
CANADA / JUDGMENT

Moyles v. McCann

2007 BCSC 744

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 744err1 Moyles v. McCann

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Moyles v. McCann,

2007 BCSC 744

Date: 20070529

Docket: E019843

Registry: New Westminster

Between:

Judith Helen Moyles

Plaintiff

And

Larry Douglas McCann

Defendant

Before: The Honourable Madam Justice Koenigsberg

Reasons for Judgment

Counsel for the Plaintiff:

R.L. Taylor

Counsel for the Defendant:

J.S. Harvey

Date and Place of Hearing:

February 1 & May 17, 2007

Vancouver, B.C.

- [1] This matter is concerned with cross applications arising from Minutes of Settlement executed by the parties on February 4, 2005 in an action. Reasons for Judgment were rendered on October 20, 2005.
- [2] The parties' action is a family dispute wherein a division of property and spousal maintenance are the issues. The defendant seeks an order that the action be stayed and an order confirming the Minutes of Settlement. The plaintiff seeks an order that the Minutes of Settlement be set aside and an order for interim spousal support.
- [3] Attached to these reasons is that Judgment wherein is set out a fuller factual background. For clarity as to the issue now before the Court, I set out the legal analysis and result in the earlier judgment:

But for the plaintiff's motion seeking to set aside the Settlement Agreement, the Minutes of Settlement would be confirmed. Although initially suggested, there is absolutely no basis to set aside these Minutes except to the extent that on all the facts they may be "unfair".

The circumstances surrounding the making of the Agreement leading to the Minutes being drafted, and the circumstances surrounding the execution of the Minutes were all circumstances brought about at the insistence of the plaintiff. Having received part performance of the Minutes, she then said the Minutes did not accord with the agreement reached by the parties. If that were the basis upon which this Court should set aside the Minutes, I would not do so.

However, a decision of the Court in *Schlenker v. Schlenker* (1999), 72 B.C.L.R. (3d) 203 (S.C.), sets out a thorough review of the relevant law applicable to the facts of this case. These parties never married but were common law spouses for 24 years. Their Agreement falls under s. 120.1(1) of the Family Relations Act, R.S.B.C. 1996, c. 128. Thus, for the reasons set out in *Schlenker*, the Minutes are subject to a review for prima facie fairness considering Parts 5 and 6 of the Family Relations Act. Although, this matter did not come before the Court as a consent order, the effect of confirming the Minutes as requested by the defendant raises the same issue and the same principles apply.

In this case, there is insufficient evidence for the Court to carry out any such review. While the plaintiff has given up any right she may have had to the plaintiff's CP Rail Share Purchase Plan and equalization of CPP and to spousal support for an extended period, she received numerous other benefits. The Court cannot evaluate the fairness without knowing the value of what was given up.

In the circumstances, each of the parties' applications is dismissed. Each is at liberty to bring the matter forward on proper material to obtain the remedy each seeks.

- [4] The matter came back before the Court and central to the issue now is whether the compromise reached in the Minutes of Settlement was a "fair" compromise. Central to that determination is the value of the defendant's employment pension, and whether agreeing to split it was "valuable" consideration, and the value of the defendant's CPP. The Railway Share Plan's value is just over \$4,000. The plaintiff would have no claim to it.
- [5] The plaintiff's argument is clear cut. She submits that the division of the defendant's pension cannot be seen as a reasonable substitute for a claim to spousal support because the plaintiff likely would have been entitled to a division of his pension in any event and she would still be entitled to spousal support. In addition, she should have received a right to equalization of the parties' CPP's.
- [6] In addition, the plaintiff says she has been in a financial crisis since shortly after signing the Minutes of Settlement and has been unable to work.
- [7] It is conceded by both parties that the test of fairness of an agreement under s. 65 is to consider fairness in relation to circumstances at the time of the execution of the agreement and what was reasonably in the contemplation of the parties at the time they entered into it.
- [8] At the time of the Agreement, the plaintiff had briefly stopped working owing to stress resulting from the break-up of the relationship. There was no suggestion at the time that her departure from the workforce was either permanent or indeed, long term. The evidence before the Court was that the plaintiff expected to be vacationing at the end of February 2005; just weeks after the Minutes were signed, and would be returning to work thereafter. It is against this backdrop that the brevity of spousal support must be considered. There also was evidence before the Court that the plaintiff's historical income was not insignificant. Reference was specifically made to her 2003 assessment and attached T4 indicating employment income of \$32,600. 2004 was the year in which the separation occurred and in April the plaintiff quit the job at which she was working. Her 2004 income, to the date of quitting, was \$10,660 as evidenced by the statement of remuneration paid. Extrapolated over the course of the year, this would equate to over \$30,000 annually. The evidence was that she worked at these positions part-time so as to allow time to work the berry crop, on the parties jointly owned farm. Thus, the parties' income was not so disparate as to warrant either long term or substantial maintenance. It was a definite time period provided for which both of the parties envisioned at the time of entering into the Minutes of Settlement would tide the plaintiff over until her return to full-time employment. For this she received other benefits which already have been referenced in the earlier Reasons for Judgment.
- [9] The Court, at the conclusion of the last hearing, requested further information and submissions regarding the pension entitlement of the defendant and the plaintiff's entitlement to it under the provisions of the Minutes of Settlement. These are accurately referenced in the plaintiff's submissions:

The pension information provided by the Defendant is as follows:

Joint Accrual Commencement Date: January 1, 1981 (But Parties commenced cohabitation in the summer of 1980).

Joint Accrual End Date: April 1, 2004

Pensionable Service between these dates: 277 months

Total Pensionable Service to end date: 389 months

Amount of Defendant's Monthly Pension: \$2,414.00

Rutherford Formula contemplated in Part VI of the Family Relations Act: $277/389 = 71.21\% \times 2414.00 \times \frac{1}{2} = \$859.51$ (or a 35% interest to the Plaintiff)

The Plaintiff cannot access the monthly pension until age 55.

- [10] It is also important to this analysis to recall that despite it being a long relationship, the parties very clearly kept their finances separate. They never mingled bank accounts save and except for the account to pay the household expenses. They agreed to equal ownership of the home and an investment account. Otherwise they owned nothing jointly. The plaintiff had separate savings by way of an RRSP which she kept. They had separate debt for which the other was not responsible.
- [11] The relationship did not result in children. The relationship did not result in any interference with the capacity of Ms. Moyle to earn income. Although it is acknowledged she did some work on the farm which resulted in income which on all of the evidence she kept. No evidence exists that her work on the farm interfered with her capacity to obtain employment or that she assisted in any way with Mr. McCann's employment as a rail worker.
- [12] The governing law between non-married parties for an entitlement to an asset owned solely by one of them is still premised on the concept of trust as noted in *Pettkus v. Becker*, [1980] 2 S.C.R. 834 and *Peter v. Beblow* (1993), 1 S.C.R. 980. For the plaintiff to succeed she must show the necessary elements of:
- (a) contribution;
 - (b) enrichment;
 - (c) no juristic reasons that the owning party should retain the benefit.
- [13] The plaintiff is able to point to no factual considerations in the evidence to allow the Court to find either contribution to the acquisition of the asset in question or an enrichment of the defendant. The pension entitlement was funded by payroll deduction. The parties kept their finances separate such that there was no detriment to the plaintiff as a result of his reduced take home pay.

- [14] It is not incumbent upon the defendant to demonstrate that the plaintiff's claim for an interest in his pension must fail. Only that the transfer of it, in the fashion described in the Minutes of Settlement, constituted consideration, in part, for the remainder of the concessions made by the plaintiff in the final resolution of this matter.
- [15] The plaintiff submits that the facts here support an executed or express trust, a resulting trust or a constructive trust. There is no basis on which the pension could be claimed on either an express or resulting trust. No evidentiary foundation found in the materials before the Court exists as to an agreement to share in the pension in the event of their separation. The defendant did name her in his pension documents as a beneficiary as a survivor should the defendant die during the relationship. This naming, however, does not constitute a clear declaration necessary to found a trust. It is no different than if the defendant named her in his will as a beneficiary. That would not create a trust during the lifetime of the testator.
- [16] Nor is there any demonstrated intention that the pension interest would accrue to the plaintiff by way of the doctrine of resulting trust. To the contrary, there is evidence before the Court that the parties discussed her removal as a beneficiary of the trust during their discussions.
- [17] The plaintiff relies on several decisions of various courts in which pension entitlement is found. The overwhelming majority are, however, cases in which either the parties were lengthy marriages and expectations were clearly created as to retirement pension entitlement; or in lengthy common law relationships where there is more than one specific indication of an intention or expectation that the parties would share in each others pensions (see *Green v. Melynyk*, [1998] B.C.J. No. 1466, para. 52; and *E.K.G.D. v. L.W.P.*, [2006] B.C.J. No. 3002, at para. 41).
- [18] Thus, I can find no support in the evidence for any of the alleged trusts. Something more is required to establish any such trust than designating a common law partner as a "spouse" or survivor beneficiary on one's pension documents. In this case, there was no other indication of a common intention. Further, what is noteworthy in this couple's financial relationship is that where they intended to share, they owned jointly. All other assets were kept separate. There was no financial dependence or contribution by either of them to the ability or non-ability of the other to obtain or keep employment.
- [19] On the facts of this case, there is no certainty that the plaintiff would have had any entitlement to the defendant's pension. Thus, in obtaining what she did, there is a clear benefit.
- [20] Section 120 of the Family Relations Act does not allow the Court to replace sections of the agreement and leave the rest. Section 120 allows the Court to review the Agreement under Parts 5 and 6 of the Family Relations Act for fairness and, if unfair, vary the division of the property referenced in the Agreement. Part 5 contains Section 65(1) and (2) which allow the Court to deal with the division of property and determine fairness under the enumerating factors in the section and, if found to be unfair, to redress the unfairness by reapportioning

the division into shares fixed by the Court. It does not provide the Court with a general ability to rewrite the parties' agreement, in particular, to uphold the Agreement in property division while defeating it as to its intent concerning spousal support.

- [21] I find no unfairness in the waiver of permanent or indefinite spousal support and the agreement to divide the plaintiff's employment pension. In considering this, I note the plaintiff is to receive or has received several other lump sum amounts giving her a larger share of the proceeds of the shared property.
- [22] The waiver, however, of any right to equalization under ss. 55.1 and 55.2 of the Canada Pension Plan is a waiver of approximately \$12,000-\$17,000, a value unknown to the plaintiff at the time she agreed to the waiver. Entitlement is provided for those in common law relationships under the Federal legislation. Thus, it is more than likely that if the parties litigated, the plaintiff would have obtained entitlement to equalization.
- [23] Thus, I vary the Minutes of Settlement to achieve fairness only to the extent that paragraph numbered 7 in the Minutes will be amended to read that "The parties' unadjusted pensionable earnings under the Canada Pension Plan will be equalized under s. 55.1 and 55.2 of the Canada Pension Plan Act (Canada) and either party may apply for an equalization of the parties unadjusted pensionable earnings."
- [24] Otherwise, the Minutes of Settlement are confirmed.

The Honourable Madam Justice Koenigsberg

June 13, 2007 - Revised Judgment

Corrigendum to the Reasons for Judgment issued advising that the reference to the earlier hearing date of February 1, 2007 was omitted. The date of hearing should read as follows:

February 1 & May 17, 2007

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