
CANADA / JUDGMENT

Silliphant v. Silliphant

2007 BCSC 153

COURT

Supreme Court of British Columbia

DECIDED

31 January 2007

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2007 BCSC 153 Silliphant v. Silliphant

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Silliphant v. Silliphant,

2007 BCSC 153

Date: 20070131

Docket: E5914

Registry: Chilliwack

Between:

Rodney Scott Silliphant

Plaintiff

And

Sheelagh Joan Drever also known as

Sheelagh Joan Silliphant

Defendant

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

The plaintiff appearing in person

Counsel for the defendant

R.C. Doell

Date and Place of Trial/Hearing:

November 6-7, 2006

Chilliwack, B.C.

INTRODUCTION

- [1] In this family law proceeding the plaintiff seeks a divorce. By way of counterclaim the defendant seeks the following corollary relief:
- (a) child support for the two adult children of the marriage;
 - (b) spousal support; and
 - (c) equal division of the family assets, being the plaintiff's pension and an RRSP held by the defendant.
- [2] The plaintiff takes the position that the issues of division of family assets and spousal support were finally determined by means of two agreements. The defendant takes the position that there is no binding agreement respecting the division of assets and that the agreement regarding spousal support ought not to preclude an order for ongoing spousal support.

BACKGROUND

- [3] The parties were married in Alberta in 1981 when the plaintiff was 22 and the defendant 18. They have two children, Tara, born January 3, 1985 and Alyssa, born October 10, 1987.
- [4] At the time of their marriage the plaintiff was employed with the City of Medicine Hat and the defendant was a student taking a 2 year diploma program in business administration. Upon receiving her diploma the defendant went to work, first as a waitress and then as a bookkeeper. She worked as a bookkeeper until she became pregnant with her first child. She was then unemployed for 33 months.
- [5] In the meantime, the parties moved from Alberta to B.C. in February 1986. The plaintiff found employment at the MSA Hospital in Abbotsford, where he is still employed.
- [6] The defendant returned to work on a part-time basis after the younger daughter was born. In 1990 she took a position as a part-time clerk with Buckerfields, a local feed and supply store. In time she worked her way up to a full-time position as a purchaser.
- [7] The parties separated June 2, 2002. They were in debt at that time and both declared bankruptcy. The family home was sold but there was no equity in it after the trustee was paid.

- [8] About the time the parties separated the defendant's job at Buckerfields came to an end when her employer ceased operations in Abbotsford. The defendant moved with the children to Victoria where she worked first at a telephone call-in centre, as manager of a retail store, and for an agency doing temporary office work. She then found permanent employment with a company that operates parking lots.
- [9] In the fall of 2006 the defendant was led to believe that she would be able to alter her work hours so that she could attend college and obtain a Bachelor of Business Administration degree. However, after she had committed to this course her employer advised her she would have to choose between work and school so she chose to continue with her education and quit her job.
- [10] At the time of trial the defendant was enrolled in 3 courses, which she testified amounted to a full course load. She had no employment income. Her plan was to take evening courses beginning in January 2007 and look for work during the day.
- [11] The plaintiff has continued to work at the hospital. In his Form 89 he reported employment income of \$72,735 and union dues of \$1,115 resulting in a Guideline income of \$71,620, which was not challenged.
- [12] In June 2006 the parties consented to an interim child support order for one child in the amount of \$678 per month based on a Guideline income of \$72,735.

DIVORCE

- [13] The parties have clearly established their entitlement to a divorce pursuant to s. 8(20(a) of the Divorce Act.

PRIOR AGREEMENTS AND THEIR LEGAL EFFECT

- [14] After the parties separated they had discussions concerning the resolution of the issues surrounding the breakdown of their relationship and a form of agreement dated June 2, 2002 was prepared and signed by the parties.
- [15] The agreement contained the following provisions:
7. The Husband shall pay to the Wife, for her own support, the sum of \$150.00 bi-weekly, commencing on the 14th day of June, 2002 and continuing on each and every other week thereafter until the 1st day of June 2006, (or) until such time as the Wife dies, remarries, or commences cohabitation with another person, in what is generally referred to as a common-law relationship, whichever shall occur first.

9. The Husband shall pay to the Wife for the maintenance of the infant children of the marriage the sum of 17% of gross monthly income or \$693 per month which ever is greater, such payments to be made bi-weekly commencing on the 14th day of June 2002 and continuing on every other week thereafter, for so long as each child of the marriage remains a child of the marriage.
 10. In addition to the amount described above, the Husband shall pay to the Wife, for special expenses, 50% of any special expenses that could arise during the years of childhood. The amount and the activity must be mutually agreed upon before the said expense is incurred.
 11. Husband and wife have mutually agreed to not lay claim to the others pensions or severances.
 12. (a) It was mutually agreed upon to divide up all the household property on an item by item basis. It was mutually agreed upon to declare bankruptcy to eliminate the liabilities.
 13. The division of the proceeds from the liquidation of the van will be 50/50 split or a car each if we decide to trade it in.
 14. The equity in the house is to be split evenly between the husband and the wife.
- [16] There is some doubt whether the agreement was properly witnessed and therefore whether it would meet the formal requirements of a marriage agreement within the meaning of the Family Relations Act though in my view it would qualify as a separation agreement. However, I find that both parties resiled from the agreement. On June 30, 2002, the plaintiff sent the defendant an e-mail message in which he said he had burned what he described as the "invalid agreement". He set out terms that he said he would be prepared to agree to in a "new agreement". The plaintiff clearly showed an intention to resile from the agreement by burning the only signed copy and by writing the e-mail.
- [17] On July 2, 2002 the defendant sent the plaintiff an e-mail in which she disputed that destroying the agreement made it void but went on to tell the plaintiff that she was prepared to "start from scratch on the separation agreement". She set out terms that she proposed for a new agreement. I find that the defendant also resiled from the agreement and that it ceased to have any legal effect.
- [18] On September 16, 2003, with the assistance of a Family Justice Counsellor but without legal advice, the parties made a new written agreement pursuant to s. 121 of the Family Relations Act dealing with custody, access and child and spousal support. This agreement provided, in part, as follows:

THAT Rodney Scott Silliphant having been found to be a resident of British Columbia and to have an annual income of \$64,000.00 for the purpose of determining the table amount of child support.

THAT Rodney Scott Silliphant pursuant to the Family Relations Act shall pay to Sheelagh Joan Drever the sum of \$857.00 per month for the support of the two children payable bi-weekly in the amount of \$428.00 commencing July 25, 2003 and to continue to be paid bi-weekly each and every month thereafter.

THAT Sheelagh Joan Drever shall advise Rodney Scott Silliphant of any additional University expenses for the child Tara Lee Silliphant with two weeks advance notice and Rodney Scott Silliphant shall pay 1/3 of the cost of additional University expenses for the said child.

THAT Sheelagh Joan Drever shall advise Rodney Scott Silliphant of the cost of drum lessons for 3 months for the child Alyssa Jane Silliphant with two weeks advance notice and Rodney Scott Silliphant shall pay ½ of the cost of drum lessons for three months for the said child.

THAT Rodney Scott Silliphant shall pay to Sheelagh Joan Drever for her support the amount of \$300.00 per month payable bi-weekly in the amount of \$150.00 commencing July 25, 2003 and to be continued to be paid bi-weekly each and every month until June 01, 2004 at which time the responsibility to provide spousal support shall end.

[19] There was no evidence whether the foregoing agreement was ever filed with the Provincial Court or this court. Nonetheless, I find that it was a final agreement dealing with custody, access, child support and spousal support and therefore amounts to a separation agreement for the purpose of s. 56 of the Family Relations Act (*Rutherford v. Rutherford* (1981), 23 R.F.L. (2d) 337 (B.C.C.A.))

CHILD SUPPORT

[20] Since both children are over the age of 19 the first issue to be determined is whether they continue to be children of the marriage.

[21] Tara is now 22 years old. Since graduating from high school in June 2004 she has taken some university transfer courses. In November 2005 Tara moved into her own residence but in April 2006 she returned to the defendant's home. She pays her mother \$350 per month room and board. At the time of trial she was attending school 11 hours per week, taking three courses, and was working about 20 hours per week at a job that pays \$9.00 per hour. The defendant testified that Tara is on a waiting list for a nursing program beginning in September 2007, although no confirmation of her status from the educational institution was provided. The plaintiff has been giving Tara \$200 per month to assist her with expenses.

[22] Counsel for the defendant submits Tara remains a child of the marriage and that support should be paid for her, although in a lesser amount than the Guidelines would provide since she has an ability to contribute towards her own expenses through her part-time earnings and student loans.

- [23] I am satisfied that Tara remains dependent upon her parents for financial support and is unable to withdraw from their charge because of educational pursuits. However, I agreed with defendant's counsel that she has the ability to contribute towards her expenses and that it would be inappropriate to make an order in accordance with the Guidelines.
- [24] Alyssa graduated from high school in June 2005. The defendant testified that Alyssa wants to become a doctor and intends first to obtain her B.Sc. at the University of Victoria. At the present time she is taking some university transfer courses at a local college with a view to transferring to the university in the future to complete her degree. I am satisfied Alyssa remains a child of the marriage. The defendant seeks support for Alyssa in accordance with the Guidelines table. She does not seek s. 7 expenses for either child.
- [25] In my view an appropriate amount of child support for the two adult children can be determined by using the Guideline amount for one child and adding to that amount one-half of the difference between the Guideline amounts for two children and one child. Based upon a Guideline income of \$71,620 per year basic Guideline child support for one child is \$668 per month and for two children is \$1,075 per month. I therefore propose to fix the amount of child support for the two children at \$872 per month commencing January 1, 2007.

DIVISION OF ASSETS

- [26] There are two family assets in question. The defendant acquired an RRSP when she lost her job at Buckerfields. It now has a value of about \$31,500. The plaintiff has a Municipal pension.
- [27] I find that a triggering event occurred September 16, 2003 when the parties entered into the separation agreement. The situation here is not like that in *Buck v. Buck* (1987), 16 B.C.L.R. (2d) 71 (S.C.) where the making of an interim agreement respecting support was held not to constitute a triggering event. I find that the agreement in this case was a final agreement, even though it did not deal with assets.
- [28] As of the date of that agreement each party was entitled to a 50% share in each family asset. In my view there is no basis for reapportionment of the parties' interests in the family assets.
- [29] The plaintiff is entitled to one-half of the value of the defendant's RRSP, which can be accomplished by way of a spousal rollover.
- [30] The defendant is entitled to one-half of that portion of the plaintiff's pension to be divided in accordance with s. 6(2) of the Family Relations Act Division of Pensions Regulation, B.C. Reg. 77/95, using September 16, 2003 as the defendant's entitlement date. The parties will have liberty to apply if necessary to settle the terms of the order in relation to the pension division.

SPOUSAL SUPPORT

[31] It is clear that the existence of the agreement dated September 16, 2003 does not preclude this court from making an award of spousal support under the Divorce Act, although the existence of the agreement is a factor that has to be considered. In *Miglin v. Miglin*, [2003] 1 S.C.R. 303 the Supreme Court of Canada set out a two stage test for considering the effect of a prior agreement on an originating application for spousal support. At the first stage the court must consider:

- (1) the circumstances in which the agreement was made to determine whether it was obtained fairly; and
- (2) whether the agreement substantially complied with the objectives of the Divorce Act.

[32] If the agreement satisfies the first stage the court must consider whether it still reflects the original intentions of the parties and remains in substantial compliance with the objectives of the Divorce Act.

[33] In *Miglin* the test was summarized at para. 4 as follows:

As we explain below, we believe that a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the Divorce Act as a whole should receive considerable weight. In an originating application for spousal support, where the parties have executed a pre-existing agreement, the court should look first to the circumstances of negotiation and execution to determine whether the applicant has established a reason to discount the agreement. The court would inquire whether one party was vulnerable and the other party took advantage of that vulnerability. The court also examines whether the substance of the agreement, at formation, complied substantially with the general objectives of the Act. As we elaborate later, these general objectives include not only an equitable sharing of the consequences of the marriage breakdown under s. 15.2, but also certainty, finality and autonomy. Second, the court would ask whether, viewed from the time the application is made, the applicant has established that the agreement no longer reflects the original intention of the parties and whether the agreement is still in substantial compliance with the objectives of the Act. In contrast, the trial judge's and the Court of Appeal's approaches failed to value a determination by the parties as to what is mutually acceptable to them.

[34] The absence of independent legal advice will not necessarily vitiate an agreement but it can be a consideration in determining its fairness. In this case while neither party had independent legal advice they did have the assistance of a Family Court Counsellor in negotiating and preparing the document. They were advised that it might be in their best interest to obtain independent legal advice and declined to do so. I would not be inclined to discount the agreement on this basis.

[35] The next question is whether the substance of the agreement complied substantially with the general objectives of the Act. The objectives are set out in s. 15.2(6) of the Divorce Act:

15.2(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.

[36] In my opinion, the agreement whereby the defendant agreed to spousal support of \$300 per month for a period of only one year was inconsistent with the objectives of the Divorce Act. Before the defendant married she had aspirations to become an accountant. She gave up that idea when she was married. The parties were married for over 20 years during which the plaintiff consistently earned considerably more income than the defendant. Moreover, when the agreement was made the plaintiff had a secure job whereas the defendant had recently lost her job and was in the process of re-establishing a new position, one which turned out to be not secure. In my view the defendant suffered an economic disadvantage as a result of the breakdown of the marriage which the agreement failed to address.

[37] The plaintiff's income will significantly exceed that of the defendant for the foreseeable future. I find that she requires a contribution from the plaintiff in order to meet her reasonable needs.

[38] I therefore conclude that the defendant is entitled to an order for spousal support on both compensatory and needs-based grounds.

[39] I am not persuaded, however, that the plaintiff is obliged at this stage to completely finance the defendant's desire to retrain and embark on a new career. In the past she has shown the ability to find employment from which she has been able to earn an income of \$30,000 per year or more. Her most recent position came to an end when she quit to pursue further studies but I am satisfied that she has the capacity to find alternative employment. She is obviously entitled to choose to take a course of studies, either part-time or full-time, but I am of the view that the quantum of spousal support should be determined taking into account her ability to earn income, particularly as her choice to pursue another career has been made five years after separation. I consider that the defendant has the capacity to earn \$30,000 per year.

[40] In determining the amount of spousal support I have considered the Spousal Support Advisory Guidelines ("SSAG") on the basis of the following facts:

Payor's Guideline Income \$71,620

Recipient's income \$30,000

Length of marriage 21 years

Recipient's age 43 years

[41] The situation in this case is somewhat complicated because there are two children over the age of majority but child support will be payable in an amount halfway between the basic amount for one child and the amount for two children. In order to find guidance from the SSAG I have looked at the amounts suggested for "with children" scenarios for one child and for two children. The ranges suggested are as follows:

One Child

Two Children

Lower

\$411

\$137

Middle

\$681

\$469

Upper

\$940

\$726

[42] In the table below I have set out the approximate net disposable incomes of the parties based on various spousal support amounts:

Spousal support

Plaintiff's Net Income

Defendant's Net Income

\$300

\$3,263

\$3,086

\$600

\$3,057

\$3,299

\$800

\$2,919

\$3,433

[43] The plaintiff claims expenses, net of income tax and child support payments, in the amount of \$3,118 per month while the defendant claims expenses of \$3,469 per month. While most of the defendant's expenses are reasonable, I am of the view, with respect, that she need not spend \$390 per month on cable TV and cell phones. In my view she could cut that amount in half without seriously affecting her lifestyle or that of the children.

[44] In my view, the plaintiff has the capacity to pay and the defendant needs spousal support in the amount of \$600 per month.

SUMMARY

[45] The defendant is entitled to the following orders:

1. A divorce;
2. Child support in the amount of \$872 per month commencing January 1, 2007 pursuant to the Divorce Act;
3. An order pursuant to Part 6 of the Family Relations Act dividing the plaintiff's Municipal Pension Plan Benefits in accordance with these reasons;
4. Spousal support in the amount of \$600 per month commencing January 1, 2007 pursuant to the Divorce Act;
5. Costs at Scale B.

[46] The plaintiff is entitled to an order that the plaintiff pay to him one-half of the RRSP in her name at BMO Bank of Montreal by way of a spousal rollover.

"B.M. Joyce, J."

The Honourable Mr. Justice B.M. Joyce

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Prepared on 29 October 2026 · Esheria