

CANADA / JUDGMENT

Andersen v. Andersen

2005 BCCA 208

COURT

British Columbia Court of Appeal

DECIDED

8 April 2005

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2005 BCCA 208 Anderson v. Anderson COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Andersen v. Andersen, 2005 BCCA 208 Date: 20050408 Docket: CA031773 Between: Michele Marie Andersen also known as Michele Marie Mitchell Respondent (Plaintiff) And Robin Kent Andersen Appellant (Defendant) Before: The Honourable Madam Justice Southin The Honourable Mr. Justice Braidwood The Honourable Mr. Justice Oppal J. O. Richardson Counsel for the Appellant D. MacKinnon Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia 16th February, 2005 Place and Date of Judgment: Vancouver, British Columbia 8th April, 2005 Written Reasons by: The Honourable Madam Justice Southin Concurred in by: The Honourable Mr. Justice Braidwood The Honourable Mr. Justice Oppal Reasons for Judgment of the Honourable Madam Justice Southin:

- [1] Robin Kent Andersen appeals from the judgment of the Honourable Madam Justice Holmes pronounced 4th March, 2004, and entered 12th August 2004, concerning child support and spousal maintenance, division of family assets, and division of the proceeds of the sale of the family home.
- [2] These are the terms of the judgment in issue:
 3. the defendant shall pay to the plaintiff the sum of \$2,195.00 per month for the base support for the four Children of the marriage, payable the 1st day of each and every month commencing on the 1st day April, 2004 and continuing thereafter for as long as the Children are children of the marriage as defined by the Divorce Act;
 4. the defendant's base support for the four Children of the marriage shall be reduced to \$1,846.00 per month for the months during which the child, Joceline Katrine Andersen, born April 10, 1985, lives elsewhere while attending university;
 5. in addition to the base support the parties shall share proportionately to their incomes the Children's reasonable extraordinary expenses, which include:
 - a) Melisande's riding and horse-related expenses for lessons and stabling, which are currently \$816.00 per month;

- b) in addition to riding and horse related expenses, occasional veterinary fees and tack fees associated with maintaining a horse, are also extraordinary expenses for the purposes of this Order;
- c) reasonable costs of post-secondary education for the child, Joceline, to be agreed between the parties, subject to Joceline's obligation to make reasonable efforts to reduce the costs of her education by applying for available bursaries or scholarships, and by contributing her summer earnings, with liberty to apply;
- d) the defendant shall maintain the Children on such extended medical and dental plans available through his employment and the parties shall share proportionately to their incomes the Children's medical, dental or prescription expenses for the Children that are not otherwise indemnified through the extended medical and dental plans;
- e) commencing April 15, 2004 and every six (6) months thereafter, the plaintiff shall provide to the defendant invoices or receipts for special or extraordinary expenses and the plaintiff is to advise the defendant immediately if those expenses terminate or change in amount;
- 6. the defendant, ROBIN KENT ANDERSEN shall pay spousal maintenance to the plaintiff, MICHELE MARIE ANDERSEN also known as MICHELE MARIE MITCHELL, in the sum of \$3,000.00 per month commencing on the 1st day of April, 2004 and monthly thereafter until further Order of the Court or agreement of the parties; * * *
- 20. the proceeds of sale of the Sorrento Property be divided as follows:
 - a) real estate commission;
 - b) legal fees and adjustments on sale;
 - c) \$9,300.00 to the plaintiff to repay the line of credit debt incurred by the plaintiff;
 - d) \$3,000.00 to the plaintiff to repay the loan from the plaintiff's aunt;
 - e) the remainder to be divided as follows:
 - (i) 70% of the proceeds are payable to the plaintiff, and (ii) the remainder to the defendant. * * *
- 22. the defendant shall pay compensation to the plaintiff (hereinafter referred to as the "Compensation Amount") regarding her interest in the Dental Practice, currently operated as Dr. Robin K. Andersen Inc. (hereinafter referred to as the "Dental Practice") as follows:
 - a) \$14,165.00 representing her one half interest in the shares of the Dental Practice, based on a tentative value of \$28,311.00;
 - b) \$56,933.00 representing her one half interest in the \$113,985.00 shareholder loan to the Dental Practice;

23. if the defendant sells or transfers the Dental Practice or its assets within three (3) years of delivering the compensating amount to the plaintiff as described above, the plaintiff shall be entitled to half of any proceeds reflecting a higher value of the shares;
24. in the event of such a sale or transfer within three (3) years as described above, the defendant shall provide the plaintiff or her representative full details of the sale and financial information relating to the Dental Practice or its assets and the practice from the date of listing through to the time of the sale; * * *
27. As between the parties, the parties be jointly responsible for the repayment of Verne Andersen's funds, except that the defendant be solely responsible for \$18,616.00 of the funds and that the defendant shall be solely responsible for the payment of any interest accrued on the monies;
- [3] As the reasons of the learned judge are reported, (2004), 25 B.C.L.R. (4th) 132, 2004 BCSC 300 (supplementary reasons: (2004), 30 B.C.L.R. (4th) 189, 2004 BCSC 881), I shall advert only to such part of the reasons as may be necessary to elucidate the points in issue.
- [4] One preliminary comment is appropriate. From a reading of the transcript, it is obvious that these parties have lived beyond their means and neither they nor their children should expect to maintain the style of life they enjoyed before the breakdown of the marriage.
- ISSUES ON APPEAL
- [5] The appellant, in his factum, asserts:
1. That the learned trial judge erred in fact and in law in determining the annual income of Dr. Andersen.
 2. That the consequential orders for spousal and child maintenance cannot be sustained as they involve an assessment based on an erroneous determination of the means of Dr. Andersen.
 3. That the approach taken by the learned trial judge to issues of spousal and child maintenance can only be consistent with an apportionment of 100% of the dental practice to Dr. Andersen.
 4. That the learned trial judge erred in re-apportioning the family home.
 5. That the learned trial judge erred in holding Dr. Andersen solely responsible for the interest on the joint family debt owed to Verne Andersen. ERRORS ALLEGED - 1. and 2.
- [6] At paragraphs 140-162, the learned judge addressed the respondent's income under the Child Support Guidelines and fixed that income at \$120,000, an amount considerably in excess of his income essentially derived from his dental practice, as that income appeared on his tax returns.
- [7] By the Guidelines: Determination of annual income

-
15. (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20. * * * Calculation of annual income
16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III. SOR/2000-337, s. 3. * * * Shareholder, director or officer
18. (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
 - (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income. Adjustment to corporation's pre-tax income
- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances. Imputing income
19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following: * * *
- (g) the spouse unreasonably deducts expenses from income; * * * Reasonableness of expenses
 - (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act. SOR/2000-337, s. 5.
- [8] In his factum, Mr. Richardson says:
29. It is submitted that the law requires that the income be determined by the tax returns of the spouse save and except when any one or more of a number of circumstances exist that require the basic income to be adjusted. If the circumstances for an adjustment are not present, it is submitted that it would violate Section 15 to adjust the income on a "more generalized assessment". In the present case, there is no evidence of circumstances that would allow the learned trial judge to take the approach that she did.
- [9] In support of that assertion, Mr. Richardson took us through some of the evidence.
-

- [10] But on the unusual facts of this case, I do not see how the learned judge could do other than what she did. Central to her determination of \$120,000, as I read her reasons, are paragraphs 157 and 158.
- [11] At paragraph 157, the learned judge noted, first, that the appellant, in the year 2002, had in his practice an associate who earned between \$96,600 and \$124,200 on billings of \$276,000 and, secondly, that the appellant's billings were \$414,000.
- [12] She then said:
- [158] I am unable to conclude that over the years Dr. Andersen elected to continue in a practice from which his own earnings fell below those of his main associate. If the practice was so unremunerative for Dr. Andersen, he would not have invested \$84,000 in new equipment for it in 2002.
- [13] Exactly. ERRORS ALLEGED - 3.
- [14] That brings me to the third alleged error, which addresses itself to terms 22, 23 and 24 of the judgment.
- [15] Here, the essence of the argument is that the dental practice is the goose which will lay the golden eggs of child support and spousal support.
- [16] As I understand the learned judge's reasons, the order in term 22 is meant to represent one-half the value of the practice as she determined it at trial. I see nothing in the reasons from which one could infer that counsel at the trial (not Mr. Richardson) submitted to the learned judge that there should be a reapportionment in favour of the appellant. The argument about the practice was its valuation. That being so, I would not interfere with term 22.
- [17] But although Mr. Richardson did not directly attack terms 23 and 24, I take his attack generally to encompass the proposition that those terms ought not to have been pronounced. In order to meet all his obligations under the judgment, the appellant may well find it necessary to work a great deal harder than he had in the years before the trial. If he does, the increase, if any, in the value of the practice should accrue to him. ERRORS ALLEGED - 4.
- [18] The fourth alleged error is the reapportionment by the learned judge of the proceeds of sale of the matrimonial home in favour of the respondent.
- [19] The nub of the learned judge's reasons on this point is at paragraph 119 when read with the antecedent paragraphs.
- [20] By the Family Relations Act, s. 65(1): 65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to * * *

- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse, the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.
- [21] On the evidence, 70% of the net sale proceeds of the matrimonial home (valued as of the date of trial) would be about \$400,000.
- [22] While another judge might have left the apportionment of the house at the presumptive equal division, I am not able to say that the learned judge committed reversible error in the order which she made. ERRORS ALLEGED - 5.
- [23] I turn, finally, to the fifth alleged error which addresses term 27. Neither party asked us to delete that term in its entirety.
- [24] What led to the order is recounted in paragraphs 72-100 of the learned judge's reasons.
- [25] Because the learned judge ordered that a copy of her reasons should be sent to the Public Trustee, I consider some comment is in order lest it be inferred that this Court considers that everything which the learned judge said, or which might be inferred from what she said, is legally correct as between Verne Andersen, on the one hand, and the appellant and the respondent, on the other.
- [26] The first sum of money to come into the appellant's hands, \$65,000, came from the appellant's parents in 1982. Of it, the appellant said it was "earmarked by my parents for Verne".
- [27] It is not contrary to law for parents to hand over a sum of money to one child with the intention of imposing on that child not a duty enforceable either at law or in equity but a moral duty - a duty of honour - to use that money for the benefit of another child. If that is what happened here, and it appears so, the appellant's dealings with that sum of money are no business of the Public Trustee. If the Public Trustee chooses to assert the duty to be legal rather than moral, the issue of the nature of the duty will have to be determined in proceedings below.
- [28] As to the settlement from the Government of Alberta of \$165,000, received by the appellant in December 1999, other considerations would appear to apply. The evidence does not disclose how the appellant came into possession of it.
- [29] On this point, what the appellant says is:
64. The learned trial judge had held that with the exception of a small portion of the debt (\$18,616.00), the debt "...generated funds that supported the family, whether directly or by way of the dental practice. [paragraph 92]. In paragraph 98, she makes the order that Dr.

Andersen is responsible for the payment of the interest on the basis that "...he failed to repay it when funds were available to do so." [paragraph 96]. This is simply inconsistent. If one has the advantage of half the value of a fund of money, one must bear half the costs of obtaining that fund of money. If Dr. Andersen would have paid the monies back, both parties would be poorer by an equal amount and they would have been out the equal use of the assets over the period of time that the loan has been outstanding. This reapportionment does not alleviate unfairness; it creates unfairness.

[30] To this, the respondent replies:

34. The finding of the court that Dr. Andersen utilized his brother's funds without consulting with Ms. Andersen or that Dr. Andersen made unilateral decision in relation to incurring the debt is relevant under section 65(1)(f) being it is a circumstance relating to the "acquisition, preservation, maintenance, improvement or use of the property" under section 65.1(f).

35. The court is at liberty to review liability for debt in the context of section 65(1)(f). See LBM v. SNM, 2003 BCSC 1680, para. 64).

[31] I have to say, with all respect, that I am unable to find any provision in Part 5 of the Family Relations Act authorizing what might be called a stand alone order of this kind.

[32] The learned judge might have taken the possibility of interest being payable into account in her reapportionment of, let us say, the matrimonial home, but she did not do so.

[33] I would therefore delete from term 27 the reference to interest. SUMMARY

[34] To sum up, therefore, I would allow the appeal to the extent only of setting aside terms 23 and 24 of the judgment and the words "and that the defendant shall be solely responsible for the payment of any interest accrued on the monies" from term 27.

[35] No costs. "The Honourable Madam Justice Southin" I agree: "The Honourable Mr. Justice Braidwood" I agree: "The Honourable Mr. Justice Oppal" Signed: April 6, 2005

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/05/02/2005bccca0208.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/andersen-v-andersen-2005>

Prepared on 29 October 2026 · Esheria