence as a whole, I accept Mr. Harder's testimony that he had not engaged in any extra-marital affairs until sometime in January.

[60] While it is very unfortunate that Ms. Harder contracted the infection, she has not met the burden of proving on a balance of probabilities the key element that Mr. Harder transmitted the virus to her. Further, her bare statement that she was "devastated" emotionally by the infection is not sufficient to establish compensable emotional harm. While Ms. Harder was experiencing emotional stress generally, it is not clear how she could segregate the "trauma", as she described it, from the serious distress that she was experiencing over the failure of thirty-year marriage. Further, the evidence shows that Ms. Harder carried on with her life. Not long after the end of the relationship she sought out and had cosmetic surgery performed, entered into an intimate relationship and contributed positively to her work place as an office manager working many extra hours throughout 2009.

[61] Accordingly, her claim under this head is dismissed.

Conclusion

[62] I am satisfied that the materials establish that a divorce is in order and is so granted.

[63] The family assets will be divided as indicated above.

[64] Mr. Harder shall pay to Ms. Harder spousal support in the amount of \$2,600 each month.

[65] Ms. Harder is entitled to retroactive spousal support in the amount of \$13,600. Such amount will be paid from Mr. Harder's share of the net proceeds from the sale of the townhouse.

[66] Ms. Harder's claim against Mr. Harder for having transmitted the skin virus to her is dismissed.

[67] Each party shall bear their own costs.

"The Honourable Mr. Justice Masuhara"

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