S98-1003
Date: 19980630
Docket: F970325
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

R.M.B.

PLAINTIFF

AND:

R.W.B.

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE HUMPHRIES

Counsel for the Plaintiff:	A. Thiele
Counsel for the Defendant:	E. Morris
Date and Place of Hearing:	June 3, 4 & 5, 1998 Vancouver, B.C.

[1] This is an action for spousal maintenance and reapportionment of assets under the ***Family Relations Act*** R.S.B.C. 1996, c. 128. R.W.B. and R.M.B. have been married for 28 years and neither has yet sought a divorce. There having been no triggering event prior to trial, I declared there to be no reasonable prospect of reconciliation pursuant to section 57 of the ***Family Relations Act*** at the close of trial on June 5, 1998, at the request of both counsel.

[2] R.M.B. is 51, R.W.B. 48. Both worked full-time throughout the marriage, except for short periods which were by mutual consent. All aspects of the marriage were viewed by both as a shared and joint enterprise. Both shared domestic duties. Although each kept a separate bank account, they shared expenses with R.W.B. paying the mortgage, taxes and the house insurance, and R.M.B. paying for household items, groceries, phone and hydro.

[3] In 1970, R.W.B., realizing that working in a mill would not provide a secure future, took six months off, accepted unemployment insurance and took an electrician's course. He now holds a good job with Chubb Security. R.M.B., who had been at home for nine months following the birth of their daughter, went back to work full-time while R.W.B. took the course, but it is not seriously suggested she would have done otherwise within a short period in any event.

[4] R.M.B., who has a Grade 9 education, took short periods off work at the birth of their two children in 1966 and 1971 but otherwise worked steadily, other than a three year period between 1975 and 1987 when she stayed home to look after the children. It is not disputed that she returned to the work force in a better position, with union security and at a higher rate of pay than when she had left. R.M.B. has worked in the brewery business for many years, doing, as she puts it, "man's work for man's pay." She worked at St. Michelle Wineries from 1978 - 1990, was laid off for six months, then worked at Labatt's Breweries until 1995. She was then laid off, accepting a lump sum severance payment of about $20,000 rather than choosing to remain at Labatt's on an on-call basis.

[5] R.M.B. is now employed on an on-call basis by Brewers' Distributors Limited which requires her to work irregular and unpredictable shifts and to check in several times daily by phone. Her job involves fairly heavy labour, manoeuvering beer kegs and loading cases of beer. She never turns down shifts, but due to no longer having full-time work, her income has suffered. She expects, as jobs come available by attrition, to get a full-time job in the future and in fact she will eventually be guaranteed a position by reason of seniority once one comes available. Although she has looked for other positions, she was only offered minimum wage or slightly higher, with no guarantee of long term or permanent employment. Her union wage is considerably higher at $23.48/hour with a

shift differential. She does not want to give this up, nor does she wish to relinquish the potential for full-time work at the brewery, so she remains at Brewers Distributors Limited on an on-call basis.

[6] R.M.B.'s union business agent, Mr. Sutherland, filed an affidavit stating that there will be three or four early retirements this year allowing R.M.B. to move upwards on the seniority list, but he does not anticipate new full-time positions coming available for a person in her position in the foreseeable future.

[7] The parties' respective levels of earnings were not divergent to any great extent during the marriage, with R.W.B.'s being $5,000 - $10,000 higher. For instance, in 1993, R.W.B. made $53,783; Mrs. $41,490. In 1994, he made $49,730; she made $43,070. This is reflective of the pattern throughout the marriage. However, following R.M.B.'s lay-off from Labatt's in 1995, the levels of income became more disparate: R.W.B. made $54,924.00; R.M.B. made $38,487.00; in 1996 he made $61,487; she made $21,822.00. In 1997, he made $72,005 (including a one-time buy-out of a stock option of $11,000), she made $35,735.97.

[8] The parties separated briefly in 1995, and then finally in December of 1996 when R.W.B. moved in with his girlfriend. He continued to pay the mortgage on the matrimonial home and R.M.B. continued to live in it until it was sold in July of

1997. Both now live in rental properties, and neither lives an extravagant lifestyle. R.M.B.'s only major expenditure has been the $20,000 she lent their son to help with his business. R.W.B., who shares some expenses with his girlfriend but bears the majority of the larger expenses for both of them, has taken a vacation to Mexico.

[9] There is no separation agreement. The parties have resolved many issues themselves, and both appeared to me to be honest, well-intentioned people who bear each other no ill will. They each received about $200,000 from the sale of the matrimonial home. R.W.B. bought some of the furniture and family cars and paid R.M.B. half. R.M.B. presently owns no furniture. Although both parties seemed to have points they wanted to make during their evidence with respect to the smaller assets, in the end nothing turned on them. It is not seriously disputed that the assets were fairly and jointly valued and split 50-50. I do not intend to deal further with them, except for the specific items raised in argument.

[10] In R.M.B.'s name are RRSP funds of $119,219.51 and pension funds of $5,960.00. In R.W.B.'s name are RRSP funds of $51,092 and pension funds of $48,000 (this figure, provided to the defendant from his employer is thought to be in error as it was about $12,000 lower last year. If there is an error, I will leave its significance to counsel).

[11] R.W.B. has taken his share of the funds from the matrimonial home, has bought a small rental property and invested the rest in high return mutual funds. R.M.B. has kept her portion in a safe investment giving very little return. She testified she does not wish to spend any money until she knows what her situation will be following this litigation.

[12] In September of 1997 R.M.B. brought an application for interim spousal maintenance and was successful, receiving $1,200/month to trial. Since that time, R.W.B. has removed her from his medical and dental coverage, substituting his girlfriend, and has substituted his Estate for her name as the beneficiary of his pension.

ISSUES

[13] R.M.B. seeks permanent spousal maintenance in the amount of $1,200 per month, subject to a significant change of circumstances such as retaining full-time employment at her former income level. Although her income has gone up slightly since the interim award, her counsel argues that she no longer has her husband's medical/dental coverage and as well will have to secure the award by paying for life insurance on her husband.

[14] R.M.B. also seeks reapportionment of the RRSPs, in that the $20,000 severance pay from Labatt's was at least in part an incentive to leave and should not be considered a family asset. As well, she argues that the pay is related to her having to

move to on-call work and should be awarded to her to cushion the inconvenience and difficulty of that lifestyle.

[15] R.M.B. seeks half the stock option buy-out received by R.W.B. in 1997, and half the tax refunds received by R.W.B. as a result of his use of tax losses from their joint investments. The defendant agrees he should share the tax refunds, which are about $7,000.00.

FAMILY RELATIONS ACT and ***DIVORCE ACT***

[16] Although the action is brought under the ***Family Relations Act***, both parties argued the question of maintenance based solely on section 15.2(4) and (6) of the ***Divorce Act***, R.S.C. 1985, c. 3 (2nd Supp.).

[17] Section 89 of the ***Family Relations Act*** reads:

> (1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:
>
> (a) the role of each spouse in their family;
>
> (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other
>
> ...
>
> (d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves
>
> (e) economic circumstances
>
> (2) Except as provided in subsection (1), a spouse or former spouse is required to be self sufficient in relation to the other spouse or former spouse.

Section 93(2) reads:

> (2) If a spouse or child will be living separate and apart from the spouse or parent against whom the application is made, the court may, as it considers appropriate, adjust the amount of its order under subsection (1) to take into account the needs, means, capacities and economic circumstances of each spouse, parent or child, including the following:
>
> (a) the effect on the earning capacity of each spouse arising from responsibilities assumed by each spouse during cohabitation:
>
> (b) any other source of support and maintenance for the applicant spouse or children;
>
> (c) the desirability of the applicant spouse or child having special assistance to achieve financial independence from the spouse or parent against whom the application is made;
>
> (d) the obligation of the spouse or parent against whom application is made to support another person;
>
> (e) the capacity and reasonable prospects of a spouse or child obtaining an education or training.

[18] The relevant subsections of section 15.2(4) and (6) of the ***Divorce Act*** read:

> (4) In making an order under subsection (1)..., the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation;
>
> ...

> (6) An order made under subsection (1)...that provides for the support of a spouse should
>
> a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> ...
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage: and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[19] Notwithstanding the pleadings, counsel concentrated their respective arguments on the meaning of "economic disadvantages...arising from the marriage or its breakdown" and "economic hardship arising from the breakdown of the marriage," phrases which are found in the ***Divorce Act***, but not the ***Family Relations Act***.

[20] In ***Harris v. Harris*** (1994), 7 R.F.L. (4th) 91 (B.C.S.C.) the case upon which the plaintiff relies in support of her claim for permanent spousal maintenance, proceedings were brought under both the ***Family Relations Act*** and the ***Divorce Act***. The learned trial judge said, at page 93:

> This application comes under the *Divorce Act* and, alternatively, the *Family Relations Act*. Parties are not required to elect one or the other but it does seem to me they cannot conduct proceedings as if they were somehow a smorgasbord.
>
> Section 61 of the *Family Relations Act* puts that Act subject to the *Divorce Act* in matters for maintenance and support, so absent any argument to the contrary, I proceed, as seems to be the common course, under the *Divorce Act*.

[21] In ***Stuart v. Stuart*** (1996), 22 R.F.L. (4th) 26 (B.C.C.A.), the plaintiff sought support pursuant to the ***Family Relations Act***, but had also brought a petition for Divorce. The majority considered the support application as pleaded pursuant to the ***Family Relations Act***, and to be governed solely by that ***Act***. The C.J.B.C., dissenting, said, at page 31:

> As to the pleadings, Madam Justice Southin has quoted the relevant provisions of the *Divorce Act* and the *Family Relations Act* and I need not repeat them. The wife brought proceedings under both of those statutes. First she brought proceedings under the *Divorce Act* for a decree of divorce. In her Petition, she claimed spousal maintenance. The divorce was granted. Second, in an action, she also sought the usual remedies provided by the *Family Relations Act*, including the division of family assets. Both proceedings were before the trial judge. In my view, *because she brought proceedings under the Divorce Act*, the court is entitled to exercise the corollary jurisdiction found in that Act. The trial judge was not confined to just the Family Relations Act, which provides what L'Heureux-Dube J. in Moge (at pp. 860-61), describes as a strict "self-sufficiency" model. (emphasis mine)

Madam Justice Southin, writing for the majority, said at page 39:

> Even if the British Columbia statute could be taken, despite the emphasized words of section 57(2), as having a compensatory model, rather than a self-sufficiency model, there is no separate head of relief in either statute for "compensatory spousal support" and Madam Justice L'Heureux-Dube did not say that there was. She was simply addressing the factors which, *under the federal Act*, are to be taken into account in determining support and the weight to be given to each. (emphasis mine)

[22] What these excerpts make clear is that there are different considerations for each ***Act***, and the two are not

interchangeable, although there is clearly some overlap and commonality of approach. In the case before me, as I have said, the action is brought solely under the ***Family Relations Act*** but argument was focussed solely on the ***Divorce Act***. Nearly all of the cases given to me by counsel on the issue of spousal maintenance were based on the ***Divorce Act***, rather than the ***Family Relations Act***, (among them, ***Meyers v. Meyers*** (1995), 17 R.F.L. (4th) 298 (B.C.C.A.); ***Keyes v. Keyes*** (1996), 17 R.F.L. (4th) 201 (N.S.S.C.); ***O'Hara v. O'Hara*** (1995), 15 R.F.L. (4th) 408 (N.B.Q.B.), ***Leek v. Leek***, [1994] B.C.J. No. 659 (S.C.) (QL); ***Gill v. Gill***, [1995] B.C.J. No. 2215 (S.C.) (QL); ***Fernandez v. Fernandez***, [1996] B.C.J. No. 817 (S.C.) (QL); ***Giraud v Giraud***, [1997] B.C.J. No. 2717 (C.A.) (QL); ***Merrell v. Merrell*** (1996), 21 R.F.L. (4th) 88 (B.C.S.C.); ***McGrath v. Holmes*** (1995), 10 R.F.L. (4th) 161 (N.W.T.C.A.); and ***Reardigan v. Reardigan*** (1994), 1 R.F.L. (4th) 261 (Nfld. S.C.)). None of the cases which were referred to me from British Columbia were brought solely under the ***Family Relations Act***. In ***Newson v. Newson*** (1993), 78 B.C.L.R. (2d) 35 (B.C.C.A.), the Court proceeded by consent on the basis that the factors in the ***Divorce Act*** and ***Family Relations Act*** were the same but noted that the circumstances were unusual, and specifically declined to pronounce on the correctness of the proposition. In that case, however, there were concurrent divorce proceedings.

[23] In a general sense, the ***Family Relations Act*** would favour the defendant in its emphasis on self-sufficiency. The ***Divorce Act***

allows the plaintiff to make the arguments on disadvantages and hardships which were presented to me, and together with the analysis contained in ***Moge v. Moge*** (1992), 43 R.F.L. (3d) 345 (S.C.C.) gives less emphasis to self-sufficiency and allows for a compensatory scheme of spousal maintenance.

[24] As I recall the oral argument, counsel for the plaintiff briefly referred to her mistaken assumption that the defendant would have applied for a divorce by the date of trial as the reason for concentrating her argument on the ***Divorce Act***, and no issue was taken by counsel for the defendant, who also focussed argument on the ***Divorce Act*** provisions. After a consideration of the cases, I am of the view that such an approach is incorrect, given that there is no Divorce proceeding. I have considered sending this back to counsel for written submissions on the ***Family Relations Act***, but after considering the issues in the case, I am compelled to a result which would not differ regardless of whether it is decided under the ***Divorce Act*** or the ***Family Relations Act***.

ENTITLEMENT TO SPOUSAL MAINTENANCE

[25] The basis upon which the interim award for spousal maintenance was made is the basis upon which R.M.B. seeks a continuance of that amount before me. It is succinctly stated in the Masters' reasons, in which she followed ***Harris***, *supra*, a decision of this court:

> ...in a marriage of 27 years where both parties have worked and where there has been in recent years a significant disparity of income between the parties, the plaintiff is economically disadvantaged as a result of the breakdown of the marriage; she no longer has the pooled income of two spouses to rely on.

[26] The respondent argues that the disadvantage or the hardship now being experienced by the requesting spouse must have a causal link to events within the marriage or to the breakdown of the marriage. Here there is none, the plaintiff's economic state having been brought about by a lay-off at Labatt's and her present level of employment at Brewers Distributors Limited.

[27] In all the cases referred to, there was a finding by the trial judge that the wife's employment capacity or opportunities were somehow compromised by the marriage, or that her economic status was adversely and directly affected by the breakdown of the marriage itself. In ***Harris***, where the claim for maintenance was brought under the ***Divorce Act***, the Court found that the breakdown of the marriage was a cause of hardship to the wife in that she was forced to borrow money in order to survive. There, however, the proceeds from the sale of the assets was described as minimal. Notwithstanding the wife's need, maintenance was set at a low amount for a fixed period of three years, the judge ultimately putting the principle of independence ahead of permanent subsidy of the wife by the husband.

[28] In the circumstances before me, I can find no causal relationship between R.M.B.'s present position and either the marriage or its breakdown. Counsel suggested R.W.B.'s decision to take his electrician's course and R.M.B.'s consequent return to work shows a causal link between an event in the marriage and the present situation. However, R.M.B.'s subsequent work status was marked by better job prospects and increased pay. R.W.B.'s decision to retrain now works to his advantage, but there is no corresponding disadvantage to R.M.B., nor is there any hardship arising from that event. Therefore, even if I were considering this action solely under the ***Divorce Act***, which would be the avenue most favourable to the plaintiff, I could not find a basis upon which to order compensatory maintenance, that is maintenance based upon a disadvantage caused by the marriage or its breakdown or a hardship caused by the breakdown of the marriage.

[29] Notwithstanding that the plaintiff cannot show a disadvantage arising out of the marriage, or a hardship arising out of the breakdown, the court must still strive to promote the equitable sharing of the economic consequences of marital separation. This necessitates, under the ***Divorce Act***, an examination of the conditions, means, needs of each spouse, together with the other factors listed in section 15.2(4). Under the ***Family Relations Act***, the court must consider the needs, means, capacities and economic circumstances of each spouse, and the other factors in section 89 and 93(2).

[30] Here, the assets have been divided fairly (subject to my rulings on RRSP and stock options), and each spouse will be left with about $300,000 worth of assets. Neither maintains a subsistence standard of living. As well, although I have not been asked to rule on any issues specifically relating to pensions, it is not disputed that R.M.B. stands to share in the defendant's pension by virtue of the provisions of the ***Family Relations Act***.

[31] However, a comparison of the respective Property and Financial Statements shows that R.W.B. ends each month with a surplus even while paying interim maintenance, whereas R.M.B. ends with a deficit if the interim spousal maintenance is taken away, even without counting vacation reserve and a rather high monthly allowance for furniture. With the spousal maintenance, and still without counting vacation and furniture allowance, she breaks even, if one considers only her monthly income in isolation from her assets.

[32] Based solely on this factor, if there were no assets, monthly payments could be warranted on some basis because of the needs of the wife and the means of the husband, somewhat akin to ***Harris***, *supra*, (without the characterization of the loss of pooled income as an economic disadvantage as a result of the marriage breakdown). However, given all the circumstances here, I am unable to find a principled basis upon which to order a continuance of spousal maintenance. R.M.B. has emerged

from the marriage with sufficient assets to enable her to maintain a decent standard of living if she allows those assets to work for her. So far she has not done so, but that has been her choice, one which, given the new situation in which she has found herself after over two decades of marriage, is understandable, but which does not, as I have said, constitute a compensable disadvantage.

[33] In the result, the application for spousal maintenance is dismissed.

STOCK OPTION

[34] I have read the cases submitted by counsel after the trial on the issue of whether separate bank accounts are family assets. Although courts have taken differing views depending on all the facts, the test, according to section 58(3)(c) of the ***Family Relations Act*** is whether the accounts were used for a family purpose.

[35] The fact that the spouses kept separate bank accounts does not necessarily mean the money in those accounts was not family money. There is no suggestion that each account, although controlled by each party separately, was for that party's exclusive use. To the contrary, all the family expenses were paid from the accounts. Clearly both used the accounts for family purposes. The amounts in the accounts themselves,

apparently minimal, have not played a part in the argument before me.

[36] The particular stock option in issue was bought through payroll deductions. If those deductions had not been made, the money would have been available in R.W.B.'s account for family use.

[37] R.M.B. should receive half the amount received by R.W.B. in 1997 from the sale of the stock options, which is approximately $5,800.

SEVERANCE PAY IN THE RRSP

[38] R.M.B. seeks reapportionment of the RRSP's to take into account the amount she paid in from her severance pay from Labatt's. Part of this payment was an incentive to leave the employment and such a fund has been recognized not to be a family asset (see ***Cameron v. Cameron*** (1994), 9 R.F.L. (4th) 358 (B.C.S.C.)). As for the remainder, it is R.M.B.'s position that the result of the severance, which was known at the time, was to put her in an on-call position at work, and that fund should therefore be used to compensate her for the situation in which she now finds herself. It is R.W.B.'s position that once the money became an RRSP fund, it lost its former character and became a family asset, relying on ***Wheatley v. Oliver*** (1996), 22 R.F.L. (4th) 91 (B.C.C.A.). He says the entire RRSP fund should be divided 50-50.

[39] In ***Wheatley***, the Court, although recognizing that an RRSP is a family asset regardless of the source of its fund, nevertheless took the source of the funds into account when deciding upon the issue of reapportionment. Here, given the existing employment circumstance in which R.M.B. finds herself, the source of the money and the purpose for which she received it, and the remaining factors set out in section 65 of the ***Family Relations Act***, it would be fair, in my view, to reapportion the RRSP's to allow R.M.B. the portion attributable to the severance fund from Labatt's, which is approximately $20,000, but which should include interest to the date of judgment. In my approximation, this would result in a 45-55 split of the RRSP's in favour of R.M.B., but I will leave the calculation of the percentage of reapportionment to counsel.

TAX REFUND

[40] By agreement, R.M.B. is entitled to $3,500 from the tax refunds received by R.W.B. since separation.

SUMMARY

1. The application for spousal maintenance is dismissed.

2. R.M.B. should receive half the proceeds from the stock option buyout, less the tax paid on it by R.W.B.

3. The RRSP's should be reapportioned to allow R.M.B. credit for the Labatt's severance payment.

4. By consent, R.M.B. will receive half the tax refunds received by R.W.B.

COSTS

[41] Success has clearly been divided. Unless there are considerations of which I am unaware and which counsel wish to address through a Memorandum to the Registry, each party will bear its own costs.

[42] If there is an outstanding issue respecting clarification of the order for costs on the interim application, that will have to be dealt with before the Master who made it.

"M.A. Humphries, J."
The Honourable Madam Justice M.A. Humphries