

CANADA / JUDGMENT

Morck v. Morck

2012 BCSC 468

COURT

Supreme Court of British Columbia

DECIDED

30 March 2012

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2012 BCSC 468 Morck v. Morck IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Morck v. Morck, 2012 BCSC 468 Date: 20120330 Docket: E5729 Registry: Chilliwack Between: Colleen Eva Morck Claimant And Michael Anders Morck Respondent Before: The Honourable Mr. Justice Curtis Reasons for Judgment Counsel for the Claimant: David H. Hart Counsel for the Respondent: Heidi A. Taylor Place and Date of Hearing: New Westminster, B.C. March 16, 2012 Place and Date of Judgment: Chilliwack, B.C. March 30, 2012

- [1] Michael Morck has applied for an order to terminate spousal support, or in the alternative, to reduce it.
- [2] The Morcks were married May 31, 1981 in Coquitlam, when he was about 23 years of age, and she 25. They had sons born in 1984 and 1987 and separated June 15, 2005 by which time both children were independent.
- [3] After the separation, Colleen Morck started a court action and the parties signed a separation agreement dated October 19, 2006.
- [4] The separation agreement included the following: D. Colleen and Michael have agreed to enter into the Agreement hereinafter set forth to settle, inter alia, the issues of maintenance or support, and division of property and responsibility for debts. It is the intention of the parties that this agreement shall once and for all finally resolve all such issues and this agreement is entered into in lieu of any action contemplated by either party with respect to any property between them. It is the intention of the parties that this agreement shall continue beyond any dissolution of their marriage, should the parties be divorced, save and except as elsewhere provided for herein. H. It is the desire of Colleen and Michael to settle all maintenance and property matters between them pursuant to the terms of this agreement in contemplation of corollary relief pursuant to sections 15 and 16 of the Divorce Act and in contemplation of claims pursuant to the Family Relations Act, and all Acts in substitution thereto. I. Colleen and Michael have been fully advised by independent counsel of the law pertaining to the setting aside of separation agreements, including but not limited to nondisclosure, fraud, misrepresentation, coercion, duress, undue influence and unconscionability. J. The parties have further been independently advised with respect to the Family Relations Act and, in particular, Sections 65 and 68 with respect to the variation

of separation agreements and settlements and with respect to the law of trusts (in particular, resulting, express and constructive trusts and unjust enrichment). In particular, the parties have been advised and understand the principles contained in *Clarke v. Clarke* (1991), 31 R.F.L. (3d) 383 B.C.C.A. The parties agree the terms of their Agreement hereinafter set forth are "fair" given their respective circumstances and their respective contributions during the marriage and post separation. Colleen and Michael have also taken into account future circumstances and any changes that may occur. The parties agree that this Agreement is "fair" as of the date of its execution and for all future purposes. In the event that, either party shall bring application to override the provisions of this Agreement, it is the parties' intention that this clause shall once and for all finally establish the fact and principle that the Agreement is regarded by both as "fair" and not subject to judicial intervention and reapportionment.

4. C Michael shall pay to Colleen spousal support in the amount of \$3,000.00 per month starting November 1, 2006, such payments to be made on the first of each month. The amount of Colleen's support will be reviewed two (2) years from the date of this agreement without a change in circumstances and in any event upon a change in circumstances, with either party having liberty to apply to a court of competent jurisdiction.
- [5] Michael Morck's interest in the family home on five acres in Mission was transferred to Colleen Morck who increased the mortgage by \$115,000 to pay him. Mr. Morck retained his interest in an electrical contracting business carried on with a partner under the name of Advantage Enterprises Ltd.
- [6] The asset divisions resulted in the following: Colleen Morck ASSETS 1. 9540 Woodward Street \$600,000 2. 1995 Jeep Cherokee 9,000 3. RRSPs 62,000 4. Household furnishings 8,000 \$679,000 DEBTS 1. Existing mortgage \$128,000 2. Added to mortgage 115,000 3. MasterCard 900 \$243,900 NET ASSETS \$435,100 Michael Morck: ASSETS 1. Canaccord RRSP Investments \$100,000 2. 2002 Harley Davidson 15,000 - 25,000 3. Honda dirt bike 1,000 4. Life Insurance policy 2,300 5. Share holdings in Advantage Enterprises Ltd. 207,000 6. Chequing account 1,000 7. Lawn tractor 3,000 8. Equalization payment 115,000 \$444,300 DEBTS 1. Scotialine Visa \$2,000 NET ASSETS \$442,300
- [7] At the time of separation, Colleen Morck was unemployed but planning to become a counsellor. She had experienced mental health issues related to depression of which Mr. Morck was well aware. Michael Morck was employed in his electrical contracting business. His February 2006 financial statement listed his income at \$74,320 annually.
- [8] The Order of Divorce pronounced December 12, 2006 incorporated the spousal support terms of the separation agreement as follows:

2. The Defendant, Michael Anders Morck shall pay spousal support to the Plaintiff, Colleen Eva Morck in the sum of \$3,000.00 per month commencing November 1, 2006. The amount of such support shall be reviewed two (2) years from the date of this order, without a change in circumstances, and in any event upon a change in circumstances, with either party having liberty to apply to a court of competent jurisdiction. That term of the Order was by consent.
- [9] Colleen Morck has not been gainfully employed since the separation and has continued to live in the matrimonial home. Michael Morck continued with the electrical contracting business and moved to Kelowna in May 2006 to expand the business in that area.
- [10] Mr. Morck's income tax returns show the following income: 2007 \$130,916 2008 \$321,431 2009 \$290,234 2010 \$ 80,603
- [11] The business of Advantage Enterprises Ltd. began to decline about 2009 and the company could not support both of the partners. Mr. Morck sold his shares and those of his holding company, Kettle River Holdings Company, to his partner for \$100,000 effective January 1, 2010. In addition to the share price, Kettle River Holdings Company received a dividend of \$425,000 shown in its October 31, 2011 financial statement – this represented a part of the payout of Mr. Morck's interest in Advantage Enterprises Ltd. I also note that Mr. Morck received substantial dividends as part of his earnings from Advantage in 2008, 2009 and 2010.
- [12] After selling his shares, Mr. Morck started a new electrical estimating and consulting business based in the Okanagan called KRH Electrical Services Ltd., however he deposes that business has been slow and that its earnings were only \$4,036.86 in 2010 and that although business picked up in April 2011, all he has drawn from his company was \$1,000 per month April through August. Mr. Morck's 2010 tax return reports his income as follows: Dividends \$ 3,533 Interest \$ 303.72 Taxable Capital Gain from sale of Advantage Enterprises Ltd. \$33,399.74 Withdrawn from RRSPs \$42,823.16 Employment \$ 4,036.86 Total 2010 income \$80,603.04
- [13] As of December 11, 2011 he deposes his income is as follows: Self Employment \$ 5,650 Withdrawn from RRSP \$47,353.18
- [14] In his February 29, 2012 affidavit, Mr. Morck deposes to a \$274,068.29 investment loss in his Canaccord investment account in 2008 and losses of about \$154,000 in investments held by Kettle River Holdings Ltd. since 2008.
- [15] The current asset position of the parties is as follows: Colleen Morck (February 22, 2012 Financial Statement) 1. 9540 Woodward Street, Mission \$612,000 2. 1995 Jeep Grand Cherokee 1,000 3. dirt bike and horse trailer 1,400 4. Investors Group RRSP 26,779 \$641,179.83 DEBTS 1. Mortgage January 7, 2012 \$226,361.82 2. Credit Cards 859.68 \$227,221.50 NET ASSETS \$413,958.33 Michael Morck (February 29, 2012 Financial Statement) 1. Christian Valley Road lot \$116,000 2. Vehicles: 2008 Chevrolet pick-up 2002 Harley Davidson motorcycle 2005 Harley Davidson motorcycle 25,000 5,000 8,000 3. Chequing

account 500 4. Canaccord Capital RRSP 20,000 5. Kettle River Holdings Ltd. 490,849 6. KRH Electrical Services Ltd. <6,000> \$659,349 DEBTS \$0 NET ASSETS \$659,349

- [16] Colleen Morck shows her income as \$36,000 per year in spousal support from Mr. Morck, plus \$7,200 in rent from a Mike Kennedy. Ms. Morck deposes that she has not worked for many years on account of her health, and that she is currently unable to obtain employment as her medical status does not permit it. Attached to her affidavit is a note dated February 19, 2012 from Dr. Matt Blackwood which simply says "Completely unemployable for at least 6 months ... severe depression." Ms. Morck's position is supported by an affidavit from her neighbour Karen Scott who has been her neighbour for 23 years and states as follows:
7. I see the Claimant on average about five times a month, usually at least once a week. Currently, I phone the Claimant daily as I am concerned about her health. I feel the need to check on her often.
 8. The Claimant tends to isolate herself from everyone. I make a point of going to the Claimant's home and encouraging her to get out of the house. There are many times when I am not successful in having the Claimant leave her home or even seeing her. Sometimes, I just leave flowers for her as she does not answer the door, although I know she is home as I see her through the window. There are times when the Claimant does not return my phone calls, so I will go to her house to check on her to ensure she is okay.
 9. The Claimant tells me that she goes for periods of time when she does not sleep, and will also go through periods of time where she sleeps for long periods of time.
 10. I have witnessed the Claimant's battle with depression since prior to the parties' separation and divorce. In my layperson's opinion, I feel that the Claimant's depression has worsened since the parties separated.
 11. The Claimant is anxious and overwhelmed a lot of the time. I assist her with daily issues such as her house insurance, mortgage and maintenance of the property and yard. She stammers and is sometimes unable to get her words out, and is tearful much of the time.
- [17] There is no evidence that Colleen Morck has made any attempt to obtain paying employment since the separation in 2005, and it appears she has no intention of seeking employment in the future. She is 55 years old and it appears she intends to live on spousal support. There is no evidence as to whether she would be eligible for any disability payments because of her medical condition.
- [18] Mr. Morck wrote to Colleen Morck requesting a change in the spousal support because of his financial situation January 26, 2010, March 1, 2010, April 2010 and August 20, 2010. He has deposed "Since selling my interest in Advantage on January 1, 2010, I have had to significantly deplete my RRSPs to continue to maintain the monthly spousal support payments to Colleen. For example, in 2010, I depleted my RRSPs by 42,823.16. In 2011, I have depleted my RRSPs by a further \$40,703.18." Taken at face value, that statement suggests a rather dire financial position, however, an examination of the October 31, 2011 financial

statement of Mr. Morck's holding company, Kettle River Holdings Ltd. shows that in 2010 his company had \$319,924 in cash and in 2011 \$168,384 in cash and \$199,129 in marketable securities, plus the lot in Christian Valley on which the financial statement put a value of \$203,829 rather than the \$116,000 assessed value.

- [19] Mr. Morck is a journeyman electrician and a very experienced electrical contractor. He is clearly not going to be limited to earnings of \$4,036.86 (2010) and \$5,650 (2011). He has the ability to earn at least the income of \$74,000 he was making in February 2006 about the time the \$3,000 per month was agreed to.
- [20] Colleen Morck had medical issues when the separation agreement was entered into that would clearly have been contemplated by both parties at the time. What they agreed should be paid in spousal support was \$3,000 per month with the amount to be subject to review in two years time. When Mr. Morck was making \$130,000 (2007) \$321,000 (2008) and \$290,000 (2009) rather than the \$74,000 he showed in 2006 he obviously felt no need to apply for a review and he did not apply.
- [21] In my opinion, the evidence presented suggests that his current reduced earning circumstances are temporary, and he retains the ability to earn income sufficient to pay the amount agreed to, especially when considered over time rather than on the basis of his worst years.
- [22] I accept that Colleen Morck, at the current time, is unable to maintain gainful employment. It is not clear however that she has been receiving a proper course of treatment for her medical condition. Currently, she remains in need of continued support and is just getting by on the current level of support. I dismiss the application to terminate or reduce the amount of spousal support but I do so on the following terms:
1. The amount of support shall be reviewed two (2) years from the date of this order, without a change in circumstances, and in any event, upon a change in circumstances with either party having liberty to apply to a court of competent jurisdiction.
 2. At the time of the review, if Colleen Morck takes the position that her ability to earn income is limited in any way by her medical condition, she must present medical evidence setting forth a full diagnosis of her condition, a record of her course of treatment, and a prognosis, including specifically an opinion upon her ability to obtain gainful employment as it relates to her medical condition.
 3. Colleen Morck shall provide evidence of the availability of disability payments or assistance for her medical condition. "V.R. Curtis J."

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