CANADA / JUDGMENT

Wale v. Wale

2008 BCSC 1562

COURT
Supreme Court of British Columbia

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2008 BCSC 1562 Wale v. Wale IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Wale v. Wale, 2008 BCSC 1562 Date: 20081117 Docket: 25532 Registry: Vernon Between: Janis Pearl Wale Plaintiff And Kenneth Albert Wale Defendant Before: The Honourable Mr. Justice Rogers Reasons for Judgment Counsel for the Plaintiff: T.M. McCaffrey Appearing on his own behalf: K.A. Wale Date and Place of Trial: September 8-12, 2008 October 30 and 31, 2008 Kelowna, B.C.

Introduction

[1] The issues in this family proceeding center on whether a trucking business operated by the defendant is a family asset, whether the valuation date for apportionment of the family assets should be the date of separation in 2000 or the trial in 2008, and whether the assets should be reapportioned on any ground contemplated by s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128. History

[2] The parties began to co-habit in 1987. They lived together as man and wife for five years. The parties married on November 19, 1992. They then lived together as spouses for another nine years.

[3] It was a second marriage for both parties. The plaintiff's daughter was five years old when the parties moved in together. The daughter lived with the parties until she was old enough to move out on her own. The defendant's son also lived with the parties, but not for all of the time that they were together. The defendant's daughter lived with the parties for only a few months after she had graduated from high school.

[4] The parties separated on May 29, 2000. On June 22, 2000, this court made an order under s. 57 of the Family Relations Act that there was no prospect that the parties would reconcile their differences. This court also made an order under s. 67 of the Act restraining the parties from disposing of assets that were the subject of this litigation.

[5] The plaintiff is currently 56 years old. She is in good health. For the past 26 years, the plaintiff has worked as a clerk at a Safeway grocery store. Her Line 150 income in 2007 was $54,184. She has had exclusive possession of the former matrimonial home since the separation.

[6] The defendant is 60 years old. He is in good health. The defendant is the owner and operator of a trucking business. The business trades under the name Ken Wale Trucking (KWT). KWT has always been a proprietorship and the defendant has always been the operation's prime decision maker. From separation to the end of 2006 (the last year for which a tax return is available from the defendant), the defendant's gross and net incomes have been: Year Gross Net 2000 $495,399 $3,469 2001 282,714

- 43,673 2002 307,826 8,395 2003 324,123 15,229 2004 453,912 8,434 2005 489,200 88,008 2006 440,070 53,172

[7] On the day the parties separated, the defendant was charged with assaulting the plaintiff. Shortly after the separation, the plaintiff obtained an interim order in this proceeding restraining the defendant from contacting her. The defendant was convicted of the assault charge. Part of his sentence was to have no contact with the plaintiff.

[8] Since the separation the defendant has continued to operate KWT. He has not accounted to the plaintiff for profits made by the business. At separation, KWT's assets were:

- 1978 grey Ford dump truck
- 1988 grey Ford dump truck
- 1978 grey Ford dump truck
- 1982 blue International dump truck
- 1980 white Kenworth dump truck
- 1986 black Ford dump truck
- 1990 black Ford dump truck
- 1990, 1995 and 1998 pup trailers
- Farm tractor
- Snowplowing trucks:
- 1980 pickup truck
- 1981 pickup truck
- 1986 pickup truck
- Three snowplows for pickup trucks
- 1993 Case skid-steer loader
- Home-built flat deck trailer for hauling the loader
- Five travel trailers

- Numerous shop tools

[9] The defendant has sold two of the travel trailers and has received insurance proceeds following the destruction by fire of a third trailer.

[10] Since separation, the plaintiff has made use of $2,000 in cash that was in the house, and she has sold a 1989 Mazda car that was in her possession at separation. Neither party sought the other's permission to dispose of those assets, and both parties were aware that their actions were contrary to the terms of this court's restraining order.

[11] The plaintiff adduced expert evidence relating to the value of the assets as of the date of separation. According to the plaintiff's valuation, the KWT assets had a fair market value of $277,500 as at the separation date. The author of the valuation report was a chartered accountant. The accountant appears to have done his arithmetic correctly. The number of $277,500 logically flows from the assumptions that the expert made. The accountant likewise adopted the correct valuation theory for the KWT assets. That is to say: the accountant's choice of valuation based on the bare value of the assets was correct. However, the accountant took as the value of the assets whatever values were shown for them on the proprietorship's December 31, 2006 financial statement.

[12] I have no doubt that the accountant was instructed to adopt those figures. I also have no doubt that the accountant knew, as does the court, that those book values do not correlate with the actual fair market value of the KWT assets as of December 31, 2006. I have no hesitation in taking judicial notice that any coincidence between the depreciated book value of, say, a dump truck and its actual cash value at any given moment is the product of pure chance. Rather, the actual cash value of a dump truck will depend on the interplay between its condition and the prevailing overall business demand for vehicles of its type. The plaintiff's report does not recognize that economic fact, and that is the fatal (and glaringly obvious) flaw in the valuation report upon which the plaintiff relied. It follows that I will give no weight whatsoever to the plaintiff's valuation report.

[13] The plaintiff produced no evidence as to the value of any of the assets in issue as of the trial date.

[14] The defendant, who represented himself at trial, adduced no valuation evidence at all. It is clear, however, from the evidence of the parties that all of the KWT trucking assets have deteriorated in value since the separation, while the matrimonial house has increased in value during that same period. Parties' Positions

[15] The plaintiff asserts that the KWT assets are family assets, the defendant asserts that they are not. The plaintiff seeks an order that the family assets be valued as of the date of separation and that the trucking assets be apportioned to the defendant and the matrimonial home be apportioned to her. The defendant seeks an order that the family assets are limited to the matrimonial home, the parties' Winnebago motor home and the parties' RRSPs. He seeks an order that the house and motor home be sold and the proceeds

be divided equally between the two parties, and that the parties keep the RRSPs currently registered in their own names. If the matter is resolved on those terms, the defendant does not seek a share of the plaintiff's Safeway pension. Family Assets Statutory Framework: Family Relations Act, Sections 58, 59 and 60

[16] The Family Relations Act establishes a class of property called family assets. The provisions of the Act most relevant to this litigation are: 58(1) Subject to section 59, this section defines family asset for the purposes of this Act.

(2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

(3) Without restricting subsection (2), the definition of family asset includes the following:

(a) if a corporation or trust owns property that would be a family asset if owned by a spouse,

(i) a share in the corporation, or (ii) an interest in the trust owned by the spouse;

(b) if property would be a family asset if owned by a spouse, property

(i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself or herself, or (ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;

(c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;

(d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;

(e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

(4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979. 59(1) If property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

(2) In section 58 (3) (e) or subsection (1) of this section, an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property. 60 The onus is on the spouse opposing a claim under section 56 to prove that the property in question is not ordinarily used for a family purpose.

[17] Certain of the parties' assets are indubitably family assets. They include: Matrimonial House

[18] This house was a family asset - it was purchased by the parties and was used for family purposes. Vehicles

[19] The vehicles that the parties owned or used while they lived in Vernon are, or were, family assets. Those vehicles included a 1989 Mazda, a 1994 GMC Sierra pickup truck, a 1990 Winnebago motor home, a 1993 Jeep YJ, a 1967 Mercury convertible, and a 1929 Model A. RRSPs

[20] These are family assets by virtue of s. 58(3)(d) of the Act. At trial, the plaintiff's RRSPs had a value of $139,330, but the plaintiff started the relationship with $60,365 and contributed $27,487 of that total after separation. The net amount of RRSPs in the plaintiff's name at trial was therefore $51,478. At trial, the defendant's RRSPs had a value of $107,962, but he started the relationship with $12,500. The net amount of RRSPs in the defendants' name was therefore $95,492. Investments

[21] The non-registered investments held by the parties are family assets. Power Boat

[22] The parties used the power boat for family purposes. It was a family asset. Items in Dispute KWT Assets

[23] The defendant testified that the plaintiff did nothing to advance KWT's business. He asserted that whatever she did try to do was more of a hindrance than a help. The plaintiff testified that she helped do the bookkeeping and kept track of accounts receivable and accounts payable. She testified that she regularly calculated the employees' pay and that she often wrote out business cheques for the defendant to sign. In addition, the plaintiff testified that when she was not working at Safeway, she was at home looking after the house. She said that she cooked and cleaned and did most of the yard work. According to her, the defendant devoted most of his time to KWT business.

[24] Sorting out the truth on this issue is not difficult. The handwriting on the business cheques that the plaintiff was able to extract from the defendant demonstrated that the plaintiff regularly prepared the cheques for the defendant's signature. The defendant's assertion that the plaintiff "did nothing" for the business is therefore simply false. Furthermore, the defendant made no effort to rebut the plaintiff's evidence that she looked after the house and that he spent most of his time on the business. Effective management of household duties comprises an indirect contribution to the business assets: s. 59(2) of the Act. Accordingly, I find that the KWT assets are, in fact, family assets within the meaning of the Act. Safeway Shares

[25] The plaintiff has acquired publicly traded shares in the Safeway corporation. She had 49.58 shares at the date of separation. There was no evidence that those shares were used for a family purpose, but the plaintiff did acquire them through a payroll deduction program. I infer that the plaintiff diverted funds to the purchase of those shares which would otherwise have been available to support the family. In my view, those shares are family assets. Division of Assets Statutory Framework: Family Relations Act, Sections 56 and 65

[26] The starting point for a discussion of division of family assets is the Act's decree that equality is the default: 56(1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

(a) a separation agreement,

(b) a declaratory judgment under section 57,

(c) an order for dissolution of marriage or judicial separation, or

(d) an order declaring the marriage null and void respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

(a) an order under this Part or Part 6, or

(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after March 31, 1979. 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.

(2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

(3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[27] In this case, neither party sought to apportion a greater share of the family assets to him or herself and to the exclusion of the other. The plaintiff's position was simply that the matrimonial home and the KWT assets were roughly equal in value at the date of separation and that it would be sensible for her to take the house and for him to take the trucking business. The defendant's position was that the KWT assets were not family assets and that the value of the matrimonial home, the RRSPs and the Winnebago should be divided equally between the parties. The defendant argued that the balance of the family assets should remain with the party having possession of them. Valuation Date

[28] The flaw in the plaintiff's position concerning the valuation date is that it is contrary to the B.C. Court of Appeal's direction in Stark v. Stark, [1990] B.C.J. No. 1392 (B.C.C.A.). In Stark, the court clearly stated that trial is the preferred date for valuation of family assets. That said, it is open to the court to fix some other valuation date if that is necessary in order to achieve fairness. For an excellent distillation of the principles involved in that determination, see N.M.M. v. N.S.M., 2004 BCSC 346, at para. 77.

[29] In the present case, there was no evidence that the defendant purposefully allowed the assets of KWT to deteriorate. The fact is that mechanical devices tend to lose value over time, especially when they are subject to rough use like sand and gravel haulage. By the same token, it is clear that the parties' Winnebago has decreased in value due to simple market forces. On the other hand, it is equally clear that the parties' matrimonial home has appreciated in value and that that appreciation is due primarily to the real estate market as opposed to anything the plaintiff did to preserve or improve the property.

[30] There are no circumstances which would militate in favour of reapportioning a greater than one-half interest in one or more of the family assets to either of the parties.

[31] It would be manifestly unfair for this court to confer on the plaintiff the entire benefit of the house's increase in value while saddling the defendant with the entire weight of the decreased value of KWT's assets. Because the parties came to trial without current valuations, it would likewise be unfair, not to say injudicious, to try to achieve a balance by vesting interests of the parties in those assets.

[32] For those reasons, I am compelled to order that all of the family assets be sold and that the net proceeds of sale be distributed equally between the parties. The matrimonial home will be sold pursuant to an order for sale, and the parties will have joint conduct of that sale. The Safeway shares will be disposed of by a method of sale convenient to the plaintiff. The other assets will be sold at one or both of the next two general auctions held in the Vernon area. Those assets include the contents of the garage at the matrimonial home, the Model A Ford, the 1967 Ford, the 1993 Jeep, the 1990 Winnebago, and such of the KWT assets noted above as remain in the defendant's possession.

[33] The cost of transporting the items to the auction(s) will be deducted from the sale proceeds before division. Similarly, any debt associated with the Case skid-steer loader will be paid out of the total auction proceeds before division. In the event that the auctioneer rejects one or more of the assets, those assets will be disposed of for scrap or recycling at the nearest suitable facility. The net profit or loss of that disposal will be divided equally between the parties.

[34] The parties will equalize their net RRSPs. This will require the defendant to transfer $22,007 to the plaintiff. The parties' non-registered investments will also be equalized. The plaintiff's pension will be divided according to Part 6 of the Act. The parties' CPP entitlements will be divided according to the applicable legislation. The entitlement dates for both pension divisions will be from November 19, 1992 to May 29, 2000.

[35] There will be no adjustment of the sale proceeds from either the house or the other assets to account for money that the plaintiff expended to maintain the house while she was in occupation of it, or to equalize the $2,000 in cash that she used, or to equalize the plaintiff's disposition of the 1989 Mazda. The adjustments that would ordinarily flow from those transactions are offset by the defendant's disposition of two of the KWT travel trailers, his keeping the insurance proceeds from the third trailer, and his having the benefit of the use of the KWT assets, the Winnebago and the Jeep in the years since the separation. Spousal Support

[36] Neither party sought spousal support from the other. Any claims advanced for support in this proceeding are dismissed. Restraining Order

[37] The plaintiff sought a continuing restraining order preventing contact between her and the defendant. The plaintiff cited fears for her safety as the grounds for that order.

[38] The evidence in the trial satisfied me that the parties deeply dislike each other. That said, the parties have lived separately for more than eight years now. They have established new patterns in their daily lives. The evidence did not satisfy me that, at present, the defendant's negative attitude toward the plaintiff presents any greater risk to her than her attitude presents to him.

[39] In my view, to impose a permanent restraining order on the defendant would be to unnecessarily restrict his liberty. Under such an order, the defendant would be obliged to be constantly vigilant and ready to clear off should the plaintiff happen to wander into the same place as he. Once the family assets have been sold and the proceeds divided between the parties, they will have no reason to be in contact with one another. In the future, the civil and criminal justice systems would afford the plaintiff a remedy and protection should the need for such arise. Costs

[40] The plaintiff sought special costs against the defendant. She grounded her submission on the defendant's failure to make timely disclosure of documents and his efforts to delay resolution of the case. This court has already sanctioned the defendant's tardiness with interlocutory orders levying a fine against him and by awarding the plaintiff certain costs. The defendant's conduct in the matter was not perfect, but it was not, in my opinion, so scandalous or vexatious as to merit an award of special costs.

[41] Neither party has achieved substantial success in this matter. The plaintiff won an order that the KWT machinery is a family asset, but she lost her application to have the assets valued at the date of separation. Only if she had succeeded on that score could she have maintained a claim for ownership of the house, and that was clearly her main objective in this litigation. For his part, the defendant lost on the KWT issue but won his argument that the family assets, including the matrimonial house, be sold and the proceeds divided.

[42] Under these circumstances, the appropriate order is that the parties bear their own costs. "P.J. Rogers, J." The Honourable Mr. Justice Rogers

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