

CANADA / JUDGMENT

S.D.M. v. K.F.M.

2003 BCSC 38

COURT

Supreme Court of British Columbia

DECIDED

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Citation:	S.D.M. v. K.F.M.
Date:	20030108 2003 BCSC 38
Docket:	E012183 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	S.D.M. PLAINTIFF
AND:	K.F.M. DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE LOWRY

Counsel for the Plaintiff:

D.G. Batist

The Defendant, K.F.M.:

In person

Dates and Place of Trial:

December 9--13,

16--17, 2002

Vancouver, BC

- [1] K.F.M. and S.D.M., who are now in their late 30s, separated in June 2001 after almost 12 years of marriage. They have two children, ages seven and five. This court determined that there was no reasonable prospect of reconciliation in July 2002 and there will now be a decree of divorce with Ms. S.D.M.'s surname being changed to her maiden name, H.. There are various issues the parties have been unable to resolve relating to the division of property, spousal support, and, most significantly, the children's access to their father.

The Marriage

- [2] The parties were born, raised, educated, and lived most of their lives in the Maritimes. Both are university graduates. Mr. K.F.M. is an engineer who has earned a good income from employment in the marketing and servicing of highly specialized manufacturing components for the forest industry. Ms. S.D.M. is a well qualified and capable elementary school teacher who, subject to maternity leave, worked until her second child was born five years ago. They have managed their income well in that they owned a comfortable home, were substantially free of debt, and held a considerable RRSP portfolio.
- [3] In 2000, Mr. K.F.M.'s employer offered him a position in British Columbia. The position was attractive. It was a promotion and it meant that the time he had been required to spend travelling away from home would be substantially reduced. The M. bought a home in North Vancouver and embarked on life on the West Coast.
- [4] Unhappily, their relationship deteriorated and eventually broke down completely. The breakdown led to a number of court applications.
- [5] This past summer, Ms. S.D.M. returned to the Maritimes with the children. Relying on her contacts in the New Brunswick school system, she is actively pursuing work as a teacher. She is employed now as a supply teacher and is hopeful of obtaining a contract to teach full time within the next two years.
- [6] Mr. K.F.M. remains in Vancouver. Unfortunately, his employment has recently been terminated. He attributes that to the difficulties associated with the break-up of his marriage and the priority he gave to being with his children in circumstances that afforded him little flexibility with respect to arrangements in that regard. He believes his best chances for employment lie on the West Coast and he sees little prospect of finding work in his field in the Maritimes. He has (or had at the time of trial) one offer of employment open to him here, albeit at a salary that was about one half of what he has been earning. In the interim, he has a severance package that essentially maintains his income and benefits to May 2003. Additionally, he has now entered into a new relationship with a woman employed in Vancouver in interior design.

- [7] The sale of the family home and the division of its contents has been the source of much difficulty which appears to be attributable to a lack of communication. The parties had been given joint conduct of sale by court order. Ms. S.D.M. returned to Vancouver to attend to the sale of the home just after Mr. K.F.M.'s employment had been terminated and he had gone east to see his family. Neither knew what the other was doing and their attempts to communicate were, in the circumstances, minimal. In Mr. K.F.M.'s absence, Ms. S.D.M. made application on an ex parte basis and obtained an order granting her sole conduct of the sale of the home. She then proceeded to effect the sale for almost a half a million dollars clear. She also decided how the contents were to be divided and shipped what she took for herself to the Maritimes.
- [8] Against this background I turn to the issues.

Custody, Guardianship, Access, and Child Support

- [9] There has, as I understand it, never been any question that Ms. S.D.M. should have custody of the children in that they are quite young and she has been the primary caregiver. There has also been no question that Mr. K.F.M. is a loving father and that it is in the children's best interest that he exercise as much access as is practical. Much of the difficulties Mr. K.F.M. and Ms. S.D.M. experienced in their relationship arose out of differences in their approaches to parenting, but both are committed parents. It is agreed that they should have joint guardianship on terms that are to be set out in the order for judgment and Mr. K.F.M. is agreeable to continuing to pay child support of \$1,456 a month plus his share of such extraordinary expenses as may arise in accordance with his current guideline income, at least until there is a material change in circumstances in that regard.
- [10] Until Ms. S.D.M.'s case had been closed, Mr. K.F.M. maintained, as he has throughout, that the children should reside in Vancouver so that he could be with them as much as possible. He was effectively seeking a disposition that would have required Ms. S.D.M. to continue to live here or surrender custody of the children to him. However, on entering the witness box in his own defence, he abandoned that position and now acknowledges that the children should live with Ms. S.D.M. in the Maritimes, such that the only issue remaining is the access he will be able to exercise, where it will occur, and who will pay for it.
- [11] The arguments concerning what may be in the best interests of the children concerning access go back and forth. I have concluded that, having regard for their ages, they should spend time with their father in Vancouver but should not, for the foreseeable future, make more than two trips a year. Those trips will occur at spring break in March (one week) and in the summer (four weeks). Mr. K.F.M. will be required to bear the cost of transporting the children principally because he should be best able to do so. He is content to take advantage of a service the airlines offer to have the children travel on non-stop flights in the care of flight attendants. If Ms. S.D.M. wishes to accompany them, she will bear the cost of her own transportation. Ms. S.D.M. will be entitled to provide daycare for the children in Vancouver herself if, by virtue of Mr. K.F.M.'s employment commitments, daycare is required.

- [12] In addition, Mr. K.F.M. will be entitled to exercise access to the children in Moncton, New Brunswick, where they are living, for any reasonable period of time upon giving Ms. S.D.M. two weeks notice of his intention to do so.
- [13] There is one outstanding matter relating to child support. The amount of support Mr. K.F.M. has been paying was set by order of this court in July 2001 based on a guideline income of \$123,600. However, Mr. K.F.M.'s income as per his tax return for 2000 was actually \$183,000. The correspondence shows this to have been common ground at the time the order was made. Ms. S.D.M. says that, having regard for s. 16 of the Federal Child Support Guidelines, which stipulate annual income to be as stated for tax purposes, Mr. K.F.M. should pay her a sum of money for the six month period following the order to make up the difference between what he paid and what he ought to have been ordered to pay.
- [14] However, as Mr. K.F.M. points out, s. 17 provides for consideration of his pattern of income. When the order was made the monthly income available to him to pay child support was in fact commensurate with an annual income of \$123,600. The additional income he received in 2000 was attributable to extraordinary employment income like bonuses and moving allowances, which had all been received and used for family purposes before the parties separated. I do not consider that Mr. K.F.M. should in the circumstances be required now to make any additional payment of child support for 2001.

Division of Property

- [15] At the outset of the trial, Ms. S.D.M. took the position that it would be unfair to divide the family assets equally and sought a 70/30 reapportionment of all of the assets in her favour. By the end of the trial, her position had changed to contending for a 60/40 split of only the proceeds of the sale of the family home. On that basis she would receive virtually all of the sum of \$100,000 that has been paid into court from the sale or about \$50,000 that would otherwise go to Mr. K.F.M..
- [16] The parties have reached agreement with respect to the 50/50 disposition of their savings. They remain divided over the division of the contents of the matrimonial home and Ms. S.D.M.'s claim to a portion of Mr. K.F.M.'s travel points account. Mr. K.F.M. contends that Ms. S.D.M.'s sale of the matrimonial home was to some undefined extent improvident, but he has made out no case in that regard.
- [17] Ms. S.D.M. contends that she divided the household contents equally. She says that what she left for Mr. K.F.M., together with what he had already taken from the house, had the same value as what she took. But what she says has no evidentiary basis. Ms. S.D.M. offers no explanation as to why she is able to say what she does. Mr. K.F.M. says that not only did Ms. S.D.M. leave him with what was essentially worthless, she left him in the position of having to spend a considerable amount of money to replace much of what he would have liked to have shared in. Neither party wants an order that the contents be sold and the proceeds, which would be modest, be divided. Indeed, that kind of an order would now work a

hardship on Ms. S.D.M..

- [18] While I regard her unilateral division to have been somewhat high-handed in the circumstances, I do not consider that Ms. S.D.M. should be required to sell and then face replacing much of what she paid \$11,000 to ship to the Maritimes. I do consider that Mr. K.F.M. has been financially disadvantaged to some extent in this regard and this is best viewed as one factor to consider in relation to Ms. S.D.M.'s claim for an unequal division of the family assets. Each party will then retain what they have, subject to Ms. S.D.M. delivering to Mr. K.F.M. in Moncton a dresser and two chairs that are identified as having sentimental value to him, along with what are referred to as the Munn prints.
- [19] Ms. S.D.M. claims that she should have one half of the travel points that were in Mr. K.F.M.'s travel account as of the date of the order that was the triggering event. But she has not established what points Mr. K.F.M. had or on what basis they were obtained. Mr. K.F.M. says that all of the points he had were acquired from business travel and that his points were generally used only for business travel. I do not consider that any case has been made out for the division of any travel points Mr. K.F.M. may have had.
- [20] Ms. S.D.M.'s case for an unequal division of the proceeds from the sale of the family home is put in broad terms. It is said that she has been financially disadvantaged by the breakdown of the marriage because, unlike Mr. K.F.M., she gave up her career to raise the children and she has a much greater need than Mr. K.F.M. to become economically self-sufficient. Further, she has taken \$60,000 from her parents to pay her legal fees and intends to repay them when she can. It is said that Mr. K.F.M. was able to pursue his career objectives uninhibited and it is now necessary to alter the legislatively prescribed division of property to recognize Ms. S.D.M.'s non-financial contribution to the marriage. To do otherwise would, it is said, be unfair.
- [21] However, as Mr. K.F.M. points out, his financial circumstances are somewhat fragile. He has used his share of some of the proceeds from the sale of the family home to pay off some \$38,000 of legal fees and other debts with which he became burdened. His future employment is uncertain. The costs he faces in re-establishing himself financially on the West Coast are substantially greater than what Ms. S.D.M. will face in obtaining a comfortable home and an acceptable standard of living for herself and the children on the East Coast. As indicated, Mr. K.F.M. will not only have to pay for the support of the children but, subject to the use of travel points, he will have to bear the considerable cost of their travelling to Vancouver twice a year.
- [22] Ms. S.D.M. has the benefit of substantial capital derived from the sale of the family home. Only some of that will be needed to acquire a home in Moncton. She has the furnishings that she saw fit to take to the Maritimes. She may be indebted to her parents, but there is no suggestion she will ever have to repay them unless she wants to do so. It is unlikely they will ever ask her for any of the money. Ms. S.D.M. chose to stop teaching altogether five years ago; it was not what Mr. K.F.M. wanted for her. She is now fortunate in that the teaching

profession is such that she will in all probability be able to pick up essentially where she left off, at a comparable income, in perhaps two years time. She will even have her seven year seniority reinstated. Indeed, her ability to find employment quickly, relying on those who know her in the teaching profession, was, she says, a primary reason for her returning to the Maritimes.

- [23] Having regard for the statutory considerations that govern the division of family assets, I do not consider an equal division in the circumstances would be at all unfair. The proceeds from the sale of the matrimonial home will, accordingly, be divided equally.

Spousal Support

- [24] It is common ground that Ms. S.D.M.'s needs and Mr. K.F.M.'s current ability to pay are such that she is entitled to spousal maintenance. Mr. K.F.M. has been paying her \$1,500 a month. He is content to continue to do so for a period of at least two years even if his income were to be considerably reduced. Ms. S.D.M. takes the position that \$36,000 is the right amount to be paid for her support for two years but contends that she should receive it in one lump sum now to avoid the uncertainty associated with Mr. K.F.M.'s employment situation.
- [25] Mr. K.F.M. points out the considerable tax advantage that he will lose if ordered to make a lump sum payment. As he says, the effect of such an order would be to make less money available for the support of the family as a whole, himself included.
- [26] I do not consider the circumstances warrant an order for lump sum spousal support. Mr. K.F.M. will be required to pay Ms. S.D.M. \$1,500 a month for two years.

Disposition

- [27] There will be an order incorporating the disposition I have made of each of the issues and a decree of divorce.
- [28] The parties will be at liberty to speak to costs if they cannot be agreed.

"P.D. Lowry, J."

The Honourable Mr. Justice P.D. Lowry

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