

CANADA / JUDGMENT

Marasco v. Marasco

2001 BCSC 658

COURT

Supreme Court of British Columbia

DECIDED

8 May 2001

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2001 BCSC 658 Docket:

ED024519

Registry: Nanaimo

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HELEN MARGARET MARASCO
PLAINTIFF

AND:

THOMAS JOSEPH MARASCO
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HUTCHINSON

Counsel for the plaintiff: B. Vining

Counsel for defendant: K. Hamilton-Waterman

Date and Place of Hearing: 20 April 2001

Nanaimo, BC

- [1] After a hearing for divorce and division of family assets, I published reasons for judgment on 25 August 2000. The defendant had not been represented by counsel at the hearing so the tax consequences of the division of assets were not argued by him nor were they considered in my reasons. The defendant then sought counsel and as a result certain issues were argued before me on 12 January 2001 and I published a corrigendum to the original reasons on 17 January 2001. The tax implications of the original reasons were set over at the request of

counsel; counsel also indicated that the defendant's circumstances were changing and that could affect the award of spousal maintenance.

- [2] The issues that were argued on 20 April 2001 pursuant to the original order and fresh motions launched are these:
1. That the division of assets be varied to give the defendant relief from the tax consequences of the original order;
 2. That the cash proceeds of the sale of life insurance policies and Noranda shares held by the defendant at the time of the separation be included in the family assets;
 3. That the lump sum spousal maintenance awarded be varied by reason of changed circumstances;
 4. Clarify whether arrears of interim spousal support are part of the lump sum spousal maintenance for the future or are for past interim payments not made by the defendant. The Department of National Revenue is interested in the outcome;

Dealing with those issues in that order:

1. Division of Family Assets

[3] In the original order, as corrected, the defendant had R.R.S.P.'s in his name of \$134,892.22 and the plaintiff had \$48,626.50 in her name. The house had been sold and the net proceeds of \$184,331 were held in trust. The division of the assets left the R.R.S.P.'s in the possession of each registered owner. To even up the division the plaintiff was to receive a larger share of the house sale proceeds. I accept the submissions of defendant's counsel that this is inequitable; the defendant will be taxed on a larger part of his share of the family assets, as he will pay tax when he withdraws his R.R.S.P.'s. To be fair to both parties the R.R.S.P.'s should each be divided and that will achieve the following result:

R.R.S.P.'s in the plaintiff's name \$ 48,626.50

R.R.S.P.'s in the defendant's name \$134,892.22

\$183,518.72

Equal division \$ 91,759.36

At present the plaintiff has \$48,626.50 of R.R.S.P.'s in her name so to even up the division the defendant should roll over \$43,132.86 of his R.R.S.P.'s to the plaintiff.

2. Noranda Shares and :Life Insurance Policies

- [4] At the hearing on 14 June 2000 the defendant testified. He confirmed that he had sold life insurance policies and shares in Noranda mines that were in his name. The latter were sold on 31 August 2000 for \$3,970; the former was cashed in earlier for \$24,483. These were not included in the calculations and division of family assets. There were indeed family assets and should be brought into the division. Each is entitled to \$14,226.50 from those tax paid assets.

3. Variation of Lump Sum Spousal Support

- [5] In the original order this was set at \$40,000 based on \$800 per month from 1 September 2000 to 2 May 2005 inclusive, the date of the defendant's anticipated retirement when he reached the age of 65 on 8 May 2005. That sum was based on the plaintiff's needs as well as the defendant's ability to pay from sick leave benefits of \$30,940 per annum. That was a discounted figure from the total payable over that period of \$44,800.
- [6] The defendant is now on long-term disability benefits so his income has been reduced to \$29,592, which is \$1,348 less than before, or a reduction to him of a little over \$100 per month. His short-term disability benefits ceased on 1 September 2000 and he either had to return to work or provide medical substantiation to become eligible for long-term disability. He was able to do the latter.
- [7] The defendant has Crohn's disease, diabetes and in February 2001 suffered a mild stroke. In the original reasons I indicated it had not been established in evidence why he was on short-term disability benefits, nor how long those benefits would last. The requisite medical evidence was not presented, which is not surprising since he was representing himself. The reasons specified that the amount ordered was based on the then existing state of affairs and the evidence available. The right to apply if a change of circumstances developed was provided for. The award recognized that on retirement the plaintiff would receive a portion of the defendant's pension, and for that reason was calculated to the probable date of retirement.
- [8] The defendant has learned from his Union representative that his employer is now renegotiating its contract with the Union. At present he can retire and retain a modified version of his present medical coverage which includes extended health and dental coverage. If he does not retire until 2005, the new agreement proposed by the employer could eliminate that coverage for him. He has informed his employer of his intention to retire as of 1 August 2001. He can do so on that date without penalty or reduction in pension benefits. When he retires his pension will be \$1,668 per month, a portion of which will be payable to the plaintiff. In addition, he will become eligible for the Canada Pension, though this will be at a reduced rate if he elects to take it before he reaches the age of 65.
- [9] Plaintiff's counsel argued that for the defendant to retire at this stage makes no economic sense. He may not lose the medical coverage if he waits: that is a position being negotiated at this stage, and may not be the final position of both parties to the bargaining process. At present the defendant's employer pays on his behalf \$66.31 for medical, extended health and

dental premiums. He says that if he obtained private coverage the cost would be prohibitive, though no figure was presented. The plaintiff has no coverage through the defendant's employer and has to make her own arrangements beyond those provided by the health care system. Plaintiff's counsel argued that the defendant must have a hidden agenda that would cause him to retire now and reduce his gross income from \$28,592 per annum to \$20,016 per annum just for the medical coverage. However, that ignores the increase in the defendant's income should he elect to take Canada Pension on retirement: the defendant is eligible to receive that pension now, as he is over 60 years old. That pension and his employment pension will be divided with the plaintiff which will raise her income to approximately \$1,100 per month. It is in the plaintiff's interest to encourage the defendant to retire and elect to take the Canada pension as that will improve her circumstances considerably. The defendant will receive approximately \$15,000 per annum on retirement.

- [10] In the original reasons I indicated the plaintiff needed \$800 per month by way of spousal support to maintain her standard of living. I find that amount is still within the defendant's means notwithstanding his currently reduced income to \$29,592. Her need will continue until she receives that amount or more from the defendant's pensions. Because the defendant has elected to retire, and because he will continue to be able to pay \$800 per month spousal support until he retires, I find at this stage there has been no change of circumstances caused by the defendant's desire to retire, and that warrants varying the original order. However, on retirement, the plaintiff will receive more from her shares of the pensions than the defendant has been ordered to pay. He has made the election so I order that the monthly spousal continue until the defendant retires and the plaintiff receives \$800 per month or more from her share of the pension. At that stage the circumstances will have changed sufficiently to warrant that variation.
- [11] Collver J. ordered that the defendant continue to pay \$800 per month to the plaintiff until August 2001, pending the hearing of the appeal. I gather the plaintiff is and has been receiving that sum since the 1st of September 2000, and if there are any arrears counsel may apply to have them disposed of in the division of assets.
- [12] Should the defendant revoke his intention to retire, and continue to be employed by his present employer after 1 September 2001 he will deposit \$10,000 with the court or in an agreed trust account by way of security for the payments due until 1 May 2005, and that sum will be held back from his share of the family assets. In the original order the case of *Wilson v Wilson* (1997), 31 B.C.L.R. (3d) 332 was the reason cited for ordering a lump sum rather than monthly maintenance payments. Since the defendant has elected to retire the need for security is lessened. The security may be used to make the monthly payments. Once the plaintiff's pension income reaches \$800 per month the balance of the security may be returned to the defendant.

4. Clarification of Sum Awarded for Arrears

- [13] In the original reasons I indicated at paragraph 14 that the defendant had failed to pay interim spousal support payments from October 1999 up to and including August 2000: the payments due were \$1,500 for October 1999 and \$1,300 for the succeeding ten months totalling \$14,500. Since this sum is directly related to the monthly payments the defendant was ordered to make by Taylor J. and Shabbits J., I am at a loss to comprehend why this is not a tax-deductible amount. Shabbits J. ordered on 30 March 2000 that \$8,000 of that sum be paid from money held in trust. That will be allowed for in the final distribution.
- [14] In addition to the above matters, the division of the furnishings was raised again. The defendant said that he had spent some money repaving the driveway: those matters were or should have been canvassed at the original hearing, and I can find no good reason for going over them again as the circumstances on which the original decision was based have not changed.

Distribution

- [15] The fairest method of distributing the assets is to deal with the taxable assets separately from the tax paid assets.

Taxable Assets

- [16] These are the R.R.S.P.'s. They total \$183,518.72. An equal division of these assets is \$91,759.36. The defendant, who has \$134,892.22 in his name should roll over \$43,132.86 of the R.R.S.P.'s in his name to the plaintiff.

Tax Paid Assets

House \$184,331 (In trust)

Truck 5,000 (plaintiff)

Vehicle 13,000 (defendant)

Bank account 3,700 (defendant)

Life Insurance 24,483 (defendant)

Noranda 3,970 (defendant)

\$234,484

A one-half share for each party amounts to \$117,242.

- [17] The defendant has received those assets bracketed which total \$45,153. When subtracted from his share that leaves him with \$72,089. The plaintiff has received \$5,000, which leaves her with \$112,242. In addition, the defendant owes \$14,500 for arrears of interim maintenance which should be deducted from the sum held in trust and paid to the plaintiff. The final distribution of the money held in trust then is as follows:

To the plaintiff \$126,742

To the defendant \$57,589

These figures do not take into consideration money paid pursuant to the order of Collver J.

[18] Plaintiff's counsel has asked for an order that if the defendant should refuse to execute the proper documents to effect the roll-over of the R.R.S.P.'s, that the Registrar be authorized to sign them in his place. I make that order.

[19] I consider success to be divided: the plaintiff succeeded in including the life insurance and shares; the defendant succeeded in equalizing the tax burden and changing the lump sum spousal support order. For that reason each party will bear his or her own costs.

"R.M.J. Hutchinson, J."

The Honourable Mr. Justice R.M.J. Hutchinson

May 18, 2001 -- Memorandum to the Legal Publishers advising that on page 4, paragraph 4, fourth line of the Reasons for Judgment should read:

"... The latter were sold on 31 August 2000 for \$39,970; the former was cashed in ..."

And on page 5, paragraph 5, second line, should read:

"... pay from sick leave benefits of \$30,940 per annum. That was a ..."

June 6, 2001 -- Corrigendum to the Reasons for Judgment issued by Mr. Justice Hutchinson advising that on page 4, paragraph 4, fourth line should read:

"... The latter were sold on 31 August 2000 for \$39,970;"

And on page 5, paragraph 5, second line should read:

"... pay from sick leave benefits of \$30.940 per annum."

September 5, 2001 -- Corrigendum to the Reasons for Judgment with neutral citation 2001 BCSC 1263 issued by Mr. Justice Hutchinson advising that on June 6, 2001, a corrigendum was issued to my Reasons for Judgment on 8 May 2001.

Paragraph four of page four of the original reasons dated May 8, 2001 indicated that Noranda shares were sold for \$3,9970. This was changed inadvertently to \$39.970 by the Corrigendum of 6 June 2001. The actual amount of the sale was \$3,970 and my original reasons should have read \$3,970.00.

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