
CANADA / JUDGMENT

R.L.G. v. S.R.G.

2004 BCSC 413

COURT

Supreme Court of British Columbia

DECIDED

1 April 2004

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In the Supreme Court of British Columbia

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Citation:

R.L.G. v. S.R.G.,

2004 BCSC 413

Date: 20040401

Docket: 02-5182

Registry: Victoria

Between:

R.L.G.

Plaintiff

And

S.R.G.

Before: The Honourable Mr. Justice Owen-Flood

Reasons for Judgment

The Plaintiff acting on his own behalf

Counsel for the Defendant

M.J. Valletta

Date and Place of Trial/Hearing:

February 23, 24 & 25, 2004

Victoria, B.C.

NATURE OF THE ACTION

- [1] This action involves a petition for divorce, custody of and access to the youngest child of the marriage, child maintenance and a claim pursuant to the Family Relations Act for division of family assets. The major issues are child support for the youngest child of the marriage, including arrears, telephone access with the youngest child, and a determination and disposition of the family assets and debts.

CHRONOLOGY

- [2] Ms. S.R.G. is 35 years of age; Mr. R.L.G. is 36 years of age. The parties met in late 1995 and began living together in February of 1996. The parties were married on March 29, 1997. Ms. S.R.G. contends that the parties lived separately and apart from January 2002 but agrees that Mr. R.L.G. did not actually move out of the home until April 2002. This was a marriage, therefore, of approximately 5 years' duration.
- [3] There are three children of the marriage: S. born [], 1988; H. born [], 1993; R.J.H.E.B.G. born [], 1997. Mr. R.L.G. is the natural father of R.J.H.E.B.G. only. D.W. is the natural father of S. and J.W. is the natural father of H.. Ms. S.R.G. has sole custody of S. and shares joint custody of H. with her natural father. All three children reside primarily with their mother.
- [4] Prior to the marriage Mr. R.L.G. was significantly in debt and he entered into bankruptcy shortly after the marriage. During the marriage Mr. R.L.G. worked periodically as a carpenter and at other part-time jobs. Prior to the marriage Ms. S.R.G. worked from home in the field of childcare and for a period of time she received social assistance. After the marriage Ms. S.R.G. continued to work as a childcare provider, as well as at various other part-time jobs, before obtaining full-time employment as a janitor. The parties also pursued a career in music and recording together during the marriage, which resulted in some significant financial loss to the family. For the past 2 years Mr. R.L.G. has worked as an apprentice electrician, currently at a salary of \$25,000 per year. Ms. S.R.G. has worked full-time as a janitor for the past 6 years and now makes \$23,000 per year.
- [5] As the result of a judicial case conference and lawyer-to-lawyer negotiations, the parties reached a consensus on the issues of custody, guardianship, and access with the exception of telephone access to R.J.H.E.B.G.. An order by consent was made on January 30, 2003. Ms. S.R.G. was awarded sole custody of the children of the marriage and sole guardianship of S. and H.. An order of joint guardianship was made with respect to R.J.H.E.B.G. and Mr. R.L.G. was ordered to pay \$130 per month for the maintenance and support of R.J.H.E.B.G.. Mr. R.L.G. was in arrears on these payments in the amount of \$1,065 at the date of trial.
- [6] Since January 30, 2003, until late October when the husband became unrepresented, the parties have attempted to resolve the issues of property division to no avail.

CUSTODY

- [7] At trial Mr. R.L.G. sought to vary the consent order as to custody of R.J.H.E.B.G.. The consent order specifies that Ms. S.R.G. shall have sole custody of R.J.H.E.B.G. and Mr. R.L.G. now asks for joint custody.
- [8] While I am satisfied that Mr. R.L.G. is a loving and caring father to R.J.H.E.B.G., both parties testified that they have difficulties communicating together and there is a documented history of domestic violence by Mr. R.L.G. against Ms. S.R.G.. Under these circumstances, I am not satisfied that an increase in shared decision-making is in R.J.H.E.B.G.'s best interest, given that the likely result will be an increase in conflict between the parties.
- [9] I am satisfied that Ms. S.R.G. has demonstrated that she is able to make decisions in R.J.H.E.B.G.'s best interests and that she has facilitated contact between R.J.H.E.B.G. and his father and will continue to do so. Joint custody as specified in the January 30, 2003, consent order is therefore appropriate.

ACCESS

- [10] The parties have agreed as to access to R.J.H.E.B.G. but have not agreed on telephone access, which was not specifically addressed in the consent order and has subsequently become a disputed issue.
- [11] As the parties have agreed by consent to communicate by email only, telephone access to R.J.H.E.B.G. by Mr. R.L.G. while R.J.H.E.B.G. is at his mother's home has been a source of conflict and presents some continuing difficulty. I find that under these circumstances an order granting specified telephone access to R.J.H.E.B.G. by Mr. R.L.G. is appropriate.
- [12] I order that Ms. S.R.G. shall have the obligation to facilitate telephone access between Mr. R.L.G. and R.J.H.E.B.G. by dialing Mr. R.L.G.'s number for R.J.H.E.B.G., if he is unable to do so himself, at least twice a week. The days and times may be worked out in advance by the parties by email. This order will remain in effect for 6 months, by which time I would expect that R.J.H.E.B.G. will be able to dial his father's number independently.

CHILD SUPPORT

- [13] Mr. R.L.G.'s guideline income is \$24,950. I order that he pay Ms. S.R.G. the table amount of \$212 per month, payable on the 1st day of each and every month commencing March 1, 2004, and continuing for so long as the child is a "child of the marriage" as defined in the Divorce Act. In addition, child support arrears in the amount of \$1,065 are to be deducted from Mr. R.L.G.'s share of the family assets.

DIVISION OF FAMILY ASSETS

[14] There are two family assets of significance: the marital home in which Ms. S.R.G. currently resides with the children located on R.[] Street ("R.[]"); and a rental property located nearby on O.[] Avenue ("O.[]"). Both properties are situated in the F.[] area of Victoria. I will deal with each property in turn.

The O.[] Avenue Property

[15] In 1991, Ms. S.R.G. purchased the O.[] home with her first husband, D.W., the natural father of S., with the financial help of their families. The parties separated after the stillborn birth of their son in [] of 1992. After separation the parties entered into a written agreement in which Mr. D.W. transferred his interest in the family residence to Ms. S.R.G. as lump sum child maintenance. As part of this separation agreement Ms. S.R.G. discharged Mr. D.W. from any further obligation to pay child support.

[16] Mr. R.L.G. and Ms. S.R.G. subsequently lived together at the O.[] house as a married couple some 4 years later, between May 1996 and October 1997. One month after Mr. R.L.G. moved into O.[] Ms. S.R.G. became pregnant and the parties recognized the need to move to a larger home. In total, the parties lived at O.[] 11 months prior to marriage and 7 months after marriage. The property is currently rented and the payments are used to offset the first and second mortgages on the property.

[17] Ms. S.R.G.'s position is that O.[] is not a family asset as it was a temporary home and it was known to the parties that the property was held for the benefit of S.. In addition, Mr. R.L.G. did not contribute financially to the home and it was purchased approximately 6 years prior to the marriage. Counsel for Ms. S.R.G. also asserts that to divide this property and award Mr. R.L.G. a share would be grossly unjust and would deprive S. of the child support provided to her by her father.

[18] Mr. R.L.G. asserts that while he lived at O.[] he improved the property significantly and contributed to its increase in value through various renovations. Ms. S.R.G. disputes that Mr. R.L.G.'s contributions to the property improved the value of the property, disputes that Mr. R.L.G. worked on the home to the extent that he represented he did, and states that much of the work that was done on O.[] had to be redone as it was not in compliance with building codes.

[19] Upon review of the evidence, I am satisfied that Mr. R.L.G. did contribute to the renovation of the O.[] street property during the marriage and that the funds to do so were provided by a government residential remediation grant and a private mortgage on the home. Witness testimony confirmed that many parties, including various family members and friends, also contributed to the renovations and these testimonies cast some doubt on the extent and quality of the renovations undertaken by Mr. R.L.G.. Despite this, I am satisfied that Mr. R.L.G.'s contribution was not insignificant.

[20] Finally, although counsel for Ms. S.R.G. contends that the occupation of the home was of a temporary nature, I would not agree. There was a 7-month period during the marriage in which the couple used the home for a family purpose. A family asset is defined as an asset that has been ordinarily used during the marriage for a family purpose. The use of the home as a family residence for this period of time was more than temporary and does not fit within the facts set out in *R.J.J.M. v. D.M.M.*, [1997] B.C.J. No. 3011 (S.C), provided by counsel for Ms. S.R.G..

[21] Accordingly, I find that O.[] is a family asset under s.56 of the Family Relations Act.

Reapportionment

The date for characterizing the O.[] property as a family asset is the date of the triggering event, in this case this is the date of the s. 57 declaration contained in the consent order entered into on January 30, 2003: *Newson v. Newson* (1993), 45 R.F.L. (3d) 115 (B.C.C.A.). The O.[] property at this date was not used for a family purpose but I find that it remained a family asset: *Martelli v. Martelli* (1980), 22 B.C.L.R. 397 (S.C.).

[22] There is a presumption under the Act that family assets will be divided equally; however, under s. 65 of the Act jurisdiction is given to vary the order where equal division would be unfair. Relevant facts under s. 65 include:

- (a) the duration of the marriage;
- (b) the duration of the period during which the spouses have lived separate and apart;
- (c) the date when property was acquired or disposed of;
- (d) the extent to which property was acquired by one spouse through inheritance or gift;
- (e) the needs of each spouse to become or remain economically independent and self sufficient;
or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity of liabilities of a spouse, ...

[23] It is clear that a number of factors support reapportionment of this asset in Ms. S.R.G.'s favour.

[24] Although Mr. R.L.G. contributed to the renovation of the O.[] property he contributed nothing to its purchase and a half-interest in the property was conveyed to Ms. S.R.G. in lieu of child support by S.'s father. In addition, the parties were married for a relatively short period and the evidence also reflects that Ms. S.R.G. made all mortgage and property tax payments on the property during the marriage and has continued to do so since separation.

- [25] Ms. S.R.G. is now in a position where she is caring for the three children of the marriage as a single parent on a modest salary. Mr. R.L.G. has stated that he acted as a father to all three children during the marriage. The evidence supports the fact that Mr. R.L.G. shared some of the child care responsibilities for all three children as he worked only sporadically during the marriage. Mr. R.L.G. has, however, paid no child support for S. or H.. In addition, Mr. R.L.G. is currently significantly in arrears on his child support payments for R.J.H.E.B.G..
- [26] While a reapportionment of assets will not replace the obligation to pay child support, if the non-custodial parent is not able to make a substantial contribution, this is a factor to be considered under subsections 65(1)(e) and (f). See *Bateman v. Bateman* (1984), 42 R.F.L. (2d) 120 (B.C.C.A.). I am satisfied that, given the poor past performance regarding the payment of child support by Mr. R.L.G., the relatively short period of occupation of the house by him, the relatively short marriage, the fact that the house was purchased prior to marriage by Ms. S.R.G. and financed during the marriage by her, and the fact that the house was intended to provide child support and security for S., justify a 90% reapportionment of this asset in favour of Ms. S.R.G..
- [27] Counsel for Ms. S.R.G. argues that if the property is found to be a family asset the date of valuation ought to be the triggering event rather than the date of trial as the intervening rise in the value of O.[] is due entirely to the inflationary market. I would agree that there has been a significant increase in the value of the property in the 1 year prior to trial due to market forces. As of January 2003 the property was valued at \$145,000, while on December 2003 the property was valued at \$165,000.
- [28] I note, however, that, generally, parties are entitled to share equally in any increase in value between the date of the triggering event and the date of the trial: *Muir v. Muir*, 1996 Civ. L.D. 752 (B.C.S.C.). I have reviewed *Gilpin v. Gilpin*, [1990] B.C.J. No. 2272 provided by counsel for Ms. S.R.G. but I find that the reapportionment ordered sufficiently addresses the need for unequal division of assets in this case. The date for valuation will therefore be the date of trial. The equity in the home at this date totalled \$91,024.
- [29] Mr. R.L.G. is therefore entitled to compensation for his share to a value of \$9,102.40.

The R.[] Street Property

- [30] The R.[] Street property was purchased by Ms. S.R.G. in October of 1997 with her own money and a small contribution by her grandmother. The family then moved from O.[] to R.[]. The equity in O.[] was not used to purchase R.[] and Mr. R.L.G. did not contribute financially to the purchase of the home.
- [31] As of the triggering event, the property remained the marital home and Ms. S.R.G. and the three children live in the home. Counsel for Ms. S.R.G. asserts that the family home should be reapportioned entirely to Ms. S.R.G. due to the need for security for the children, the inability of Ms. S.R.G. to shoulder additional debt and maintain the family home, and the likelihood that Mr. R.L.G. will not fulfill his child support obligations in the future given his

past performance. Mr. R.L.G. asserts that the home is a family asset and ought to be equally distributed between the parties.

Reapportionment

- [32] Having regard to the needs of each spouse to remain independent and the factors relevant to s. 65 set out above, I find that it would be unjust to reapportion the marital home equally. However, a 100% reapportionment would not be fair having regard to the fact that Mr. R.L.G. made some contribution to this home in the form of renovation and repairs. In addition, Mr. R.L.G. shared some of the child care responsibilities. I therefore reapportion the family home 75% in favour of Ms. S.R.G..
- [33] I note that R.[] has also experienced a sharp increase in valuation over the past year due to the inflationary market; however, the date of valuation will be the date of trial as the reapportionment ordered sufficiently addresses the need for unequal division of this asset.
- [34] The equity in the home at this date totalled \$49,497.16. Mr. R.L.G. is therefore entitled to compensation for his share to a value of \$12,374.29.

Other Assets

- [35] Ms. S.R.G. alleges that Mr. R.L.G. removed virtually all of the valuable family property from the marital home without her consent after separation. Ms. S.R.G. claims a half-interest in these items, which largely comprise band equipment and are valued by her at approximately \$12,000. Mr. R.L.G. asserts that tools, musical instruments and other family and personal items to which he assigns a value of \$14,950 remain at the marital home and he claims these items or their full value.
- [36] I accept the valuations provided by the parties and order that both parties retain the items in their possession with the exception of the items claimed by Mr. R.L.G. which clearly were not used for a family purpose. These items are: work clothes and clothing, soccer cleats, hockey gear, rollerblades and ice skates, wedding ring, childhood and recent trophies, and certificates.
- [37] In addition, I order that Ms. S.R.G. pay to Mr. R.L.G. \$1,000 in compensation for the difference in valuation after Mr. R.L.G.'s personal items in her possession are returned.

DIVISION OF FAMILY DEBTS

- [38] Debts incurred prior to separation for a family purpose are considered to be family debts and subject to equal division.

- [39] Ms. S.R.G. presented a number of debts which were incurred prior to separation. These debts include VISA (\$2,556); Petro Canada (\$534); computer loan (\$1,200); Telus (\$450); FIDO statement (\$728) and Website (\$400). The total of these debts is \$5,868. I find that the records provide support for the fact that these debts were incurred during the marriage for family purposes. I order that they be divided between the parties with each party being responsible for \$2,934.
- [40] There are also a number of debts incurred prior to separation as a result of personal loans. These loans total \$3,685. I find that, on the balance of probabilities, these loans were incurred largely as a result of a music tour enterprise undertaken by the G. during the marriage. These debts were therefore incurred for a family purpose and are to be divided equally between the parties.
- [41] In addition to the debts incurred prior to separation, there are a number of post-separation debts. In *Jung v. Jung* (1998), 14 R.F.L. (3d) 430 (B.C.C.A.), the Court of Appeal held that debts incurred to support the family after separation were to be shared equally by the parties, but debts not incurred for that purpose could not be divided. In November 2002 Ms. S.R.G. borrowed \$15,225 via an inter alia mortgage on the homes, primarily to pay property tax arrears to prevent both O.[] and R.[] from being auctioned off by the City. From the mortgage amount incurred I deduct \$375 which was dispersed for Ms. S.R.G.'s legal fees. I am satisfied that the remaining portion of the debt was used to pay debts incurred for a family purpose. Each party is therefore responsible for half of the remaining \$14,850 debt.
- [42] Finally, Mr. R.L.G. listed a debt of \$8,000 incurred post-separation in July 2002. This debt had grown to \$17,000 by February 2004. There is no evidence that the debt listed by Mr. R.L.G. was incurred for a family purpose and it may not, therefore, be divided between the parties. Similarly, Ms. S.R.G. lists a \$500 debt owed to the Brick post-separation and legal fees. These debts are not family debts and may not be divided under the Act.

COSTS

- [43] As Ms. S.R.G. was substantially successful in this action she is entitled to her costs on scale 3.

SUMMARY

In summary, I order as follows:

- a) The parties are divorced effective on the 31st day following the release of these Reasons.
- b) Ms. S.R.G. shall have sole custody of the child R.J.H.E.B.G. ("R.J.H.E.B.G.") born on [], 1997. Ms. S.R.G. shall hereafter again be known by her maiden name, S.R.C..
- c) The parties shall have joint guardianship of the child of the marriage, R.J.H.E.B.G., born on [], 1997, and joint guardianship for the purpose of this order will reflect the terms set out in the January 20, 2003, consent order.

- d) Mr. R.L.G. shall have specified access to the child R.J.H.E.B.G. as set out in the January 20, 2003, consent order.
- e) Ms. S.R.G. shall have the obligation to facilitate telephone access between Mr. R.L.G. and R.J.H.E.B.G. by dialing Mr. R.L.G.'s number for R.J.H.E.B.G., if he is unable to do so himself, at least twice a week. The days and times may be worked out in advance by the parties by email. This order will remain in effect for six months following the release of these reasons.
- f) Mr. R.L.G. is required to pay child support for R.J.H.E.B.G. pursuant to the Guidelines in the monthly sum of \$212 per month, payable on the 1st day of each and every month, commencing March 1, 2004, and continuing for as long as the child is a "child of the marriage" as defined in the Divorce Act.
- g) Mr. R.L.G. shall provide to the defendant a copy of his income tax return and any notices of assessment by May 31 of each year, commencing with the year 2004.
- h) Child support arrears in the amount of \$1,065 are to be deducted from Mr. R.L.G.'s share of the assets.
- i) The O.[] and R.[] properties are family assets.
- j) O.[] is reapportioned 90% in Ms. S.R.G.'s favour with value assessed at the date of trial.
- k) R.[] is reapportioned 75% in Ms. S.R.G.'s favour with value assessed at the date of trial.
- l) Family debt in the total amount of \$24,403.50 is to be divided equally between the parties.
- m) The parties shall each keep the assets in his or her possession as his or her own personal property absolutely with the exception of the personal property of Mr. R.L.G. including: work clothes and clothing, soccer cleats, hockey gear, rollerblades and ice skates, wedding ring, childhood and recent trophies, and certificates which are to be returned to him if in the possession of Ms. S.R.G..
- n) Ms. S.R.G. shall pay to Mr. R.L.G. \$1000 in compensation for the value of family chattels retained by her.
- o) Neither party shall attend upon the residential property, residence or place of employment of the other.
- p) All communication between the Plaintiff and the Defendant shall be by email or in writing and confined to the issues of access.
- q) Ms. S.R.G. is entitled to costs on scale 3.

"D.D. Owen-Flood, J."

The Honourable Mr. Justice D.D. Owen-Flood

April 6, 2004 - Corrigendum to the Reasons for Judgment issued by Mr. Justice D.D. Owen-Flood advising that the amount of at the end of paragraph [29] should read:

"\$9,102.40".

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