

CANADA / JUDGMENT

Kraft v. Kraft

2020 BCSC 283

COURT

Supreme Court of British Columbia

DECIDED

13 March 2020

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2020 BCSC 283 Kraft v. Kraft IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Kraft v. Kraft, 2020 BCSC 283 Date: 20200313 Docket: E16952 Registry: Smithers Between: Virginia Anne Lily Kraft Claimant And Klaus Helmut Kraft and Sylvia Kempenaar Respondents Before: The Honourable Madam Justice Maisonville Reasons for Judgment Re Settlement of Order Written Submissions by the Claimant filed: August 15, 2019 Written Submissions by the Respondents filed: September 13, 2019 Written Reply Submissions by the Claimant filed: September 25, 2019 Written Submission by the Respondents filed: January 24, 2020 Written Reply Submissions by the Claimant filed: February 14, 2020 Place and Date of Judgment: Smithers, B.C. March 13, 2020

- [1] These are brief reasons on this matter coming back to this Court following an appeal of the matter indexed at Kraft v. Kraft, 2019 BCCA 204. The British Columbia Court of Appeal dismissed the appeal but remitted the issue of survivor benefits under the respondent Klaus Helmut Kraft's pension back to this Court for reconsideration.
- [2] By way of brief background, Mr. Kraft was married to the claimant Ms. Kraft for 27 years. The marriage was a traditional one. The parties separated in 1997, and Mr. Kraft began living with Ms. Kempenaar. At the time of his retirement in 2015, he had been cohabitating with Ms. Kempenaar for 18 years. At trial, Mr. Kraft's pension income was divided equally between himself and Ms. Kraft.
- [3] Both Ms. Kraft and Ms. Kempenaar have had an opportunity to submit written submissions on the survivor benefit issue. Ms. Kraft submits that she is entitled to 50% of the survivor benefit, while Ms. Kempenaar argues that Ms. Kraft should only receive 29%.
- [4] The intention of this Court is to ensure that both Ms. Kempenaar and Ms. Kraft will share Mr. Kraft's pension should he predecease Ms. Kraft and Ms. Kempenaar for them to share the survivor benefits, 50/50 equally. THE STATUTORY SCHEME
- [5] Two statutes are relevant to determining this issue: the Family Law Act, S.B.C. 2011, c. 25 [FLA], and the Pension Benefits Standards Act, S.B.C. 2012, c. 30 [PBSA].

- [6] Under s. 80(1) of the PBSA, a pension payable to a retired member who has a spouse at the date the pension commences is a joint and survivor pension. Subsection 80(2) states that the survivor interest may be reduced by not less than 60% of the amount of the pension that would have been payable to the member. Together, these sections indicate that a pension plan must entitle a person who qualifies as a spouse at the time a pension matures to a survivorship interest of at least 60%. Pursuant to s. 1(3) of the PBSA, Ms. Kempenaar was Mr. Kraft's spouse at the time his pension matured.
- [7] Despite Ms. Kempenaar's apparent priority to a survivorship interest under the PBSA, the FLA contemplates situations where another person may have an interest to pension benefits. In *Clarke v. Clarke*, [1990] 2 S.C.R. 795, Madam Justice Wilson described pension entitlement in modern family law legislation as follows: Thus the Act supports the equality of both parties to a marriage and recognizes the joint contribution of the spouses, be it financial or otherwise, to that enterprise. The Act goes further and asserts that, due to this joint contribution, both parties are entitled to share equally in the benefits that flow from the union -- the assets of the marriage. The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized. In interpreting the provisions of the Act the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction which will give effect to that purpose. In this case, as the trial judge found, it was in large part due to Mrs. Clarke's contribution that Mr. Clarke was in a position to receive the pension. *Prima facie*, therefore, in light of the object and purpose of the Act, her contribution should be recognized by awarding her a share in the benefits accruing to the respondent from the pension. Having regard to the reality that in the case of many Canadian families a pension is their only substantial asset, it would seem inequitable to place pension benefits outside the scheme of equal division: see *Rutherford v. Rutherford* (1981), 23 R.F.L. (2d) 337 (B.C.C.A.), per Seaton J.A, at p. 342. I appreciate that there are differences in the Matrimonial Property Acts of the several provinces but each supports the equal partnership concept of marriage and the equal division of property. Accordingly, judicial comments from other jurisdictions can provide helpful guidance. [At 807.]
- [8] While Justice Wilson's observations were made in the context of Nova Scotia legislation, it clearly describes the overall objective of the property division provisions of the FLA and other similar legislation. Benefits received after separation from contributions made to a pension plan during the marriage should be recognized as family property from which each spouse should receive an appropriate share.
- [9] Subsections 126(2)(b) and (3)(a) of the FLA appear to provide a mechanism for overriding the presumptive entitlement of a member's spouse as of the date the pension matured:
126 ...

- (2) If a member of a plan dies after pension commencement and his or her spouse is entitled to receive, or is receiving, survivor benefits, a waiver or an order does not affect that entitlement unless ...
- (b) the Supreme Court, in allocating all or part of the survivor benefits to a person other than the spouse, refers expressly to this subsection in the order making the allocation. ...
- (3) If a waiver or an order is made in accordance with subsection (2),
- (a) the administrator may consent to pay survivor benefits to a person other than the spouse, but is not required to do so
- THE DECISION IN TARR ESTATE
- [10] The Court of Appeal has directed this Court to consider the decision in *Tarr Estate v. Tarr*, 2014 BCCA 315, where the legal nature of a survivorship benefit was addressed. It is, to date, the only decision citing s. 126 of the FLA. The issue in *Tarr Estate* was whether Mr. Tarr's first spouse, Ms. Tarr, to whom he was married at the time his pension matured, had waived her entitlement to survivorship benefits such that Mr. Tarr's second wife became entitled to it. Mr. and Ms. Tarr had executed a separation agreement whereby they both agreed to keep their own pensions, but had not addressed survivor benefits. The Court of Appeal held that the Ms. Tarr had not waived her entitlement to survivor benefits, indicating that entitlement to these benefits had crystallized at the time the pension went into pay (at para. 43).
- [11] In reaching the above conclusion, the Court of Appeal in *Tarr Estate* highlighted that pensions are family property. When divided, the joint contribution of the spouses to the marriage, financial and otherwise, must be recognized. The Court further noted that a survivorship interest in a pension is a valuable asset that is separate from the pension itself. This is reflected in s. 126 of the FLA, which indicates that a survivorship interest can only be waived through express acknowledgement, in the prescribed form, of the rights given up. Given the absence of an express waiver, the Court was reluctant to find that Ms. Tarr was disentitled to a survivorship interest. Such a result would fail to recognize her contribution to Mr. Tarr's ability to accrue a pension throughout the marriage.
- DISCUSSION
- [12] I find that the facts of this case are distinguishable from those in *Tarr Estate*. In *Tarr Estate*, Mr. and Ms. Tarr were married for 38 years. Mr. Tarr was married to his second wife for only two years prior to his death, and was not contributing to his pension during that time. Depriving Ms. Tarr of a survivorship interest in Mr. Tarr's pension would not comply with the principles underlying pension division legislation given the long marriage. Mr. Tarr's second wife had a much weaker claim to an interest in the pension given that she was not his spouse during the time the pension was accruing.

- [13] In contrast to Tarr Estate, Mr. Kraft accrued a pension while married to both Ms. Kraft and Ms. Kempenaar. Unlike in Tarr Estate, both of Mr. Kraft's spouses have a strong claim to a survivorship interest in his pension. I find that applying Tarr Estate to the facts of this case would not comply with the principles underlying Part 6 of the FLA. A finding that Ms. Kempenaar became fully entitled to the survivor benefit by virtue of being Mr. Kraft's spouse at the time he retired fails to recognize Ms. Kraft's contributions to that asset.
- [14] Given the different circumstances of this case as compared to Tarr Estate, I find that Mr. Kraft's spouse at the time his pension matured cannot conclusively determine entitlement to survivorship benefits. I find that this is a circumstance that s. 126(2)(b) was intended to remedy: an interest has crystallized in a second spouse, but it would be unjust and inequitable to completely disentitle a competing spouse from the benefit given her contribution to the marriage and to the member's ability to accrue a pension.
- [15] Pursuant to s. 126(2)(b) of the FLA, I order the survivor benefits shall be in accordance with the settled order below to reflect payments to made to Virginia Kraft and Sylvia Kempenaar in equal portions, 50/50, pursuant to s. 126(3)(a).
- [16] Given that Ms. Kempenaar is the named beneficiary, this order shall be in place for the duration of Ms. Kempenaar's lifetime.
- [17] I note that s. 126(3)(a) of the FLA indicates that a pension administrator may consent to pay survivor benefits to a person other than Ms. Kempenaar, but is not required to do so. In the event that the pension administrator does not consent to paying half of the survivor benefit to Ms. Kraft, I order that Ms. Kempenaar shall hold Ms. Kraft's share on trust for the benefit of Ms. Kraft.
- [18] I further order as follows:
1. The final order made March 27, 2018 and entered November 5, 2018 is cancelled and replaced by this order. PENSION
 2. The benefits accrued to Klaus Helmut Kraft ("Klaus") under the name of the British Columbia Hydro & Power Authority Pension Plan under Employee Number 120584 ("the Pension") is in the form of an annuity.
 3. Klaus Kraft is a former member of the British Columbia Hydro & Power Authority Pension Plan and an annuity or a "stream of benefits" has been issued in an name unknown to the court (both of which are collectively referred to as the "Plan").
 4. The Pension and any stream of benefits or annuity is family property.
 5. Virginia Anne Lily Kraft ("Virginia") is entitled to a share of the pension and/or annuity that accrued during the parties' relationship, between June 23, 1972 and June 19, 2017, determined and divided in accordance with Part 6 of the Family Law Act and this Order.

6. Virginia Kraft's share (the "Proportionate Share") of the Pension or any benefits under the Pension is $50\% \times A/B$. Where $A = 40.8465$ years, being the number of years in which pension entitlement accrued from June 23, 1972, the date Klaus Kraft entered the Plan to June 19, 2017 (the "Entitlement Date") and $B = 40.8465$ years, being the number of years in which pension entitlement accrued while Klaus Kraft was a member of the Plan.
7. Virginia is entitled:
 - (a) To file the prescribed forms under Part 6 of the Family Law Act to become a limited member of the Plan; and
 - (b) To receive from the Plan Virginia's Proportionate Share, calculated in accordance with Part 6 of the Family Law Act and this Order, of any benefit paid under the Pension until Virginia's death and, if Klaus predeceases Virginia, to continue to receive from the Plan 50% of the benefits payable on the death of Klaus and, pursuant to s. 126(2)(b) of the Family Law Act.
8. To the extent that Klaus' estate, or any person deriving entitlement through Klaus, receives any portion of the Pension representing Virginia's Proportionate Share of the Pension, including postretirement survivor benefits, belonging to Virginia, the person receiving the benefits, upon receiving notice of Virginia's interest in those benefits, must hold those benefits in trust for Virginia and immediately pay them to Virginia.
9. Virginia and Klaus have liberty to apply for such directions and further orders as may be necessary to facilitate and enforce the division of the Pension, including the posting of security to secure Virginia's Proportionate Share of the Pension.
10. The parties will share equally the administrative costs charged by the Plan for carrying out a pension division in accordance with the Family Law Act and Pension Division Regulation (B.C. Reg. 348/2012).
11. Klaus will provide a certified copy of his birth certificate to Virginia. SPOUSAL MAINTENANCE & PROPERTY
12. Retroactive spousal maintenance owing by Klaus Kraft to Virginia Kraft is fixed at the sum of \$563,376.
13. The loan made by Virginia Kraft to the Jellets in the amount of \$100,000 is family property and reapportioned in favour of Virginia Kraft so that any payments received on that loan are for the sole benefit of Virginia Kraft.
14. The 1/2 interest of Klaus Kraft in the titles to the following properties.
 - a) PID 007-759-550 LOT 1 DISTRICT LOT 2109 RANGE 5 COAST DISTRICT PLAN 8403 EXCEPT PLAN PRP14367 ("the Houston Property")
 - b) NW 34-38 - 25W R M of Minitonas ("the Manitoba Property") shall be transferred to Virginia Kraft and Klaus Kraft's interest in those properties is fixed as follows:

- a) Houston Property \$70 000
 - b) Manitoba Property \$45 000 TOTAL \$115 000 That \$115,000, plus any amount received from the Jellerts, shall be offset against the arrears of spousal maintenance owed by Klaus Kraft to Virginia Kraft.
 - 15. The balance of retroactive spousal maintenance owed to Virginia Kraft by Klaus Kraft are cancelled. GENERAL
 - 16. The action against Sylvia Kempenaar succeeds with reference to the reapportionment of the survivor benefits of the Pension.
 - 17. The interim order of Master Keighley for spousal maintenance is cancelled.
 - 18. The parties may arrange to address costs by contacting the registry. "Maisonville J."
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