
CANADA / JUDGMENT

M.G.L.M. v. T.L.M.

2005 BCSC 65

COURT

Supreme Court of British Columbia

DECIDED

19 January 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

M.G.L.M. v. T.L.M.,

2005 BCSC 65

Date: 20050119

Docket: E030735

Registry: Vancouver

Between:

M.G.L.M.

Plaintiff

And

T.L.M.

Defendant

Before: The Honourable Mr. Justice Goepel

Reasons for Judgment

Counsel for the Plaintiff:

J.C. Fiddes

Counsel for the Defendant:

R.J. Kincaid

Date and Place of Trial:

November 1 - 5, 2004

Vancouver, B.C.

INTRODUCTION

- [1] In this family law action both parties ask for a divorce. The plaintiff seeks a reappportionment of family assets in his favour, sole custody, and child support. The defendant seeks an even division of family assets, an order of joint custody and joint guardianship, and spousal support.

BACKGROUND

- [2] Mr. M.G.L.M. and Ms. T.L.M. are both 40 years old. They began living together in 1981. They married on May 8, 1988. They separated on August 21, 2002. They have two children: J.L.M., born [], 1988; and A.C.M., born [], 1991.
- [3] Mr. M.G.L.M. is a Teamster. He works in the film industry. In 1999, he incorporated a company now known as R.[] Ltd. ("R.[] Ltd"). R.[] Ltd was initially set-up to rent make-up mirrors to the movie industry. Ultimately Mr. M.G.L.M. arranged for all his earnings to be channelled through R.[] Ltd, which allowed him to split his income between family members and reduce his income tax.
- [4] Ms. T.L.M. has a Grade 12 education. She worked part-time at various jobs until J.L.M. was born. She then became a full-time homemaker and was primarily responsible for raising the children. Prior to the separation, she was actively involved in their various activities.
- [5] Beginning in 1999 when R.[] Ltd was incorporated, Ms. T.L.M. ran the mirror rental business. In the fall of 2001, Ms. T.L.M. no longer wished to be involved and the mirrors were sold.

DIVORCE

- [6] Both parties seek a divorce. The evidence establishes that the parties have lived separate and apart for more than one year. I grant the decree of divorce.

CUSTODY AND GUARDIANSHIP

- [7] J.L.M. is 16 years old. She does well in school and the evidence indicates she is a healthy, well-adjusted child. A.C.M., who is 12, is not doing as well. She has few friends and participates in limited extracurricular activities. She is described as being sombre and introspective. A.C.M. appears to have benefited from counselling and both parents are hoping that she will get through her hostility and social problems. Both note that she is quite imaginative and they believe she continues to show promise.

- [8] The children have lived with Mr. M.G.L.M. since the separation. He has managed well as a single parent. Ms. T.L.M. agrees that the children should continue to reside with Mr. M.G.L.M., but seeks joint custody and joint guardianship. In the case of a dispute between the parties, she agrees that Mr. M.G.L.M. should have the final decision.
- [9] Ms. T.L.M. was the primary caregiver of the children until the parties separated. Subsequent to the separation, contact between Ms. T.L.M. and her children, for reasons not satisfactorily explained in the evidence, was limited. From August 2002 until March 2004, Ms. T.L.M. seldom saw her children. Since March 2004, she has driven the girls to school in the morning and sees them on some other limited occasions.
- [10] Ms. T.L.M. submits that it is in the best interests of J.L.M. and A.C.M. that she be granted joint custody and joint guardianship. She submits that such an order will demonstrate that both parents love their children and have affection for them. She expressed a concern that absent such an order, the children, particularly A.C.M., may feel abandoned.
- [11] I am satisfied that Ms. T.L.M. loves her children and that it is in their best interests that she remains an important part of their lives. I am, however, concerned that during their critical formative years she effectively disappeared from their lives for an extended period of time. Given that circumstance, I do not believe that joint custody is appropriate. I award sole custody to Mr. M.G.L.M.. I will order joint guardianship subject to the proviso that in the case of a dispute, Mr. M.G.L.M.'s views will prevail.

DIVISION OF ASSETS

Introduction

- [12] The parties agree that all assets are family assets. The parties do not agree on the value to be attributed to the family home or to R.[] Ltd. Mr. M.G.L.M. seeks reapportionment of the family home in his favour.

Family Home

- [13] The family home at G.[] Street, Burnaby, B.C. was purchased in May 1987 for \$127,500. It is registered in Mr. M.G.L.M.'s name. The home has been mortgage-free since 1991. The house was appraised, as of August 4, 2004, at \$467,000.
- [14] Ms. T.L.M. submits that either Mr. M.G.L.M. should buy her one-half interest for \$233,500, or the property should be sold and the net sale proceeds divided equally.
- [15] Mr. M.G.L.M. challenges the appraisal. He submits that the property must be valued as at the date of trial, not August 4, 2004, for the purpose of a compensation order: *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99 (C.A.).

- [16] Mr. M.G.L.M. suggests that the value of the property may have declined since the time of the appraisal. He submits that in order to properly determine the market value of the family home, it should be listed for sale, but he should retain the right to match any offer received. His proposal is opposed by Ms. T.L.M., who submits that the suggested mechanism makes it unlikely that prospective purchasers would be willing to bid on the home knowing that their offer could be matched.
- [17] Mr. M.G.L.M. also seeks reapportionment of the family home in the amount of \$20,000 in his favour in lieu of child support which Ms. T.L.M. should otherwise pay. This reapportionment is opposed by Ms. T.L.M., who says she is quite prepared to pay child support as required under the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines").
- [18] The appraisal was the only evidence submitted as to the value of the family home. If Mr. M.G.L.M. wished to challenge that value or establish that real estate prices have fallen subsequent to the appraisal, he should have led evidence to that effect. He could, for example, have requested the appraiser attend for cross-examination to elicit such evidence. He chose not to do so.
- [19] In order to comply with Rule 40A the appraisal had to pre-date the trial by at least 60 days. The trial commenced on November 1, 2004. Absent any evidence to the contrary, I find that as of the date of trial, the family home had a value of \$467,000.
- [20] Section 56 of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "Act") contemplates an equal division of family assets. Section 65(1) of the Act permits a court to reapportion a spouse's interest in the assets if an equal division would be unfair, having regard to:
- (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
- [21] In this case, the husband seeks reapportionment in lieu of child support, a factor not set out in s. 65(1). To order unequal division on the basis of a factor not covered by s. 65(1) would be an error in principle: *Turner v. Turner* (1998), 60 B.C.L.R. (3d) 64 (C.A.).

- [22] The parties are each entitled to a one-half interest in the family home. If Mr. M.G.L.M. wishes to purchase the family home, he shall pay Ms. T.L.M. \$233,500 within 45 days of the date of this judgment. If he chooses not to purchase her interest, then the family home shall be sold. Mr. M.G.L.M. will not be entitled to match any proposed offer. I agree with Ms. T.L.M.'s submission, that to allow him to do so would create an artificial market, and would likely suppress the ultimate purchase price.

RRSPs

- [23] The parties are agreed that the RRSPs are family assets and should be divided equally, with the husband transferring to the wife an amount to equalize the parties' RRSPs via a tax-free rollover. As of September 30, 2004, Mr. M.G.L.M.'s RRSP was valued at \$215,239, while Ms. T.L.M.'s RRSP was valued at \$79,949.62. The amount required to equalize the RRSPs is \$67,644.69. Mr. M.G.L.M. will transfer that sum to Ms. T.L.M..

Household Contents

- [24] By agreement, Ms. T.L.M. will receive the oak kitchen table and chairs, the Disney print lithographs, one-half of the family lithographs, the china and matching flatware, one-half of the family photo albums, and the dining room table and hutch. The balance of the household items, including the TVs, computers, bedroom suite, pool table, couches, chairs and pictures, will go to Mr. M.G.L.M..

Canada Pension Plan Credits

- [25] The parties' respective Canada Pension Plan credits are declared to be family assets and are to be divided as agreed.

Mr. M.G.L.M.'s Teamster Pension

- [26] Mr. M.G.L.M. acquired this pension after the separation. The parties agree that it is not a family asset.

R.[] Ltd.

- [27] Mr. M.G.L.M. is now the sole shareholder of R.[] Ltd, as Ms. T.L.M. transferred her shares to him some time subsequent to the separation. The parties agree that R.[] Ltd is a family asset and that Ms. T.L.M. is entitled to a compensation order pursuant to s. 66 of the Act in regard to her one-half interest. The parties do not agree as to the value of that interest.
- [28] R.[] Ltd exists almost exclusively for tax purposes. Since its incorporation Mr. M.G.L.M. has channelled all his income through R.[] Ltd. Absent Mr. M.G.L.M.'s labours, the company earns no income. R.[] Ltd has allowed Mr. M.G.L.M. to split income with other family members. R.[] Ltd's retained earnings reflects Mr. M.G.L.M.'s decision to accumulate cash upon which tax can be deferred until it is paid out by salary or dividend. As of August 31, 2002, R.[] Ltd's retained earnings were \$166,137. By August 31, 2004, Rental's retained earnings had increased to \$182,845. Almost all of the increase stemmed from Mr. M.G.L.M.'s

decision to reduce his own salary.

[29] In Blackett at pp. 105-106, Southin J.A. discussed the factors to be considered in determining compensation for shares of a private company:

If the court decides upon a vesting in one spouse and compensation to the other, the question then becomes the measure of compensation.

The learned Judge below appears to have been of the view that proper compensation was necessarily one-half of the amount he decided was the value at the relevant date of the interest of the husband.

I do not think that the statute is so rigid. It does not define "compensation". It does not, for instance, say that compensation must be "fair value" or "fair market value".

Section 52 is not an expropriation act but a mechanism for adjusting matters between spouses.

In deciding compensation, the court may, in my opinion, take into consideration that:

1. A compensation order under s. 52 is not an order under s. 224(2)(c) or under s. 231(4)(a) and (b) of the Company Act R.S.B.C. 1979, c. 59. What is a proper price under one or other of those sections is not necessarily the same as proper compensation under s. 52[.] This respondent has not oppressed the appellant in her capacity as a putative shareholder.
2. If the husband's forty-nine per cent interest were sold and if he received the value estimated by the experts, his net proceeds and, therefore, her one-half, would be substantially less than the value calculated by the experts because he would have much tax to pay on the capital gain. There may be other tax considerations unknown to me.
3. The value estimated by the experts may, in large measure, exist because the directors have received much less in management fees for their work over the last five years than their work was worth.
4. Cash in the pocket is real money. Experts' "values" are mere opinions. "Ah, take the Cash and let the Credit go, Nor heed the rumble of a distant Drum".
5. The right of a spouse to an interest in shares is not a marketable asset. An asset which, for whatever reason, cannot be offered for sale to the world at large is not of the same value as an asset, such as land, which can be.

[30] In this case, the value of R.[] Ltd reflects Mr. M.G.L.M.'s decision to leave money in the company instead of removing it by way of dividend or salary. When that money is removed it will be subject to tax. The R.[] Ltd shares are not marketable.

[31] Taking into account all of the various considerations, I would fix compensation for Ms. T.L.M.'s interest in R.[] Ltd at \$60,000.

- [32] If Mr. M.G.L.M. decides to purchase the family home, the \$60,000 will be payable within 45 days of the date of this judgment. If the family home is sold, the \$60,000 will be payable to Ms. T.L.M. upon completion of the sale.

Miscellaneous Assets

- [33] Ms. T.L.M.'s 2001 Mazda Protégé, which she purchased on the trade-in of another vehicle, is a family asset. In October 2002, it was valued at \$15,500. Ms. T.L.M. estimated that in 2003 the depreciated value was approximately \$11,000. Mr. M.G.L.M.'s interest would be \$5,500. The Mazda's present value is unknown, but it has clearly depreciated over the last two years.
- [34] Upon separation, Ms. T.L.M. received \$1,600 from a joint bank account. Mr. M.G.L.M. had \$6,053.44 in his personal bank account. Equalization would call for a payment of \$2,226.72 from Mr. M.G.L.M. to Ms. T.L.M..
- [35] In addition, Mr. M.G.L.M. owns certain guns and tools. I will set off Ms. T.L.M.'s interest in the bank account and in the guns and tools against Mr. M.G.L.M.'s interest in the Mazda. In the result, there will be no compensation order in respect of those assets.

SPOUSAL MAINTENANCE

- [36] Ms. T.L.M. seeks spousal maintenance in the sum of \$1,200 a month, reviewable in four years. Mr. M.G.L.M. paid Ms. T.L.M. \$1,000 a month for 18 months from September 2002 until February 2004.
- [37] Ms. T.L.M. worked at Staples from February 2002 to October 2002. From November 2002 to April 2003, she was employed by Work Wear World. In November 2002, she also commenced work at L.[]. Since February 2003, she has been employed by L.[] as a pharmacy technician. Her 2003 income was \$19,900, while in 2004 she will earn approximately \$22,000, subject to available hours of work.
- [38] Ms. T.L.M. testified that she would like to upgrade her education and take a pharmacy technician course. She has made limited inquiry concerning possible courses and has not yet enrolled in any program.
- [39] Mr. M.G.L.M.'s exact income is a matter of some dispute. Mr. M.G.L.M.'s total income for the last several years has been re-assessed as follows:

Year

Total Income

1999

\$112,932

2000

\$ 18,405

2001

\$ 51,686

2002

\$ 51,867

2003

\$111,567

[40] Mr. M.G.L.M.'s income for 2000-2002 is artificially suppressed, reflecting income splitting, the retention of monies in R.[] Ltd, and the writing-off in R.[] Ltd of some personal expenses. I find that for the last several years Mr. M.G.L.M.'s annual earnings have been in excess of \$110,000.

[41] This was a traditional marriage of significant duration. Ms. T.L.M. was out of the workforce for many years while raising their children. She has limited skills and training. Section 15.2(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), which sets out the criteria the court must consider in making an order for spousal support, reads as follows:

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration 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.

[42] The objectives of spousal support are set out in s. 15.2(6) of the Divorce Act as follows:

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse 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.

- [43] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, the Court recognized three grounds for entitlement to support: compensatory, non-compensatory, and contractual. Compensatory support attempts to deal with the financial costs to a spouse of economic opportunities foregone as a result of a mutual decision that one spouse bear the brunt of family responsibilities such as homemaking and childrearing. Non-compensatory support is premised on the notion that need alone may be a sufficient basis to order support.
- [44] In the circumstances of this case, I am satisfied that Ms. T.L.M. is entitled to support, both on compensatory and non-compensatory grounds. Ms. T.L.M. was responsible for homemaking and childrearing. She lost the opportunity to train and develop work skills which would today stand her in good stead. Since 2002, Ms. T.L.M. has had to fend for herself in the work force, in spite of the fact that she is ill-equipped to do so.
- [45] It is more difficult to assess Ms. T.L.M.'s needs. Although she has to date had limited financial resources, once she receives her share of the assets she likely will be able to purchase accommodation and greatly reduce her living expenses. Alternatively, the proceeds can be invested and will supplement her income.
- [46] Ms. T.L.M. has also expressed interest in furthering her education. If she does so, it is likely her income will increase and her needs will diminish.
- [47] Taking the above matters into account, I would award spousal maintenance in the sum of \$1,000 per month, commencing February 1, 2005. The order for spousal maintenance will be subject to review at the instance of either party on or after February 1, 2008, even if there is no change in circumstances.
- [48] Evidence was led at trial that possible changes in film industry practices and the general downturn in that industry may reduce Mr. M.G.L.M.'s income. I have not taken that possibility into account in setting spousal support. If there is a material reduction in Mr. M.G.L.M.'s income, it might constitute a change of circumstance which would lead to an earlier review of spousal support.

CHILD SUPPORT

- [49] To date Mr. M.G.L.M. has supported the children without any financial assistance. There is no reason why Ms. T.L.M. should not pay child support. The evidence suggested that Ms. T.L.M.'s income for 2004 would be approximately \$22,000. Pursuant to the Guidelines, the amount of child support payable is \$328 per month. I order Ms. T.L.M. to pay that sum commencing February 1, 2005.
- [50] In regard to ongoing child support, Ms. T.L.M. shall supply Mr. M.G.L.M. with her income tax return by June 1 each year. If Ms. T.L.M.'s income changes, child support shall be adjusted on July 1 each year to conform to the Guidelines.

COSTS

[51] Subject to submissions, my tentative view is that each side should pay their own costs. Hearing day fees will be split equally between the parties. If either party seeks a different order, they should make written submissions within 21 days of the date of this judgment.

"R.B.T. Goepel, J."

The Honourable Mr. Justice R.B.T. Goepel

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