

CANADA / JUDGMENT

Jendruck v. Jendruck

2013 BCSC 2196

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2196 Jendruck v. Jendruck IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Jendruck v. Jendruck, 2013 BCSC 2196 Date: 20131202 Docket: 92601 Registry: Kelowna Between: Debora Louise Jendruck Claimant And Phillip John Jendruck Respondent Before: The Honourable Mr. Justice Funt Reasons for Judgment Counsel for the Claimant: G. Miller Counsel for the Respondent: D. Polley Place and Date of Trial: Kelowna, B.C. March 5-8, 2013 Place and Date of Judgment: Kelowna, B.C. December 2, 2013 I. Introduction

- [1] This four-day family trial represents the end of a long marriage.
- [2] The claimant wife seeks spousal support, including retroactive spousal support, a division of family assets (and, depending on values assigned, a reapportionment), and costs.
- [3] After living together in a marriage-like relationship for several years, the parties were married on June 25, 1977. They separated on April 2, 2011. The wife seeks a divorce and the husband agrees. It is readily apparent that the grounds for divorce are met.
- [4] The parties had two boys, both now in their twenties. Both are financially independent of their parents.
- [5] Neither party has a post-secondary education. They each enjoy good health, appear to be physically fit and look younger than their ages.
- [6] The husband has many skills and is gainfully employed.
- [7] For almost 20 years, until the spring of 1999, the wife worked as a bank teller. In the fall of 1999, she started a small unlicensed daycare at the family home while also being at home for the parties' two boys, who were then 13 and 10 years old. The daycare ceased operation around the time of the parties' separation.
- [8] The wife would like to operate a daycare from the family home in order to provide herself with a self-sufficient livelihood. It is obvious that she loves children and that other parents trust her with their children.

- [9] The husband was never supportive of his wife operating the daycare. He thought his wife should "find something else". Since leaving the family home on April 2, 2011, his attitude has not changed. Indeed, as part of the husband's case, the older son was called as a witness to express his dissatisfaction with his mother operating a daycare and stated plainly that his mother should be "out working".
- [10] The husband recognizes his spousal support obligation but disagrees as to its computation and, among other aspects, would like to impute annual income of \$20,000 to \$25,000 to the wife for the purposes of computing spousal support.
- [11] Neither our country's divorce legislation nor our province's family legislation is premised on the fault of one party or the other when examining the cause for the parties' separation.
- [12] In considering spousal support, s. 15.2(5) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), instructs the Court to "not take into consideration any misconduct of a spouse in relation to the marriage". Section 15.2(6)(d) of the Divorce Act, however, encourages a constructive approach to be taken in order to "promote the economic self-sufficiency of each spouse within a reasonable period of time". This provision accords with the distinction between misconduct and the consequences, including emotional consequences, of misconduct: *Leskun v. Leskun*, [2006] S.C.J. No. 25, at para. 21. Where divorced spouses become economically self-sufficient over a reasonable period of time, a financial burden on society is avoided.
- [13] In this case, the husband has not taken a constructive approach to his wife's future emotional and financial well-being.
- [14] For the reasons set forth below, the Court will order spousal support of \$3,849 per month, including retroactive spousal support of \$3,849 for each of the thirteen months starting April 2011 and ending April 2012 (reduced by the husband's payments made to the wife directly or on her behalf of approximately \$2,000 per month) and a division of assets that will enable the wife to try to establish a profitable daycare operation. The spousal support will be reviewable when the husband reaches age 65.
- II. Facts
- (a) Early background
- [15] Both parties were born in 1955.
- [16] The wife attended high school in Kelowna and completed Grade 11. While in high school, her father died in a work-related accident and this affected her emotionally, which likely led to her not graduating from high school. The husband attended high school in Rutland and moved to Kelowna in 1974.
- [17] The parties met in 1974 when they were both 19. They started to live together in a common-law relationship and were married on June 25, 1977. When they met, the wife was earning some income as a babysitter. The husband was a labourer helping to build homes. Neither party had any assets or liabilities other than a GTO convertible owned by the husband.

- [18] After their marriage, the wife first worked as a cashier at a local pharmacy and then as a receptionist at a local law firm.
- [19] In 1978 or 1979 the wife started to work as a bank teller at a major Canadian bank where she worked until May 1999. She took a three-month maternity leave when their first son was born in September 1986 and a 10-month maternity leave when their second son was born in December 1989. Her pay was approximately \$7.50 per hour. Her best year of income was 1997/1998 when she made approximately \$17,000.
- [20] In 1985, the husband started to work for Shaw Cable as an installer. Initially Shaw's arrangement with its installers was that the installers would be independent contractors. This subsequently changed and the husband is now an employee of Shaw.
- [21] In the early years of their marriage, the parties would buy a building lot and then build a home on the lot. The husband would do much of the work during the evenings and weekends when he was not at his daytime construction job. Throughout this time the wife was very helpful. Other than for heavy lifting, she was a very active participant, including running errands, getting supplies and bringing cooked meals to the site for her husband and other helpers. By 1991 they had built three homes and had owned four lots. The third home was the family home at the time of separation. With the profit from the sale of the two previous homes and the other lot that they had bought they were able to pay off their mortgage in 1991, and since that time they have been, for all practical purposes, debt free.
- [22] The parties did not live lavishly. Neither was a party-goer. They were either at work or with the family. For holidays, the family went camping or attended baseball tournaments. The husband has a passion for baseball and has played league baseball for many years.
- (b) Wife's leaving bank and starting daycare
- [23] At the time the wife quit the bank in 1999, there was, apparently, a suspicion that she had taken approximately \$1,900 (USD) from her "cash can". She vehemently denied the suggestion and stated that the cash can had been tampered with previously. She was affronted by the suggestion and quit on the spot. This was undoubtedly an emotional decision. I note that she was never charged and she is still entitled to a small pension from the bank starting in 2020.
- [24] The husband believes his wife was not charged because he went and saw the bank manager two or so weeks later and paid what he was told were the missing funds and his wife's staff loan. Initially, the wife did not tell her husband that she had quit her job at the bank. As her counsel noted, she is a generally a quiet person who likes to keep matters to herself. The day after the wife quit, the bank asked her to come into the branch to clarify some items which, according to the wife, were found to be correct. She did so and, in my view, this is consistent with her being innocent of any wrongdoing. The husband did not call the bank manager or any other bank representative as a witness.

- [25] The husband testified that his wife had been handling some of the bookkeeping for his contracting business and the family finances until 1994. At this time, the husband testified that he thought some payments that should have been made (e.g. an \$800 trailer camp fee for one-month in the summer, income tax and GST quarterly instalments) had not been made and that some credit cards had greater balances than he expected. He also testified that some of the savings he thought they had were not shown in any of their bank accounts. The husband did not support his assertions with any documentation.
- [26] From this time in 1994, the husband testified that he did not trust his wife with financial matters and thought the wife's leaving the bank was consistent with what he thought was her previous behaviour. At the time the wife quit the bank in 1999, her unchallenged testimony was that she was still being paid for bookkeeping services although whether she had signing authority or other control over funds was not made clear.
- [27] With the passage of time, the lack of documentation and the wife's testimony, I have given no weight to the husband's allegations that his wife misused or misspent funds.
- [28] When the wife left the bank in 1999, the family was financially secure. They had no mortgage and no real debt other than a small staff loan with the bank.
- [29] The boys were in grades 7 and 5. The younger boy was having some difficulties at school and was often in the principal's office. One teacher thought that he had ADHD and suggested that he be prescribed Ritalin. The wife also stated that there were drugs, namely marijuana, at the school.
- [30] In the fall of 1999 the wife started a daycare operation from the family home. She felt it was important that she be at home when her boys returned from school each afternoon. She thought being an at-home mother was in the best interests of both of her boys. The husband was not supportive of the daycare or her staying at home. He questioned his wife weekly about operating a daycare. He thought the boys were normal boys and that there was no reason the wife could not work for someone else rather than run a daycare.
- [31] The daycare was not very profitable. In its best year, it earned a profit of approximately \$4,000.
- [32] In recent years the husband's income from Shaw was approximately \$125,000. However by the time of trial, his income was approximately \$90,000. From the evidence, including that supplied by a Shaw representative, it is clear the drop in income has not been caused by the husband but rather is due to the deterioration of Shaw's competitive market position in recent years.
- (c) Marriage breakdown and separation
- [33] In December 2010, the wife saw an email from her husband to one of her best friends which had made her suspicious. The wife and the husband had both known the other woman for many years, and in fact they had been witnesses at her wedding.

- [34] The wife discussed the email with her husband and according to the wife's testimony she was satisfied with her husband's explanation that "nothing was going on". To the contrary, her husband testified that he told her that the marriage was not working and that it could not be fixed. Starting in early 2010, the husband and the wife had been extensively renovating the matrimonial home and this had continued after the December 2010 email and the renovations completed shortly before the husband left the home in April 2011.
- [35] A reasonably objective person may not have believed the husband in light of the email but a trusting spouse of 33 years may believe what they should not believe. I accept the wife's testimony.
- [36] It is not disputed that, on March 19, 2011, the husband told the wife that he "didn't love her anymore" and that he was leaving the marriage. The wife testified that she was left shocked and crying. She said she thought that like any marriage they had had some issues but she had not foreseen her husband's desire to leave.
- [37] The husband also said that he and his wife were not often intimate. That said, he testified that they were intimate shortly before this time.
- [38] The husband did not leave the family home immediately. Although he offered, he did not do so because he wished to rent an apartment from his brother and he could not take possession until April 1, 2011. The wife agreed with this approach. On April 2, 2011, he moved to his brother's apartment.
- [39] In the fall of 2011, one of his nephews started living in the apartment, and the husband found this to be disruptive because of his nephew's late hours working in a restaurant. He testified that because of this, he left his brother's apartment on January 1, 2012 and became a "roommate" in an apartment occupied by the woman with whom he had the December 2010 email correspondence. The husband paid the other woman \$1,000 a month as rent.
- [40] The husband and the other woman started to travel together and, in April 2012, they visited the parties' younger son in Alberta where he was working, as well as one of the woman's children who was also living in Alberta. In November 2012, the other woman went with the husband to a family get-together with his siblings and some close friends.
- [41] The husband currently lives with the other woman in her condominium and pays her \$1,200 per month as rent.
- [42] The other woman has also loaned the husband approximately \$16,000 to help him fund a recent RRSP contribution.
- [43] The husband called his older son as a witness, who, in cross-examination, testified: Q Okay. Would you consider that she was a very good mom? A Yes. Q She was there for you when you had problems? A Yes, they both were. Q Okay. Did she keep the home clean? A Yes, very clean. Q Very clean. She did your laundry, cleaned your rooms? A Yeah. Q Yes? Fed you? A Yes. Q She a good cook? A Yes, very. Q Was she all - was she there most of the time for you? A

Yes. Q Okay. She didn't take off on weekends or party or anything like that, she was - it was a family life you led, is that fair to say? A Yes. Q And you did lots of camping together? A Yes. And then further: Q And it's bothered you since the age of 12 that there's - your mom operates a little daycare in the home? A Yes. Q Okay. What other things annoy you about your mother? A Just the whole daycare thing, I just didn't like the kids being around the house. Q Okay. And did - the - did it really annoy you that your mother wasn't going out to work? A A little bit. Q Why? A Well, I think everyone should put an equal part in in a relationship. Q You don't think your mother [has] made an equal contribution to their relationship? A I'm not saying she hasn't, but I'm not saying she shouldn't just be able to sit down for the rest of her life and not do anything. Q But she hasn't sat down and done nothing for the rest of her life. Has she? A Not quite, but not saying - not working at a full-time job. Q Well, you don't think daycare, looking after kids and working at the home is a full-time job? A I guess it can be, yeah. Q Mm-hmm. So how do you think your mother's going to feel knowing that you have come, willingly apparently, to butt your little nose into a dispute between your mom and dad? A Probably not very good. Q No. And in what way is that going to assist your father in what he thinks that the court should decide in this proceeding? A I'm just helping with getting the truth out. And then further: Q So it's your evidence that you've come forward because you think that the judge here should know that for 11-and-a-half years while your mother operated a little daycare service that you ragged on her at least a couple of times a month for 11-and-a-half years and it was your view that she should be out working? A Yes.

- [44] The older son's testimony confirms that the wife was a dedicated and loving mother who supported each of her sons in any way she could. I have little doubt that both enjoyed happy childhoods as a result of their mother's efforts and love.
- [45] The older son's testimony as a witness for his father with respect to his mother's daycare business was hurtful. The emotional consequences of such betraying testimony cannot be measured.
- [46] Since separation, the wife has not taken steps to establish a viable, profitable daycare centre which would meet bylaw and licensing requirements nor has she attempted to find other employment.
- [47] I find the husband partially responsible for the wife's failure to get or attempt to get on a path to economic self-sufficiency. Realistically, at age 57 and without a high school diploma, the wife would likely not be able to be employed other than for minimum wage at a job she would likely not enjoy. As the older son readily conceded during testimony, his mother is good at daycare and likes it.
- [48] If since separation the husband had approached, in a constructive manner, the possible operation of a daycare by his wife, some of the financial decisions the Court is now required to make may not have been necessary.

III. Division of Assets

- [49] The wife seeks the following assets: (a) the matrimonial home (the husband values at \$370,000); \$348,000 (b) a 2005 GMC truck (the husband values at \$17,750); \$15,450 (c) her RRSP account valued at \$36,714 (no adjustment made for tax on withdrawal); \$36,714 (d) a one-time payment to her as consideration for a 50% interest after tax in the husband's Shaw Pension Plan (the pre-tax value of the Pension is \$67,955); \$30,000 (e) an equal division of the husband's Canada Pension Plan (no value assigned); Ø (f) retention of her bank pension which will pay approximately \$180 per month starting in 2020 (no value assigned). Ø \$ 430,164
- [50] The wife also asks that her past withdrawals from the family's investment account not be considered. She withdrew approximately \$105,000 for living expenses, property taxes and significant legal fees. The husband withdrew approximately \$47,000.
- [51] Finally, the wife asks that the \$31,000 outstanding balance on a bank line of credit be borne entirely by the husband. On the whole of the evidence, the outstanding balance should be split equally. Large entries represent approximately \$10,000 in renovation-related expenses, \$11,000 for an RRSP contribution by the husband (now reflected in the husband's RRSP balances), and larger amounts relating to loans apparently arranged by the husband and made to or channeled through the wife's brother (no documentation of the loans were provided by either party and both parties left matters opaque).
- [52] In sum, the wife (ignoring her future bank pension and CPP benefits) seeks assets worth \$430,164. If 50% of the \$31,000 line of credit was deducted, the net amount would be \$414,664 (\$430,164 minus \$15,500).
- [53] Based on his valuations, the assets of the husband would be: (a) Shaw Shares \$10,730 (b) RRSP (#1B6HW0K0) (30% tax discount) \$30,079 (c) RRSP (#1B6HW0K1) (30% tax discount) \$11,757 (d) RRSP (#1B6HWPP0) (30% tax discount) \$166,724 (e) Joint account (after \$30,000 payment to wife) \$21,646 (f) Shaw Pension (pre-tax) \$67,955 (g) 2010 Tax Refund \$10,784 (h) loan from brother-in-law \$24,400 (i) GMC Van (2001) Ø (j) Outback Trailer (2006) \$13,000 (k) All-terrain vehicle \$2,000 (l) Manulife (cash surrender value) \$50,106 \$409,181
- [54] There were also two purported amounts described as \$7,000 cash on hand and \$7,402 in a chequing account. In final submissions, the wife did not make a claim for either amount. The husband's counsel stated that the husband "denies he had cash on hand in the sum of \$7,000 at the time of separation and if he had cash in his possession, it was intended for and was used to pay for renovation costs". With respect to the \$7,402 chequing account, the husband's counsel stated, "this represents the highpoint of the revolving balance in [the husband's] personal chequing account immediately after receiving his month-end paycheque on March 31, 2011. It is not an asset intended to be retained or shared by the parties and does not exist".
- [55] After deducting 50% of the \$31,000 line of credit, the net amount would be \$393,681 (\$409,181 minus \$15,500).

- [56] If the three RRSP accounts are not discounted for tax, then the husband's total assets would be \$498,564. After deducting 50% of the \$31,000 line of credit, he would have \$483,064 (\$498,564 minus \$15,500).
- [57] If a 15% discount for the three RRSPs is used, then the husband's total assets would be \$453,872. After paying his share of the line of credit, he would have \$438,372 (\$453,872 minus \$15,500).
- [58] The 30% discount was based on the assumption that the husband would be required to collapse a significant portion of his RRSP funds if the matrimonial home were not sold in order to acquire his own home. Taking into account his income, his other assets, and his current living arrangements, a 30% discount is too conservative. A 15% discount would still be conservative yet more reasonable in the circumstances.
- [59] With respect to the valuation of the house, there were two separate appraisals of the house. It is not disputed that there has been significant water seepage in the crawl space of the house. Attempts have been made to address the problem. At the time of trial, it was not clear whether these attempts had been successful. In any case, it would be conservative to use the lower of the two appraisals. Such is especially so where there may be unresolved water seepage. The addendum to the lower of the two appraisals reports states: The crawl space under the living room was dugout or excavated after the 1984 construction completion and finished with plywood over allan block walls to create a storage room. The storage room shows evidence of water or moisture penetration and is still considered crawl space for appraisal purposes.
- [60] As noted, after separation and before trial, both parties made withdrawals from an investment account. The husband withdrew approximately \$47,000. The wife withdrew approximately \$105,000. The husband asks that \$58,000 which represents the amount by which the wife's withdrawals (\$105,000) exceed his withdrawals (\$47,000) should be taken into account in dividing family assets. The wife argues that her withdrawals were not for wasteful, reckless or improvident purposes and, as noted, were primarily for legal fees, property taxes and living expenses.
- [61] The husband cites our Court of Appeal's decision in *Newson v. Newson* (1986), 3 B.C.L.R. (2d) 1, for the rule that legal fees, like other personal expenses, should be added back for the purposes of the division of family assets. The *Newson* rule serves to avoid double counting and it should be applied. With an equal division of family assets, the net benefit for the husband would be \$29,000 ($\$58,000 \div 2$). From the wife's perspective, an award of Court costs and retroactive spousal support ameliorates the overall financial effect.
- [62] In the end, before considering the wife's withdrawals, there is a relatively close division if a 15% discount is used for the husband's RRSPs. To summarize, the calculations are: Wife Husband Assets \$430,164 \$453,872 Deduct LOC \$15,500 \$15,500 \$414,644 \$438,372

- [63] For an equal division, the husband should be accountable for \$11,864 $((\$438,372 \text{ minus } \$414,644) \div 2)$.
- [64] The wife is required to pay the husband \$29,000 with respect to the withdrawals she made beyond his withdrawals as well as her share of the line of credit (\$15,500).
- [65] In sum, the wife is accountable for \$44,500 $(\$29,000 + \$15,500)$. The husband is accountable for \$11,864. When set off, the wife will owe the husband \$32,636 $(\$44,500 \text{ minus } \$11,864)$.
- [66] I will order that the wife not share in the Shaw pension, 50% of the pre-tax value of which is approximately \$34,000 (the pre-tax value should be used because it is not collapsed at this time). At this point, the difference is small enough that a further adjustment is not required. I have taken the same practical approach with respect to the difference in the values assigned to the various vehicles by the parties.
- [67] Having particular regard to the available assets and the needs of each spouse to become or remain economically independent or self-sufficient, the foregoing equal division is not unfair. Accordingly, a reapportionment in the wife's favour will not be ordered under s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128.
- [68] I will order that the husband will forthwith take reasonable steps with the lender to formally remove the wife's name from the line of credit. IV. Spousal Support
- [69] As noted, the husband's income has dropped in recent years as a result of his employer's market conditions. I will use the husband's employment income for 2012 with a \$10,441 downward adjustment for work-related expenses as the wife's counsel recommended. The resulting annual income is \$95,559. The husband claimed \$14,241 for work-related expenses. The \$10,441 is more reasonable given the personal component also associated with some of the expenses (e.g. cellphone, vehicle).
- [70] In computing spousal support, the husband asked that the wife be imputed income of \$20,000 to \$25,000. The onus is on the party seeking income to be imputed (*Windle v. Windle*, 2010 BCSC 18 at para. 88). In light of the wife's age, work history, skills, education and the parties' long marriage, within the context of the husband's unconstructive approach towards the operation of a daycare, the Court will not impute income to the wife at this time. I recognize that the wife has taken no steps since the separation to establish a daycare. I attribute this to the emotional consequences associated with the unanticipated end of a long marriage compounded by the husband's disparagement.
- [71] Based on the calculations provided to me, I will order \$3,849 of monthly spousal support (which serves to equalize net disposable income).

- [72] The wife also sought retroactive spousal support from the date of separation, April 1, 2011, to May 1, 2012. I will order retroactive spousal support for this thirteen-month period based on a monthly spousal support obligation of \$3,849 per month. During this period, the husband paid the wife, directly or into her account, approximately \$2,000 per month. Such payments will be deducted in computing the retroactive spousal support.
- [73] I also order that either party may apply for a review of the husband's spousal support obligations within 90 days of the husband turning 65 on August 4, 2020. Although I am not seized of the matter, I would ask the parties to appear before me if I am available to hear the review.
- [74] To secure the payment of the spousal support, I also order that the husband make the appropriate designation under his Shaw life insurance or Manulife insurance to secure the prospective spousal support obligation to August 4, 2020. V. Pensions
- [75] The husband's Canada Pension Plan will be divided equally, in accordance with the provisions of the Canada Pension Plan, R.S.C. 1985, c. C-8.
- [76] The wife's bank pension will not be divided. It is a matter that the Court may consider at the time of review as described above. VI. Divorce
- [77] A divorce is granted and will take effect on the 31st day after the date of these reasons. VII. Costs
- [78] The wife is entitled to party and party costs in accordance with Appendix B.
- [79] I am aware that costs were also awarded to the wife with respect to certain pre-trial proceedings. If not yet paid, these costs should be agreed to, or taxed, and then paid forthwith by the husband. ____ "Funt J." ____ Funt J.

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