

CANADA / JUDGMENT

J.K.S. v. H.G.S.

2006 BCSC 1356

COURT

Supreme Court of British Columbia

DECIDED

8 September 2006

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2006 BCSC 1356 J.K.S. v. H.G.S. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: J.K.S. v. H.G.S., 2006 BCSC 1356 Date: 20060908 Docket: E023057 Registry: Vancouver Between: J. K. S. Plaintiff And H. G. S. Defendant Before: The Honourable Madam Justice Satanove Reasons for Judgment Counsel for the Plaintiff: Georgiale A. Lang Counsel for the Defendant: Trudy Hopman Date and Place of Trial/Hearing: June 5 - 8; 12 - 16 and 23, 2006 Vancouver, B.C.

INTRODUCTION

- [1] The plaintiff is a fifty-one year old retired air stewardess who has enjoyed spending the fruits of her husband's lucrative orthodontic practice for the better part of seventeen years. The sixty-two year old defendant, who has worked hard in his orthodontic profession, has been creative in his tax planning and has also enjoyed spending his remuneration as quickly as it was earned. Together the parties have paid out more than a million dollars each on luxury vacations, cosmetic surgeries and treatments, clothes and sundries.
- [2] Notwithstanding their combined effort for over 17 years to deplete the defendant's resources as fast as he could earn them, this couple was actually married for only ten years. They cohabitated in 1988, married in 1989 and separated in 1999. However, they continued to spend time together socializing, and even vacationing, after separation. The defendant testified that he had always hoped they would reconcile completely. It was not until 2005 that he realized that there was no longer any hope of reconciliation.
- [3] The parties have one child of the marriage, K., age 16, and another child from the plaintiff's first marriage, S., whom the defendant has fathered and supported in every respect. S. is twenty-five now, and a university graduate capable of sustaining herself. The plaintiff has withdrawn any claim of support for S.
- [4] K. is 16. From the testimony of her parents, and her therapist Dr. Madigan, she sounds like a very troubled individual. Her problems started when she was diagnosed with Tourette Syndrome in 1995, and with anxiety and compulsive disorder at age 6. Although she appears to have lost this diagnosis, it has been replaced with a psychological disorder referred to as bulimia, which involves induced vomiting after meals to avoid weight gain. She is described today as struggling with a major depressive disorder. She has great difficulty sleeping,

concentrating and suffers from social withdrawal, irritability and feelings of hopelessness. She is obsessively compulsive about school work and her eating habits. She does not take medications but she sees a psychiatrist, a dietician, a fitness instructor and a French tutor regularly.

- [5] To the parties' credit, they are both very concerned and caring parents who want what is best for K. They are not disputing a joint custody and guardianship arrangement with the primary residence for K. being with the plaintiff. They have not been able to resolve their money issues, despite mediation, and are seeking the court's assistance with the following issues:
1. What are the family assets?
 2. How should the family assets be valued?
 3. How should the family assets be apportioned?
 4. What income should be imputed to the defendant under the Child Support Guidelines and how much child support should he pay to the plaintiff?
 5. What quantum and duration of spousal support is the plaintiff entitled to?

ANALYSIS

- a. What are the family assets?

[6] The parties agree that the following assets are family assets (or liabilities) that should be shared equally:

1. Matrimonial home at West 36th Avenue in Vancouver;
2. HSBC Savings Account;
3. Air Canada Life Insurance Policy;
4. Air Canada Life Benefits;
5. Air Canada Pension;
6. RRSP Number 1209980;
7. Arbutus Club Membership;
8. Jericho Tennis Club Membership;
9. CIBC Line of Credit.

[7] The parties also agree that the plaintiff's 2005 Volkswagen Tourag is not a family asset, nor is the Bank of Montreal chequing account from which the plaintiff's car payments are made. There is an outstanding loan payable to the Bank of Montreal in the amount of \$42,550 and the parties agree that this loan is not a joint liability and belongs to the plaintiff, solely. The

parties further agree that the defendant's two properties on Richards Street and West 8th Avenue in Vancouver, which were purchased by him after separation, are not family assets. Accordingly, any debt obligations arising from them are those of the defendant alone.

- [8] The asset which is disputed is the defendant's beneficial interest in a company which I will refer to as Dr. H.G.S. Inc. This company is the sole owner of an orthodontic practice in Richmond (the "Richmond Practice") and a 50% shareholder of an orthodontic practice in Port Coquitlam (the "Port Coquitlam Practice"). According to the defendant's corporate chart, the shares of Dr. H.G.S. Inc. are held by the defendant personally, a family trust and Cornwall Management Ltd. Cornwall Management Ltd. is a holding company of a property on Cornwall Avenue that has been divided into nine leased residential units. The defendant also holds shares personally in the Port Coquitlam Practice.
- [9] As a result of this confusing corporate structure, the parties have elected to treat the Richmond Practice, the Port Coquitlam Practice and Cornwall Management Ltd. as three separate assets and have asked me to determine firstly, whether they are family assets and, secondly, what is their value. I agree that this approach is appropriate because despite the number of separate legal entities that are involved, the defendant recognizes that he is the sole beneficial owner and that no third party shareholders are involved.
- [10] The defendant argues that none of these disputed assets are family assets because the plaintiff made no direct or indirect contribution to their acquisition or operation. The plaintiff concedes that her direct contribution was minimal, but submits that she made substantial indirect contribution to the operation of these assets in the form of child rearing and effective household management.
- [11] The evidence discloses that prior to the marriage the plaintiff was employed as a flight attendant. When K. was born in 1989, the plaintiff took a one year leave of absence. She returned to work full time until November 2002 when she again took leave until April 2003. Then in June 2005 she retired completely, with the defendant's consent.
- [12] The defendant relies on the fact that while the plaintiff worked he employed a nanny, then later a housekeeper and gardener to look after the children and the household. Throughout the marriage and since separation, the plaintiff has had the entire use of the income she has earned from her employment as flight attendant. She has always kept a separate bank account and she has never contributed any of these funds to pay any family expenses.
- [13] Notwithstanding the above evidence, when the plaintiff was not working, there is no doubt she was the primary caregiver of the two children and maintained an attractive, comfortable home. In particular, K.'s health issues have required time consuming attention. During this time the defendant was free to continue to build and run his orthodontic practices. The extent of the plaintiff's indirect contribution cannot and should not be measured against the defendant's identifiable financial contribution when determining whether an asset is a family asset or not. I conclude that all of the defendant's shares and shareholder loans in the Richmond and Port Coquitlam Practices are family assets, whether held directly or

indirectly. I note that this includes the 1,000 Class D Preference Shares in Dr. H.G.S. Inc. and the shareholder's loan held by Cornwall Management Ltd.

[14] I do not come to the same conclusion with respect to the rental property on Cornwall Avenue held by Cornwall Management Ltd. The defendant owned this property for ten years before marrying the plaintiff. It was never used for a family purpose, either through residing there or using income from the property for a family purpose. The property has its own professional manager and, most importantly, has sustained itself through rental revenues and financing secured against the property. No direct or indirect contribution of the plaintiff has enhanced its value or assisted the defendant to enhance its value.

[15] The plaintiff submits that the Cornwall property was part of a retirement plan whereby it was intended to be used for the future financial security of the parties, as was the case in *Hefti v. Hefti* (1998), 57 B.C.L.R. (3d) 171, 40 R.F.L. (4th) 1 (B.C.C.A.). I do not find that the plaintiff has established this fact on a balance of probabilities. The hearsay evidence of the accountant Bob Smith's "game plan" is insufficient, in my opinion, for me to find that the Cornwall property is a family asset and I declare it to be an asset owned by the defendant alone.

b. What is the value of the family assets?

[16] The parties have agreed that the value of the assets listed in para. 6 herein, and the value of the shares and shareholder loans related to the orthodontic practices are as follows:
Matrimonial home at West 36th Avenue in Vancouver: \$2,050,000.00 (before deduction of real estate commission) HSBC Savings Account: \$5,460.99 Air Canada Life Insurance Policy: No face value Air Canada Life Benefits: No face value Air Canada Pension: \$44,878.66 RRSP Number 1209980: \$5,824.00 Arbutus Club Membership: No face value Jericho Tennis Club Membership: No face value CIBC Line of Credit: (\$50,000.00) Shares in Dr. H.G. S. Inc.: \$712.00 Shares in Drs. J. & S. Inc.: \$2,125.00 Shareholder loan owing from Drs. J. & S. Inc.: \$23,000.00 Shareholder loan owing from Cornwall Management Ltd.: \$142,777.00 Preferred Shares of Dr. H.G. S. Inc. held by Cornwall Management Ltd.: \$356,000.00 TOTAL: \$2,580,777.65

[17] The value of the Cornwall Management Ltd. property was disputed, but as I have determined that it is not a family asset, its exact value is no longer relevant.

c. How should the family assets be apportioned?

[18] The parties have agreed that the family assets listed by me in paragraph [6] should be apportioned equally between them.

- [19] The plaintiff submits that this equal division should apply to any other assets that I find to be family assets. I have found all shares and shareholder loans relating to the orthodontic practices to be family assets, but not the real property held by Cornwall Management Ltd. The defendant submits that any of the disputed assets that I find to be family assets should be reapportioned 85% in his favour.
- [20] There is a presumption of equal division of family assets under s. 56 of the Family Relations Act, R.S.B.C. 1996, c. 128. The onus is on the defendant to displace this presumption by demonstration that equal division would be unfair because of the specific factors listed in s. 65(1) of the Act. I can only consider reapportionment once unfairness has been established (S.B.M. v. N.M. (2003), 14 B.C.L.R. (4th) 90, 2003 BCCA 300; Lockhart v. Lockhart (1989), 19 R.F.L. (3d) 359 (B.C.C.A.)).
- [21] The defendant submits that the marriage was only ten years; he brought significant assets into the marriage, some of which came through inheritance; he provided so generously to his family he was unable to save for his future; the parties have been separated for seven years; he is 63 years old with few income earning years remaining; the plaintiff retained for her sole use and enjoyment the money she earned during the marriage; she brought no assets into the marriage; she is only 51 years old; she was gainfully employed until June 2005; and she is capable of working and becoming self-sufficient.
- [22] The plaintiff submits that the marriage cannot be considered short considering the one year cohabitation prior to marriage and the ongoing dependency during separation. The plaintiff says she has limited skills and health problems and she will need to devote herself to K.'s care and rehabilitation.
- [23] When I give due weight to all the factors under s. 65(1) I reach the conclusion that equal distribution of the defendant's interest in his orthodontic practices would be unfair. The defendant acquired a significant practice and significant assets through hard work and inheritance before cohabiting with the plaintiff. From the time of marriage to the time of trial he preserved and maintained all assets without any financial contribution by the plaintiff, despite her having the means to do so.
- [24] I cannot fault the plaintiff for her exorbitant spending habits because they were matched by the defendant. However, the failure to recognize the defendant's extensive contribution and generosity, juxtaposed with the plaintiff's refusal to share her income creates an unfairness in and of itself. The disparity of material contributions at the outset of the marriage adds to this unfairness. The evidence did not bear out that the plaintiff could not work because of lack of skill or good health. She admitted that she has the ability to work and that regardless of her health problems, she could become self-sufficient, although obviously at a much lower standard than that which she is used to.

- [25] After this trial, the plaintiff will have a 50% interest in the matrimonial home less her 50% obligation to repay the \$50,000 line of credit. On the other side of the equation the defendant will also have a 50% interest in the matrimonial home less his 50% obligation to repay the line of credit. In addition, the defendant's economic self-sufficiency is assisted by Cornwall Management Ltd. and the Richard Street property.
- [26] Weighing all the evidence and the factors under s. 65(1) I conclude that the shares and shareholder loans in the orthodontic practices should be split 70% in favour of the defendant.
- d. How should the family assets be distributed?
- [27] At the outset of trial, the plaintiff expressed a concern about selling the matrimonial home before K. finished her one year of high school remaining. By the end of trial, the defendant appeared to have conceded that it might be in the best interest of K. for sale of the matrimonial home to be deferred until she graduates. Unless the parties agree otherwise, I order that the matrimonial home be sold no sooner than July 2007 and that the equity be distributed equally between the parties.
- [28] Unlike the disposition of the matrimonial home, the manner of distribution of the shares and shareholder loans may attract certain tax consequences. There appears to be no bar to simply ordering that 30% of the shares in Dr. H.G. S., 30% of the shares in Drs. J. & S. Inc., 30% of the shareholder loan from Drs. J. & S. Inc., 30% of the preferred shares in Cornwall Management Ltd., and 30% of the shareholder loan from Cornwall Management Ltd. be transferred to the plaintiff, and I so order. MAINTENANCE
- [29] The most hotly contested issue with respect to maintenance is the determination of the defendant's income under the Federal Child Support Guidelines, S.O.R./97-175. The plaintiff submits that the income available to the defendant is much higher than what he reports on his income tax returns. In particular, the plaintiff submits that a number of expenses characterized as business expenses are really personal expenses and should be added back to the defendant's income for Guidelines purposes, pursuant to s. 19(1)(g) of the Guidelines.
- [30] The defendant swore a Property and Financial Statement disclosing his income to be \$422,206 per annum. At trial he agreed that a portion of corporate expenses had been added back to his personal income in accordance with the expert report of Mr. McMann. The plaintiff's expert, Mr. Barbour, disagreed with this figure and opined that a more appropriate figure was \$559,751. He reached this opinion by not only adding back a higher percentage of corporate expenses, but also by following s. 19(1)(h) of the Guidelines and taking into account certain tax breaks that had been available to the defendant.
- [31] I agree in principle with Mr. Barbour that the evidence discloses that the defendant had exaggerated many of his corporate expenses. However, I do not agree that I should impute as much as \$559,751 annual income to the defendant.

- [32] The test under s. 19(1)(g) is one of reasonableness. Mr. Barbour appeared to be using a test closer to that of necessity. If an expense were not essential to the business then he would discount it, in some cases by 100%. For example, he deducted the entire amount of promotional expenses (\$28,000) when the evidence from Dr. Jacobs established that \$20,000 per year was reasonable. Mr. Barbour deducted the cost of a camera, even though he knew cameras were typically used in dental offices, but he did not have any information about it. In fact, a camera was itemized on the list of assets of Dr. H. G. S. Inc.
- [33] Mr. Barbour also made certain adjustments to the defendant's income to reflect the payment of dividends through a family trust which attracted less tax than payments to the defendant directly. However, there was insufficient evidence to show that a family trust would be an available means through which to pay child or spousal maintenance. I am not satisfied that any income can be imputed to the defendant under s. 19(1)(h) of the Guidelines.
- [34] I am satisfied that some income should be imputed to the defendant under s. 19(1)(g) of the Guidelines. Upon considering all of the evidence I conclude that 30% of advertising/promotional and office expenses together with 50% of automobile and telephone expenses should be added in. I was not given the tools to calculate how this would translate precisely into imputed income but by my calculations it would add to the defendant's declared income about \$55,000 after gross-up for corporate tax deduction. Therefore I find that the defendant's income for Guidelines purposes is \$477,206.
- a. Child Maintenance
- [35] Under the Guidelines, an annual income of \$477,206 would indicate an obligation to pay \$3,854.21 per month for child maintenance for K. However, under section 4(b) of the Guidelines, I have discretion to reduce the table amount because the defendant has an income over \$150,000. I conclude that it is appropriate in this case to reduce the table amount equal to the contribution the plaintiff can make toward K.'s maintenance. I find that the plaintiff is capable of earning about \$35,000 a year. That amount should be imputed to her for child maintenance purposes. She has an obligation to contribute \$326 per month for K.'s maintenance. This reduces the defendant's obligation to \$3,528.21 per month.
- [36] The defendant has offered to pay all of K.'s extraordinary expenses (about \$3,000 per month) directly to the relevant third party. In my view this is appropriate because the nature of these expenses is transitory.
- b. Spousal Maintenance
- [37] The plaintiff submits that she is entitled to indefinite spousal support in the range of eleven to fifteen thousand dollars based on the defendant's Guidelines income of \$450,000 to \$500,000. The defendant submits that I should award the plaintiff \$5,000 per month for twelve months only.

- [38] The factors that I must consider are the economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; any financial consequences arising from the care of K. over and above child support; relief of any economic hardship of the spouses arising from the breakdown of the marriage; and, insofar as practicable, promotion of each spouse's economic self-sufficiency within a reasonable period of time.
- [39] I have also considered the Spousal Support Advisory Guidelines, set out in C. Rogerson and R. Thompson, *Spousal Support Advisory Guidelines: A Draft Proposal* (Ottawa: Department of Justice, 2005). They provide a parameter of \$6,500 per month for ten years based on the highest Guidelines income of \$350,000. I recognize these Guidelines are advisory only and in the case of higher incomes, such as here, they may not be applicable.
- [40] Due to the unique circumstances of this case, it is my preference is to award the plaintiff more money for a lesser period of time. The defendant is 63 years old and will likely retire by age 70. At that point it is unlikely he will receive income anywhere near \$477,000 per annum. The plaintiff will be 58 and will have another seven years or more of employability. K. should no longer be dependent and the plaintiff should still have capital from her share of the family assets. Therefore I find that seven years of spousal support should be adequate.
- [41] K. is still in high school and it will be some time before the plaintiff is capable of being truly self-sufficient. I am going to impose a regime of decreasing spousal support payments to reflect that fact.
- [42] For the thirty-six months commencing July 1, 2006, the defendant shall pay the plaintiff \$13,750 per month. For the twenty-four months following July 1, 2009 the defendant shall pay the plaintiff \$11,000 per month. For the twenty-four months following July 2011 the defendant shall pay the plaintiff \$8,000 per month. After June 2013 all spousal support payments shall cease.

CONCLUSION

[43] In summary, I make the following order:

1. that the parties be divorced;
2. that the parties share joint custody and guardianship of K. with primary residence to the plaintiff;
3. that the following assets are family assets and liabilities and should be shared equally:
 - a. Matrimonial home at West 36th Avenue in Vancouver with a value of approximately \$2,050,000 before deduction of real estate commission;
 - b. HSBC Savings Account with \$5,460.99 on deposit;
 - c. Air Canada Life Insurance Policy with no face value;

- d. Air Canada Life Benefits with no face value;
 - e. Air Canada Pension with a value of \$44,878.66;
 - f. RRSP Number 1209980 with a value of \$5,824.00;
 - g. Arbutus Club Membership;
 - h. Jericho Tennis Club Membership;
 - i. CIBC line of credit.
4. that the following assets belong to the plaintiff solely:
- a. 2005 Volkswagen Tourag;
 - b. Bank of Montreal chequing account;
 - c. outstanding loan to Bank of Montreal.
5. that the following assets and liabilities belong to the defendant solely:
- a. Richard Street property;
 - b. West Eighth Avenue property;
 - c. shares in Cornwall Management Ltd.;
 - d. CIBC mortgage re: West Eighth Avenue property.
6. that the following assets are family assets in which the plaintiff has a 30% interest and the defendant has a 70% interest:
- a. shares in Dr. H.G.S. Inc.;
 - b. shares in Drs. J. & S. Inc.;
 - c. shareholder loan from Drs. J. & S. Inc.;
 - d. preferred shares in Cornwall Management Ltd.;
 - e. shareholder loan from Cornwall Management Inc. Thirty percent of these assets shall be transferred to the plaintiff forthwith.
7. that the defendant's income for Guidelines purposes is \$477,206;
8. that the defendant shall pay \$3,528.21 per month to the plaintiff on account of child maintenance;
9. that the defendant shall pay 100% of all K.'s extraordinary expenses directly to the relevant third party;
10. that the defendant shall pay to the plaintiff \$13,750.00 in spousal support per month from July 1, 2006 through June 30, 2009;

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11. that the defendant shall pay to the plaintiff \$11,000 in spousal support per month from July 1, 2009 through June 30, 2011;
 12. the defendant shall pay to the plaintiff \$8,000 in spousal support per month from July 1, 2011 through June 30, 2013; and
 13. All spousal support payments shall cease after June 30, 2013. "D.A. Satanove, J." The Honourable Madam Justice D.A. Satanove
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