

CANADA / JUDGMENT

Smith v. Smith

2008 BCSC 363

COURT

Supreme Court of British Columbia

DECIDED

26 March 2008

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2008 BCSC 363 Smith v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith v. Smith,

2008 BCSC 363

Date: 20080326

Docket: TE K4560

Registry: Kitimat/Terrace

Between:

Rose Marie-Claire Smith

Plaintiff

And

Lionel Llewellyn Smith

Defendant

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the plaintiff

L. E. Gibson

Counsel for the defendant

S.M.A. Mulder

Date and Place of Trial/Hearing:

March 4, 2008

Terrace, B.C.

Introduction

- [1] The plaintiff applied under Rule 18A for a divorce, spousal support and a division of family assets. Following the hearing, I made the following orders:
- (a) a divorce;
 - (b) spousal support in the amount of \$1,000 per month commencing March 1, 2008 and payable on the first day of each month thereafter until further order of the court; and
 - (a) an order that the parties were each entitled to an undivided one-half interest, as tenants in common in the former family home;
 - (c) an order that the defendant has 60 days in which to purchase the plaintiff's interest in the home, failing which the home is to be sold and the net proceeds of sale are to be divided equally between the parties;
 - (d) in the event the house is to be sold, the parties will have joint conduct of sale and any sale will be subject to the agreement of both parties or, failing agreement, approval by the Court.
- [2] I reserved judgment with respect to the division of the defendant's pension and RRSPs and the plaintiff's claim for an order that the defendant be required to name the plaintiff as beneficiary under his life insurance policy. I indicated that I would provide reasons for my decision on all of the corollary relief issues in due course. These are my reasons.

Appropriateness of summary trial

- [3] As a preliminary matter, the defendant submits that the case was not appropriate for a summary determination on affidavits. In my view, the essential facts necessary to determine the issues were not seriously in contention and the matter was appropriate for determination under Rule 18A. There was some dispute as to the parties' wishes during the marriage concerning the plaintiff working outside the home, but in my view, little if anything turns on whose version of history is more accurate.

Facts

- [4] The parties separated after 12 years of marriage. The plaintiff is 60 years old and the defendant is 57 years old. They married on November 7, 1987. It was the plaintiff's third marriage and the defendant's first. They have one child, a son born February 16, 1988. The parties separated in April 1999 and the plaintiff commenced this action in July 1999.

- [5] The plaintiff's employment history can be summarized as follows. From the time the plaintiff left school in 1965 until 1984, with the exception of a four year period from 1975-1979, she was employed on a full-time basis at various positions in Ontario and in Kitimat, B.C. In 1984, the plaintiff was forced to leave her job when she developed health problems due to exposure to ammonia contained in the blueprints with which she had to work.
- [6] From 1984 to 1986, the plaintiff worked at an elementary school in Kitimat as a volunteer teaching assistant. In September 1986, she took a position as a paid teaching assistant at a different elementary school. She continued to work in that position until late in her pregnancy. After the birth of their son, the plaintiff returned to work as a part-time substitute teaching assistant. She has continued with that work up to the present time.
- [7] It is the plaintiff's evidence that the defendant wanted her to work only part-time so that she could be at home most of the time. The defendant deposed that he never told the plaintiff to stop working when she was pregnant and that after the birth of their son he encouraged her to take on more outside work to maintain her seniority. He also deposed that he paid for some correspondence courses to upgrade her education, but the defendant says the plaintiff was not interested in working full-time.
- [8] Regardless of whose version of events is more accurate, the fact is that for over 10 years after the birth of their son the plaintiff and defendant made a life for themselves in which they adopted certain roles. The defendant worked full-time outside the home as a paper worker, and now earns approximately \$95,000 a year. The plaintiff worked on a part-time basis outside the home and the rest of the time she spent as a homemaker. In this aspect, it was a traditional marriage and both parties contributed equally to the marriage.
- [9] After the parties separated in 1999, the plaintiff applied for and received social assistance. Despite looking for full-time work after separation, the plaintiff was not able to secure a full-time position until January 2000, when she took a job as an instructor in French and ESL at the Kitimat Skills Centre. That position came to an end about three years later when the centre closed. Since then, she has continued to work as many hours as possible as a substitute teaching assistant. She has placed her name on the substitute list for clerical work with the Coast Mountains School District, has applied for positions suitable to her skills within that school district, and applied for various retail and secretarial positions in Kitimat. Despite her efforts, she has not found a permanent full-time employment.
- [10] The plaintiff earns approximately \$22 per hour when she works as a teaching assistance, but is not eligible for benefits. She has been able to supplement her employment income to some extent with employment insurance benefits ("EI"). The plaintiff's income from employment and EI during the past three years is approximately as follows:

2005 \$ 20,566

2006 \$ 27,900

2007 \$ 16,040

- [11] The situation relating to the care and support of the parties' son is as follows. In 1999, the parties consented to an order in the Provincial Court whereby they shared joint custody and guardianship of their son. They shared responsibility for his care on an approximately equal basis. Even though the defendant's earnings were substantially more than those of the plaintiff, he paid no child support until October 2003. The plaintiff deposes she never sought child support because she was afraid that if she did so, it would negatively affect her relationship with her son.
- [12] In 2003, the Director under the Family Maintenance Enforcement Act, R.S.B.C. 1996, c.127, to whom the plaintiff had assigned her rights, negotiated a consent order in the Provincial Court under which the defendant paid \$318.50 per month, which was one-half of the amount payable under the Child Support Guidelines (the "Guidelines") for one child based on the defendant's then Guideline income.
- [13] In 2007, the son moved out of the plaintiff's home and the defendant ceased paying child support. The plaintiff deposed that he was becoming verbally abusive towards her, accusing her of taking his father's money.
- [14] The plaintiff never sought spousal support until October 2005, when she obtained an order for interim support of \$800 per month.

Division of Family Assets

- [15] The natural order in which the issues should be resolved is, as observed in *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1, 17 R.F.L. (4th) 55 (B.C.C.A.), division of assets before spousal support. The plaintiff seeks an equal division of each asset, whereas the defendant seeks reapportionment in his favour. Section 56 of the Family Relations Act, R.S.B.C. 1966, c. 128 (the "Act"), provides that each spouse has an interest in all family assets upon the occurrence of a "triggering event." In this case, the triggering event is the granting of the divorce. Accordingly, the plaintiff and the defendant are each *prima facie* entitled to an undivided half interest as a tenant in common.
- [16] If an equal division of the assets would be unfair, the Court may order that the asset be divided into shares fixed by the Court. The Court must look at the factors listed under s. 65 of the Act to determine whether there are grounds for reapportionment. The grounds for reapportionment under s. 65 are as follows:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,

- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- [17] The party making an application under s. 65 bears the onus of establishing an equal division would be unfair.
- [18] In this case, there are three family assets to divide: the former family home; the defendant's pension with the Pulp and Paper Industry Plan; and the defendant's RRSPs. I will deal with each class of assets separately.

The former family home

- [19] The home, located in Kitimat, has an appraised value, as of March 2006, of \$72,000. The defendant has resided in the house since separation. At this time, there is no mortgage registered against the property. The defendant sought reapportionment on three grounds. First, he says that since separation, he paid off the mortgage, which was in the amount of \$13,000 at the date of separation. Second, he says that he paid off other credit card debts that existed at the time of separation. Third, he says that he now has a financial responsibility towards the son, which affects his need to become and remain economically self-sufficient. In my view, none of those circumstances, whether viewed individually or collectively, makes an equal division unfair.
- [20] As for the payment of the mortgage, it is offset by the fact that the defendant has had the exclusive use and occupation of the property since the parties separated (see *Jorgensen v. Jorgensen* (1998) 56 B.C.L.R. (3d) 124 (B.C.C.A.)). The payment of debts, even if it is a circumstance coming within s. 65 of the Act, is offset by the fact that for a time the defendant did not pay any child support and even when he did pay, it was in an amount less than it ought to have been.
- [21] Finally, with regard to the 20 year old son, the evidence as to his circumstances is sparse, to say the least. He is apparently taking some education upgrading courses at a local college, but there is nothing to indicate the precise nature of the courses, the hours in which he is in school, his future plans, his efforts to find part-time work, or his ability to contribute in other ways to his own expenses. The defendant does not suggest that he remains a "child of the marriage". The fact that the defendant is providing free room and board is not a circumstance that warrants a reapportionment of the family assets.

- [22] For these reasons, I concluded that there should be an equal division of the former family home.
- [23] The defendant wishes to purchase the interest of the plaintiff in the house. Given his level of income, I would expect he should have no trouble obtaining financing. Accordingly, he will have 60 days from the day of judgment to complete the purchase, otherwise the house will be put on the market and sold, with the proceeds to be divided equally between the plaintiff and the defendant.

Pension division

- [24] Section 71 of the Act provides that a spouse's entitlement to an interest in a pension under Part 5 (i.e. s. 56) must be determined in accordance with Part 6 of the Act. Part 6 of the Act and the Division of Pensions Regulation, B.C. Reg. 77/95 (the "Regulation"). It provides that, subject to reapportionment under s. 65, the plaintiff is entitled to a proportionate share that is determined in accordance with a particular formula, depending upon whether the pension to be divided is a local plan or extraprovincial plan, and whether the plan is a defined contribution, a defined benefit, or a hybrid plan.
- [25] In this case, the defendant is a member of an unmatured, local, defined benefit plan with the Pulp and Paper Industry Plan (the "Plan"). His anticipated retirement date is May 1, 2015. Accordingly, the defendant's pension division is governed by ss. 72 and 74 of the Act. Under s. 72, a spouse is entitled to be designated a limited member of the member's pension plan. As a limited member, the spouse has the right to receive from the plan direct payment of a separate pension or a proportionate share of benefits paid under the pension. Section 74 of the Act provides that a spouse is entitled to either (a) a separate pension when the member retires or (b) a transfer of the spouse's proportionate share of the commuted value of the pension any time after the member becomes eligible to retire or terminates her or his membership in the pension plan. Because the defendant is not yet eligible to retire, the division of the defendant's pension mandated by ss. 72 and 74 is deferred.
- [26] Section 74 specifies that the size of the spouse's proportionate share is determined according to a formula set out in Regulation 6 of the Regulation:

6 (1) This section applies if the calculation of a proportionate share of a pension, benefit or commuted value is required under this regulation or under any of the following sections of the Act:

- (a) section 74 (a) [transfer share of unmatured defined benefit plan];
- (2) Subject to subsection (3), the proportionate share must be determined in accordance with the following formula:

Proportionate share = $\frac{1}{2}(A/B)$

where A = the pensionable service accumulated by the member from the date of marriage to the entitlement date for the spouse and

B = the total pensionable service accumulated by the member to the date that

- (a) the spouse's share is transferred from the plan,
- (b) the spouse begins to receive a separate pension, or
- (c) the spouse begins to receive a payment of benefits from the member or the plan.

[27] Under the pension division legislation, the "entitlement date" is the date of the triggering event. Thus, the time following the date of separation and before the triggering event are included in determining the spouse's proportionate share. In this case, that is a period of nearly nine years.

[28] The defendant submits that the pension should be effectively reapportioned by including only the period of contribution from the date of marriage to the separation date. He submits it would be unfair to include contributions made after the marriage had broken down.

[29] In my view, that fact alone is not sufficient to establish unfairness. If it were, in every case where there has been delay between the date of separation and the triggering event, reapportionment would be required. The legislation specifically requires the post-separation accruals to be included in determining the proportionate share. To reapportion solely on the basis that there is a delay between separation and triggering event would defeat the purpose of the legislation. Unless there are factors coming within s. 65 of the Act that make it unfair, the pension benefits should be divided according to the Part 6 Act and the Regulation (see *Shambrook v. Shambrook*, 2004 BCSC 872).

[30] In my view, the present case is similar to *Green v. Green*, 2000 BCCA 310. In that case the parties were married in 1985, separated in 1995 and the divorce, which was the triggering event, was granted in 1999. The wife was a substitute teacher who earned about \$24,000 per year, whereas the husband earned \$82,000. The mother had been primarily a stay-at-home mother during the marriage, whereas the husband advanced in his career.

[31] The judge divided the husband's pension as of the separation date on the basis that an equal division as of the divorce was unfair since the husband continued to contribute for four and one-half years after the separation. On appeal, the Court of Appeal held that the trial judge had erred in not including the post-separation contributions in the division.

[32] At para. 53, Prowse J.A. said:

In my view, the trial judge erred in ordering the pension to be divided as of the date of separation. The effect of this order is to reapportion the pension in favour of Mr. Green (*See Toth v. Toth* (1995), 17 R.F.L. (4th) 55 (B.C.C.A.)). The only basis suggested for finding that an equal division of the pension would be unfair under s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128, is that Mr. Green continued to contribute to the pension for four and one-half years

following the separation. In my view, this factor is more than offset by the fact that Ms. Green suffered economic hardship by virtue of the role she played as a homemaker during the marriage. She was out of the workforce for 10 years raising the children and foregoing employment opportunities while Mr. Green continued to further his career. Following the separation of the parties, she took steps to upgrade her qualifications by obtaining an ESL diploma at the University of British Columbia together with credits in special education. These steps enabled her to obtain her current employment. Nonetheless, it cannot be seriously disputed that she has suffered economic deprivation as a result of her time out of the workforce during which Mr. Green was enjoying full employability and the generation of benefits. I am not persuaded that there was any basis for finding that it was unfair to divide Mr. Green's pension equally as of the triggering event. I would, therefore, order that Mr. Green's pension be divided as of the date of the triggering event, September 3, 1999.

- [33] Similarly, in this case the plaintiff suffered an economic disadvantage as a result of the marriage and its breakdown, which continues. The economic disadvantage will be addressed in the immediate future by the payment of periodic spousal support, which I have ordered, but will remain when the parties reach retirement age unless the plaintiff receives an equal division of the pension benefits.
- [34] Accordingly, the defendant's pension will be divided in accordance with Part 6 of the Act and the Regulation.

The defendant's RRSPs

- [35] As of the swearing of his most recent Form 89, dated August 15, 2007, the defendant currently had RRSPs in his name with a value of \$51,950. His Form 89, dated October 1, 1999, shortly after separation, shows RRSPs with a value of \$4,400. It also appears that in 1999, the defendant cashed in RRSPs worth \$7,000, although I cannot tell from the documents whether this was before or after the separation in April 1999. I infer, however, that he either had or could have had RRSPs worth \$11,400 at separation. From the evidence before me I cannot determine precisely how much of the increase in value of the RRSPs is attributable to new contributions after the parties separated and how much of it is due to growth in the value of the RRSPs that existed, or ought to have existed, at the date of separation. It is likely, however, that a large portion of the increase is due to post-separation contributions.
- [36] Subject to reapportionment, each party has an undivided one-half interest in each family asset as of the triggering event, which in this case is the granting of the divorce. *Prima facie*, therefore, the plaintiff has a one-half interest in all of the defendant's RRSPs in existence at the date of trial.

- [37] The party seeking reapportionment has the onus of establishing that equal division would be unfair having regard to one or more of the foregoing factors. The defendant seeks reapportionment of the RRSPs to exclude the value acquired post separation relying on s. 65(1)(c) and (f). He submits that if there is no reapportionment, the plaintiff will benefit unjustly from her inactivity in not seeking a division of assets a long time ago.
- [38] The plaintiff responds by saying that the defendant has also benefited from the inactivity of this proceeding. She argues that because she did not pursue the issue of interim spousal support until October 2005, the defendant had a greater ability to make RRSP contributions. Furthermore, it was always open to the defendant to seek a declaration under s. 57 of the Act, which would have established a triggering event, effecting a division at an earlier date. In my view, it was open to either party to bring the claim for reapportionment to a head during the period since the granting of the divorce. If there is any blame for the delay, the parties must share it equally.
- [39] Here, while the defendant made significant contributions post-separation, he did not pay child support until 2003 and did not pay spousal support until 2005. I am satisfied this enabled the defendant to contribute to his RRSPs to a greater degree that if he had been making higher support payments.
- [40] In this case, the parties were married for 12 years, which is not a short-term relationship. During the marriage, the defendant and plaintiff had their own respective roles that mirrored a traditional marriage. The plaintiff, for the most part, was responsible for child-rearing and taking care of the family home, while the defendant concentrated on his career and was the primary bread-earner. Due to the plaintiff's role during the marriage, she was essentially precluded from establishing seniority, promotion, fringe benefits and the possibility of a pension, which were all available to the defendant as the primary bread-earner. The plaintiff's potential career had been limited by her role in the marriage. Currently, the plaintiff is in her sixties and despite her attempts, has not been able to find full-time employment. I find that the plaintiff has a greater need to become self-sufficient and economically independent.
- [41] While I find that the plaintiff's need to become economically independent and self sufficient is greater than those of the defendant, I must also consider the fact that the defendant made significant contributions during the nine years post separation period. The factors are offsetting and, in all of the circumstances, I am not persuaded that an equal division of the RRSPs would be unfair. The plaintiff is entitled to one-half of the value of the RRSPs at the date of trial to be effected by means of a spousal roll-over.

Spousal Support

- [42] In my view, the circumstances of this case provide the plaintiff with an entitlement to spousal support on both compensatory and non-compensatory bases. On the compensation model, I am satisfied that during the marriage each party adopted, with the acquiescence of

the other, his or her role in the economic and financial affairs of the marriage partnership. The plaintiff was primarily a stay-at-home mother and home-maker, although she also worked part-time as a teaching assistant. The defendant was the primary income earner for the family.

- [43] Following the breakdown of the marriage, the defendant was left with his occupation and the salary it produced. The plaintiff, who had been largely out of the work force during the marriage, found herself without the support of her partner and without the qualifications to enable her to find permanent full-time work in her field. She has continued to work part-time, earning a decent wage when she is working, but limited in the number of hours she can work. She is now 60 years old and has arthritis, which prevents her from accepting work at the large secondary school because of the distances she has to walk. The plaintiff has suffered economic disadvantage as a result of the marriage and its breakdown.
- [44] Turning to the non-compensatory basis, the plaintiff clearly is in need of support and the defendant has the capacity to contribute to her support on an on-going basis. That may well change when the parties reach retirement age but, in the meantime, I can see no proper basis for anything other than an indeterminate spousal support order.
- [45] Having determined that the plaintiff is entitled to spousal support I considered the Spousal Support Advisory Guidelines. The amount of support sought by the plaintiff, i.e. \$1,000 per month appears to be at the low end of the range. As the support order is of indeterminate duration, that is likely appropriate. Considering the defendant's income and his reasonable expenses, I am satisfied he has the capacity to pay support in that amount.

Naming the plaintiff as beneficiary under the defendant's life insurance

- [46] The plaintiff seeks an order that the defendant name her as a beneficiary under any life insurance policy that may be available to him through his employment. The order is not sought to secure the payment of spousal support because of the risk that the defendant will not comply with the order. The plaintiff seeks the order to provide a replacement for spousal support in case the defendant dies prematurely.
- [47] Such an order is akin to making spousal support binding on the estate of the payor and is an unusual order. The obligation to pay maintenance is personal and does not extend past the date of the death of the payor in the absence of an agreement or an order that binds the estate (see *Milne v. MacDonald Estate* (1986), 5 B.C.L.R. (2d) 46, 3 R.F.L. (3d) 206 (B.C. C.A.); *Dutkowski v. Dutkowski*, 2007 BCSC 1558, [2007] B.C.W.L.D. 6849 (B.C.S.C.))
- [48] I am not satisfied it is just and appropriate in this case. The defendant has the parties' son to be concerned about and there may be other persons whom he needs to provide for in the event of his untimely death. This part of the claim is dismissed.

"B.M. Joyce, J."

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