

CANADA / JUDGMENT

M.R.G. v. A.L.

2013 BCSC 173

COURT

Supreme Court of British Columbia

DECIDED

5 February 2013

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2013 BCSC 173 M.R.G. v. A.L. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: M.R.G. v. A.L., 2013 BCSC 173 Date: 20130205 Docket: 11-3966 Registry: Victoria Between: M.R.G. Claimant And A.L. Respondent Before: The Honourable Mr. Justice R. Punnett Reasons for Judgment In Chambers M.R.G.: In Person Counsel for respondent: G.J. Loster Place and Date of Hearing: Victoria, B.C. January 8, 2013 Place and Date of Judgment: Victoria, B.C. February 5, 2013 Application

- [1] In this summary trial application (Rule 11-3 of the Supreme Court Family Rules), the respondent seeks resolution of all outstanding matters arising from his marriage to the claimant. The claimant opposes the application as not suitable for summary disposition.
- [2] The matter is currently set for a three-day trial commencing on February 25, 2013.
- [3] The issues are:
- a) division of family assets with a claim by the claimant for reapportionment;
 - b) spousal support claimed by the claimant;
 - c) suitability for summary resolution.

Background

- [4] The parties were married on April 5, 1986 and separated on December 18, 2010. The parties were divorced on September 19, 2012 after 26 years of marriage.
- [5] They have two children, a son, J.A.L. and a daughter J.L., both born on September 20, 1994. They have completed high school and currently reside with the claimant. It is not disputed that they remain children of the marriage. The respondent acknowledges child maintenance is payable.
- [6] The claimant and the respondent met in Germany in the late 1970's or early 1980's and in 1986 moved to Canada. The claimant was the sponsor of the respondent in Canada. They jointly established a landscaping business known as W.G. The claimant's role in the marriage in the early years was as a homemaker also assisting with the business. When the children

were in school full-time she returned to school and received her grade 12 certificate. She then attended night school twice a week and on Saturdays and graduated in 2002 as an Educational Assistant. She accomplished this while also working for School District #62 as a noon hour supervisor and bus supervisor. In 2004 she obtained a permanent position with School District 62 as a teaching assistant. She explained that she had pursued this training as the family's financial stability was concerning.

- [7] The business became overextended in 2008 and the following years. The parties' former matrimonial home located at 2715 Otter Point, Sooke, British Columbia which the claimant states was worth \$1.2 million, was eventually sold for \$875,000 under threat of foreclosure. As it was mortgaged for over \$800,000 the parties only netted \$31,959.28 after real estate commission, outstanding taxes and legal fees were paid. They divided the net proceeds equally, each receiving \$16,005.59.
- [8] They also own a property at 6856 Pascoe Road, Sooke, British Columbia on which is located a manufactured home. The respondent initially lived there after the parties separated but moved out in 2012. It is mortgaged for approximately \$225,000 and has an appraised value of \$260,000. During the hearing it was agreed that the Pascoe Road property be listed and sold by the parties' realtor, Ellen Bergerud, and that if they were unable to agree on a listing price they would list it at the price recommended by her. There will be an order to that effect.
- [9] The business has had trucks and other equipment repossessed or voluntarily relinquished. It is not disputed that the business debts exceed the business's value by a wide margin. The claimant does not assert that the business has value. She acknowledges that the business has declined substantially but blames that on the respondent. Assets
- [10] The assets of the parties consist of:
- a) 6856 Pascoe Road with equity of approximately \$35,000;
 - b) A 1998 Ford Explorer in the possession of the claimant and registered in her name;
 - c) A 1991 Chevrolet owned and in the possession of the respondent;
 - d) The claimant's Municipal Pension which has approximately 4 years of vested service;
 - e) The proprietorship W.G.;
 - f) Canada Pension Plan Benefits ("CPP");
- [11] Given the parties have agreed to retain the vehicles in their possession without any adjustment for their differing values and have divided their household goods the only assets remaining for division are the Pascoe Road property, the claimant's Municipal Pension and the parties' CPP benefits. The value of the business is substantially less than its debts given the extent to which its assets have been seized or voluntarily relinquished.

- [12] The claimant asserts that the leased Hummer is also a family asset as it was used for both personal and business purposes. However as a leased vehicle it only has value if the purchase option is exercised at the end of the lease. That is, any value is contingent. The respondent paid \$9,000 on the lease in August 2011 and extended the lease for a further two years. Had he not done so it would have been returned to the lessor. There was no valuation evidence with respect to the Hummer.
- [13] After the parties separation the respondent continued to make mortgage payments on the former matrimonial home and on the Pascoe Road property. The claimant expended her income on the children and expenses related to the former matrimonial home and the Pascoe Road property.
- [14] Much of the evidence of the claimant is not relevant as it dwells on decisions made by the respondent during the marriage and its breakdown. What is clear is that their financial situation has declined dramatically since 2008. Income of the Respondent
- [15] The income of the respondent shown on his 2009 tax return is \$17,434.76 being his net income after gross business income of \$285,158.59. In 2007 the gross business income was \$367,016 and in 2008 \$380,911. His 2010 personal tax return shows business income of \$326,936.07 with a net personal income of minus \$5,926.56. His 2011 gross business income was \$216,934 with a net personal taxable income of \$82,872.95. The difference in 2011 is explained as due to the seizure and return of financed vehicles and equipment resulting in a substantial reduction in overhead. The earlier large gross income and limited personal income reflect the high debt load of the business during the years 2007 to 2008.
- [16] He estimates his taxable income for 2012 at \$45,000. For the purposes of child maintenance ordered paid at the time of the Judicial Case Conference the parties agreed to his income being \$50,000 per annum. For the purposes of these reasons I am of the view that the estimate of \$45,000 - \$50,000 is realistic.
- [17] The gross income of the proprietorship indicates the ability of the husband to generate substantial business. During the marriage he developed the skills and expertise required to run a successful business providing landscaping and excavating services, underground water systems and annual maintenance contracts. Income of the Claimant
- [18] The income of the claimant in 2009 was \$28,204 and in 2010 was \$30,862. The claimant did not provide her 2011 income tax return. Although not in her materials she provided further information at the hearing and it is not in dispute that her income is approximately \$33,000 to \$34,000 per annum. As she is employed during the school year for 10 months she collects Employment Insurance each summer which is included in this income. Her position is apparently secure. Liabilities
- [19] Joint liability is limited to a mortgage of approximately \$225,000 on the Pascoe Road property mortgage.

[20] The liabilities of the husband are substantial consisting of the following:

- a) Well Finance \$41,116.31
- b) CitiFinancial (MasterCard) \$19,348.97
- c) MetCredit \$8,821.00
- d) John Deere Credit \$9,131.00
- e) HSBC Auto Finance \$12,000.00
- f) Canada Revenue Agency (HST due -- may be reduced to \$25,000) \$41,241.00
- g) Berks Intertruck (Est) \$100,000.00

[21] The liabilities of the claimant, relying on her 2011 financial statement consist of:

- a) Visa \$19,228.08
- b) American Express \$5,528.33

[22] As the claimant did not provide updated financial information at the summary trial hearing the present status of the debts is unclear. However, what is clear is the substantial disparity between the debts of the claimant and those of the respondent. Position of the Claimant

[23] The claimant opposes resolution of the action summarily asserting there are credibility issues, in particular with respect to the respondent's evidence respecting financial matters, including his true income. She also asserts the issues are too complex for a summary trial and that to proceed summarily will lead to an unfair result.

[24] She submits that in 2007 and 2008 the respondent began making financially improvident decisions, acquiring on credit dump trucks and other assets as well as the leasing of a Hummer. He told her he planned to make the business the largest landscape company in Sooke.

[25] She asserts however that thereafter the respondent no longer devoted his efforts to the business, that he withdrew funds from the business bank accounts and that he lost contracts regularly leading to the failure of the proprietorship. She argues the business failed due to the respondent's poor decisions as opposed to a collapse of the market for its services. She states he "did not care anymore".

[26] She also criticizes him for building a shop and having to borrow to do so despite the business already being overextended.

- [27] If the matter proceeds summarily she seeks reapportionment of the family assets in her favour including the Pascoe Road sale proceeds, her Municipal Pension and her CPP benefits. She also seeks an order respecting child maintenance, spousal maintenance and security for the maintenance. She asserts that the respondent has the capacity to earn significantly more than her and always will. Position of the Respondent
- [28] The respondent proposes the net sale of the proceeds of the Pascoe Road property and the claimant's Municipal Pension be divided equally and that the parties' CPP be divided in accordance with the Canada Pension Plan, R.S.C., 1985, c. C-8.
- [29] The respondent agrees to assume sole responsibility for all debts noted above under his name. He states that the debts are in part as high as they are because he directed his earnings to servicing the family mortgages and expenses rather than his business debts. He wishes to retain the leased Hummer motor vehicle.
- [30] He opposes the wife's claim for spousal support citing their respective incomes and his assumption of the majority of the family debt. Suitability for Summary Trial
- [31] The Supreme Court Family Rules specifically address the use of summary trial applications in family litigation. Rule 11-3(15) provides that:
- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
 - (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
 - (c) award costs.
- [32] As noted earlier the claimant submits this matter is not suitable for summary disposition while the respondent states it is. The principles to be applied respecting suitability for disposition for summary trial are found in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.). Those principles include those contained in Rule 11-3(15) above and, in addition, that "[i]n deciding whether it will be unjust to give judgment the chambers judge is also entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question." (Para. 48).
- [33] I am satisfied that the necessary factual findings can fairly be made summarily. In this case the amount involved and the cost of a conventional trial in relation to the amount involved weigh heavily in favour of resolving the matter summarily.

- [34] While there are clearly credibility issues between the parties those that relate to the matters in issue are capable of resolution on the evidence. Much of the affidavit of the claimant addresses the marriage history and its deterioration. The parties not surprisingly disagree on such matters, matters that are not relevant to the issues of property division and spousal support.
- [35] The claimant asserts the respondent is hiding income and receiving cash payments for work done. The defendant has filed comprehensive evidence to address the allegations of the plaintiff. I am satisfied that he has responded persuasively to those allegations. The evidence of the claimant was speculative and based for the most part on supposition and assumptions. She concedes that she has not spoken to others concerning the alleged cash payments and in effect has no evidence of such being made and not accounted for. She accepts that the defendant has explained many of the discrepancies to which she refers and acknowledges that the reply material of the respondent did answer her allegations respecting unexplained deposits and withdrawals. In that regard I do not accept the assertions of the claimant that such customers as the District of Sooke, B.C. Hydro or the Department of National Defence would pay in cash. The respondent states that such customers do not pay in cash.
- [36] With respect to any credibility issues with regards to the disposition of funds by the respondent both during the latter portion of the marriage and after separation, the respondent's position as to division of family assets and the assumption of the majority of debts render those issues moot. The value of the assets is small, the debts large. In effect the respondent is proposing reapportionment in favour of the claimant as payment of the debts from the assets would leave nothing to be divided.
- [37] The claimant orally raised allegations respecting employment of individuals not reported in the business records however no evidence is properly before the court on those allegations and I decline to consider them.
- [38] The allegations of the claimant that the respondent has deliberately run the business down are contradicted by the respondent who states that business declined with the 2008 economic downturn. He asserts not only did his business suffer but so did his competitors.
- [39] When addressing specific allegations of the claimant with examples of contracts lost the respondent explains that his customers were suffering during the economic downturn and as a result reduced their expenditures. I accept that landscaping services are likely an expense that is first to be cut in a declining economy.

- [40] On the evidence provided I am satisfied that the economic downturn has been a factor in the reduction of the business's customer base and that the productivity of the respondent has also been affected by the marriage break-up and his depression. The planned expansion of the business by the respondent and the increase in its debt occurred as the economy declined. The claimant has not established a deliberate rejection of customers by the respondent nor an intent to destroy the business.
- [41] For the foregoing reasons, I find this case suitable for summary judgment. I shall now consider the substantive issues. Discussion Family Assets
- [42] The claimant pleads reapportionment on the grounds that she has a limited income, childcare responsibilities and a concern that the respondent will leave the country to avoid paying support payments. The latter I interpret as in part a request for security for any maintenance payable. However, she does not specifically address the issue in her materials. As I indicated above, I find that apportionment as proposed by the respondent is appropriate. Given the respondent's willingness to assume all debts incurred by the family business, this proposal in effect amounts to a reapportionment on the claimant's behalf. The proceeds of the sale of the Pascoe Road property shall be divided equally as shall the claimant's Municipal Pension Plan. The dates for division shall be from the enrolment in the plan until the date of the divorce. The parties' respective CPP benefits shall be divided in accordance with the Canada Pension Plan.
- [43] As mentioned earlier there was no admissible evidence of the value of the Hummer motor vehicle. Its value to the parties is contingent on the respondent exercising the buyout. In the event the respondent does exercise the buyout any equity in the vehicle shall firstly be credited to him for the lease payments made since the parties' separation plus any buyout amount paid by him with the balance, if any, to be divided equally between the parties. Any issue respecting the vehicles value is to be resolved by the decision of a qualified appraiser. Children
- [44] While the claimant pleads sole custody and guardianship there is an existing consent order stating that the parties shall have joint custody and guardianship of their children. The issue of sole custody and guardianship was not pursued by the claimant either in her affidavit or her submission. In any event given the ages of the children I am of the view that the existing order is appropriate.
- [45] The respondent agrees to continue paying child support of \$759 per month. Spousal Support -- Entitlement
- [46] The spousal support provisions in the Divorce Act R.S.C., 1985, c.3 (2nd Supp.)) that are relevant are found at s. 15.2 (4)-(6):
- (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. Spousal misconduct
- (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.
- Objectives of spousal support order
- (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.
- [47] The categories of maintenance applicable in this instance are compensatory and non-compensatory.
- [48] The defendant submits that the claimant is not entitled to maintenance as she has not been disadvantaged by the marriage or its breakdown.
- [49] It is not disputed that during the marriage the claimant's role was that of mother and homemaker. Her childcare responsibilities resulted in a delay in her completion of education and retraining. The role she adopted permitted the respondent to pursue his business interest and increase his earning capacity. The breakdown of the marriage has created hardship for her. Her income is less than that of the respondent and while the difference is not large I am of the view that the respondent is capable of earning a significantly greater income while the claimant is not. The respondent appears to have greater discretionary income than the claimant as witnessed by his recent vacation in Germany. Given the length of the marriage there is a presumptive claim to equivalent standards of living.
- [50] In *W. v. W.*, 2005 BCSC 1010, Martinson J. said this at paras. 12-13:

- [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. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996) 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945 (S.C.); *O'Neill v. Wolfe* (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); *Walton v. Walton*, [1997] B.C.J. No. 1089 (S.C.); *Ulrich v. Ulrich*, 2003 BCSC 192; and *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.).
- [13] Compensatory support recognizes not just economic disadvantage suffered as a result of a marriage or its breakdown but also economic advantage arising from the marriage or its breakdown: s. 15.2(6)(a) of the Divorce Act. The types of advantages and disadvantages that arise can be seen in situations such as the one presented in this case. That is, one spouse's career, (often that of the husband) is given priority and that spouse is the primary income earner. The other spouse (often the wife) is the primary parent, but also works and is a secondary earner.
- [51] I am satisfied that the claimant has established entitlement to compensatory maintenance and non-compensatory maintenance.
- [52] The Spousal Support Advisory Guidelines based on the parties' respective incomes of \$50,000 and \$34,000 with child support show minimal maintenance payments. However, without child support the amounts are considerably greater.
- [53] At the time of hearing of this matter the outcome of the husband's efforts to pay the outstanding debts is uncertain. While he states he intends to pay them they may be compromised in some fashion or he could declare bankruptcy. The length of time the children will remain children of the marriage is also uncertain as they have just recently graduated from high school.
- [54] As matters presently stand I am satisfied the respondent cannot pay spousal support. Given the claimant has been found to be entitled to support an order of spousal maintenance of \$1 per annum is appropriate. This will leave open to the claimant the right to return to court if her or the respondent's circumstances change. Security
- [55] The evidence does not justify an order for security for child maintenance. There is no history of failure to comply with orders or evidence that the respondent will not comply in the future (*Cohen v. Cohen* (1995), 11 R.F.L. (4th) 1 (B.C.C.A.); *Greenwood v. Greenwood* (1998), 37 R.F.L. (4th) 422 (B.C.S.C.); *Brown v. Brown* (2004), 6 R.F.L. (6th) 43 (Ont. S.C.J.); and *Kollmuss v. Kollmuss*, 2012 BCSC 709. The fact that he is originally from Germany and now has a girlfriend in Germany does not establish a move is likely, particularly given he has

lived in Canada for 30 years, his employment is here and so are his two children.

[56] The parties shall, not later than May 31 of each year hereafter, commencing with June 30, 2013, provide to the other copies of their personal income tax returns and notices of assessment for the prior year. As long as the respondent's business is a proprietorship his statement of business income and expenses is anticipated to be included in his tax returns. In the event it is not he shall provide such financial statements separately. In the event the respondent incorporates he shall produce the financial statements for such a corporation.
Costs

[57] In light of these reasons and unless there are matters of which I am not aware each party shall bear their own costs. "Punnett J."

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