IN THE SUPREME COURT OF YUKON

Citation: *Toquero v. Ramirez*, 2013 YKSC 7 Date: 20130131
Docket No.: S.C. No. 10-D4253
Registry: Whitehorse

Between:

BENJAMIN SARMIENTO TOQUERO

Plaintiff

And

EVANGELINE RAMIREZ

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Norah Mooney Counsel for the Plaintiff
Brahm Dorst Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by Mr. Toquero for directions on the disposition of certain assets jointly owned by him and Ms. Ramirez until their separation on June 18, 2010. The trial in this matter was held in the Fall of 2011. My reasons for judgment were issued on November 2, 2011 and are cited at 2011 YKSC 81. At para. 125 of those reasons, I stated:

> "125. All things considered, it seems the only way to achieve a practical and fair result for the parties is to proceed, as Mr. Toquero's counsel suggests, with a global order that virtually all of the couple's joint property be sold, that the joint debts be

> paid from those proceeds, and that the remaining equity be divided equally between the parties, with some accounting for the debts solely attributable to Ms. Ramirez…." (my emphasis)

Further, at para. 126 (7) and (8), I stated:

> "(7) The proceeds of sale from the houses and the vehicles shall be held in trust by the law firm of Mr. Toquero's counsel for the purpose of paying the parties' joint debts. If the parties are unable to agree on the total amount of the joint debts, or on any particular debts payable, either may return to this Court for further directions on two days notice….
>
> …
>
> (8) The net amount remaining after the payment of the couple's joint debts will be divided equally between the parties…"(my emphasis)

[2] It is pursuant to my retention of jurisdiction in para. 126(7) that the parties are now before me seeking directions.

[3] The post-trial hearings on this issue took place on December 11 and 18, 2011. Thus far, I have made a number of rulings on issues of court costs and issues relating to specific items of property. When we adjourned on December 18, 2011, there were two remaining issues. They are:

1) an accounting for payments made on the piano, which I ordered to be returned to Mr. Toquero in my reasons of November 2, 2011; and
2) whether certain debts in the name of Ms. Ramirez alone should be treated as joint debts, and therefore shared equally between the parties before the equal division of the net assets.

ANALYSIS

1) The Piano

[4] On the topic of the piano, I have reviewed my notes from the trial. Mr. Toquero testified about a statement he received from Total Credit Recovery (B.C.) Limited dated August 5, 2011, addressed to him alone. This statement referred to a Desjardins Visa account with an outstanding balance of $1,022.99, plus a non-specified amount of interest. The statement read:

> "Dear Benjamin Toquero:
> We cannot hold this account any longer.
> You must arrange payment today!"

[5] Mr. Toquero testified that Ms. Ramirez had stopped paying this bill after they separated. He also said that this collection agency was threatening to have his salary garnisheed in order to pay this debt. Accordingly, as I understood his evidence, Mr. Toquero said that he paid off the outstanding balance on his own.

[6] Ms. Ramirez testified that the original loan for the piano was in the name of both parties, but then inconsistently stated that "I put his name" on that loan. She further stated that the loan was all paid off, initially from a business account in the name of Ben and Vangie's Janitorial Services, and after separation from an account in the name of Vangie's Janitorial Services. She also made reference to payments having been made by post-dated cheques, but produced no such cheques in evidence.

[7] Ms. Ramirez also filed an affidavit (#9) in response to Mr. Toquero's application for directions. At paras. 6 and 7 of that affidavit she refers to the purchase of the piano, stating, "I purchased the piano with Mr. Toquero on or around October 25 of 2008 for $5,034.75." She also went on to state that financing for the piano was arranged through a

Desjardins Visa account, and attached statements relating to that account for the months of February through May 2011. However, Ms. Ramirez did not depose that she made the payments on the piano, nor do the Visa statements indicate that she did so. Her counsel indicated at the hearing that he had been provided with a number of cancelled cheques, but for some reason failed to attach those as exhibits to Ms. Ramirez's affidavit. Accordingly, no such cheques are in evidence.

[8] In the result, Mr. Toquero's evidence that he paid the balance due on the piano remains largely uncontradicted and unchallenged. As Mr. Toquero has regained possession of the piano pursuant to my reasons of November 2, 2011, I do not understand there to be any further need for an accounting for the payment of this debt prior to the division of the remaining assets.

2) Ms. Ramirez' Debts

[9] On the more global issue of the debts solely in the name of Ms. Ramirez, her counsel submits that, based upon the principles arising from *Kerr v. Baranow*, 2011 SCC 10, I should take a "value survived" approach to the division of the couple's joint assets, i.e. determining the amount by which their joint property has been improved by their respective contributions. Indeed, I referred to *Kerr* at para. 98 of my reasons of November 2, 2011, in the context of dealing with Ms. Ramirez's pension. At para. 100, I stated:

> "100. In my view, allowing Ms. Ramirez to retain 100% of the Yukon Government pension, on these facts, would constitute an unjust retention of a disproportionate share of assets accumulated during the course of a "joint family venture", to which both partners have contributed. In finding that the couple worked together as part of such a joint family venture, I have taken into account factors such as their mutual and roughly equal effort, the economic integration between

> the parties' janitorial business and their personal family expenses, their teamwork in performing their janitorial services and the length of their relationship: see *Kerr v. Baranow*, cited above."

[10] With respect to the other joint assets, there was no need to engage in the constructive trust analysis I went into regarding the pension. At para. 95, I stated:

> **"**95. There is no need to consider the remedy of constructive trust in determining that the parties jointly owned assets should be divided equally, because these assets are legally in the names of both parties and the presumption that each holds equal interests prevails. However, Ms. Ramirez' Yukon Government pension is presumably in her name alone. Therefore, it must be dealt with differently than the parties' jointly owned assets."

[11] However, the overall approach that I took towards the division of the joint assets was that the net value of those assets would be divided equally after payment of the joint debts. This approach was based upon my finding, at para. 84(14), that "Mr. Toquero and Ms. Ramirez contributed to the couple's business and household income on a roughly equal basis."

[12] Counsel for Ms. Ramirez submitted that, where unjust enrichment is claimed by a common-law spouse, the defendant spouse will have an implicit cross-claim which must also be considered: See *Wilson v. Fotsch*, 2010 BCCA 226, at paras. 2 and 3. This is because, in a common-law relationship between two adults, each of whom has provided spousal services to the other, each must be assumed to have benefited and to have suffered a deprivation at the same time. Accordingly, counsel argued that Ms. Ramirez has an implicit cross-claim relating to the unequal distribution of debts in her name alone.

[13] Leaving aside for the moment the fact that I did not employ an unjust enrichment / constructive trust analysis in the division of the non-pension joint assets, I have no

reason to reject in principle what Ms. Ramirez' counsel is proposing. Debts are in many ways the flip side of assets and should be taken into account in an unjust enrichment analysis.

[14] In *Stein v. Stein*, 2008 SCC 35, the Supreme Court of Canada was dealing with a marriage in the context of the British Columbia *Family Relations Act*, which provided that, upon the breakdown of the marriage, each spouse is presumptively entitled to a half interest in the family assets. While the *Act* did not require debts to be similarly equally divided, the Court held that family debt was a factor to be considered in determining whether an equal division of assets is fair. Thus, the Court confirmed that both assets and debts must be considered after the breakdown of the marriage. Looking beyond the provisions of the *Act*, the Court noted, at paras. 9 and 10:

> "9. It seems self-evident that, generally speaking, both assets and debts need to be considered in order to ensure fairness upon the breakdown of a marriage. As the British Columbia Court of Appeal noted in *Mallen v. Mallen* (1992), 65 B.C.L.R. (2d) 241:
>
> > ... the equality of treatment of the spouses as required by the scheme of the Act is intended to be a true equality in real terms, and not an artificial equality reached by ignoring some of the facts and emphasizing others. In order to bring about a true equality it is necessary that debts and other liabilities of the spouses at the time of the triggering event and earlier be examined in a way that will illustrate the true relationship between the debts, on the one hand, and the attainment of equality and fairness, on the other. [para10]
>
> 10. Indeed, the term "family debt" has evolved in the jurisprudence out of a recognition that spouses jointly contribute to not only the accumulation of assets, but also debt. Although the phrase has no statutory significance, it has been used with increasing regularity by trial courts (particularly in British Columbia) to describe "a liability of either or both of the spouses which has been incurred during

> the marriage for a family purpose" (*Mallen*, at para. 26). The very existence of the term "family debt" underlines the reality that in order to ensure fairness, both debts and assets must be considered after the breakdown of a marriage.

[15] I see no reason why the requirement to consider both assets and debts should not also apply to the dissolution of a common-law relationship in order to achieve equality and fairness for the former common-law spouses. However, *Stein* does not stand for the proposition that the attainment of equality means that the debts must be divided equally. Rather, “the complete financial situation of both spouses needs to be considered in order to ensure a just result” (para.11).

[16] According to the evidence at the trial, Ms. Ramirez had significantly more debt in her name at the time of separation than Mr. Toquero. At para. 28 of my reasons for judgment, I listed the debts in the name of Ms. Ramirez, which totalled approximately $102,000, versus that of Mr. Toquero, totalling approximately $20,000. On the other hand, I also concluded that, despite the roughly equal contribution to the couple’s business and household income by both parties (para. 84(14)), Mr. Toquero “did not actually receive or enjoy the benefits of the business income” (para. 84(16)) and was “rendered practically incapable of going after his share of the business’ net income in 2010” (para. 93) because of Ms. Ramirez’ failure to provide complete financial disclosure (para. 92). Further, Ms. Ramirez refused to give Mr. Toquero any of the commercial contracts held by their business at the time of the separation (para. 84(19)). Rather, I found that Ms. Ramirez had:

> “…either transferred or simply taken over a number of the commercial contracts, which were assets of Ben & Vangie’s Janitorial Services, to her new business without Mr. Toquero’s knowledge or consent. Accordingly, Ms. Ramirez continues to receive income from those transferred contracts. Her actions

> in this regard constitute a breach of both of the court orders [of September 8, 2010 and March 15, 2011].” (para. 84(20))

[17] According to *Peter v. Beblow*, [1993] 1 S.C.R. 980, “equity and fairness should guide the court in determining the value and contributions made by the parties” (para. 105). In the case at bar, Ms. Ramirez does not come before this Court with “clean hands” in seeking the equitable remedy of an equal division of the debts in her name. In my view, given that she continues to hold a disproportionate share of the couple’s assets from their janitorial business, and given that Mr. Toquero was never properly compensated for his contributions to that business, I conclude that it is fair and equitable that she should continue to be responsible for the debts in her name.

[18] With these rulings, I am hopeful that counsel will be able to resolve the division of the remaining assets and debts. However, I will remain seized of the matter in the event that further directions are required.

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GOWER J.