
CANADA / JUDGMENT

Kondi v. Butler

2019 BCSC 620

COURT

Supreme Court of British Columbia

DECIDED

17 April 2019

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2019 BCSC 620 Kondi v. Butler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kondi v. Butler,

2019 BCSC 620

Date: 20190417

Docket: E54333

Registry: New Westminster

Between:

Lajos Kondi

Claimant

And

Eileen Marie Butler

Respondent

Before: The Honourable Madam Justice Marzari

Oral Reasons for Judgment

Counsel for the Claimant:

R. Davison

Counsel for the Respondent:

E. Szilagyi

Place and Date of Trial/Hearing:

New Westminster, B.C.

March 6, 2019

Place and Date of Judgment:

New Westminster, B.C.

April 17, 2019

Introduction

- [1] Mr. Kondi seeks a divorce, equal division of pension assets and spousal support from Ms. Butler. Ms. Butler opposes on the basis that they had agreed to maintain separate finances into their retirement, and that there is no basis for a spousal support award.
- [2] The parties are both in their 60's. Ms. Butler is approximately 6 years older than Mr. Kondi. They began living together in June 1997, were married February 14, 1999, and they separated in July 2017. This was the third or fourth marriage for each of them, and they both have adult children from previous marriages.
- [3] During their near 20 year marriage they maintained separate finances, paying equal monthly amounts into a joint account for the purposes of paying joint expenses including groceries, and ultimately the mortgage on their home. They agreed that the remainder of their income was their own to spend or save as they saw fit. Financial independence was of particular importance to Ms. Butler.
- [4] Both parties worked throughout the marriage until 2012 when Ms. Butler retired from her position as risk manager for Fraser Health at the age of 60. She continued to contribute equally to the household expenses from her pension income. Mr. Kondi is a skilled carpenter by trade, and he worked at Pacific Coast Millwork, and operated his own woodworking business in the years before separation.
- [5] Shortly after their separation they agreed to sell the home they shared and divide the proceeds equally. As a result, they have each received over \$633,000.
- [6] This claim was brought by way of summary trial, and although there are discrepancies in the evidence, both parties submit that the facts can be resolved on the evidence available to me, which includes affidavits and examinations for discovery. They also say that neither considers it to be in their best interests to proceed to a conventional trial.

Issues

- [7] The issues before me in this summary trial are as follows:

- a) The equal or unequal division of Ms. Butler's pension and the parties' retirement savings; and
- b) Mr. Kondi's entitlement to retroactive and ongoing spousal support.

Discussion

- [8] For the reasons that follow, I find that while the parties maintained separate finances throughout the marriage, their decision to do so does not amount to an oral agreement pursuant to s. 92 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] that they would not divide their assets evenly in the event of dissolution of the marriage. I therefore order the equal division of the portion of Ms. Butler's pension that accrued during the marriage, and the retirement savings that each party had at the time of separation.
- [9] With respect to spousal support, it is agreed that there is no compensatory basis for support. I also find there is no non-compensatory basis for spousal support. Although Mr. Kondi has no pension of his own, his income at the time of separation was equivalent to that of Ms. Butler and there is no reason on the evidence before me that he could not continue to earn a similar income. Furthermore, Mr. Kondi's share of Ms. Butler's pension provides an appropriate level of support on a non-compensatory basis going forward.

Pension Division

- [10] When Mr. Kondi and Ms. Butler met, Ms. Butler was already employed as a risk manager and was already contributing to her BC Municipal Pension Plan. When she took another job, her pension followed her, and she was able to continue to contribute to it throughout the marriage. In 2012, Ms. Butler retired, and has been living off of her pension, OAS and CPP since then. Her monthly pension is \$2,554. Between 2012 and 2017 when the parties separated, Ms. Butler's reported income was derived from her pension as well as income from operating a bed and breakfast business out of the family home. Her average income in the years 2014-2016 was just under \$49,438.
- [11] Mr. Kondi does not have a pension. Nor does he have any retirement savings beyond an RRSP that Ms. Butler started for him through the deposit of \$2,500 in 2011, and which now has a value of approximately \$5,142. At the time of separation, he also had \$20,000 in savings in his own bank account.
- [12] This was clearly a frustration for Ms. Butler and a worry for Mr. Kondi, at least in the latter years of their marriage. Ms. Butler resented that she might be required to support Mr. Kondi unequally from her pension income, and Mr. Kondi worried that he might not be supported.
- [13] Mr. Kondi is 6 years younger than Ms. Butler and was employed full-time at the time of separation. His average reported income in the 3 years prior to separation was \$47,327. However, shortly after the parties separated, Mr. Kondi took medical leave from work and through his counsel now advises that he considers himself retired.

- [14] Mr. Kondi relies upon Part 5 of the FLA which establishes a presumptive equal entitlement to family property, including pension entitlement accrued during the marriage.
- [15] Ms. Butler acknowledges this presumptive equal division of pension, but says that she and Mr. Kondi had an implied oral agreement that they would not divide all of their family property equally in the event that the marriage failed. She argues that her pension was excluded by agreement from any such division, and Mr. Kondi therefore has no right to a share in it. Alternatively, she argues that it would be significantly unfair for her pension to be divided equally with Mr. Kondi and she seeks an unequal division of this asset in her favour.
- [16] Ms. Butler specifically relies upon s. 92 of the FLA that provides that "spouses may make agreements respecting the division of property" including agreements to exclude items that would otherwise be included. It is well established that agreements under s. 92 of the FLA need not be in writing: *Thomas v. Young*, 2014 BCSC 799 at para. 48; and *P.N.K. v. C.L.*, 2013 BCSC 1856).
- [17] Where such an agreement exists, the court may take that agreement into consideration in ordering an unequal division of family property pursuant to s. 95(2)(b) of the FLA on the basis of significant unfairness.
- [18] Ms. Butler says that the existence of such an agreement is established through the conduct of the parties in keeping their finances separate throughout the course of the marriage.
- [19] The evidence does establish the parties' financial separation during the course of the marriage. Regardless of what each of the parties earned, the evidence establishes that they deposited an equal amount into a joint account each month for the payment of their joint expenses, including groceries and their mortgage. Neither accounted to the other for their income or their spending outside of making this joint and equal contribution. Furthermore, the evidence establishes that the parties agreed that in the event of the death of either one, the house would be sold and that the portion attributable to the deceased would be distributed to that person's children.
- [20] Ms. Butler acknowledges that the parties never discussed how long they would persist in making equal contributions to their joint expenses, or what would happen if the marriage failed. However, she says that by their conduct in treating their finances separately, they implicitly agreed that their financial assets other than the family home were their own to spend or save. Thus she argues that they had an implied oral agreement that all non-jointly owned assets were excluded from family property pursuant to s. 92 of the FLA.
- [21] In support of this contention, Ms. Butler relies on a series of cases where the courts excluded property or divided it unevenly where the parties maintained separate finances, including *P.N.K.; J.C. v. A.W.*, 2016 BCSC 1012; *Bressette v. Henderson*, 2013 BCSC 1661; *Blair v. Johnson*, 2015 BCSC 761; *Nearing v. Sauer*, 2015 BCSC 58; and *Hasselwander v. Ludvigson*, 2018 BCSC 1814.

- [22] However, in my view none of these cases establish that a practice during the marriage of keeping separate finances amounts to an oral agreement for the purposes of s. 92 of the FLA.
- [23] P.N.K. was not decided under the FLA, and relied upon the use/contribution model under the former Family Relations Act, R.S.B.C. 1996, c. 128. The FLA relies on a distinction instead between excluded and included property, and imposes the much higher threshold for unequal division of "significant unfairness": see *Remmem v. Remmem*, 2014 BCSC 1552; *Jaszczewska v. Kostanski*, 2016 BCCA 286; and *Cole v. Cole*, 2016 BCSC 716 at para. 21.
- [24] In *J.C.* there was a waiver of entitlement over the pension that fully addressed that issue.
- [25] *Bressette* was primarily argued pursuant to the common law as a constructive trust claim, and a constructive trust was found that was also the basis for a finding of significant unfairness in the event that the FLA applied.
- [26] In *Hasselwander*, both parties agreed that they had entered into an agreement at or around the date of their marriage that, should they divorce, they would retain their personally held property including the appreciation in the value of such property.
- [27] In this case, I am not convinced that the parties, simply by their conduct in maintaining separate finances during the marriage, had an agreement of the type contemplated by s. 92 of the FLA so as to exclude Ms. Butler's pension from equal division. In my view, while such an agreement may be oral there must be some evidence of an actual agreement before this court could or should rely on such an agreement to divide property unequally pursuant to s. 95(2)(b).
- [28] Furthermore, the evidence does not support that equal division of Ms. Butler's pension would be significantly unfair pursuant to the other factors listed at s. 95(2) of the FLA, or more generally.
- [29] This case has many parallels with this court's decision in *Cole*, where the parties also maintained separate finances throughout the marriage. In that case, one party had a pension through their employment and the other was self-employed during the marriage and did not have any significant retirement savings. Justice Voith found no reason to deviate from the presumption that the pension would be divided equally.
- [30] In this case, I find that Ms. Butler's BC Municipal Pension Plan is not excluded property by agreement or otherwise. There is no significant unfairness under the FLA that would warrant an unequal division of this family property. Mr. Kondi is entitled to a one half interest in Ms. Butler's pension entitlement accrued during the marriage as at the date of separation.

- [31] Ms. Butler has provided an accounting of the value of her pension as at the date of separation. Although it assumes that the marriage-like relationship commenced 3 months earlier than acknowledged by Ms. Butler, it still provides a useful estimate of Mr. Kondi's entitlement and Mr. Kondi accepts this accounting. This shows that upon an equal division of the pension accrued during the marriage, Mr. Kondi would be entitled to approximately \$918 per month of Ms. Butler's \$2,554 monthly pension amount.
- [32] Mr. Kondi is not seeking division of Ms. Butler's OAS or CPP, nor is Ms. Butler seeking a share of Mr. Kondi's entitlements under these programs. It is also possible that Mr. Kondi has some entitlement to a pension through the government of Hungary, but any such amounts are unknown and not claimed in these proceedings.
- [33] Mr. Kondi also seeks equal division of the RRSP in his name in the amount of \$5,142 and Ms. Butler's TFSA savings account in the amount of \$8,440. He acknowledges that he also has savings of \$20,000 that is subject to division.
- [34] The same reasoning applies to these assets as applies to Ms. Butler's pension, and the parties are entitled to a presumptive equal division of them pursuant to Part 5 of the FLA.
- [35] I therefore find that Mr. Kondi must account to Ms. Butler for \$8,350 in relation to these savings.
- [36] Although Ms. Butler provides evidence that Mr. Kondi at some points during the marriage kept approximately \$25,000 in cash, Mr. Kondi says that he no longer has those funds. On the evidence in this summary trial, I find that the existence of these savings was not established at the time of separation, and I do not include it in the division of assets. I also do not include the proceeds of sale of Mr. Kondi's tools or the difference in value of the party's vehicles, as there is no application to divide these in this summary trial. This is a total difference of approximately \$10,000 in Mr. Kondi's favour.
- [37] I will now turn to Mr. Kondi's claim for spousal support, including an award for retroactive spousal support.

Spousal Support

- [38] It is agreed that Mr. Kondi has no claim for spousal support on a compensatory basis. Neither party was required or requested to compromise their own career for the sake of this marriage, and both worked throughout the marriage (until Ms. Butler's retirement in 2012). With respect to their contributions and standard of living, both parties contributed in the same amounts to joint property and expenses, but were entirely independent in terms of their personal savings and spending.
- [39] In addition, it was acknowledged by Mr. Kondi that Ms. Butler did the lion's share of the cooking, cleaning, laundry and gardening on their behalf throughout the marriage. Mr. Kondi contributed to the renovation and maintenance of the home.

- [40] Mr. Kondi's claim for spousal support therefore rests entirely on the differential between his income and Ms. Butler's after separation. He seeks a spousal support award that would give rise to an equal income as between himself and Ms. Butler for an indefinite period.
- [41] Mr. Kondi discontinued working after separation and has little retirement income outside of his entitlement to a portion of Ms. Butler's pension. Beyond this, his CPP entitlement is low (in part due to his retirement before the age of 65) and it is unknown what his Hungarian pension might provide.
- [42] Ms. Butler says that Mr. Kondi had no legitimate reason to quit working after separation except for a desire to make her support him, and seeks that he be imputed the income that he was making at the time of separation.
- [43] As I noted above, in the 3 years leading up to the separation, both parties were generating similar incomes, and were contributing equally to the costs of the household financially.
- [44] Mr. Kondi quit working shortly after the separation and claimed EI on the basis that he was too mentally distraught and physically disabled to work. His last assessment for the purposes of EI was in February 2018 and stated that he would be reassessed in 1-2 months. There is no evidence that he ever sought reassessment, and it is agreed that he ceased to qualify for EI at some point thereafter.
- [45] In May 2018, Mr. Kondi applied for and obtained an order for interim spousal support in the amount of \$625 per month commencing May 1, 2018. In making that order, Master Caldwell imputed income to Mr. Kondi in the amount of \$30,486.
- [46] After obtaining the interim spousal support award, Mr. Kondi did not return to work and provided no explanation for not doing so. At summary trial, his counsel indicated that he had decided to retire.
- [47] It is acknowledged that there is no evidence before me that would establish a medical basis for Mr. Kondi's decision to not return to work after his unemployment insurance for medical leave expired.
- [48] Furthermore, the evidence establishing his entitlement to EI on the basis of a medical condition is generally not admissible for the purposes of establishing his inability to work for the purposes of the calculation of spousal support.
- [49] In this regard, I have no expert opinion as to Mr. Kondi's medical condition. The doctor's letters and notations before me appear to have been prepared largely to qualify for EI and do not suggest any injury or change in his physical condition.
- [50] I do have admissible evidence from Mr. Kondi that he was too shocked and depressed to work after the separation. Ms. Butler challenges that evidence on the basis that Mr. Kondi did not seem shocked or depressed when she decided to leave the marriage, instead stating he would "make [her] pay" and signing up for match.com almost immediately.

- [51] The extent of Mr. Kondi's mental distress in the months after the separation is not an issue that I can properly resolve on this summary trial. However, I do not consider it necessary to do so in any event.
- [52] The family home was sold within a few months of separation, and both parties received more than half a million dollars from the proceeds.
- [53] Mr. Kondi filed his claim for spousal support in December 2017 when he filed the notice of family claim in this proceeding.
- [54] By May 1, 2018, Mr. Kondi had an order for interim spousal support of \$650 per month. That order was made on much the same evidence that was before me, although at that time Mr. Kondi was still on leave for medical reasons and had not yet decided to retire.

Imputation of Income

- [55] As noted above, there is little admissible medical evidence before me to establish that Mr. Kondi was unable to work at all after separation. With respect to this period, Master Caldwell imputed Mr. Kondi an income of \$30,486 suggesting he had some capacity to work. Although Mr. Kondi's CPP entitlement was somewhat overstated in the evidence before Master Caldwell, I find that that an imputation of income to Mr. Kondi was supported, and that the imputation amount was appropriate at that time.
- [56] After May 1, 2018, there is no evidence that Mr. Kondi was unable to work. Mr. Kondi's counsel advises that he chose to retire at the age of 61. In doing so, Mr. Kondi chose to forego the income he had been making up to the time of separation in the amount of over \$47,000. He also chose to forego some amount of CPP entitlement that would otherwise have accrued.
- [57] While Mr. Kondi was entitled to retire when he did, in my view he is not entitled to demand support from Ms. Butler on that basis. The evidence establishes that had the parties remained married, Mr. Kondi would have been expected to continue to contribute equally to the parties' finances, and Ms. Butler had no reason to expect him to retire early in a situation where he was unable to do so. From June 1, 2018 onward, I would impute Mr. Kondi an income of \$47,000. I impute that income to him to the age of 65.

Claim for retroactive spousal support

- [58] The leading case regarding when the court should order retroactive child support is the Supreme Court of Canada's decision in *D.B.S. v. S.R.G.*, 2006 SCC 37. While the *D.B.S.* factors were developed in the context of retroactive child support, they also apply to retroactive spousal support: *Ducharme v. Rempel*, 2016 BCCA 198 at paras. 16-17.

- [59] Mr. Kondi has benefited from interim spousal support within 5 months of bringing his claim to the date of the summary trial. He also has benefited from a slightly unequal division of assets, as Ms. Butler has not sought equal division of the parties' vehicles or of the tools he sold after separation.
- [60] Furthermore, the amount of spousal support Mr. Kondi has received since May 2017 is based on an imputed income below what I have found he ought to have been imputed after that date.
- [61] In these circumstances, I find that Mr. Kondi is not entitled to retroactive spousal support.

Ongoing Spousal Support

- [62] As stated above, the claim for ongoing spousal support in this case is based solely on non-compensatory grounds.
- [63] In cases of non-compensatory support, there is no presumption of an entitlement to an equalization of income or an expectation that the parties should be able to maintain a similar lifestyle to what existed prior to separation; *Lee v. Lee*, 2014 BCCA 383 at paras. 60-61; and *Cole* at para 122.
- [64] In this case, it is clear that both parties will be required to live a more modest lifestyle than what they enjoyed prior to separation. Furthermore, the evidence establishes that in this marriage, there never was an expectation that the parties would equally share in their incomes. Beyond covering joint expenses, each party was free to spend or save their income however they sought fit without contribution to the other.
- [65] Given my finding on Mr. Kondi's income potential, there is no needs based grounds for spousal support in this case.
- [66] Furthermore, given my decision that Mr. Kondi is entitled to a share of Ms. Butler's pension going forward, Mr. Kondi's potential income could in fact be substantially higher than Ms. Butler's for a number of years.
- [67] Even had I not imputed an income to Mr. Kondi, I would have found that the income that he shall receive from Ms. Butler's pension appropriately addresses his need for spousal support going forward. Furthermore, having divided her pension for the purposes of property division, little income is left to Ms. Butler for the purposes of spousal support that does not "double dip" from this source: *Boston v Boston*, 2001 SCC 43.

Conclusion

- [68] In conclusion, Mr. Kondi is entitled to an equal division of Ms. Butler's BC Municipal Pension Plan accrued during the course of the marriage, from June 1997 to June 2017.
- [69] Both parties are entitled to an equal division of their savings and RRSP accounts, for which Mr. Kondi is required to account to Ms. Butler in the amount of \$8,350.

[70] Mr. Kondi is not entitled to any further spousal support beyond what he has received by way of interim support from Ms. Butler.

[71] As the parties success has been equally divided, they shall bear their own costs.

"Marzari J."

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