
CANADA / JUDGMENT

Madruga v. Madruga

2015 BCSC 1605

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Supreme Court of British Columbia

DECIDED

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2015 BCSC 1605 Madruga v. Madruga

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Madruga v. Madruga,

2015 BCSC 1605

Date: 20150908

Docket: E131655

Registry: Vancouver

Between:

Jeannette Margaret Madruga

Claimant

And

Leonel Sousa Madruga

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Claimant:

M. De Guzman

D. Boyd

Counsel for the Respondent:

C. A. Millar

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 6,7, 2014

June 22,23,25, 2015

Place and Date of Judgment:

Vancouver, B.C.

September 8, 2015

- [1] The claimant Jeannette Guichon (formerly Madruga) and the respondent Leonel Madruga were married in September 2002 separated on July 1, 2012. They have three children-twin boys who are now nine and a third son who is now five.
- [2] On October 7, 2014, I made an order for divorce and appointment of a parenting co-ordinator. The trial was then adjourned because of the unsatisfactory state of the evidence on the value of a major asset.
- [3] During the adjournment, the parties were able to resolve most parenting issues, with the continuing involvement of the parenting co-ordinator, and most of the property issues. The issues remaining when the trial resumed were:
- Finalization of the property division: the major issue is whether \$200,000 advanced by Ms. Guichon's parents and used by the parties to purchase their first matrimonial home is "excluded property" under s. 85 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
 - Spousal support: both parties are financially independent with high incomes, but Ms. Guichon's income is significantly higher and Mr. Madruga claims spousal support on that basis.
 - Child support: the children now spend equal time with each parent
- [4] Ms. Guichon is 41 and holds an executive position with a retail clothing chain. Her income for 2015 is expected to be \$307,500, comprised of a salary of \$264,000 and an anticipated bonus of \$43,500.
- [5] Mr. Madruga is now 42. At the time of separation, he worked in a senior management position for a construction company but was terminated about a year later. He obtained a similar position with another company in October 2014 and now earns \$190,000 a year.
- [6] During the marriage, and for more than a year after separation, both parties deposited their pay into a joint account, from which family expenses were paid. They also had a joint investment account.

I. FAMILY PROPERTY

- [7] The parties jointly own a house in the Point Grey neighborhood of Vancouver -the former family home- and a condominium in downtown Vancouver. Mr. Madruga has lived in the Point Grey house since separation. There is no mortgage on the property, which has an agreed value of \$1,850,000. The condominium was acquired during the marriage as an investment property and continued to be rented for a time after separation, but Ms. Guichon now lives there. Its appraised value is \$1,225,000 subject to a mortgage with an outstanding balance of \$315,408, leaving a net equity of \$909,592. The parties have agreed that Mr. Madruga will obtain sole title to the Point Grey house while Ms. Guichon will retain the condominium and assume responsibility for the mortgage.
- [8] Apart from the two real properties, the most valuable asset owned by either party consists of Ms. Guichon's shares in the company she works for. Those shares are not publicly traded. The parties have agreed they have a net value of \$946,000 and it is agreed that Ms. Guichon will retain them.
- [9] When the value of the shares is added to the equity in the condominium, Ms. Guichon is left with assets worth \$1,855,592. That almost exactly offsets the value of the family home retained by Mr. Madruga, subject only to a payment by Ms. Guichon of \$2,800 for complete equalization.
- [10] The values of registered retirement savings plans and tax free savings accounts held by each party at separation were virtually equal and I find each party should simply retain the accounts in his or her name.
- [11] Ms. Guichon claims credit for \$200,000 that she says was a gift from her parents in 2003. The parties used that money to buy a condominium, which they later sold when they bought the Point Grey house.
- [12] Section 84 of the FLA defines family property to include all property owned by at least one spouse. Section 85 sets out a number of exclusions from the general rule including, in s. 85(1)(b.1), gifts to a spouse from a third party.
- [13] A cheque for \$200,000, dated July 26, 2003, was made out to Ms. Guichon only. Her father, Michael Guichon, testified he intended it as a gift to his daughter with no strings attached and she was free to do with it as she wished. He refused to agree to the suggestion on cross-examination that it was a gift to both spouses to allow them to purchase a home.
- [14] But the cheque was written only four days before the closing of the condominium purchase. Mr. Guichon agreed that he knew before then that the couple was looking for property and that he had viewed some potential purchases with them. He had previously written a \$20,000 cheque to a realtor (later repaid by Ms. Guichon) that he knew was being used as a deposit. The note on that cheque says "deposit for Jeannette & Lee."

- [15] When spouses divorce, parents of one frequently say that any money they gave during the marriage was either a loan or a gift to only their daughter or son, with no intention to benefit the other spouse. Because those recollections are naturally coloured by the subsequent divorce, the court must look to the circumstances and intentions at the time the money was advanced.
- [16] All of the evidence supports the inference that Mr. Guichon knew when he advanced the money that it was being used by both parties to buy a family home. In *Cabezas v. Maxim*, 2014 BCSC 767 at para. 68, Hinkson C.J. said:

However, where a parent chooses to provide funds to a child for the purchase or maintenance of the family residence (to use the language of the [FLA]), those funds are presumed to be a gift to both the child and his or her spouse. Absent evidence rebutting that presumption, the funds and any proceeds derived from them are family property under s. 84 of the [FLA].

- [17] *Cabezas* was followed in *H.C. v. H.C.P.*, 2014 BCSC 1775 at para. 71 where Burke J. said:

Even if I were to conclude in this case that the claimant's parents gifted the disputed amount to the claimant, the case law reflects a presumption of gift to both a child and his or her spouse to facilitate the purchase of a family home when a parent chooses to provide funds to the child for the purchase of a family residence.

- [18] The same presumption and the same result apply in this case. The evidence put forward by Ms. Guichon does not rebut the presumption that the money was given to both spouses and I find that the \$200,000 advanced by her parents was family property.
- [19] When Mr. Madruga lost his job after separation, he received a severance package totalling \$83,000. I understand Ms. Guichon to also claim an interest in that. Cases under the former Family Relations Act, R.S.B.C. 1996, c. 128 held that severance pay received after separation was not a family asset: *Jenkins v. Jenkins* (1993), 81 B.C.L.R. (2d) 133 at paras. 12-22 (S.C.), *Giebelhaus v. Giebelhaus*, 2012 BCSC 1100 at para. 28. Nothing in the FLA mandates a different approach. Indeed, s. 84 specifically defines family property as property owned by a spouse "on the date the spouses separate" (emphasis added).
- [20] During the marriage, the parties held a joint investment account. The balance in that account on the date of separation was \$602,072.60.
- [21] Shortly after separation, Ms. Guichon deposited just over \$50,000 into the investment account and Mr. Madruga withdrew approximately \$70,000 to buy a car. I find that these transactions were related and by agreement. Prior to separation, only one of two vehicles owned by the parties was suitable for transporting the children. Ms. Guichon had retained possession of that vehicle and Mr. Madruga needed a similar one to use when he had the children. In any event, the vehicle Mr. Madruga purchased became family property under s. 84(1)(b)(i)-property acquired after separation that is derived from property owned at the time of separation. Therefore, only the \$20,000 difference between the deposit and withdrawal need to be considered in dividing the joint investment account.

- [22] Between September 2012 and March 2013, Ms. Guichon withdrew a total of \$166,000. Mr. Madruga later transferred the balance of the account into his own name and spent approximately \$56,000 on living expenses before the funds were frozen by court order. The parties subsequently agreed to each take \$100,000.
- [23] Therefore, of the \$281,000 that Ms. Guichon was entitled to at the date of separation (one of half, in round numbers, of the account balance as of that date, less \$20,000 for the subsequent car purchase) she has received a total of \$266,000. She should now receive a further \$15,000 from the funds held by Mr. Madruga.
- [24] For a time following separation, the downtown condominium that Ms. Guichon now occupies continued to be rented out under the control of Mr. Madruga. He agrees that he owes her approximately \$11,200 in respect of income and expenses during that period.
- [25] When those two items are totalled and offset against the small amount owed by Ms. Guichon to equalize the major assets in para. 9 above, Mr. Madruga owes a total of \$23,400. Upon payment of that amount to her, he will be free to retain and use the balance of funds from the investment account. If I have made any arithmetical errors in the division of these assets, counsel may make written submissions within 30 days of the date of these reasons if they are unable to agree.
- [26] I have been given no evidence on the value of the three vehicles owned by the parties. An equal division is required and if the parties are unable to agree on how that is to be accomplished, counsel may make written submissions, including affidavit evidence of value, within 30 days of the date of these reasons.

II. SPOUSAL SUPPORT

- [27] Mr. Madruga enjoys an above-average income, but says he no longer has the standard of living that was available to him when he shared Ms. Guichon's even higher income. He seeks spousal support, relying primarily on the decision of the Court of Appeal in *Mckenzie v. Mckenzie*, 2014 BCCA 381. Ms. Guichon relies on *Lee v. Lee*, 2014 BCCA 383-a decision released by the Court of Appeal one day after *McKenzie*-to argue that the current income disparity does not entitle him to spousal support. With respect, I must say that I am unable to reconcile the contradiction between these two decisions of the Court of Appeal.
- [28] The objectives of a spousal support order are set out in s. 15.2(6) of the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.) They are to:
- (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.
- [29] All four of these objectives must be examined: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 850-853 and the court must consider the condition, means, needs and other circumstances of each spouse, including the factors set out in s. 15.2(4):
- (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.
- [30] The Supreme Court of Canada has identified three bases for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42.
- [31] While compensatory support deals with economic disadvantages arising from the marriage, non-compensatory support relates to the impact of the marriage breakdown, including the needs of the recipient spouse. Mr. Madruga's claim is based on the non-compensatory approach.
- [32] In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-49, and *Tedham v. Tedham*, 2005 BCCA 502 at para. 55, the Court of Appeal held that in the context of a long-term marriage involving a sharing of resources, a spouse's "need" after divorce is measured against the standard of living that was enjoyed during the marriage. In *Chutter v. Chutter*, 2008 BCCA 507 the Court of Appeal said at para. 90:
- [90] If the appellant must encroach upon her capital to maintain a standard of living comparable to that which she enjoyed during the marriage, then arguably she is suffering hardship from the breakdown of the marriage and experiencing the loss of marital standard of living, since her capital would deplete over time and eventually she would be in a worse position than had the marriage continued. If that is so, whether the respondent has the means to assist her financially to live a lifestyle closer to what they shared as a couple is a relevant question.
- [33] In *McKenzie*, which Mr. Madruga relies on, the former wife earned \$200,000 a year and the former husband was found to have an income, for purposes of spousal support, of \$375,000. In finding that the wife was entitled to lump sum spousal support, the trial judge referred in particular to *Bell v. Bell*, 2009 BCCA 280, where the Court of Appeal said at para. 23:

[23] It appears to me that in this case, where one spouse enjoys a large income while, in relative terms, the income of the other is much less, it can be assumed one is able to enjoy a significantly higher standard of living than the other even though there was an equal division of substantial family assets. Neither spouse should be required to encroach on capital to address the difference in the standard of living provided by each of their incomes. (Emphasis added.)

Although reference is made to the principal that neither spouse should be required to encroach on capital, I can find no reference to evidence of actual encroachment.

[34] In upholding the award of spousal support in McKenzie, the Court of Appeal said at para. 112:

I do not find any error in principle, nor in the underlying findings of fact made by the judge as to Ms. McKenzie's entitlement to spousal support. His reasons are consistent with this Court's jurisprudence on the question.

[35] In Lee, the former wife had an annual income of \$120,000. The trial judge imputed an income of \$50,000 to \$60,000 to the former husband. The former husband was also living with a new partner who earned \$75,000 to \$90,000. The trial judge rejected the husband's claim for spousal support.

[36] On appeal, Newberry J.A. referred to the leading authorities, including Moge, Bracklow, Yemchuk and Chutter, as well as to Keller v. Black (2000), 182 D.L.R. (4th) 690 at 706 (Ont. S.C.J.), where the court said:

It seems that Bracklow has taken us to the point where any significant reduction in the standard of living of a spouse, resulting from marriage breakdown will warrant a support order - with the quantum and/or duration of the support being used to tweak the order so as to achieve justice in each case.

[37] Newbury J.A. said those comments also reflect the BC approach, but said at para. 60:

[60] We have not been referred to any decision of this court, however, in which spousal support was awarded solely on the basis of disparity in incomes, or even solely on the basis of the non-compensatory model. [Emphasis in original.]

[38] Newbury J.A. agreed with the statement of the Alberta Court of Appeal in Griffiths v. Griffiths, 2011 ABCA 359 at para. 6 that "equalization of incomes, or even of lifestyles, is not a basis alone for non-compensatory spousal support" and concluded at para. 65:

If Mr. Lee had not formed this new relationship, the case law in British Columbia would have permitted an award of spousal support to him, given the length of the parties' marriage (which presumably creates interdependence) and the expansion of the meaning of "need" in the family law context. But whether it would have been a "material error" in law or a wrong exercise of discretion to refuse support in such circumstances is another matter. To rule as a matter of law that Mr. Lee should be compensated indefinitely for the "loss" of the ability to share in Ms. Lee's

income and lifestyle would, taken to its logical conclusion, mean that support must be ordered on one model or the other in virtually every case that comes before the court. The concept of need (in the true sense) of the applicant spouse would be supplanted by the sole criterion of the respondent spouse's ability to pay. Marriage would, contrary to what was said in *Moge*, automatically entitle a spouse to the standard of living enjoyed during the marriage, or as much as the payor could afford. I respectfully agree with Professor Rogerson's suggestion, and with the Court in *Griffiths*, *supra*, that this cannot be correct. A 'clean break' is clearly possible in this case, and again as stated in *Moge*, the mere fact of marriage or its breakdown does not activate a "general tool of redistribution." (Emphasis in original.)

- [39] The Court of Appeal's decisions in *McKenzie* and *Lee* are consistent with each other and with the other authorities in that they recognize that a self-sufficient former spouse who has not suffered any disadvantage as a result of marriage may still be entitled to spousal support on non-compensatory principles if he or she has been deprived of the lifestyle enjoyed during the marriage. The point on which they differ is that *McKenzie* suggests that deprivation of lifestyle and a resulting entitlement to spousal support must be presumed solely on the basis of income disparity, while *Lee* expressly rejects that proposition. On the basis of *Lee*, it would appear that there must at least be some evidence of how the applicant's lifestyle has been diminished and, even then, other factors may have to be considered. If there is a basis on which the two decisions can be reconciled, I am afraid it has escaped me.
- [40] The apparent contradiction was also noted by Humphries J. in *Carreiro v. Carreiro*, 2015 BCSC 714 at para. 253. In *Nearing v. Sauer*, 2015 BCSC 58 at para. 181 Fleming J. followed *Lee*, noting that it includes "a very careful examination of the jurisprudence regarding non-compensatory support." *McKenzie* was not referred to.
- [41] In the absence of further guidance from the Court of Appeal, I respectfully find *Lee* to be based on a much more detailed discussion of the applicable authorities. I also note that if income disparity alone established entitlement to spousal support, there would be no need for the considerations set out in s. 15.2(6) of the Divorce Act or any reason for the authorities to consider compensatory v. non-compensatory models-entitlement would simply be automatic once income disparity was established.
- [42] In the absence of a presumption based on income disparity alone, the evidence does not show that Mr. Madruga has suffered any diminution in his lifestyle from what he enjoyed during the marriage. He continues to live in the same house he lived in during the marriage and will acquire sole, mortgage-free title to that property. He now lives there with a new partner, although there is no evidence of her income.
- [43] Ms. Guichon lives in the downtown condominium, where she is paying \$1,400 a month on a mortgage, as well as strata fees. She has also assumed sole responsibility for paying the fees for the children to attend a private catholic school at a total cost of more than \$21,000 a year. (A catholic education for the children is more important to her than it is to Mr. Madruga.)

Both parties have encroached on capital to a relatively small extent by making withdrawals from the investment account, but the larger encroachment was actually made by Ms. Guichon.

- [44] In short, there is no evidence of any pre-separation activities or amenities that Mr. Madruga is no longer able to enjoy or will be unable to enjoy in the future without encroaching on capital. There is no evidence of a significant difference in the parties' current lifestyle. I find that Mr. Madruga has failed to establish entitlement to spousal support.

III. CHILD SUPPORT

- [45] By agreement, the three children of the marriage divide their time equally between the parents' residences. That arrangement has essentially been in place since separation, although intervention of a parenting co-ordinator was necessary to make it more workable. Based upon the difference in income, Mr. Madruga seeks child support of \$1,857 a month. That amount represents the difference between what is payable by him and what is payable by Ms. Guichon under the Federal Child Support Guidelines, SOR/1997-175 [Guidelines] based on their respective incomes.
- [46] The considerations related to child support differ from those on spousal support because, of course, child support is the entitlement of the children. The goal of the guidelines is to ensure that the children have the benefit of the payor parent's, or in this case both parents' incomes.
- [47] On the facts of this case, consideration must be given to two sections of the Guidelines that give the court discretion to depart from the amounts set out in the support tables.
- [48] Section 4 of the Guidelines permits the court to depart from the table amounts where the income of the payor spouse exceeds \$150,000. It reads:
4. Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is
 - (a) the amount determined under section 3; or
 - (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
 - (iii) the amount, if any, determined under section 7.

[49] Section 9 deals with equal or near-equal parenting time. It reads:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[50] I have not been referred to any case where, as here, parenting is shared equally and the income of both spouses exceeds \$150,000.

[51] Although s. 4 of the Guidelines gives the court discretion in regard to the portion of a payor spouse's income in excess of \$150,000, I find there is no basis for exercising that discretion in this case. There is a presumption in favour of the table amount and "clear and compelling evidence" is needed to depart from it: *Francis v. Baker*, [1999] 3 S.C.R. 250 at para. 43. There is simply no such evidence here.

[52] The starting point for analysis under s. 9 is the simple set-off of the Guidelines amounts payable by each parent, which is what Mr. Madruga seeks. But there is no presumption in favor of the set off amount and the court must consider the factors set out in ss. 9(b) and (c).

[53] In applying s. 9(b), the court should generally examine the budgets and expenses of both parents to determine the increased global costs resulting from the fact the children are effectively being given two homes: *Contino v. Leonelli-Contino*, 2005 SCC 63 at para. 52. The broad discretion under s. 9(c) must also be exercised on the basis of evidence. The Court in *Contino* said at para. 68:

[68] the Table amounts used in the simple set-off are not presumptively applicable and the assumptions they hold must be verified against the facts, since all three factors must be applied. Here again, it will be important to keep in mind the objectives of the Guidelines mentioned earlier, requiring a fair standard of support for the child and fair contributions from both parents. The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances.

[54] The only evidence of the parties' budgets and expenses in this case are the form F8 financial statements they were required to file. These were included in the trial record but neither party was examined or cross-examined on them in any great detail and no submissions were made about them. Such statements generally tend to be more reliable about income than about expenses. Income is usually a single, easily verified figure, while the listed expenses are at least partially based on estimates. Those estimates are made with varying degrees of care and may or may not be supported by documentary evidence.

- [55] The evidence in this case demonstrates only one expense that has clearly been increased by duplication. Each party employs a full-time nanny. Considering the incomes of each party, there is no reason to believe the children are unable to enjoy a broadly similar lifestyle in each residence. In the absence of additional and more detailed evidence that would permit a full consideration of ss. 9(b) and (c), I find the basic set-off approach to be appropriate, subject to one adjustment.
- [56] Ms. Guichon has voluntarily assumed the full cost of private school tuition for the children at a cost of \$1,775 a month. That agreement was made in the absence of any agreement or order requiring her to pay spousal support. If she had chosen to claim tuition as a special expense under s. 7 of the Guidelines, Mr. Madruga may have been required to contribute a proportionate share based on his income-approximately 40% or \$710. In the circumstances of this case, I find it appropriate to adjust child support accordingly and I order that Ms. Guichon pay child support of \$1,150 a month, effective September 1, 2015.
- [57] Mr. Madruga also seeks retroactive child support from the date of separation. On considering the factors set out in *D.B.S v. S.R.G.*, 2006 SCC 37, I decline to order retroactive child support.
- [58] Mr. Madruga's claim for child support was first raised in a counterclaim filed on July 30, 2014- a year after his original response to family claim and two months before trial. There is no evidence of any previous demand for child support and no evidence of blameworthy conduct by Ms. Guichon in failing to pay it. From the separation in July 2012 until approximately November 2013, each party was able to meet the needs of the children through access to a joint bank account into which Ms. Guichon's income was deposited. There is no evidence of any deprivation suffered by the children, who have been spending half their time with Ms. Guichon. I find Mr. Madruga's claim to retroactive child support to be in the nature of what the Court of Appeal described in *Macdonald v. Macdonald*, 2005 BCCA 23 at para. 33:
- [33] to the extent that an award of retroactive child support is properly seen as a redistribution of capital or an award of spousal support in the guise of child support, such a retroactive award should not be made.

IV. SUMMARY

- [59] Ms. Guichon will pay child support of \$1,150 a month. On or before July 1 of each year, the parties will exchange income tax returns and adjust the amount of child support in accordance with the child support guidelines and the amount Ms. Guichon is then paying for private school tuition.
- [60] Mr. Madruga will pay Ms. Guichon \$23,400 to equalize the division of family property. His claims for spousal support and retroactive child support are dismissed.
- [61] In view of the divided success, each party will bear his or her own costs.

"N. Smith, J."

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