

CANADA / JUDGMENT

Johansen v. Martin

2001 BCSC 465

COURT

Supreme Court of British Columbia

DECIDED

28 March 2001

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2001BCSC0465

Citation:	Johansen v. Martin
Date:	20010328 2001 BCSC 465
Docket:	4608/00 Registry: Victoria IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	TARA LEE JOHANSEN PLAINTIFF
AND:	WADE WILLIAM MARTIN DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE R. D. WILSON

Counsel for the Plaintiff:

L. P. Gagnon

Counsel for the Defendant:

Z. Porter

Date and Place of Hearing/Trial:

26 January 2001

Victoria, BC

I.

- [1] The plaintiff seeks a summary determination of the corollary relief claims in this matrimonial proceeding. The defendant says that the matters are not appropriate for a summary determination.

II.

- [2] The history of the litigation is this. The writ of summons was issued, and the statement of claim was filed, on 17 October 2000. Service of the process was effected on Mr. Martin on 27 October 2000. An appearance was entered 2 January 2001, followed by a statement of defence and counterclaim on 17 January 2001.
- [3] As well, on 2 January 2001, orders were made dissolving the parties' marriage, and adjourning the plaintiff's corollary relief claims to 19 January 2001.
- [4] The plaintiff claims an order for spousal support and an order for reapportionment of the family assets. The plaintiff pleads that she requires spousal support in order to become and remain economically independent and self-sufficient. She pleads that she made a greater contribution to the acquisition, preservation, maintenance and improvement of family assets.
- [5] The development of the dispute is as follows. Following a period of cohabitation of approximately 2 years, the parties married on 27 June 1998. They separated 9 November 1999.
- [6] During their relationship, the parties acquired assets and corresponding liabilities. By the time of separation, it is more likely than not that their liabilities, that is to say, debt, by far exceeded the value of their assets.
- [7] Following their separation, the parties concluded a resolution of the property matters between themselves, by agreement. Their assets and liabilities were divided to their mutual satisfaction.
- [8] At the outset, both parties performed the obligations they had assumed, by their agreement, in discharging their several joint liabilities. However, by February 2000, the defendant was in default in performing his end of the bargain. This default precipitated discussions throughout the spring of 2000. On 22 June 2000, the parties concluded a new agreement on the division of their assets and liabilities. That agreement was evidenced, in part, by a memorandum signed by both parties. The agreement includes the following terms:
1. The plaintiff to be sole owner of the former matrimonial home; and to assume entirely the responsibility for repaying the mortgage loan on the title to that property;
 2. The defendant to be the sole owner of a 1992 truck; and to assume full responsibility for repayment of a Bank of Montreal loan obtained to acquire the vehicle;

3. The defendant to assume full responsibility for repayment of a Bank of Montreal line of credit;
 4. The parties to bear equally the repayment of a retirement savings plan debt incurred on the acquisition of the former matrimonial home, standing in the plaintiff's name;
 5. The plaintiff to assume full responsibility for repayment of an outstanding balance on a VISA card in her name;
 6. The defendant to obtain from the former family home certain personal property;
 7. The plaintiff to obtain a release from the Bank of Montreal releasing the defendant from liability on the mortgage on the title to the former family home;
 8. The defendant to pay out the Bank of Montreal line of credit, the Bank of Montreal truck loan, and pay to the plaintiff his share of the R.R.S.P. loan and obtain a release from the Bank of Montreal releasing the plaintiff from liability on those debts;
 9. The plaintiff to be responsible for the costs of transfer of the title to the former family home from the joint names of the parties to her name alone; and
 10. The parties to share the costs of obtaining a divorce order.
- [9] The defendant's performance of his obligations under the new agreement were no better than had been his performance of his obligations under the former agreement. Among other defaults, the plaintiff explained, (in an affidavit filed 6 December 2000), the defendant's approach to his obligations on the 1992 truck:
53. ... When I confronted the Defendant about the missing payments, he proceeded to tell me that he was not going to pay the truck loan or the line of credit debt. He told me I could have the truck because he didn't want it and that he couldn't afford it. I asked him why he put a stop payment on the first payment towards his repayment of the RRSP debt and he told me because I wouldn't let him come and pick up his stuff. I reminded him that was not the agreement; when our financial matters were dealt with then he could pick up his stuff. He further advised me that he was not paying his share of the RRSP debt that we had agreed upon in June, 2000. He said he was not in a financial position to pay these debts. He told me that he had to sell the tires and the rims off the truck for some money. When the Defendant and I purchased the truck, we were advised that the previous owner had spent approximately \$3000.00 on the rims and tires of the truck.
54. I told the Defendant to drop the truck off at my home and the Defendant's response was that I would get it when he was ready. On October 25, 2000, the Defendant contacted me to advise that he'd dropped the truck off at the Highway 18 Connector, which is between Lake Cowichan and Duncan and that the keys were inside the gas lever on the side of the truck. When I picked up the truck, it was in a sad state. The Defendant has basically trashed the truck. It was covered in mud, there was four different sized tires on it, the inside of it was completely filthy, and the front quarter panel on the passenger's side was dented in. The

truck had an exhaust leak and the bracket that holds the headers in place was broken and there was no oil in the motor. ...

[10] The defendant's response to that evidence is as follows:

32. ... when I returned the truck the truck had four serviceable tires on it.

[11] In the face of the defendant's defaults, the several creditors of the parties have looked to the plaintiff. The plaintiff has responded, and made the payments on the joint obligations of the parties. As well, she has expended funds in repairing the truck; and now has that vehicle for sale, in an effort to mitigate the shortfall which will doubtless be incurred, between the outstanding Bank of Montreal loan, and the sale proceeds of the truck.

[12] Among other things, the defendant says that since the plaintiff has all of the assets, she should assume all of the liabilities.

[13] The defendant deposes that he:

27. ... had no legal advice regarding any separation agreement and the documents produced by the Plaintiff were merely discussions between the parties.

[14] The defendant goes on to say:

29. That eventually it became impossible for me to keep up those payments and to transfer that debt into my name.

[15] It is probably not accurate to say that it was "impossible" for the defendant to meet his obligations. It is more likely than not that the real explanation is in this further evidence from the defendant:

43. ... I have been living with Lia Miles since March 2000, we are engaged to be married on February 10, 2001 and I am the sole breadwinner for Ms. Miles and her two children Riley aged 8 and Hunter aged 6.

44. ... Ms. Miles and I are expecting a baby in August of this year.

III.

[16] The plaintiff's notice of motion on this application is said to be made pursuant to:

... the Divorce Act (Canada), the Family Relations Act, and Rule 60(24)(a) and (25) of the Supreme Court Rules.

[17] Rule 60(24) of the Rules of Court, presupposes an undefended proceeding. This proceeding is not undefended. The motion does not comply with R. 44(3). However, both counsel appeared to proceed on the understanding that the relief sought by the plaintiff was made pursuant to R. 18A. I will entertain the application accordingly, on the presumption that counsel will agree to an amendment to the notice of motion to cite the rule.

IV.

- [18] The only significant conflict in the affidavit material relates to the estimated value of the former family home. There is no opinion evidence by a registered appraiser, before the court, on the probable fair market value of that asset. However, on the basis of the evidence that is available, it is more likely than not that the fair market value of the asset is exceeded, substantially, by the mortgage indebtedness encumbering that asset.
- [19] Although the parties can be said to have accumulated "assets" during their marriage, the present liabilities arising from that accumulation, renders the family unit into a negative position. Perhaps in recognition of that phenomenon, the parties concluded, what appears to be, a fair resolution of their positions following the marriage breakdown. Pursuant to s. 65(1)(f) of the Family Relations Act, therefore, I conclude that an equal division of the "assets" would be unfair. Accordingly, there will be a reapportionment of the assets. Title to the former family home is reapportioned entirely to the plaintiff. Beneficial ownership of the 1992 Chevrolet truck is reapportioned entirely to the defendant. However, exclusive possession of that truck is granted to the plaintiff, as well as an order for sale of that asset, the plaintiff to have exclusive conduct of that sale. Net proceeds of the sale of that asset will be applied to the reduction of the Bank of Montreal loan attributable to the acquisition of that asset.
- [20] The plaintiff will assume the joint obligation on the mortgage on the former family home. The plaintiff will hold the defendant harmless and indemnify him for any costs arising out of any claim made against him on that mortgage.
- [21] Each of the parties will retain the personal property currently in their possession, free of any claim by the other party.
- [22] The defendant's initial position was that since the plaintiff retained all of the family assets, she should be responsible for all of the family debts. Such a contention may have merit in a circumstance where liquidation would yield a net return from those assets. That is not this case. Furthermore, the plaintiff is currently in possession of the 1992 pickup truck because the defendant has virtually abandoned it to her.
- [23] In result, I reject that contention.
- [24] The defendant's present position, which I do adopt, is:
- ... certainly Mr. Martin should be required to pay some of the debt that he helped acquire and there should be a court order to that effect. ...
- [25] And:

Mr. Martin takes no issue with a financial obligation to Ms. Johansen in the sum of \$4,000.00, which would deal with [sic] truck loan, line of credit and tires for the truck. Mr. Martin certainly is prepared to pay that debt in the sum of \$200.00 per month. ... This is simply a case of two people acquiring some debts and one party taking on the responsibility of the debt. Certainly the party not paying the debt must account to the party paying the debt. ... The \$200.00 per month is not an unreasonable sum given Mr. Martin's new responsibilities.

V.

[26] The defendant's quarrel is with the characterization of his contribution to payment of the family debt as "spousal support".

[27] On that issue, counsel are agreed that the starting point on an analysis of an application for spousal support is s. 15.2 of the Divorce Act.

[28] As the defendant points out, this is a case of two people acquiring debt and one of them taking on the responsibility of repayment. At the time the debt was acquired, a revenue stream from two sources was available to service it. The breakdown of the marriage has brought that happy situation to an end. The plaintiff has taken steps to protect both of the parties. In doing that, she has suffered an economic disadvantage arising from the breakdown of the marriage. The defendant's delinquency in meeting his obligations in discharging this indebtedness has placed an economic hardship on the plaintiff. The drain on her resources impairs her need to remain economically independent and self-sufficient.

[29] In the current vernacular, this marriage would probably be characterized as a "modern" marriage. However, as the Supreme Court of Canada pointed out in *Bracklow v. Bracklow*[1] at paragraph 31:

... when people cohabit over a period of time in a family relationship, their affairs may become intermingled and impossible to disentangle neatly.

[30] And, at paragraph 34:

... the Divorce Act is premised on the doctrine of the equitable sharing of the economic consequences of the marriage and its breakdown. It is not confined to one type of marriage or one type of support.

[31] I find that by reason of assuming sole responsibility for discharge of the joint obligations of the parties, the plaintiff is in need of financial support from the defendant.

Accordingly, I order that the defendant do pay spousal support to the plaintiff in the sum of \$200.00 per month, commencing the 1st day of February 2001 and continuing on the 1st day of each succeeding month thereafter until further order. Further, I direct that the defendant's obligation to pay spousal support be reviewed on or before the 31st day of January 2005.

[32] Finally, the defendant will pay the plaintiff's costs of these proceedings, assessed on Scale 3.

"R.D. Wilson, J."

The Honourable Mr. Justice R.D. Wilson

[1] [1999] 1 S.C.R. 420.

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