

CANADA / JUDGMENT

Schofield v. Schofield

2006 BCSC 453

COURT

Supreme Court of British Columbia

DECIDED

21 March 2006

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2006 BCSC 453 Schofield v. Schofield IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Schofield v. Schofield, 2006 BCSC 453 Date: 20060321 Docket: 25756 Registry: Vernon Between: John Edward Schofield Plaintiff And Jacqueline Schofield Defendant Before: The Honourable Mr. Justice Powers Reasons for Judgment Counsel for the Plaintiff K.R. Fiddes Counsel for the Defendant R.D. Braun Date and Place of Trial/Hearing: March 6, 2006 Vernon, B.C.

INTRODUCTION

- [1] Dr. Schofield is a 65 year old family physician. He is retired as of April 22, 2005, and applies to review an order for support for his former spouse who is 63 years old. He did pay support to January 2006. Ms. Schofield argues that Dr. Schofield should continue to pay the support even if it requires him to continue working to do so.

BACKGROUND

- [2] The parties were married March 18, 1966 and separated May 28, 1999. They entered into a consent order April 14, 2003. The order provided that they were divorced. The order also required Dr. Schofield to pay Ms. Schofield maintenance in the amount of \$1,800.00 per month commencing January 1, 2003. Dr. Schofield was entitled to apply to review the amount of the support, if any, upon a reduction of his income before his 65th birthday, or upon his 65th birthday.
- [3] The order also provided for a division of the family assets. The division was by consent and was a fair and equal division. This included an equalization payment to Ms. Schofield of approximately \$53,000.00 and a roll over of RRSPs in the amount of \$203,155.83.
- [4] A review of support pursuant to an order such as this is a new hearing to decide the issue of support based on the circumstances at the time of the hearing. It is not an application to vary that requires a change of circumstances. (See: Seymour v. Seymour, [2001] B.C.J. No. 1091 (QL), 2001 BCSC 777; Schmidt v. Schmidt, [1998] B.C.J. No. 42 (C.A.)(QL); La Liberte v. La Liberte, [2000] B.C.J. No. 1770 (QL), 2000 BCSC 1285 and Rogers v. Rogers (1999), 45 R.F.L. (4th) 65, 1999 BCCA 238). CIRCUMSTANCES

- [5] The parties were married for thirty-three years and have been separated for almost seven years. They have three adult children who are self-supporting. During the marriage, Dr. Schofield operated a family medical practice. Ms. Schofield is a registered nurse, and when the children were old enough, she assisted in the practice. She also started two businesses before the parties separated. One provides commercial cleaning services and the other provides catering services. She continues to operate these businesses, but does not generate much income from them. The cleaning business showed income of \$1,216.95 in 2004, and the catering business \$2,104.14 in 2004. She was able to deduct some expenses that may benefit her personally, such as a portion of her auto expense, \$1,645.00 for each business, telephone and utilities \$1,478.00 and \$252.00, capital cost allowance of \$823.00 and \$632.00. She also deducted business use of the home expenses of approximately \$2,723.00. She paid salary, wages and benefits of \$3,060.00 and \$7,699.00 from those businesses. This was much more than she earned from the businesses.
- [6] Dr. Schofield was able to earn \$80,000.00 to \$90,000.00 from his family practice, but retired in April 2005. He considered volunteering for Doctors Without Borders, but was considered too old. He no longer wished to maintain a family practice, but maintained his practicing certificate and license in case he had to continue to pay maintenance to Ms. Schofield.
- [7] Dr. Schofield argues that it is appropriate for him to retire at age 65. He and Ms. Schofield have reasonably equivalent means of supporting themselves. If Ms. Schofield believes she requires more income than she can derive from her assets, then she can apply herself more to the businesses that she operates, or can earn more money from part-time minimum wage work. Ms. Schofield argues that after thirty-three years of marriage, Dr. Schofield should be prepared to keep working to allow her to enjoy a lifestyle more consistent with the lifestyle they enjoyed during the marriage. The \$21,600.00 annual spousal support is certainly a significant part of her income.
- [8] Dr. Schofield argues that if he retires their incomes are relatively equal based on the following calculations: Dr. Schofield: Canada Pension Plan (one half of the amount he is entitled to): \$4,800.00 Old Age Pension: \$5,400.00 Interest on RRSPs ($\$472,116.45 \times .07 = \$29,989.15$): \$29,989.15 TOTAL: \$40,098.15 Ms. Schofield: Share of Dr. Schofield's Canada Pension Plan: \$4,800.00 Income from RRSPs ($\$373,262.00 \times .07 = \$28,000.00$): \$28,935.20 Income from Employment: \$3,321.08 TOTAL: \$41,439.08
- [9] Dr. Schofield points out that this is more than Ms. Schofield claims for her necessary expenses and, therefore, there is no need for future support. Dr. Schofield has calculated the income on the RRSPs based on 7% return by way of earnings or withdrawals.
- [10] Ms. Schofield's counsel did not argue about the calculations. However, there appear to be some errors in the calculations. Dr. Schofield calculates his interest on his RRSPs at \$29,989.15 based on a 7% return. However, my calculation is $\$472,116.45 \times 7\% = \$33,048.15$.

- [11] Dr. Schofield calculates Ms. Schofield's income from RRSPs of \$373,262.00 based on 7% at \$28,935.20. However, my calculation is $\$373,262.00 \times 7\% = \$26,128.34$.
- [12] Therefore, Dr. Schofield's total income is \$43,248.15.
- [13] Ms. Schofield's income therefore should be \$34,249.42.
- [14] It appears then that based on a correction of the calculations there is in fact a difference in the parties' income. Dr. Schofield would have income of close to \$9,000.00 more than Ms. Schofield.
- [15] Neither party really discussed the expenses of the other party or took issue with them. Ms. Schofield's expenses are claimed at just under \$37,000.00 per annum.
- [16] Dr. Schofield claimed expenses of \$87,314.00 per annum. This included CPP contributions of \$305.25 per month $\times 12 = \$3,663.00$, spousal maintenance \$1,800.00 per month $\times 12 = \$21,600.00$. He has included \$1,500.00 per month for gas and oil. I assume that is an error but no explanation has been given for it; \$175.00 per month is probably a more accurate number - that is a reduction of \$1,325.00 per month $\times 12 = \$15,900.00$. He also includes \$400.00 RRSP contributions per month $\times 12 = \$4,800.00$. The total of these amounts is \$45,960.00. If that is deducted from his claimed annual expenses of \$87,314.40, the balance of his expenses is \$41,354.40. His income, without employment income, as I have calculated it, is \$43,248.15. He has a surplus of income over expenses of \$1,893.75.
- [17] Ms. Schofield has expenses of \$36,977.72 and income, by my calculations, of \$34,249.42 for a shortfall of -\$2,728.30.
- [18] The Divorce Act, R.S., 1985, c. 3 (2nd. Supp.) provides at s. 15.2(1): Spousal support order
- 15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse. Factors
- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse. Objectives of spousal support order
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

- [19] Dr. Schofield's retirement will result in a significant change in both parties' financial positions. Ms. Schofield argues that Dr. Schofield has been able to increase his RRSP holdings by trading the stocks and continues to do that. He responds that he has taken more risks to do so, but is not actively trading now. He also contributed \$28,000.00 to his RRSPs and increased his mortgage debt, while Ms. Schofield has decreased her mortgage debt.
- [20] They were married for thirty-three years and both enjoyed the fruits of their joint efforts inside and outside the home. They have divided the assets they acquired equally. The question is whether Dr. Schofield should be required to continue to work past the normal retirement age of 65. Not everyone retires at age 65; some retire earlier or later. Dr. Schofield is not seeking to retire earlier, or to retire simply to avoid his responsibilities to Ms. Schofield. His desire to retire is not out of the ordinary, nor is it unexpected.
- [21] The real question is whether Dr. Schofield should be required to continue to work so that he is in a position to continue to pay spousal support. He argues that the parties have reached a stage in their lives where they both have to adjust to a lower standard of living based on lower income.
- [22] The court does not have the power to force someone to work, but will not consider retirement as a change of circumstance if that is brought about by a voluntary retirement done for the purposes of avoiding the payment of support. (*Vennels v. Vennels*, [1993] B.C.J. 378 (S.C.)(QL) and *Marsh v. Marsh*, [2005] B.C.J. No. 1413 (QL), 2005 BCSC 951).
- [23] In the *Marsh* case, ongoing support was ordered when the 51 year old spouse had income of \$10,000.00 per year, an RRSP of \$287,396.00, a home valued at \$221,000.00 and savings of \$212,351.00. She also had a 15 year old child.
- [24] Dr. Marsh, who was 67, had assets of \$1.8 million, including RRSPs of \$400,000.00. He retired and worked part-time. This retirement was considered a proper change of circumstances, but Dr. Marsh still had significant income. The spousal support was to continue, but to be reviewed in one year. His spouse's need, including supporting the children's education seemed to be a major factor.

- [25] Ms. Schofield referred to a decision *Seebaran v. Seebaran*, [2005] B.C.J. No. 2862 (QL), 2005 BCSC 1801. Mr. Seebaran was a 69 year old retired professor. He was doing consulting work earning from a high of just under \$40,000.00 in the year 2000 to a low of \$5,000.00 in 2004. He wished to retire from the consulting work. He had been ordered to pay support of \$1,500.00 per month in 1994. His former wife had health problems and was unable to find full-time employment after separation. She was teaching part-time. She had retired in 2005 and was having financial difficulties. The matrimonial assets had been divided equally between the parties at separation. The court found that the former spouse continued to have a need, having an income of only \$1,095.00 per month. Support was fixed at \$1,000.00 per month payable for a further three years.
- [26] Mr. Seebaran's circumstances were not very good. His income was just under \$3,000.00 per month, and he had debts of close to \$74,000.00. This income consisted of CPP, Old Age security benefits and just over \$1,800.00 per month from consulting work.
- [27] Mr. Seebaran had RRSPs totalling just over \$400,000.00, and Ms. Seebaran had RRSPs of approximately \$100,000.00 remaining after an equal division. The court found that given the length of the marriage and the role each party played in the marriage, Ms. Seebaran was unable to obtain any self-sufficiency since separation, therefore it was reasonable for Mr. Seebaran to encroach on his RRSPs to pay support for a further three years.
- [28] Dr. Schofield argued the parties were in relatively equal positions regarding income and needs and could meet their own expenses from their own incomes. However, that appears to have been based on an error in calculations. It is true that Dr. Schofield could earn a reasonable income and afford to pay the support if he continues to work. However, I am satisfied that it is not reasonable to require Dr. Schofield to continue to work to support a lifestyle that neither of them can afford without more effort. Ms. Schofield can certainly work more if she wishes to enjoy a higher standard of living. However, they have both received the benefits of their years together, including a division of their assets. If Dr. Schofield chooses to stop work, I am satisfied it is reasonable in this case.
- [29] Dr. Schofield argues it would be unreasonable to expect him to encroach on his capital to pay support to Ms. Schofield. She is two years younger than he is, and can work for the next two years to increase her savings or to support herself. (*Cramer v. Cramer*, [2000] B.C.J. No. 873 (C.A.)(QL)).
- [30] Given the length of the marriage and the role played by each of the parties in the marriage, I find that even with Dr. Schofield ceasing to work, that there is still a need for spousal support and an ability to pay. I find that an appropriate amount of support that will bring some equality to the parties' positions, although not exact equality, is \$350.00 per month. I have considered that Dr. Schofield's expenses are slightly higher than Ms. Schofield's, and that a portion of his increased RRSPs are as a result of income he was able to earn after the parties separated and a court order was made.

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- [31] Therefore, I order that spousal support be varied as of February 1, 2006 from \$1,800.00 per month to \$350.00 per month. However, each will continue to provide the other with true copies of their income tax returns each year and forthwith advise the other of any change in their employment status.
- [32] The parties have not addressed the issue of costs and may do so if they wish. "R.E. Powers, J." The Honourable Mr. Justice R.E. Powers
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