
CANADA / JUDGMENT

J.P. v. B.G.

2012 BCSC 979

COURT

Supreme Court of British Columbia

DECIDED

5 July 2012

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2012 BCSC 979 J.P. v. B.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.P. v. B.G.,

2012 BCSC 979

Date: 20120705

Docket: E093361

Registry: Vancouver

Between:

J.P.

Plaintiff

And

B.G.

Defendant

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Plaintiff:

J.J. Hittrich

The Defendant, B.G.:

Appearing in person on his own behalf

Counsel for the Director of Child, Family and Community Service:

C.P. Feenie

G.L.F. Somers, Q.C.

D.L. Dunn

Place and Dates of Trial:

Vancouver, B.C.

October 17-21, October 24-26, 2011

November 2-3, November 7, November 14-18, November 21-25,

November 28-30, 2011

December 1, December 12-16,

December 19, 2011

January 5-6, 2012, January 17-18, January 20, January 23-27

January 30-31, 2012

February 1-3, February 6-8, February 20-23, 2012

March 8-9, March 12-13,

March 19-23, March 26-30, 2012

April 2, April 4-5, April 10-13,

April 16-17, April 19, April 24-27, April 30, 2012

May 1, May 3-4,

May 7, May 10-11, May 14-16 and May 29, 2012

Place and Date of Judgment:

Vancouver, B.C.

July 5, 2012

Overview

- [1] B.G. and J.P. advance competing claims for a division of family assets. B.G. insists on an equal division and J.P. asks for a reapportionment of 75 per cent in her favour. In addition, J.P. wants B.G. to pay retroactive and ongoing child support, retroactive spousal support, and his share of extraordinary expenses. J.P.'s claims are brought pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) ("Divorce Act") and the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"). I will refer to all of these claims as the "financial claims".
- [2] I previously determined, following a lengthy trial, that B.G., had sexually and physically abused three of his four young children. I ordered sole guardianship and custody to the children's mother, J.P., and denied B.G. access to his children at this time. My reasons for judgment in respect of the sexual abuse claim are indexed at 2012 BCSC 938.
- [3] I am unable to determine the financial claims due to insufficient evidence. I must have appropriate financial and income information from the parties before engaging in a determination of claims for division of assets and making final orders for child and spousal support: *Vincent v. Vincent*, 2012 BCCA 186.
- [4] Very little evidence was led at trial concerning the financial claims. Although B.G. and J.P. filed Form 8 financial statements, they failed to tender evidence from which I could determine the financial claims. They did not produce financial tax returns and assessments required by the Federal Child Support Guidelines (SOR/97-175) and the Spousal Support Advisory Guidelines (collectively, the "Guidelines"), and they did not provide financial information concerning rental property that is a matrimonial asset. They produced insufficient evidence concerning the value of a business asset and extraordinary expenses.
- [5] The parties should schedule a continuation of the trial once they have that evidence in hand. In the meantime, I am able to make an order for interim child support.

What I Need and What I have

- [6] In order to determine an appropriate division of assets, specific information concerning the value of matrimonial assets (such as real property and businesses, including shareholdings) must be considered. For child and spousal support claims, personal income tax returns and assessments for the previous three taxation years and specific information and documents concerning employment income and income from self-employment must be produced. The disclosure requirements the parties must meet are set out in the British Columbia Supreme Court Family Rules and the Guidelines.

Division of Assets and Reapportionment

[7] In approaching issues concerning division of property and spousal support, the Court should first address division of property, including any issue of reapportionment. In *Tedham v. Tedham*, 2005 BCCA 502, Prowse J.A. explained at para. 67 that a practical reason for this approach is that the division of property may affect spousal support:

[T]he division of property, particularly where there is a reapportionment, will affect the relative condition, means and needs of the parties, not the least because it may generate further income in the hands of the payee. Another reason is that, in some cases, particularly where there are substantial family assets and/or a short-term marriage, an order of reapportionment may have the effect of fully addressing all of the factors and objectives set forth in s. 15.2 (or its equivalent under the FRA) with respect to spousal support, such that a spousal support order is unnecessary.

[8] Family assets should be divided equally unless it would be unfair to do so in light of the criteria set out in s. 65 of the FRA. The burden to establish such unfairness rests on J.P.: *C.L.H. v. R.J.J.S.*, 2012 BCSC 579 at para. 185; *MacNeil v. MacNeil* (1995), 14 R.F.L. (4th) 24 at para. 29 (B.C.S.C.); *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1 at para. 62 (C.A.).

[9] Factors to be considered for a claim of reapportionment include:

- (a) the duration of the marriage;
- (b) the duration of the period which the spouses have lived separate and apart;
- (c) the needs of each spouse to become or remain economically independent and self sufficient; and
- (d) any other circumstances relating to the acquisition, preservation, maintenance, improvement, or use of the property or the capacity or liabilities of a spouse.

See: *Davies v. Davies*, 2012 BCCA 219 at para. 28; FRA, s. 65(1).

[10] The needs of each spouse are determined in part by reference to their standard of living prior to separation as well as their needs post-separation: *Fong v. Fong* (1983), 45 B.C.L.R. 222 at 230 (C.A.). Where the combined financial resources of both spouses will not support the needs of both parties, a greater portion may be awarded to the spouse who has custody of the children in order that at least one of the spouses may become economically independent: *Tsonis v. Tsonis* (1985), 45 R.F.L. (2d) 353 at 360 (S.C.). Family assets and debts must be considered in the analysis in order to ensure fairness: *Stein v. Stein*, 2008 SCC 35 at para. 9.

[11] There is some evidence that B.G. and J.P. relied on bank financing and loans from family members to survive. There is also evidence that they received revenue from rental property, but there is no evidence concerning the revenues and expenses. Prior to their separation on October 5, 2009, B.G. held title to the rental property, located in Vancouver, which J.P. managed. Both parties agree it is a matrimonial asset. The property was eventually sold

through foreclosure proceedings. The net proceeds from the sale presently being held in Court, after Court ordered distributions, are just over \$88,000.00 (the original amount paid into Court was over \$180,000).

- [12] B.G. and J.P. were also equal shareholders in Benston Ventures Ltd. ("Benston Ventures"), a privately held company registered in British Columbia. It was struck from the register maintained by the Registrar of Companies. B.G. believes this happened in 2009.
- [13] Benston Ventures owns shares in another limited company called Broker Builder Corp. ("Broker Builder"). The majority shareholder is Ben Sillem. The nature of Broker Builder's business is to arrange premium financing to insurance brokers who wish to offer financing to their clients (generally, commercial risks) for their insurance premiums.
- [14] As between B.G. and J.P., B.G. was the more active participant in Broker Builder in view of his past experience in the finance industry having worked for American International Group ("AIG"). B.G. also has a university degree with a major in economics.
- [15] B.G. was active in the daily affairs of Broker Builder and had access to its financial information and records. Although B.G. was involved in a dispute with Mr. Sillem, he maintained regular contact with him throughout this proceeding.
- [16] In spite of demands made by J.P. (through counsel) of B.G. and Mr. Sillem prior to and during the trial, no financial statements (audited or unaudited), financial information or documents, or valuations (or documents from which valuations could be inferred) concerning Benston Ventures and Broker Builder were produced in the litigation let alone admitted into evidence. No application was made for production for any of those records. As a result, I am not able to determine the value of the shares held by Benston Ventures.
- [17] I am also unable to determine other facts that affect the financial claims. For example, it is not possible to determine whether a promissory note issued by Broker Builder to Bentson Ventures in the amount of \$95,000 (plus interest) has been re-paid in whole or in part to B.G. to the exclusion of J.P. That sum was borrowed against the rental property and paid to Broker Builder; the promissory note was given in return. Nor is it possible to determine the number and dollar amount of payments B.G. received from Broker Builder, when those payments were made, and whether they were to repay the promissory note or to pay for consulting services that B.G. says he provided to Broker Builder.
- [18] B.G. and J.P. testified that they each were advanced \$3,000 per month from Broker Builder on account of their shareholdings in Benston Ventures. Those funds were always paid to B.G. Following their separation, B.G. retained both payments and did not pay J.P. her share, make any payments on the mortgage on the rental property, or pay child or spousal support.
- [19] Even though they disagree on value of the shares held by Benston Ventures in Broker Builder, B.G. and J.P. have asked me to engage in a rough and ready approach to valuation. They would like me to infer the value of those shareholdings based upon two offers to purchase made by Mr. Sillem. The first offer was made on May 30, 2011 and called for a one-

time payment of \$35,000. B.G. and J.P. agree the offer is inordinately low. The second offer is more recent, made in late December 2011, for \$100,000. That amount is to be paid out over 8 years; it is not secured. B.G. disagrees with J.P.'s submission that I may also glean the value of the shares to be \$80,000 based on the contents of an unsigned credit application prepared by a bank officer during a meeting with B.G.

- [20] J.P.'s claim for reapportionment is based in part on her assertion that she will have limited ability to seek gainful employment because she will be tending to her four young children (three of whom have been sexually abused) and in part on what she claims is B.G.'s deceitful conduct in the Broker Builder business venture to her economic detriment. As I have noted, there is insufficient evidence about the payments made to B.G. for me to determine the second prong of her claim.

Child and Spousal Support

- [21] J.P.'s claims for child and spousal support and extraordinary expenses are made pursuant to the Divorce Act and the FRA.
- [22] Both parents are responsible to support their children. Each must earn "what [they] are capable of earning": *Hanson v. Hanson*, [1999] B.C.J. No. 2532 at paras. 8-9 (S.C.); *Chapple v. Sissons*, 2008 BCSC 1740 at para. 9.
- [23] Spousal support is intended to relieve the economic consequences of the breakdown of the marriage and to promote economic self sufficiency. The four objectives of spousal support are set out in s. 15.2(6) of the Divorce Act:

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 the 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.
- [24] No single objective is paramount. All four factors must be taken into account: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 879; *Bracklow v Bracklow*, [1999] 1 S.C.R. 420 at para. 18.

- [25] In making an order for spousal support under the Divorce Act, I must consider the "condition, means, needs and other circumstances of each spouse": Divorce Act, s. 15.2(4). That section has been interpreted to include a consideration of the income capacity and capital means of each spouse: *Armstrong v. Armstrong*, 2012 BCCA 166 at para. 27; *Leskun v. Leskun*, 2006 SCC 25 at paras. 29 and 32; *Muirhead v. Muirhead* (1995), 6 B.C.L.R. (3d) 229 at para. 14 (C.A.).
- [26] The possibility of a compensation order in lieu of spousal support was raised on behalf of J.P. during argument. The approach to be taken in determining a compensation order is not to equalize net disposable income, but the "equalization of the economic consequences of the marriage or its breakdown": *Armstrong* at para. 69.
- [27] B.G. and J.P. have not produced income tax returns or assessments required by the Guidelines.
- [28] B.G. does not dispute his obligation to pay child and spousal support. B.G. challenges J.P.'s claim that she will be unable to earn meaningful income and challenges her claim that nanny expenses qualify as extraordinary expenses. In turn, he seeks recovery for household furnishings which he says J.P. has taken for her own benefit. B.G. also says that he has incurred family debt in the amount of \$148,000 (a claim that J.P. disputes).
- [29] In addition to caring for her four children prior to separation, J.P. worked at various jobs including managing small rental properties in addition to the rental property in Vancouver, first aid, modelling, and teaching swimming lessons. She estimated her current income is \$1,500 per month, but she did not provide any particulars or supporting documentation. J.P. is prepared to waive future spousal support provided the matrimonial assets are reapportioned in view of what she states is her limited ability to earn income.
- [30] Income may be imputed where a party is intentionally under-employed: *Chapple* at para. 9; *Hanson* at para.14; Federal Child Support Guidelines, s. 19; Spousal Support Advisory Guidelines, Part 6.1. But there is insufficient evidence to determine what income, if any, may be imputed to J.P.
- [31] J.P. testified that she retained the revenue from the rental property for herself and the children until they were apprehended by the Director of Child, Family, and Community Service ("Director") on December 30, 2009. She did not make any payments to the mortgage. As I have noted, no documents or financial information have been produced in respect of the rental property.
- [32] In addition to the payments he received from Broker Builder, B.G. admitted to being paid a gross monthly income of \$8,500 per month (or \$102,000 per annum) from Navigate Capital Corp. following the parties' separation until his employment terminated in August 2011. B.G. also said that he earned a greater income at AIG. He testified that he has not worked for remuneration since that date due to his pre-occupation and involvement with this proceeding, especially the trial which occupied over 90 days (most of the trial time

concerned the sexual abuse allegations).

Family Debts

- [33] J.P. gave evidence about debt she incurred to support the family during the marriage. Some of her evidence is supported by documents. B.G. has not provided any evidence whatsoever to support his claim for reimbursement of family debt. He only spoke of the existence of such debt as a family debt in his closing oral submissions.

Household Furnishings

- [34] B.G. has not provided any evidence of the \$10,000 value that he placed on his half of the household furnishings. I have been made aware, and only generally, of a dining room table, television, beds for adults and four children, a couch, and a home office computer, desk, and chair. I infer from the evidence that B.G. and J.P. had cookware, dishware, and eating utensils at home.

Disposition

- [35] The lack of appropriate financial information and documents prevents me from determining the financial claims. It would be an error in law to engage in "rough and ready" evaluations that the parties have asked me to do: Armstrong.
- [36] There is no doubt that B.G. must pay retroactive child support between separation on October 5, 2009 and December 30, 2009 (the date the children were apprehended by the Director) and ongoing child support now that the children have been returned to J.P.'s custody. The difficulty in setting those amounts arises from insufficient evidence.
- [37] I am unable to determine the amounts B.G. was earning during that period apart from \$6,000 per month that he collected for himself and his wife (and retained). I am reluctant to assess his past child support obligation based upon monthly revenue of \$6,000 because B.G. likely received other amounts as well, and in addition, one half of that amount belongs to J.P. (which may also factor into the determination of the reapportionment claim).
- [38] I am mindful of the remarks of D. Smith, J.A. in Armstrong (at para. 28) that it would be "unorthodox" to make a final order for child support before determining the division of property between the parties. For that reason and because there is insufficient evidence, I am not prepared to make a final order concerning B.G.'s child support obligation at this time.
- [39] The children should not, however, be left without financial support while they wait for their parents to obtain appropriate evidence.

- [40] There is a basis to determine interim child support. B.G. and J.P. agree that an annual income of \$72,000 should be imputed to B.G. at this time. Both agree that B.G.'s income potential is significantly greater and that his income will increase over time. I agree that B.G. should pay interim child support based on that amount. My order that he does so is made pursuant to the Divorce Act. According to the Federal Child Support Guidelines, the amount for child support, based on \$72,000 per annum, is \$1,701 per month.
- [41] B.G. and J.P. also agree that the commencement date for payment of child support should be delayed for a brief period in order that B.G. may find work now that the trial has concluded. B.G. wants to delay imposition of his child support obligation to August 1, 2012. J.P. seeks to have it imposed a month earlier. B.G.'s evidence that he has been out of work since the start of the trial was not challenged.
- [42] Given that B.G. has been out of work for some time due to his daily involvement in the trial, I am of the view that it would be unrealistic to expect him to secure employment at \$72,000 per year by July 1, 2012. I agree with B.G. that his support obligations should commence on August 1, 2012, and then continue on the first of each month thereafter. A review of B.G.'s child support obligation must, however, take place six months later, i.e., by February 1, 2013. J.P. is not precluded, however, from seeking to vary that amount should B.G. obtain employment that pays him more than \$72,000. B.G. should provide written evidence of his income to J.P., c/o her counsel, once he obtains employment and then continue to provide such evidence every two months thereafter until the review takes place.
- [43] Otherwise, the parties should secure production of the requisite financial information and arrange for continuation of the trial so that final orders may be made. Hopefully, advance production of that information to each other will result in a shortened hearing. The parties should also schedule a trial management conference. If necessary, the parties may arrange a hearing or case conference before me to sort out any difficulties regarding production.

"P. Walker J."

The Honourable Mr. Justice Paul Walker

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