

CANADA / JUDGMENT

R.M.J. v. P.N.J.

2003 BCSC 1135

COURT

Supreme Court of British Columbia

DECIDED

18 July 2003

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2003BCSC1135 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R.M.J. v. P.N.J., 2003 BCSC 1135 Date: 20030718 Docket: E021820 Registry: Vancouver Between: R.M.J. Plaintiff And: P.N.J. Defendant Before: The Honourable Madam Justice Ross Reasons for Judgment Counsel for the Plaintiff Lora Anjos Counsel for the Defendant I.G. Gibson Date and Place of Hearing: June 5, 2003 Vancouver, B.C.

INTRODUCTION

[1] This is a family proceeding. Both parties have filed motions seeking summary judgment pursuant to Rule 18A. The relief sought is:

- (a) an Order for divorce;
- (b) Ms. R.M.J. seeks an Order changing her surname to L.;
- (c) a declaration and an Order for division of family assets;
- (d) Ms. R.M.J. seeks an Order for occupational rent with respect to the matrimonial home;
- (e) Mr. P.N.J. seeks a compensation Order with respect to expenditures made in relation to the matrimonial home and the recreational property;
- (f) Mr. P.N.J. seeks an Order for retroactive child support. BACKGROUND FACTS

[2] The parties were married on February 18, 1978 in Vancouver, British Columbia. They ceased to cohabit on May 1, 2001 when the plaintiff, Ms. R.M.J., left the matrimonial home.

[3] Ms. R.M.J. is a hospital worker with an annual income of approximately \$36,000. Mr. P.N.J. is employed as a bus driver with an annual income of between \$46,000 and \$52,000. Mr. P.N.J. has experienced problems with depression and suicide attempts, necessitating hospitalizations. It was during one such hospitalization that Ms. R.M.J. left the matrimonial home.

- [4] The J. have two children; S.H., born [], 1982; and J.P.G., born [], 1984. Both children were living independently at the time of the application and both parents agree that neither is a child of the marriage any longer.
- [5] J.P.G. had a difficult adolescence. He has had problems with substance abuse and has spent some time in a treatment program. Following an argument with Ms. R.M.J., J.P.G. was arrested and convicted for uttering threats. He served a short period of incarceration.
- [6] There is a dispute in the evidence with respect to the issue of J.P.G.'s residence during much of the period of the separation. Ms. R.M.J. deposed that J.P.G. moved in with Mr. P.N.J. in January 2002, but that soon after he spent increasing periods of time at her residence. She deposed that by March 2002, J.P.G. was spending only one day per week with Mr. P.N.J., the rest of the time with her or at his girlfriend's house.
- [7] The evidence of Mr. P.N.J. is in flat contradiction. He deposes that J.P.G. lived with him from December 2001 to January 2003 and that during that time J.P.G. saw his mother only occasionally. S.H. deposed that J.P.G. was living with his father and seeing his mother only about once every three weeks. She deposed further that, in the past month and a half before February 2003, J.P.G. stayed at his mother's from Sunday to Wednesday. He would get out of school at noon and then spend the afternoon at his father's or at his girlfriend's house. He did not, however, have a key to his mother's apartment. All his personal items were at his father's house. It was her evidence that this arrangement was so that J.P.G. could get a ride to school in the morning.
- [8] S.H. deposed that she was living with her mother from February 2002 to August 2002.
- [9] The assets at issue are as follows:
- (a) Matrimonial home located at [], Delta, British Columbia. The home was sold on April 30, 2003 for \$213,000. The net proceeds of the sale of \$198,821.42 are being held in trust pending disposition of the applications.
 - (b) Recreational property located at [], Washington. This property has been for sale for some time at a listing price of \$10,000 with no offers forthcoming. Mr. P.N.J. has consented to Ms. R.M.J. acquiring his interest in this property for \$1,250 subject to Ms. R.M.J. reimbursing him for expenditures made with respect to the property.
 - (c) Pension plans. Each party has a pension plan with Canada Pension and a plan through their respective employment. No evidence was adduced with respect to the valuation of any of the plans.
 - (d) RRSPs and Mutual Funds. The parties have the following RRSPs:
 - (i) TD Canada #[] in the amount of \$6,187.87; (ii) DISA #[] in the amount of \$1,793.64; and (iii) Canada Western Bank # [] in the amount of \$7,000.

- [10] In addition the parties have two CT Mutual funds, Accounts #[] in the amount of \$4,119.16 and #[] in the amount of \$7,345.70. DIVORCE
- [11] The parties seek a divorce on the grounds that they have been separated for over one year. This ground has been proven and all the other requirements of the Divorce Act R.S.C. 1985, c. 3 have been met.
- [12] Therefore, the parties are granted a divorce. Pursuant to s. 12(1) of the Divorce Act, that divorce will take effect in 31 days. NAME CHANGE
- [13] Ms. R.M.J. seeks an Order pursuant to s. 5 of the Name Act R.S.B.C. 1996, c. 328 that her surname be changed to L., surname at birth and before the marriage. That Order is granted. FAMILY ASSETS
- [14] I find that the matrimonial home, recreational property, pension plans, RRSPs, and mutual funds are all family assets. Subject to the adjustments detailed below with respect to occupational rent, expenditures and retroactive child maintenance, there will be an Order for equal division of the family assets. The pensions are to be divided pursuant to part 6 of the Family Relations Act R.S.B.C. 1996, c. 128. The RRSPs and mutual funds will be equalized and the RRSPs dealt with by spousal roll over. OCCUPATIONAL RENT
- [15] Ms. R.M.J. claims that an amount of between \$23,650 and \$25,800 should be deducted from Mr. P.N.J.'s share of the proceeds of sale of the matrimonial home to represent an occupational rent of between \$1,100 and \$1,200 per month for 21 1/2 months. Mr. P.N.J. submits that for 13 months of the period for which occupational rent is being claimed, Mr. P.N.J. was providing a home for J.P.G. and that S.H. was also residing with him for four of those months. Accordingly, any occupational rent charged should be reduced to take account of that fact. Moreover, counsel submits that it is unfair to charge occupational rent where, as here, there has been conspicuous delay, not of Mr. P.N.J.'s making, in bringing the matter on for trial.
- [16] I find that J.P.G. was living with Mr. P.N.J. for 13 months of the period of the separation while Mr. P.N.J. was occupying the matrimonial home. I also find that the delay in bringing these applications on for hearing cannot be attributed to either party.
- [17] In the circumstances, the guidance with respect to the approach to be taken is found in *Donovan v. Donovan*, [1986] B.C.J. No. 922, a decision of Mr. Justice Paris at para. 21: On the other hand, she should receive the following credits. The actual rent received from the suite was \$14,275.00. There was evidence that the value of the rent which could be realized from the balance of the house, that is that portion occupied by the husband and children, was \$800.00 a month. The total of that amount since separation is \$26,400.00. However, notionally, only part of that amount is chargeable to the husband as rent because the children were occupying the premises as well. It would hardly be right for her to charge her children rent for staying in the house. In my view, the husband should be charged with only half of the amount attributable to occupational rent, that is, \$13,200.00. Therefore, the total

of the actual rent received by the husband and his share of the occupational rent is \$27,475.00. Her share of that amount is one-half thereof, that is, \$13,737.00.

[18] Following that reasoning in the case at bar, Mr. P.N.J. should be charged only half the amount of occupational rent for the period when one or both of the children were residing with him. That would amount to \$7,150 for the 13 month period (\$550 x 13). The amount for the remaining period would total \$8,800 (\$1,100 x 8) for a total occupational rent figure of \$15,950 for which Ms. R.M.J.'s share is one half or \$7,975. Therefore, Ms. R.M.J. will be credited with \$7,975 in the division of the proceeds of the sale of the matrimonial home with respect to her claim for occupational rent. EXPENDITURES ON THE PROPERTY

[19] Mr. P.N.J. seeks a credit for the expenditure of the following sums with respect to the property in preparation for the sale:

- a. \$1,500.00 on the furnace (Exhibit B);
- b. \$675.74 for paint and painting (Exhibit C);
- c. \$161.00 for weigh scale tickets at the dump (for hauling garbage to the dump) (Exhibit D);
- d. \$423.65 for door replacement (Exhibit E);
- e. \$39.39 for painting supplies and new gutters (Exhibit F);
- f. \$23.88 for the new outside light (Exhibit G);
- g. \$12.12 for a new blade for the range hood (Exhibit H);
- h. \$104.00 for carpet cleaning (Exhibit I);
- i. \$295.26 for a new hot water tank (Exhibit J);
- j. \$296.69 for garage shingles (Exhibit K);
- k. \$385.00 for labour (painting, scrubbing the floor, cleaning the cupboards, installing shelf strips, pressure washing cleaning windows, yard work, etc. Paid @ \$10.00 per hour) (Exhibit L)
- l. \$163.25 for labour (hired a man to hang the door, trim the shingles, and replace some of the gutter)(Exhibit M); and
- m. \$126.32 for miscellaneous items purchased to prepare the matrimonial home for sale (Exhibit N).

[20] These amounted to a total of \$4,206.30. It was his evidence that these expenditures resulted in an increase in the value of the property.

[21] Mr. P.N.J. also seeks a credit for: \$1,277.28 paid with respect to property taxes for 2002, \$425 for home insurance for 2002 and \$449 for 2003, \$525 for water, sewer, garbage and recycling for a total of \$2,676.28. The total credit claimed by Mr. P.N.J. was \$6,882.58.

- [22] In addition, the matrimonial home had a credit line registered as a mortgage in the approximate value of \$4,423.36. Mr. P.N.J. made monthly payments on that debt in the amount of \$20 per month for 21 months.
- [23] Mr. P.N.J. seeks to have all of these expenditures deducted from the proceeds of sale of the matrimonial home before the equal division of the proceeds. In other words, he seeks to be fully reimbursed for those sums.
- [24] Ms. R.M.J. disputes all of the items claimed with respect to the expenditures in relation to preparation for the sale except for the door replacement, submitting that they were unnecessary. She submits that home insurance was required only until April 2003.
- [25] I find that the expenditures were reasonable expenditures made in relation to the preparation of the home for sale. From the evidence, it appears that the sale price of the home was increased at least in part as a result of these expenditures. It is not appropriate however, in my view, for Mr. P.N.J. to be fully reimbursed for these expenditures. Rather, it is appropriate that the parties share in these expenses. Mr. P.N.J. should receive a credit for only one half of the expenditures and the 2003 insurance should be prorated. Therefore, in the division of the net proceeds of the sale of the matrimonial home, Mr. P.N.J. will be credited with $\$3,651.29(1/2 \text{ of } \$4,206.30 = \$2,103.15 + 1/2 \text{ of } \$2,676.28 = \$1,338.14 + 1/2 \text{ of } \$420)$. RETROACTIVE CHILD SUPPORT
- [26] Mr. P.N.J. also seeks a credit for retroactive child support for the period during which he was supporting J.P.G.. It is common ground that Ms. R.M.J. was not paying anything to Mr. P.N.J. during this period by way of child maintenance.
- [27] Rowles J.A. for the Court of Appeal in *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254, 1999 B.C.C.A. 393 (1999), leave to appeal to S.C.C. refused *S. (L.) v. P. (E.)*, [1999] S.C.C.A. No. 444 (S.C.C.), discussed at length the principles and factors governing the discretion to order child support in relation to the periods before judgment or before service of the application for child support. At para. 66-67 she noted the following: A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end. Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the

guise of child support; and (3) a significant, unexplained delay in bringing the application

- [28] In *Ryerson v. Ryerson*, 2002 B.C.S.C. 1606, Holmes J. discussed the principles that are at play in relation to such applications, stating at paras. 39-40: In her Reasons, Rowles J.A. identified a tension -- which I find applies here -- between two of the principles underlying the court's exercise of discretion to award retroactive child support. On one hand, the court should not unfairly impose an unexpected retroactive obligation in respect of a time when there was no extant application for support. On the other hand, the obligation to support a child is one that a parent knowingly carries from the time of the child's birth; it exists regardless of the custodial parent's neglect in its enforcement, and may not be bargained away. It appears that a fair balancing of the child's right to financial support and fairness to the parent from whom support is sought is usually, though not always, found in confining the retroactive effect of an order for child support to the date of the application. This gives the paying parent notice of the likely event of a support order, while also ensuring that the child receives the support to which he or she is entitled for at least part of the pre-trial period.
- [29] In the case at bar, I find that there is need on the part of the child and a corresponding ability to pay on the part of Ms. R.M.J., the non-custodial parent. There is no evidence of blameworthy conduct. There is no evidence that Mr. P.N.J. was obliged to erode his capital or incur debt to provide for J.P.G.. The claim for child maintenance was raised in the Counterclaim dated June 17, 2002. There is no explanation for the delay in bringing on the application. However, it is clear from the affidavit material that there have been extensive efforts to resolve the outstanding issues by way of settlement. The award here would serve to redistribute assets. Given that, the fact that J.P.G. no longer resides with Mr. P.N.J., and the fact that no application was brought during the time when he was living with Mr. P.N.J., I have concluded that this is not an appropriate circumstance in which to make an Order for retroactive maintenance. EXPENSES IN RELATION TO THE RECREATIONAL PROPERTY
- [30] Mr. P.N.J. has paid the following sums for the strata fees for the recreational property:
- a. \$253.49 (August 7, 2001)
 - b. \$288.50 (October 19, 2001)
 - c. \$278.49 (January 25, 2002)
 - d. \$270.51 (April 20, 2002)
 - e. \$270.91 (August 1, 2002)
 - f. \$279.30 (November, 2002)
 - g. \$193.64 (January, 2003)
 - h. \$269.17 (April, 2003) Total: \$2,104.01

[31] In addition he has paid \$98.54 U.S. dollars and \$98.85 Canadian to the taxes on the property and \$122.11 for propane for the property. There will be a compensation Order for half of the total amount of those expenditures. COSTS

[32] Success has been divided in this matter. Each party will bear their own costs. "C. Ross, J." The Honourable Madam Justice C. Ross

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