
CANADA / JUDGMENT

Mitchell v. Mitchell

2008 BCSC 1440

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1440 Mitchell v. Mitchell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mitchell v. Mitchell,

2008 BCSC 1440

Date: 20081028

Docket: E073028

Registry: Vancouver

Between:

Marie Antoinette Berthe Christiane Mitchell

Plaintiff

And

William Bruce Mitchell

Defendant

Before: The Honourable Mr. Justice Slade

Reasons for Judgment

Counsel for the Plaintiff:

M.R. Ellis, Q.C.

Counsel for the Defendant:

J.A.W. Schuman

Date and Place of Trial:

June 16-20, 2008

Vancouver, B.C.

I. OVERVIEW

- [1] The plaintiff is 60 years of age. The defendant is 66.
- [2] They met in 1966, and started living together in 1967. They were married in 1969.
- [3] There are two children, a daughter born in 1971, and a son born in 1975.
- [4] The plaintiff attended to the home and children up to 1983, when she returned to the work force, part-time, as a bank teller.
- [5] In 1989, the parties purchased the home in which they resided until their separation.
- [6] The defendant was employed by the Provincial Government as a court reporter. In 1995, the Province discontinued providing court reporter services, and thereafter the services were provided by private firms. The defendant, together with two partners, started their own business to provide court reporting services. The plaintiff trained as a scopist. Her work involved the preparation of transcripts from the phonetic record of testimony in examinations for discovery, and at trial.
- [7] The business appeared to prosper. The matrimonial home was mortgage-free. They also owned a vacation cottage in Birch Bay, in the State of Washington.
- [8] In November 1999, the parties, together with the defendant's brother, purchased a residential apartment in a building on Robson Street. The parties purchased another apartment in 2001, and three apartments in 2004. They also purchased a one-third interest in yet another apartment. Their interest in the latter, and in one of the apartments owned entirely by them, were later sold. The proceeds were invested in the purchase of another apartment after the separation. All of the apartments are in the same building.
- [9] The plaintiff was not actively involved in the purchase of the apartments, or the business of apartment rentals. The defendant informed her of the various acquisitions, and registered their interest in each apartment in joint tenancy. He attended to every aspect of the renovation, maintenance, and furnishing of the apartments. They were generally rented out, furnished, to short-term occupants. Rents were paid in cash, and cash was used to cover all expenses.
- [10] The relationship between the parties changed in December 2003. The defendant announced that their marriage was over, and moved into a basement suite in the matrimonial home. The plaintiff remained in the home until the end of October 2004. The defendant continued to reside in the home, and the upstairs and downstairs suites were rented out from time to time. The home was sold in April 2008.

- [11] The plaintiff continued working in the defendant's business, part-time, until late 2007, when ill health prevented her from continuing. She had suffered a heart attack in April 2006 and, during an emergency angioplasty, suffered a second heart attack. She suffered a third heart attack in April 2007. She suffers from numerous ailments, and is unable to work.
- [12] The defendant continues to work as a self-employed court reporter, and is one of three shareholders in a company that provides these services.
- [13] The defendant, at all times in the course of the marriage, managed the finances. The plaintiff was uninformed as to his income from employment, and the income from the business of apartment rentals.
- [14] The defendant deals in cash. Rental receipts are in cash, and cash is paid to cover expenses. It appears, in relation to the apartment rental business, that no regular record is kept of receipts and disbursements.
- [15] As of May 2008, the approximate amount of the balance outstanding on mortgages of the former matrimonial home (which was mortgaged for \$165,000 in connection with the acquisition of the apartments), plus the outstanding mortgage balances on the apartments, totalled \$665,000.
- [16] The appraised value of the apartments retained in the joint names of the parties as at April 2008 totalled \$1,573,000. The former matrimonial home was sold in April 2008 for \$1,100,000. The combined equity is approximately \$2,008,000.

II. ISSUES

[17] These are the issues:

1. Is the defendant in possession of undisclosed family assets?
2. Is an adjustment, by way of reapportionment, indicated in relation to a potential tax liability on account of revenue from apartment rentals?
3. What is the appropriate division of known family assets?
4. Should income additional to the defendant's reported income be imputed for purposes of the determination of spousal support?
5. What is the appropriate level of spousal support?

III. DISCUSSION

1. Undisclosed Family Assets

- [18] The plaintiff says that the defendant has failed to disclose his income from the reporting business, and from apartment rentals. It is contended that this would explain his accumulation of sufficient capital to invest in the acquisition of apartments at a cost that substantially exceeded monies borrowed, and secured by mortgages, for the purchase of those apartments.
- [19] The plaintiff says that the defendant's income, as reported in his income tax returns and as indicated in his Form 89 financial statement fail to reflect all of his income from the court reporting business, and the net receipts from the rental of the apartments. In addition to the defendant's ability to fund the purchase of apartments, she points to his ability to raise \$85,000 to advance to their daughter, and the plaintiff's extravagant lifestyle. Although the defendant claims a modest income, he has, since the separation, taken several trips abroad. He has an extensive wardrobe of fashionable suits, shoes, and accessories. He has three large automobiles. These are old, and have some value as collectibles. All are operable, and are used for transportation.
- [20] The plaintiff also points to the defendant's apparent failure to make full disclosure of his financial records. He maintains that he delivers his financial records to his accountant, who prepares his tax returns. No such records have been listed or produced. His position in relation to such documents is inconsistent with his evidence that he keeps no ledgers of rental receipts and expenses.
- [21] The exchange medium for all transactions that relate to the apartments is cash. It is the defendant's evidence that there is no income from rentals to report, as expenditures are equal to receipts.
- [22] The defendant acquired interests in a total of seven apartments. The interest was registered, in relation to each apartment, in joint tenancy with the plaintiff. One apartment, apartment #304, was sold, and the net proceeds from the sale were applied to the purchase of apartment #701. The parties shared, as joint tenants, a one-third interest in apartment #605. It is the defendant's evidence, and that of his brother, that the defendant sold the parties' interest in apartment #605 to the defendant's brother, who previously held a one-third interest. I accept the defendant's evidence that he has no beneficial interest in apartment #605.
- [23] The sum of the purchase prices for all apartments except apartment #605 is approximately \$1,042,000. The sum of all loans, secured by mortgages at the time of the various purchases, also excluding apartment #605, is \$572,750. The difference is \$469,250. When apartment #304 was sold, the net proceeds of approximately \$141,000 was applied to the purchase of apartment #701. If this sum is deducted from the last mentioned figured, the balance required to fund the initial purchases of all apartments except #605, totals \$328,250.

- [24] There has, in relation to some of the apartments, been further borrowing. As of the trial date, the encumbered amount was approximately \$664,500. If the new money from refinancing, approximately \$92,000, was applied to the purchase of apartments, the unfinanced contributions would still amount to approximately \$230,000.
- [25] It is apparent that, over a period of eight years, the defendant has had sufficient income to apply, at a minimum, \$30,000 each year to the purchase of apartments. This, combined with the evidence of his lifestyle, and the advance of substantial funds to the parties' daughter, indicates an income very substantially in excess of the approximately \$44,000 claimed by the defendant.
- [26] The probability of income substantially in excess of that disclosed does not, when considered together with the financial history of the acquisition of assets that have been disclosed, support a finding that, in probability, there are undisclosed assets. To the contrary, it is plain on the evidence that undisclosed income has been applied to the acquisition and maintenance of disclosed assets.

2. Apartment Rent Revenue

- [27] The plaintiff's concern is that the Canada Revenue Agency may call upon her, as a joint tenant in income-producing properties, to account for income derived from the receipt of rents.
- [28] It is the defendant's evidence that expenses associated with the acquisition and operation of the apartments have been substantially the same as the rents received. Whether the CRA will take the matter up with the plaintiff, or either party, cannot be known at this time.
- [29] The defendant operated the rental business without any involvement of the plaintiff. It was his evidence that the business of apartment rentals did not generate any revenue over expenses. I accept his evidence. No adjustment for a potential liability is indicated.

3. Division of Family Assets

- [30] There will, subject to certain adjustments discussed below, be an equal division of the value of the family assets.
- [31] The defendant has, at all times before and after the parties separated, received and unilaterally controlled the expenditure of all rents generated from real property held as family assets. These included the former matrimonial home and the apartments. The matrimonial home, once mortgage free, was mortgaged as security for a loan of \$165,000 used for the purchase of apartments. After the separation, arrears of property taxes accumulated in relation to the former matrimonial home. Property taxes were owed for each of the five remaining apartments as at the date of trial.
- [32] The defendant continued to reside in the matrimonial home after the departure of the plaintiff, and parts of the home were rented to others from time to time.

[33] It is apparent that the revenues generated, or capable of being generated, from the rental of the apartments, was adequate to satisfy all obligations for mortgage payments, taxes, strata fees, and the operating expenses associated with the business of renting the apartments. If, after separation, any debt was accumulated for the preservation, upkeep, and maintenance of any of the real property, it was due to the defendant's use of the rental money for his sole benefit.

[34] There will be no adjustment of the plaintiff's entitlement on account of unpaid property taxes, mortgage payments in arrears, unpaid strata fees, unpaid utility charges, or any other expenses that relate to the real property.

[35] The plaintiff did not plead reapportionment in her statement of claim. If my attribution to the defendant of the above-mentioned obligations amounts to reapportionment, I would allow the amendment sought by the plaintiff at the opening of the trial. There is no prejudice to the defendant, as he alone was in receipt of money generated from the use of the family assets, and exercised exclusive control over the use of these revenues. There has been no suggestion that a claim for reapportionment of debt incurred due to choices made by the defendant for the use of revenues from the real property would have been met with a claim for reapportionment by the defendant on some other basis contemplated by s. 65 of the Family Relations Act.

[36] The value of the reporting business in which the defendant is a one-third owner is represented by the accounts receivable of \$58,000. The one-third interest is a family asset, and the plaintiff's interest is valued at \$9,666.67.

[37] I accept Mr. Falcus' opinion of the value of the remaining apartments, as of the date of trial. Those are as follows:

1.

Apartment #513 - 1270 Robson Street

\$266,000

2.

Apartment #406 - 1270 Robson Street

\$300,000

3.

Apartment #504 - 1270 Robson Street

\$277,000

4.

Apartment #802 - 1270 Robson Street

\$360,000

5.

Apartment #701 - 1270 Robson Street

\$370,000

TOTAL:

\$1,573,000.00

- [38] For the purpose of calculating the value of the plaintiff's interest in the apartments, the mortgage balances, as of the date of trial, will be used. To the extent that any mortgage balance includes arrears in monthly payments, the amount of such arrears will be deducted.
- [39] There is evidence that the defendant had, in the past, collected gold coins. I accept his evidence that these were disposed of prior to the separation.
- [40] I accept Mr. Waters' valuation of the three automobiles. The total value of the 1968 Chrysler Crown Imperial, the 1960 Chrysler Imperial, and the 1966 Lincoln is \$23,500. The plaintiff's interest is valued at \$11,750.
- [41] I accept the plaintiff's evidence that substantially all of the furnishings were left in the former matrimonial home when she moved out. The value of the plaintiff's interest is \$11,150.
- [42] The combined value of the apartments, together with the sale price of the matrimonial home at \$1,100,000, totals \$2,673,000. The balance owing on the mortgages on the matrimonial home, and apartments, totals \$664,500. As at the date of trial, the indicated equity in real property was \$2,008,500.
- [43] An equal division of assets would indicate that each party should receive, in cash or kind, approximately \$1,004,000, plus one-half of the value of the automobiles and antique furniture. The plaintiff will receive \$800,000 from the net proceeds from the sale of the matrimonial home. Title to the five apartments will be transferred to the defendant. The defendant will pay compensation to the plaintiff in an amount equal to the difference between \$800,000 and her share of the value of the real estate, the automobiles, and the antique furniture. One-half of the amount of the compensation order will be secured by a mortgage registered against apartment #504. The other half will be secured by a mortgage registered against apartment #701. Both mortgages will mature on January 31, 2010. Both will bear interest at a rate of 7% annually.
- [44] The division of assets would leave any taxable capital gain in the hands of the defendant if he chooses to sell any of the apartments. In order that there be finality and certainty, there will be an adjustment of the amount to be paid to the plaintiff in order that the defendant receive a credit against her share of any future tax on capital gains.

- [45] The difference, in aggregate, between the purchase price of the apartments and their value at the date of trial was \$816,000. The plaintiff's share would be \$408,000, of which one-half, \$204,000, would be taxable.
- [46] If the parties remained married, it may be assumed that they would, if liquidating their assets, do so in a way that would result in the capital gain being taxed at the lowest possible marginal rate. It may be assumed, based on the approach taken by the defendant to determine what will be reported as income, that he will seek to minimize the tax consequences of the disposition of the apartments. Contingencies to be taken into account include his ability to retain the apartments indefinitely. He may never sell all of them. If sold in the future, the attribution of capital gains exposure to the plaintiff would be discounted for present value. All considered, I would attribute to the plaintiff a potential for a capital gains tax exposure of 60% of \$204,000, at an average marginal rate of 30%. Accordingly, the compensation order will be adjusted by a reduction of \$36,720. This will be effected by a reduction of \$18,360 in the amount secured by each mortgage.
- [47] The defendant's B.C. Government pension will be divided pursuant to Part 6 of the Family Relations Act. The parties' RRSPs will be divided equally. CPP benefits will be divided as provided for in the Canada Pension Plan Act and regulations.
- [48] The defendant will reimburse the plaintiff the sum of \$810 for her Medical Service Plan expenses.
- [49] The amount awarded in relation to MSP expenses, together with any arrears of spousal support, and any outstanding orders for costs, will be paid to the plaintiff out of the remainder of the defendant's share of the proceeds from the sale of the matrimonial home.
- [50] The defendant is the sole owner of the automobiles. Each party will retain, respectively, any items in their possession.

IV. SPOUSAL SUPPORT

1. Imputation of Income to the Defendant

- [51] On the hearing of the plaintiff's application for interim spousal support, the defendant, then self-represented, claimed that his annual income was between \$65,000 and \$85,000.
- [52] The defendant, in his most recent Form 89 Financial Statement, represented that his annual income is in the order of \$44,000.
- [53] As noted above, the defendant has been able to invest approximately \$30,000 annually in the acquisition of real estate, in particular apartments. If apartment rentals did not generate any net revenue, he has undisclosed income from other sources.
- [54] I take account of the defendant's lifestyle, and his ability to make substantial annual investments out of income, in imputing to the defendant an annual income of \$90,000.

2. Spousal Support

[55] The plaintiff is, due to ill health, unable to work.

[56] Based on the defendant's income, at \$90,000, the Spousal Support Advisory Guidelines indicate a range for monthly spousal support between \$2,813 and \$3,570. The defendant will pay monthly spousal support in the sum of \$3,300, commencing November 1, 2008.

V. COSTS

[57] Both parties requested an opportunity to speak to costs after the release of my reasons. They are liberty to set the matter down for a hearing on costs or, it both prefer, to make written submissions instead.

"H.A. Slade J."

The Honourable Mr. Justice H.A. Slade

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