

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Armillotta v. Armillotta*,
2018 BCSC 1722

Date: 20181009
Docket: E049912
Registry: New Westminster

Between:

Marion Kathleen Armillotta

Claimant

And

Gregory John Armillotta

Respondent

Before: The Honourable Mr. Justice Crawford

Reasons for Judgment

Counsel for Claimant:

P.F. Schmidt

The Respondent, appearing in person:

G. Armillotta

Place and Date of Trial:

New Westminster, B.C.
March 26 – 29, 2018

Place and Date of Judgment:

New Westminster, B.C.
October 9, 2018

Introduction

[1] Mr. Armillotta and Mrs. Armillotta met at work in 2004, began living together on or about June 1, 2006, were married on January 26, 2008, and separated in mid-February 2015. Mr. Armillotta left the matrimonial home in October 2015. They have two sons who, at trial, were ten and seven respectively and live with their mother in the matrimonial home.

[2] Mr. and Mrs. Armillotta come from families that have been working on the railroads for several generations. Early in the marriage, both Mr. and Mrs. Armillotta were working on the railroad.

[3] The couple purchased the family home in Mission, British Columbia, in 2007. Mr. Armillotta said he made a substantial contribution from the sale of his properties. Mrs. Armillotta said she gave her husband \$54,000 in cash.

[4] When the children were born in 2008 and 2011, Mr. and Mrs. Armillotta respectively took parental leave with each son.

[5] In late 2013, Mrs. Armillotta had the opportunity of upgrading from conductor to engineer, but that could have meant moving to Edmonton for a six month apprenticeship. Mr. Armillotta prevailed on her not to do that and instead to retire from her occupation and he would work increased hours to maintain the family. She says she expressed her concerns about potentially being without a job and having little security and he agreed to transfer his half interest in the home to Mrs. Armillotta.

[6] On this point, they are in disagreement. Mr. Armillotta says that he was in financial trouble due to an investment on another property where there was a shortfall on a foreclosure, the potential creditors were closing in and to remove the house from being a potential asset, he agreed to transfer the house into his wife's name.

[7] For either reason, the result was the title was transferred to Mrs. Armillotta on December 12, 2013.

[8] In spite of Mr. Armillotta's very good earnings; \$86,806.20 in 2013 and \$68,217.47 in 2014, they were obliged to refinance their house in January 2015.

[9] At the time the home was valued at \$466,000.

[10] The debts were: the mortgage of \$201,420; a line of credit over \$100,000; Mr. Armillotta's \$7,300 debt from the shortfall on the settling of the foreclosure of his investment property; and credit cards totaling \$42,000. The principal amount in the January 6, 2015 mortgage was \$372,000 with an interest rate of 2.8% per annum and monthly payments of \$2,194.49.

[11] Other family debts are said to be Mrs. Armillotta's four credit cards: American Express \$5,600; CIBC line of credit \$5,000; CIBC Visa \$8,369; Costco Capital One MasterCard \$5,000. At the time of separation, Mr. Armillotta had a line of credit of \$11,000.

[12] Mrs. Armillotta says that the separation date is February 14, 2015, which I accept. She said Mr. Armillotta got upset at her smoking and he smacked a cigarette out of her mouth. Mr. Armillotta claimed in his response to family claim that the parties had been separate and apart after September 2014. However, that is contradicted by his own tax return for 2014, where he describes him and Mrs. Armillotta as married as of December 31, 2014.

[13] The evidence is that Mr. Armillotta moved to the basement of the family home in 2015 but a further altercation occurred on October 21, 2015, resulting in the police arriving and Mr. Armillotta moving out of the house. No contact orders were made. The Crown pursued assault charges but ultimately Mr. Armillotta was found not guilty at trial. He breached his no contact provisions several times and at trial, breach proceedings were still outstanding.

[14] These family law proceedings began on November 17, 2015. On January 12, 2016, Harvey J. made an order that Mr. Armillotta pay \$1,593 a month in child support, premised on Mr. Armillotta's income of \$109,000.

[15] Parenting and access issues have been dealt with in Provincial Court. The parties are joint guardians. Mrs. Armillotta has primary care and Mr. Armillotta has regular access to the boys twice a week and on alternating weekends.

[16] However, other than paying child support, Mr. Armillotta has made no other contribution to the support of his family since at least May 2016.

[17] Mrs. Armillotta's evidence at trial was that she had made the following payments on the house:

- mortgage payments of \$654 every two weeks totaling \$17,004 (presumably a reduction from the earlier figures);
- property taxes of \$4,000 per annum and in total \$8,000;
- home insurance of \$1,400 per annum and in total \$2,800;
- home security \$804 for two years, totalling \$1,608;
- annual maintenance costs, in total \$10,000;
- house utilities for two years, \$5,400; and
- renovations to complete a rental suite \$10,000.

[18] That is a total of \$54,812 at trial.

[19] When Mr. Armillotta initially left the home, he lived with his relatives. He says more recently he has been paying \$1,000 a month in rent.

[20] In May 2016, the mortgage balance was \$356,003.43. Mrs. Armillotta said she paid down the principal some \$14,000.

[21] The house assessment valuation at trial was \$757,000, less the mortgage of \$343,000, leaving an equity of \$414,000.

[22] The parties' motor vehicles are approximately equal in value.

[23] There is a timeshare valued at \$1,300 that Mrs. Armillotta has been making payments for.

[24] The other principal asset is Mr. Armillotta's Canadian Pacific pension valued at \$346,959 in Mr. Armillotta's financial statement. Mrs. Armillotta's LIRA in February 2015 was approximately \$30,373. In mid-2017 she withdrew \$21,181 to pay delinquent property taxes and arrears, so there is a current value of \$9,192.

[25] A matter of recent concern, prior to trial, was Mr. Armillotta's termination from his employment at Canada Pacific Railroad on February 7, 2018. Of course that is a great concern to him and it also affects his ability to support his children.

[26] In spite of a suspension and other missed days of work in 2017, his T4 income was \$118,965.58.

[27] Mr. Armillotta said a grievance had been started regarding his termination and he was optimistic about his reinstatement but said it might take a year and a half to reach resolution. At trial, he said he was applying for unemployment insurance compensation.

[28] In the circumstances, Mrs. Armillotta agreed to Mr. Armillotta varying his child support on an interim basis, to be \$1,000 a month with liberty to apply, prompt advice of any reemployment, and other ancillary orders.

Arguments

Mrs. Armillotta's Argument

[29] Given the fact situation, Mrs. Armillotta seeks reallocation of the equity in the house to herself on the basis of her paying down the mortgage, her need to maintain the children and the house, the renovation and upkeep costs, her accepting responsibility for her (larger) share of family debt and the timeshare expenses, the 2013 transfer and her preservation of the house.

[30] As well, she says she is prepared to accept the *Spousal Support Advisory Guidelines* [SSAG] calculations for lump sum spousal support which she says range between \$100,000 and \$189,000.

[31] To that is to be added the shortfall on family support payments that were not covered by Harvey J.'s order, a total of \$3,186. As well for 2017, based on Mr. Armillotta's income of \$118,965, there is a shortfall of \$2,100, thus a total of \$5,286 retroactive child support.

Mr. Armillotta's Argument

[32] Mr. Armillotta, representing himself, struggled with giving testimony and satisfactorily arguing the issues.

[33] If I may summarize it, his argument was that with respect to the house it should have already been sold, that he had put \$100,000 into it and it should have been divided on the basis of the \$100,000 equity.

[34] He argued that his wife could be working as a railroad engineer, and that in effect, she was underemployed and therefore he should not be paying any spousal support.

[35] He was not prepared to recognize Mrs. Armillotta's contribution as a housewife but he did acknowledge he wanted her to stay home and take care of the children. He simply said he wanted the house and the children.

Credibility

[36] I note in respect to his evidence, counsel for Mrs. Armillotta cited the principles found *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186 and 188, as to Mr. Armillotta's credibility. It was patent Mr. Armillotta was not prepared. He was late on occasion. He claimed to be sick on occasion. He demonstrated animus towards Mrs. Armillotta in his questioning, and his questions were of variable relevance. His threats to call various witnesses were empty as no witnesses were

called. He produced no documents regarding his alleged contribution to purchasing the house. He evaded and prevaricated in cross examination.

[37] Mrs. Armillotta was straightforward and direct in her testimony. In large part, where there was concern of credibility I preferred Mrs. Armillotta's evidence over Mr. Armillotta's.

Income

[38] I note that Mrs. Armillotta in spite of giving up her work on the railroad, still contributed to the family income. In 2013 there was employment income of \$7,079; in 2014 \$9,083 as well as her payout payment from Canadian Pacific of \$28,044.66 that went into a LIRA; in 2015 \$30,999 from several different employers; in 2016 the initial employment with Canada Post for \$11,383, and \$6,700 from other income plus unemployment insurance for a total of \$27,021.

[39] In 2017 she made \$15,597 but withdrew from her LIRA \$21,181 to pay for house taxes and expenses. Her expectation in 2018 was income of approximately \$16,000 per annum.

[40] Mr. Armillotta's income until his termination, in 2015 was \$109,711; in 2016 \$98,759; and in 2017 \$118,965. At trial he said he was seeking unemployment insurance benefits.

Discussion

[41] For the purpose of the following discussion, I accept the separation date is February 14, 2015.

The Family Home

[42] Neither party has referred me to bank statements, or conveyancing file or anything in writing to support their positions. I find they contributed equally to the purchase of the house.

[43] The house is presently valued at \$757,000, with a mortgage of \$342,519 and an equity \$414,000.

[44] I have already noted differing reasons given in evidence as to the transfer of the property into Mrs. Armillotta's name. It is consistent with reason for the promise, being that Mrs. Armillotta stay and be an at-home mother and that this would be consideration. On the other hand, Mr. Armillotta suggests a plan to avoid creditors which in law would be a potential fraudulent conveyance. In either case, there is no basis to say other than the property was the parties' and there is no excluded property.

[45] As noted in January 2015, both Mr. and Mrs. Armillotta consolidated their debts into the mortgage.

[46] Had there been a prompt resolution of matters when the parties separated at the end of 2015, there would have only been approximately \$100,000 in equity and both parties could have sought to buy out the other for \$50,000 but that has not come to pass. What has come to pass is a rapid market inflation in the value of the house which is being preserved by Mrs. Armillotta's contributions to the mortgage, insurance, taxes and upkeep.

[47] Mrs. Armillotta asks the Court to reallocate the equity in the family home to her for reasons already stated. I find that the home is family property, and therefore the equity should be divided equally according to s. 84 of the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*].

[48] However, Mrs. Armillotta submits it would be significantly unfair to divide the home equity 50/50. She says that the Court should therefore order unequal division under s. 95 of the *FLA*.

Unequal division by order

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

(a) equally divide family property or family debt, or both, or

(b) divide family property as required under Part 6 [*Pension Division*].

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

- (a) the duration of the relationship between the spouses;
- (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [*setting aside agreements respecting property division*];
- (c) a spouse's contribution to the career or career potential of the other spouse;
- ...
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

(3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [*objectives of spousal support*] have not been met.

[49] And s. 161 reads:

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[50] Mrs. Armillotta accepts that law has changed with the bringing into force of the *FLA*, as stated by the Court of Appeal in *Jaszczewska v. Kostanski*, 2016 BCCA 286 [*Jaszczewska*], where at para. 42-44, the court said s. 95(2) has narrowed factors and removed the previous legislative references to acquisition, preservation, maintenance, and improvement or use of property.

[51] While the factors regarding an unequal division as being significantly unfair have changed, McEwan J. in *Khan v. Gilbert*, 2017 BCSC 2060 at para. 27, citing *Jaszczewska* at para. 44, noted 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 judicial discretion. While the circumstances where unequal contribution is considered are intended to be much constrained, it may still be a relevant factor in some cases. McEwan J. went on to hold that it would be significantly unfair if Mr. Gilbert were to share equally in the increase in equity in the circumstances of the case.

[52] In *Parton v. Parton*, 2016 BCSC 1528, Butler J. noted the effect of s. 95(3) brings the issue of spousal support into the analysis on claims for reappportionment, at para. 18. His Lordship went on to say, starting at para. 81:

[81] The starting point for an analysis of significant unfairness is the financial situation the parties would be placed in if family property is divided equally: *Remmem*, para. 43. ...

...

[95] ... The claimant has a clear entitlement to compensatory support on the basis of the jurisprudence which has developed over the last 25 years. In *Moge v. Moge*, [1992] 3 S.C.R. 813, the Court set out the principles which should guide courts in applying the objectives of spousal support. As L'Heureux-Dubé J. noted at 864, the doctrine of equitable sharing of the economic consequences of marriage breakdown is central to proper application of spousal support.

The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, it recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative. In so far as economic circumstances permit, the Act seeks to put the remainder of the family in as close a position as possible to the household before the marriage breakdown.

...

[98] Recently, in *Zacharias v. Zacharias*, 2015 BCCA 376, at para. 26, Groberman J.A. nicely summarized the principles governing entitlement to compensatory support:

[26] Compensatory entitlement will arise where, as a result of the parties' roles during the marriage, one spouse has suffered economic disadvantage or has conferred economic advantages on the other. Most often, such entitlement will arise where one spouse has sacrificed career opportunities in order to take on more of the family's household or child-rearing responsibilities. Upon the dissolution of the marriage, the spouse who has given up opportunities may be entitled to spousal support, either to compensate for diminished earning capacity, or to share in the augmented earning capacity of the other spouse. The main goal of compensatory spousal support is to provide for an equitable sharing of the economic consequences of the marriage (see *Moge v. Moge*, ... at 858-66).

...

[101] Section 95(3) of the *FLA* allows the court to consider, when deciding on a reapportionment claim, "the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 have not been met." In other words, if the spousal support order which would be made based on the parties' circumstances and incomes at the time of separation would not fulfil the objectives of spousal support, that fact can be a relevant consideration in deciding whether it would be significantly unfair to divide family property evenly. This provision recognizes the close connection between the property division and spousal support orders made on dissolution of a marriage. It is particularly applicable to situations involving parties like the Partons, who separated late in their careers when they may not be in a position to continue to earn sufficient income to pay spousal support at a level and for the duration which would otherwise be appropriate.

[53] Butler J. at para. 109 concluded that the best remedy to correct the substantial unfairness is to make a lump sum spousal support order rather than an order for reapportionment.

[54] Here, the parties are not late in their careers but there is a substantial disparity in their incomes, triggered by the parties' agreement that Mrs. Armillotta become a stay at home mother.

[55] Other factors concern me. Mr. Armillotta is eight years older and given his years on the railroad, may be closer to retirement though I do not have evidence on that issue. As well, he has been terminated but that is subject to grievance and at

trial he was confident he would be reinstated. He has not been paying spousal support. If he loses his grievance the likelihood of spousal support would be very uncertain.

Support

[56] Mrs. Armillotta points to (other than taking care of the children and being responsible for the house since October 2015) her entitlement to spousal support.

[57] I note it is an eight and two thirds year marriage. Mrs. Armillotta gave up her career advancement at the behest of Mr. Armillotta and the good of her small children, and is entitled to spousal support, on both compensatory and non-compensatory grounds.

[58] In that regard she says that it is plain that Mr. Armillotta's income in 2017 was \$118,965.58, and had he worked the whole of 2018, could well have earned in excess of \$120,000. Whether that will be recaptured after the grievance we do not know.

[59] For 2016, from several sources of income, Mrs. Armillotta made some \$27,000 and her Canada Post work will see her earning approximately \$16,000 per annum. Counsel points to the SSAG calculations for spousal support for an indefinite term with a minimum of four-and-a-half years, (i.e. 50% length of the relationship), to a maximum 15 years (i.e. date when the youngest child finishes high school) and on the potential incomes, she should be entitled to a lump sum spousal support order of approximately \$133,000. However that figure is premised on incomes of \$118,965 and \$15,597 and Mrs. Armillotta has an upside to her employment and potential rental income.

[60] The SSAG calculation with incomes of \$125,000 and \$25,000 result in a midpoint lump sum of \$118,000.

[61] Mr. Armillotta is positive he will regain his employment, but I note he is eight years older than Mrs. Armillotta and whether he would actually work for another 15 years is debateable.

[62] Mrs. Armillotta points to the fact that she is paying the mortgage which includes a portion of Mr. Armillotta's foreclosure debt, she is raising the children in the house, she was and is responsible for family debts, renovations and repairs and her housing expenses were substantially more. Mrs. Armillotta's housing expenses were \$2500 monthly, not \$1000 monthly.

[63] In sum, counsel submitted that the estimated lump sum spousal support of \$133,000; unpaid child support of \$5,300; her \$22,000 of family debt; and the housing expenses of \$44,000, total \$204,000. As well, Mrs. Armillotta offers to take over sole responsibility for the mortgage. She seeks an order that her claims be satisfied by transferring Mr. Armillotta's half interest in the house to her. It was submitted this would be a satisfactory and fair method of dealing with the asset division of the principal asset of the parties.

[64] There are other factors I am obliged to point out. One is that if Mr. Armillotta had been represented the issue of occupational rent would have been put on the scales. I have received no evidence on that point. Another is that the estimated lump sum value of spousal support is a variable based on continuing and consistent streams of income which are plainly lacking certainty. As well, the equity may not be what it was at trial given the weakening real estate market. Counsel laid the ground work to argue that Mr. Armillotta had already given his half interest in the family home to Mrs. Armillotta but did not pursue that argument.

Conclusion

[65] I am satisfied the proposal regarding the transfer of Mr. Armillotta's interest in the family home, and settlement of the spousal support and other claims, above, put forward by counsel for Mrs. Armillotta is well-founded and provides a fair solution to both parties and one of significant certainty for the parties and the children of the

marriage, given the parenting regime in place with Mrs. Armillotta having primary parenting responsibility and the raising of two young children.

[66] The proposal obliges Mrs. Armillotta to shoulder the larger part of the family debt, and relieves Mr. Armillotta of a substantial ongoing spousal support obligation by it being lump sum rather than periodic payments.

[67] As I understand it at present, the house title is in Mrs. Armillotta's name alone. Accordingly, I order Mr. Armillotta transfer his equitable half interest in the family home to Mrs. Armillotta. She will be obliged to save him harmless on the mortgage until such time as she is able to transfer the mortgage to her own name.

[68] With respect to the other primary asset, Mr. Armillotta's Canadian Pacific pension, I direct it be divided pursuant to Part 6 of the *FLA*, i.e., that Mr. Armillotta shares for the period of the marriage. Their respective CPP contributions shall be similarly divided.

[69] Mr. Armillotta will be responsible only for his \$11,000 of family debt.

[70] The motor vehicles appear to be of equal value and each party may keep their own vehicle.

[71] Mrs. Armillotta would be entitled to her court costs but there may be factors of which I am not aware. If counsel need to make submissions on this issue, a date may be fixed on notice to Mr. Armillotta through trial scheduling.

“Crawford J.”