

CANADA / JUDGMENT

McCallum v. McCallum

2001 BCSC 1493

COURT

Supreme Court of British Columbia

DECIDED

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2001 BCSC 1493 Docket:

D25168

Registry: Vernon

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ARLENE ELLEN MCCALLUM
PLAINTIFF

AND:

GARY MCCALLUM
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MEIKLEM

Counsel for the Plaintiff: A.M. Gaudette

Counsel for the Defendant: D.M. Frechette

Date and Place of Trial: June 21, 22, 25, 2001

Vernon, BC

INTRODUCTION TO THE ISSUES

- [1] This trial involved the appropriate division of family assets upon the dissolution of a marriage of two years and seven months. The parties cohabited for approximately one year prior to their marriage. Ms. McCallum seeks an equal division of assets but the defendant says that she should receive a maximum of ten percent of the current somewhat diminished value of family assets. The rationale for the defendant's position is that he brought liquid

assets worth approximately \$229,000 into the relationship whereas Ms. McCallum brought in no assets of value, and, notwithstanding his further disproportionate contribution of labour to the construction of their Kelowna home, their net worth is less than what it was at the time of the marriage.

- [2] Ms. McCallum asserts that the family assets have a net value of approximately \$334,370. Mr. McCallum asserts that the unfinished matrimonial home is the only family asset remaining undivided and the equity in it is only \$130,000, based on an "as is" appraisal. So, whereas Ms. McCallum claims a compensation payment of \$167,850, Mr. McCallum says that a payment of ten percent of \$130,000 and retention of personal property in her possession would be more than fair, considering their respective contributions. He says that even that distribution would leave him bearing the brunt of the diminution in their combined net worth.
- [3] Counsel for the plaintiff suggested for the first time in closing argument that any apportionment other than an equal division was foreclosed because the very scant statement of defence did not include any "application" sufficient to invoke the jurisdiction to reapportion that is set out in sections 65 and 66 of the Family Relations Act, R.S.B.C. 1996, c. 128 (The FRA). Furthermore, he argued, an amendment to include such an application should not be permitted at this late stage because it would be unduly prejudicial to the plaintiff.
- [4] This submission highlights an obvious shortcoming in the defendant's pleadings, but, fortunately for the defendant, the prayer for relief in the statement of claim is not limited to seeking a reapportionment in favour of Ms. McCallum. Rather, it reads:

The plaintiff seeks the following relief under the Family Relations Act ...

- (a)
- (b)
- (c) pursuant to Part 5, a determination of family assets and such orders as to division and distribution of the assets accumulated by the Plaintiff and the Defendant during the marriage, including declarations of ownership and right to possession of specific assets as may be appropriate under the circumstances;
- [5] Thus there is an application before me which invokes the s. 65 and s. 66 jurisdiction. Even if that were not so, I would be loathe to find that amendment would prejudice the plaintiff when the submission comes at the end of a trial in which the issue of the appropriate division of family assets was clearly joined and fully developed in the evidence.

HISTORY RELATING TO FAMILY ASSETS

- [6] Prior to meeting Ms. McCallum in the spring of 1996, Mr. McCallum owned a house on Lakeville Court in Kelowna. After they met, he was working in the residential construction field in Whistler and Ms. McCallum moved into his house as a matter of mutual convenience, prior to the commencement of a committed relationship. Mr. McCallum dates the commencement of their formal cohabitation as the late fall of 1996, whereas Ms. McCallum says they were serious and in a sexual relationship as of June of 1996. Not much turns on pinpointing the commencement of their formal cohabitation, but I note that the completion date of the sale of the Lakeville Court property was September 30, 1996, and the solicitor's reporting letter of October the 2nd, 1996 was addressed to Mr. McCallum at Campbell Road, a property owned by Ms. McCallum's parents and rented by the parties.
- [7] The parties rented the Campbell Road property from October 1996 until April 1999, when they moved into the garage of the new home that they were building on Delphern Court in Kelowna. While at the rented home, they informally shared the rent and other living costs. Ms. McCallum was employed throughout this period and Mr. McCallum was employed part of the time and working on constructing the new matrimonial home on Delphern Court the remainder of the time. Mr. McCallum had purchased the Delphern Court lot in March 1997 for \$132,485.00, which came from the sale proceeds of his Lakeville house that totalled \$209,980.00. He commenced construction of the house on July 1st, 1997, and worked full-time on that project for six months before returning to his former employment as a carpenter at Sunshine Farms. His savings were expended on living expenses and construction materials by the time of the parties' wedding in September 1997, and a line of credit was obtained to continue the construction of the home.
- [8] The current balance on the line of credit is approximately \$150,000.00. Some of the advances on the line of credit were probably used to pay interest on earlier advances, but Mr. McCallum testified that, at least from the time they moved into the garage of the new house in April 1999, he paid the interest on the line of credit from his employment income while Ms. McCallum paid their living expenses from her income.
- [9] In the years 1997 through 1999 inclusive, Ms. McCallum earned a net income totalling \$84,582 and Mr. McCallum's income from employment totalled \$53,535.
- [10] Mr. McCallum's records indicate a total expenditure on the house, including the purchase of the lot, of \$303,579.83. The house was appraised as of April 2001 at \$355,000 if completed, but at \$280,000 "as is", because it would cost \$50,000 to complete and 50% of that cost should be deducted for a contingency reserve, "profit taking", and an incentive to purchase. The work remaining to be done, (which is within Mr. McCallum's abilities) includes installing interior doors, other finishing carpentry, and outside stucco. Mr. McCallum estimates out-of-pocket costs to finish the house would be \$20,000.

- [11] Mr. McCallum conceded that Ms. McCallum made direct financial contribution by buying building materials and components such as concrete, shower doors, paint, wallpaper, lights, bathroom fixtures, fruit trees, and sundeck glass, but he calculates her direct financial contribution at approximately \$7,000. He agrees that she worked hard and for many hours during the construction, but he also accused her of delaying construction by as much as a year. It is apparent that the house has many unique features and some relatively expensive materials and features are incorporated in the construction.
- [12] Ms. McCallum has retained chattels which she values at \$15,200 (including \$6,000 for a car) and she has compiled a list of 70 chattels or categories of chattels which she asserts are family assets acquired during the marriage which Mr. McCallum retains possession of and which have a value of \$54,220. This listing includes his Ford pick-up valued at \$11,000, which other evidence indicates is encumbered by a loan with a balance of \$10,000. There is a profusion of issues in respect of this list. Mr. McCallum asserts that some of these items are gifts to him from Ms. McCallum, others were his separate property long before the marriage, and others he has either previously offered to deliver to Ms. McCallum or offered to do so during the trial. Mr. McCallum says he cannot recognize some of the items described; one item, an engagement ring, previously belonged to Mr. McCallum's mother and has since been returned to her. On some items, Ms. McCallum's evaluation is the only dispute.
- [13] There are RRSP assets on both lists and the parties agree that each should retain the RRSP in their own names, and these need not enter into the division made by the court.

THE APPLICABLE STATUTE LAW AND CASE AUTHORITIES

- [14] By virtue of s. 56 of the Family Relations Act, R.S.B.C. 1996, c. 128, each spouse is prima facie entitled to an undivided half interest in family assets upon the occurrence of one of several triggering events. The triggering event in this case is the order of divorce granted June 25th, 2001.
- [15] Section 65(1) of the Family Relations Act sets out judicial reapportionment on basis of fairness and provides that:

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,

[16] In a marriage of short duration, where one spouse has brought a major portion of the family assets into the marriage, factors (a), (c), and (f) from s. 65(1) will generally result in an equal division being found to be unfair, unless there was an offsetting unequal contribution to the acquisition of assets during the marriage or a compelling situation in respect of the self-sufficiency needs of the spouse who brought relatively little into the relationship.

[17] The defendant has referred the court to several decisions applying that principle to effect distributions in the range of 7.5% to 15% to spouses who brought few or no assets into the marriage:

Elwin v. Elwin , an unreported B.C.S.C. decision, Vancouver Registry No. D108181, January 4, 2000, [2000 BCSC 2]

Stobbe v. Stobbe , an unreported B.C.S.C. decision, Vancouver Registry No. A871165 and Chilliwack Registry No. C850098, October 20, 1987

Jensen v. Jensen , an unreported B.C.S.C. decision, Vancouver Registry No. A921967, November 18, 1994 [1994] B.C.J. No.2603

Zaurrini v. Zaurrini , (1981) 22 R.F.L. (2nd) 161 (BCCA)

Stammmler v. Stammmler , (1979) 37 R.F.L. (2nd) 83 (BCSC)

Chau v. Tsang , (1982) 27 R.F.L. (2nd) 187 (BCCA)

Patten v. Patten , an unreported B.C.S.C. decision, Nanaimo Registry No. 5920/008445, October 1, 1992

[18] In Wallace v. Wallace, unreported, Victoria Registry No. 5939/32095, August 23, 1999, Low J. stated, in paragraph 11, after citing a passage from Zaurrini (supra):

Where the marriage (including any period of pre-marriage cohabitation) was five years or less and one spouse contributed little or nothing to the acquisition of the family asset being considered, in the absence of special circumstances, that spouse will receive 10% to 20% of the asset. The cases I find applicable are: Eichgruen v. Eichgruen (Unreported October 24, 1996), Vancouver no. F950625 (B.C.S.C.); Koski v. Koski (Unreported June 5, 1997), New Westminster No. D035002 (B.C.S.C.); Moore v. Moore (Unreported November 27, 1995), Kamloops No. 10334 (B.C.S.C.); Samson v. Samson (1996), 26 R.F.L. (4th) 333; Semple v. Houston (1996), 23 R.F.L. 339 and Shaw v. Shaw (1995), 14 R.F.L. (4th) 340 (B.C.S.C.).

- [19] The plaintiff's authorities include two Court of Appeal cases where the trial judge's findings of unfairness in equal divisions were overturned. The first of these is *Baird v. Baird*, [1981] 130 D.L.R. (3d) 128 (B.C.C.A.). That case involved a five and one-half year marriage. There had been no unilateral major contribution of assets by one spouse. The parties had agreed on an equal division of all assets other than the matrimonial home. That home was one that Mr. Baird's mother had inherited and which the parties purchased from Mr. Baird's parents for \$48,000 with a \$3,000 down payment and his parents carrying an interest free mortgage for the balance. Mr. Baird had paid \$2,500 of the \$3,000 down payment and worked full-time during the marriage whereas Mrs. Baird had worked sporadically. The Court of Appeal found that the trial judge's reasons for reducing the wife's interest to 25% were not based on the factors set out in the F.R.A. and held "there is no reason in this case to consider the length of the marriage as somehow making it unfair that Mrs. Baird should have one-half of an asset acquired during that marriage".
- [20] The second case was *Murchie v. Murchie*, [1984] B.C.J. No. 1582 (B.C.C.A.). That case involved a twelve-year marriage to which the defendant husband had brought much of the property comprising the family assets. At the time of trial the husband was in possession of assets worth \$687,500 and the wife in possession of assets totalling \$193,000. The trial judge ordered that each of the parties should keep the property in their possession with the exception that the husband should transfer RRSP's worth \$52,000 and a cash payment of \$20,000 to the wife. In overturning the trial judge, the majority decision of Lambert, J.A. at para. 32 set out the following:

The husband had significant assets at the start of this marriage, including most particularly his dental practice and the associated management of that practice. As the trial judge said, he was at that time a person of means. In a comparatively short marriage of one or two years the fact that the asset was brought into the marriage by one of the spouses and not created by the joint efforts of the spouses would be a reason why equality of distribution of that asset in that marriage would be unfair. But parties marry in contemplation of each other's assets and by entering marriage they give up other opportunities of doing other things. In my opinion when two people in their forties marry and stay married for the length of time which the parties have stayed married in this case, it is not unfair that both spouses should share equally in the assets brought into the marriage by each of them.

- [21] The plaintiff also relies on the case of *Formosa v. Formosa* (1983), 37 R.F.L. (2d) 217 (B.C.C.A.). The Court of Appeal upheld the trial judge's apportionment of the matrimonial home equally between the spouses. It was a relatively short marriage of five and one-half years and the husband had owned the home for approximately three and one-half years before the marriage, but there was evidence that subsequent to the marriage the wife, who had some assets of her own, advanced \$10,000 to help retire the mortgage at the same time as the husband advanced \$9,000 for that purpose. In addition, the wife assisted the husband in renovating the property. The report of the case does not reveal the value of the home or the equity of the parties at any point in time.

- [22] The plaintiff also relied on *Elsom v. Elsom*, [1989] 1 S.C.R. 1367. In that case the Supreme Court of Canada held that the Court of Appeal had erred in interfering with the trial judge's exercise of his discretion under the Family Relations Act. The marriage in that case was one of nine years duration and all the assets, both those used for family purposes and for business purposes, were brought to the marriage by the husband. The wife was awarded a 25% interest in the assets worth \$1,450,000. The case was not relied upon for the specific apportionment but for the principles enunciated that the Family Relations Act does not require an assessment of individual items of property and does not require the court to effect a division of property that it feels is proportionate to the contribution that each spouse has made to the particular assets or groups of assets.
- [23] Ms. McCallum's counsel also relied on the unreported case of *Lynch v. Bysse*, [1988] B.C.J. No. 197, Vancouver Registry No. A863102, (McKinnon, J.). This was a four year marriage case, where, although the parties had more or less equal net worth at the time of the marriage, Mrs. Lynch supported a submission for reapportionment with the circumstances that she owned much more at marriage than she was left with at separation, and that Mr. Bysse had dissipated the estate by spending large sums for which both parties were liable. The court stated:

Most persons who separate have either more or less money than they started out with. In this litigation, the parties each have less. I have already discussed the reasons for this. This is not a consideration in the division.

Counsel for the plaintiff placed great emphasis on the "dissipation" of assets by Mr. Bysse. It is a fact that he used mortgage money, obtained by both parties signing the loans, to pay his share of expenses. Mrs. Lynch, on the other hand, used her income to pay hers. Now she is asked to share the existing mortgages. This undoubtedly seems unfair to the plaintiff. Nevertheless, I do not consider it to be cause to order an unequal division. We do not scrutinize the income and spending habits of a husband and wife with a view to distribution. That is not the intent of the legislation. To do so would result in very few equal awards.

- [24] Mr. McCallum admits that Ms. McCallum's father has advanced approximately \$30,000 to her since the date of separation. Some of these funds retired pre-existing debt as well as property taxes and insurance in respect of the matrimonial home, while other advances relate to items which are clearly not family debts, for example, advances for living expenses in July 2000, car repairs in October and November of 2000, legal fees to Ms. McCallum's solicitor in June of 2000, telephone bills in July, September, and October of 2000, and car repairs in October and November of 2000.

FINDINGS AND CONCLUSIONS

Family Asset Valuations

Matrimonial Home on Delphern Court

- [25] I think it is highly improbable that Mr. McCallum will sell this property while it is unfinished because that would be in effect discounting its "as finished" value by \$30,000 for labour that he can supply himself, plus an additional \$25,000 for the incentive discount or "profit taking" described in the appraisal. (I arrive at the \$30,000 figure by deducting his estimate of the out of pocket costs remaining from the \$50,000 estimate in the appraisal) He, of course, is not required to contribute a portion of the value of his labour required to finish the house to Ms. McCallum at this point in time. I value this asset at \$305,000 for the purposes of this action, by adding the incentive discount back into the "as is" value.

Chattels and Other Personal Property

- [26] Mr. McCallum is in possession of an automobile with insignificant equity. Ms. McCallum is in possession of an automobile of approximately \$6,000 value. Household furnishings, effects and tools always present evaluation difficulties. Ms. McCallum's "Scott Schedule" values the total of such items at approximately \$137,500, which reflects the values set out in her October 2000 Property and Financial Statement. At trial she produced three lists attempting to divide the entirety of the family assets into, firstly, items which Mr. McCallum brought into the relationship and still possessed, secondly items which were acquired during the relationship which he possesses, and thirdly, items acquired during the relationship which she possesses. The total of the values Ms. McCallum introduced to the first list is \$57,250; to the second list excluding automobiles, she attributes \$43,220; to the third list she attributes a value of \$15,200.
- [27] Both parties testified in detail with respect to these lists and it is apparent that the second listing includes items, which were intended to be gifts from Ms. McCallum to Mr. McCallum, items which should have been on list 1, and some double entries. Also, as I have indicated above, Mr. McCallum indicated a willingness to deliver or surrender several items to Ms. McCallum. Nevertheless, after the necessary adjustments are made in light of the evidence, it is clear that Mr. McCallum is in possession of personal chattels with a value exceeding the value of those in Ms. McCallum's possession by approximately \$12,000, even after the delivery of the items he has offered, being: items 9, 11, 12, 14, 16, 19, 27 - 31, 60, and 63 under Tab 44 of Exhibit 3. My finding is that Mr. McCallum would remain in possession of property worth approximately \$30,000 while Ms. McCallum would be in possession of property worth \$18,100.

The Family Debts That are Relevant to the Division of Property

[28] I find that \$25,700 of the funds advanced by Mr. Brenner was used to retire family debt. The other family debts are the line of credit in the amount of \$150,000, and \$2,900 of credit card debt incurred by Ms. McCallum for family expenses prior to separation. I have excluded in this listing the financing relating to the Ford pick-up remaining in Mr. McCallum's possession, because I also excluded it in the chattel valuations determined above.

Division and Reapportionment of Family Assets

[29] I find that an equal division of property would be unfair taking into account the short duration of the marriage and the significantly disproportionate contributions of assets to the marriage, factors which fall into the categories described in sub-subsections 65(1) (a), (c) and (f) of the Family Relations Act. From a market value perspective there has been a significant dissipation of the joint net worth of the parties since the commencement of their cohabitation. I do not agree with Mr. McCallum's attribution of the fault for this solely to Ms. McCallum. They made joint decisions which resulted in their matrimonial home being overbuilt, in other words placing high quality materials and a great deal of labour into quality features and components, the value of which is not reflected in the market value of the home. In addition, some of Mr. McCallum's capital was dissipated in living expenses. The earnings of both parties were used for living expenses, construction costs, and acquisition of chattels.

[30] In my opinion, applying the provisions of s. 65 and s. 66 of the Family Relations Act and the pertinent case authority, there should be an equal division of chattels and personal property acquired during the relationship and of the unsecured family debts incurred during the relationship. The line of credit obligation is clearly tied to the real property, although there is no formal legal mortgage, and it should be treated as reducing the equity of the parties in that asset. I conclude that Ms. McCallum is entitled to a 15% interest in the equity in the Delphern Court home, which I have determined to be \$155,000.

[31] In summary, therefore, Mr. McCallum shall deliver to Ms. McCallum the chattels specified in paragraph 26 above and make the following compensation payments:

- a) \$6,000 to equalize the division of personal property acquired during the relationship; provided, however that Mr. McCallum is at liberty, subject to the time limitations I set out in this paragraph, to make this compensation payment "in kind", by way of requiring Ms. McCallum to designate those items listed in Tab 44 of Exhibit 3 of a total value of \$6,000 (as valued on that list) that she wishes to recover, and then delivering the designated items to her. If he elects to proceed in this fashion, he shall advise Ms. McCallum of his election within 21 days of the date of release of these reasons for judgment, and she shall, within 10 days of receiving his notice, choose the items she will receive, and communicate those choices to him, along with delivery options. Mr. McCallum shall then deliver the chosen items within 10 days of receiving her notification. If Ms. McCallum fails to communicate her

choices within the required time frame, Mr. McCallum may designate the items and have them delivered to her. The parties are at liberty to seek directions in respect of this order.

- b) \$14,300 as his share of the personal debt that has been assumed by Ms. McCallum, (that is, one-half of the family portion of her indebtedness to her father and of her credit card debt);
- c) \$23,250 in respect of her 15% interest in the Delphern Court property.

[32] In my view each party should bear their own costs unless there are circumstances that impinge on the issue of costs that I have not yet been made aware of. The parties are at liberty to make further submissions in respect of costs if that is the case.

"I.C. Meiklem, J."

The Honourable Mr. Justice I.C. Meiklem

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