

CANADA / JUDGMENT

Schwarz v. Schwarz

2021 BCSC 1493

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1493 Schwarz v. Schwarz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schwarz v. Schwarz,

2021 BCSC 1493

Date: 20210730

Docket: E117901

Registry: Kelowna

Between:

Deborah Jean Schwarz also known as Deborah Jean Petterson

Claimant

And

Rainer Schwarz

Respondent

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Claimant:

H.A. Taylor

The Respondent on his own behalf:

R. Schwarz

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 14-18, 2021

Place and Date of Judgment:

Kelowna, B.C.

July 30, 2021

Introduction

- [1] The parties, now in their sixties and both retired, began cohabiting in a marriage-like relationship in May 2008, married on July 22, 2010, and separated on March 30, 2017 ("Separation Date"). It was the second marriage for both of them.
- [2] They seek a divorce order and orders respecting the division of family assets. In addition, the claimant seeks occupational rent from the respondent, who has resided in the matrimonial home since the parties separated. The respondent pursues an order for spousal support from the claimant and also seeks compensation for medical and dental expenses incurred post-separation.

Background

- [3] The claimant has no children. The respondent has three adult children from his prior marriage.
- [4] The couple met online in February 2008 and soon began dating. The claimant moved into the respondent's modular home in May 2008, located on a pad at a mobile home park in East Kelowna, B.C. ("Family Home"). The respondent purchased the Family Home in 2001 following the collapse of his first marriage. Prior to moving into the Family Home, the claimant had purchased a condominium on Rutland Road, in Kelowna, B.C. ("Rutland Condo"). She sold it in August 2011 for significantly less than what she paid for it.
- [5] Throughout their time together, the parties lived a modest lifestyle. The claimant worked as a registered nurse, retiring in October 2014. The respondent worked as a power engineer, retiring in 2012.
- [6] In January 2012, the respondent transferred title to the Family Home to the claimant and himself as joint tenants. The circumstances surrounding the transfer are in controversy and will be addressed below.

- [7] The claimant's father, Mr. Petterson, moved into the Family Home in January 2014, as his health was declining. During the time he lived with the parties living expenses were split three-ways. Mr. Petterson also paid for some improvements to the Family Home including a ramp to allow wheelchair access, handrails, and a renovation of the main bathroom to accommodate his needs. He died in April 2015.
- [8] In the year following Mr. Petterson's death, the parties' relationship began to falter. Following a trip to Florida to visit the respondent's uncle, the claimant made the final decision to leave the relationship and left the Family Home on March 30, 2017. In January 2018, she purchased a life lease in a condominium complex for \$50,000 plus monthly fees, where she presently resides.
- [9] Meanwhile, the respondent has lived in the Family Home and has paid all related expenses, including the pad rental, utilities, taxes, insurance, and maintenance and repairs.

Issues

- [10] The issues for determination concern:
- (a) The parties' request for an uncontested divorce;
 - (b) How the parties' assets should be divided;
 - i. How to divide the parties' bank accounts and investments;
 - ii. How the parties' work-related pensions and CPP should be divided;
 - iii. How to divide the parties' chattels, vehicles, and other personalty;
 - iv. How to divide the sale proceeds from the Rutland Condo;
 - v. How the Family Home should be divided;
 - (c) Whether the respondent owes occupational rent to the claimant;
 - (d) Whether spousal support is payable by the claimant to the respondent; and
 - (e) Whether the respondent is entitled to compensation for medical and dental expenses he incurred post-separation.

Discussion

- a) Divorce
- [11] I am satisfied that the requirements of the Divorce Act, R.S.C. 1985, c. 3 have been met. The parties, who were married on July 22, 2010, in Campbell River, B.C., will be divorced from each other effective 31 days from the date of these reasons.
- b) Division of Property

- [12] The division of property on separation is governed by the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Section 81 of the FLA provides that on separation each spouse is entitled to a presumptive one-half interest in all family property, which s. 84 defines to include all real and personal property owned either directly or beneficially by a spouse at the date of separation including any property derived from family property.
- [13] Family property is to be divided equally unless to do so would be significantly unfair. Section 95 of the FLA allows the court discretion to consider various factors in determining whether an equal division of family property would be significantly unfair, including the duration of the relationship and the terms of any agreement between the parties. The use of the term "significantly unfair" requires proof of something objectively unjust, unreasonable, or unfair in some important or substantial sense, having regard to the factors set out in s. 95(2) of the FLA: *Jaszczewska v. Klostanski*, 2016 BCCA 286 at paras. 41-42. This places a high onus on the party seeking unequal division.
- [14] Section 87 of the FLA provides that, generally speaking, family property is to be valued at fair market value as of the date of trial.
- i. How should the parties' financial assets be divided?
- [15] I am satisfied that from the outset of their relationship the parties intended to keep their respective bank accounts and investments separate and pay their expenses from their separate resources. Throughout the relationship, the monthly bills relating to the Family Home and living expenses were equally shared between them. The parties also split their travel expenses. In short, each paid their own way and did not rely on one another for financial support.

The House Account

- [16] The claimant took charge of paying the monthly expenses, initially from her personal chequing account, and later from an account that she opened, which was referred to at trial as the "house account" that they both contributed to ("House Account"). To fund their monthly expenses, each contributed \$1,200 per month. This amount amply met their modest needs.
- [17] Although the respondent says that the \$2,400 per month deposited into the House Account exceeded their living expenses and questions what the claimant did with the excess (suggesting, for example, that she may have deposited some of the house account money into her own investments), he has not proven that the claimant misused the House Account. In any event, I am satisfied that to the extent there were excess monies in the House Account, the claimant probably used those monies for extraordinary expenses related to either the Family Home, travel, or other items of joint benefit to the parties.

[18] When Mr. Petterson moved into the Family Home, the claimant says the agreement was that they would each pay one-third of the expenses. Mr. Petterson had added the claimant as a joint owner of his various bank and investment accounts and the bank records suggest that, on Mr. Petterson's behalf, the claimant deposited \$2,000 per month from Mr. Petterson's accounts into the House Account. This is consistent with the respondent's evidence that Mr. Petterson told him he was going to pay \$2,000 per month, which is the same amount as he had been paying in Saskatchewan prior to moving into the Family Home. There is no indication that these additional funds were misappropriated and there is nothing that remains to be divided.

Chequing and Savings Accounts

[19] Beyond the House Account, each party maintained separate savings and chequing accounts that were roughly equivalent at the Separation Date. Accordingly, there will be no order that those accounts be divided.

Claimant's Investments and Inheritance

[20] During the couple's cohabitation, the claimant received cash gifts and, in 2015, a sizable inheritance from her father ("Gifts and Inheritance"). The claimant says, and I accept, she kept the Gifts and Inheritance separately invested and deposited the majority of these monetary gifts into her investment accounts with Investors Group. Her investments are currently valued at approximately \$500,000. She seeks to have them declared as excluded property under s. 85(1) of the FLA. Specifically, the claimant asserts that, save for approximately \$35,000 which she concedes is family property, the Gifts and Inheritance invested with Investors Group are excluded property because they were either pre-relationship assets or were gifts or inheritances received from Mr. Petterson. She seeks to exclude the following investments in her name:

(a)

TFSA

\$58,360

(b)

RRSP

\$182,149

(c)

Non-registered RRSPs

\$250,987

(d)

LIRA

\$11,194

("Claimant's Investments")

- [21] Section 85 of the FLA provides for the exclusion of certain property from family property including property acquired by a spouse before the relationship began, inheritances, gifts from third parties, and property derived from excluded property. Section 84(2)(g), however, provides that growth in the value of excluded property during the marriage is considered family property. To establish an excluded property claim, the party claiming the exclusion must prove the basis for the exclusion with clear and cogent evidence. The court may draw reasonable inferences from evidence that is less certain or precise in order to do justice between the parties: *Shih v. Shih*, 2017 BCCA 37 at paras. 43, 44, 51. The party seeking to have an increase in the value of excluded property included in family property has the onus of establishing that increase: *J.S.F. v. W.W.F.*, 2015 BCSC 2375 at para. 161.
- [22] Section 96 of the FLA provides that the court must not order a division of excluded property unless, among other things, it would be significantly unfair not to do so having regard to the duration of the relationship and a spouse's direct contribution to the preservation, maintenance, improvement, operation, or management of the excluded property.
- [23] Much of the claimant's evidence at trial involved tracing her investments from before the parties began cohabiting. At the time she moved in with the respondent, she had approximately \$60,000 in investments. During the cohabitation, she earned \$75,000 annually as a nurse which she used for day-to-day living expenses and travel. The claimant concedes that to the extent her RRSPs and other investments are made up of contributions made by her during her cohabitation with the respondent from May 2008 through March 2017, they must be considered family property to which the respondent is entitled to share. She calculates, and I accept, that the amount of the Claimant's Investments attributable to investments made during cohabitation is \$35,824.
- [24] There is no doubt that the bulk of the Claimant's Investments were derived from pre-inheritance gifts from Mr. Petterson (totalling \$359,262 over the period March 26, 2013 through July 15, 2015 - the claimant wrote cheques on the joint account she had with her father after his death) and as sole beneficiary of Mr. Petterson's estate (totalling \$281,203). These funds were always kept separate and I am satisfied are excluded assets pursuant to s. 85(1)(b) of the FLA. Pursuant to s. 84(2)(g) of the FLA, any increase in value from these investments must be considered family property. From the evidence, it is difficult to calculate or even assess what that increase in value is, if any. The respondent has the onus of proving the increase in value and he has failed to do so. Accordingly, I am unable to award the respondent any amount under this head.

- [25] The fact that the claimant received significant cash gifts from Mr. Petterson during the parties' marriage is a financial advantage she gained unrelated to the economic characteristics or events of their relationship. The disparity in their consequent financial positions does not warrant a departure from the usual rule that each party should retain excluded property while equally sharing family property.

Respondent's Investments

- [26] Respecting the respondent's RRSPs, it is apparent that as of the trial date, he has cashed them all in and nothing remains. From the less-than-ideal evidence available and as will be seen, I conclude that he had approximately \$75,000 in investments and RRSPs in 2008 when the parties began cohabitation. I also conclude that he made no additional contributions after May 2008.
- [27] The claimant argues that I should value the respondent's RRSPs as at the Separation Date at \$73,927 because the only evidence of value is the respondent's F8 financial statement sworn May 30, 2017 stating that he owned RRSPs in that amount. She contends that the respondent's entire RRSP is a family asset to which she is entitled to one-half. She argues the respondent has failed to prove that the value of his pre-cohabitation RRSPs is excluded. She points to the order made at the April 11, 2018 judicial case conference that required the parties to particularize their excluded property claims within 45 days. Despite that order and at least three subsequent requests by the claimant's counsel for particulars of the respondent's RRSPs from the start of the parties' cohabitation through to the Separation Date, save for his CRA RRSP contribution history produced during trial, those documents were never produced. Relying on the Court of Appeal's comments in *Jean Louis v. Jean Louis*, 2020 BCCA 220 at para. 64, the claimant argues that providing a CRA RRSP pre-relationship contribution history is not sufficient to prove the pre-cohabitation value in an excluded property claim for RRSPs.
- [28] I accept the respondent's evidence that he made no contributions to his RRSPs after the parties began to cohabit in May 2008. Relying on his memory, he testified that in 2008 his RRSPs totalled \$75,000. He also stated that he started saving in his RRSP in 2005 when his mother died leaving him \$19,000, although contrary to this, there is some evidence that he made contributions to a RRSP in 2001 and 2003. In any event, and despite the lack of clear and cogent evidence on the point, on a more likely than not basis and attempting to do rough justice between the parties with imperfect evidence and submissions, I am prepared to accept that the respondent's RRSPs were \$75,000 at the time the parties began cohabiting in May 2008. There is no evidence upon which I can determine the increase in value, if any, of the respondent's RRSPs from May, 2008 to the Separation Date. Indeed, based on a starting point of \$75,000 as at May 2008 and the respondent's May 30, 2017 disclosure that they were \$73,927, I infer that at best, if there was any increase in value, it would have been modest. Accordingly, in order to do justice to the parties, I conclude that the value of the respondent's RRSPs as at the date the parties began to cohabit is excluded property.

ii. How are the Parties' work-related and CPP pensions to be divided?

- [29] Because the parties' pensions and CPP benefits are of similar value, the claimant says they should not be divided. Alternatively, she says that if they are to be divided, they are divisible under Part VI of the FLA and the division of the Canada Pension Plan credits should be pursuant to the Canada Pension Plan Act, R.S.C. 1985, c. C-8.
- [30] I accept the claimant's argument. Indeed, during submissions, the respondent agreed that the claimant and he should each keep their respective pensions, including work pensions and their Canada Pension Plan, free from any claim from the other.

iii. Division of chattels, vehicles, and other personalty.

- [31] The parties have now agreed to the division of chattels, furniture, personalty, and jewelry. During submissions, the claimant advised that she was not seeking any division of the respondent's bank accounts, vehicles, or other personalty. The respondent agrees likewise and makes no similar claim against the claimant.
- [32] Accordingly, there will be an order that each party is entitled to keep all personalty, furniture, jewelry, vehicles, and household contents currently in their respective possession, free of any claim by the other.
- [33] Additionally, the respondent is entitled to keep his coin collection, ore, gold, silver, and safe contents (including any cash therein) free from any claim by the claimant.

iv. How to divide the sale proceeds from the Rutland Condo?

- [34] The net sale proceeds from the sale of the claimant's Rutland Condo were kept and invested as separate property and must be considered excluded property: FLA, s. 85(1)(a). The property was purchased before the parties began cohabiting and did not increase in value. Indeed, the value decreased substantially. The claimant is entitled to keep any remaining proceeds from the Rutland Condo as excluded property.

v. How should the Family Home be divided?

- [35] The claimant seeks payment of one-half of the current appraised value of the Family Home, as of the date of trial (\$155,000) to be paid within 30 days of these reasons being issued. If the respondent is unable to pay her, she seeks and order that the Family Home be listed for sale and sold with joint conduct of sale with the net sale proceeds divided equally.
- [36] The respondent owned the Family Home for approximately seven years before meeting the claimant and her moving in in May 2008. It was clear title.

- [37] When the parties discussed the claimant becoming a joint owner of the Family Home in late 2011 or early 2012, the claimant's evidence was that the respondent said he would put her on title on the understanding that she would pay one-half of the Family Home's then value that he estimated at \$60,000. The claimant says she agreed to this proposal and has a vague recall that she might have paid him but that none of her banking or other records show that she did. As she stated in evidence - "I can't prove it".
- [38] The respondent's evidence was that although he agrees \$30,000 was roughly one-half of the Family Home's value in 2012, there was no discussion about the claimant paying him one-half of its value to become a joint owner. He testified that he made the claimant a joint owner because he loved her, they were partners and as such would "share and share alike".
- [39] I conclude that the claimant's version is the more probable because it is consistent with the pattern of how the couple managed their affairs and finances throughout their relationship, including keeping their respective finances separate and generally sharing the cost of travel equally between them. The way they conducted their affairs was to split everything approximately equally. As the claimant put it during submissions, she always "paid her way". I conclude that they agreed and intended that the claimant would buy a one-half interest in the Family Home for \$30,000, but she forgot or failed for some other reason to do so. For reasons that are unclear, the respondent did not press the issue at the time or since. Given the lack of evidence that this money was paid and the agreement honoured, I conclude that the claimant still owes the respondent \$30,000 for her half interest in the Family Home which must be accounted for in the division of family property. Given my finding that the claimant essentially "purchased" a one-half interest in the Family Home for one-half of its estimated market value at the time, no substantial unfairness issue under s. 95 of the FLA arises.
- [40] In this case and in accordance with s. 87 of the FLA, the appropriate valuation date for the Family Home is the date of trial: Jean Louis, at para. 36. There is no compelling evidence that would suggest another valuation date should be used.
- [41] Accordingly, the claimant's interest in the Family Home is \$77,500 representing one-half of its appraised value as of the trial date. From this, the sum of \$30,000 must be deducted to account for her failure to pay the respondent one-half of what the parties estimated it was worth in 2012 when she became a co-owner. This means her current one-half interest in the Family Home is \$47,500.
- c) Is Occupational rent payable by the respondent to the claimant?
- [42] The claimant claims occupational rent from the respondent due to his exclusive use of the Family Home since the Separation Date, while she had to pay living costs elsewhere. There is no question that the claimant is a joint owner of the Family Home and that she has not had the benefit of living there since she left in March 2017.

- [43] Occupational rent is discretionary and determined on the basis of fairness. It is often requested, but rarely granted. It is an exceptional remedy used cautiously to ensure justice and equity between the parties in appropriate circumstances. Factors to consider include the conduct of both spouses, the circumstances under which the non-occupying spouse left the home, when the claim for occupational rent was made (here it was first made when the claimant filed the notice of family claim on December 28, 2017), financial difficulty of the non-occupying spouse occasioned by not living in the home, who is paying the ongoing expenses related to maintaining the home, and whether the occupying spouse has increased or decreased its value.
- [44] The discretionary nature of an occupational rent award requires a balancing of these factors and a determination of whether it would be reasonable or fair given the totality of the circumstances. The remedy is exceptional and caution is to be exercised before it is awarded: *Ross v. Ross*, 2013 BCSC 1716 at para. 47.
- [45] While the respondent has been living in the Family Home since the claimant left at the end of March 2017, he has paid all related expenses. The claimant has fortuitously benefited by the significant increase in its value over the past two years or so in part because of the respondent's upkeep.
- [46] In balancing the relevant factors in this case, I am unable to conclude that occupational rent is warranted. While the claimant has incurred expenses for alternate accommodation, she has not had to maintain or financially contribute to the upkeep of the Family Home. The evidence satisfies me that the respondent has done an exceptional job of maintaining the Family Home since the Separation Date, which has contributed, along with the gratuitous significant increase in property values in the Kelowna area, to the increase in its value from which the claimant will benefit.
- [47] Accordingly, I decline to make any award to the claimant for occupational rent.
- d) Is Spousal support payable by the claimant to the respondent?
- [48] The respondent seeks spousal support from the claimant. The claimant says that the respondent has no entitlement to spousal support and, in any event, their retirement pension incomes are similar.
- [49] Entitlement for spousal support must be proven based on a compensatory, non-compensatory, or contractual claim. Contractual spousal support is not an issue here.
- [50] Compensatory support is intended to provide redress to the recipient spouse for his or her efforts during the relationship which conferred an economic benefit or advantage on the other spouse and for his or her economic disadvantage arising from the relationship or its breakdown: *Chutter v. Chutter*, 2008 BCCA 507 at paras. 50-51.

- [51] Non-Compensatory support is needs-based and aims to narrow the gap between the needs and means of the spouses. Here, both parties retired well before the Separation Date and earn similar incomes through their respective pensions.
- [52] I am not persuaded that the respondent has proven an entitlement to spousal support either on a compensatory or non-compensatory basis. The respondent has not suffered any financial disadvantage or hardship from the relationship or its breakdown. I conclude his standard of living has not suffered, nor has he been disadvantaged since the Separation Date. The only financial advantage in this case is that the claimant received the Gifts and Inheritance from her father.
- [53] Even if the respondent could show entitlement, the parties' incomes (not taking into account income from cashing in RRSPs) are within \$2,000 of each other (with the respondent earning more than the claimant) making them roughly equivalent.
- [54] The respondent's claim for spousal support from the claimant must be dismissed.
- e) Is the respondent entitled to compensation for medical and dental expenses incurred post-separation?
- [55] The respondent also alleges that the claimant owes him one-half of medical and dental expenses he has incurred since the Separation Date. The respondent has not proven this claim and it must be dismissed.

Summary

- [56] For the above-noted reasons, I make the following orders:
- (a) The parties, who were married on July 22, 2010 in Campbell River, B.C., will be divorced from each other, with the divorce to take effect 31 days from the date of these reasons.
- (b) Save for the sum of \$35,824 that is family property derived from the claimant's investments during the parties' cohabitation, the Claimant's Investments are excluded property. From the Claimant's Investments, the respondent is entitled to be paid \$17,912 (one-half of \$35,824); the Claimant's remaining investments are owned exclusively by the claimant free from any claim by the respondent.
- (c) The respondent's RRSPs, to the extent they existed at the Separation Date, are excluded assets.
- (d) Each party is entitled to keep all personalty, furniture, jewelry, vehicles, and household contents currently in their respective possession free of any claim by the other.
- (e) The respondent is entitled to keep his coin collection, ore, gold, silver, and safe contents (including any cash therein) free from any claim by the claimant.

- (f) The claimant's interest in the Family Home is \$47,500. Taking into account the \$17,912 owed by the claimant to the respondent related to the Claimant's Investments, there will be an order that upon the respondent paying the claimant the sum of \$29,588 (\$47,500 - \$17,912), the claimant shall transfer her interest in the Family Home to the respondent. The respondent shall have 60 days from the date of these reasons to pay the claimant, failing which the Family Home is to be listed for sale with a realtor to be jointly chosen by the parties, with either party having liberty to apply to court should further directions be required during the sale process.
- (g) The claimant's claim for occupational rent is dismissed.
- (h) The respondent's claim for spousal support from the claimant is dismissed.
- (i) The respondent's claim for unpaid medical and dental expenses is also dismissed.

[57] Given the divided success, each party shall bear their own costs.

"G.P. Weatherill J."

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