
CANADA / JUDGMENT

Leskun v. Leskun

2004 BCCA 422

COURT

British Columbia Court of Appeal

DECIDED

3 August 2004

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2004 BCCA 422 Leskun v. Leskun

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Leskun v. Leskun,

2004 BCCA 422

Date: 20040803

Docket: CA031247

Between:

Gary Leskun

Appellant

(Plaintiff)

And

Sherry Jean Leskun

Respondent

(Defendant)

Before:

The Honourable Madam Justice Southin

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hall

L. N. MacLean

Counsel for the Appellant

S. J. Leskun

Appearing in person

Place and Date of Hearing:

Vancouver, British Columbia

28th May, 2004

Place and Date of Judgment:

Vancouver, British Columbia

3rd August, 2004

Written Reasons by:

The Honourable Madam Justice Southin

Concurred in by:

The Honourable Mr. Justice Hall

Concurring Reasons by:

The Honourable Madam Justice Newbury (P. 19, para. 60)

Reasons for Judgment of the Honourable Madam Justice Southin:

- [1] At the root of this appeal from an order of Morrison J. pronounced the 2nd September, 2003, the principal provision of which dismisses an ex-husband's application to rescind an order pronounced by Collver J. on 31st May, 2000, for the support of his ex-wife in the amount of \$2,250.00 per month, are ss. 15.2(6)(d) and 17(7)(d) of the Divorce Act, R.S. 1985, c. 3 (2nd Supp.), each of which provides that an order for spousal support shall "in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time."
- [2] No appeal was brought from the order of Collver J.
- [3] For convenience, I shall refer to the plaintiff below as the husband and the defendant below as the wife.
- [4] The husband was born in December 1954 and the wife, in October 1946. Thus, he is now 49 and she is 57. They were married in 1978. The wife had two children by a previous marriage. They are long since grown up. The following year, a daughter was born. The daughter, having recently had a child out of wedlock to whom apparently the child's father makes no financial contribution, resides with the wife.

- [5] In 1998, the husband's work took him to reside in the United States of America. The wife expected to join him but he returned in September of that year, among other reasons, to inform her that he wanted a divorce. On 24th September, 1999, the parties were divorced.
- [6] Since then, the husband has married and has a child by that marriage.
- [7] The property and support issues came on for trial before Collver J. in January 2000.
- [8] The relevant term of the order he pronounced is this:
2. The Plaintiff shall pay spousal support to the Defendant in the sum of \$2,250.00 per month on the first day of June, 2000 and continuing on the first day of each and every month thereafter until further Order of this Honourable Court, and the Plaintiff shall be at liberty to apply for an Order reviewing both entitlement to and quantum of spousal support;
- [9] Why the order was couched in such terms is to be found in Collver J.'s reasons.
- [10] The wife had worked for many years for the Toronto-Dominion Bank, with a break for about two years in the late 80's whilst the husband was studying for a degree in Business Administration at an eastern university.
- [11] In August 1998, the wife learned:
- ... that her position at the TD Bank was about to be eliminated as part of the bank's reorganisation. Ultimately, she was offered a severance package, rather than an expected position as a personal bank representative at the bank's branch in Mission.
- [12] When Sherry Leskun told her husband about the bank's plans, he came back from Chicago, arriving in Vancouver on August 18, 1998. That was also the last day that Sherry Leskun worked for the bank. She applied for long-term disability benefits, and Gary Leskun hired a labour lawyer to begin negotiations with the bank.
- [13] On September 16, 1998, the TD Bank's human resources counsellor proposed a better severance package or, in the alternative, a position requiring Sherry Leskun to retrain in order to undertake responsibilities reflecting the bank's move into the trust and financial management areas. Again, Gary Leskun came back to Vancouver, ostensibly to confer with his wife and her lawyer about the two options. However, he also chose that weekend to inform Sherry Leskun that their marriage was over. She testified that she was "flabbergasted and devastated" by this news.
- [14] Gary Leskun also consulted his own lawyer during that visit, and on September 28, 1998, Sherry Leskun received the first communication about a divorce. She testified that her doctor told her to get away for a while, so she decided to drive to her older daughter's home in Winnipeg. Detouring via Chicago, she confronted her husband, who admitted his involvement with Jin-Kee Kim (now his wife).

- [12] The foundation for the application for long-term disability benefits was a back injury unconnected to her work which had occurred in 1995. Although she had had surgery, "her recovery has been both slow and incomplete".
- [13] Thus, at the time of the trial, the issues of a severance package and long-term disability benefits were unresolved.
- [14] As Collver J. put it:
- [15] Sherry Leskun has not had an easy time. In 1998, her income was just over \$45,000. Her disability benefits were discontinued last fall, and she has been relying upon Gary Leskun's interim monthly support payments of \$2,250, ordered (by consent) on August 16, 1999.
- [16] With respect to the TD Bank dilemma, she doubts that she has either the physical stamina to return to full time work or, should she choose the reassignment option, the capacity to retrain. Although the prospect of a sweeter severance package was also considered (Sherry Leskun testified that before Gary Leskun opted out of the marriage they had discussed using her severance award to assist with buying a home in Chicago), the ultimate result of her labour lawyer's efforts may involve a permanent disability award.
- [15] The learned judge having then reviewed the financial position of the parties said this:

Spousal support

Spousal support of \$2,250 per month will continue until Sherry Leskun returns to full employment, when both entitlement and quantum will be reviewed.

- [16] The order, as drawn up, does not contain the words "until Sherry Leskun returns to full employment". If it did, then, as the wife has not returned to full employment or indeed any employment, there would be nothing to discuss.
- [17] Subsequent to his original reasons, the learned trial judge gave reasons on the question of costs. In those reasons, he said:
- [8] I believe that Sherry Leskun's doubtful ability to regain and maintain economic self-sufficiency was the most significant issue addressed in the proceedings. Because the maintenance award effectively tipped the scales in her favour, she is entitled to an award of costs.
- [18] The wife did receive a severance award of some \$83,000.00 but not long-term disability benefits. It appears that much of the severance award went to pay existing obligations.
- [19] When the wife reaches retirement age, she will, as I understand it, receive a pension from the Toronto-Dominion Bank of about \$12,000.00 per year.
- [20] The husband brought this application, or at least gave notice of it to the wife in May 2003.

- [21] She responded with a cross-application for an increase in maintenance. It was dismissed below and is not pursued here.
- [22] The applications first came on for hearing on 14th July, 2003, at which time the learned judge had before her Form 89 financial statements, the affidavits of the wife sworn 22nd May, 2003 and 10th July, 2003, the affidavits of the husband of 2nd May, 2003, 2nd July, 2003 (two), and 14th July, 2003 (the latter being handed in at the hearing), as well as some minor affidavits running in total to some 843 pages comprising now five of the seven volumes of appeal books.
- [23] Two excerpts from these affidavits point up the divergent perspectives of the parties:

The wife's affidavit of 22nd May, 2003 -

One can only experience something like this to know how it feels. I have lost my Father March 26, 1999, my brother October 12, 1999, my sister in law December 31, 1999, (this was within a 9 month period while Gary Leskun was pushing to get his divorce) my step mother January 17, 2001, and my sister in law April 19, 2002.

My sister has Cancer and may have 3 or more years to live. My oldest daughter has Multiple Sclerosis and may be wheel chair bound. My 34 year career ended suddenly 1998. My back broke and I will live with pain the rest of my life. I lost my home to pay for the huge mass of debts left for me to pay that were joint with Gary Leskun, I was left with a \$ 12m+ pension that I worked so hard for, I face pain with the problems of an alcoholic son because I don't know how to deal with it. I have no income whatsoever and very soon no home to live in because my family cannot afford to take care of me. This happened to me in the past 4 years.

The husband's affidavit of 2nd July, 2003 -

43. I note that the Plaintiff has not attached to her Affidavit, nor provided any information to me or my counsel establishing her attempts at achieving economic self-sufficiency.

* * *

46. I verily believe that the Defendant has not made any attempts to find employment and that she has been denied disability benefits on the basis that she is not disabled.
47. I verily believe that the Defendant received a sizable severance package from her prior employment with the bank. I do not know what she did with this severance.
- [24] On the first day of hearing, 14th July, 2003, counsel for the husband made submissions. The matter was then adjourned until the 2nd September for further argument, presumably by the wife. On 25th August, the wife swore a further affidavit of some 380 pages which, so far as I can tell, on the same day was filed and delivered to the husband and, I assume, upon its filing, immediately sent to the judge.

[25] At the continuation of the hearing, counsel for the husband objected to the court receiving this affidavit, making the point that as the husband lived in Chicago he could not respond in time but did not seek an adjournment of the hearing for that purpose.

[26] Upon the conclusion of the hearing, the learned judge delivered her reasons orally.

[27] Morrison J. said, in part:

[5] There has been a great deal of material filed, particularly by Mrs. Leskun, and I have had a chance to go through that material. What was set down for a one-day hearing has involved, conservatively, four days of reading. I have gone through the material and I am convinced that Mrs. Leskun remains in need of spousal support. She is not self-sufficient at this time.

* * *

[7] Mrs. Leskun seems unable to find even part-time employment....

[28] Later she said:

[12] Mr. Leskun and his second wife have the ability to earn. They are apparently in business together. I am drawing certain adverse conclusions with regard to their financial position, having read all of the material before me. The lifestyle and asset investments of Mr. Leskun and his present wife show a much different financial situation than that enjoyed by the defendant, the first Mrs. Leskun.

[29] Then, having addressed some of the evidence, she arrived at an estimate of the husband's assets thus:

[15] My own view of his assets is that there are approximately \$761,800 in U.S. assets. And I have used a figure of U.S. Dollars, \$170,000 U.S. for Big Apple rather than \$100,000 Canadian. Converted to Canadian dollars, that would be in the area of a million dollars Canadian in assets.

* * *

[17] The argument of Mr. Leskun is that his economic prospects are no longer significantly better than his former wife's. And that is frankly nonsense. Mrs. Leskun was disadvantaged by the marriage, and that situation continues. Her lack of formal education, her lack of job diversity, her age and her health are also factors to be considered at this time. She has typing, computer and some financial skills, and she will be in financial jeopardy should anything happen to her former husband. She remains at risk by relying solely upon him for financial support, and I assume that is a risk that she is well aware of.

[18] In my view, spousal support must continue and it will continue in the amount of \$2,250 a month payable by Mr. Leskun to his former wife.

[30] The appellant alleges the chambers judge erred:

1. ... in concluding that the Plaintiff has the ability to pay ongoing spousal maintenance to the Defendant in the amount of \$2,250.00 as ordered by the Honourable Mr. Justice Collver on Thursday May 31, 2000 and Wednesday January 31, 2001;
 2. ... in concluding that the Plaintiff is required to use capital to pay ongoing spousal maintenance to the Defendant;
 3. ... in concluding the Defendant was unable to find employment and become economically self-sufficient as the Defendant provided no evidence to support this conclusion.
 4. ... in calculating the value of the Plaintiff's capital assets and net worth as she based such calculation on a material misapprehension of the evidence and error of law in rejecting the Plaintiff's credit card liabilities.
 5. ... in considering the Defendant's Affidavit #3 sworn August 25, 2003 and entered into evidence over the objection of the Plaintiff after the Plaintiff had completed his final arguments.
- [31] The first and third of these are allegations of error in fact, the second and fourth of errors in law, and the fifth an error of miscarriage of justice which, of course, if established, is an error of law.
- [32] The appellant then seeks these orders:
- a) An order that the spousal maintenance ordered by the Honourable Mr. Justice Collver on Thursday May 31, 2000 and Wednesday January 31, 2001 in the amount of \$2,250.00 be rescinded and cancelled effective July 1, 2003;
 - b) In the alternative, an order that the spousal maintenance ordered by the Honourable Mr. Justice Collver on Thursday May 31, 2000 and Wednesday, January 31, 2001 in the amount of \$2,250.00 be reduced in quantum and limited in duration and that such limitation be retroactive.
 - c) In the further alternative, an order the Plaintiff be at liberty to reapply for an order reviewing both entitlement to and quantum of spousal support at a specified future date within which time the Defendant provide the solicitors for the Plaintiff with the following:
 - i. copies of all job applications and letters of rejection for all jobs that she has applied for;
 - ii. copies of all documents arising from her application for disability benefits and approval or rejection for said disability benefits;
 - iii. copies of all documents relating to any retraining she pursues;
 - iv. a copy of her income tax return and all attachments by June 1st of each year that an Order the Plaintiff pay the Defendant spousal maintenance remains in effect.
 - d) Costs, including increased and special costs.

[33] I shall address the issue of the late filed affidavit first.

[34] This is the appellant's argument on the point:

E. The learned Chambers Judge erred in considering the Defendant's Affidavit #3, sworn August 25, 2003.

1. The learned chambers judge considered the Affidavit of the Defendant sworn August 25, 2003 despite the fact that it was sworn and delivered to the solicitors for the Plaintiff after counsel for the Plaintiff completed her submissions on July 14, 2003.
2. The Plaintiff did not have sufficient time to read the Defendant's August 25, 2003 Affidavit, instruct counsel and swear a responsive Affidavit prior to the September 2, 2003 continuation of the hearing before Madam Justice Morrison in light of the voluminous nature of the materials and the fact that the Plaintiff lives in the Chicago Illinois area.
3. If the Court was to permit an Affidavit to be admitted following the completion of the Plaintiff's submission, the Chambers Judge should have ordered an adjournment to permit the Plaintiff to make a full response.

[35] The appellant relies on Rule 51A of the Supreme Court Rules which provides that a respondent who is opposing an application must, before the hearing commences, file the affidavits which are to be referred to at the hearing by that respondent.

[36] This is a salutary rule intended to bring order into chambers proceedings, but I cannot think that a chambers judge has no residual discretion to permit further evidence after a hearing has commenced. In order to prevent the hearing becoming unfair, the judge, if he or she decides to receive the further evidence, and if he or she is asked for an adjournment to meet that further evidence, should usually grant it.

[37] Having read the affidavit in issue, I find that it is mostly argument. It adds little of significance on the principal issues here: Has the husband the means to pay, and has the wife, by not striving to become self-sufficient, disentitled herself to support?

[38] In any event, the husband has now brought before this Court a motion to adduce as further evidence his affidavit sworn 6th May, 2004. It does not address directly the affidavit of 25th August, 2003. It essentially speaks to the 2003 corporate tax return of a company in Chicago in which he has invested money and to his own U.S. personal tax returns, but contains these clauses:

12. I have continued to look for employment since the hearing before Madam Justice Morrison, but I have not been successful. I remain unemployed and I have not been receiving any income since the termination of my Unemployment Insurance Benefits on December 13, 2003.

13. My wife is pregnant and is expecting our child to be born in [sic] June 6, 2004. Accordingly, there will be another person in our family to support. We only have partial medical health insurance to cover the medical costs for my wife's delivery of our baby. Therefore, we expect to incur some additional and ongoing health care costs not covered by our basic health care insurance plan.
- [39] I would allow the motion and admit the affidavit.
- [40] It was open to the husband on this appeal, in light of the question of the August affidavit, to seek to adduce also such evidence in reply to that affidavit as he thought it was essential for this Court to know. Thus, any injustice which might have been done to him by the receipt of the affidavit could have been remedied here had we been asked for a remedy. As we were not, I am not prepared to give effect to the ground of appeal concerning the affidavit of 25th August, 2003.
- [41] I next address the second alleged error, that is that the learned judge erred in concluding that the husband was required to use capital to pay ongoing spousal maintenance.
- [42] There is no such proposition of law.
- [43] Capital is part of "means" and the Divorce Act requires the means of each party to be addressed.
- [44] I come now to the first of the alleged errors which goes to the question of the husband's means.
- [45] As to this, he says in his factum:
3. The Plaintiff is not deliberately unemployed or underemployed, and rather has made Herculean efforts in searching for replacement employment, but with no success save and except for a brief period of employment from May 12-July 2, 2003.
4. The Plaintiff attempted to organize his capital so as to provide for future security and minimize debts as he believed this is the most practical solution in light of his curtailed means resulting from his unemployment. This scheme has left him with virtually no liquid assets and no ability to pay spousal support.
- [46] Quite obviously, the learned judge did not accept these assertions. The brief period of employment to which the husband refers came to an end when he was dismissed from a job paying US \$110,000.00 per year on the ground that his behaviour towards his subordinates was unacceptable. He says that the assertions made by other employees which led to his dismissal were absurd. Where the truth lies on that point is quite impossible for this Court to determine.

[47] In a matter in which the evidence is on affidavit, the judge lacks the advantage of seeing the parties give evidence which, when the issues are of the kind existing here, is most useful. Morrison J. did see the wife, who appeared in person. All she could know of the husband came from the written material.

[48] I am simply unable to say that the learned judge committed the first alleged error.

[49] I come, finally, to the question of the wife's failure to achieve economic self-sufficiency.

[50] No quarrel is taken with the learned judge's finding that "She is not self-sufficient at this time."

[51] The learned judge made no direct finding on such related issues as, "Why not?" and "Should she have?" and "Could she have?"

[52] By s. 15.2(1) of the Divorce Act:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

* * *

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

[53] Thus, Parliament, in its wisdom or lack thereof, has said the court must give no weight to what the husband here did - that is, carrying on behind his wife's back and, when it suited him, walking out on his wife of 20 years who had borne him a child and contributed substantially to his financial well-being.

[54] Having read much of the material and from seeing the wife in court, I have concluded that the answer to the question, "Why not?", is that emotionally she is bitter to the point of obsession with his misconduct and in consequence has been unable to make a new life. Her life is this litigation.

[55] Fortunately, most spouses do put the past behind them and, as the saying is, "move on".

[56] Not without hesitation, I have concluded that subsection (5) does not prevent us from considering, when an issue arises under subparagraph (6) concerning the failure of a spouse to achieve economic self-sufficiency, a failure resulting at least in part from the emotional devastation of misconduct by the other spouse.

[57] I would not wish to be misunderstood. In the case at bar, there are further factors, that is to say, the age of the wife at the time of the break-up of the marriage, her own health, and her family's sorrows.

[58] In all the circumstances, I am not prepared to hold that the wife has conducted herself in such a manner as to be disentitled to support from the husband.

[59] I would dismiss this appeal.

"The Honourable Madam Justice Southin"

I agree:

"The Honourable Mr. Justice Hall"

Reasons for Judgment of the Honourable Madam Justice Newbury:

[60] I would also dismiss the appeal, but for slightly different reasons than those of my colleague Madam Justice Southin.

[61] The Chambers judge noted at para. 5 of her Reasons that having gone through Mrs. Leskun's material, she was convinced that Mrs. Leskun remained "in need of spousal support. She is not self-sufficient at this time." At para. 7, the Chambers judge observed that Mrs. Leskun "seems unable to find even part-time employment." Madam Justice Southin at para. 54 of her Reasons asks why this is and concludes that Mrs. Leskun is bitter to the point of obsession with her ex-husband's conduct and has therefore been unable to make a new life.

[62] In my view, Parliament's stricture against considering the misconduct of a spouse in relation to the marriage when the Court is asked to make an order for spousal maintenance under s. 15 of the Divorce Act, means that "bitterness" does not supply an answer to the question "Why not?", nor provide an excuse for a spouse who is able to work, for remaining unemployed. Having seen Mrs. Leskun, who appeared on her own behalf, I would have thought she was employable at least on a part-time basis in the banking industry. In this regard, Mrs. Leskun advised us that she had sought employment unsuccessfully, and that she had so advised the Chambers judge. Mrs. Leskun said she could not afford to file evidence on this point, notwithstanding the fact that she has filed literally hundreds of pages of material.

[63] On the other hand, Mrs. Leskun is now 57 years of age and her affidavit evidence points to various family difficulties and to her medical problems and those of her family. A court cannot ignore these difficulties, which have been exacerbated by the breakdown of the Leskuns' marriage. For this reason, and not because of any self-imposed disability, I would reluctantly uphold the order of the Court below and dismiss the appeal.

"The Honourable Madam Justice Newbury"

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