

CANADA / JUDGMENT

Stalker v. Stalker

2012 BCSC 478

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 478 Stalker v. Stalker IN THE SUPREME COURT OF BRITISH COLUMBIA Citation:

Stalker v. Stalker, 2012 BCSC 478 Date: 20120402 Docket: 15647 Registry: Nelson Between: Janice Emily Stalker Plaintiff And Glen Andrew Stalker Defendant Before: The Honourable Mr. Justice McEwan Reasons for Judgment Counsel for the Plaintiff: S. Wallach Counsel for the Defendant: T. Underwood Place and Date of Trial/Hearing: Nelson, B.C. March 15 and 16, 2012 Place and Date of Judgment: Nelson, B.C. April 2, 2012

- [1] The plaintiff and defendant were married October 6, 1984, and separated November 12, 2007 according to the allegation and admission in the pleadings, although the evidence suggests that actual separation may have been on or about July 6, 2007.
- [2] The parties had four children who are independent.
- [3] They seek a divorce. They have been separated for over four years and have each gone on to other relationships. There is no possibility of reconciliation and there are no impediments to the grant of a divorce. There will therefore be a decree to be effective 31 days following release of these reasons.
- [4] The issue before the court is spousal support pursuant to s. 15.2 of the Divorce Act. It reads, insofar as it is applicable: 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse. ... Factors
 - (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse. Spousal misconduct

- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
- Objectives of spousal support order
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [5] The parties discussed their separation in 2007. The evidence is that the plaintiff was sure the marriage was over for some years before the actual separation, which took place the year their last child was graduating from high school. Following counselling and some attempts to improve matters on the defendant's part, the parties agreed that their marriage was finished. They then discussed what to do with their assets and, in particular, the family home. The defendant wanted to sell it "as it" while the plaintiff wanted to fix it up first. The plaintiff prevailed, and the parties worked together on a series of home repairs. The defendant found living separately in the same house increasingly difficult and asked the plaintiff to leave. The plaintiff did so.
- [6] The defendant then decided that it would be better if he kept the house and bought out the plaintiff's interest. It was not entirely clear how this came about, but the parties understood that in order for the defendant to refinance the home to pay off the parties' debts and pay out the plaintiff's interest, they would have to execute a separation agreement. The parties obtained a do-it-yourself form and worked out the terms in a series of in-person discussions. The Agreement is dated November 12, 2007. It was filed for enforcement in the Nelson Supreme Court Registry, by the plaintiff, on November 14, 2007.
- [7] The Agreement includes recitals that it was intended to be:
- (i) a final settlement of their respective rights to and in property owned jointly and/or separately by them; and (ii) a final settlement of the issues of custody, access, guardianship and support.

- [8] The defendant was to provide the primary residence to the parties' son who remained at home, with no provision for child support from the plaintiff. The parties agreed to spousal support on the following terms:
8. The Husband shall pay to the Wife for her own support, the sum of \$800.00 per month, commencing on the 1st day of December, 2007, and continuing on each and every month thereafter until the 31st day of December, 2012, (or) until such time as the Wife/Husband 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 agreement included the following terms:
2. This agreement and everything contained in it shall continue to govern the relationship between the Husband and the Wife, notwithstanding subsequent divorce, dissolution, or annulment of the marriage, by an order or instrument.
3. This agreement and everything contained in it shall be governed by the laws of the Province/Territory of British Columbia.
4. Any part or provision of this agreement that is found to be void, voidable, or otherwise unenforceable shall be severable from the agreement and the remainder of the agreement following that finding shall continue in full force and effect.
5. This agreement may only be amended or varied by a court order, or by written agreement between the Husband and the Wife, which amendment or agreement shall be duly executed by the Husband and the Wife by unrelated or independent persons. ...
15. This agreement adequately and completely provides for the present and future needs of the Husband and the Wife, and each covenants and agrees that the arrangement herein described constitutes a full, complete, and final settlement of all rights, causes, claims, and demands with respect to support and property. ACCEPTANCE
16. The Husband and the Wife further acknowledge and agree that -
- (a) each and every recital of fact contained herein is true and accurate;
- (b) they each have general knowledge of the other's affairs, assets, and liabilities;
- (c) they have each read and understood this agreement;
- (d) they each sign this agreement as free agents;
- (e) this agreement has been executed without any pressure, influence, or intimidation by anyone; and

- [10] The parties did not list their debts or any of their chattels other than the vehicles each were keeping as their separate property. This was notwithstanding a clause that said the assets and liabilities were completely and accurately described in the near-blank schedule attached to the agreement.
- [11] The arrangement for the defendant to buy out the family home included the payment of all of the parties' liabilities and absorbed most of the equity in the house. It is common ground that the following debts were paid off: i) joint mortgage \$104,079.65 ii) joint line of credit 5,000.00 iii) personal loans 22,657.43 19,262.48 iv) student loan 1780962 9,328.83 v) student loan 1780963 12,411.13 vi) student loan 793966 5,942.64 vii) GMAC financing 16,872.79 viii) Sears 8,584.19 ix) Visa 4,565.09 x) Mastercard 12,201.00 TOTAL \$220,905.23
- [12] The student loans are for courses the plaintiff took to upgrade her education to become a qualified teacher. She went from needing high school upgrading to qualifying to teach during the marriage and worked for some years as a substitute teacher.
- [13] The plaintiff obtained an appraisal of the house that suggested the property was worth \$250,000. Notwithstanding this, the conveyancing documents suggest that a value of some \$280,000 was used to adjust the parties' interests and the plaintiff was paid a half share of the equity of \$20,700.
- [14] In connection with the real estate transaction the parties were obliged to seek independent legal advice. As a result of her attendance on a Castlegar lawyer the plaintiff sought an amendment to the Agreement to include division of the defendant's pension from the local mill in Castlegar, where the defendant has worked since 1988. He agreed and a variation to the Agreement was prepared and executed.
- [15] On September 8, 2008 the variation was also filed in the Nelson Registry of the Supreme Court for enforcement.
- [16] The substance of the meetings between the parties and their lawyers that led to the variation agreement is not before the court, except to the extent that the agreement is a product of those discussions. It is obvious that each party had an opportunity to discuss the entire arrangement with independent counsel if they wished, and it would be rather surprising if the lawyers themselves did not make enquiries as to the context for the variation.
- [17] As far the omissions from the original agreement are concerned the defendant testified that he thought a 50-50 division of his pension was automatic without an agreement and that the parties' chattel property did not need to be listed, other than the vehicles, because the chattels were worth very little and the plaintiff was free to take what she wanted. Beyond the fact that she was persuaded to formalize the agreement by adding the variation as to pension, the plaintiff does not appear to disagree with this or suggest that the defendant was attempting to get away with anything.

- [18] The issue before the Court is whether the provision for spousal support made in the parties' Agreement is adequate, applying the requisite legal standard in the circumstances.
- [19] The plaintiff suggested that they fixed the amount of spousal support informally. She said it was done because the parties needed a separation agreement before the credit union would advance the money required to pay off the parties' debts and allow the defendant to buy her out. She suggested that she always expected that there would be a further, more formal arrangement. She was unable to explain the printed terms of the agreement to the effect that it was final and binding, except to assert that she did not think she was doing anything that firm or irreversible.
- [20] Having heard the evidence of both parties and considered the circumstances they have described, I am unable to accept that much of the plaintiff's characterization of the events surrounding the execution of the agreement. There were no vitiating circumstances that would render the agreement void or voidable, applying the law of contract. As between the parties, the plaintiff was the one who had long since reconciled to the prospect of divorce and separation and it was the defendant who was hoping to reconcile. The timing of the buyout of the house was influenced more by the plaintiff than by the defendant: he wanted to sell it "as is" and she wanted to improve it before sale.
- [21] There is no particular significance to the defendant's change of heart respecting keeping the house, and no issue as to the price obtained or the payout received by the defendant. It appears that they may not have reduced their arrangement to writing at all if it had not been recommended by the Credit Union or a family member. As between the parties, the plaintiff did most of the work related to the Agreement including getting the forms and subsequently filing it (and the later variation) in court. There was no fraud, duress or undue influence. Both parties ultimately had the benefit of legal advice and as a result the defendant's pension was formally included.
- [22] During their discussions, the plaintiff asked for some financial assistance and the defendant agreed. The parties differ as to whether she asked for \$900 or \$800, but there was not much back and forth about it. The plaintiff was satisfied with the amount negotiated at the time.
- [23] The defendant paid the money on time each month until the fall of 2009. By then the plaintiff had become dissatisfied with the amount she was receiving and had become aware of the Spousal Support Guidelines. There was some discussion between the parties as to the defendant buying out the support obligation. He was interested in exploring whether he could come up with a lump sum that would buy out both his support obligation and his pension. There was no evidence that the defendant even took the step of having his pension evaluated, but he was advised that he did not have enough assets or equity to obtain the necessary loan for either purpose. From the plaintiff's perspective the only effect of this discussion was to postpone her coming to court while she waited to see if a buyout of some kind could be worked out.

- [24] The defendant stopped paying the support at or very near the time that the plaintiff began cohabitating with a man named James Crockett. She has continued in that relationship for the last three years. There was no evidence tendered as to the financial arrangements between the plaintiff and Mr. Crocket.
- [25] The defendant has also formed a new attachment and lives in that woman's house, where he pays rent and a contribution toward living expenses totalling \$700.00 per month. He currently has the former family residence rented at \$1,700 to two different tenants. This largely pays for the mortgage and the other expenses of owning the house.
- [26] The parties incomes for the last several years are as follows: The plaintiff: 2007 39,925 2008 45,541 2009 58,556 2010 43,657 2011 45,060 The defendant: 2007 94,541 2008 107,635 2009 102,522 2010 105,644 2011 110,000
- [27] The defendant is steadily employed at the Zellstoff Celgar Mill in Castlegar. He never finished high school.
- [28] The plaintiff, as noted previously, did not finish high school, but during the marriage was able to upgrade her education and to qualify as a teacher. Her earnings at the time of the separation and since are derived from steady employment as a teller at the Castlegar Credit Union.
- [29] There is no issue that the disparity in incomes was known, at least generally, by the plaintiff at the time the Separation Agreement was made. The plaintiff testified that she generally paid the bills and managed the household when the parties were together.
- [30] There is no disagreement that the roles the parties played in the marriage were "traditional" in the sense that the defendant provided the primary source of income and the plaintiff was expected to take on the larger share of household management and caring for the parties' four children. There is also no issue respecting the plaintiff's efforts to assist in earning income during the marriage. The plaintiff variously took in babysitting, waitressed, earned her credentials as a teacher and taught as a substitute for several years, and has latterly been employed steadily by a credit union. She said that she could not get steady work as a teacher when layoffs began in the local district, and the laid off teachers came to be the first ones called as substitutes. The plaintiff says that despite her credentials as a teacher she went to work as a teller, which was steadier employment although it does not pay as well per hour. The plaintiff says that her prospects for advancing at the credit union are limited by her lack of seniority and her relative age.
- [31] The plaintiff's application is for an original order inconsistent with their Agreement. There was a time when the fundamental premise of the law was that parties ought to be bound by their agreements, but since *Miglin v. Miglin*, 2003 SCC 24, the question is broader and involves a two-part test. The first is found in *Miglin* at para. 80: 80 In an originating application for spousal support, where the parties have executed a pre-existing agreement, the court should first look to the circumstances in which the agreement was negotiated and

executed to determine whether there is any reason to discount it.

- [32] I have found that there were no circumstances of oppression, pressure or other vulnerabilities. The parties were clearly ignorant of the legal range in which spousal support would normally fall, but they both had an opportunity to take independent legal advice, following which they did not disturb the figure.
- [33] The evidence is to the effect that the plaintiff was satisfied at the time with the amount she had negotiated. I think the Agreement expressed "a genuine mutual desire to finalize the terms of the parties' separation", and that it was "indicative of their substantive intentions" (see Miglin, para. 83). I say so recognizing the gaps respecting the chattels and the pension. The parties appear to have understood that the chattels could be dealt with by each party taking what they wanted. It appears that the defendant believed the pension would be divided in half when the time came - which is more than his legal obligation - while the plaintiff may have overlooked it until the omission was put right. That does not affect what I have concluded was the parties' subjective intention to live in accordance with the terms of the Agreement.
- [34] It is evident, however, that notwithstanding the intentions of the parties at the time, the Agreement did not equitably share the economic consequences of the marriage and its breakdown.
- [35] Both parties entered the marriage with very little. The plaintiff testified that it was largely happenstance that they found themselves in Castlegar at an opportune time and that the defendant secured the steady, long term, well paying employment at Zellstoff-Celgar. It enabled the parties to raise their children and enabled the plaintiff to upgrade her education. Had she been able to secure long-term employment as a teacher - which would have been the optimal income-earning use of her skills - the present situation might have been somewhat different, because the fact that her occupation did not pay exactly what the defendant's did, might not have been a disadvantage related to the marriage. But the plaintiff's inability to find permanent work as a teacher, given her age and the point in time when she was able to enter the work force, is a disadvantage related to the marriage that is reflected in her limited practical earning capacity. Despite the fact that she was aware of the disparity in the parties' incomes when she signed the Agreement, and that she signed it willingly, it was improvident at the time, as she has come to appreciate. The defendant testified that the \$800 per month was to help her "get on her feet," but it is apparent that the plaintiff has come out of the marriage considerably behind economically despite the fact that the burdens were shared equally.
- [36] The second stage of the Miglin test is found at paragraph 87: 87 Where negotiation of the agreement is not impugned on the basis set out above and the agreement was in substantial compliance with the general objectives of the Act at its time of creation, the court should defer to the wishes of the parties and afford the agreement great weight. Nevertheless, the vicissitudes of life mean that, in some circumstances, parties may find themselves down the

road of their post-divorce life in circumstances not contemplated. Accordingly, on the bringing of an application under s. 15.2, the court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.

- [37] The parties' estimation of an adequate amount of support was, at the time, and has certainly come to the plaintiff to appear to be, inadequate to meet the objectives of spousal support set out in s. 15.2 of the Divorce Act. It did not properly reflect the plaintiff's relative economic disadvantage arising from the marriage, or apportion the financial consequences that have arisen because of the marriage. This relates particularly to the fact that the role the plaintiff took in the marriage kept her out of the workforce until circumstances made it impossible for her to achieve steady, stable employment commensurate with her skills.
- [38] The last two factors in s. 15.2 address situations that do not pertain to the parties' circumstances. They came out of the marriage self-sufficient, but on completely different economic planes. I do not think there was a specific economic hardship attributable to the breakdown of the marriage. The problem is, rather, that the roles taken by the parties' inside the marriage left the plaintiff economically disadvantaged coming out of it.
- [39] I asked counsel what their positions were on the part of the spousal support clause setting out time limitations, particularly the part that provides that support would continue until "the Wife/Husband remarries or commences cohabitation with another person in what is generally referred to as a common-law relationship, whichever shall occur first." It was on this basis that the defendant stopped paying in October of 2009, about the time the plaintiff moved in with Mr. Crocket. Leaving aside the anomaly that, as drafted, the agreement would have entitled the defendant to stop payment if he himself took up another relationship (which he has done), I asked whether such a clause was legal or an unlawful *dum casta* clause pursuant to s. 61(7) of the Family Relations Act.
- [40] The answer appears to be set out in *Gold v. Gold*, [1991] B.C.J. 2302, where Prowse J. (then of this Court) found that a *dum casta* clause is a clause requiring chastity, not a clause of the sort found in this agreement, which is predicated on a new relationship constituting a material change in circumstances.
- [41] Here, the spousal support adjustment is to relieve the plaintiff from the economic disadvantage caused by the role she took in the marriage. Apart from the name of the person with whom the plaintiff presently cohabits, she led no evidence respecting any change in her circumstances as a result of that relationship, and the defendant did not make a case that it was relevant. In the circumstances, the right to support arises as an adjustment between the parties, and not as a form of temporary subsidy.

- [42] Counsel for the plaintiff has produced various scenarios under the Spousal Support Advisory Guidelines. These suggest a low range of \$1,927 and a high range of \$2,569. Counsel has also sought that the order be retroactive. Among the Spousal Support Advisory Guidelines scenarios presented were some which recognized the fact that for a year after the separation the plaintiff had primary care of the parties' last child without the benefit of child support from the plaintiff, which would have been about \$320 per month.
- [43] I have found that the Agreement was executed in circumstances considered fair by both parties at the time it was made. Its provisions have governed the parties since it was signed. The defendant's election to terminate the support upon the plaintiff's cohabitation was in accordance with a provision contained in the Agreement. The agreement for support was, in any event, expected to terminate in November 2012. These were adult choices made by adults. I have, however, declared that the amount they agreed to is not adequate applying the provisions of s. 15.2. That does not mean that the plaintiff should be relieved of the consequence of the choice she made, retroactively.
- [44] The order I make is not time limited. It is subject generally to the laws relating to the circumstances under which it may be varied. It will change upon the division of the pension and pension credits if other circumstances have not by then intervened.
- [45] In the circumstances I do not think it unfair that the order speak from and after April 1, 2012. I fix the amount of spousal support payable by the defendant to the plaintiff at \$2,000 per month. In doing so, I have taken account of the Spousal Support Advisory Guidelines and the circumstances of the parties.
- [46] There will be no order for costs unless there are circumstances that should be drawn to my attention following these reasons. "McEwan J."

The Honourable Mr. Justice McEwan

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