

CANADA / JUDGMENT

Kroeker v. Hall

2019 BCSC 2032

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 2032 Kroeker v. Hall

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kroeker v. Hall,

2019 BCSC 2032

Date: 20191128

Docket: E181077

Registry: Victoria

Between:

Robert George Kroeker

Claimant

And

Jennifer Joan Hall

Respondent

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Claimant:

S. Williams

The Respondent, appearing in person:

J. Hall

Place and Date of Hearing:

Victoria, B.C.

May 2 - 3, 2019

August 22, 2019

November 21, 2019

Place and Date of Judgment:

Victoria, B.C.

November 28, 2019

INTRODUCTION

- [1] The parties to this family law case agreed that the determination of property and support issues arising from the dissolution of their marriage are suitable for summary disposition. In fact, the hearing of the matter on May 2 - 3, 2019 became more like a mediation than contested litigation. It resulted in a consent order that dealt with most items in dispute. I reserved judgment on the following issues: support, stock options, pension division, and apportionment of a line of credit.
- [2] On July 2, 2019, as I was in the midst of writing a judgment on these issues, I was notified that the claimant wished to reconvene the hearing on the basis that there had been a material change in his circumstances that would affect disposition of the case. A conference was arranged for August 22, 2019, at which the claimant advised that he had been terminated from his employment at the BC Lottery Corporation, and was experiencing difficulty finding a new position because of certain negative media publicity surrounding his dismissal.

BACKGROUND

- [3] The parties began living together in 1986, were married in 1988, and separated on December 12, 2012. They had no children. Both parties successfully pursued full-time careers in the public sector. Together they accumulated a significant portfolio of assets in the range of \$3 - 4 million, including two full, unreduced public service pensions. The matrimonial home in Victoria is being marketed for sale at an asking price of approximately \$1.5 million. The parties have agreed to share their matrimonial property more or less equally, leaving me to decide certain details about which they were not able to agree.
- [4] Each party has come away from the marriage with a sizeable asset base. On the revenue side, the parties earned more or less equivalent incomes in roughly the \$110,000 range until 2010. In January of the latter year, however, the respondent was dismissed without cause from her employment as an executive at ICBC. Thereafter, with the agreement and assistance of the claimant, she started a consulting business called Sirius Solutions. The

parties agreed that they would live off the claimant's employment income while business earnings accrued to Sirius Solutions would be retained within the company. Both parties described this approach as part of their joint plan for retirement. The division of value in the business, I should specify, was one of the items settled during the hearing.

- [5] This, then, was how the parties managed their affairs during the final years of their married life. There were a couple of notable developments in 2012, however. First of all, the claimant earned \$170,000, that year, significantly more than usual. He deposed that this was from work on some kind of special project for which he received additional compensation over and above his base salary of \$113,000. Then on November 1, 2012, the claimant set off in a new occupational direction entirely. He accepted an executive position in the private sector with the Great Canadian Gaming Corporation in Richmond BC. As a qualified lawyer and former police officer, he was taken on as a specialist in the area of corporate security and compliance.
- [6] The claimant's base salary in this new employment was fixed at \$150,000 with an annual bonus target of 25 per cent of that figure based on performance. He also became eligible to receive an option grant of 50,000 shares in the company subject to the terms and conditions of the company's stock option plan. The parties agreed, apparently, that the claimant would commute from Victoria to Richmond on a weekly basis in order for him to take advantage of this substantial improvement in his career and economic prospects.
- [7] Within a month, however, to the respondent's surprise and dismay, the claimant announced his intention to leave the marriage and live permanently in Vancouver by himself. For quite some time the respondent hoped that the claimant would change his mind and return to the relationship, but there was no reconciliation. The respondent claims, and I have no reason to doubt, that she found this abrupt change in her life to be upsetting, distracting and depressing.
- [8] For the next three or so years, neither party seems to have agitated for a winding up of their joint affairs. The respondent remained in the family home. The claimant lived in rental accommodation in Vancouver. He continued depositing his paycheques into the parties' joint bank account. The respondent was able to access these funds freely for her own maintenance, to pay household bills, and for discretionary expenses. On September 16, 2015, however, the claimant opened a separate bank account for the deposit of his salary and thereafter limited his monthly payments into the parties' joint bank account to \$2,000.
- [9] It was during 2015, moreover, that the claimant exercised the stock options granted to him prior to separation in November 2012. He sold his shares for a net gain of \$321,527, which he deposited into a separate account. In the same year he also sold vested options issued post-separation in 2013 and 2014 yielding significant sums, before leaving the Great Canadian Gaming Corporation to take on the role of vice-president in charge of corporate security and compliance with the BC Lottery Corporation.

- [10] For reasons not explained, the claimant also received a payout from his previous employer of several hundred thousand dollars when he changed jobs. In total the claimant earned over \$1.2 million in 2015. His income in 2016 was \$263,470 and \$241,283 in 2017. His most recent sworn financial statement indicates that he earned approximately \$205,000 in 2018, but I was not shown his tax return or assessment for that year.
- [11] As for the respondent, from the date of separation on or about December 9, 2012, until September 16, 2015, she lived substantially off the claimant's payments into their joint bank account, which over the 34 month period in question amounted to \$494,316.64. In 2013 she enrolled in a doctoral program in public administration at the University of Victoria while simultaneously developing her consulting business. Her annual taxable income has fluctuated from \$85,487 in 2015, to \$26,801 in 2016, to \$32,954 in 2017. Her average annual income since separation has been approximately \$48,000.

SPOUSAL SUPPORT

- [12] The claimant argues that the respondent is not entitled to spousal support. He says that she made an equivalent income to his throughout their marriage and made none of the financial and career sacrifices often associated with child rearing and home-making. He takes the position that his significantly higher income since separation is irrelevant to the question of prospective support. The improvement in his fortunes in recent years, he says, came without any involvement, contribution or sacrifice from the respondent.
- [13] He maintains, furthermore, that the downturn in the claimant's income since separation has been the result of personal choices for which he is not responsible. He emphasises particularly her decision to return to university. He says that she should be focussing on remunerative employment instead. He alleges that she has not done enough to contribute to her own support. She is well educated, highly intelligent, and has a long history earning double the amount of her post-separation income. She has received a sizeable property settlement. She has not suffered any economic disadvantage from the marriage or its dissolution. Accordingly, he says, she is not entitled to any form of ongoing spousal compensation.
- [14] In the alternative, if the respondent was entitled to support at separation, the claimant says that by his voluntary contributions to her maintenance since that time he has amply discharged his obligations. As previously mentioned he paid almost half a million dollars into the parties' joint bank account between December 2012 and September 2015. The respondent accessed and used these funds at her discretion. The claimant has paid her an additional \$80,000 or so since September 2015. He stresses that the respondent's use of his earnings and contributions over the years were not declared as support and thus attracted no taxes in her hands. He emphasises, finally, that the claimant has enjoyed the substantial benefit of living rent-free for almost 7 years in the matrimonial home.

- [15] The respondent argues, for her part, that the marital breakdown has left her at a significant and unfair economic disadvantage compared to the claimant. As I have mentioned, her last occupation in the public sector, for reasons described by her only as "a difference of opinion", resulted in her dismissal without cause. Her decision to go into consulting was made with the claimant's input, encouragement and agreement. The claimant himself confirms that this was part of a long-term economic plan that they devised together. Through no fault of hers the business has been slow to develop. She enrolled in the doctoral program at the University of Victoria convinced that it would enhance her business credentials and contacts. Her primary focus has been the growth of her business.
- [16] To paraphrase the respondent's argument, the parties had a fixed plan throughout their marriage that they would both work full-time until retirement and jointly assist and provide for one another for the rest of their lives. She says that the claimant's present strong earning power developed incrementally over many years with her devoted and constant support, including as the principal breadwinner during the claimant's law school years. Instead of holding up his end of this long-standing bargain, the respondent says, the claimant suddenly departed the marriage just as his economic prospects were taking off and hers were declining. Without an order of spousal support, the claimant says that she will have a decidedly modest standard of living compared to the claimant, and this would not be fair or equitable given the history of the parties' relationship.
- [17] There is no doubt that there has been a large and ever-widening disparity in the parties' respective incomes since separation, and the respondent says that, in all the circumstances, it is only fair that the claimant should pay her support to bridge the gap. The respondent says that given the length of their marriage, the close integration of their finances through all those years, and the parties' deliberate program of life-long economic interdependence, she has a very strong presumptive claim to an equal standard of living post separation: *Chutter v. Chutter*, 2008 BCCA 507.
- [18] Section 15.2(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) sets out the factors that I must take into consideration in making or declining to make an order of spousal support. I must consider the condition, means, needs and other circumstances of each spouse including:
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- [19] The objectives of spousal support are contained in s. 15.2(6) of the Divorce Act, which provides that an order of support should:
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[20] In the present case, the parties cohabited in an economically interdependent way for close to 30 years. I find as a fact that their financial affairs were very tightly interwoven throughout, and that this was part of a life-long joint economic plan for their permanent mutual support and material well-being. In my view, the breakdown of the marriage, and the claimant's removal of his income earning capacity from this decades-long joint economic plan, constitutes a significant and unfair economic disadvantage to the respondent that must be redressed by a spousal support order.

[21] I also accept the respondent's evidence that her decision to strike out on her own and develop her consulting business was a decision jointly taken with the claimant. Now that the claimant has left the marriage, this mutual decision has brought economic hardship to the respondent for which, in my view, she requires to be compensated through a support order. The equitable sharing of jointly created prosperity also comes into play: Chutter at para. 49 et seq. The following passage from the Supreme Court of Canada's decision in *Moge v. Moge*, [1992] S.C.R. 813 at para. 84 is apposite:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", *supra*, at pp. 174-75).

[Internal citations omitted]

[22] The claimant's conduct after separation reflects, I think, his acceptance that the principle of equitable sharing between the parties needs to be satisfied here. Why else would he continue paying his entire salary into a joint bank account for nearly three years after separation? Why continue paying her \$2,000 per month for more than four years on top of that? Why permit her to live in the matrimonial home for close to 7 years without demanding compensation or payout? On my review of all the evidence, the answer to these questions is reasonably clear: the claimant knew that he had left the respondent at a significant disadvantage, for which he had ample means and considered himself obliged to compensate her.

- [23] For these reasons I reject the claimant's argument that the respondent was never entitled to support. In the totality of the circumstances, however, I would also conclude that the claimant has no valid argument for a retrospective award. This possibility was not much stressed in argument, it has to be said. Nonetheless, and for the sake of completeness, in my view the respondent has been adequately compensated up to now by the large sum of money voluntarily paid to her since separation, combined with her almost seven years of exclusive occupancy of the matrimonial home without the respondent demanding occupational rent or forcing a payout of his undivided half interest. In any event, as far as I am aware the respondent has never sought a support order other than by her counterclaim filed in this proceeding, and I decline to make a retrospective order in the absence of a compelling explanation for the respondent's lengthy delay in seeking it.
- [24] The remaining question is whether the respondent is entitled to prospective maintenance. The claimant argues that his support of the claimant since separation constitutes sufficient compensation for the economic disadvantage caused to her by the breakdown of the parties' marriage and the dissolution of their long-term joint economic plans. He says, in effect, that that he has paid enough already, and has provided the claimant with ample time, especially given her long history of strong earnings and economic self-sufficiency, to narrow the disparity in the parties' respective incomes.
- [25] The respondent, for her part, argues that she will never achieve anything close to income equivalency with the respondent. She claims to have earned less than \$50,000 in recent years, while the respondent, until he was terminated from his employment, was making in the range of \$225,000 per annum including his bonuses. About these arguments, there are two major factors to consider. First, in my view, is whether there should be an imputation of income to the respondent, and second, the proper way to handle the claimant's recent dismissal from his employment.
- [26] I have had the opportunity to observe the respondent, who has represented herself throughout these proceedings, during three days of hearing. I have listened to her arguments and evaluated her written materials. I agree with the claimant that she is a highly intelligent and articulate person who has argued her case fluently and persuasively. I am rather sorry that she did not choose a legal career. She is well-educated. She has a solid resume in responsible and remunerative fields of occupational endeavour. She was only 52 years old at separation. In my view, there is no reason why she ought not to be earning significantly more in annual income than she has since separation. I think it likely that her earning capacity has been negatively affected by the prolonged hurt caused by the abrupt and unexpected end of her marriage, and latterly by her devotion to this litigation, an impediment that will shortly be removed.
- [27] The claimant has argued that it was improvident for the respondent to go back to university to pursue academic interests instead of committing herself full-time to the development of her consulting business, or to finding other employment suited to her experience and abilities. I am not particularly moved by this argument. The respondent's position that her

doctorate in public administration will enhance her credibility and advance her career as a consultant seems to me to be reasonable. In any event, she enrolled in the program in 2013, and with the passage of six years, she must surely be on the verge of graduation. Thus in upcoming years - without pending litigation and no academic distractions - she will be able to devote all of her energy to the achievement of economic self-sufficiency.

- [28] As for the claimant, there is no doubt that his dismissal from employment constitutes a setback, but I am by no means satisfied that it is permanent. While his occupational status is in some flux, like the respondent he is well-educated and has a history of well-paid employment across a range of senior and responsible occupations. He is qualified as a lawyer. He continues to have the capacity to earn a significant income. Even in his present circumstances he has managed to find work with an Ontario technology corporation at an annual salary of \$120,000. I have no doubt that he will be back on an upward trajectory in short order notwithstanding his recent travails.
- [29] On all of the evidence, in other words, I have concluded that the respondent is working under capacity and has the present ability to do better. I consider it to be reasonable, for the time being at any rate, to impute to her an annual income of \$80,000. This is on the basis, as I have said, that she is a well educated and talented individual with a long history of economic self-sufficiency at a level of income far greater than she has achieved in the last few years. With the removal of the twin distractions of academia and litigation, she will infallibly, in my view, meet or exceed this imputed amount.
- [30] I have concluded, secondarily, that the hiatus in the claimant's successful career will be short-lived. Since separation, after all, he has routinely earned income of over \$200,000 per annum. In 2015, in fact, he earned \$1.2 million. I am persuaded that he retains the capacity to earn a significant income, and I consider it reasonable if not modest to impute an annual income of \$150,000 to him, even as I acknowledge that his economic future is somewhat uncertain. If contingencies arise in the claimant's case that may durably affect his ability to pay spousal support he will be at liberty, of course, to bring an application for a downward variation on the basis of a material change of circumstances.
- [31] For the various reasons discussed above, having mostly to do with the length of the parties' relationship, their long-time economic interdependency, and the need for the equitable sharing of the prosperity jointly created over many years, I have concluded that the respondent is entitled to ongoing and indefinite support. I am satisfied, furthermore, that the claimant has and will have ample means to pay support notwithstanding his recent temporary career setback.

- [32] According to the Spousal Support Advisory Guidelines, the range of support payable in the parties' imputed circumstances is from \$2,188 (low), to \$2,552 (mid), to \$2,917 (high). In my view, on all of the evidence, and in order to achieve the sort of equitable sharing that I have discussed, support in the mid-range would be fit and appropriate. I hereby order the claimant to pay spousal support in the amount of \$2,552 beginning on the first day of December 2019 and continuing on the first day of every month thereafter.

STOCK OPTIONS

- [33] Stock options are properly considered to be an employment related benefit. Such options should be included as family property if, prior to separation, the recipient party had earned the right to the options: *Ross v. Ross*, 83 O.R. (3d) 1 (Ont. CA).
- [34] In the present case, the claimant earned the right to the options on November 16, 2012, approximately a month before he announced that he was leaving the parties' marriage. Thus, in my view, they must be included in the mix of the parties' matrimonial property subject to division. The claimant quite sensibly waited to exercise these options and sell the shares until it became profitable for him to do so. This was on March 15, 2015. The undisputed evidence before me is that he sold the shares for a net benefit of \$321,527.50. Despite the claimant's arguments, I am not persuaded that a reapportionment of this amount would be appropriate on the basis of unfairness, and the statutory presumption of equal division will apply.
- [35] Accordingly, I hereby order the claimant within 30 days of this judgment to pay the respondent the sum of \$160,763.75 for her half-interest in this family asset.

PENSION DIVISION

- [36] As previously mentioned, the parties are both former public servants who have each qualified for full, unreduced public service pensions. The claimant argued that it would be pragmatic and sensible if each of them simply kept his/her own pension without any claim by the other. The respondent argued against this proposal, saying that it would result in a smaller monthly pension income to her than if the pensions were divided in accordance with Part 6 of the Family Law Act, S.B.C. 2011, c. 25.
- [37] It is clear that both pensions are family property and presumptively subject to equal division. I am prepared to accept, especially in the absence of evidence to the contrary, that equal pension benefits would not be achieved if each party kept his/her own pension. Accordingly, I order that each of them is entitled to an equal share or interest in the benefits payable under the others' pension plan, and that each share will be calculated and determined in accordance with the provisions of Part 6 of the Family Law Act.

LINE OF CREDIT

- [38] Before the parties separated, they established a line of credit to purchase a part interest in a recreational condominium. The sum of \$51,000 was drawn on the line of credit for this purpose. This liability was paid off in full between the date of separation and mid-September 2015, when the claimant stopped depositing his monthly pay-cheques into the parties' joint bank account.
- [39] The claimant takes the position that, as he was the principal contributor to the joint account during that time, he is entitled to compensation for the disproportionate extent to which he paid off this debt with his employment income. In my view, however, this was a joint debt, paid for from a joint bank account. Each of the parties made contributions to the account over the relevant period, during which the parties maintained their pre-separation joint banking and financial arrangements. In short, this was a debt jointly raised for a family purpose which was jointly repaid. I decline to order compensation to the claimant for any portion of it.

SUMMARY

[40] In summary, I make the following orders:

- (1) The claimant is to pay the respondent the sum of \$2,552 in prospective spousal support payable on the first day of December 2019 and on the first day of every month thereafter.
- (2) The claimant must, within 30 days, pay the respondent the sum of \$160,763.75 for her 50% share of proceeds from the sale of stock options acquired during the marriage.
- (3) The parties' public service pension plans will be divided equally in accordance with the provisions of Part 6 of the Family Law Act.
- (4) The claimant's application for compensation on account of the line of credit is dismissed.

[41] In my view, the respondent has been prevailingly successful on this summary trial. She will have her costs on Scale B.

"Baird J."

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