

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)	SUPPLEMENTARY
WILLIAM ANTHONY PEVECZ) REASONS FOR JUDGMENT)
	PLAINTIFF))
AND:) OF THE HONOURABLE)
LINDA LILLIAN PEVECZ)) MR. JUSTICE SMITH
	DEFENDANT))

Counsel for the Plaintiff: F.G. Potts
H. MacKenzie

Counsel for the Defendant K. F. Nordlinger, Q.C.

Place and Dates of Hearing: Vancouver, B.C.
December 22, 23, 1995

1 On May 25, 1995, I gave reasons for judgment in this matter. I dealt partially with the fair allocation of family assets between the parties pursuant to s. 51 of the Family Relations Act, R.S.B.C. 1979, c. 121 ("the Act"). I felt unable to arrive at a conclusion with respect to the compensation necessary to redress the inequality in the parties' division of their respective pensions. I left it to counsel and their actuarial experts to do further calculations to take into account the valuation date I chose and the effects of income tax on the pension valuations.

2 On June 9, 1995, Mr. Potts, counsel for the plaintiff, applied to reopen the trial on the issue of the effect of income taxes on the pension division. It was his position that if the effect of income taxes is to be taken into account to reduce the present values of the pensions, there should be a compensating "gross-up" for income taxes applied to the plaintiff's share. He said the result would be a substantial change in the pension values from those presented by the actuaries at the trial. I granted leave to reopen and these reasons are the result.

3 In my reasons of May 25, 1995, I contemplated a compensatory payment from the defendant to the plaintiff to remedy the unfair division of the pension rights. As a result of the further submissions of counsel, I have reconsidered and have come to the view that such an award would not achieve fairness. In the first place, it would be unfair to compel the defendant to pay cash now for future benefits that may not accrue to her. I appreciate that there is a 91% statistical chance that the defendant will predecease the plaintiff, but the converse is that there is a 9% chance that she will not live to collect any benefits from his pension. As well, other contingencies could come into play. For example, the plaintiff may lose her job, she may not get the salary increases assumed in the calculations, she may retire before the date assumed in the calculations, or the pension fund may go bankrupt. The actuarial calculations are based on many assumptions that may or may not turn out to be correct. In my earlier reasons for judgment I overlooked the contingencies associated with pension benefits.

4 Further, to require the defendant to come up with cash now to pay the plaintiff a sum to equalize the pension rights would impose financial hardship upon her. She would have to liquidate assets to make the payment and that liquidation would disproportionately affect her present financial circumstances. The result would be to leave her with non-pension assets worth substantially less than the assets in the plaintiff's hands. That would not be a fair result, having regard to s. 51(e) of the Act. In my earlier reasons I

overlooked the effect on Mrs. Pevecz's financial circumstances of her having to liquidate assets to pay the award.

5 The discrepancy in the pension division is attributable to the survivor's benefits Mrs. Pevecz will enjoy from Mr. Pevecz's pension if she survives him. The inequality can be remedied by a declaration that she holds a proportion of those benefits as they are received as trustee for Mr. Pevecz's estate. To that extent Mr. Pevecz will be relieved of the necessity of making provision for his present dependents from his current income, a relevant consideration pursuant to s. 51(e) of the Act.

6 The proportion to be held in trust will be a function of several factors, namely:

- (1) the present value at the date of Mr. Pevecz's death of the survivor benefits from his pension;
- (2) the present value at the date of Mr. Pevecz's death of the benefits payable from Mrs. Pevecz's pension;
- (3) the present value of Mrs. Pevecz's notional share in his pension actually received during his lifetime by Mr. Pevecz;
- (4) the present value of Mr. Pevecz's notional share in her pension actually received during his lifetime by Mrs. Pevecz.

7 Items (3) and (4) require some elaboration. Because I concluded that a fair division requires the pension earned by Mr. Pevecz prior to the marriage to be excluded, Mrs. Pevecz would be entitled on an equal division to one-half of 14/31sts of the value of Mr. Pevecz's pension, that is, to approximately 22.6% of the benefits payable under that plan. Mr. Pevecz has been receiving the full benefits since October, 1991. Thus, notionally, 22.6% of these benefits are the property of Mrs. Pevecz. As the fair division will be calculated as of Mr. Pevecz's date of death, she must be credited with the value of these notional payments received by him during his lifetime.

8 As for item (4), it is possible that Mr. Pevecz will live beyond Mrs. Pevecz's retirement date. As he is entitled to one-half of her pension benefits on an equal division, she will be receiving his notional one-half from the date of her retirement until his death. She must give his estate credit for the value of those payments at that date.

9 The measure of the inequality at Mr. Pevecz's death will be one-half of the sum of

- (1) the present value of the survivor benefits to be received by Mrs. Pevecz from his pension; and
- (2) the present value of her pension,

adjusted for value of the notional payments received by the parties in the meantime. The proportion of the survivor benefit payments to be held by Mrs. Pevecz as trustee for Mr. Pevecz's estate will be the proportion that the result of that calculation bears to the present value of the survivor benefits.

10 If Mrs. Pevecz should predecease Mr. Pevecz, which is highly unlikely, the receipt by him of her notional share of his pension between now and her death will roughly offset his notional share of the benefits he would be entitled to receive from her pension if it were divided equally between them.

11 The present values used in the calculation of the trust benefits will be net of income taxes payable. Mr. Potts submitted that the present values of the respective pensions should be ascertained without deduction for income tax payable in future on the benefits to be received. I cannot agree. For purposes of the Act, pension rights are considered to be property. The value of property is conventionally expressed as the price an objective, fully-informed, arms'-length purchaser would pay for it. That is necessarily net of liabilities associated with the property, including taxes. The present value calculations will be the result of a discounting of the anticipated benefit payments. Those payments will be subject to taxation when they are received and the effect of that taxation must be considered in arriving at the present values. Mr. Potts, relied on *Roberts v. Roberts* (1989), 20 R.F.L. (3d) 141 (B.C.S.C.), particularly at p. 150, and *May v.*

Yanitski (9 October 1192), Vancouver A903128 (S.C.), particularly at pp. 2-3, to support his submissions that tax effects should not be taken into account. I do not read those decisions as standing for the proposition that no allowance for future income taxes should be made as a matter of law. Rather, they are instances where fairness could be achieved without a rigorous application of valuation principles.

12 As I have decided that a compensatory award to adjust the pension division would not be appropriate, it is unnecessary to address the issue of tax gross-up on an award in favour of Mr. Pevecz.

13 The recent hearing has offered another opportunity to gauge the fairness of the division I have ordered. An overview of the result of the division shows that Mrs. Pevecz has non-pension assets of \$216,041 (\$310,473 - \$94,432). In addition, she has a 91% chance of receiving the non-trust portion of the survivor benefit of Mr. Pevecz's pension. She is 46 years old and earns in the order of \$4,000 per month. She has remarried to a man younger than herself, who is also an employee of B.C. Hydro, and they have no children nor any plans for children. She sold the matrimonial home and has purchased another home with her new husband. The home was encumbered by a mortgage in the amount of approximately \$150,000 at the time of trial, although it appeared from Mrs. Pevecz's testimony that she and her new husband have agreed that the mortgage is his responsibility.

14 Mr. Pevecz is left with non-pension assets of \$378,652 (\$284,220 + \$94,432). He is 66 years old and has pension income of about \$3,000 per month. In addition, he had about \$17,000 income in 1995, net of expenses and taxes, from his consulting business. Future consulting income depends on the availability of contracts and on his health. He has also remarried, to a woman 42 years old. She is presently unemployed. He stands in loco parentis to her two daughters, aged 14 and 18, who live with Mr. Pevecz and his new wife in the home they have purchased. According to Mr. Pevecz, the assessed value of the home is approximately \$380,000 and it is encumbered by a mortgage for about \$260,000.

15 Economic independence and self-sufficiency is a function of cash flow: Meier v. Meier (28 September 1995) Vancouver CA019296 (C.A.) at p. 13, para. 28. In the circumstances and having regard to the relevant factors, it is my view that the division I have proposed is a fair one.

16 In my reasons for judgment of May 25, 1995, I stated that the plaintiff is entitled to pre-judgment interest on the compensatory award, except for the \$20,000 adjustment for the increased value of the matrimonial home, from September 12, 1991, the date of the separation agreement, to October 7, 1994. Both counsel are dissatisfied with that disposition and seek different orders with respect to pre-judgment interest. Accordingly, I have reconsidered in light of their further submissions.

17 Mr. Potts now seeks pre-judgment interest on the \$20,000 adjustment on the value of the home from the date Mrs. Pevecz sold the home, June 23, 1993, and on the balance of the compensatory award from the date the action was commenced, June 3, 1993. He relies on Billingsley v. Billingsley (1991), 58 B.C.L.R. (2d) 329 (C.A.), where it was held that the Court Order Interest Act, R.S.B.C. 1979, c. 76 applied to the compensatory award made in that case pursuant to s. 52(2)(c) of the Act.

18 In Billingsley, the Court was concerned with a compensatory award to the wife for her share of family assets that her husband had unilaterally disposed of. The situation here is quite different. As was pointed out by Ms. Nordlinger in her submission, Mr. Pevecz agreed to the division of assets that he subsequently attacked as unfair. As well, Mrs. Pevecz has acted in reliance on that agreement. The circumstances are such that Mr. Pevecz was kept out of his full share of the family assets because of his agreement, not because of any unilateral action by Mrs. Pevecz. Another relevant factor in this regard is that the delay since May, 1995, has been occasioned by the plaintiff's successful application to reopen the trial. Accordingly, an award of pre-judgment interest is not appropriate.

19 Moreover, the compensatory award is made pursuant to s. 52(2)(c) of the Act to adjust the division of family assets. This process is a rough assessment of fairness, not an arithmetical

calculation. In my view, it is not necessary to add interest to the compensatory award to achieve a fair division.

20 JUDGMENT

1. There will be a declaration pursuant to s. 51 of the Act that the inducement fund be vested in the plaintiff in its entirety;
2. There will be a declaration that the defendant is trustee for the plaintiff's estate of a proportion of any death benefit she may receive from the plaintiff's pension on his death calculated as I have indicated;
3. There will be a compensation payment of \$94,432 from the defendant to the plaintiff pursuant to s. 52(2)(c) of the Act to adjust the division of the non-pension assets.

"K.J. Smith, J."

January 29, 1996
Vancouver, B.C.