
CANADA / JUDGMENT

M.M.F. v. R.B.

2008 BCSC 984

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.M.F. v. R.B.

2008 BCSC 984

Date: 20080725

Docket: NAE49844

Registry: Nanaimo

Between:

M.M.F.

Plaintiff

And

R.B.

Defendant

Before: The Honourable Mr. Justice Nathan H. Smith

Reasons for Judgment

(In Chambers)

Counsel for the plaintiff

Sandra L. Dick

Counsel for the defendant

Kristin M.J. Rongve

Date and Place of Hearing:

June 11, 2008

Nanaimo, B.C.

- [1] The plaintiff and the defendant separated in 2004 after a 12-year marriage. They have two children, now aged 15 and 8. The major issues on this summary trial are the plaintiff wife's entitlement to spousal support and the determination of each party's income for the purpose of child and/or spousal support.
- [2] The parties met in 1990, began living together in November 1991 and were married in May, 1992. At the time of the marriage, the plaintiff was 37 years old and was self-employed as a movement teacher and jewelry maker. The defendant was a 46-year old musician/songwriter. They moved together to Gabriola Island after they began living together and remained there throughout the marriage. Since their separation, the plaintiff has moved to Nanaimo while the defendant has remained in the former matrimonial home.
- [3] By the time the parties separated, the defendant's income was coming primarily from interest on loans he had made, mostly to people he knew and other residents of Gabriola Island. The recitals to a separation agreement, dated June 23, 2004, stated that the defendant had interest income of \$15,000 to \$20,000 per year, while the plaintiff had been earning less than \$6,000 per year making jewelry and leading movement classes. The separation agreement divided family assets, and the plaintiff received a cash settlement of more than \$200,000 that enabled her to buy her present home without a mortgage.
- [4] The parties also agreed to share joint custody of their children and the situation has since evolved to one in which the older child lives primarily with her mother and the younger child lives primarily with his father.
- [5] The separation agreement deferred the issue of spousal support for two years. The relevant portion of the agreement reads:

Spousal Maintenance

- 23. The parties will review and negotiate spousal maintenance in a timely fashion so that any such arrangements will be negotiated by August 30, 2006.
- 24. The parties acknowledge and agree that, at all future times, they will make reasonable efforts to become independent and self-supporting. In reviewing the quantum of maintenance to be paid by one party to the other, consideration will be given (in addition to the reasonable efforts made by the parties to become independent and self-supporting) to the following:
 - (a) the income-earning prospects of the parties as of June 30, 2006;

- (b) the income-earning history and practices of the parties prior to June 30, 2006;
- (c) other sources of income of the parties;
- (d) if the party has a new spouse, the ability to share expenses with the new spouse;
- (e) the effect of custodial arrangements, as of June 30, 2006, on the income-earning capacity of a party;
- (f) the length of the marriage, the impact of the marriage and any family and parenting responsibilities on the career and past income-earning prospects of the parties; and
- (g) any other factor or factors which would be legally relevant to consider at the time.

The parties acknowledge that they have already made a complete settlement of family assets. The assessment of quantum of spousal maintenance is not intended to be an indirect means of invoking a further property settlement. The assets of the parties at the time are relevant only insofar as those assets are capable of producing an income for the parties or either of them.

- [6] The major change in the parties' financial circumstances since separation has been an inheritance that the defendant received on the death of his mother. He has invested those funds in more loans and private mortgages. According to his 2007 tax return, his annual income has increased to \$67,596. The plaintiff has continued to work as a self-employed movement educator and jewelry maker. Her total income for 2007, including net business income, was \$12,369. Although that represents an increase since the time of separation, the plaintiff recognizes that will not be sufficient and she has enrolled in an 18-month educational program to obtain a teaching certificate. That course begins in September, 2008.

Attribution of Income and Child Support

- [7] Each party has one child living primarily with him or her and they agree that child support should be payable by each of them according to their income under the Federal Child Support Guidelines ("Guidelines").
- [8] In his form 89 financial statement, the defendant's Guidelines income is stated as \$65,581, but his 2007 income tax return reports a total income of \$67,596. The reason for that small discrepancy is not clear to me and I take the larger figure as the minimum income that should be applied for purposes of the Guidelines.
- [9] The plaintiff argues that a larger income should be attributed to the defendant pursuant to the s.19 of the Guidelines, and particularly ss. 19(1) (e) and (g), which read:
- (19) (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (e) the spouse's property is not reasonably utilized to generate income;
 - (g) the spouse unreasonably deducts expenses from income.

- [10] Most of the defendant's income (about \$55,000) comes from interest on the private loans and mortgages. The plaintiff argues that the principal amount of those loans exceeds \$1 million and most of them are at stated interest rates of 9 or 10 per cent, so they should be generating a larger return. She also says there have been some "balloon payments" of which nothing has been attributed to interest.
- [11] Most of these private loans and mortgages are to individuals on Gabriola Island who the defendant knows personally. He has produced records of payments received, which indicates that many of the borrowers miss payments from time to time. Without knowing the details of each borrower's circumstances, it is not possible to say whether the defendant could or should be doing more to collect arrears. In considering whether the defendant's property is being "reasonably utilized to generate income," I must consider the fact that the defendant has loaned money to people he knows and other fellow-residents of a small community. He is continuing a practice, on a larger scale, which existed during the marriage. A person who lends money in such circumstances is not expected to behave in all respects as would a commercial lender, nor does he have the collection resources of a commercial lender. As for the "balloon payments", I have not been provided with details of the terms of these loans, but it is certainly common that borrowers who make additional payments are entitled to have the full payment attributed to a reduction in principle.
- [12] The plaintiff also argues that the defendant earns net income from his professional music activities in the amount of \$22,711, but deducts expenses in almost the same amount. She suggests these deductions are unreasonably large, given the modest income. Expenses are not necessarily proportional to income and one expects any business to have a certain minimum level of expenses that must be incurred regardless of the level of income. There is no evidence before me on which I could find any of the business expenses listed by the defendant to be unreasonable or not properly related to his efforts to earn some professional income. I also note that, if there is going to be any change in the defendant's professional income, it will likely decline further, in part because of his age and in part because he provides the primary residence for their youngest child.
- [13] For all of those reasons, I do not find this an appropriate case to attribute greater income to the defendant than what he has most recently declared on his tax return. The defendant's income, for purposes of the Guidelines, will be \$67,500.
- [14] I have already referred to the fact that the plaintiff's total income in 2007 was a little more than \$12,300. Although she will likely continue some of her work in movement education and jewelry making while she attends university to obtain her teaching qualifications, it would not be realistic to expect any increase in that figure. I therefore attribute an income of \$12,300 to her.
- [15] Based on those figures, the support for one child, payable by the defendant to the plaintiff, is \$631, while the amount payable by the plaintiff to the defendant for the other child is \$73. The defendant will therefore pay to the plaintiff the net amount of \$558 per month.

Spousal Support--Entitlement

[16] The principles governing spousal support are set out in s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Sections 15.2(4) and (6) provide as follows:

15.2(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.
- (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 break-down of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[17] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.) the Supreme Court of Canada said entitlement to spousal support may be based on compensatory, contractual or non-compensatory (need) considerations. The compensatory considerations relate to the economic advantages and disadvantages arising from the marriage and its breakdown. In *W. v. W.* 2005 BCSC1010, 47 B.C.L.R. (4th) 348 (S.C.) Martinson J. said:

[12.] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation .

[18] Although compensation is often the major consideration, there are cases where post-separation need may be a sufficient basis. The Court in *Bracklow* said economic hardship may arise merely from the fact that a person "who formerly enjoyed intra-spousal spousal entitlement now finds herself or himself without it." The Court added at paragraph 43:

[43.] This represented a shift away "to some degree" from the "means and needs" approach of the 1968 Act: *Payne on Divorce*, supra, at p. 267. But while the focus of the Act may have shifted or broadened, it retains the older idea that spouses may have an obligation to meet or contribute to the needs of their former partners where they have the capacity to pay, even in the absence of a contractual or compensatory foundation for the obligation .

[19] An example of a purely needs-based award can be found in *Newton v. Newton*, 2003 BCSC 333, 37 R.F.L. (5th) 391 (S.C.), where this court found that the plaintiff wife's ability to earn was as limited after the marriage as it had been before:

[30.] In summary, on the issue of entitlement, this is not a case in which the wife has sacrificed career and financial security for domestic duties. Nor is it a case in which the need for support arises at least in part from illness or disability unconnected with the marriage. On the other hand, the relationship was of some duration, and although Ms. Newton cannot be said to have suffered any disadvantage arising from the marriage breakdown, she must now fend for herself despite the fact that she is ill-equipped to do so. In my view, the principles articulated in *Bracklow* are broad enough to encompass this type of situation.

[20] Although the objectives of spousal support set out in the Divorce Act include the promotion of economic self-sufficiency of each spouse, the Supreme Court of Canada made clear in *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920 (S.C.C.) that:

[27.] Failure to achieve self-sufficiency is not breach of "a duty" and is simply one factor amongst others to be taken into account.

[21] Counsel for the defendant argues that, in this case, the separation agreement created an obligation to become independent and that the parties have effectively contracted out of the foregoing law. I think that overstates the effect of the separation agreement. I agree that the separation agreement places particular emphasis on efforts to become self-supporting and that consideration must be given more weight than might otherwise be the case. However, the agreement makes clear that is not the only consideration.

[22] The agreement lists a number of factors that are to be considered in addition to efforts to become self-supporting. It refers to factors such as "the income earning prospects of the parties" and the "impact of the marriage on the career and past earning income prospects of the parties." The effect of that language is that, however much importance the parties place on self-sufficiency, the compensatory and non-compensatory considerations set out in the Divorce Act and the case law have also been adopted and cannot be ignored.

[23] The agreement requires "reasonable efforts" to become self-supporting. It does not create an absolute requirement to become self-supporting by a specified date, nor does it deprive a spouse of support if reasonable efforts prove unsuccessful. In *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (C.A.) the Court of Appeal said that reasonableness must be assessed in the context of factors such as a person's age, state of health, education, skills and work history. *Van Gool* dealt with the obligation to obtain employment for purposes of paying

child support, but the same considerations must apply in this case, with the added factor of what these parties would reasonably have expected of each other, having known each other for many years.

- [24] The defendant argues that the plaintiff has made no effort to become self-supporting and has chosen to pursue her artistic passions, although she would be making more money working for minimum wage. At the time of separation, the plaintiff was 50 years old. She initially attempted to earn a living by doing the work she had been doing throughout the marriage. This was, in fact, the only kind of work the defendant had ever known her to do and the defendant could not reasonably have expected anything else.
- [25] The plaintiff's efforts met with some limited initial success. In 2005, the first full year after separation, the gross business income reported on her tax returns was \$10,160, but her net income was effectively nil. The following year saw her gross income increase to \$15,154, producing a net income of \$3,500. In 2007, her gross income increased again, to \$21,867, with a net income of \$10,360.
- [26] In view of that steady, although modest, growth, I do not think the plaintiff can be said to have acted unreasonably in attempting to expand her business and in persisting with that effort for a period of time. I do not think it is reasonable for the defendant to expect the plaintiff, in her early fifties, to simply abandon her area of interest and experience in order to obtain any minimum wage job that happened to be available.
- [27] It has now become clear that the efforts the plaintiff has made to date will not likely result in her becoming self supporting. If she was continuing to insist on working only in those fields, I would agree that she would not be fulfilling her obligations under the separation agreement. However, she has viewed the situation realistically and is returning to university to obtain teaching qualifications.
- [28] The plaintiff, to this point, has met her obligation to make reasonable efforts to become self-supporting, although those efforts have not been successful. The question then is whether she is entitled to spousal support, on the basis of the statutory factors that were effectively adopted by the separation agreement.
- [29] Having reviewed the affidavit evidence from both parties and the various collateral witnesses they have each marshaled in support of their positions, I find that the plaintiff has not established entitlement based on compensatory principles.
- [30] The plaintiff says that when she met the defendant she was living in Calgary and had established a successful career. However, her evidence on examination for discovery was that she had recently returned to Canada after several months living in the Philippines and had planned to return to the Philippines. The plaintiff continued to pursue her work in jewelry making and movement education throughout the marriage. Although she assumed many child care and household responsibilities, I am satisfied that the defendant shared in those duties and the couple frequently had paid help.

- [31] I have no doubt that the plaintiff's career suffered because she lived and worked on Gabriola Island rather than in a major city, but the same is true of the defendant's music career. Both parties sacrificed their careers for the adoption of a semi-rural lifestyle and the opportunity to become parents relatively late in life.
- [32] However, there are some non-compensatory considerations that are relevant here. Although each party, as a result of the division of family assets, owns his or her home, there is a large disparity in the incomes that they have available to meet other expenses. The defendant's current income is more than five times that of the plaintiff, putting him in a much better position to enjoy a life style comparable to what the parties enjoyed during their marriage. The SCC in Bracklow said that s.15.2(6)(c), which refers to economic hardship arising from the breakdown of the marriage, was "an explicit recognition of non-compensatory support".
- [33] Much of that difference in income that now exists arises from the defendant's inheritance and the increased income it has produced. The defendant argues that the claim for spousal support is an indirect attempt by the plaintiff to obtain a share of what is not a family asset. However, the separation agreement makes clear that, following the division of assets, the assets of each party will still be relevant to the extent they are capable of producing income. The law is clear that income from assets acquired after separation can and should be taken into account, at least where spousal support is being awarded on non-compensatory, needs-based principles. In Leskun, the Court said:

[29.] There is no support in the case law or in logic for the proposition that the chambers judge was wrong to take into account the appellant's capital assets acquired after the marital break-up. In *Strang v. Strang*, [1992] 2 S.C.R. 112, the Court stated that the traditional understanding of the word "means" includes, "all pecuniary resources, capital assets, income from employment or earning capacity, and other sources from which the person receives gains or benefits". (p. 119). J. Payme and M. Payne elaborate as follows:

The word means includes all pecuniary resources, capital assets, income from employment or earning capacity, and any other source from which gains or benefits are received, together with, in certain circumstances, money that a person does not have in possession but that is available to such person. [Emphasis in original]

(Canadian Family Law (2001), at p. 195.

[30.] The appellant says that there was a division of capital by Collver J. at the original trial and that it is unfair that his after-acquired capital should now be tapped to pay the respondent continuing support. The present case does not raise the "double dipping" issue mentioned in *Strang* and dealt with at length in relation to pension benefits in *Boston v. Boston*, [2001] 2 S.C.R. 413, 2001 SCC 43. In that case, Major J. described the problem in this way:

upon marriage dissolution the payee spouse (here the wife) receives assets and an equalization payment that take into account the capital value of the husband's future pension income. If she later shares in the pension income as spousal support when the pension is in pay after the husband has retired, the wife can be said to be recovering twice from the pension; first at the time of the equalization of assets and again as support from the pension income. [para. 34]

(31.) The appellant's capital assets at issue here did not exist at the time of the initial division by Collver J. and no issue of "double dipping" arises.

[34] The situation of these parties is no different than it would be if the defendant was an employee and, shortly after separation, moved to a new, higher paying job. In both cases, there is additional income that the former spouse can no longer benefit from, as she would have if the marriage had not ended.

[35] I therefore find that there is a need for spousal support. That said, the separation agreement, with its emphasis on efforts to become self-supporting, remains in effect. The plaintiff is now beginning an educational program to obtain teaching credentials within two years. There is no evidence of what her job prospects will be when she completes that training at the age of 55, but I assume the plaintiff has at least made some general inquiries and has some confidence that employment opportunities will be available. If she were to enroll on such an educational program blindly, with no effort to realistically estimate its likelihood of resulting employment, that would not be a reasonable effort to become self-supporting within the meaning of the separation agreement.

[36] In the circumstances, I think it is appropriate to limit the order for spousal support to two years. If the plaintiff, through no fault of her own, is unable to complete the program or, on completion, finds there are no employment opportunities, the court may consider that to be a change of circumstances giving rise to an application for variation of the order.

Spousal Support--Amount

[37] The plaintiff seeks spousal support in accordance with the Spousal Support Advisory Guidelines. In *McEachern v. McEachern*, 2006 BCCA 508, 62 B.C.L.R. (4th) 95 (C.A.) the Court of Appeal said:

[64.] As has been stated by this Court on prior occasions, the Advisory Guidelines are simply guidelines; they are not law. The formulas need not be slavishly adhered to by judges, who must always have regard to the particular facts before them. Those facts may disclose valid reasons why the Advisory Guidelines are not of particular assistance in a given case, or why an award may justifiably be greater or less than that set out in the applicable formula. But, it is fair to say that the Advisory Guidelines have been accepted by this Court, and by the trial courts, as a useful tool in determining the appropriate range of awards in most cases.

[38] I see nothing in the facts of this case that would justify a departure from the Advisory Guidelines, particularly given the fact that I have made a time-limited award. I will leave it counsel to calculate the appropriate range of a support award under the Guidelines, based on the income parameters that I have set out. Counsel will be at liberty to make further submissions if they are unable to agree on the appropriate range or the appropriate amount within that range. Those submissions may be in writing.

Divorce

[39] There was no issue between the parties on the application for divorce. There is clear and undisputed evidence that there has been a breakdown of the marriage and the parties have lived separate and apart for more than one year. There will be an order of divorce.

Costs

[40] As the major issue on this application was entitlement to spousal support, on which the plaintiff was successful, she is entitled to costs.

Mr. Justice Nathan H. Smith

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