
CANADA / JUDGMENT

S.J. v. J.J.

2005 BCSC 1180

COURT

Supreme Court of British Columbia

DECIDED

15 August 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

S.J. v. J.J.,

2005 BCSC 1180

Date: 20050815

Docket: E013163

Registry: New Westminster

Between:

S.J., also known as S.J.

Plaintiff

And

J.J.

Defendant

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the plaintiff

J.S. Harvey

Counsel for the defendant

F.C. Lowther

Date and Place of Hearing:

July 6, 2005

New Westminster, B.C.

INTRODUCTION

- [1] The parties were married on December 6, 1980 and divorced on July 22, 2004. The plaintiff is now 41 years old and the defendant is 48. They have two children, A.1 ("A.1"), born [], 1984 and A.2 ("A.2"), born [], 1986. The parties brought this application under Rule 18A to determine the corollary relief issues, namely:
- (a) determination and division of family assets;
 - (b) the plaintiff's claim for child support for the two adult children; and
 - (c) the defendant's claim for spousal support.
- [2] The plaintiff also seeks a name change.
- [3] During the course of the hearing, the parties reached an agreement with respect to the property issues and a consent order was made dealing with that aspect of the matter.
- [4] The plaintiff is entitled to an order permitting her to change her name from S.J. , also known as S.J., to S.L. and that order is hereby made. That leaves only the issues of child support and spousal support.

CHILD SUPPORT

- [5] The children, who have both reached the age of 19 years, are children of the marriage for whom the defendant is legally obligated to pay support only if they are children of the marriage as defined in the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.), i.e. "unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life". The plaintiff deposes that the children continue to reside with her and remain dependent upon their parents by reason of their attendance in post secondary educational institutions.
- [6] In determining whether a child pursuing an education is unable to withdraw from his or her parents' charge or obtain the necessities of life, a court must consider the surrounding circumstances; mere attendance at an educational institution is not sufficient (W.P.N. v. B.J.N. (2005) 36 B.C.L.R. (4th) 330, 2005 BCCA 7). A non-exhaustive list of relevant factors was set out in Farden v. Farden (1993), 48 R.F.L. (3d) 60 at ¶15 (S.C.):
- (a) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;

- (b) whether or not the child has applied for, or is eligible for, student loans or other financial assistance;
 - (c) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
 - (d) the ability of the child to contribute to his own support through part-time employment;
 - (e) the age of the child;
 - (f) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
 - (g) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
 - (h) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.
- [7] In my opinion, the plaintiff has not put forward sufficient evidence in relation to the various factors to enable this court to determine whether or not either child is a child of the marriage.
- [8] In relation to the younger child, A.2, the plaintiff deposed in ¶16 of her affidavit dated June 20, 2005 that:

A.2 is now 18 years of age and attends school on a full-time basis at K.[] College. He is not attending school during the summer months but is working full time at J.[]. He worked part time at the same job while he attended school this year. He is earning enough for his expenses and trying to (sic) any extra toward school expenses. A.2 will return to school in the Fall to work toward a degree in Business Economics at K.[] College.

- [9] Contrary to what is set out in the affidavit, counsel for the plaintiff advised the court that A.2 had in fact been working full time at J[...] since completing high school and that he had enrolled in three courses at K.[] College this spring, had dropped one of the courses and completed the others. Also, it now turns out that A.2 has started a small business and any plans he may have had to go to school this fall are very much up in the air. In any event, even if A.2 does go to school, there is no evidence what courses he might take, what the cost would be, what financial assistance might be available by way of loans, scholarships or bursaries, or whether he would work part-time.

- [10] In relation to A.1 the plaintiff deposed in ¶20 that:

A.1 is now 20 years of age. He does not work and is a full time student at K.[] College. He is attending school on a full-time basis in the summer months.

- [11] The plaintiff deposed that a non-official transcript exhibited to her affidavit related to A.1 but it was conceded that was an error and the document in fact related to the three courses in which A.2 enrolled.
- [12] Contrary to what is stated in the affidavit, counsel advised the court that A.1 had completed second year at S.[] University in Fine Arts and would enter third year at that university in the fall. He then advised that he had misunderstood and the affidavit was correct in that A.1 was no longer attending S.[] University but had transferred to K.[] College. There is no evidence by way of university enrolment records to establish what courses A.1 is enrolled in at this time, there is no evidence what courses he plans to take in the fall, there is no evidence what the cost will be, there is no evidence what financial assistance may be available to A.1 and there is no evidence what efforts A.1 has made to work part time or why he has not done so.
- [13] There is also evidence with respect to A.1 that he has rebuffed his father and will have nothing to do with him. Counsel for the defendant submits that that fact should be sufficient on its own to dismiss the application for child support for A.1.
- [14] While the evidence put forward by the plaintiff is inadequate, I have decided not to dismiss the application but to accede to the application by counsel for the plaintiff to adjourn it to permit the plaintiff to put forward a proper evidentiary foundation for support, if it exists. I do so on the basis that if either or both of these young men are in fact children of the marriage, they should not be denied the support to which they may be entitled because of their mother's incomplete affidavit. Further, with respect to A.1, while his relationship with the defendant is a factor to consider, it may not be determinative. There are other factors the court may wish to consider once the court has a proper evidentiary basis for doing so. I do not consider myself seized of this application.

SPOUSAL SUPPORT

- [15] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 63 B.C.L.R. (3d) 77, the Supreme Court of Canada recognized three grounds upon which entitlement to spousal support may be based: compensatory, contractual, and non-compensatory. In *Bellman v. Bellman* (1999), 46 R.F.L. (4th) 414 (B.C.S.C.), Madam Justice Beames concisely summarized the three grounds as follows (at ¶41):

Compensatory support may arise in a situation where losses have accrued as a result of the marriage or the marriage break up which would not have been suffered but for the marriage. Contractual support may flow from express or implied agreements between the parties with respect to the responsibility to support and maintain the other. Non-compensatory support appears to be founded in the principles of basic social obligation.

- [16] Counsel for the defendant submits that his client's entitlement to spousal support is founded on both compensatory and non-compensatory (needs-based) grounds. He submits his client should be awarded permanent spousal support because of the disadvantage suffered by the defendant during the marriage and the disparity in the incomes of the parties.
- [17] The parties married in England when the plaintiff was 16 years old, having completed grade 10. The defendant was 24 at the time of marriage. In the early years of the marriage the plaintiff worked at a clerical position in an office and then as a retail clerk before taking a job as a data entry clerk. The parties immigrated to Canada in 1983 and the plaintiff soon found work as a mail clerk and later as a typist. The plaintiff took maternity leave when the first child was born, then returned to her office position for a period of seven months. She then gave up that job to stay home with the child and subsequently became pregnant and gave birth to the second child. While she was not working outside the home, the plaintiff took an English course and completed her grade 12 equivalency.
- [18] In 1987 the plaintiff took a position as a receptionist in the civil service. She has gradually progressed within the civil service, moving through positions of file room clerk, secretary and administrative assistant until 1999 when she obtained her current position as L.[]. As she moved up the ranks the plaintiff took various night classes and computer courses.
- [19] In 2004 the plaintiff had employment income from her position with the government of \$60,312. She earned an additional \$1,888 from a second job for total employment income of \$62,200. A portion of her 2004 employment income was a bonus. While I have not seen a document that expressly sets out the amount of the bonus, I deduce it was in the range of \$9,000 based on the fact that her regular hourly wage rate in 2004 was \$28.186 which would result in an annual income of \$51,298 per year. The plaintiff received a wage increase in 2005 to \$32.4061 per hour (\$58,979 per year). Her pay stub for the period ended April 6, 2005 shows a bonus of \$4,432. While it is not altogether clear whether the plaintiff is entitled to a bonus once a year or more often than that, it appears that her employment income for this year should be at least \$63,411. If she receives the same amount from her second job as she earned last year, her total employment income should be at least \$65,299. In addition to this income, the plaintiff receives rental income of \$450 per month for a suite in her home. I expect that only a small portion of this income is offset by hard expenses.
- [20] The plaintiff deposes that she has annual expenses in excess of \$65,000 per year not including any allowance for income tax. Included in this figure is an amount of \$12,000 per year relating to the two children, which may or may not be a necessary expense, depending upon the actual circumstances of the children. If allowance is made for the payment of income tax, the plaintiff's expenses as claimed, exclusive of those relating to the children, exceed her income.
- [21] When the parties lived in England, the defendant was a lathe turner. After arriving in Canada, the defendant worked for a time in a leather factory then obtained his Class 5 driver's license and began to drive a taxi. Soon he bought a half interest in a taxi. Between

1994 and 1998 the defendant took a number of accounting courses at BCIT. By 1985 he owned his own taxi and had a half interest in a second taxi. The defendant owned and operated taxicabs until 1998 when he began a job selling mutual funds and life insurance products, apparently without much success. In 2001 the defendant returned to work as a taxi cab driver. He has recently obtained a position as a transit operator. The defendant's income is currently \$37,000 per year. He expects his income to increase to about \$39,000 commencing in 2006.

- [22] The defendant deposes that his annual expenses amount to approximately \$42,500 per year. Included in this figure is an amount of \$2,520 on account of the children, which I am not satisfied is actually being spent. His current expenses are therefore within \$1,000 of his current income.
- [23] The defendant submits that he was substantially involved in child care and child rearing activities during the parties' marriage, which enabled the plaintiff to progress with her career, achieving promotions that have left her with a significantly higher income than that enjoyed by him. He submits the income disparity is likely permanent and that given the length of the marriage he is entitled to a comparable standard of living to that of the plaintiff. He submits, therefore, that he is entitled to spousal support in an amount of \$1,000 per month.
- [24] Counsel for the defendant refers to *Rednall v. Rednall* (1986), 4 R.F.L. (3d) 337 (B.C.S.C.) and *Touwslager v. Touwslager* (1992), 63 B.C.L.R. (2d) 247, 9 B.C.A.C. 203 (cited to B.C.L.R.), in support of his position.
- [25] In *Rednall* the parties had been married for 24 years. The husband was an executive with a bank while the wife did not work outside the home, aside from some short periods of employment. After separation the wife completed a legal secretarial program and found part-time work with a travel company. The trial judge concluded that the wife had the capacity to find employment that would pay her between \$1,000 and \$1,200 per month, leaving her in a deficit position with regard to her expenses. In awarding the wife \$950 per month in spousal support, the trial judge said, at p. 358:

In the circumstances, I consider that Mrs. Rednall is indeed entitled to permanent maintenance. I do not believe that in the next seven years she will ever attain a level of complete self-sufficiency. In stating that a spouse has an obligation to become economically self-sufficient, I do not believe that either the Parliament or the Legislature simply contemplated a situation in which a spouse could earn sufficient income to provide for his or her own basic needs. Rather, in my opinion, the Parliament and the Legislature contemplated a situation in which a spouse could earn a level of income such as to cover the costs incurred in living a life-style not unlike that which that spouse would have enjoyed had the parties continued to live together. This statement is, of course, qualified by the recognition that following separation and the establishment of separate households, both spouses usually experience some diminishment of their individual standards of living. Given what I consider to be Mr. Rednall's high earning ability, that problem is

not as graphic in this case.

[26] In *Touwslager* the parties had been married for 24 years during which the wife had worked in the home and raised the parties' four children. After separation the wife had taken some training, had worked at some part-time positions and had then found permanent employment as a teaching assistant earning a modest income. The husband earned approximately \$66,000 per year. The wife's expenses exceeded her income by some \$1,200 per month. The trial judge awarded the wife spousal support of \$400 per month for one year and \$200 per month for a further year. On appeal the award was increased to \$1,200 per month for an indefinite period of time. Speaking for the Court, Hinkson J.A. observed at ¶19 that:

This was a traditional marriage. The wife was out of the work force for a period of 23 years. Her formal education consisted of high school completed in the Netherlands. At the date of trial she was 49 years of age. Since separating she has made an effort to become self-supporting and has found permanent employment but her income is modest. It is apparent from the evidence that she is not self-supporting and is unlikely to become self-supporting in the future.

[27] The court referred to *Linton v. Linton* (1990), 1 O.R. (3d) 1 at 26, 30 R.F.L. (3d) 1 (C.A.), where the Ontario Court of Appeal said:

In my view, there is an almost presumptive economic disadvantage arising upon the breakdown of a long-term marriage where the claimant spouse has been absent from the work-force for a lengthy period. There is an element of economic disadvantage arising out of the roles assumed in the marriage and a further economic disadvantage arising from the breakdown of the marriage.

[28] The plaintiff submits that while she has enjoyed greater success in her career than the defendant, neither of them sacrificed career opportunities during the marriage to enable the other to pursue a career. She submits that since the parties separated she has borne the burden of supporting the children as well as maintaining the family assets, without significant contribution from the defendant. She deposes that since separation she has incurred personal debt in the amount of approximately \$55,500 as a result of the shortfall between her income and her expenses, including those relating to the children. She submits that the defendant is not entitled to spousal support simply because of the current difference in incomes.

[29] In support of her position, the plaintiff refers to *Grams v. Grams*, [2004] B.C.J. No. 28, 2004 BCSC 11. In that case the parties separated after 25 years of marriage. Their children were independent. Both parties had worked during the marriage. The husband was a school psychologist earning \$73,795 per year while the wife was a nurse whose income was somewhat in excess of \$42,000 per year and the disparity of incomes of roughly \$30,000 per year was unlikely to change. In dismissing the wife's claim for spousal support, Lamperson J. referred to the principles set out in *Bracklow* and then said at ¶23-27:

¶23 First of all, I wish to consider the criteria set out in the Divorce Act. The parties were married for 25 years. Their marriage was a modern one, in that both pursued their respective careers. Neither suffered any significant economic advantage or disadvantage arising from the marriage or its breakdown insofar as their professional careers are concerned.

¶24 It is well recognized that there is a distinction between modern marriages, where the wife pursues her career, and traditional marriages, where the wife stays out of the work force for many years. In the latter case, economic disadvantage arising from the marriage and its breakdown can almost be presumed, but that is not the situation here. The disability pension and the property settlement should provide the plaintiff with a reasonable standard of living, even when measured against the parties' standard of living during their marriage. The goal of economic self-sufficiency has been met.

¶25 The suggestion is that the defendant will, as a result of his higher income, enjoy a significantly higher standard of living than the plaintiff. The evidence does not indicate that will necessarily be so. This is not a situation where there is such a dramatic difference in lifestyles that it calls for some form of equalization. The most important consideration here is that both parties move on with their lives without depending on one another.

¶26 The Family Relations Act which implies an agreement that spouses will support each other also requires each spouse to seek self-sufficiency in relation to their former spouse.

¶27 This case is similar to that dealt with by Oppal J. (as he then was) in *Graves v. Graves* (2001), 20 R.F.L. (5th) 381, 2001 BCSC 1081, aff'd (2002), 32 R.F.L. (5th) 58, 2002 BCCA 508. He concluded at [paragraph] 23:

The wife's claim for permanent spousal support cannot succeed under any of the so-called conceptual grounds alluded to in *Bracklow*, supra. This is a case in which both parties were employed during the marriage and continue to be employed after the breakdown of the marriage. Each earns a better than average income. Each is in a relatively stable financial position. The sole subject of concern is her outstanding credit line. The law does not state that there has to be a precise equalization of incomes following a marriage breakdown.

[30] I have also considered the very recent decision of the Court of Appeal in *Yemchuk v. Yemchuk*, [2005] B.C.J. No. 1748, 2005 BCCA 406, which concerned an application for spousal support by a husband. In *Yemchuk*, the parties separated after 35 years of marriage. Both parties were employed throughout the marriage. At the time of the order Mr. Yemchuk was 63 years of age and Ms Yemchuk was 61. Ms Yemchuk was employed by the federal government as a Labour Affairs Officer and her income for the purpose of determining spousal support was \$75,000 per year. She claimed expenses of \$69,000 per year. Mr. Yemchuk had retired early from employment some four years before the parties separated. He took early retirement mainly because Ms Yemchuk had to relocate in order to maintain her employment. Mr. Yemchuk's income for spousal support purposes was \$37,632 per year before consideration of imputed income. He claimed expenses of \$46,000 per year.

- [31] Mr. Yemchuk claimed spousal support in an amount approaching equalization of the parties' incomes based primarily on the length of the marriage and the disparity of standards of living experienced by the parties on marriage breakdown.
- [32] The trial judge attributed income of between \$800 and \$1,000 per month to Mr. Yemchuk on the basis that he could have invested the \$132,000 he had received as a lump sum payout of his share of Ms Yemchuk's pension in an annuity rather than in the short term investments he chose. The trial judge found that Mr. Yemchuk was able to meet his expenses with the income attributed to him and concluded he had no need for support and, therefore, no entitlement to support.
- [33] The Court of Appeal held that the trial judge had erred in concluding that "need" was the sole basis upon which a spousal support order could be founded. The Court held that the circumstances and effect of Mr. Yemchuk's early retirement raised a compensatory aspect to the claim for spousal support. The Court held that there was a significant disparity in the economic circumstances and standard of living of the spouses arising from the marriage breakdown that resulted in hardship to Mr. Yemchuk disproportionate to that experienced by Ms Yemchuk, reflected in their relative expense budgets. The principal cause of the difference in the economic circumstances of the parties was Mr. Yemchuk's early retirement. At ¶31, Prowse J.A. remarked:

It is apparent that the principal reason for the disparity in the means and circumstances of the parties upon marriage breakdown was Mr. Yemchuk's retirement in 1997. While the trial judge considered the reason for Mr. Yemchuk's retirement to be irrelevant, I do not agree. In my view, it is apparent that Mr. Yemchuk retired in large part because his wife had to relocate in order to maintain her employment with the Federal Government and had been offered employment in Manitoba. Subsequently, she was offered similar employment in British Columbia. The parties sold their homes and moved to accommodate the wife's employment situation on both occasions. The second move also enabled them to be closer to their son. There is no suggestion that Ms. Yemchuk objected to Mr. Yemchuk's retirement, or that he had the opportunity which she enjoyed of readily finding employment in a new jurisdiction, particularly given the fact that he was 57 years of age at the time of their first move.

- [34] And again, at ¶38:

In my view, Mr. Yemchuk's retirement is highly relevant as it is the single most important factor which resulted in the disproportionate effect of the marriage breakdown on the parties.

- [35] The Court also held that the trial judge erred in attributing income to Mr. Yemchuk as he did. Prowse J.A. held, at ¶46 that:

In my view, this case presents another example of a situation in which the imputation of income is not justified. Here, the length of the marriage, the age of the parties, and their overall financial circumstances, support the proposition that both of them should be permitted to preserve the capital in Ms. Yemchuk's pension, to the extent possible, until Ms. Yemchuk retires. Mr. Yemchuk

is seeking to do so by investing in short term investments until interest rates rise or until Ms. Yemchuk retires so that he will not be forced to encroach on capital. Ms. Yemchuk is doing so by her continued contributions to her pension and her ongoing years of service which will accrue to her benefit alone. Mr. Yemchuk finds himself in a disadvantaged position in relation to Ms. Yemchuk only because he retired early.

[36] The Court held further that the trial judge had in any event taken too narrow a view of the concept of "need". At ¶48-49 Prowse J.A. stated:

¶48 Further, even if attribution of income were justified in these circumstances, the trial judge's treatment of Mr. Yemchuk's need for support was unduly restrictive. In *Myers v. Myers* (1995), 17 R.F.L. (4th) 298 (B.C.C.A.), for example, Mr. Justice Finch (as he then was), speaking for the Court, stated at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

¶49 In considering the concept of "need" in the context of a long-term marriage involving a sharing of resources, I am satisfied that it should take into account the relative standards of living of the spouses following the marriage breakdown. In many cases, like this one, where the parties have relatively modest assets at their disposal and no realistic prospect of increasing those assets given their retirement (and pending retirement), it is often not possible to replicate the standard of living enjoyed by the parties when they were living together. The most a support order can do is to attempt to alleviate a significant disparity in their relative standards of living following marriage breakdown.

[37] In the present case, I am not satisfied that Mr. J.J. suffered an economic disadvantage or that Ms S.J. enjoyed an economic advantage as a result of the marriage. I am not persuaded that Mr. J.J. gave up career opportunities to enable his wife to pursue her own career. This case is not like *Rednall* or *Touwslager* where one spouse stayed at home to look after the household responsibilities and raise the children while the other pursued a career. Unlike Yemchuk, this is also not a case in which one spouse's career suffered a disadvantage to promote the other spouse's career. In this case both parties worked throughout the marriage and pursued their individual careers. Both contributed to child raising and household endeavours. As it turned out, Ms S.J. was more successful in her career than was Mr. J.J.. She has been able to progress and rise through the ranks of government service with increasing levels of remuneration. Mr. J.J.'s decision, supported by his wife, to embark on a new career selling mutual funds did not result in much success. He now has a secure job as a transit operator, although it is less remunerative than Ms S.J.'s. He still has some 17 working years ahead of him in which to enhance his level of remuneration and contribute to a pension. He has the opportunity to take on a second job, just as Ms S.J. has done. While there is a difference in

the parties' current levels of employment income, that difference is due mainly to good fortune and individual success rather than circumstances relating to the parties' respective roles during the marriage.

- [38] In my view, the circumstances of this case do not give rise to a compensatory factor such as existed in Rednall, Touwslager and Yemchuk.
- [39] Further, I am not satisfied that there is a significant disparity in the standard of living of the parties that arises from the breakdown of the marriage resulting in hardship to Mr. J.J. that needs to be addressed by an award of spousal support. Clearly Ms S.J. has greater employment income, \$63,500 compared to \$39,000 (as of 2006) in gross terms. The difference in after tax income is less dramatic, approximately \$17,000. However, Ms S.J. has over \$50,000 in consumer debt to service, which she incurred as a result of not receiving any assistance from Mr. J.J. to support the children.
- [40] Even when the expenses relating to the children are removed, both parties' expense claims exceed their income, the plaintiff's by some \$590 per month and the defendant's by some \$330 per month. I note that \$250 of the claimed monthly expense is for a "hoped for" RRSP contribution, so his actual deficit is only \$80 per month. I am not satisfied that the standard of living Mr. J.J. can provide with his income is significantly lower than that enjoyed by Ms S.J.. He will be receiving his share of the value of the former matrimonial home and an investment property. This should provide sufficient down payment to enable him to acquire, subject to a mortgage, comfortable accommodation of his own without increasing his overall expenses.
- [41] In summary, it is my view that the defendant has failed to establish entitlement to spousal support, whether on compensatory grounds or on the basis of need, and I dismiss his application.

COSTS

- [42] In my view, success on this motion was divided. The plaintiff was successful on the application for spousal support but her application for child support has been adjourned because of the unsatisfactory state of the evidence she put forward. In my view it is appropriate that both parties bear their own costs of this application. The costs relating to the hearing of the child support application, if it is re-set, will be for the judge hearing that application to decide.

"B.M. Joyce, J."

The Honourable Mr. Justice B.M. Joyce

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