

CANADA / JUDGMENT

Shaw v. Shaw

2007 BCSC 1024

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1024 Shaw v. Shaw

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shaw v. Shaw,

2007 BCSC 1024

Date: 20070711

Docket: 03 2450

Registry: Victoria

Between:

Helen Marie Claire Shaw

Plaintiff

And

Barry John Shaw

Defendant

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Plaintiff

T. L. Brown, Q.C.

Counsel for the Defendant

L. A. Ottem

Date and Place of Trial:

9-11 and 16 May 2007

Kamloops, B.C.

- [1] The main issues in this family law action are whether Mr. Shaw has disclosed all of his assets, a determination of the family assets, and division of those assets.
- [2] Helen Shaw is now 59 years old. Barry Shaw is 60 years old. They married in July 1976. She was from Swastika, a small town south of Timmins, Ontario. He was from Auckland, New Zealand. After they were married they lived in New Lisdard, Ontario. Mrs. Shaw worked part-time as an x-ray technician. Mr. Shaw worked as a heavy duty mechanic for Sherman Mines in Kirkland Lake.
- [3] Their daughter Stephanie was born in July 1977. Their son Ryan was born in April 1979. After each birth Mrs. Shaw had a three month maternity leave and then returned to work.
- [4] The parties lived off one income and saved the other. Mrs. Shaw says that during the first four years of their marriage they lived off Mr. Shaw's salary and saved her salary. Mr. Shaw says that during the first years of their marriage they lived off Mrs. Shaw's salary and saved his salary because he could not work for the first two months of their marriage until he became a landed immigrant.
- [5] While it seems more likely that they lived off of Mr. Shaw's salary during the early years of their marriage because Mrs. Shaw was on maternity leave for a total of 6 months, it matters little. They agree that they lived off one salary and saved the other. However, it highlights the larger issue in this litigation: Mr. Shaw's credibility. I will return to this later.
- [6] In 1980 the parties packed their belongings and moved to Logan Lake, British Columbia. Mr. Shaw found work at Highland Valley Copper Mine, where he continues to be employed as an automotive mechanic. His present annual income is approximately \$80,000.
- [7] Mrs. Shaw began working part-time as an x-ray technician at a doctor's clinic and brought her then infant children to work with her. Mrs. Shaw continues working part-time at essentially the same job at the Logan Lake Health Centre, although since about 1996 she became a union member employed by B.C. Interior Health Authority. Her present annual income is approximately \$28,000.
- [8] In 1980 the parties bought a house on Basalt Avenue in Logan Lake. They opened a joint account at the Bank of Montreal to deal with the mortgage and transferred their Kirkland Lake TD account to a TD Bank in Kamloops where they also set up an account starting with \$3,000 for each child. They also opened a joint account at the CIBC in Logan Lake where Mr. Shaw's pay cheques were deposited. The CIBC joint account was the main account from which most of their household bills were paid.

- [9] The task of looking after all of the finances fell to Mr. Shaw. He is a very meticulous person and kept a transaction register that detailed all of the deposits, the source of the deposits, and the particulars of each cheque.
- [10] He yelled and bullied Mrs. Shaw when she wrote a cheque and failed to note the particulars in the transaction register. She simply stopped writing cheques, cashed her pay cheque and used cash to pay for what she needed.
- [11] Mr. Shaw looked after the mortgage payments and the household expenses, including the food. Except for food and shelter, Mrs. Shaw paid for almost everything related to herself and the children, including their clothes and extracurricular activities. When she needed a cheque for anything, such as a school field trip, she gave the cash to Mr. Shaw who then wrote a cheque payable to the school.
- [12] In 1984 the parties purchased a scholarship fund for the children who were then in high school. Mr. Shaw looked after the monthly payments for Stephanie, which were \$103 each month. Mrs. Shaw looked after the payments for Ryan, which were \$82.50 each month.
- [13] In July 1991 the parties sold the house on Basalt Avenue and moved to a house on a two acre lot on Gowan Drive, where Mr. Shaw continues to reside.
- [14] The parties lived frugally: Mrs. Shaw canned the fruits and vegetables that she grew in her garden, baked bread every week, and wore used clothes from Value Village. Throughout the long marriage they went out together for a total of three movies and four meals. For vacations, they went camping three times, made two trips to Ontario (although Mr. Shaw may have gone only once), and two trips to New Zealand. Mr. Shaw also took Stephanie to New Zealand to visit his mother before she died in 1996.
- [15] Mr. Shaw made approximately 12 trips to New Zealand during the marriage. Otherwise, he also was not a big spender. He went to a few movies (on "cheap Tuesdays"), played a few rounds of golf in the summer, and made the occasional trip to Vancouver where he would go to the race track, car show or other event.
- [16] Towards the later years of their marriage, around 1997 or 1998, when both children were attending university, whenever Mrs. Shaw asked for money, or wanted something like a block of cheese at Costco, Mr. Shaw told her they were broke and could not afford it. He told her he could no longer afford to pay for her truck insurance, gas or repairs, or the life insurance for her and the children. He told her if she did not believe him, to look at the transaction register in his desk drawer where he kept their finances. When she looked, the bottom line showed that they had no money.
- [17] Mrs. Shaw was very ill from about July 1999 to April 2000 and missed 8 months of work. When she began a graduated return to work she could not afford the insurance for her truck and was forced to walk or get a ride from a neighbour or patient.

- [18] Mr. Shaw kept telling her they were broke. Mrs. Shaw believed him. She borrowed money from her brother to help pay for the children's university tuition. The children used the proceeds of the scholarship fund and worked in order to pay for their education. They knew enough not to ask their father for any money. In 2003 Stephanie lost her job and asked her father for \$5,000 to help her out for a couple of months. He lent her \$2,500, told her he could not give her the full amount because property taxes were due, and that the \$2,500 would come off her share of the estate.
- [19] In 2002 Mrs. Shaw decided that the marriage needed to end. She photocopied all of the financial documents she found in Mr. Shaw's desk drawer so that she would know the state of their finances. She found the key to his safety deposit box, opened it, and was stunned to find a stack of \$100 bills in it. She found out that Mr. Shaw had an inheritance from his father's estate, money in bank accounts in New Zealand, safety deposit boxes at TD Canada Trust in Kamloops and CIBC in Logan Lake, bank accounts at TD Canada Trust, Bank of Montreal and MBNA. She knew none of this before.
- [20] It took Mrs. Shaw four years to painstakingly review and make sense of all of the financial records going back to 1995. In the end, after compiling detailed spreadsheets setting out all of the accounts, deposits, withdrawals, and expenses, she found that over time, Mr. Shaw had withdrawn close to \$200,000 in cash from their CIBC joint account and that he has money in ASB Bank in New Zealand.
- [21] What it meant was that all of the time Mrs. Shaw was struggling for money, walking because she could not afford to drive, borrowing money from her brother to help Ryan through university, Mr. Shaw was lying to her when he said they were broke. Mr. Shaw deposited \$8,000 into his RRSP in 1999, \$12,600 in 2000, the same year he received an inheritance of more than \$108,000, and kept thousands of dollars in a separate account.
- [22] Mr. Shaw testified that in 1989 he began withdrawing cash from their joint account and stashing it away so that by 1999 he had approximately \$7,500. He claims that he planned to put the cash in their CIBC safety deposit box but found that it was full so he opened an account at the TD Bank. By July 2003, he claims he had about \$16,500 in the account.
- [23] This action was commenced on June 10, 2003 and on June 12, 2004 an order made restraining Mr. Shaw from disposing of any family asset or other property at issue, including any property contained in safety deposit boxes, and bank accounts other than his regular chequing account. Mr. Shaw was served with the writ of summons, statement of claim and restraining order on July 16, 2003.
- [24] Notwithstanding the restraining order, Mr. Shaw withdrew \$49,750 in cash from their joint CIBC account between January 2003 and September 2004. There is no doubt he used some of the cash for day to day living expenses, but Mr. Shaw lives frugally. Where the balance of the cash has gone is unknown.

- [25] Mr. Shaw continues to accumulate cash which he claims he keeps at home. I find it difficult to accept his evidence that he does not know how much money he has lying around the house because "I don't count it". Over the years Mr. Shaw has paid close and detailed attention to the state of their finances. I am certain that he pays close attention to his accumulated cash which he concedes is "several thousand dollars".
- [26] Mr. Shaw failed to disclose his TD Bank account in either of his Financial Statements sworn in September 2003 and April 2007; he has failed to produce any records relating to the TD Bank account. He failed to disclose any cash, let alone his "several thousand dollars" of cash.
- [27] Mr. Shaw continues to reside in the matrimonial home. Mrs. Shaw moved out around the fall of 2003 when Mr. Shaw refused to move out. Since then she has moved nine times, staying with different friends. Except for her clothes, which she keeps in two plastic boxes, her personal belongings are in storage.
- [28] Both parties want to remain living in Logan Lake. Mrs. Shaw is working part-time, but there are no more available hours for her to work. After 20 years, she is at the top of the seniority list and "sole charge". The only other work for x-ray technicians posted from time to time with Interior Health are casual positions with no benefits. Any work at private clinics pays far less than what she currently earns, and Mrs. Shaw would have to relocate from Logan Lake.

The House in Victoria

- [29] In 1995 Stephanie began attending the University of Victoria. In 1997 when Ryan decided to attend the same university, Mrs. Shaw and the children decided to buy a house in Victoria. Stephanie found a house on Cadillac Avenue for \$150,000 which was the most Mrs. Shaw thought the three of them could afford. Stephanie had \$3,000, Ryan had \$1,000 and Mrs. Shaw borrowed \$10,000 from her brother. An Offer to Purchase was made in Stephanie's name. Mrs. Shaw claims that at the last minute they telephoned Mr. Shaw and asked him if he wanted to come in with them on the purchase and he agreed. Mr. Shaw contributed the balance towards the \$22,274 down payment.
- [30] Mr. Shaw initially took the position at trial that it was he and Mrs. Shaw who came up with the idea of buying the house in Victoria. He recapitulated on cross-examination.
- [31] Mr. Shaw insisted that for tax reasons the house should be in the parties' names rather than Stephanie's name. He also insisted that Stephanie and Ryan sign a written residential tenancy agreement to rent the house for \$960 a month, and pay a security deposit of \$960.
- [32] The house was in derelict condition. Mrs. Shaw took four weeks of her vacation time in August 1997 and along with Ryan spent the full month stripping, sanding and painting all five rooms in the house. Stephanie and Mr. Shaw worked on the house during the last weekend in August.

- [33] Stephanie moved out of the Victoria house in November 2002. Ryan graduated but found work in Victoria and continues to live in the house, often with a roommate to help pay for the rent. When he has had difficulty paying the full rent, Mrs. Shaw has paid the difference.
- [34] Mrs. Shaw claims it was agreed that when the house was sold, each of them, including Ryan and Stephanie, would get back what they put in and they would share equally in any profit realized at the time of sale.
- [35] Ryan continues to contribute his labour making various home improvements. Mr. Shaw reimburses him for any out of pocket expenses. Ryan testified that the family discussed the house as a "family investment" but he does not recall the specifics of any discussion. He used the word "assume" or "assumed" a number of times. That is, he has always assumed he has an interest in the house; he assumes that when the house is sold that he will get back what he contributed and any profit will be split four ways equally.
- [36] Stephanie testified that the home was a "future investment" for herself. Whatever interest she had in the house would be her investment for the future. When the house was sold the property would be divided into quarters and she would have "some sort of return" for her effort in acquiring the property. However, this trial is "the first arena" where any discussion of the division of any profit has occurred.
- [37] Mr. Shaw does not deny that they would each get back what they initially put in to purchase the house. However he claims that they agreed "they would take a look" at sharing in the profit when the time came to sell the house.
- [38] I conclude that the house in Victoria was bought with the idea that it would be an investment for the family. When the house was sold, they would each receive a return of their initial investment, but there were no firm plans or agreement on how any profit would be divided. At the time this action was commenced in 2003 the house was assessed at \$157,000 and encumbered by a \$150,000 mortgage. If the house was sold then or after Ryan's graduation in the summer of 2003, there would have been little if any profit. However, house prices have risen dramatically. The 2006 assessed value was \$264,000, and the 2007 assessed value (as of July 1, 2006) increased to \$293,700.

The Agreed Statement of Assets and Liabilities

[39] The agreed assets and liabilities are as follows:

STATEMENT OF ASSETS/LIABILITIES

Real Property

Value

Residence located at 222 Gowan Drive, Logan Lake BC

\$275,000.00

Residence located at 171 Cadillac Avenue, Victoria BC

295,000.00

RRSPs

Plaintiff

CI Investments (as at Dec 31, 2006)

18,275.05

Clarica Investments (as at Dec 31, 2006)

42,047.71

TD Canada Trust (as at Dec 29, 2006)

38,113.66

98,436.42

Defendant

TD Canada Trust (as at Dec 29, 2006)

60,570.05

Bank of Montreal (as at Jan 5, 2007)

25,941.02

Clarica Investments (as at Dec 31, 2006)

82,252.02

168,763.09

Life Insurance Policies

Plaintiff

Clarica - Cash Surrender Value

5,929.03

Clarica - Cash Surrender Value

6,133.15

12,062.18

Defendant

Clarica - Cash Surrender Value Vehicles/Chattels

25,788.00

Vehicles/Chattels

2000 Ford Taurus

8,500.00

1974 MGB

1,250.00

5th Wheel RV

8,250.00

1992 Ford F250

6,000.00

1988 Chevrolet Sprint

250.00

Utility Trailer

300.00

Scott Canoe

300.00

Liabilities

Bank of Montreal Mortgage against 171 Cadillac Avenue, Victoria BC (as at Dec 31, 2006)

98,587.08

[40] In March 2006 Mr. Shaw purchased a condominium in Logan Lake for \$36,000. He used approximately \$12,000 from his inheritance to reduce the mortgage, leaving a mortgage balance of \$11,000. It is agreed that the condominium is not a family asset.

Has Mr. Shaw disclosed all of his assets?

[41] Mrs. Shaw contends that Mr. Shaw has failed to disclose assets that he has in New Zealand that are family assets or that should be taken into account in determining the division of assets.

[42] When Mr. Shaw came to Canada he had two accounts, a savings account and a homeowners account at a bank in Mount Roskill, which is a suburb of Auckland, New Zealand.

- [43] During the earlier years of their marriage the parties discussed their finances and Mrs. Shaw made notes of what was discussed. A note she wrote in 1988 based on what Mr. Shaw was telling her at the time was that they had \$23,000 of their savings in an account in Mount Roskill because interest rates were higher.
- [44] A Wills Information Form the parties filled out in 1989 noted that they had an "Auckland Savings Bank New Zealand, Roskill Branch". The Wills Information Form was updated in 1994 and 2000, and at some point, the reference to the New Zealand account was crossed out.
- [45] Mr. Shaw admits that the parties had around \$23,000 in savings around 1988. However he claims he cannot recall sending money to New Zealand, but maybe Mrs. Shaw did, and if she did, he did not know how much. He claims he no longer has the savings and homeowner accounts, but cannot recall when he closed them. However, he does not deny that in 1990 money came from a bank account in New Zealand to help pay for the 5th wheel trailer.
- [46] Mrs. Shaw's detailed analysis of the banking records shows that in 1998, \$8,387.66 was transferred from an account in New Zealand to Mr. Shaw's MBNA account. When asked who would have deposited money from New Zealand into his account, Mr. Shaw's response was that it could have been his father, but he did not know. When asked if he had money in New Zealand in 1998, his answer was that he "had some", but he doubted that he had \$8,387.66.
- [47] Mr. Shaw claims that in 1999 he attended his father's funeral and opened an ASB Bank account in New Zealand where his inheritance could be deposited. However, according to the bank statement, the account was opened in July 2000, and not in 1999 as Mr. Shaw claims.
- [48] In October 2000, \$108,555.09 was deposited into Mr. Shaw's ASB Bank Accelerator account from his father's estate. The bulk of the estate came from the sale of his father's house. The estate was divided between him and his brother who lives in Auckland. The parties never discussed Mr. Shaw's inheritance or anticipated inheritance.
- [49] Mr. Shaw has his ASB Bank statements sent to his brother's address in Auckland. His brother has signing authority on the account. If Mr. Shaw needs money from the account, his brother withdraws the money for him and sends it to him. In April 2007 his brother sent him over \$12,300. Mr. Shaw used it to reduce the mortgage on his condominium.
- [50] Mr. Shaw failed to disclose his New Zealand bank account on either of his Form 89 Financial Statements. He claims that based on his own legal research he concluded that inheritances were not subject to divorce proceedings. I view it as an indicator that Mr. Shaw wants to keep Mrs. Shaw in the dark about the state of his finances.

- [51] In December 2005 Mr. Shaw opened a new bank account at CIBC in his own name by transferring \$10,000 from their joint account. His pay cheques are deposited into the new account. He failed to disclose his CIBC account on his Form 89 Financial Statement because "I didn't think it was relevant". He failed to disclose his timeshare in New Zealand and claims he was under the impression that gifts and inheritance were not part of divorce proceedings.
- [52] Within 5 days of being served with the restraining order, on July 16, 2003 Mr. Shaw transferred \$80,000 from his New Zealand bank account to his brother. He claims he did not think the restraining order applied to assets outside of the Province.
- [53] He failed to disclose his TD Bank account or the thousands of dollars he keeps stashed in the house.
- [54] I conclude that Mr. Shaw deliberately hid and continues to hide assets, including family assets, and that he has deliberately failed to disclose all of his assets in this litigation. I do not find him to be a credible witness.

The Date of Separation

- [55] The parties disagree on their date of separation. While the issue was not addressed in closing argument, it is still a factor in determining the length of the marriage and the division of assets.
- [56] The Statement of Claim alleges that the parties separated in 1998, but this is an error.
- [57] For most of the marriage, the parties kept separate bedrooms. Mr. Shaw used to work shift work, often came home after midnight, and woke up the children. Mrs. Shaw also suffers from insomnia. Mr. Shaw began sleeping in the basement sometime in the 1980s. To use Mrs. Shaw's words, she "always lived upstairs" and he "always lived downstairs".
- [58] Mr. Shaw would like me to find that they separated by 2000 because he claims that by then they were not talking to each other and Mrs. Shaw had stopped cooking meals and washing clothes. However, in 2000 Mrs. Shaw was off work and stayed in bed most of the time so that it is not surprising if she did little housework. Mr. Shaw agrees that they went to Victoria together at least twice a year, the last time in 2002.
- [59] Mrs. Shaw's uncontradicted evidence is that they had sexual relations in 2000. She remembers because she was so tired. I prefer her evidence that they stopped talking to each other in 2002. I conclude that the parties separated in 2002.

What Each Party Seeks

- [60] Mrs. Shaw contends that while the parties own the Victoria house jointly, they hold one-half in trust for the children. The net equity in the house after the outstanding mortgage balance is \$196,000 before capital gains of at least \$24,000.

- [61] Mrs. Shaw argues that she cannot be self-sufficient if she is forced to pay Mr. Shaw \$137,500 for his one-half interest in the matrimonial home.
- [62] Mr. Shaw has lived in the home rent and mortgage free since the fall of 2003. He has not carried out any required work or maintenance because he knows that Mrs. Shaw may end up with the house. The deck flooring, hand rails, swimming pool liner and furnace all need to be fixed, repaired or replaced.
- [63] Mrs. Shaw asks the Court to find:
- (a) Mr. Shaw has undisclosed assets and to impute to him \$100,000 in undisclosed assets;
 - (b) the New Zealand assets are family assets;
 - (c) one-half of the house in Victoria be held in trust for the children; and
 - (d) unequal division of the family assets in her favour and lump sum spousal support.
- [64] Mrs. Shaw seeks the following division of assets:
- (a) the Gowan Drive matrimonial home be transferred to her;
 - (b) the Victoria house be transferred to her on the condition that she transfer fifty percent of the interest to Ryan and Stephanie;
 - (c) the pensions of the parties be divided by operation of Part 6 of the Family Relations Act, R.S.B.C. 1996, c. 128 and that each party pay one-half of the cost to register the Order with the respective pension plans;
 - (d) the RRSPs of the parties be equalized as at the dates specified or that Mr. Shaw transfer by way of spousal rollover, the sum of \$35,163.33 to Mrs. Shaw;
 - (e) the Clarica Life Insurance Policy cash surrender values be equalized or that Mr. Shaw transfer the sum of \$6,862.91 to her;
 - (f) she retain as her assets the 1992 Ford F250 truck, the 5th wheel trailer, and the Scott canoe;
 - (g) Mr. Shaw retain the 2000 Ford Taurus, the 1974 MGB, the 1988 Chevrolet Sprint, and the utility trailer;
 - (h) she pay Mr. Shaw the sum of \$2,125 to equalize the division set out in (f) and (g) above; and
 - (i) that the cash located in the safety deposit box at the TD Bank be divided equally between the parties; provided that the bank manager first count the money in the presence of the parties and then divide it equally between them.
- [65] Mr. Shaw contends that the children are not parties to this action: a trust order in their favour cannot be made; Mrs. Shaw can do what she wants with her share of the Victoria house. Mr. Shaw also contends that his inheritance is not a family asset because it was not ordinarily used for a family purpose.

[66] Mr. Shaw seeks the following division of assets:

- (a) title to the matrimonial home be transferred to Mrs. Shaw on payment to him of \$137,500 representing his half interest in the home;
- (b) the Victoria house be sold and the proceeds of sale divided equally between the parties; and
- (c) Mr. Shaw agrees with what Mrs. Shaw proposes as outlined in paragraph [64] herein, items (c) to (i).

Conclusion

[67] I find that Mr. Shaw's inheritance is not a family asset because it was never used for a family purpose. His condominium is also not a family asset. However, the assets may still be taken into account in determining the needs of each spouse to remain economically independent and self-sufficient.

[68] I find that Mr. Shaw has undisclosed assets that are family assets. Doing the best I can based on Mr. Shaw's non-disclosure, I assess them at \$80,000.

[69] Mr. Shaw is required to retire from Highland Valley Copper at age 65. Mr. Shaw, as an automotive mechanic, is capable of finding other work and has indicated that whether he continues to work after age 65 is dependent on the outcome of this litigation.

[70] Mrs. Shaw is willing to give up any claim for spousal support if both homes are transferred to her. In the case of the Victoria house, neither Stephanie nor Ryan were parties to the action, and I do not propose to determine the extent of their interest in the Victoria house.

[71] There has been no triggering event.

[72] I find a division of the assets under s. 56 of the Family Relations Act would be unfair based on the factors set out in s. 65(1), particularly the needs of each spouse to remain economically independent and self-sufficient.

[73] I make the following orders:

1. Mr. Shaw will transfer his interest in the matrimonial home to Mrs. Shaw. He has two weeks from the date of these reasons to vacate.
2. Mr. Shaw is entitled to 20 percent of the interest in the Victoria house; Mrs. Shaw is entitled to the remaining 80 percent.
3. The pensions of the parties will be divided pursuant to Part 6 of the Family Relations Act.
4. The RRSPs of the parties will be equalized as of the date of these Reasons for Judgment.
5. The Clarica Life Insurance Policy cash surrender values will be equalized.
6. The parties will retain the assets as agreed and as set out in paragraph [64], items (f) and (g). Mrs. Shaw will not be required to pay Mr. Shaw \$2,125 to equalize the division of those

assets.

7. The cash in the TD Bank will be divided equally in the manner agreed to by the parties and as set out in paragraph [64], item (i).
8. The parties are divorced from each other.

[74] While Mrs. Shaw claims spousal support, it appears to me that she should be able to remain economically independent and self-sufficient when Mr. Shaw transfers his interest in the matrimonial home to her; I award her nominal support of \$1.00.

[75] The parties may speak to the issue of costs if they cannot agree.

"Loo J."

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