

CANADA / JUDGMENT

Pedrozo v. Hope

2020 BCSC 1578

COURT

Supreme Court of British Columbia

DECIDED

27 October 2020

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2020 BCSC 1578 Pedrozo v. Hope

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pedrozo v. Hope,

2020 BCSC 1578

Date: 20201027

Docket: E63326

Registry: Nanaimo

Between:

Rinaldi Carmen Lourdes Pedrozo, also known as Carmen Lourdes Pedrozo

Claimant

And

Darcy James Hope as executor of the Estate of Douglas Lawson Hope, Deceased

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph [6] on November 2, 2020.

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Claimant,

appearing via teleconference:

B. Collier

Counsel for the Respondent,
appearing via teleconference:

M. Buhler

Place and Date of Trial:

Nanaimo, B.C.

September 22-23, 2020

Place and Date of Judgment:

Nanaimo, B.C.

October 27, 2020

Introduction

- [1] This is a summary trial application in which the claimant, Carmen Pedrozo, seeks a variety of orders against the estate of her former spouse, Douglas Hope ("the deceased"), related to the provisions of a family law separation agreement ("the separation agreement") made on dissolution of their marriage. The estate executor is the deceased's son, the respondent Darcy Hope. I agree with the parties that the issues presented are suitable for summary determination.
- [2] Primarily, the claimant seeks:
1. payment to her of \$250,000, less \$79,387 already paid by the deceased's estate, on account of his failure to comply with a provision of the separation agreement requiring him to maintain a life insurance policy in that amount for as long as he was obliged to pay the claimant child and spousal maintenance ("the insurance provision");
 2. payment to her of \$10,000 on account of the deceased's breach of the separation agreement by failing to sell a boat worth \$20,000 and to account to her for 50% of its value; and
 3. compensation for 150,000 Aeroplan points for each of the years 2016 and 2018.
- [3] The claimant's pleadings refer to alternative items of relief that counsel advised need not be addressed if I rule in the claimant's favour on the question of the insurance provision.

BACKGROUND

- [4] The claimant and the deceased were married in the Republic of Colombia on November 5, 2004. The claimant was then 26 years old, the deceased 54. The claimant brought a 4-year-old son to the marriage named Jose, who is now 20; the deceased had two older children by a prior relationship, his son Darcy and a daughter Breanne, both of whom are now in their 30s.

- [5] The parties lived in Parksville, B.C. before separating permanently in December 2013. The claimant filed a Notice of Family Claim seeking division of matrimonial property and support for herself and Jose, who by then was 15. The parties settled their differences by mediation. The separation agreement, signed on October 20, 2015, was the result. It was filed in the Nanaimo Supreme Court registry on December 23, 2015. Its provisions respecting support have the force and effect of a court order: see Family Law Act, S.B.C. 2011, c. 25, ss. 148(2), 163(3).

THE SEPARATION AGREEMENT

The Insurance Provision

- [6] The separation agreement provided that the deceased was to pay the claimant \$1,667 per month for Jose's support starting November 1, 2015 for as long as he remained a child of the marriage and lived with the claimant. This obligation was not to be reviewed or adjusted unless or until Jose turned 19 or ceased to live with the claimant. By inference, on occurrence of either of these events, the separation agreement left the parties to agree or seek a review of whether Jose continued to be legally entitled to support and the extent of the deceased's obligation to pay it.
- [7] The deceased also agreed to pay the claimant spousal support of \$5,500 per month on a fixed term starting November 1, 2015 with the final payment due on July 1, 2019. It was specified that there was to be no variation of this condition by either party during its term, and that afterward the deceased's obligation to pay spousal support would cease absolutely "notwithstanding any change of circumstances no matter how unforeseen or catastrophic".
- [8] Under the heading "Security for Support", the separation agreement required the deceased to carry life insurance in the following terms (the underlining is mine):
17. [The deceased] shall maintain the life insurance policy currently in place on his life in the face amount of \$250,000 as security for child and spousal support and he shall irrevocably designate [the claimant] as beneficiary
- a. for the full amount of \$250,000 for so long as he is obligated to pay spousal and child support; and
- b. reducing to \$100,000 for so long as he is obligated to pay child support,

following which he may choose to do as he wishes with the policy and [the claimant] will sign such documents as he may reasonably require in that regard. [The deceased] will provide such proof as [the claimant] may reasonably require regarding the policy as soon as reasonably practicable.

The Finality Provision

- [9] Under the heading "Informed Consent and Finality" the separation agreement included the following terms:
33. This agreement was negotiated with the assistance of Eugene Raponi, Q.C., acting as a family law mediator.
 34. This agreement has been fairly negotiated and represents the intentions and expectations of the parties.
 35. Each of the parties acknowledges that he or she:
 - a. has had independent legal advice about their rights against and obligations to the other party under the law and this agreement;
 - b. has read the entire agreement carefully;
 - c. knows and understands the contents of this agreement;
 - d. is fully aware of the effect, purpose and intent of this agreement; and
 - e. is signing this agreement voluntarily without any undue influence or coercion by the other.
 36. For greater certainty the parties acknowledge that:
 - a. [the agreement has] been negotiated in an unimpeachable fashion and fully represent[s] the intentions and expectations of the parties. Both parties have had independent legal advice and all the disclosure they have asked for and need in order to understand the nature and consequences of [the agreement] and to come to the conclusion, as they do, that [the agreement] constitutes and equitable sharing of both of the economic consequences of their relationship and its breakdown.
 - .
 - d. the parties intend [the agreement] to be a final and certain settling of all issues between them. They wish to be allowed to get on with their separate and independent lives, no matter what changes may occur. Each of the parties specifically anticipate that one or both of them may become ill and be unable to work, find their financial resources diminished or exhausted whether through their own fault or not, or be affected by general economic and family conditions changing over time. Changes in their circumstances may be catastrophic, unanticipated or beyond imagining. None of any such changes will be grounds for variation or alteration of this settlement which is absolute and final. Any causal connection between the present or any future economic need of either party and their marriage has been addressed and compensated fully by the terms of [the agreement].
- [10] Unfortunately, these emphatic declarations were followed more or less immediately by a notable failure by the deceased to fulfil his obligations. While he complied with his commitment to carry the amount of insurance stipulated in the agreement, he failed to designate the claimant as the sole and irrevocable beneficiary, instead naming the claimant

and Jose as joint revocable beneficiaries. Worse still, several months after the separation agreement was filed in court, he removed both the claimant and Jose from the policy and substituted his older children, Darcy and Breanne, as beneficiaries. He took no further steps to comply with the insurance provision.

- [11] The deceased paid his child and spousal support payments up to and including August 1, 2018, but then he died unexpectedly on August 14, 2018. At that time, for clarity, he continued to be obligated to pay the claimant support both for herself and Jose, and thus was bound by the contractual commitment to carry life insurance payable to the claimant in the amount of \$250,000. His breach of the insurance provision meant that on his death the money that should have gone to the claimant was paid instead to Darcy and Breanne in the amount of \$125,000 each.
- [12] On August 6, 2019, the parties consented to an order for the unconditional payment of \$79,387 to the claimant from the deceased's estate. This amount represented the cumulative total amount of child and spousal support payable from the deceased's death up to and including July 1, 2019, which was the last payment date before Jose's 19th birthday, and the end of the fixed term spousal support obligation specified in the separation agreement.

Discussion

- [13] As previously stated, the claimant now seeks judgment from the estate in the amount of \$250,000 less the payment made pursuant to the August 6, 2019 consent order. The respondent, by contrast, argues that this latter payment fully discharged the deceased's support obligations under the separation agreement and the claimant is entitled to no more.
- [14] The respondent concedes or does not dispute that:
1. the deceased breached the insurance provision by not naming the claimant as the sole and irrevocable beneficiary of the policy in question;
 2. if the deceased had complied with the insurance provision it would have been unlawful for him to remove the claimant as irrevocable beneficiary without her consent: see s. 60 of the Insurance Act, R.S.B.C. 2012, c.1;
 3. but for the deceased's breach the claimant would have been paid the \$250,000 face value of the policy; and
 4. if this had happened, the deceased's estate would have had no lawful basis for an action against the claimant for unjust enrichment.
- [15] In light of these concessions, and especially since the parties jointly anticipated that Jose, depending on his circumstances, might continue to be entitled to support after his 19th birthday on July 14, 2019, I cannot accept the respondent's argument that the claimant's damages for breach of contract should be limited to the amount of support payable to her from the date of the deceased's death until July 1, 2019. There is no express or implied

language, either in the insurance provision or elsewhere in the separation agreement, and no juristic reason, that could sustain this argument or act as a bar to the claimant's entitlement to recover the full security amount of \$250,000.

- [16] To the contrary, the insurance provision created a clear and unambiguous duty that, to my eye, comprised one of the most important conditions of the separation agreement. It was plainly devised to provide comfort to both parties that the claimant and Jose would be adequately looked after in the event of the deceased's death at any time while he was bound to pay support for either of them, and in my view this was an independent obligation freely undertaken in unqualified terms: see, in similar circumstances, *Milne Estate v. Milne*, 2014 BCSC 2112, and *Turner v. DiDonato*, 2009 ONCA 235.
- [17] It goes without saying that the separation agreement must be read and considered as a whole. It covered a number of issues that required compromise on both sides. Not the least of these was the claimant's decision to relinquish any claim to the deceased's business, a profitable going concern called Evergreen Exhibitions Ltd. that is now owned and operated by Darcy Hope. She also surrendered, or perhaps I should say she purported to surrender, her right to seek additional support for Jose regardless of any rise in the deceased's income, or for herself no matter what future material changes may occur in her condition, means, needs or other circumstances. These were significant concessions. I doubt they would have been made if not for the inclusion of benefits for the claimant elsewhere in the agreement, including the insurance provision.
- [18] I would stress, as well, that the "Informed Consent and Finality" provisions of the separation agreement are heavily laden with strong language attesting to the parties' fastidious attention to every detail, their devotion to the need for a clear, certain and immutable settlement, and their mutual belief that in its totality the terms of the agreement constituted an equitable sharing of the economic consequences of their relationship and its breakdown. The deceased's duty to comply with the insurance provision was an important part of their final and infeasible arrangements. In my view, it would be inequitable to deny the claimant the full amount that she would have received if the deceased had complied with his solemn contractual obligations.
- [19] This result, after all, was manifestly the intention of both parties. It is what they both bargained for and agreed to after much deliberation involving two senior lawyers and a well-known and respected professional mediator. If the parties intended for the claimant's entitlement to the full insurance proceeds to be limited in some way, clear language to that effect would infallibly have been included in the terms of settlement. One sees such language, for example, in *Ladner v. Ladner*, [1995] B.C.J. No. 2135 (S.C.), [1997] B.C.J. No. 474 (C.A.). Its absence in the present case renders this a straightforward matter of putting the claimant in the position that she would have enjoyed absent the deceased's breach of this important term of the separation agreement.

- [20] There is no question before me of an equitable remedy for the claimant along the lines discussed in *Moore v. Sweet*, 2018 SCC 52. Darcy and Breanne, who profited from the deceased's breach of the insurance provision, are not parties to this litigation. All I have been asked to do is enter judgment against the respondent as executor of the deceased's estate. I will do so now in the amount of \$170,613 which, combined with the payment made pursuant to the August 6, 2019 consent order, makes up the \$250,000 award to which, for the reasons discussed, the claimant is entitled.
- [21] The said sum is to form a charge upon the estate. I was told that the estate, at present, has insufficient funds to satisfy this judgment and there may be obligations to priority creditors. Apparently there are separate proceedings underway dealing with these questions. They are not for me to discuss or decide.

The Boat Provision

- [22] The parties' joint assets at separation included a 2007 Ebb Tide power boat worth an agreed \$20,000. The separation agreement provided that the boat was to be sold, that the parties were to have joint conduct of sale, and that the proceeds were to be divided equally. The evidence suggests that the boat was on consignment with a local broker for a time before the deceased moved it to Kootenay Lake hoping there would be a better market for it there.
- [23] Darcy Hope, the deceased's executor, is unable to say what became of the boat after its removal to the Kootenays. He has discovered no evidence that it was sold. He claims that its present whereabouts are unknown. It seems the claimant took no active steps to secure a joint sale. She made an inquiry of the deceased's lawyer about this asset in late 2016, but it was not until May 23, 2019 that she brought an application seeking compensation for her share of it.

Discussion

- [24] Section 6 of the Limitation Act, S.B.C. 2012, c. 13 provides that a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered. Section 3(1)(l)(ii) of the same statute provides an exemption for claims for arrears of child and spousal support where a separation agreement has been filed with the court under s. 148(2) or 163(3) of the Family Law Act, but there is no exemption for claims to property division arising from such agreements.
- [25] The separation agreement in the present case provides that the parties should collaborate in the sale of the boat. They failed jointly do this. The claimant made an inquiry of the deceased's lawyer concerning this asset in late 2016, at which point she discovered that it had not been sold and had, in fact, been moved to the Kootenays. She did not pursue the matter further or take any steps of her own to bring about the sale of the boat. I have concluded that her claim filed on May 23, 2019 respecting the boat exceeded the statutory limitation period and must be dismissed.

The Aeroplan Provision

[26] The separation agreement addressed Aeroplan points in the following language:

[The deceased] will make available to [the claimant] 150,000 Aeroplan points per year for each of the years 2016, 2017 and 2018, provided that:

- a. [the deceased] will book travel using the points on behalf of [the claimant] ; [and]
- b. [the claimant] will be solely responsible for all fees and taxes associated with the bookings and will reimburse [the deceased] for these costs within two weeks of receiving receipt.

[27] The claimant alleges that after the separation agreement was signed she asked the deceased to make Aeroplan points available to her but the deceased refused except for those required for a trip to Colombia in 2017. She seeks compensation for the value of 150,000 Aeroplan points for each of the years 2016 and 2018.

Discussion

[28] The Aeroplan provision merely required the deceased to make travel points "available" to the claimant, not to transfer such points to her in any given number or to pay her compensation for any portion of them. The claimant provided no evidence concerning when, why or in what amounts she requested points to be made available, or any details concerning the deceased's refusals when requested to do so. In any event, she provided no plausible basis for valuing the Aeroplan points. This claim is dismissed.

CONCLUSION

[29] I hereby order the respondent to pay the claimant damages of \$170,613 from the deceased's estate in compensation for his breach of the insurance provision. Her claims for compensation for the boat and Aeroplan points are dismissed. At the claimant's invitation I decline to address the alternative grounds of relief set out in her pleadings.

[30] The claimant has been successful on the main issue argued before me. She will have her costs on Scale B.

"Baird J."

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Prepared on 24 October 2026 · Esheria