

CANADA / JUDGMENT

Storey v. Terry

2020 BCCA 30

COURT

British Columbia Court of Appeal

DECIDED

22 January 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 30 Storey v. Terry

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Storey v. Terry,

2020 BCCA 30

Date: 20200122

Docket: CA46123

Between:

Kevin Allen James Storey

Respondent

(Claimant)

And

Michelle Carla Terry

Appellant

(Respondent)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

May 1, 2019 (Storey v. Terry, 2019 BCSC 674, Nanaimo Docket E80768).

Oral Reasons for Judgment

The Appellant, appearing in person:

M.C. Terry

Counsel for the Respondent:

R. Yousefi

A. Ngom

Place and Date of Hearing:

Vancouver, British Columbia

January 20, 2020

Place and Date of Judgment:

Vancouver, British Columbia

January 22, 2020

Summary:

The appellant appeals a summary trial order providing for the equal division of the parties' interest in a jointly owned home following their four and a half year marriage-like relationship. The appellant lived in the home after separation and paid the mortgage, property taxes and insurance without contribution from the respondent for approximately two years. Held: Appeal dismissed. The judge did not err in rejecting the appellant's claim for reapportionment of the family property on the basis that her contribution to the home was greater following the separation. Nor did the judge's order effectively require the appellant to assume a greater share of the family debt. The judge properly considered all of the circumstances including the fact that the appellant had sole occupancy of the family home while the respondent had to provide housing for himself.

[1] BUTLER J.A.: Michelle Terry appeals orders dividing property and debt made following a summary trial application in this family proceeding. The appellant and the respondent, Kevin Storey, lived in a marriage-like relationship for four and a half years before separating. They had each been previously married and for the most part kept their personal financial assets separate after they began to cohabit. The parties jointly purchased a home (the "Merrill Lane property") in which they resided and they maintained a joint bank account to deal with expenses relating to that home. The division of the net equity in the Merrill Lane property was the primary issue in the court below and is the focus of this appeal.

- [2] The respondent issued the notice of family claim in February 2017 but the matter did not proceed to a summary trial until March 2019. In spite of that delay, the pleadings remained somewhat unclear at the commencement of the summary trial. In his amended notice of family claim filed in November 2018, the respondent sought an order for an unequal division of the family property and family debt but did not indicate what division he sought until the start of the hearing. The amended notice of family claim sought a determination that the assets the respondent held prior to the commencement of the relationship were excluded property. In November 2018, he filed the notice of application for a summary trial in which he raised for the first time a claim for occupational rent based on the fact that the appellant continued to reside in the Merrill Lane property after he moved out in July 2016.
- [3] By way of a counterclaim, the appellant also sought an unequal division of family property and debt because she paid all of the expenses to maintain the Merrill Lane property after the respondent stopped contributing to those expenses at the end of March 2017. She also advanced a claim for excluded property. In addition, in the materials she filed in response to the summary trial application, she alleged for the first time that the parties had an oral agreement to keep their own property and debt separate during their relationship.
- [4] Following a three-day summary trial hearing, the judge ordered that the net proceeds from the sale of the Merrill Lane property be divided equally between the parties and that any funds remaining in their joint bank accounts be divided equally. She found that the parties had an oral agreement to maintain the rest of their property separate. Accordingly, she "reapportioned" the remaining family assets so that each party would retain 100% of the increase in their respective pension benefits and 100% of the increase in value of the real property held prior to the commencement of the relationship. The appellant was also entitled to retain 100% of the increase in the value of her RRSP. The judge also reapportioned the family debt so that each party was responsible for 100% of their personal debt. The judge dismissed the respondent's claim to occupational rent and the appellant's claim that the respondent should contribute to mortgage payments, property taxes and other expenses incurred to maintain the Merrill Lane property for the period from March 27, 2017 until the date of trial. She ordered that each party bear their own costs.
- [5] The appellant advances various grounds of appeal directed at overturning the judge's orders in relation to the Merrill Lane property. In brief, she says the judge erred by either failing to order an unequal division of the net equity in that property or by failing to require the respondent to contribute to the cost of maintaining the property from March 27, 2017 to the date of trial. She says that the effect of the judge's order is to reapportion family debt in favour of the respondent. She also appeals the costs order. For the reasons that follow, I am of the view that the appellant has failed to identify any error of law or fact made by the judge and I would dismiss the appeal.

Summary Trial Decision

- [6] The reasons for judgment are indexed as: *Storey v. Terry*, 2019 BCSC 674 (the "Reasons"). The judge began the Reasons by noting the lack of clarity in the pleadings and the fact that the appellant's claim of an oral agreement and the respondent's claim for occupational rent were made late in the day. Nevertheless, she was of the view that the parties had a fair opportunity to respond to those claims. The judge agreed with the parties that the case was suitable for determination by summary trial. She concluded that she was able to find the facts necessary to decide the issues on a summary trial application and that it would not be unjust to do so.
- [7] The Reasons set out the assets and debts of the parties. The judge noted that the parties each owned a home prior to purchase of the Merrill Lane property. They both retained those properties and rented them out during the relationship. Those properties increased in value by a similar amount during the parties' cohabitation. She described the circumstances leading to the joint purchase of the Merrill Lane property. The respondent refinanced the mortgage on his existing property in order to make the down payment on the Merrill Lane property. The total down payment was approximately \$28,500. The parties agreed that the appellant's half of the down payment was to be treated as a loan from the respondent to the appellant that she was required to repay. The respondent maintained that the appellant failed to repay her half of the down payment and the appellant asserted she had done so. The judge did not resolve that issue, although she recognized that at least some repayment was made by the appellant.
- [8] The parties' interest in the Merrill Lane property was their major asset. The equity in the home at the time of trial was approximately \$313,000. The judge noted that the appellant sought reapportionment on the basis that she had been entirely responsible for maintaining the Merrill Lane property, including by paying the mortgage, property tax and insurance, from late March 2017 to the date of trial. The respondent sought an unequal division of that property on the basis of his disproportionate contribution to the original purchase price and the fact that the appellant had sole occupancy after the date of separation.
- [9] The parties were employed as letter carriers and each had an employee pension through the Canada Post Corporation Registered Pension Plan. The respondent sought an order dividing the pension benefits accrued during cohabitation at source. The appellant maintained that the parties' pension benefits were to remain their separate property pursuant to the oral agreement. The appellant's pension entitlement was significantly less than the respondent's given her much shorter period of employment. However, she made significant contributions to an RRSP before, during and after cohabitation. She maintained that she was entitled to retain the full amount of her RRSP as a result of the oral agreement.

- [10] The evidence established that the respondent owed approximately \$27,000 on various personal lines of credit while the appellant owed approximately \$3,000 on a line of credit. The appellant maintained that the parties agreed to be personally responsible for their own debt while the respondent sought an order that they were to be equally responsible for those debts.
- [11] The judge correctly set out the principles regarding the division of family property and debt with reference to relevant provisions of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. She noted that pursuant to s. 81 of the FLA, spouses have a presumptive entitlement to an equal interest in all family property and are equally responsible for family debt. She further noted that family property includes the amount by which the value of excluded property increases during the period of the relationship: s. 84(2)(g). She recognized that family debt includes financial obligations incurred after separation for the purpose of maintaining family property: s. 86. She referred to s. 87 of the FLA for the principle that family property or debt is to be determined as of the date of the trial and must be based on the fair market value of the property. She noted that s. 92 permits spouses to make agreements to divide property and debt equally or unequally or to exclude as family property or debt, property or debt that would otherwise be included. Finally, she noted that s. 95 of the FLA allows the court to make an order for unequal division of family property or debt if an equal division would be "significantly unfair". She set out the factors to be considered under s. 95(2) including that a court may take into account the terms of an oral agreement.
- [12] Referring to the affidavit evidence provided by the parties and taking into account their personal circumstances, the judge found that the parties had an oral agreement in relation to assets and debts other than the Merrill Lane property and joint bank accounts. She concluded that the parties agreed that the property brought into the relationship, including their homes and pensions, would remain separate. Further, she concluded that they had separate control over discretionary spending and separate responsibility for any debt accruing as a result of personal overspending: at paras. 56-63.
- [13] The judge considered whether the family assets that were not included in the oral agreement should be divided equally. She recognized that an unequal division of family property should only be ordered where it would be significantly unfair to order an equal division. Referring to *Jaszczewska v. Kostanski*, 2016 BCCA 286, she noted that to justify an unequal division of family property, a court must find that the unfairness is "compelling or meaningful having regard to the factors set out in s. 95(2)": at paras. 65-67.
- [14] The judge concluded that there were no circumstances warranting an unequal division of the Merrill Lane property:
- [70] Because the Merrill Lane Property is to be valued as of the date of the summary trial, the parties are presumptively entitled to share in any post-separation increases in the value of the Property. This entitlement exists independent of the parties' respective contributions to the post-separation increase in value: *Jaszczewska* at para. 39. This is not to say that post-

separation contributions are irrelevant, but rather that courts must be constrained in relying on post-separation contributions as warranting a departure from the presumption of equal division: Jaszczewska at para. 41.

- [71] Jaszczewska provides an example of exceptional circumstances that may warrant an unequal division of family property based on post-separation contributions. In that case, one spouse had designed and rebuilt a new residence after separation which enhanced the value of the property beyond market trends. The present case, by contrast, concerns the more typical scenario in which one spouse has remained in the family home post-separation, prompting debate as to the relative economic advantages of staying in the home or having to find new accommodations.
- [72] I conclude that an equal division of the proceeds of the sale of the Merrill Lane Property would not be significantly unfair to either party. While the respondent has made a disproportionate contribution to reducing the mortgage debt post-separation, the claimant has had to find alternate accommodations that, for at least some portion of time, has required him to pay rent. Also relevant to the analysis is the claimant's original contribution to the deposit and down payment on the Merrill Lane Property purchase.
- [73] In the circumstances, I find that neither party has provided persuasive reasons to depart from the presumption of equal division of the Merrill Lane Property. For the purpose of clarity I should note that I have considered the claimant's claim for occupational rent as relevant to the issue of whether the Merrill Lane Property should be unequally divided. To the extent that the claimant seeks compensation from the respondent for occupational rent as an independent claim, I dismiss the claim.
- [15] On the issue of costs, the judge reasoned at para. 81:
- [81] Given the manner in which this application proceeded, and the parties' divided success, I consider it appropriate to order that each party bear their own costs.

Issues on Appeal

- [16] The appellant alleges eight errors in judgment. She says the trial judge erred in ordering each party to bear their own costs. The other alleged errors focus on the judge's decision to equally divide the equity in the Merrill Lane property. Most of the alleged errors are based on the appellant's assertion that the judge made an order dividing family debt unequally. This assertion is based on the appellant's characterization of the payments she made to maintain the property after the separation as family debt. She says that the judge erred by failing to apportion those "debts" equally between the parties. In advancing these arguments, the appellant says the judge made errors of law and fact.
- [17] I do not intend to separately examine each of the errors alleged but would restate the grounds of appeal as follows:

- i. Did the judge err in law or fact in ordering equal division of the parties' equity in the Merrill Lane property?
- ii. Did the judge err in ordering each party to bear their own costs?

Division of Equity in the Merrill Lane Property

Standard of Review

- [18] This appeal concerns a question of reapportionment. The judge considered the issue to be the reapportionment of the parties' interest in the Merrill Lane property. The appellant now says the case raises an issue of the reapportionment of family debt. Whether debt or property is being considered for reapportionment, the same standard of review applies. Reapportionment is an exercise of a trial judge's discretion taking into account the legislation and findings of fact. An appellate court is justified in intervening in a trial judge's exercise of discretion only if the trial judge misdirects himself or herself or is so clearly wrong as to amount to an injustice: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12. This Court has adopted this standard of review for questions of reapportionment under the relevant family law legislation: *Karisik v. Chow*, 2010 BCCA 548 at para. 51.
- [19] The appellant's arguments are based on the allegation that the judge erred in her appreciation of the facts by misunderstanding or failing to consider relevant evidence. Alternatively, she says that the judge misapplied the law to the facts the judge found. The appropriate standard of review for such errors is set out in *Van de Perre v. Edwards*, 2001 SCC 60 at paras. 13-15. A court can only intervene if the judge erred in law or made a material error in her appreciation of the facts. An omission is not a material error unless "it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.": at para. 15.
- [20] As I am of the view that the appellant has not identified an error of law, the standard of review applicable to the errors alleged is deferential.

Analysis

- [21] The appellant's arguments about the Merrill Lane property assume that the judge ordered an unequal division of family debt. The judge made no such order. The Merrill Lane property was the only significant asset to be divided between the parties and they each sought unequal division. The judge ordered the net proceeds of sale of the Merrill Lane property to be divided equally between the parties. The Reasons, which responded to the arguments advanced at trial, explain why the judge ordered an equal division of the equity in the Merrill Lane property without any reapportionment for the appellant's contribution to the expenses of that property after separation, and without any reapportionment to the respondent or compensation for occupational rent. While the judge did not directly state that she was dividing the family debt in relation to the Merrill Lane property equally, that is what she did;

she deducted the outstanding principle on the mortgage to arrive at the approximate equity in that property. In dividing the family property as of the date of the summary trial application, the judge followed the provisions of s. 87 of the FLA that require property to be valued on its fair market value as of the date of the hearing.

- [22] The appellant argues that the effect of the order was to divide family debt unequally. She says this is because the payments she made to the mortgage, property taxes and insurance after the respondent stopped contributing to those expenses were made for the purpose of maintaining that property. She stresses that during the time she made those payments, the principal owing on the mortgage was reduced by approximately \$26,000. She says that the payments she made, or some portion of them, are family debt because of the provisions of s. 86(b) of the FLA:

86 Family debt includes all financial obligations incurred by a spouse

...

- (b) after the date of separation, if incurred for the purpose of maintaining family property.

- [23] I disagree with the appellant's characterization of the expenses incurred after separation as family debt. Rather, the judge considered the appellant's payment of those expenses along with other circumstances relevant to the division of the equity in the Merrill Lane property. Subsection 86(b) does not require that all payments made to maintain property after separation be regarded as family debt to be divided equally. As this Court recognized in *Jaszczewska*, entitlement to an equal share of the family property exists independent of use or contribution:

- [38] The FLA starts with the presumption found in s. 81 that family property is to be equally divided. As I read s. 81, each spouse is presumptively entitled to an undivided half interest in all family property, regardless of their respective use or contribution. But as I read it, the phrase in s. 81(a) refers to the basis of entitlement to family property. Entitlement exists independent of contribution or use, and the extent of that entitlement on separation is defined in s. 81(b).

- [39] Also, because family property is generally valued on the date of the hearing, the parties will presumptively share in any post-separation increases in the value of family property. Once again, because of s. 81, this entitlement exists independent of the parties' respective contribution to the post-separation increase in value.

- [24] When faced with claims for unequal division of an asset of significant value based on alleged differences in contribution, a court must consider all of the provisions of Part 5 of the FLA. That is what the judge did here. She recognized that property and debt are presumptively to be divided equally. The values of the property and debt are to be determined as of the date of trial and the court can order unequal division only where it would be "significantly unfair" to divide property and debt unequally. She set out and applied the test for significant unfairness as explained in *Jaszczewska* at paras. 41-43. Any unfairness must be significant or

weighty having regard to the factors set out in s. 95(2) of the FLA. In order for a trial judge to reapportion the family property or family debt, there must be "something objectively unjust, unreasonable or unfair in some important or substantial sense": Jaszczewska at para. 42.

[25] In Jaszczewska, this Court found it significant that the listed factors in s. 95(2), while not exclusive, do not include contributions to the maintenance of property. The Court explained why the circumstances in which unequal contributions to the maintenance of property may be considered and relied upon is to be much constrained:

[43] The determination of whether an equal division would be significantly unfair is also guided by a more precise identification of relevant factors than was found in the FRA. Importantly, the Legislature did not include in s. 95(2) the principle of relative contribution found in s. 65(1)(f) of the FRA. Under s. 65(1)(f), a court could consider circumstances relating to the acquisition, preservation, maintenance, improvement or use of property. Section 95(2), by comparison, refers rather narrowly to career contributions (95(2)(c)) and to post-separation increases in value beyond market trends caused by one spouse (95(2)(f)). I agree with the judge's view that if relative contribution to the acquisition, preservation, maintenance or improvement of family property during the relationship was intended to be a significant factor or one frequently relied on in justifying the conclusion that the equal division of family property is significantly unfair, the Legislature would have said so. Allowing relative contribution to become a regular consideration in the context of s. 95 would likely create uncertainty and complexity. This would be contrary to the legislative objectives discussed earlier that underlie the FLA division of property regime.

[44] Having said that, in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the FLA as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much constrained.

[Emphasis added.]

[26] The judge concluded that dividing the equity in the Merrill Lane property would not result in a situation that was unjust, unreasonable or unfair in an important or substantial sense even though the appellant paid the expenses for maintenance of the property and reduced the principal on the mortgage after March 27, 2017. In doing so, she considered the fact that the respondent had to provide for his own accommodation once he left the Merrill Lane property. The respondent's affidavit set out the steps he took to do that: he provided various services to friends in lieu of paying rent; he worked at an inn that gave him room and board as part of his compensation; and he ultimately moved into his pre-owned home as a result of which he lost the rental income that he otherwise received. The judge also took into

account the benefit that the appellant received by residing in the Merrill Lane property without paying rent to the respondent.

- [27] In my view, the judge did not err in taking these circumstances into account. The approach she took has been approved in this Court in *Stasiewski v. Stasiewski*, 2007 BCCA 205, and *Shen v. Tong*, 2013 BCCA 519. The proper approach to considering claims for occupational rent where one spouse leaves the family property was accurately summarized by Justice Fleming in *J.D.G. v. J.J.V.*, 2016 BCSC 2389:
- [226] At common law, a co-tenant is entitled to claim occupation rent when he or she has been ousted from property. Absent an ouster from the property, there is no claim. However, if the tenant in possession seeks to recover property expenses from the departed tenant, the court retains a discretion to set off occupation rent against the expense claim. There is no absolute right to such a claim or set off. Occupation rent is an equitable remedy (L.M.R. at paras. 27-29, 31, 32).
- [227] In *Stasiewski* the Court of Appeal held that in family proceedings occupation rent is not a stand-alone claim but should be considered in deciding whether to order an unequal division of family property. In *Shen v. Tong*, 2013 BCCA 519, Justice Smith in concurring reasons identified the objective of an award for occupation rent as doing what is "'just and equitable' between the parties, albeit within the parameters of s. 65(1) of the FRA" (at para. 94).
- [28] The judge properly did not treat the claim for occupation rent as a stand-alone claim but treated it as a factor to be considered because the appellant, the tenant in possession, was seeking to recover expenses paid to maintain the property from the respondent. It is evident from the whole of the Reasons that she considered all of the circumstances in order to divide the equity in the Merrill Lane property in a way that was just and equitable. She properly considered the additional contributions made by the appellant post-separation, the fact that the appellant was in possession of the family property and the respondent incurred expenses or losses in order to provide housing for himself. I see nothing wrong in principle with the approach taken by the judge and would not interfere with her exercise of discretion. Indeed, I would agree that equal division of the Merrill Lane property is just and equitable taking all of the circumstances into account.
- [29] While this is a full answer to this issue, I should note that I am of the view that there is no merit to the allegation that the judge committed errors of fact, let alone errors that are palpable and overriding. The finding at para. 72 that "the claimant has had to find alternate accommodations that, for at least some portion of time, has required him to pay rent" was available to the judge on the evidence of the respondent.
- [30] The appellant also says the judge erred or misunderstood the evidence by taking into account the respondent's "provision of the down payment for Merrill Lane, without a finding of fact considering this was a loan." I do not see any error in the judge's approach. She merely stated that the respondent's original contribution to the deposit and down payment

on the Merrill Lane property was relevant to the analysis, presumably because those contributions enabled the purchase of the property which proved to be a good investment for the parties.

- [31] One of the appellant's principle arguments is that the order fails to give effect to the presumption in s. 81 that each spouse has equal responsibility for family debt. I do not agree. The appellant's arguments ask this Court to require the respondent to reimburse her for half of the expenses she incurred to maintain that property without having regard to the benefit she received from residing in the property or the costs the respondent incurred when he left. As I have indicated, the judge approached this issue correctly by taking a holistic view of all of the circumstances relating to the use, occupation and maintenance of the Merrill Lane property and equally dividing that property, the value of that property, net of the mortgage, at the date of trial.
- [32] At the hearing, the appellant argued that in order to make the payments for the mortgage, property tax and insurance for the Merrill Lane property she had to access her high interest savings account that held a compensation payment she received from WorkSafe B.C. She notes that this is excluded property and says the judge's order effectively reapportioned her excluded property in favour of the respondent. I would reject this argument. The judge made no order reapportioning excluded property. Rather, she accepted the appellant's submission that the parties should retain their personal assets including their savings and be responsible for their personal obligations. The judge noted that the parties each exercised independent discretion over allocation of their income and personal savings. The judge's order allowed the appellant to retain the full amount of the substantial increase of \$160,000 in her RRSP savings account during the course of their relationship that was facilitated by the appellant's bi-weekly contributions to those savings. The appellant's suggestion that she should be compensated in some way for the allocations she made to savings and expenses after the parties' relationship ended is not only inconsistent with the provisions of the FLA, it is contrary to her position at trial that was accepted by the trial judge.
- [33] Finally, I am of the view that there is no merit to the appellant's assertion that the judge failed to apply the proper test when considering significant unfairness, whether of property or debt. The judge properly considered the relevant provisions of the FLA and did not err in applying the law to the facts she found.

Costs

- [34] The appellant says the judge "made an error of fact by attributing the failure to communicate equally between the [parties]". She said this was an important factor that led the judge to order the parties to bear their own costs.

- [35] An award of costs is discretionary and subject to limited appellate review: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27. An appellate court should not interfere with a discretionary award unless satisfied the judge misdirected herself as to the law, or the decision is so clearly wrong as to amount to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367.
- [36] The judge ordered the parties to bear their own costs because of the manner in which the application proceeded and the divided success. While the manner in which a summary trial application proceeds is not usually relevant to a costs order, the judge's assessment of which party was substantially successful is highly important. The main issue to be determined was division of the Merrill Lane property, the family asset of real substance. Each party applied for an unequal division. The judge rejected the claims of each party for reapportionment and ordered an equal division. The judge's assessment as to the relative success of the parties was not unreasonable.
- [37] I see no error in principle in the approach taken by the judge. Accordingly, I would also dismiss this ground of appeal.
- [38] SAUNDERS J.A.: I agree.
- [39] FITCH J.A.: I agree.
- [40] SAUNDERS J.A.: The appeal is dismissed.
- "The Honourable Mr. Justice Butler"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/00/2020BCCA0030.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/storey-v-terry-2020>

Prepared on 28 October 2026 · Esheria