
CANADA / JUDGMENT

Hughes v. Miller et al

2007 BCCA 116

COURT

British Columbia Court of Appeal

DECIDED

26 February 2007

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2007 BCCA 116 Hughes v. Miller et al

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Hughes v. Miller et al,

2007 BCCA 116

Date: 20070226

Docket: CA32825

Between:

Bambii Sue Hughes

Appellant

(Plaintiff)

And

Bryan Roger Miller and Jean Florence Hughes

Respondents

(Defendants)

Before:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Hall

E. Raponi

Counsel for the Appellant

N.P. Lenaghan

Counsel for the Respondent

Bryan Roger Miller

Place and Date of Hearing:

Victoria, British Columbia

24 February 2006

Place and Date of Judgment:

Vancouver, British Columbia

26 February 2007

Written Reasons by:

The Honourable Mr. Justice Hall

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Donald

Reasons for Judgment of the Honourable Mr. Justice Hall:

- [1] This case involves an appeal and a cross-appeal from an order of Mr. Justice Macaulay pronounced March 16, 2005. The respondent Jean Hughes took no part in the appeal. The female plaintiff, Bambii Hughes, and the male defendant, the respondent Bryan Roger Miller, were never married but lived together in a spousal-type relationship for about 12 years before they separated in February of 2002. Ms. Hughes was 24 and unmarried when in 1989 she met Mr. Miller, who was 39 and divorced. Ms. Hughes worked at a coffee shop operated by her mother at a marina near Sidney. Soon after the two met, they began to live on the "Bomoh", a vessel owned by Mr. Miller. They lived on the Bomoh until 1993 when they moved for a time to live on Cortes Island. In Sidney, they would usually go ashore from the boat in the morning to permit Ms. Hughes to work in the restaurant and Mr. Miller to do odd jobs. They would return to the boat in the evening. The judge found that the couple had most of their meals free of charge at the restaurant during this period. They both earned relatively modest incomes at this time and the trial judge found that Mr. Miller was deliberately under-employed in order to avoid having to pay child support to his ex-wife for his two children of the marriage. As an average, their reported income during those years was, in the case of Ms. Hughes, about \$13,000 per annum and, in the case of Mr. Miller, about \$6,000 per annum. The trial judge said this about how the couple lived during that period:

- [17] According to the plaintiff, she usually paid the common living expenses as well as some of Mr. Miller's personal expenses. I find that evidence most probable in light of her greater income, although it is apparent that the couple also relied heavily on the largesse provided by Jean Hughes in the form of free meals at the café and other assistance. The benefit to Mr. Miller from that arrangement flowed, of course, from his relationship with the plaintiff, as he had become a member of the Hughes family. During this same period, however, the plaintiff lived on board the Bomoh and, accordingly, received the benefit of not paying anything for rent or utilities.
- [2] During the time they were living on the boat, the two parties were considering the purchase of property in order to build a home. The judge found that they ultimately intended to marry. Late in 1994, the defendant, Mr. Miller, gave Ms. Hughes an engagement ring he had recently inherited from his aunt. The defendant denied their plans to marry but the judge did not accept his evidence. The judge was generally sceptical about the evidence of Mr. Miller where it conflicted with that of the plaintiff or other witnesses. Around 1991, the two parties discovered a five acre plot of undeveloped woodland on Cortes Island that they wanted to purchase. The purchase price for the property was \$23,000. The actual purchase was made by Ms. Hughes and her mother, Jean Hughes. Each of the women contributed \$1,000 and a sister of the plaintiff loaned them \$5,000. Jean Hughes took out a bank loan for the balance of the purchase price. Title to the property was registered at this time in the name of Ms. Hughes and her mother. The two women made monthly payments on the bank loan. There was some thought originally that the sister would build a house on the property but this never happened. Eventually the sister was bought out and had no further interest in the property.
- [3] The arrangement and expectation among Mr. Miller, Ms. Hughes and Jean Hughes was that they would be equal owners of the property and, while the purchase money was to be put up by the two women, Mr. Miller was going to contribute material and expertise to build on the property. Ms. Hughes and Mr. Miller planned to construct a home on the property and it was anticipated there would be a retirement cottage built for Jean Hughes. A very basic cabin was ultimately constructed on the site using the labour of Mr. Miller and the plaintiff and with financial contributions largely from Jean Hughes. Mr. Miller ultimately paid \$13,000 to satisfy the original loan obligation incurred by Ms. Hughes and her mother to buy the property. Upon the payment of this \$13,000, title to the property was registered as a one-third interest to Ms. Hughes, a one-third interest to her mother and a one-third interest to Mr. Miller. That was the state of ownership of this property at the time of separation.
- [4] The judge made this finding concerning the Cortes Island property:
- [56] I find that Jean Hughes made the only disproportionate financial contribution towards the Cortes property. Mr. Miller conceded in cross-examination that his contribution, financial and otherwise, never exceeded one-third of the overall value of the property at the time.

The judge found that Ms. Hughes contributed disproportionately to the day-to-day needs of the couple during 1999 and 2000 because she was earning more than Mr. Miller, who was ill for a good part of that time.

- [5] The judge concluded that the plaintiff and defendant resided at Cortes for most of the time from 1993 until 1999, when they moved back to live near Sidney. During the intervening years on Cortes, Ms. Hughes would sometimes return to Sidney to work for periods of time. There was an interval in that period around 1994-95 when they were living on the Bomoh while Mr. Miller dealt with his aunt's estate. The judge found that during their time at Cortes Island, they had a lifestyle of subsistence with occasional reprieves when they house-sat for friends in the area. The rustic conditions they lived in were quite basic. After 1994, Ms. Hughes was working less and thus earning less and Mr. Miller's net income continued to be modest with the exception of 1995, when he received a commission in the range of \$50,000 but with deductions, including child support, his net income that year was under \$30,000.
- [6] From time to time over these years, Mr. Miller paid sums of money to reduce the balance on the Visa account of Ms. Hughes. Although the judge found that Ms. Hughes had paid more to support the couple in the earlier years of the relationship, he found that neither had made a disproportionate contribution to the other throughout the period from 1994 to 1997. Mr. Miller became ill in late 1998 and the judge found that during this time, Ms. Hughes contributed more to common living expenses than did Mr. Miller.
- [7] It appears that the Cortes Island property was valued at about \$225,000 at the time of separation. Each of the co-owners would thus have a \$75,000 monetary interest in that property. In his cross-appeal, the defendant suggests that he should be awarded an extra \$13,000 either by way of an enhanced interest in the property or a payment of compensation from the plaintiff, based on the additional sum he contributed to repay the original loan taken out by Ms. Hughes and her mother to purchase the property. The thesis underlying that claim is that his contribution to Cortes Island was to be materials and labour, which contribution he made, and that to divide the property into one-third interests to each is to give insufficient recognition to this additional amount of money he contributed over and above what it was envisaged he would contribute to earn his one-third interest in the property. The trial judge found against him on this claim at trial, holding that the plaintiff had not been unjustly enriched by any monetary contribution of the defendant. The judge found that there was a juristic reason to find no unjust enrichment, namely the circumstance that all parties agreed at the time that they would share the property one-third each and took title in that proportion to reflect such an arrangement. If all there was in this case was the Cortes Island property, it may be doubted that litigation would have ensued between these parties after their separation in 2002.
- [8] However, there is involved in this litigation a piece of property of much greater value than Cortes Island. Going back to the generation of the grandparents of Mr. Miller, the family owned 269 acres of forest land located near the summit of the Malahat Highway between the Trans Canada Highway and Finlayson Arm. The ownership of that property descended to

Mr. Miller's father and aunt. The father died in 1981. By the terms of the father's will, an undivided 19/50 interest in the property was to be divided equally among his five children, including the defendant Mr. Miller. The defendant's siblings did not take any interest in the Malahat property but shared the remainder of their father's estate between themselves, leaving Mr. Miller with the interest of his late father in the property. Under a family agreement made around 1991, Mr. Miller's aunt took title to the whole of the property but the defendant remained the owner of an unregistered one-third interest.

- [9] When the aunt died in 1994, she left a substantial estate of about \$1.3M, including her interest in the Malahat property. She died intestate and the estate was divided equally among her two nephews and three nieces. The Malahat property was split into two parcels by agreement. Sixty-five acres were removed from the original parcel and transferred to the siblings and a third party with a view to develop the property. That left a parcel of 204 acres to which the defendant took title in September 1995. As the judge found, this property came into Mr. Miller's ownership as a result of inheritance and not by reason of any contribution, financial or otherwise, on his part or on the part of the plaintiff. The judge found that in addition to some jewellery, Mr. Miller received about \$100,000 besides the Malahat property from his aunt's estate. So after 1994, although Mr. Miller's cash flow position did not change dramatically, it is clear that he had possession of a most valuable capital asset. Before 1980, this piece of property was very much out in the country and probably not worth a great deal but with the growth in the Victoria area and the Cowichan Valley, this property along with all property in the area, began to escalate in value. I shall have more to say later about the value of this property.
- [10] The judge found that Mr. Miller paid property taxes of about \$27,000 for the Malahat property between 1996 and 2001. He began to incur expenses on the property with a view to generating logging revenue after moving back to Sidney in 1999, although his capacity to be active in connection with the property was hampered by his illness for a time. Between 1999 and 2002, the couple were back in the Sidney area and living on the boat, Ms. Hughes working in the restaurant and Mr. Miller, at first, doing little of anything, but ultimately becoming more involved with logging operations on the property. The judge dated his work on the property in logging operations as being after 2000 when he was fully recovered from his illness.
- [11] The plaintiff alleged in her amended statement of claim that she should be found entitled to a declaration of constructive trust over the Malahat property based on unjust enrichment. She said this was because she supported the defendant over the duration of their relationship. She asserted that her financial contribution to the defendant enabled him to pay taxes on the Malahat property, to do logging operations on the property and, from logging proceeds, to purchase equipment, including a portable sawmill, tractor, winch, welder and trucks. Alternatively, she sought monetary compensation for his enrichment and her deprivation without any juristic reason. In her pleadings, she sought certain other relief but in this Court the relief claimed was limited to a declaration of trust or monetary

compensation.

- [12] As the trial judge observed, a salient circumstance of the present case is that the Malahat property came to the defendant via the route of inheritance. That makes this case different from the majority of cases wherein the principles of unjust enrichment and constructive trust in domestic situations have been developed by courts over the past 25 years. It is, for instance, much different from the situation in the leading case of *Peter v. Beblow*, [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621, where the parties lived together and jointly built up assets over many years. In that case, the plaintiff had contributed nothing to the acquisition of the family home. However, the court awarded her a remedy in constructive trust based on her direct contributions, through homemaking and other activities, to preserving and maintaining the property for the duration of the 12-year relationship, by the end of which the property's value had increased substantially.
- [13] Mr. Miller and Ms. Hughes lived quite a modest lifestyle over many years and the only substantial asset they were involved in building up (with the assistance of the mother of the plaintiff) was the property on Cortes Island. The Malahat property accrued to the defendant through the bounty of descent from his father and aunt, and neither he nor the plaintiff had any hand in working to acquire it. If the plaintiff is to be found entitled to any trust claim to the Malahat property, such claim must arise from what she did after it came into the ownership of the defendant.
- [14] After the defendant recovered from his illness, he began to devote himself to logging the Malahat property. He employed logging contractors to perform work on the property. Making the Malahat property more accessible and logging it had the potential to benefit the defendant in a couple of respects. First, it would generate income and allow him to purchase some of his own equipment. Also, it would enhance the ultimate development potential and, hence, the value of the property.
- [15] The defendant received about \$140,000 from logging sales in 2001 and, by reason of treating what he received as capital gain, he declared income of about \$70,000. The plaintiff doubtless received some benefit in her living standard from the more affluent condition of the defendant, and specifically I note that the defendant used some of his funds to pay about \$7,000 on a Visa account of the plaintiff.
- [16] The defendant was able to purchase a considerable amount of equipment valued somewhere between \$75,000 and \$100,000. The bulk of the equipment the defendant ultimately came to own was acquired with funds he had received from the estate of his aunt after her death in 1994 and the funds generated more recently from the logging. Of course, the plaintiff can take no credit for anything acquired by the defendant with funds inherited from his aunt.
- [17] The valuation of the Malahat property at the time the defendant inherited it is in issue between the parties. The family members by agreement valued the property at \$320,000 in 1995. On discovery the defendant answered "Yes" in response to a question thus framed:

So pursuant to the terms of this agreement you accepted that the value (of the property) was \$320,000, is that right?

- [18] However, there is evidence in the record from an appraiser supportive of the proposition that the property at the time of inheritance was worth in the range of \$1.5 million. In an appraisal report obtained by the plaintiff and dated January 14, 2005, the appraiser, in speaking of property in the area of the Malahat property, opines that market conditions in the area had peaked in 1994 and values stabilized from that time until 2001-2002, when price levels began to increase.
- [19] A property in the area said to be similar to the Malahat property had sold in 1994 for a price that suggested the Malahat property was then worth in the range of \$1.5 million. The appraiser expressed the opinion that at the date the parties separated in 2002, the Malahat property had a value of about \$1.75 million. Counsel for the plaintiff submitted that the Malahat property escalated in value from \$320,000 in 1995 to \$1.75 million in early 2002. Counsel for the defendant, referring to the appraisal evidence, submitted that any escalation in value over these years was probably less than \$200,000. Appraisal is, of course, not an exact science but on the evidence of the appraiser it seems to me that the better view is that the escalation in value is nearer to the estimate argued for by counsel for the defendant than that argued for by counsel for the plaintiff. The \$320,000 figure was a figure set by family agreement, a valuation that may well have been influenced by probate and taxation considerations. Having regard to the contents of the report of the appraiser, I simply cannot view the agreed figure of \$320,000 as an accurate measure of the value of the Malahat property in 1995.
- [20] I do not perceive in the reasons of the trial judge any finding on the extent of escalation in value of the Malahat property between 1995 and 2002. It seems to me that the reason the judge came to no conclusion on this is that he probably did not feel he needed to do so. This flows from the way he analyzed the claim of the plaintiff having regard to previous authorities. Given the facts of this case, a great many precedents are simply inapplicable to the present case. In most of the earlier cases in this area of law, the contestants have been arguing about what should be ordered concerning assets built up by joint efforts over the years the parties lived together. What must be valued or divided is the property as it exists at the time the relationship ends in such a case. This value is often referred to in the cases as "value survived" and there is a general tendency for the courts to favour this approach over seeking to assign a value to the contributions made by the parties during the subsistence of a relationship.
- [21] In the present case, the judge, correctly, in my view, found it would not be appropriate to award the plaintiff a constructive trust remedy over the Malahat property having regard to her relatively sparse direct contributions to maintaining or improving the property after the defendant inherited it. I consider that the case of *Peter v. Beblow*, *supra*, in which the court held that constructive trust is the appropriate remedy for unjust enrichment only where a monetary award is insufficient and where there has been a direct contribution to the

property by the party seeking such remedy mandates such a result. The judge awarded the plaintiff \$75,000 on account of what he perceived as her unjust enrichment without juristic reason of the defendant over many years by her contributions of some funds and particularly services. The judge, however, gave no indication of just how he arrived at the figure and I am unable to divine from the evidence how such a figure was derived. Because of that, it seems to me this Court must examine the matter to some extent anew to endeavour to find a satisfactory basis for any award to the plaintiff. Counsel for the plaintiff claimed substantially more than awarded at trial and counsel for the defendant suggested there was really no basis for any award, having regard to the history of the relationship and respective contributions over many years.

- [22] What occurred over the years after 1995 was that there was some increase in the value of the Malahat property and the defendant was able to get ownership of several pieces of equipment, some of which was financed from the cash inheritance from his aunt and some from logging revenue. The property was also rendered more valuable for development by logging activity since access was being improved in the process.
- [23] I consider the increase in property value over the relevant period and the value of the equipment obtained from the logging revenues of the defendant could together be fairly valued in the range of \$300,000. The spouse-like care and assistance, some personal and some financial, over the years from 1995 onward by the plaintiff seems to me to entitle her, as the judge found, to an award based on the doctrine of unjust enrichment. Because this is an inheritance situation, it seems to me that an award of one-half of this value of land and equipment accruing to the defendant would not be justified but a monetary award of one-third of the value to the plaintiff seems to me to be a fair way of measuring the enrichment and quantifying the amount the plaintiff should receive. This was a relatively long relationship and the proportional approach I consider appropriately reflects the temporal duration of the relationship. I consider this a more appropriate basis of valuation as opposed to an imprecise estimate of each party's contribution: see, for example, *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44, [1997] 5 W.W.R. 595, in which this Court preferred to consider the increase in the contested properties' value, rather than attempting to calculate each party's exact contribution. I would allow the appeal by varying the monetary award to the plaintiff from \$75,000 to \$100,000.
- [24] As regards the cross-appeal advanced by the defendant, I note the following passage from the reasons of Macaulay J.:
- [97] Mr. Miller's own claim for unjust enrichment fails. He agreed with the plaintiff and her mother that his interest in the Cortes property would be one-third. He conceded in cross-examination that the value of his contributions was about the same. I did not find that his contribution towards the Cortes property was disproportionate to that of the plaintiff, only that it was different. Accordingly, there is no injustice in holding him to the bargain reached. Even if Mr. Miller's contribution towards the Cortes property was disproportionate as between he and the plaintiff, the express agreement of the parties to each take a one-third

interest provides a juristic reason for the ensuing benefit to the plaintiff.

[25] In my respectful view, this analysis of the trial judge is entirely correct on the facts of the present case. I am content to adopt his reasoning. I would dismiss the cross-appeal of the defendant.

"The Honourable Mr. Justice Hall"

I Agree:

"The Honourable Madam Justice Rowles"

I Agree:

"The Honourable Mr. Justice Donald"

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