
CANADA / JUDGMENT

T.C. v L.A.

2020 BCSC 1315

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1315 T.C. v L.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.C. v L.A.,

2020 BCSC 1315

Date: 20200901

Docket: E18165

Registry: Smithers

Between:

T.C.

Claimant

And

L.A.

Respondent

Before: The Honourable Mr Justice Crerar

Oral Ruling: Evidence of Spousal Misconduct

Counsel for Claimant:

Glenford Emerson Greene

Counsel for Respondent:

Lara Joan Branson

Place and Date of Trial:

Smithers, B.C.

August 31, 2020

September 1-4, 2020

Place and Date of Judgment:

Smithers, B.C.

September 1, 2020

- [1] This is a family law dispute. There are two children. That said, parenting is not an issue in this trial. The mother, the respondent in this matter, has conceded that the father should have primary custody of the two children.
- [2] The core of this trial is financial. There is a claim for spousal support. The Court must also determine the appropriate division of the family property.
- [3] Mr Greene, on behalf of his client, the father, seeks to adduce evidence of the mother's alleged misconduct. He seeks to adduce this evidence through the father's testimony. He also seeks to adduce it through the cross-examination of the mother. Finally, and of considerable concern to the Court, he seeks to adduce this evidence by calling to the stand the couple's 17-year-old daughter to testify against her mother, providing evidence of her own mother's alleged misconduct.
- [4] I will not recount in detail the alleged misconduct on the part of the mother. In broad strokes, there is an allegation that the mother, after the breakdown of the marriage, brought her new boyfriend into the marital home, which was then being used in a nesting arrangement, with the children staying in the house and the parents alternating residence weekly. Counsel for the father argues that this development was designed to hurt her children and the father psychologically, and that, indeed, it had that effect. It is also alleged that the mother did not give her daughter sufficient emotional support in the face of certain stressful incidents, including the daughter witnessed a suicide attempt. It is also alleged that the mother later brought a different boyfriend back to the house, leading to a fight of sorts with the daughter, during which the mother allegedly slapped her daughter.
- [5] For the purposes of this evidentiary ruling, I will assume that the father has an evidentiary basis to make these allegations. I will also assume that the father's allegations are true, and assume them in their best (or worst) light. Of course, by proceeding with that assumption, I am not making any statement about the truth, or lack thereof, of these allegations.

- [6] Mr Greene has categorized this line of evidence as "really his entire case." He acknowledges that there is no case on all fours with the present case or the evidence sought to be adduced. He says that this present case will be "THE case" to establish that in certain circumstances, spousal misconduct will be a relevant enquiry with respect to spousal support, and that facts such as the present may disentitle the spouse from spousal support.
- [7] Given the centrality of this line of evidence to Mr Greene's client's case, instead of hearing argument on the evidentiary point immediately, I instead directed that the examination continue, and that this evidentiary matter be considered after the lunch break, after Mr Greene had a chance to focus on the specific evidence that he wished to adduce, and after he had reviewed the applicable case law, to allow him to put his best foot forward.
- [8] I turn to the law. Mr Greene acknowledges that he faces a difficult challenge in the language of the Divorce Act, RSC 1985, c 3 and the Family Law Act, SBC 2001, C.25, with respect to the spousal misconduct in the determining entitlement to spousal support.
- [9] I start with the Divorce Act, s. 15.2:

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.
- [10] Of course, the s. 15.2 (1) referred to authorizes the court to make an order with respect to spousal support.
- [11] The British Columbia Family Law Act, s.166, under the heading of "Misconduct of spouse", states that:

In making an order respecting spousal support, the court must not consider any misconduct of a spouse, except conduct that arbitrarily or unreasonably

- (a) causes, prolongs or aggravates the need for spousal support, or
- (b) affects the ability to provide spousal support.

- [12] I infer that the language in (a) and (b) acknowledges the Supreme Court of Canada decision in *Leskun v. Leskun*, [2006] 1 SCR 920, which contemplates that the fact of spousal misconduct that causes a psychological or physical injury that increases the need of one spouse for spousal support or decreases the ability of the paying spouse to provide that spouse with support remains a legitimate inquiry to some limited extent. I will return to *Leskun* in a moment.
- [13] I do not understand Mr Greene to argue the *Leskun* exception in the current circumstances.

- [14] In the face of this stark statutory language, Mr Greene took me to several cases where spousal support had been denied. The first two are from British Columbia. The 1995 decision of this Court, incidentally in which Mr Greene was the successful counsel
- [15] MR GREENE: No he wasn't.
- [16] COURT: Oh; well, he modestly brings this unsuccessful case to the attention of the Court: perhaps it is burned on his memory.
- [17] in any case, another Smithers decision: *Day v. Day*, 1995 CanLII 1669 (BCSC). The second case is *Ungerer v. Ungerer*, 1998 CanLII 4394, a decision of the Court of Appeal.
- [18] I note first off that both of these cases were decided well before the Family Law Act, and well before *Leskun*.
- [19] Mr Greene also responsibly acknowledges that the facts in both *Day* and *Ungerer* are different from the present circumstances.
- [20] The facts in *Day* are starkly distant from the present allegations. The Court found that the spouse seeking support was disentitled to that support, as she had attempted to murder her husband by shooting him twice in the head.[1]
- [21] In *Ungerer*, the wife had earlier received an order granting her spousal support. She then essentially denied the payor ex-husband access to their child for some five years. She actively sought to alienate the child from the father. The court then specifically ordered her to provide access. She repeatedly ignored that court order. She was found in contempt of the access order, and incarcerated.
- [22] In these two cases, the Courts found that the outrageous conduct of the recipient spouse was so morally repugnant and unconscionable as to constitute a gross repudiation of the marriage, and thus disentitled the spouse who would otherwise receive spousal support from receiving that support: *Day* at paras. 25-26, 28; *Ungerer* at paras. 41-42.
- [23] I note parenthetically, with respect to *Ungerer*, that the Court has broad discretionary powers to craft an appropriate punishment to condemn contempt of court. I also note, as I mentioned earlier, that the former wife had in fact earlier received an order for a spousal support, which was then rescinded due to her actions.
- [24] The third case that Mr Greene took me to is the *Stewart v. Stewart*, [2000] NS. No. 339 (NSSC (FD)). The Court cited approvingly the decision in *Ungerer* in its alternative conclusion denying the ex-husband's claim for support.[2] Again, the facts in *Stewart* are significantly and fundamentally different from the present facts. *Stewart* involved long-term and repeated threats of violence, and actual violence against the wife by the ex-husband seeking support: paras. 24-25. This violence included a threat of murder-suicide.

- [25] While I am not condoning or blessing the alleged actions of the mother, if they happen to be true, those facts, even presented in their worst light and assumed to be true, fall far short of those in the three cases provided by Mr Greene.
- [26] Living with a new partner is not rare in the family law jurisprudence or in marital disputes generally. Nor it is rare or unusual for children to be emotionally harmed by the marital breakup. It is also not rare for there to be a serious acrimony between a parent and a child arising from the parent moving in with a new partner: an action that could be hurtful and traumatic to the children.
- [27] In short, the proposed evidence, in light of the cases, in light of the very stark, broad, and plain language of the Divorce Act and the Family Law Act, and in light of the no-fault regime governing family law since the 1968 and 1985 reforms, do not incline this Court to permit this evidence.
- [28] These statutory provisions are not only a matter of public policy designed to encourage parties to get on with their new lives and not revisit past grievances and wrongs. They also serve an important evidentiary purpose. Almost every family law dispute that proceeds to trial will have a long recitation and litany of marital wrongs allegedly committed by each spouse towards the other. These marital wrongs will often be hurtful for the spouse and children.
- [29] Such an investigation of spousal misconduct would greatly lengthen trials. It would hinder resolution. It would also make trials a public airing of marital grievances. These marital grievances will often will be inflammatory. Indeed, in certain circumstances, the threat to air spousal misconduct in the public forum of a trial could be used as litigation blackmail.
- [30] I turn, finally, to the Leskun decision to which I referred earlier. At para. 20, Binnie J stated: I believe that stripped of the rhetoric, the appellant has a valid point of statutory interpretation. Prior to the 1985 Act, s. 11 of the Divorce Act, S.C. 1967-68, c. 24, directed the court to have "regard to the conduct of the parties and the condition, means and other circumstances of each of them" in exercising its discretion in making an award of spousal support. The 1985 Act sought to eliminate misconduct, as such, as a relevant consideration. Section 15.2(5) of the Divorce Act now provides that in making an interim or final order for spousal support, "the court shall not take into consideration any misconduct of a spouse in relation to the marriage". In addition, s. 17(6) instructs the court not to consider any conduct in a variation application that could not be considered in the making of the initial order. These provisions make it clear that misconduct should not creep back into the court's deliberation as a relevant "condition" or "other circumstance" which the court is to consider in making or varying a spousal support order (s. 15.2(4)). Misconduct, as such, is off the table as a relevant consideration.

[emphasis added]

[31] At para. 21, the Court makes the observation that I made earlier: if it is alleged that the spousal misconduct harmed the psychological or physical well-being of the would-be paying spouse such that the paying spouse is unemployable or otherwise not able to make the payments that would ordinarily be awarded in the circumstances, that misconduct, as a cause of that inability, may be a relevant consideration. Similarly, a spouse who has suffered psychological or physical harm due to the other spouse's misconduct such that he or she has additional need, or requires additional support, it may open the door a crack to evidence of spousal misconduct as the cause of that need:

There is, of course, a distinction between the emotional consequences of misconduct and the misconduct itself. The consequences are not rendered irrelevant because of their genesis in the other spouse's misconduct. If, for example, spousal abuse triggered a depression so serious as to make a claimant spouse unemployable, the consequences of the misconduct would be highly relevant (as here) to the factors which must be considered in determining the right to support, its duration and its amount. The policy of the 1985 Act however, is to focus on the consequences of the spousal misconduct not the attribution of fault.

[emphasis in original]

[32] Even then, however, evidence of the misconduct itself would be of minimal relevance; the court may have to consider whether the misconduct in fact caused the need or impairment alleged to affect spousal support, and the degree of causation and harm. But the court focuses the consequences of that misconduct, not the actual misconduct itself.

[33] Thus, as the Supreme Court says in *Leskun*, misconduct is otherwise "off the table" as a relevant consideration or as a subject of evidence.

[34] Accordingly, my ruling is that questions with respect to spousal misconduct, whether in direct or cross, will not be allowed. Unless there can be some other reason to call the 17-year-old daughter as a witness against her mother, and I have heard of no other reason, the daughter will not testify in this trial.

"Crerar, J"

[1] As stated by T.P. Warren J at para 7: "The circumstances of the separation are tragic and unusual and play an important part in the plaintiff's submission on spousal support. The defendant and the plaintiff had approached the end of the 1990 hunting year and were camped with a number of their employees and clients prior to the final wrap-up and return to winter quarters. Earlier in the season the plaintiff had informed the defendant that he wished to separate. They had talked about their marriage the last evening together but it appears there was little if any argument between them. The defendant appeared to take the news of the impending separation stoically. She returned from a walk to the clean-up area and had a glass or two of wine, something which was most unusual for her to do, as she was a non-drinker. She has no recollection of the events which followed, but the evidence of the plaintiff was that as he lay sleeping, the defendant fired 2 bullets into his head, one bullet

into his lung and one into his leg. Rather surprisingly, the plaintiff survived but he did lose the sight of his left eye and half of the hearing in his left ear. The defendant was convicted of attempted murder but before she was sentenced she shot herself four times. Remarkably, she too survived, a testament not so much to her marksmanship, as to her strength and will. The defendant was sentenced to a custodial term but she spent most of that in hospital recovering from her own wounds and she was released on parole in February 1992."

- [2] The spousal misconduct decision was presented as an alternative ground, and can be considered obiter dicta. The Court primarily concluded that the claimant ex-husband did not need support: para. 21.

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