
CANADA / JUDGMENT

Y.L. v. G.Q.

2006 BCSC 1774

COURT

Supreme Court of British Columbia

DECIDED

30 November 2006

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2006 BCSC 1774 Y.L. v. G.Q.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Y.L. v. G.Q.,

2006 BCSC 1774

Date: 20061130

Docket: ED040862

Registry: Nanaimo

Between:

Y.L.

also known as L.Y.

Plaintiff

And

G.Q.

Defendant

Before: The Honourable Mr. Justice Shabbits

Reasons for Judgment

Counsel for the Plaintiff

P.F. Armstrong

Counsel for the Defendant

P.A. Gibb

Date and Place of Hearing:

November 24, 2006

Nanaimo, B.C.

- [1] The plaintiff and the defendant were married on October 2, 1995. There was one child born of the marriage, namely L.Q. who was born on November 17, 1998. She is now eight years of age.
- [2] The plaintiff and the defendant separated on June 16, 2004. On June 18, 2004, a master of the court made an order that neither party remove L.Q. from British Columbia, unless with the other party's written consent or court order.
- [3] On July 16, 2004, the court made a declaration pursuant to s.57 of the Family Relations Act that there was no reasonable prospect of reconciliation between the plaintiff and the defendant. That order enjoined and restrained each of the parties from dealing with any of the family assets except with the written consent of the other, or by further court order, provided that each were entitled to retain and deal with a sum of approximately \$45,000 withdrawn from a joint account.
- [4] On July 26, 2004, the court ordered that the plaintiff and the defendant have shared custody and joint guardianship of L.Q. The order contained a schedule setting out when it was that L.Q. would be with each of the parties.
- [5] When these proceedings were commenced, the parties were resident in Nanaimo. The plaintiff has returned to China to live with her parents. She has not maintained contact with either the defendant or with L.Q. The last occasion that she had any direct communication with the defendant was in June, 2005. The plaintiff left a telephone message for the defendant in May, 2006, but left no return number. She has made no further attempts to contact the defendant.
- [6] While the parties were together, the plaintiff suffered from mental illness. That is the likely explanation for her lack of communication with her daughter L.Q. There is no reason to think that she has not kept in contact with her child because of a lack of interest in her or because of a lack of affection for her. Nevertheless, in the present circumstances, I am satisfied that L.Q.'s best interests require that the present interim order relating to her custody and care be changed. The defendant applies for an interim order of sole custody of L.Q. Given that the plaintiff has not communicated with either the defendant, who has had L.Q.'s care, or with L.Q., for a very long period of time, I am of the opinion that the custody order pronounced July 26, 2004, should be varied. I order that the defendant have sole interim custody of the child, L.Q., born November 17, 1998.

- [7] I see no reason to vary the order for joint guardianship. The July 26, 2004, order was made by consent.
- [8] The order defines what is meant by joint guardianship. Paragraphs 1(a), 1(b), 1(c) and 1(d) are not varied with these reasons. I do order that it is defendant, as custodian of L.Q., who shall have L.Q.'s day-to-day care.
- [9] The defendant seeks that the order that precludes both parties from removing L.Q. from British Columbia, except with the other's written consent or court order, be vacated.
- [10] In applying to have that provision vacated, the defendant deposes that it is in the best interests of L.Q. that he, the defendant, be permitted to take L.Q. with him on visits either out of the Province of British Columbia into the United States or to any other country including China. I am satisfied that there is no longer reason to have the defendant subject to the restrictions imposed by the master's order pronounced June 18, 2004. I order that that order be cancelled. I do order, however, that the defendant shall keep the plaintiff apprised of L.Q.'s address. He shall do so by communicating that information to the plaintiff's parents in China, or to such other address or contact place provided to him by the plaintiff or her counsel. He shall also provide her with any information about L.Q. that she or her parents may request.
- [11] Both the plaintiff and the defendant seek final orders under Part 5 of the Family Relations Act.
- [12] The plaintiff seeks an order for judicial reapportionment of family assets pursuant to s.65 of the Act. She seeks to have the whole of the assets vested in her.
- [13] The defendant seeks an order for the equal division of family assets.
- [14] The parties are in agreement that the whole of their family assets are the proceeds of the sale of their former matrimonial residence in Nanaimo, and two RRSP accounts with CIBC Wood Gundy. The proceeds of the sale of the former matrimonial residence held in trust total \$187,123.50. There is also in trust an additional \$4,138.20 for solicitor's costs incurred by counsel for the defendant in order to complete the conveyance. The two RRSP accounts are one in the name of the plaintiff having an approximate value of \$14,744 and one in the name of the defendant having an approximate value of \$68,533.
- [15] I am satisfied that counsel for the defendant should be paid the sum of \$4,138.20 in satisfaction of his account relative to the completing of the conveyance of the former matrimonial residence. I order that he be paid.
- [16] I find that the proceeds of sale of the matrimonial residence and the two RRSP accounts comprise the whole of the family assets, and that those assets are the whole of the assets that are subject to division in this proceeding. Both parties agree that that is so.

- [17] The application for orders pursuant to ss. 56, 65 and 66 of the Family Relations Act relating to the ownership and possession of the family assets is brought under Rule 18A, the summary trial procedure. Both parties are anxious for final orders.
- [18] I have concluded that the issues relating to family assets are suitable for resolution under Rule 18A. Although the evidence could be more complete, each of the parties has had ample opportunity to gather evidence and advance evidence in support of their respective positions. Each of the parties is satisfied that the orders relating to family assets be determined on the evidence before the court. Neither party advances an application for further disclosure from the other. Neither party seeks an adjournment. I am satisfied that the facts of relevance to the division of family assets can be determined from the available evidence, and that the resolution of the issues relating to family assets on this application would not risk an injustice.
- [19] The plaintiff and the defendant were married to each other before they married in 1995. Their marriage in 1995 was a second marriage. Their first marriage was dissolved. After they were divorced, the plaintiff married a third party. She was later divorced from that third party. It was after that that the plaintiff and the defendant again married, their second marriage to each other being on October 2, 1995.
- [20] I am of the opinion that the first marriage of the plaintiff and the defendant to each other is of no consequence to the division of assets in this proceeding. All of the issues between the plaintiff and the defendant arising from their first marriage were earlier resolved between them. They did not acquire any of the family assets at issue in this proceeding during their first marriage. Their child was born three years after their second marriage. I am also of the opinion that the first marriage is of no relevance to the plaintiff's claim for spousal maintenance that arises as a result of the second marriage. The defendant's obligations to the plaintiff, if any, that arose because of the first marriage, were settled long before their second marriage took place.
- [21] The plaintiff now is resident in China with her parents. Her history is that of longstanding mental illness. The plaintiff agrees in her affidavit # 2 that she was receiving treatment for depression, and there is evidence from a psychiatrist that he treated her during the marriage for a paranoid disorder. The defendant deposes that the plaintiff was hospitalized in China for schizophrenia before they married in 1995.
- [22] I am satisfied that if the plaintiff is presently unable to work, it is because of mental illness and not because of her marriage to the defendant. Her mental status is not related to the marriage.
- [23] The plaintiff is well educated. She was trained in China as an architect. There is affidavit evidence that she has been employed in times past in instructing others in architecture and engineering. If the plaintiff is not working in China, it is not because of this marriage. There is no evidence that the marriage disadvantaged the plaintiff economically.

- [24] The defendant is resident in Richmond. He is a business man. The information that is available on this application is that his income in years past was \$70,000 per annum. Counsel for the plaintiff submits that the applications before the court should be resolved on the basis that that continues to be his income. The defendant could have advanced more current financial information. He has chosen not to do so, and his counsel seeks to have the property division finally resolved on the basis of the information presently before the court.
- [25] It is the defendant who has the whole financial burden of caring for the parties' child, L.Q. There is no evidence that the plaintiff has any guideline income.
- [26] Most of the family assets are proceeds from the sale of the former matrimonial residence.
- [27] The plaintiff had little gainful employment during the marriage. In her affidavit sworn June 18, 2004, she deposed that she made "some living as an artist," but she did not disclose what that income was. Those earnings were minimal. The other income attributed to the plaintiff arose because of income-splitting arrangements between the plaintiff and the defendant relating to the defendant's business. The defendant is an architectural renderer and the plaintiff has a masters degree in architecture, but her actual employment relating to architectural activities during the marriage was very limited.
- [28] The parties agree that the plaintiff's limited marital work history was related to mental health issues.
- [29] There is no evidence that the plaintiff sacrificed a career to be at home, or to care for L.Q. This marriage did not compromise the plaintiff financially. It did not compromise her career.
- [30] In September, 2004, the plaintiff and the defendant, although represented by counsel, met without counsel. They agreed that the proceeds of the former matrimonial residence would be divided between them with 60% of those proceeds being paid to the plaintiff and 40% to the defendant. On September 20, 2004, both of them signed a written direction that the house proceeds were to be divided in that fashion. After that document was signed, the plaintiff withdrew from the agreement. In fact, it was the plaintiff's withdrawal from the agreement that required legal steps to be taken for the sale of the former matrimonial residence to be completed.
- [31] In an affidavit filed February 8, 2005, the plaintiff deposed that she and the defendant had a "contract" whereby the money they got from the sale of their home would go 60% to her and 40% to the defendant.
- [32] Then, in her affidavit filed March 4, 2005, the plaintiff said this at paragraph 15:
- I previously agreed to accept payment of 60 percent of the proceeds of the sale of 600 Cumberland Place and would still agree to this arrangement.

- [33] I have concluded that it would be unfair, having regard to the need of the plaintiff to become economically independent and self sufficient not to make an order judicially reapportioning family assets to her. In my opinion, it is s. 65(1) (e) of the Family Relations Act that renders unfair an equal division of assets.
- [34] I order that the proceeds of the sale of the former matrimonial home be apportioned 60% to the plaintiff and 40% to the defendant.
- [35] I order that the two CIBC Wood Gundy RRSP accounts shall be equalized with spousal rollovers. That shall be effected by the defendant rolling over that part of RRSP account #5600-4667 to the plaintiff's RRSP account #5625-4353 to effect equalization of the two RRSP accounts.

Spousal Maintenance

- [36] The plaintiff seeks an order for spousal maintenance. A divorce decree has not yet been pronounced. The parties are in agreement that any order for spousal maintenance must be an interim order. The plaintiff seeks a retroactive order. In the fall of 2004, the defendant paid the plaintiff the sum of \$9,000 for interim spousal maintenance, representing maintenance for six months at \$1,500 a month.
- [37] The plaintiff seeks spousal maintenance retroactive to the spring of 2005. I decline to make an order for any retroactive spousal maintenance. There has not, in my opinion, been any reason shown as to why such an order would be made. The plaintiff could have applied for spousal maintenance earlier. She chose not to apply. Furthermore, the plaintiff has not provided meaningful information as to her present needs or income, or as to her circumstances during the past 18 months..
- [38] I am, however, satisfied that an order for interim maintenance must be made.
- [39] The best evidence in front of me is that the plaintiff is without income, and that the defendant has income of \$70,000 per annum.
- [40] The parties were married on October 2, 1965. The declaration that they had no reasonable prospect of reconciling was made on July 16, 2004. That time period is eight years nine and one-half months. I see no reason why the spousal support advisory guideline ought not to provide guidance as to the appropriate order.
- [41] The information before me is that the income differential between the parties is \$70,000. If spousal maintenance is fixed at 1.75 % for each year of the marriage, the amount of spousal maintenance annually would be 15.4 % of \$70,000, or about \$900 per month.
- [42] I order that the defendant pay interim spousal maintenance to the plaintiff in the sum of \$900 per month.

- [43] Each of the parties can require the other to provide current financial information. This may occur at the time of the divorce. The parties are free to require disclosure earlier. The guidelines suggest that the duration of spousal maintenance should be for a total of a further five years.
- [44] The issues of quantum of spousal maintenance and duration will be decided at the time that the final order is made. It will be the evidence then made available that will be of importance.
- [45] There has been mixed success on these applications. I order that each of the parties bear her or his own costs.

"S.J. Shabbits, J."

The Honourable Mr. Justice S.J. Shabbits

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