

CANADA / JUDGMENT

Khan v. Gilbert

2019 BCCA 80

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 80 Khan v. Gilbert COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Khan v. Gilbert, 2019 BCCA 80 Date: 20190307 Docket: CA44955 Between: Sophia Rashid Khan Respondent (Claimant) And Anthony Franc Gilbert Appellant (Respondent) Before: The Honourable Madam Justice Kirkpatrick The Honourable Mr. Justice Goepel The Honourable Madam Justice Fenlon On appeal from: An order of the Supreme Court of British Columbia, dated November 14, 2017 (Khan v. Gilbert, 2017 BCSC 2060, Vancouver Docket E163207). Counsel for the Appellant: A. Wormeli Counsel for the Respondent: R. Yalowsky Place and Date of Hearing: Vancouver, British Columbia November 20, 2018 Place and Date of Judgment: Vancouver, British Columbia March 7, 2019 Written Reasons by: The Honourable Madam Justice Fenlon Concurring in by: The Honourable Madam Justice Kirkpatrick The Honourable Mr. Justice Goepel Summary: Appeal from order granting unequal division of family property in favour of the respondent wife. Held: appeal allowed. The trial judge erred in reapportioning family property 85% in favour of the respondent wife based on the husband's lower earnings and financial contributions. The judge also erred in using the assessed rather than appraised value of the family home to calculate its increase in value without providing an explanation for that choice. The judge did not address the husband's claim for division of settlement proceeds received by the wife and the record is inadequate for this Court to resolve that issue. In light of these conclusions, the matter is remitted to the court below for rehearing. Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] The main issue on this appeal is whether the judge erred in departing from the presumption that family property should be divided equally. He found the husband should receive a 15% share because he earned significantly less than his wife over the course of the parties' relationship, and had not contributed equally to the family economy and burdens.
- [2] At trial, the issues between the parties centered on division of family property. There were no children, the grounds for divorce were established and neither party sought spousal support. In order to divide family property, the judge had to determine:
1. The length of the relationship, as the parties did not agree on either the date it began or ended;

2. The increase in value of the family home during the relationship;
 3. Whether the wife's wrongful dismissal settlement was family property;
 4. Whether the shares in Mountainstar Gold were family property; and
 5. How the family property should be divided.
- [3] It is common ground that the judge did not decide either the husband's claim to a share of the wrongful dismissal settlement or his claim to the Mountainstar Gold shares. The parties have, however, now agreed on division of the shares: the wife will transfer to the husband 59,740 shares she acknowledges are his property, and a further 20,000 shares representing one-half of the 40,000 shares purchased during the marriage. They have also resolved a minor issue raised on appeal as to the means by which family photographs were to be returned to the wife under the trial order. I turn now to the remaining issues.
1. The length of the relationship
- [4] The parties began an on-again off-again dating relationship in 2004. In January 2010, the appellant husband moved into the wife's condominium. They lived there together until November 2011, when an argument led to the police being called. The husband left and "couch surfed" for several months, living with friends and family. In August 2012 he proposed to the respondent and moved back into the condominium. They married in September 2013, and separated at some point between May and November 2016. The husband moved out on November 13, 2016 when the wife obtained an order for exclusive possession of the home.
- [5] The husband took the position that the marriage began when he first moved into the condominium in January 2010, and ended in October 2016 -- a marriage of six years after deducting the brief period they lived apart before their engagement. The wife says the marriage began when the husband returned to the home in August 2012 and ended in May 2016 when she first told him she wanted a divorce -- a marriage of about four years.
- [6] On this issue, the judge said:
- [20] Mr. Gilbert's pleas to the contrary notwithstanding this was a relationship of some four years, August 31, 2012, to approximately August 31, 2016. I say this because there is a letter dated September 26, 2016, in which the claimant makes it clear that she is willing to reconcile but there is also evidence that the parties separated in May. The date is somewhat arbitrary but as will be seen hardly makes a difference. [Emphasis added.]

- [7] The judge's finding that the marriage ended on August 31, 2016 is inconsistent with a mid-trial ruling made during the husband's cross-examination of the wife on the separation date. The parties were self-represented at trial. The cross-examinations were difficult and at times descended into bickering. The judge interrupted the husband's cross-examination to say that he would use "the last possible date", i.e., October 3, 2016, as the separation date, and the husband then left off cross-examination on that point.
- [8] The wife agrees it was an error for the judge to say that he would use October 3, 2016 as the separation date, and then to use August 31, 2016 instead. But she submits the difference of 33 days is not significant.
- [9] Although I would agree that 33 days is not generally a difference of much moment, in this case it could affect the husband's share of the settlement proceeds if they are found to be family property -- an issue to which I will return.
- [10] Of greater significance is the commencement date of the marriage. Section 95(2)(a) of the Family Law Act, S.B.C. 2011, c. 25, provides that the duration of a relationship is a factor that may be considered in judicial reapportionment on the basis of significant unfairness. The husband argues that a marriage of less than four years is often a factor in the jurisprudence supporting judicial reapportionment: *Williams v. Killey*, 2014 BCSC 1846; *Yeh v. Wadud*, 2017 BCSC 694; *A.J.E. v. T.B.W.*, 2017 BCSC 1657, and that the difference between a four-year and a six-year marriage is therefore a significant one. The commencement date of the parties' relationship was also relevant to a determination of the change in value of the family home over the course of the marriage.
- [11] As the husband acknowledges, there was evidence before the judge to support a finding that the marriage-like relationship began in August 2012. But there was also evidence to support a start date of January 2010. Both the husband and the wife said that they were trying to reconcile after the husband moved out the first time in November 2011, including by attending counselling together. In addition, the husband testified that he could not move back into the home earlier because two of the wife's family members had gone to live with her temporarily. Whether parties continue to be in a marriage or marriage-like relationship even though they live in separate premises is a question that turns on the judge's findings of fact: *Roach v. Dutra*, 2010 BCCA 264 at para. 16; see e.g. *Roch v. Payne*, [1999] B.C.J. No. 2739 at para. 17 (S.C.).
- [12] The difficulty in this case is that the judge did not explain why he found that the marriage began in August 2012 rather than in January 2010. In *R. v. Walker*, 2008 SCC 34, Binnie J. described the approach to be taken by an appellate court assessing the sufficiency of reasons. The Court held that reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments, measured not in the abstract but as they respond to the substance of what was an issue (at para. 20). In my respectful view, although the finding made was open to him on the evidence, the judge's bare conclusion on this issue does not permit meaningful appellate review: *Shannon v. Shannon*, 2011 BCCA 397 at para. 9.

2. Determination of the increase in value of the family home

- [13] The parties agreed that the value of the family home prior to their relationship was excluded property under s. 85 of the Family Law Act and belonged to the wife. They disagreed on the increase in value of the condominium during the marriage, which turned in part on when the marriage began and ended.
- [14] The wife testified that the 2012 assessed value of the home was \$355,000, and as of trial in 2017 was \$471,000. The notices of assessment were not entered into evidence. She also gave evidence about the size of the mortgage in each of those years. The judge used these figures to determine that the home increased in value by \$180,000 over the course of the marriage:
- [29] In 2012 the mortgage was \$223,000 and the assessed value was \$355,000 for a net equity of about \$120,000. In 2017 the mortgage was \$181,416 and the assessed value was approximately \$471,000, a net equity of \$300,000 more or less.
- [15] The judge did not refer to the appraised values relied on by the husband. During his evidence-in-chief, the husband first referred to notices of assessment and asked the judge whether he needed to see them. The following exchange then took place: THE COURT: Well, I know what I have, and we don't have an appraisal unless you've got one. MR. GILBERT: I have appraisals for multiple years. THE COURT: Well, what does it say? MR. GILBERT: I have an appraisal for the -- THE COURT: Look, I can't draw this out of you. You've got to present your case. MR. GILBERT: Okay. THE COURT: Now, what? Do you have appraisals? GILBERT: I have appraisals. THE COURT: All right. What's the most recent one? MR. GILBERT: The most recent one is for September 6th, 2017. THE COURT: Yeah. And what's it worth? MR. GILBERT: It says that the appraised value is \$580,000. THE COURT: Yeah. MR. GILBERT: And I also have appraisals, two different appraisals, this was at the request of the claimant and I. During the joint case conference, we agreed I would pay for these. THE COURT: Yeah. MR. GILBERT: And there was dispute over the date of living in a marriage-like relation. So we got one for September 1st, 2012 with a value. THE COURT: That's way in the past now. MR. GILBERT: It's an appraised value from that point. And I also have an appraise -- THE COURT: What relevance does it have? MR. GILBERT: The relevance is that, based on the Family Law Act, we would find out what is considered family property during that time. And so the increase in value would then be equalized from that point to separation. THE COURT: What's your point? MR. GILBERT: My point is that I'd like to submit evidence to show what the value was at two different points because we have a dispute over -- THE COURT: What is the value at that point? MR. GILBERT: January 1st, 2010 it was appraised at 345,000. THE COURT: Yeah. MR. GILBERT: And then at September 1st, 2012 it was appraised at \$355,000. [Emphasis added.]

- [16] The wife acknowledges that appraisal evidence is generally to be preferred to assessed value: *Dosanjh v. Liang*, 2015 BCCA 18 at paras. 57-63; *Hall v. Mougén*, 2009 BCSC 645 at paras. 30-34. But she says the judge was not required to consider the appraisals because the husband had not entered them as exhibits and in any event, they amounted to expert opinion evidence that had not been served in accordance with the Rules.
- [17] In my respectful view, although the judge was not bound to accept the appraised values, it was an error to reject them without some explanation in the circumstances of this case. First, although the appraisals were not entered as exhibits, it is apparent from the exchange quoted above that the husband, who was self-represented, intended to rely on the appraisals. Second, the wife takes no issue with the judge relying on the assessed values she relayed in her testimony, even though that evidence was hearsay and the notices of assessment themselves were not entered as exhibits. Further, the wife did not reject the appraised values outright, saying only that she thought they were at least \$20,000 too high. Finally, even if the husband had not served the appraisals in time, it was open to the judge under R. 13-7(6) of the Supreme Court Family Rules to admit them into evidence in any event. I note in this regard (without making any findings) that there was evidence before the judge that the appraisals could not be completed on time because the appraiser had difficulty arranging a time for inspection with the wife.
- [18] The net increase in value of the family home using the appraised values is \$267,000 and using the assessments it is \$158,000. The difference between the net increase in value to be divided is about \$110,000, or closer to \$120,000 if the marriage started in January 2010 as the husband asserts.
- [19] In summary on this issue, and with great respect, I am of the view that the judge erred in using the assessed values rather than the appraised values in the absence of any explanation for that choice.
3. The settlement proceeds
- [20] The wife had been employed for 13 years with the same company, earning steady promotions and finally holding a position of executive vice-president. She was let go from her job in February 2016 and commenced an action for damages for wrongful dismissal. She reached a settlement agreement with her employer, receiving \$120,000 US, \$20,000 of which was for punitive and aggravated damages.
- [21] The husband claimed a portion of that settlement as property or in the alternative as income during the notice period when the parties continued to live together.

- [22] Section 85(1)(c)(ii) of the Family Law Act provides that settlement amounts in respect of lost income of a spouse are not excluded from family property. Section 85(2) dictates that the spouse seeking to exclude such an award has the burden of proving it is not income and is therefore excluded. The husband contends the judge erred in not finding a portion of the settlement to be income replacement for the months prior to the parties' separation and therefore family property.
- [23] The judge noted the wife's loss of employment and receipt of a settlement as part of the chronology of the marriage (at para. 10), but he did not address the husband's claim for a portion of that award.
- [24] On appeal, the husband submits this Court should decide the issue. In my view, we are not in a position to do so. As the wife points out, the record is inadequate. Applicable income taxes and legal fees paid to pursue the wrongful dismissal action would have to be deducted from the award -- evidence which is not before the court. Nor is there evidence as to the wife's income per month upon which to base a calculation of sums notionally paid to cover lost income per month during the marriage.
4. Division of the family property
- [25] The judge identified the presumption in the Family Law Act that family property is to be divided equally unless it would be significantly unfair to do so, citing *Jaszczevska v. Kostanski*, 2016 BCCA 286 at paras. 43 and 44.
- [26] He then said:
- [28] Bearing in mind that the presumption is clearly in favour of 50% - 50% for the period over which the property was held, I find that it would be significantly unfair if Mr. Gilbert were to share equally in the increase in equity in the circumstances of this case. Mr. Gilbert was unemployed throughout the period from August 2012 to March of 2014. In March of 2014, the claimant helped Mr. Gilbert find a job with Ledcor Technical Services. Mr. Gilbert reported an income of \$25,314. In 2015 he earned \$45,340. On August 10, 2015, Mr. Gilbert collected EI disability at a rate of \$1,800 per month until July 2016. He worked for the period of time between March 2014 and September 2015. He was on EI until July 2016.
- [30] Bearing in mind the guidelines of the Act as set out in *Jaszczevska v. Kostanski*, 2016 BCCA 286 there must be some division but it must be modest. For the time they were together, Mr. Gilbert did not materially contribute to the mortgage or to the general welfare of the home. He may not, in fact, have contributed his share of expenses and was probably an actual drag on the family economy. His share must therefore be modest, and I fix it as 15% of the equity [Emphasis added.]
- [27] As noted in *Jaszczevska*, the principle of relative contribution found in s. 65(1)(f) of the former Family Relations Act, R.S.B.C. 1996, c. 128, permitted the court to consider, in dividing property, circumstances relating to the acquisition, preservation, maintenance, improvement or use of property. In contrast, s. 95(2) of the Family Law Act "refers rather

narrowly to career contributions (95(2)(c)) and to post-separation increases in value beyond market trends caused by one spouse (95(2)(f))" (Jaszczewska at para. 43). In Jaszczewska, the court found that although discretion to reapportion remained, the Legislature intended to limit and constrain the exercise of that discretion:

- [44] . in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the FLA as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much constrained. [Emphasis added.]
- [28] It is apparent from the reasons for judgment and the record that the judge placed a great deal of emphasis on the husband's failure to financially contribute to the relationship on an equal footing with the wife. The judge noted that throughout the relationship the wife earned a significantly higher salary than the husband and therefore paid more than half of the expenses. As quoted above, he referred to the husband's lower income, his failure to pay for "his share of expenses" and found him to be a "drag on the family economy". The judge also found it significant that the husband did not contribute equally to housekeeping, although his contributions through upkeep and renovations were noted.
- [29] In my view, and with great respect, the judge erred in principle in assuming that if the husband did not contribute 50% to the financial and housekeeping efforts during the relationship, it would be significantly unfair to apply the presumption of an equal division of property.
- [30] In addition, a 15% share of family property does not reflect the husband's percentage contribution to family expenses on the facts found by the judge -- even if that approach could be justified. The wife testified that the husband paid \$1,500 into the joint account which she described as his share of the bills, including the mortgage payment. She also gave evidence that their monthly expenses came to \$3,000 to \$4,000, but even using these figures the husband's financial contribution for much of the marriage was in the range of one-third to one-half of their expenses.
- [31] In *Slavenova v. Ranguelov*, 2015 BCSC 79, Justice Savage (as he then was) said:
- [60] The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the FLA recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions. [Emphasis added.]

- [32] Cases in which unequal contribution to family expenses and burdens were found to make it significantly unfair to divide family property equally have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: *Nanara v. Nanara*, 2017 BCSC 1447; *E.H.H. v. C.L.M.*, 2017 BCSC 1299.
- [33] In *Nanara*, the trial judge awarded 60% of family property to the claimant wife based on the respondent husband's unequal contribution, and lack of financial disclosure. In that case, the parties had been married for 33 years, and had four grown children. Throughout the relationship, the wife worked multiple full-time, low-paying jobs and regularly worked 16 hour days. After separation, she maintained both family residences and continued to support one son who was attending medical school. In contrast, the husband had been continually underemployed throughout the relationship without explanation, and made no contributions to the residences or their son's education after separation.
- [34] In *E.H.H.*, the judge awarded the respondent wife 70% of the increase in value of the family home.
- [35] The judge found the husband had hidden his income from his wife throughout the relationship. She found the wife had \$318,137 available to her throughout the relationship and had contributed \$301,162 to the maintenance, preservation and improvement of the family home. In contrast, the husband had funds available to him of \$610,803, and had contributed only \$188,269. In addition, he had taken unauthorized sums from the wife without her knowledge, by using her online banking password.
- [36] In summary on this issue, in my respectful view the judge erred in principle in his approach to the reapportionment of family property, basing it on a dollar for dollar comparison of contribution to expenses which does not reflect the nature of marriage as a family venture. In most marriages, one spouse will earn more than another and therefore contribute more to the family finances. As noted at para. 43 of *Jaszczewska*, allowing relative contribution to become a regular consideration in the context of s. 95 would create uncertainty and complexity, contrary to the legislative objectives underlying the Family Law Act division of property regime.

Disposition

- [37] The order of divorce, the order entitling the husband to the family computer, and the order addressing return of family photographs to the wife should continue in effect as they are no longer in dispute. Accordingly, paragraphs 1, 2, and 3 of the order stand. By consent, the respondent is to transfer 79,740 shares in Mountainstar Gold to the appellant within 60 days from the date of this judgment.

- [38] I conclude, with regret, that the remaining issues relating to division of family property must be remitted to the trial court for rehearing. It follows that paragraphs 4, 5 and 6 of the order addressing property and costs should be set aside. In light of that conclusion, I find it unnecessary to address the application to adduce fresh evidence.
- [39] The appellant is entitled to costs of the appeal. Costs of the first trial are to be determined by the judge hearing the retrial. "The Honourable Madam Justice Fenlon" I AGREE: "The Honourable Madam Justice Kirkpatrick" I AGREE: "The Honourable Mr. Justice Goepel"

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