

CANADA / JUDGMENT

Rojas v. Estevez

2002 BCSC 907

COURT

Supreme Court of British Columbia

DECIDED

17 June 2002

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Citation:	Rojas v. Estevez, aka Antonio Alvarez
Date:	20020617 2002 BCSC 907
Docket:	D12303 Registry: Chilliwack IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	PEGGY PAULINA MARIN ROJAS PLAINTIFF
AND:	ANTONIO ALVAREZ ESTEVEZ ALSO KNOWN AS ANTONIO ALVAREZ DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE RALPH

Counsel for the plaintiff

Lester A. MacDonald

The defendant not appearing

Date and Place of Hearing/Trial:

December 17, 2001

Chilliwack, BC

- [1] Ms. Rojas and Mr. Alvarez were married in Costa Rica January 28, 1989. At the time Ms. Rojas was resident in Costa Rica and Mr. Alvarez was resident in British Columbia but in Costa Rica on an extended stay. Shortly after the marriage they moved to British Columbia. Their son was born in Vancouver on July 1, 1990. The parties also lived for one or two months of each year in Miami, Florida, and approximately two months in Costa Rica. They separated in 1992 while staying in Costa Rica and Ms. Rojas remained in Costa Rica where she and her son continue to reside.
- [2] Ms. Rojas commenced this action in July 1998 seeking a divorce, custody of the child, child and spousal support and orders dealing with family assets. The parties have already taken certain actions in Costa Rica for support and judicial separation and I will return to them below.
- [3] There are two preliminary matters which must be considered before the substance of Ms. Rojas claims can be addressed.
- [4] Mr. Alvarez did not appear at the trial on December 17 although he had been personally served with Notice of Trial on July 8, 2001. He was personally served with Notice of Trial a second time on October 17, 2001, that notice being accompanied by a letter from counsel for the plaintiff advising Mr. Alvarez that witnesses from Costa Rica would be attending the trial.
- [5] On Sunday, December 16, 2001, and at 7:30 a.m. on December 17, a "Request for a Stay of Proceedings" bearing Mr. Alvarez' signature was faxed to the court registry. The body of the request stated:

In view of the circumstances, I do not know whether I am supposed to be at the court today, because I had opposed the trial date and location earlier by registered mail. Because of events that took place in the courthouse in Chilliwack in the year 2000, and more specifically one on or about Dec. 29, 2000, I was intimidated by the armed officers, etc. and was forced to leave the registry when trying to file some documents which were refused by Ms. M. Moore, and which are necessary to afford fundamental evidence of real issues etc.

I am intimidated and afraid to attend at this location because of what has happened in the past. I feel that I have been treated unjustly in several matters, and that my human rights were not respected.

- [6] Ms. Rojas and one witness had travelled from Costa Rica to attend the trial and counsel for Ms. Rojas opposed an adjournment. Counsel was not aware of any incident involving "intimidation" of Mr. Alvarez. Mr. Alvarez had appeared in court on January 8 and 22, 2001, and on at least two occasions prior to that although he did not appear at the pre-trial conference on December 12, 2001. He had also filed affidavits at earlier stages of the action. I ruled pursuant to R. 39(33) that the trial would proceed in the absence of Mr. Alvarez.

- [7] The second preliminary matter arises out of the fact that a decree of divorce was granted by Grist J. on January 22, 2001. On February 5, 2002, subsequent to the trial before me on December 17 and 18, 2001, but before judgment, the Court of Appeal set aside the decree of divorce. The court did so on the basis that Mr. Alvarez had been led to believe that January 22, 2001, was only a date on which he was to advise the court of his intentions to retain counsel and not a date for hearing the divorce application.
- [8] Subsequent to the order of the Court of Appeal I directed a memorandum to counsel for Ms. Rojas seeking his position on whether it was still open to this court to rule on Ms. Rojas' entitlement to family assets in the absence of a divorce order. Counsel responded with a position which he had taken in the trial that an order of judicial separation of the parties pronounced by a court in Costa Rica on June 30, 1997, constituted a triggering event under s. 56 of the Family Relations Act, R.S.B.C. 1996, c. 128. It was his position that it was therefore open to the court to rule on family assets.
- [9] The judicial separation was pronounced by the Family Court of San Ramon on June 30, 1997. Counsel for Ms. Rojas in the judicial separation proceedings gave evidence in the trial before me. In Costa Rica judicial separation will be granted under article 58 of the Family Code if the parties have been separated for one year occurring after two years of marriage.
- [10] Mr. Alvarez appeared at the hearing in San Ramon. He denied the separation but the court held otherwise. Mr. Alvarez then appealed the judicial separation order. The Family Superior Tribunal of San Jose confirmed the judicial separation on October 8, 1997.
- [11] The legal effect of a judicial separation under Costa Rican law was not made entirely clear in the trial before me. What is clear, however, is that it had the legal force of altering the marital relationship of the parties in view of their separation for a period of two years. In addition, Ms. Rojas had a real and substantial connection with Costa Rica. Mr. Alvarez both appeared at the trial and appealed the decision of the Costa Rican court. These facts give force to a finding that the judicial separation should be recognized by this court.
- [12] In *Tatlock v. Tatlock* (1992), 71 B.C.L.R. (2d) 194 (S.C.) Gow J. considered the meaning of "judicial separation" as used in the definition of "spouse" in s. 1 of the Family Relations Act. He found that a Quebec declaration in 1967 constituted a "judicial separation". Because the judicial separation had occurred more than two years before the petitioner's action was taken, however, the petitioner was found not to be a "spouse" under the Act.
- [13] The decision was affirmed by the Court of Appeal at (1994), 88 B.C.L.R. (2d) 197 (C.A.). Prowse J.A. noted that s. 56(1)(c) of the Family Relations Act refers to both "an order for dissolution of marriage or judicial separation" as events which entitle a spouse to an interest in each family asset. At para. 15 she stated:

Those drafting the Act must be taken to have been aware of the nature and effect of a judicial separation. By specifically referring to judicial separation in the definition of spouse, in the same phrase as they refer to divorce and nullity, I conclude that they have treated them alike for the

purpose of the definition of spouse. It is reasonable to conclude that they did so because they regarded them as having similar consequences. In other words, they regarded them as affecting the marriage bond in such a way that the marriage could be treated as effectively over for the purpose of applying for relief under the Act.

- [14] I am satisfied that the legal proceedings which took place in Costa Rica constitute a judicial separation as contemplated under s. 56(1)(c) of the Family Relations Act. I am also satisfied that Ms. Rojas is a "spouse" as defined under s. 1 of the Act and that her action before this court commenced on July 15, 1998, was brought within 2 years of the making of the order for judicial separation. It follows that she is entitled to an interest in the family assets as of June 30, 1997.
- [15] Before determining the family assets it is necessary to review further evidence concerning the marriage. At the time of the marriage Ms. Rojas was 18 years old and Mr. Alvarez was 44. Ms. Rojas was residing with her parents and attending university in San Ramon. She was close to completing the prerequisite courses for entry into medical school and upon doing so was intending to enter medical school. Ms. Rojas says that Mr. Alvarez assured her that she could complete her studies in Canada or Spain.
- [16] When the parties arrived in Vancouver after the marriage, they resided in one of the apartments of a small apartment building at 2632 West 2nd Avenue, Vancouver. Mr. Alvarez has been the registered owner of the property since May 1995 but the state of title is complex. In 1971 Mr. Alvarez' brother, Jesus Angel Alvarez, registered a right to purchase the property from the then owner. The City of Vancouver holds judgments against the interest of Jesus Alvarez in the property.
- [17] In September 1992 Mr. Antonio Alvarez commenced an action relating to the property against his brother, Mr. Lyle who was then the registered owner, and the City of Vancouver. The Statement of Claim was amended in 1994. In the action Mr. Antonio Alvarez alleges that he contributed funds to the purchase of the property including the initial deposit in 1971 and claims an undivided one-half interest in the right to purchase the property. It is Ms. Rojas' evidence that Mr. Alvarez also told her after the marriage that he and his brother were joint owners of the property. Ms. Rojas also testified that during the time she lived there between 1989 and 1992 her husband collected the rents for the building, held the keys and was responsible for the building. She said that on occasions when Mr. Alvarez went out of town the keys were left with her.
- [18] It appears from the evidence before me that Mr. Alvarez' action against his brother has not proceeded to trial. In the financial statement filed by Mr. Alvarez in this action in October 1999 he states that the litigation is ongoing. The assessed value of the property for 1998 was \$642,200. The 1997 assessed value was \$582,100.

- [19] Ms. Rojas testified that prior to the marriage Mr. Alvarez had told her that after the marriage they would live in a house in Richmond and showed her a picture of the house. Upon her arrival in Vancouver after the marriage Ms. Rojas said that Mr. Alvarez took her to the house where she found Mr. Alvarez' former common law wife and two children of that relationship residing.
- [20] Mr. Alvarez took Ms. Rojas to the house on an almost daily basis for substantial portions of each day. Mr. Alvarez would do chores, attend to the swimming pool and carry out finishing work on the house. The parties ate their meals at the house. Ms. Rojas found the experience to be frustrating and not the normal family life which she had expected. It became a source of constant argument with Mr. Alvarez. Ms. Rojas said that this routine went on from 1989 to 1992 although there were some long periods of time when she would not go to the property because she did not know how to deal with the situation.
- [21] The Richmond property was situated at 7071 Gilbert Road. Mr. Alvarez became the registered owner of the property in August 1982. He sold the property in February 1997 for \$750,000. The only charge registered against the property was for income tax in the amount of \$31,901.87. There is no evidence of what use Mr. Alvarez made of the net proceeds.
- [22] In August 1990 Ms. Rojas and Mr. Alvarez purchased an eight unit apartment building at 2050 S.W. 3rd Avenue in Miami, Florida. The purchase price was \$235,000 (U.S.). Mr. Alvarez made the down payment and the property was subject to a mortgage to the vendors of \$177,000 (U.S.) which was paid out in 1993. In January 1995 Ms. Rojas and Mr. Alvarez placed a new mortgage against the property in the amount of \$150,000 (U.S.). The mortgagee was Mr. Alvarez' brother, Ramon Alvarez Estevez. Ms. Rojas testified that she had agreed to sign the mortgage in return for Mr. Alvarez' promise to pay her 80,000 Costa Rican colones per month (approximately \$250 (U.S.)). Mr Alvarez did not make payments to her nor did she receive any of the rents paid by tenants. Statements made by Mr. Alvarez in his examination for discovery, indicate that the mortgage is in arrears but the amount of arrears has not been ascertained. If payments had been maintained the amount owing on the mortgage in December 2001 would have been approximately \$115,000 (U.S.). An appraisal of the building without having carried out an interior inspection was tendered in evidence at the trial. The appraised value is \$300,000 (U.S.).
- [23] After the separation of the parties at the end of 1992 Ms. Rojas remained in Costa Rica. She enrolled in university and completed her pre-medicine courses and medical school including an internship in September 2001. The cost to Ms. Rojas was approximately \$20,000 (U.S.). Ms. Rojas testified that establishing a medical practice is difficult in Costa Rica and it is her expectation that it may take a substantial period of time for her to earn a reasonable income.
- [24] The child of the marriage is now eleven years old. He has resided with Ms. Rojas' parents and been with his mother on weekends. In October 1995 the Small Claims Court of San Ramon ordered Mr. Alvarez to pay support for Ms. Rojas and their child in the amount of

30,000 colones per month. Ms. Rojas appealed the order and the amount was raised to 40,000 colones per month. To the date of the trial Mr. Alvarez has made approximately 25 of the 84 payments he was ordered to pay. In the three months before the trial he made payments of \$100(Cdn) directly to the bank account of the child.

- [25] In his financial statement filed in this action in October 1999, Mr. Rojas stated his annual income as \$3000 and his expenses as \$53,800. He disclosed real property holdings valued at \$627,500. This amount did not include a value for the property at 2632 West 2nd Avenue which is the subject of litigation between Mr. Alvarez and his brother. It did include the Miami property valued at \$352,500 (Cdn). The other properties are a one-half interest with his brother Jesus Alvarez in 3474-3476 West Broadway, Vancouver acquired in 1975 and a one-third interest in property in Blaine, Washington acquired in 1988. The other two-thirds is owned by Mr. Alvarez' brother. The assessed value of one-half of the property on West Broadway is \$225,000. The assessed value of one-third of the Blaine property is approximately \$50,000 (Cdn). Ms. Rojas has not asserted that the West Broadway or Blaine properties are family assets.
- [26] Counsel for Ms. Rojas says that the property at 2632 West 2nd Avenue, Vancouver, 7071 Gilbert Road and the Miami property are family assets. He stated that, although Mr. Alvarez did not seek reapportionment of family assets, Ms. Rojas was not seeking an equal division of all family assets given the relatively short length of the marriage and other factors. Counsel submitted that the court should consider an apportionment of 20% of family assets to Ms. Rojas "with some adjustments". The adjustments would take into account the expense of \$20,000 (U.S.) incurred by Ms. Rojas in returning to university and recognition that it may take some time for Ms. Rojas to become self-sufficient in her medical profession. The adjustments should also take into account the likelihood that Mr. Alvarez is unlikely to keep up periodic maintenance payments. Counsel submits that a lump sum maintenance order should be made, or alternatively, as I understand his submission, that Ms. Rojas should receive 30% of the value of the family assets in the form of a compensation order.
- [27] In considering the Gilbert Road property, it appears that counsel did not recognize that this property is not a "family asset". The property was sold in February 1997 but the triggering event of the judicial separation did not occur until June 30, 1997.
- [28] In *Newson v. Newson* (1986), 2 R.F.L. (3d) 137 (B.C.C.A.), however, the court recognized that a compensation order may be made where a spouse has disposed of a "potential" family asset shortly before the end of a marriage or after separation. The court set down four guidelines for determining whether compensation orders should be made. The guidelines suggest that there must be proof of "unfairness" having regard to s. 65 of the Family Relations Act.
- [29] The property was sold four and one-half years after the parties separated but only four months before the triggering event. On the evidence before me, the Gilbert Road property, albeit in an unusual way, was used for a family purpose and would have been a family asset

if it had not been disposed of prior to the triggering event. It was a place owned by Mr. Alvarez where both parties were frequently in attendance over a period of almost four years and carried on part of their lives together. Ms. Rojas was a newcomer to Canada and had few friends or other associations during this time. The property was the most significant asset of Mr. Alvarez and it was unencumbered except for the income tax assessment. It therefore constituted the asset most likely to have the capacity to help meet the need of Ms. Rojas to become economically self-sufficient following the breakdown of the marriage. I conclude that the requirements for a compensation order are present in relation to disposition of the Gilbert Road property.

- [30] Having regard to the provisions of s. 65(1) of the Family Relations Act I find that Ms. Rojas is entitled to a compensation order for the loss of a claim to the Gilbert Road property. Recognizing that Mr. Alvarez had owned the property since 1982 and that it was fully paid for by him prior to the marriage, I would assess the compensation order in the amount of 20% of the sale price, that is \$150,000.
- [31] I am satisfied that the Miami property is a family asset contemplated under s. 58 (1)(e) of the Family Relations Act. Ms. Rojas accepted the risks of being a party to the original mortgage and to the subsequent refinancing of the property. I recognize that the property is an immovable asset outside of British Columbia but also that Ms. Rojas is one of the registered owners of the property. Prima facie Ms. Rojas is entitled to a half interest in that property and I do not in this decision purport to take any steps to alter or vary that interest.
- [32] The division of family assets as it relates to the property at 2632 West 2nd Avenue is difficult to determine. The parties occupied one of the four apartments as their residence in Vancouver. The balance of the building is used for a non-family purpose but Ms. Rojas played some role in its management, at least when her husband was out of town. While Mr. Alvarez became the registered owner of the property after the parties separated, he was the registered owner at the time of the triggering event and had been asserting a one-half ownership interest in the property for a number of years. On the evidence before me it is likely that Mr. Alvarez owns no more than a one-half interest in the property. That interest, however, remains the subject of litigation between Mr. Alvarez and his brother.
- [33] I conclude that the whole of Mr. Alvarez' interest in the West 2nd property is a family asset. I also conclude that an appropriate order with respect to that interest is to declare that Ms. Rojas is entitled to a 20% ownership of Mr. Alvarez interest in the property.
- [34] Having addressed the family asset allocation, there remains the issue of Ms. Rojas' claim for a lump sum spousal maintenance order. It is provided for under s. 93 of the Family Relations Act. I am satisfied that despite the share of family assets allocated to Ms. Rojas and the training she has undertaken following the separation that she will continue in the short term to have a need for support. She incurred substantial expense in completing her medical training and I accept her evidence that it may take some time for her medical practice to develop. Ms. Rojas is, nevertheless, a young woman with a professional career

ahead of her.

[35] Mr. Alvarez has a poor record of making monthly support payments. The parties reside in different countries. Costa Rica is not a reciprocating state under s. 118 of the Family Relations Act for the enforcement of support orders. In my view a lump sum maintenance order is justified in this case. I set that amount at \$20,000.

[36] Ms. Rojas is entitled to costs on scale 3.

"Bryan F. Ralph, J."

The Honourable Mr. Justice Bryan F. Ralph

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