
CANADA / JUDGMENT

P.K.N. v. D.S.N.

2014 BCSC 1709

COURT

Supreme Court of British Columbia

DECIDED

11 September 2014

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2014 BCSC 1709 P.K.N. v. D.S.N.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

P.K.N. v. D.S.N.,

2014 BCSC 1709

Date: 20140911

Docket: E38113

Registry: New Westminster

Between:

P.K.N.

Claimant

And

D.S.N.

Respondent

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Support and Division of Assets

Counsel for Claimant:

M. Dyonisius

Counsel for Respondent:

In Person

Place and Date of Trial:

New Westminster, B.C.

October 29 - 31, 2012

November 1 and 2, 2012

July 29 - 31, 2013

August 1 and 2, 2013

December 9 - 12, 2013

Place and Date of Judgment:

New Westminster, B.C.

September 11, 2014

I. Background

- [1] On June 25, 2014 I issued reasons for judgment in this matter regarding parenting arrangements for the three children of this marriage. Due to concerns expressed in a parenting report over the eldest child in particular, it was important to release reasons for judgment relating to the parenting of the children as soon as possible. Those reasons can be found at 2014 BCSC 1156.
- [2] These are my reasons for judgment regarding division of family assets and child and spousal support. The primary issue in contention is whether income should be imputed to the husband, the respondent.
- [3] The eldest child, T., has been residing with his father and paternal grandparents since the parties separated in 2011 and has become alienated from his mother, the claimant. Dr. England, the author of the parenting report, recommended that T. undertake reunification counselling with the goal that T. would eventually return to his mother's care. Dr. England had been hopeful that T. would be primarily residing with his mother by the end of August 2014.

II. Distribution of Family Assets

- [4] Because this proceeding was commenced before the Family Law Act, S.B.C. 2011, c. 25 [FLA] came into force, the Family Relations Act, R.S.B.C. 1996 c. 128 [FRA] continues to apply to the division of property as though it had not been repealed: FLA s. 252.

A. The One-Third Interest in Lot 16

- [5] The only asset of significance is the respondent's one-third interest in property adjoining his parents' family blueberry farm. For convenience I will refer to the property in which the respondent holds a one-third interest as Lot 16. Lot 16 is bare land consisting of 6.5 acres. It is held by the respondent and his two brothers in joint tenancy. The respondent's parents purchased Lot 16 for their sons in 2004 for a price of \$360,000. The 2013 assessment for Lot 16 was in an amount of \$862,000. This was appealed and the review panel reduced the assessment to \$795,000. Lot 16 was listed for sale by the brothers in 2012 for an amount of \$818,000 but has not been sold.
- [6] When Lot 16 was purchased in 2004 it was registered in the names of the three brothers and no mortgage was registered against the title. Subsequently, in December of 2011, the paternal grandparents registered a mortgage dated November 18, 2011 in their favour against title to Lot 16 in an amount of \$550,000. This mortgage was registered just over a month after the claimant had registered a Certificate of Pending Litigation against Lot 16. That Certificate of Pending Litigation was filed in this family proceeding.
- [7] At trial, the respondent and his parents all testified regarding the brothers' agreement to grant a mortgage to the parents. Although the mortgage was signed and registered November 2011 after the claimant and respondent had separated, the respondent and his parents testified that the brothers had made a prior agreement to repay the funds advanced by the paternal grandparents to purchase Lot 16. A "promissory agreement" referring to the brothers having borrowed \$455,000 from their parents was presented in evidence, signed by each of the brothers on November 14, 2004. The promissory agreement required monthly payments of \$2,200, one third of which was to be paid by each brother. There was no interest rate stated in the promissory agreement but the promissory agreement did include two sentences relating to interest as follows:
- ...Interest rates, payback period and payments schedule will be determined by the Lender at market rate and maintained by the borrowers. This may change as interest rates change and the Borrowers are responsible for making the necessary adjustments to ensure the monthly mortgage amount is met.
- [8] Although the purchase price was \$360,000, \$391,000 was advanced to cover taxes and other costs incurred for the purchase. The respondent's mother attempted to explain why the amount of the promissory note was \$455,000 and yet only \$391,000 had been advanced to purchase Lot 16. She testified that the extra money over and above the purchase price was advanced to finance the establishment of a crop. The land has never been farmed.
- [9] The respondent's father testified that the additional money, amounting to approximately \$65,000, was to be put into trust so the "boys could start a business and would not look for more money". Instead of the \$65,000 in trust being used to commence farming operations on the land, the respondent's father used those funds to make the payments due on the loan for a total of 29 months. He further testified that he had originally borrowed the money for the

purchase of Lot 16 with funds from a mortgage granted to the TD Bank with the family farm as security for the mortgage. That mortgage to the TD Bank was in an amount of \$550,000 which happens to be the amount of the mortgage registered in favour of the respondent's parents against Lot 16.

- [10] The respondent's father further testified that he had collected money from his sons due under the mortgage to him and his wife, but that he has no records of the payments and does not know what they owe. However he also testified that \$550,000 is owing.
- [11] The clear intention of the respondent's parents was that Lot 16 was purchased for their three sons to allow them to start a business which could include a further blueberry farm or other farming enterprise.
- [12] I find that the entire financial arrangement between the grandparents and their sons is more likely a scam in an attempt to secure the interests of the sons away from their spouses, including the claimant in this case. I further find that the promissory agreement was likely not prepared in 2004 as claimed, that the amount of the mortgage registered in 2011 was likely set at an amount to reduce or eliminate any equity in favour of the brothers in Lot 16 which could be exposed to claims by the brothers' spouses. It is not a coincidence that the mortgage registered against Lot 16 in favour of the respondent's parents was registered shortly after the claimant left the family home on the blueberry farm. One of the witnesses for the claimant at trial was T.L., who was or is married to one of the respondent's brothers and who is involved in family litigation as well. I find it more likely that the purchase of Lot 16 by the grandparents was intended as a gift to their sons to provide them with some financial security and an asset which could be farmed so as to provide income for the sons and their families.
- [13] A question still remains as to whether the interest of the respondent in Lot 16 is a "family asset" as defined in s. 58 of the FRA. The Court of Appeal decision in *Gillespie v. Gillespie* (1995), 1 B.C.L.R. (3d) 28 (C.A.) included a discussion of ways in which a family asset could be established. At the time *Gillespie* was decided, what is now s. 58 of the FRA was s. 46 of an earlier version of the FRA. In these reasons, I will refer to the current section number, ie. s. 58 when quoting from *Gillespie*:

27. Under the foregoing provisions a family asset can be established on one or more of the following bases:

under s. 58(2), property owned by one spouse and ordinarily used for a family purpose;

under s. 58(3)(e), a right, share, or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse or,

under s. 59, property owned by one spouse and used primarily for business purposes and a direct or indirect contribution has been made by the other spouse to the operation of the business.

[14] In this case it is clear that Lot 16 was not ordinarily used for a family purpose. There was a lack of evidence at trial to indicate that Lot 16 was being used at all and was only referred to as bare land. However, it is possible that if an asset owned by one spouse was to provide financial security to the family, it could be considered to having been used for a family purpose in cases where there is occasional use. See *MacLean v. MacLean* (1990), 28 R.F.L. (3d) 103 (B.C.S.C.) and *Brown v. Brown* [1996] B.C.J. No.J. No.3048 (S.C.).

[15] It is helpful to compare the facts in *MacLean* to the facts in the case at bar. I quote from p. 108 of *MacLean*:

The husband has owned a vacant undeveloped waterfront lot on Hornby Island for a number of years. It appears that some years ago, he and at least one of his sisters were given vacant lots adjacent to his parents' waterfront lot on the island. A home sits on the parents' lot. Together it appears that the lots form a sort of family compound.

The wife testified that following their marriage and after they returned from Toronto to live in Vancouver, they frequently visited the island and stayed over in his parents' cabin. They frequently visited the property either alone, with other family members, or with guests. While there, they walked over their own adjacent lot, inspecting it for any garbage or live fires left by campers and simply enjoying the walk itself on the beach and on a deserted road running through the vacant lot. They stored a small boat on the beachfront to this property which was later moved over to the parents' lot.

Over their years together, the parties frequently discussed the property - the summer house they hoped to build on the lot and its optimal location. They also discussed the possibility of mortgaging the property and using the funds to purchase a home of their own in the city. Later they discussed selling the lot and using the proceeds to purchase another nearby waterfront lot on which a home was already built.

In all of these circumstances, I have no hesitation in finding that this property is a family asset. Apart from his statement that the gate to the access road was not located on this property, the husband did not contest any of her evidence on this issue. As I understand the thrust of his counsel's submission, it is that the property was never used for any family purpose and that, at best, its use was incidental to the use of the parents' property, which was the focus of their visits to the island. I reject that submission, I find that the property was used and enjoyed throughout the years of the marriage. The parties walked on it, stored a boat for a period on it and hosted one large camping outing on it. More importantly, they took particular pride in the property and looked upon it and spoke of it as a nest egg of security for their own future.

[16] Unlike the facts in *McLean*, in the case at bar there is no evidence of use of Lot 16 by the parties or by the respondent's brothers or their families. Lot 16 was consistently referred to in the evidence as bare land, and there was little or no evidence of use of Lot 16 for any purpose other than possible future use for agricultural purposes by the three sons.

[17] In the earlier decision of *Laxton v. Laxton* (1981) 21 R.F.L. (2d) 126 the husband had been given a 17.5 acre "berry farm" by his father as well as another one-acre parcel on which stood the family home of the parties which were both found to be family assets. In addition to giving the husband the "berry farm" and the one-acre parcel, the husband's father also gave the husband a 19-acre "bog" or "bottom" area described as "marshy and partly covered by seasonal water". At p. 130 the court again referred to the "bog" area and stated:

The bottom land was apparently not used for any purpose other than duck hunting by the husband and his blood relatives and their friends although there was a 36-inch irrigation pipe sunk on it.

In *Laxton*, the court found the "berry farm" and the one acre parcel to be family assets however the 19-acre "bog" was excluded from the family assets. The court found, at p. 135:

As to the 18 acre bog or bottom land, the evidence is sparse: a drainage pipe of unknown dimension or expense was put on it and it was used for the recreation of the husband and his friends. There is no evidence Mrs. Laxton ever set foot on it. It could hardly be classed as a venture or business, and I think in this instance the husband has met the onus of s. 47 and I conclude that this parcel falls more into the class of a legacy and I exclude it from the family assets

[18] I regrettably conclude, having reviewed the above authorities and comparing the facts in those cases to those before me, that Lot 16, not having been ordinarily used or even occasionally used as a family asset, cannot be considered a family asset under s. 58 of the FRA.

B. Guaranteed Income Certificate

[19] In 1998 the respondent received an inheritance from his aunt's estate, which consisted of a payment to him of \$58,171.49. The respondent testified that he did not place those funds into the joint account with his wife. Rather, he placed the funds into two guaranteed income certificates in his name. He further testified at trial that on October 20, 2008, he withdrew \$40,000 from the joint account maintained with the claimant at the Bank of Montreal and transferred the funds to his parents to hold for him. He further testified that he gave the funds to his parents to deposit to their account "for safekeeping due to trouble between me and Pam", ie. the claimant. He also stated that "possibly some of the money from [the inheritance] was to pay the mortgage" and at one other point in his testimony stated the \$40,000 was used to pay lawyers' fees. He did acknowledge that the funds that were transferred from the Bank of Montreal joint account were from the inheritance received in 1998. At some time unknown prior to October 2008 the respondent clearly deposited the remainder of the inheritance in the joint account and decided to transfer the same to his parents so that he claimant could not obtain access to those funds. In short, his evidence on the disposition of these funds is lacking. I find that the \$40,000 transferred to his parents in October of 2008 was a family asset and that the claimant is entitled to a one-half interest in

the same together with interest.

- [20] The joint account at the Bank of Montreal was, based upon bank statements placed in evidence, a family bank account used by the parties to pay family expenses.
- [21] The balance of funds in this account at the date of separation in March of 2011 is a family asset pursuant to s. 58(3)(c) of the FRA. I am satisfied that the inheritance money in this account was used regularly during the several years the funds were held for family purposes and the balance of that account plus the \$40,000 referred to earlier are family assets.

C. Investment at the Bank of Montreal

- [22] The only other asset which could be a family asset was in a "Term Investment Report" at the Bank of Montreal in the respondent's name. The Report indicated as of July 2011 there was \$4,572.81 invested. There is insufficient evidence before me as to the source of those funds or the account into which it was invested so as to allow me to find the funds in that account was a family asset.

III. Support

- [23] The claimant seeks spousal support and child support.

A. The Respondent's Income

- [24] The respondent is employed as the manager of the blueberry farm owned by his parents. As a result, the amount of remuneration received by him is controlled by his parents, particularly his father. The respondent works on the blueberry farm for approximately four to five months each year. He claims he is paid \$3,000 per month or \$13,000 per year. In addition, when not working on the blueberry farm, the respondent receives employment insurance which amounted to \$6,900 in 2013 for a total income of almost \$20,000.
- [25] The Form F8 Financial Statement filed by the respondent in 2013 included correspondence from CRA indicating taxable income of just over \$28,000 in 2011 and \$19,000 in 2012.
- [26] The claimant submits that income should be imputed to the respondent pursuant to s. 19 of the Federal Child Support Guidelines, SOR/97-175 [FCSG]. Section 19 of the Guidelines permits the court the discretion to impute income to a spouse when the total income of a parent should be more than the total income calculated from financial information and sets out circumstances which can be considered by the court when imputing income. Those circumstances relevant to this case are:

19.(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
 - f) the spouse has failed to provide income information when under a legal obligation to do so;
- [27] The respondent's resume provides a description of his 20 years' experience in trucking and as a heavy duty equipment operator with "specific strengths in: end dump, hi-way truck, cross-border and port, B-train side dump, excavator operator, skid steer [and] fork lift". The document also describes his experience in trucking and operating equipment between 1998 and 2011. From 2003 to 2011, the respondent also worked part-time as a manager on the family blueberry farm. Since 2011, he has not worked at any occupation other than as a manager of the blueberry farm.
- [28] In his Form F8 Financial Statement filed in this action in 2011, the respondent claimed self-employment income of \$20,000 from "trucking". Attached to that Form F8 are several invoices from the respondent to X Trucking issued in 2009. X Trucking is described in his resume as being in Edmonton, Alberta where he was "hauling aggregated and excavation materials to locations throughout Alberta, [doing] maintenance and repair of trucks, [and] maintaining records and files". For that work, he was regularly invoicing X Trucking \$1,500 per day. No doubt those invoices would have been gross income from which his cost of doing business would have been deducted.
- [29] His total declared annual income between 2005 and 2009 varied between \$22,738 and \$33,905, the latter being in 2009. In each of those years his income included employment insurance which ranged between \$5,578 and \$8,020. The respondent gave no explanation of why he required employment insurance for part of each year.
- [30] At trial, the respondent admitted he could earn a better income. He also testified that caring for his oldest son, T., was a "full-time job", but that he also has assistance from his parents living on the blueberry farm in the same house as him and T.
- [31] The respondent filed in evidence some bank statements from the parties' joint account, which was maintained by both parties during the time they were residing together, specifically for the years 2008 to 2010. He has not provided bank statements for his personal bank accounts for any period, and he has provided no bank statements at all covering the period of time since the separation of the parties in 2011.
- [32] Investigation of the parties' joint account statements for the period prior to separation reveal several bank transfers from other accounts and deposits which easily exceed the amount the respondent purports to have been earning and receiving from employment insurance. For example, on December 31, 2008 the Bank of Montreal joint account statement indicates: \$1,800 transferred from another unidentified account, a deposit of \$4,826.05 on January 5, 2010, an ABM deposit of \$2,125.40 on October 13, 2009, an ABM deposit of \$2,500 on

September 10, 2010 and total deposits of \$9,487.28 for the statement period of 30 days ending January 8, 2010. The source of funds, other than deposits made by the Government of Canada, is not clear. However, this clearly indicates that the respondent has sources of funds exceeding the income he has declared on his income tax returns and the income he professes to receive in his evidence at trial. There are other transactions in addition to those set out above which reflect funds well in excess of his declared income amount having been received by the respondent for the periods in question.

- [33] The respondent also testified that he had made payments to his parents of \$730 per month as his share of the monthly payments due under the mortgage granted to his parents over the land registered in the name of the respondent and his two brothers. The acquisition of that property and a mortgage of that property registered in favour of the respondent's parents was discussed earlier in these reasons. The respondent testified that he made such payments for a period of approximately two and one-half years. If the respondent is correct in this respect, he must have had incomes greater than he has declared considering the other expenses he also claims to have incurred and leads me to conclude that his income is considerably greater than declared by him.
- [34] It is very clear that the respondent is now totally financially dependent upon his father who sets the amount of income for the respondent when working on the blueberry farm and, from all of the evidence I have heard, provides funds to the respondent from time to time as the needs of the respondent arise. There was no explanation as to why the respondent does not work during the time of year he is not working on the blueberry farm. For several years he appears to have been content to be laid off once the blueberry crop had been harvested and sold, and to return to receiving employment insurance until work starts up on the farm in the spring. Considering his experience as a truck driver and as an operator of heavy equipment, I would expect that the respondent would actively seek out such work; however, other than a few examples of applications for employment made by the respondent, there does not appear to have been any serious effort to find work to support his family. Based upon the evidence I have heard, the respondent is content to earn whatever his father deems to pay the respondent to manage the blueberry farm and then to collect employment insurance for the balance of the year. The author of the FLA s. 211 parenting report received by the court also commented on the paternal grandfather's control over the respondent.
- [35] I have no hesitation in these circumstances of finding the respondent to be intentionally underemployed pursuant to s. 19(1)(a) of the FCSG by working on the blueberry farm part time and seeking financial assistance, and by the fact that he appears to have no control over the amount that he is being paid by his parents' farming operation. I find that he is capable of working as a truck driver or equipment operator and is able to earn substantially more than he currently earns on the family blueberry farm. As well, I find that, pursuant to s. 19(1)(f) of the FCSG, he has failed to provide all information relevant to determining his income, as evidenced by many deposits recorded on the bank statements for the joint account for the years 2008 to 2010.

- [36] In addition, the respondent has, for many years, lived in the same house as his parents which was also the family home while this couple was living together. The family lived on the ground level which the claimant described as large, including a large living room area, kitchen two bedrooms and other space. The respondent has never paid for rent or utilities for the suite in which he has lived for many years. The claimant testified that the respondent's parents often paid for items for the family which included the purchase of clothes and play items for the children and also for entertainment for the family. As well, the paternal grandparents have paid the tuition for T. to attend at the Khalsa School, a private Sikh school located in Surrey. The claimant also testified that the respondent's father purchased a truck for the respondent.
- [37] Section 19 of the FCSG does not purport to be an exhaustive list of circumstances which may be considered by the court in imputing income to a spouse; it states, "which circumstances include the following:" in s. 19(1). In this case, where the respondent experiences a lifestyle well in excess of what may be indicated by his declared income and he has a major source of financial benefits and funds from the family blueberry farm and his parents, I find the value of these benefits should be considered in imputing income to the respondent in addition to the circumstances listed in s. 19.
- [38] Accordingly, I impute an income to the respondent of \$50,000 considering his lack of disclosure, the benefits received from others including his parents, and his underemployment.

B. The Claimant's Income

- [39] The claimant has no income, other than social assistance, Universal Child Care benefits and the Child Tax benefit and BC family bonus which were declared to be received by her through 2011, although I understand those benefits continued to be paid to the claimant. The total of those benefits was \$22,776 per annum. The claimant continues to be fully committed to caring for the two youngest children and will hopefully soon be parenting T. on a full-time basis.
- [40] The claimant has not worked for over 15 years and has no special training. While living with her husband in the suite of his parent's home, the claimant was busily engaged in raising and caring for her three children. I accept her evidence that she was also acting as a "maid" for her in-laws in cleaning their portion of the house, doing their laundry and other tasks.
- [41] Also, in my previous reasons for judgment regarding parenting issues, I ordered that the eldest son, T., will reside primarily with the claimant after a reunification program as recommended by Dr. England in her s. 211 parenting report. As a result, it is intended that all three children will be primarily resident with the claimant. In addition to being the children's primary caregiver, it is anticipated that because of the alienation of T. from his mother, the process of reunification will take some time and will be time-consuming for the claimant.

- [42] The claimant is not in a position to return to work and accordingly I will not impute income to her above the sum of \$22,776 referred to above, which is her income for spousal support purposes.

C. Spousal Support

- [43] The claimant is entitled to spousal support on a compensatory basis. As described above, the claimant has been the primary care-giver for the children of the marriage for over 12 years and will continue in that role for years to come since the youngest child of the marriage is but six years old.
- [44] In the circumstances of these parties, I find the claimant entitled to non-compensatory spousal support based upon the economic disparity between the parties and the claimant's need for spousal support. The respondent has not paid spousal support since separation of the parties. Since separation, the claimant has received social assistance and is in clear need of support from her former husband.
- [45] As a result the claimant is entitled to spousal support on a compensatory and non-compensatory basis at the mid-range of spousal support contained in the Spousal Support Advisory Guidelines [SSAG] based upon the respondent's imputed income of \$50,000 and the income of the claimant referred to above. My review of the SSAG indicates that the amount of monthly spousal support would be \$919 to commence September 1, 2014.
- [46] I will hear submissions on the entitlement of the claimant to retroactive spousal support should the claimant proceed with an application for retroactive support.

D. Child Support

- [47] The respondent has been paying child support to the claimant for the support of the two youngest children in an amount of \$375 per month. The amount of child support payable for two children based on the parties incomes, according to the FCSG, is \$685. I order that the respondent pay the claimant that amount of child support monthly. Once T. begins to reside with his mother, the amount of child support will be adjusted to cover support for three children which would be \$998 per month.

IV. Summary

A. Distribution of Family Assets

- [48] Lot 16 is not a family asset under s. 58 of the FRA.
- [49] The balance of the joint account at the Bank of Montreal held by the claimant and the respondent and the \$40,000 the respondent transferred to his parents in October of 2008 from this joint account are both family assets. The claimant is entitled to a one-half interest in the same together with interest;

[50] There is insufficient evidence to determine whether the term investment at the Bank of Montreal is a family asset.

B. Support

[51] The respondent's imputed income is \$50,000.

[52] The claimant's imputed income is \$22,776.

[53] The claimant is entitled to spousal support on a compensatory and non-compensatory basis and shall receive \$919 per month starting on September 1, 2014.

[54] The respondent shall pay \$685 per month in child support until such time as T. begins to reside with his mother, at which time the amount of child support will be adjusted to cover support for three children which will be \$998 per month.

V. COSTS

[55] I will receive submission in writing regarding costs if received no later than October 15, 2014.

"Jenkins J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/14/17/2014BCSC1709.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/p-k-n-v-d-s-n-2014>

Prepared on 30 October 2026 · Esheria