
CANADA / JUDGMENT

Malbon v. Malbon Estate

2013 BCSC 931

COURT

Supreme Court of British Columbia

DECIDED

29 May 2013

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2013 BCSC 931 Malbon v. Malbon Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Malbon v. Malbon Estate,

2013 BCSC 931

Date: 20130529

Docket: E64565

Registry: Nanaimo

Between:

Patricia Ellen Norah Malbon

Claimant

And

The Estate of Ronald James Malbon,

by his Executors Neil Malbon and Leslie Malbon

Respondent

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment

Counsel for the Claimant:

K.M.J. Rongve

Counsel for the Respondent:

W.W. Geselbracht

Place and Date of Chambers Summary Trial:

Nanaimo, B.C.

April 18, 2013

Place and Date of Judgment:

Nanaimo, B.C.

May 29, 2013

- [1] In a summary trial under Rule 9-7 of the Supreme Court Rules, the claimant seeks various orders under the Family Relations Act, R.S.B.C. 1996, c. 128, [Act], in relation to the property of the parties. The claimant seeks an order for the unequal division of the family residence in her favour; occupational rent in respect of the family home; a payment to equalize the funds held in the joint accounts of the claimant and Ronald Malbon at the date of separation, and various expenses in relation to the operating costs of the family residence.
- [2] The claimant originally commenced proceedings against Ronald Malbon under the Act. On March 16, 2012, Madam Justice Fisher made a declaratory judgment that there was no possibility of reconciliation between the parties. Ronald Malbon died on July 26, 2012. On September 10, 2012, Mr. Justice Voith ordered that the style of cause in these proceedings be amended to replace Ronald Malbon with the Estate of Ronald Malbon and the executors of the estate as respondents.
- [3] The facts in this case are difficult to glean from the material filed. Only one affidavit of Ronald Malbon was filed and it is dated March 1, 2012. The claimant filed three affidavits, although her first affidavit was not contained in her application record. Two affidavits were filed by Leslie Malbon, a son of Ronald Malbon and one of the executors of his estate; however, his affidavits are based largely on what he heard or understood from discussions with his father over the years, and therefore are not entitled to a great deal of weight.
- [4] The claimant and Ronald Malbon met in July 1983 and were married on December 14, 1985. When they married, the claimant was 50 years of age and Ronald Malbon was 57. They separated on October 8, 2011, after almost 26 years of marriage. The claimant is currently 77 years old. When Ronald Malbon died, he was 84 years of age. Probate was granted to his two sons, Neil and Leslie Malbon, on February 1, 2013.
- [5] At the start of the relationship between Ronald Malbon and the claimant, he was injured from an industrial accident that ended his work as a faller. As a result, he received WCB benefits together with an IWA pension, CPP and OAP, totalling \$48,392.64 annually.

- [6] The claimant's annual pension income is \$28,855. In addition, after Mr. Malbon's death, the claimant began receiving Mr. Malbon's IWA pension of \$919.10 per month and CPP survivor benefits. The total amount she now receives was not in evidence, but I expect that it is in the vicinity of \$44,000 per year, plus her investment income of about \$3,000 per year. Her annual living expenses are stated to be about \$40,000.
- [7] It is apparent that based on the amount of their pensions, during their marriage, Ronald Malbon contributed a larger amount towards their living expenses and savings than the claimant. It appears that their accumulated investments were derived from their pension income.
- [8] It appears that during the marriage the claimant looked after their financial affairs. She used their funds for various living expenses such as dining out, repairs and maintenance to the house and mobile home, gas and automobile insurance, taxes, cigarettes and liquor. There is no evidence to show that the claimant used their funds for purposes other than their personal or living expenses. While the respondents say that their combined pension income of \$77,000 per year left them with an excess of \$37,000 after their living expenses of \$40,000 per year, that ignores the amount of income tax payable on their pensions. Their extra funds also appear to have been invested, as described above.
- [9] Until they separated, the claimant and Ronald Malbon resided in a house situated at 3174 Mexicana Road in the City of Nanaimo, British Columbia, (the "Residence"). Prior to their marriage the claimant owned the Residence, free of encumbrances. On November 12, 1993, she transferred title to the Residence into their joint names as tenants in common. On the date of separation, the Residence was estimated to have a value of \$271,000. That property is presently listed for sale at a price of \$229,000.
- [10] As of the date of separation, the financial assets of the claimant consisted of funds in bank accounts or investment accounts and an automobile, with a total value \$276,358.09. On that date the property of Ronald Malbon consisted of funds in bank accounts or investment accounts and a motor vehicle, having a total value of \$142,864.61. Also at that time, the claimant and Ronald Malbon had funds totalling \$98,966.97 in three joint bank accounts. It is also not disputed that, as a result of a loan, Leslie Malbon owes \$25,000 to the claimant and the estate jointly.
- [11] Shortly after their separation, Ronald Malbon withdrew \$77,255.16 from their joint bank accounts. Of that amount, Leslie Malbon avers in his affidavit that \$49,182.64 was inherited by Ronald Malbon from his mother. No mention is made of this inheritance in Ronald Malbon's affidavit. There is disagreement as to how much the claimant withdrew from the joint accounts, but it appears to have been between \$17,645 and \$24,000.
- [12] If the amount held in the joint accounts of the parties were to be equalized at the date of separation, the respondent would have to pay the sum of \$30,838 to the claimant.

I. Analysis

- [13] The claimant seeks reapportionment of the parties' interests in the Residence and the payment of \$30,838 by the estate to account for the funds withdrawn by Ronald Malbon from their joint accounts shortly after the date of their separation.
- [14] The respondent submits that all assets should be divided equally in accordance with s. 56 of the Act.
- [15] As a result of the declaratory judgment by Madam Justice Fisher, under s. 56 of the Act, each spouse became entitled to an undivided one-half interest in each family asset, effective upon the date of their separation.
- [16] At the date of separation the parties owned jointly the Residence and certain investment funds.
- [17] Section 65 of the Act provides:
- 65(1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, 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,
- the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.
- [18] The test under s. 65(1) of the Act is whether an equal division of family assets under s. 56 of the Act would be unfair having regard to the factors referred to in the sub-paragraphs of s. 65(1).
- [19] With regard to the individually held investments, the evidence does not satisfy me that they should be considered to be family assets under s. 58 of the Act. The parties clearly differentiated between their jointly held investments and those that were kept in their own names. The investments in their own names should remain as their individual assets and not be subject to reapportionment.

- [20] With regard to the jointly held investment funds, the claimant should be compensated for the withdrawal of \$77,255.16 by Ronald Malbon within a period of three days after the date of separation. The evidence does not satisfy me that any portion of the jointly held funds was received by Ronald Malbon as an inheritance. This will require the repayment by the respondent of \$30,838 to the claimant. As a result, the claimant and the respondent will each have had the benefit of one half of the jointly held investments as of the date of separation.
- [21] With regard to the withdrawal of funds from various accounts by the claimant while the parties lived together, the evidence does not indicate that the funds were used other than for their living expenses, nor does the evidence show that the withdrawal of funds by the claimant was at the expense of Ronald Malbon or to his detriment.
- [22] With regard to the Residence, considering the length of the marriage and the transfer of a one-half interest in the Residence by the claimant to Ronald Malbon during the marriage, an equal division would appear to be fair. While the claimant acquired the Residence before the marriage, the transfer of a one-half interest to Ronald Malbon (for \$1 and "love and affection") as a tenant in common, rather than as a joint tenant, indicates an intention by the claimant to give him a one-half interest so that he would be free to deal with it separately in his last will and testament.
- [23] The needs of each spouse to remain economically independent and self-sufficient must also be considered. In *Dowell Estate v. Dowell*, 2009 BCCA 175, our Court of Appeal said that the needs of Ms. Dowell ended with her death. In the case at bar, the needs of Ronald Malbon ended with his death. In these proceedings the needs of the beneficiaries of Ronald Malbon's estate are not relevant. Clearly, the claimant has economic needs for the remainder of her lifetime and while the evidence is scanty, it appears that her needs will likely be met with the pensions she is receiving, plus her financial investments. She will also eventually have access to her share of the proceeds from the sale of the Residence.
- [24] In the end result, I have concluded that the interests of the parties in the Residence should remain as it was on the date of separation and not be reapportioned.
- [25] With regard to the claim for rent, although there is conflicting evidence, it appears that the claimant could have stayed in the Residence, or at least obtained a court order for exclusive occupation before September 12, 2012, and in my view is not entitled to the payment of imputed rent during the time that it was occupied by Ronald Malbon.
- [26] With regard to property tax in respect of the Residence, the respondents shall pay one half of any unpaid property tax and any property tax that becomes payable prior to the sale of the Residence.
- [27] With regard to the operating costs of the Residence, the respondents shall be solely responsible for the operating costs during the period that Ronald Malbon was the sole occupant of the Residence.

[28] The resulting orders are as follows:

- 1) The Residence shall remain in joint tenancy and, upon its sale, the proceeds of sale shall be divided equally between the claimant and the respondent Estate of Ronald Malbon.
- 2) The respondent Estate of Ronald Malbon shall forthwith pay the sum of \$30,838 to the claimant.
- 3) The respondent Estate of Ronald Malbon shall pay one half of any outstanding and unpaid property taxes and one half of any property tax assessed in respect of the Residence prior to its sale.
- 4) The claimant and the respondent Estate of Ronald Malbon shall each pay one half of the ongoing operating costs arising after July 26, 2012, in respect of the Residence.
- 5) The respondent Estate of Ronald Malbon shall pay the claimant \$675.81, representing a portion of the operating costs of the Residence, which have been paid by the claimant while Ronald Malbon was the sole occupant.

[29] As success in respect of this application has been divided, costs will not be ordered.

"Mr. Justice G.T.W. Bowden"

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