

CANADA / JUDGMENT

Mackenzie v. Mackenzie

2021 BCSC 2723

COURT

Supreme Court of British Columbia

DECIDED

9 April 2021

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2021 BCSC 2723 Mackenzie v. Mackenzie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mackenzie v. Mackenzie,

2021 BCSC 2723

Date: 20210409

Docket: E58022

Registry: Kamloops

Between:

Thea Louise Mackenzie

Claimant

And

Allan Fraser Mackenzie

Respondent

Before: The Honourable Mr. Justice Gomery

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant appearing by teleconference:

J.L. Ball

The Respondent:

No appearance

Place and Date of Trial/Hearing:

Kamloops, B.C.

April 9, 2021

Place and Date of Judgment:

Kamloops, B.C.

April 9, 2021

- [1] THE COURT: Mr. and Ms. Mackenzie separated in September 2015, following a long marriage in which they raised five children to adulthood.
- [2] Ms. Mackenzie's role was to work on the family farm and raise the children. Mr. Mackenzie supported the family with employment income as an elevator technician.
- [3] From its outset to separation, the relationship lasted 34 years.
- [4] The Mackenzies experienced some difficulty disentangling their finances following separation. The farming business was not sold until October 2018. They disagree as to the proper characterization of their dealings in the period from separation until the farm was sold. As will be seen, that disagreement is not material to the application now before me.
- [5] As matters now stand, Ms. Mackenzie has a very limited income. Mr. Mackenzie has a substantial income. Ms. Mackenzie seeks spousal support and an order to facilitate the division of a pension asset. Mr. Mackenzie filed materials opposing the application, but did not attend the hearing today.
- [6] I am satisfied that it is in the interests of justice that the application proceed today. It has been outstanding for more than six months since the application was filed on September 2, 2020. It has been adjourned multiple times. Mr. Mackenzie was served on March 16, 2021, with a requisition adjourning the hearing to today's date. Ms. Ball has undertaken to file an affidavit confirming service by email to the email address provided by Mr. Mackenzie in his notice of intention to act in person filed on May 22, 2020.
- [7] Efforts were made to contact Mr. Mackenzie by telephone before proceeding with the hearing today, and I delayed starting the hearing for 25 minutes in case Mr. Mackenzie was delayed in getting to the telephone to participate in the hearing.
- [8] Ms. Mackenzie brings her application on a summary trial pursuant to Supreme Court Family Rule 11-3. In his materials, Mr. Mackenzie agrees that the application is suitable for disposition on a summary trial. Pursuant to Rule 11-3(15)(a), I find that I am able on the evidence to find the facts necessary to decide the application and it is not unjust to do so.
- [9] There are only two matters in dispute:

- a) Ms. Mackenzie's claim for spousal support; and
 - b) Ms. Mackenzie's request for an order requiring Mr. Mackenzie to sign documents required to divide his Canada Pension Plan entitlement.
- [10] Both parties wish a divorce, but that is not an order I can make on this application because the parties have not filed a registrar's certificate of pleadings and their affidavits do not address all the formal requirements of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), such as an absence of collusion. The parties should obtain a divorce by desk order in accordance with the court's practice direction.
- [11] The parties agree that the one-page agreement they made on December 3, 2018, should be set aside. It does not appear that the agreement was ever implemented, and I agree that it does not govern the parties' relationship, if it ever did.

Ms. Mackenzie's Claim for Spousal support

- [12] Ms. Mackenzie has an unanswerable claim of entitlement to spousal support based upon the length of the parties' relationship and the economic disparity in the parties' incomes and income-earning capacities. According to their respective Form F8 financial disclosure statements and income tax returns, both statements sworn in 2019, Mr. Mackenzie's income was \$161,915, while Ms. Mackenzie had only pension income of \$2,400. Mr. Mackenzie was employed as an elevator technician. In 2018, he had employment income of \$97,027, and pension income of \$57,551.
- [13] Mr. Mackenzie's objection to paying spousal support is grounded in his belief that he made substantial payments to Ms. Mackenzie in 2015 through 2018. He says that these payments totalled more than \$300,000.
- [14] At least some of the payments made by Mr. Mackenzie related to farm expenses that were a mutual responsibility because the farm was a joint asset. It is clear that the farm business was a money-losing proposition, at least in the later years. Ms. Mackenzie says that she paid \$128,800 of amounts received by her from Mr. Mackenzie to the children to compensate them for labour and services provided by them at the farm. Mr. Mackenzie cannot claim his past contributions to discharging a joint obligation as a credit against his present obligation to support Ms. Mackenzie.
- [15] Mr. Mackenzie's obligation to support Ms. Mackenzie is ongoing. Given the length of the marriage and nature of the relationship, it will endure indefinitely. Mr. Mackenzie's contributions to Ms. Mackenzie's support since separation do not excuse him from continuing to support her at this time and in the future.
- [16] I am not persuaded that Ms. Mackenzie is not in need of support by reason of the payments she has received to this point. There is no evidence that she has accumulated capital assets that generate income on which she could live.

- [17] Ms. Mackenzie accepts that it is appropriate to quantify a support award in her favour on Mr. Mackenzie's employment income alone, excluding his pension income, and to impute to her an annual income of \$20,000. On this basis, she seeks an award of \$2,800 per month, at the middle of the range established by the Spousal Support Advisory Guidelines. Subject to one point I will address, in my view this approach is conservative and appropriate in the circumstances.
- [18] The point I mentioned is that Mr. Mackenzie's income should be taken net of the union dues he pays to earn his employment income. His employment income net of union dues was \$94,889. Given that income, the midpoint of the Spousal Support Advisory Guidelines suggests a figure of \$2,730 per month rather than \$2,800.
- [19] Ms. Mackenzie's notice of application was filed on September 2, 2020, but her claim for spousal support has been outstanding since she filed her notice of family claim on September 13, 2019. On January 31, 2020, the parties agreed to a consent order under which Mr. Mackenzie agreed to make monthly payments of \$1,500 to Ms. Mackenzie on a without prejudice basis. The order states that the payments were not to be characterized as support payments. Notwithstanding that term, it appears that the order was intended to address, on a without prejudice basis, Ms. Mackenzie's claim for support. In my view, having regard to the considerations canvassed in *Kerr v. Baranow*, 2011 SCC 10, the award should be retrospective to February 1, 2020, when Mr. Mackenzie had notice of the application and was addressing it in the manner I have described.
- [20] I order Mr. Mackenzie to pay spousal support of \$2,730 per month from February 1, 2020. As the award is based on Mr. Mackenzie's employment income, when he retires it will be open to him to seek a variation of the support payable based on a material change of circumstance.
- [21] In light of this order, the consent order dated January 31, 2021, should be set aside and all payments made pursuant to the consent order should be considered as payments on account of the support obligation established by this order.

CPP Pension

- [22] Ms. Mackenzie is entitled to a share of Mr. Mackenzie's CPP pension. Mr. Mackenzie opposes, but it is not clear from his materials on what basis he objects. In my view, Ms. Mackenzie's entitlement is clear.
- [23] I order that Ms. Mackenzie may apply to the Canada Pension Plan for the division of Mr. Mackenzie's unadjusted pensionable earnings under the Canada Pension Plan. Mr. Mackenzie will cooperate and will, if necessary, provide a copy of his social insurance number and birth certificate for the purpose of the application. The application will be made on the basis that the parties began cohabiting on June 1, 1981, and separated on September 28, 2015.

Disposition

[24] To recapitulate, for these reasons I order that:

- a) Mr. Mackenzie will pay spousal support of \$2,730 per month from February 1, 2020;
- b) the consent order dated January 31, 2020, is set aside and all payments made pursuant to the consent order should be considered as payments on account of the support obligation established by this order;
- c) Ms. Mackenzie may apply to the Canada Pension Plan for the division of Mr. Mackenzie's unadjusted pensionable earnings under the Canada Pension Plan. Mr. Mackenzie will cooperate and will, if necessary, provide a copy of his social insurance number and birth certificate for the purpose of the application. The application will be made on the basis that the parties began cohabiting on June 1, 1981, and separated on September 28, 2015.

[25] Ms. Mackenzie is entitled to her costs which are fixed at \$5,000 all inclusive for this application and all hearings leading to this application.

[26] Ms. Ball, is there anything arising?

[27] CNSL J. BALL: No, My Lord, thank you.

[28] THE COURT: Very well, we will adjourn.

"Gomery J."

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