Robertson v Robertson, 2025 NWTSC 46

Date: 2025 06 27
Docket: S-1-DV-2021-104 790

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BOZENA BREZNIK ROBERTSON

Petitioner

-and-

DOUGLAS ARTHUR ROBERTSON

Respondent

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] This is a divorce action filed by Bozena Robertson ("the Petitioner"). The Respondent, Douglas Robertson ("the Respondent") filed an application seeking the following relief:

(i) Equalization of net family property in accordance with the *Family Law Act*; and

(ii) Termination of spousal support payable to the Petitioner.

[2] There are a number of issues arising on this application. They can be summarized as follows:

(a)The mechanism that should be used to divide the Respondent's pension. Specifically, whether it should be included in the equalization calculation under the *Family Law Act*, SNWT 1997 c 18 (*FLA*) or divided pursuant to the *Pension Benefits Division Act* SC 1992 c46, Sch II (*PBDA*)

(b) Whether the pension amount should be reduced to account for future tax consequences, and if so, the amount of the reduction;

(c) Whether an unequal division of property is warranted in relation to certain debts;

(d) The valuation of certain assets for the purpose of equalization, including what commencement date should be used for the calculation of family property;

(e) Whether spousal support should continue; and

(f) Whether spousal support should be adjusted retroactively.

BACKGROUND

[3] The parties were married on July 23, 2011. The Petitioner is originally from Slovenia. She met the Respondent on a trip to Canada in July of 2010 and the parties began dating. The Petitioner decided to remain in Canada and moved in with the Respondent in his home in Fort Smith in October 2010 and he proposed marriage in February 2011. The Petitioner remained in Canada after marrying the Respondent and eventually became a Canadian Citizen. They separated on February 26, 2020, although continued to cohabit until September 2021. Following their separation, the Petitioner returned to Slovenia and has remained living there since November 2021.

[4] The Respondent was 55 years old at the date of marriage and was 64 years old at the date of separation. The Petitioner was 53 years at the date of the marriage and 62 at the date of separation.

[5] The Respondent worked as a public servant during his career and held positions with the Government of Canada, Town of Fort Smith, and the Government of the Northwest Territories. He retired on November 18, 2022 at age 66. He had 29 years of pensionable service at the date of retirement.

[6] The Petitioner operated a massage therapy business out of the family home during the marriage and had worked in this capacity prior to moving to Canada.

[7] On June 30, 2021, the Petitioner filed a Petition for Divorce seeking an equalization of family property and spousal support. The parties were granted a divorce which took effect January 21, 2022.

[8] On March 3, 2022, an interim order was granted requiring the Respondent to pay monthly spousal support of $1000 starting February 1, 2022. On May 11, 2023, the Court reduced the monthly spousal support payable by the Respondent to $700 per month starting June 1, 2023.

[9] There are no other interim orders. There are no children of the marriage. The only outstanding issues relate to equalization of family property and spousal support.

EQUALIZATION OF FAMILY PROPERTY

General Principles

[10] Section 35 of the *FLA* sets out the regime for equalization of family property. It operates on a presumption that both spouses are entitled to share equally in the increase of value of their net worth during the marriage.

[11] To determine whether an equalization payment is owed to either party, the parties must compare each spouses' net worth at the beginning of the relationship ("the commencement date") to their net worth at the end of the relationship ("the valuation date").

[12] The net family property of a spouse is calculated by valuing all property that the spouse owns on the valuation date and deducting from that amount:

> (a) the spouse's debts and other liabilities on valuation date;
>
> (b) the value, calculated as of the commencement date, of property that the spouse owned on that date after deducting the spouse's debts and other liabilities on that date.

There are other deductions available under the *FLA* such as gifts and inheritances but they are not applicable in this case.

Evidence on Family Property

[13] The Respondent entered an updated Net Family Property Statement into evidence at trial. The Net Family Property Statement includes a value for the Respondent's pension. The pension is reduced by 25% for future tax consequences, which will be addressed later in these reasons.

[14] Based on the Respondent's calculations, he will owe the Petitioner payment in the amount of $85, 322.14 to equalize family property.

[15] The Petitioner disagrees with the Respondent's proposed equalization calculation on three specific grounds. First, she argues that the pension should be omitted from the equalization calculation under the *FLA* and instead divided at the source, pursuant to the *PBDA.* Second, she takes issue with certain debts that were incurred during the marriage and seeks to omit those debts from the calculation. Third, she challenges the valuation of the motorcycle owned by the Respondent prior to the date of marriage.

Pension Benefits Division Act

[16] The *PBDA* applies to certain federal pensions, including pensions administered under the *Public Service Superannuation Act*, RSC, 1985, c P-36. The Respondent's pension is a Government of the Northwest Territories pension administered under the *Public Service Superannuation Act* and as such the *PBDA* applies.

[17] There is a mechanism under the *PBDA* whereby spouses who have been divorced or separated for at least one year may apply for a division of pension benefits. Section 8(1)(a) of the *PBDA* provides that an amount representing fifty percent of the value of the pension benefits that have been accrued by the pension member, during the period subject to division, shall be transferred to a spouse or former spouse upon an application being submitted. Payments under the *PBDA* are lump sum payments deposited into a locked-in retirement vehicle.

[18] The Petitioner asserts that she is entitled to have the Respondent's pension divided under the *PBDA* rather than through an *FLA* equalization payment. The Petitioner references section 3 of the *PBDA*, which states that:

> In the event of any inconsistency between this *Act* and the regulations made under this *Act* and any other law, this *Act* and the regulations shall prevail to the extent of the inconsistency.

She argues that by operation of s 3, the *PBDA* must be applied for the division of the Respondent's pension.

[19] I agree s 3 confirms the *PBDA* is paramount where there is a conflict arising between the *FLA* and *PBDA*. However, courts must strive to interpret related federal and territorial enactments in a harmonious manner (*Fawcett v Fawcett*, 2018 ONCA 150). It is not reasonable to assume that a conflict exists, simply because the *PBDA* and *FLA* both provide mechanisms for pension division and aim to ensure equitable distribution. In my view, no actual conflict exists between the two legislative regimes and as such the paramountcy doctrine is not engaged.

[20] In *Eddie v Canada (Attorney General) (TD)*, 2003 FCT 577, the court confirmed that marital property division falls under provincial and territorial jurisdiction and held the *PBDA* is not mandatory but serves as a mechanism to facilitate federal pension division when necessary. This principle is also reinforced in *HEDC v RMC*, 2003 BCCA 420 at para 42 and *Verdun v Dorrance*, 2006 NSSC 305.

[21] In *Johnsen v Johnsen*, 2012 ONSC 3079, the court notes that the *PBDA* does not operate as a standalone piece of legislation that excludes that application of provincial legislation in the context of equalizing net family property (paras 16 and 26). Further, the *PBDA* contemplates that pension division can be achieved by other means (s 6(2)b).

[22] Pensions are included in the definition of property under the *FLA*. It therefore follows that pensions would be included in equalization calculations under this regime. In *Fair v Jones*, 1999 CanLII 4436 (NWT SC) this court emphasized that the definition of property in the *FLA* includes "all conceivable types of property" (para 33) and Justice Vertes commented on the nature of equalization payments at para 35:

> The *FLA* does not create a share in ownership of property as such but a share in property value through an equalizing transfer of money. It is a debtor-creditor statute, not a true property statute. It provides for the payment of money so as to equalize the value of the assets for each spouse.

[23] The Respondent has indicated his preference to include his pension in the equalization calculation under the *FLA*. He has made arrangements to re-finance his home in order to pay the Petitioner. As such, a division under the *PBDA* is not strictly required for him to meet his obligations. This is also consistent with the underlying purpose of the *FLA* as noted in *Fair v Jones*.

[24] To divide the pension through the *PBDA* would diminish the Respondent's pension annuity, thereby decreasing his monthly income. The advantage for the

Petitioner is that she would receive the full amount in a lump sum, which would be placed in a locked-in retirement vehicle, from which she can draw an income. However, no specific disadvantage or prejudice was identified to her receiving the pension value through an equalization payment. If that were the case, she would have the freedom to invest the funds at her discretion.

[25] There is no compelling reason to demand that the pension be divided under the *PBDA* when the Respondent has liquid assets sufficient to satisfy the equalization payment.

[26] The Petitioner does raise concerns about the tax implications of this method of division which I will now address.

Valuation of Pension and Tax Implications

[27] Pension valuation is typically calculated after deducting the present value of expected future income taxes. This is similar to other taxable assets such as RRSPs.

[28] The pension amount is noted at Line 25 of the Net Family Property Statement submitted into evidence. The value recorded is $185,000. It is then reduced by 25% ($46,275.26) to account for future tax consequences to the Respondent, which is noted at Line 65.

[29] The Petitioner disputes the reduction of the pension amount. It is her position that only 50% of the pension's value (representing the Respondent's share) should be reduced for future tax consequences. She submits that she will be required to pay tax on the pension amount upon receipt, and as such she will be penalized twice if she is taxed at equalization.

[30] The Respondent submits that if the equalization payment is made in a lump sum as he proposes, there should be no future tax consequences to the Petitioner.

[31] I agree with the Respondent that equalization payments are generally not taxable to the recipient and not deductible by the payor, as they are considered a redistribution of existing assets rather than income.

[32] If the Petitioner were to be paid directly under the *PBDA* mechanism, there may be future tax implications to her, although there is not specific evidence before me on that point. If the payment is made as part of the equalization payment as proposed by the Respondent, there are no negative tax implications to the Petitioner

that I am aware of. In this scenario, the case law supports a reduction in the pension amount prior to equalization.

[33] The Respondent relies on the case of *Sengmueller v Sengmueller*, 1994 CanLII 8711 (ON CA) [*Sengmueller*] as authority allowing a court to consider the notional sale and disposition costs of an asset, including future tax liability of a pension. This approach has been applied consistently in subsequent cases.

[34] In *Sengmeuller* the court of appeal set out three rules in assessing the notional costs of disposition of an asset:

> (1) Apply the overriding principle of fairness, i.e., that costs of disposition as well as benefits should be shared equally;
>
> (2) Deal with each case on its own facts, considering the nature of the assets involved, evidence as to the probable timing of their disposition, and the probable tax and other costs of disposition at that time, discounted as of valuation day; and
>
> (3) Deduct disposition costs before arriving at the equalization payment, except in the situation where "it is not clear when, if ever" there will be a realization of the property.

[35] The Respondent proposes a figure of 25% as a reduction for future tax consequences. In argument he noted that there is a typical range in the case law of 20-30% reduction, and he relies on cases such as *Brown v Brown* 2004 Canlii 12750 (ON SC) (20%), *Conway v Conway*, 2005 CanLII 14136 (ON SC) (20%), *Baiu v Baiu*, 2014 ONSC 216 (30%), and *McCulloch v McCulloch*, 2003 ABQB 432 (25%).

[36] It is to the payor's advantage to have the greatest reduction possible, as this keeps the most money in their own pocket on equalization. To over-estimate future tax consequences will be unfair to the recipient. As such, it is important to consider the evidence on each specific case to support the proposed reduction.

[37] In the case of *Sundberg v Sundberg*, 2025 ONSC 2150 [*Sundberg*] the payor was suggesting 20% as the appropriate rate for calculating notional tax. There was no evidence of his retirement income or marginal tax rate on that income. In *Sundberg*, the court quoted from *Virc v Blair*, 2016 ONSC 49:

> Courts have adopted various approaches to deal with the lack of evidence in these cases. In some cases, the Court will allow a deduction in the absence of any evidence

> and will simply insert a percentage without further discussion. In other cases, a deduction may be allowed but at a reduced rate. However, in some cases the Court disallows the deduction altogether due to a lack of evidence.

[38] In this case the Respondent admits that the most accurate indicator of future tax consequences would be to review his 2024 tax return, which would offer an accurate picture of the tax he pays on his pension income. This was not submitted into evidence. However, he did provide evidence that his estimated income for 2024 was $44,000 based on his 2024 T4A. He testified that he did not take any contract work in 2024 and does not plan to in the future, as such his income should be stable at this amount.

[39] In this case there is reliable evidence regarding the Respondent's pension income information. On this amount, he would pay tax at the lowest marginal tax rate in the Northwest Territories, which is approximately 20% when combining federal and territorial taxes.

[40] As such, I am prepared to reduce the pension amount by 20%.

<u>VALUATION ISSUES</u>

Commencement Date

[41] The Petitioner argues that the commencement date for valuation of the Respondent's pension should be October 1, 2010, they day they began cohabiting. She relies on the document titled Canada Pension Plan [CPP] Credit Spilt Approval dated March 18, 2023, which was submitted into evidence at trial. The date used for CPP credit splitting was October 1, 2020. This was based on information the Petitioner included in her application to Service Canada.

[42] The Petitioner agrees that the date of marriage being July 23, 2011, may be used for other family property. The Respondent submits the date of marriage is the appropriate commencement date for all property, including the pension.

[43] Commencement date is defined at s. 33 of the FLA:

> "commencement date" means, in respect of a spousal relationship, the earlier of the dates on which the spouses (a) were married, or (b) commenced cohabitation outside marriage for a period or in a relationship sufficient to establish their spousal relationship.

[44] If the parties cohabited in a spousal relationship prior to marriage, the date at which the spousal relationship was established shall be used as the commencement date. In the *FLA*, "spouse" is defined as someone who is married, or someone who has been cohabitating with another person for two years (if there are no children).

[45] To establish a "spousal relationship" prior to marriage, the parties would have to have been cohabiting for two years prior to getting married. That is not the case here. The parties lived together for less than a year before marrying. Therefore, on these facts, the commencement date is the date of marriage.

[46] In my view, there is a singular commencement date. It is not reasonable to set an alternative commencement date for one specific asset. The fact that the date of cohabitation was used for the splitting of CPP credits does not persuade me otherwise.

REQUEST FOR UNEQUAL DIVISION

[47] The Petitioner disputes the inclusion of certain debts in the Net Family Property Statement:

- The loan on the 2018 Dodge Ram Truck (Line 61)
- The loan on the Camper (Line 63)
- The inclusion of the BMO personal line of credit (Line 62)

[48] The Petitioner requests an unequal division of property excluding these debts. Her evidence is that at the time these purchases were made, and associated debts incurred, their marriage was in decline. She states that she did not agree to the purchase of the truck and camper because they were too expensive and at the time she knew the Respondent was having an extramarital affair. She says she was not included on financial decisions and certain financial matters were concealed from her during the marriage.

[49] Similarly, the Petitioner argues that the BMO line of credit is debt she did not agree to and should be excluded from the equalization payment. She says the credit line was for the Respondent's own personal expenses, and he did not consult her. She alleges the Respondent went on hunting and sailing trips in 2018 and 2019 and incurred debt on the credit line as a result, however there is no specific evidence of this. On cross examination the Respondent could not remember exactly what the

credit line was used for but asserts it was to cover general expenses for the household.

[50] The legal test for unequal division of property is set out at s. 36(6) of the *FLA*. It is a high threshold to meet; the court must conclude it is "unconscionable" not to award an unequal division. The test is described as "more than hardship, more than unfair, more than inequitable. It should reach the extent of outrageous." (see *Bahadur v Bahadur*, 2018 ONSC 126 at para 44, citing *Weddel v Weddel*, 2006 CanLII 21589)

[51] The party seeking the unequal burden bears the burden of proving this threshold has been met. Section 36(6) provides examples of scenarios where an unequal division may be appropriate. The one that most closely aligns with the Petitioner's argument is 36(6)(b) and (c):

> (b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
>
> (c) a spouse's intentional or reckless depletion of his or her net family property;

[52] In my view the Petitioner's disagreement with the purchase or the truck and camper, or lack of knowledge in advance, does not rise to the level of unconscionability. I accept that a truck and camper are fairly standard purchases for a family living in Fort Smith. It is not clear from the evidence that the purchases were reckless, made in bad faith, or with an intention towards depleting the net family property. The debts were incurred during the marriage. As such, they will be included in the net family property calculation, as contemplated by the *FLA* scheme.

Other Valuation Issues

(i) Motorcycle

[53] At trial the Parties made submissions about the value of the 2010 Harley Davidson Motorcycle. This is an asset he acquired in June or July of 2010, before the parties were cohabitating, and as such is an exclusion, effectively reducing the equalization amount. In the Net Family Property Statement the motorcycle is valued at $44,759 on the commencement date, which was the purchase price in June of 2010.

[54] The value of the motorcycle at the valuation date is listed at $13,000. The Respondent gave evidence at trial that he called the Harley Davidson dealership and the person he spoke with told him the value was $13,000, based on its condition at that time.

[55] In his April 2023 Statement of Property, the Respondent listed the value of the motorcycle at $30,000 at the commencement date. He did not have a clear explanation for this change in value, but testified he believes the value of $44,759 reflected in the updated Net Family Property Statement is more accurate.

[56] In general, the Respondent presents fairly weak evidence to support valuation of the vehicles in his possession. He was not able to provide appraisals. Rather, he relies on hearsay evidence. However, the Petitioner did not submit any evidence regarding the value of these items. As such it is difficult for the court to determine the value with accuracy.

[57] In the circumstances I am prepared to account for some depreciation of the motorcycle from June 2010 to the commencement date. I therefore value the motorcycle at $30,000 at the commencement date, which is consistent with the Respondent's prior Statement of Property. I accept the Respondent's evidence that the value at the date of separation was $13,000, in the absence of evidence to the contrary.

(ii) Other Property

[58] The Petitioner accepts the valuation of the remaining property, as set out in the Net Family Property Statement. The Respondent's counsel questioned the Petitioner on each individual item and she either agreed with the amount listed or indicated that she did not know the value. She did not submit any independent evidence regarding property values. As such, the remaining values in the Net Family Property Statement are to be used for the equalization calculation.

SPOUSAL SUPPORT

[59] The parties were married for 8.5 years. When they separated, the Respondent was still working. In 2022, there was an initial spousal support order of $1000 per month. This was adjusted to $700 per month in 2023, following the Respondent's retirement.

[60] The objectives on variation of a spousal support order are set out in s.17(7) of the *Divorce Act*:

> **(a)** recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
>
> **(b)** apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> **(c)** relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
>
> **(d)** in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

Entitlement

[61] The basic premise underlying spousal support is to bring the overall standard of living between the two homes closer to equal following separation. This is balanced with a need for each party to ultimately become self-sufficient. The Petitioner has a non-compensatory claim for spousal support. She submits that she has no other means of self sufficiency following the breakdown of the marriage. Her claim is rooted in her lack of employability due to both injury and age.

[62] The Petitioner worked as a massage therapist before and during the marriage. She trained in certain massage techniques like Thai massage and abdominal massage during the marriage. She also trained as a doula in Slovenia and continued that training and certification in Canada.

[63] The Petitioner injured her back in 2018 which made work as a massage therapist impossible, and the injury continues to limit her ability to work. She also injured her shoulder in 2020 which has only recovered about 75%, by her estimation. When the COVID pandemic arose in 2020 she was not able to operate her business due to public health restrictions. She never returned to her work as a massage therapist, due to her injury. In addition to her injuries, she is now 67 years old and describes herself as unemployable in Slovenia due to her age.

[64] In April 2023, the Petitioner began receiving her Slovenian pension, which amounts to approximately $790 CAD per month. As a Canadian citizen, she also receives Canada Pension Plan payment of $196 CAD per month. She testified to

accepting payments from her adult children to help her set up her accommodations in Slovenia. She characterizes these payments as loans that she is obliged to repay.

[65] I accept her evidence that it is difficult to earn money given her age and her physical limitations. Although she has other post-secondary education in the field of economics it is not realistic for her to embark on a new career at this stage in her life. Further, she moved to Canada to pursue this relationship and upon separation had to bear the expense of returning to her home country of Slovenia, where she has family supports. There were significant costs associated with this relocation. I am therefore satisfied that the Petitioner is entitled to spousal support on a non-compensatory basis.

[66] However, the Respondent has been paying spousal support since February of 2022. To date he has paid $31,400 in support. He is now retired. It is generally accepted that retirement at the Respondent's age qualifies as a material change in circumstances affecting entitlement to spousal support. This is confirmed in cases such as *St-Jean v Fridgen*, 2017 ONSC 7680 and *P(D) v S(A)* 2021 NWTSC 30.

[67] In *Boston v Boston*, 2001 SCC 43, the Supreme Court of Canada held that while there is no absolute prohibition against using pension income for spousal support, courts should strive to avoid double recovery whenever possible.

[68] The Petitioner concedes that the spousal support payments should cease once the property equalization has been completed and she has received her share of the family property. She clarified at trial that she seeks a bridge period to allow her to adjust to this financial change.

[69] Considering the objectives set out in s.17 of the *Divorce Act*, and the specific circumstances of the Petitioner, it is reasonable to allow a short bridge period of spousal support after the equalization payment is made. However, such a bridge period must also take into account that the Respondent is now a pensioner and that any monies paid to the Petitioner for support will be drawn from his pension funds.

Retroactive Claim

[70] The Petitioner is also seeking retroactive spousal support from June 1, 2023 to April 1, 2025. She is seeking a retroactive increase from $700 a month to $1000 a month during this period. She alleges that the Respondent misrepresented his income when he sought to amend the spousal support order in 2023 and as such the order of $700 per month is too low.

[71] The initial spousal support order is dated March 3, 2022. The Respondent filed a variation application in January of 2023. At that time, he was retired and seeking to vary spousal support from $1000 per month to $700 per month while the remaining property issues between the parties were being resolved. Between the time the application materials were filed in January of 2023 and the application was heard in May of 2023, the Respondent took a contract position with Aurora College for thirteen weeks. However, he did not update the evidence regarding his income in advance of the hearing and the Aurora College income was not accounted for in calculating the reduction of interim spousal support.

[72] In my view it is reasonable to award the Petitioner some additional spousal support to reflect the lack of disclosure about the Aurora College income in 2023. There is no evidence of contract work or additional income beyond 2023, therefore, there is no basis to conclude that spousal support should be adjusted for 2024 or 2025 and I decline to do so.

[73] I am conscious of the relatively short length of the marriage and the significant spousal support that has already been paid. I am also conscious that the Respondent is now collecting his pension and that double-dipping into pension funds should be avoided where possible. However, in all the circumstances I am satisfied that a short period of continuing spousal support is warranted.

[74] The total retroactive claim for 2023 is $2100 (7 months x $300). Considering both the 2023 shortfall and the Petitioner's request for a bridge period, I direct the Respondent to continue paying $700 per month in spousal support for 3 months following the date of this judgment, at which time the obligation will terminate.

<u>CONCLUSION</u>

[75] I order the following:

1) The commencement date for calculation of net family property is the date of marriage: July 23, 2011.

2) The Respondent's pension should be included in the FLA equalization calculation.

3) The pension value should be reduced by 20% for future tax implications.

4) The motorcycle shall be valued at $30,000 at the commencement date.

5) The values in the Net Family Property Statement submitted into evidence at trial are otherwise confirmed and may be used to calculate equalization. If there is any dispute arising relating to the final calculation, the parties may set the matter for a further hearing.

6) Respondent shall continue to pay the Petitioner spousal support in the amount of $700 per month for July, August, and September 2025, after which spousal support obligations will terminate.

K. L. Taylor
J.S.C.

Dated at Yellowknife, NT, this
27th day of June, 2025

Counsel for the Petitioner: Self-Represented

Counsel for the Respondent: Paul Parker

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MEMORANDUM OF JUDGMENT OF
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