

CANADA / JUDGMENT

# Cook v. Cook

2002 BCCA 232

## COURT

British Columbia Court of Appeal

## DECIDED

12 April 2002

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2002BCCA0232 Citation: Cook v. Cook Date: 20020412 2002 BCCA 232 Docket: CA028951 Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA BETWEEN: TRUDY CHARLENE COOK APPELLANT (PLAINTIFF) AND: WARREN MARK COOK RESPONDENT (DEFENDANT) Before: The Honourable Mr. Justice Hall The Honourable Madam Justice Saunders The Honourable Mr. Justice Thackray D.F. Tracy Counsel for the Appellant D.R. Bennett Counsel for London Drugs Limited Place and Date of Hearing: Victoria, British Columbia March 15, 2002 Place and Date of Judgment: Vancouver, British Columbia April 12, 2002 Written Reasons by: The Honourable Madam Justice Saunders Concluded in by: The Honourable Mr. Justice Hall The Honourable Mr. Justice Thackray Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] This appeal concerns the interaction between an order made under the Family Relations Act and the terms of a registered retirement savings plan established as part of a benefit package earned through employment.
- [2] Mr. Cook, through his employer London Drugs Limited, has two registered retirement savings plan accounts. They are funded by contributions from Mr. Cook and matching contributions from his employer. One account is known as the Employee Basic Account and the other as the Employer Basic Account.
- [3] Mrs. and Mr. Cook, as part of a settlement of the division of their assets, agreed to equalize their registered retirement savings plan holdings. The terms of the agreement were incorporated into a consent court order that provides:
9. THIS COURT FURTHER ORDERS AND BY CONSENT that the parties' RRSPs will be equalized as follows:
- a) The parties will exchange concurrent statements for all their respective RRSPs as of the triggering event, October 27, 1999;
- b) The party with more registered funds in his or her name will transfer, by way of spousal rollover pursuant to Section 116 of the Income Tax Act, one-half the difference to the other so that, after the transfer, the parties will each have equal amounts of registered funds as of the dates of the concurrent statements; 10. THIS COURT FURTHER ORDERS AND BY CONSENT that, to adjust for all other matrimonial property issues between them and child

and spousal support arrears, the Defendant will immediately transfer to the Plaintiff, pursuant to Section 116 of the Income Tax Act, additional registered funds in the amount of \$8,743.00;

- [4] There is no dispute concerning the transfer of funds from the Employee Basic Account. However, that transfer will not equalize RRSP holdings. Equalization requires transfer to Mrs. Cook of a portion of the funds in the Employer Basic Account. Mr. Cook has co-operated with Mrs. Cook to effect a transfer of a portion of the Employer Basic Account, but London Drugs has taken the position that the terms of the account do not allow him to withdraw funds unless he resigns or retires, and that Mrs. Cook is similarly restricted. On this basis it has declined to effect the transfer agreed by Mr. and Mrs. Cook and included in the consent order.
- [5] Contending that London Drugs was required to transfer the funds to her, Mrs. Cook applied to the Supreme Court of British Columbia for an order compelling the transfer to her of a portion of Mr. Cook's Employer Basic Account. The learned chambers judge, considering the terms of the RRSP plan, concluded that London Drugs was not required to do so and dismissed Mrs. Cook's application. Mrs. Cook appeals that order.
- [6] The program establishing the registered retirement savings plans was accurately described by the chambers judge: The London Drugs Program is set out in a document entitled the "Personal Plus Retirement Program for Employees of London Drugs Limited", dated September 25, 1991. The purpose of the Program is to assist employees of the company in making financial provision for their retirement: 2.01. Each employee must complete an enrolment form to commence membership: 3.06. All amounts allocated under the Program to the Accounts on behalf of individual Members vest irrevocably in the respective Member immediately: 5.05. Article 7 of the Program deals specifically with benefits under the Program. A Member may withdraw some or all of the funds in the Employee Basic Account while remaining in the employment of the Company: 7.01. Members are prohibited from withdrawing funds from the Employer Basic Account while in the employment of the Company: 7.02(a). Funds under the Locked-in Account may not be withdrawn while employed by the Company and remain locked-in, in accordance with paragraphs 7.04, dealing with retirement, or 7.05, dealing with Termination of Employment: 7.02(c) Article 12.05 deals specifically with marital breakdown: 12.05 In the event of marriage breakdown, benefits under this Program are subject to any court order or agreement between the Member and his or her spouse under applicable provincial property law. The restrictions on withdrawal of Funds specified in Article 7 will still apply in this situation.
- [7] Article 5.05 referred to by the chambers judge provides: 5.05 All amounts allocated under the Program to the Accounts on behalf of individual Members vest irrevocably in the respective Member immediately.

- [8] Article 7 referred to by the chambers judge provides: 7.02 (a) Subject to paragraph 7.02(b), except with the Company's consent on Program termination, Members are prohibited from withdrawing funds from the Company Account while in the employment of the Company. ... 7.04 Upon retirement, the value of the Member Account and the Company Account established on behalf of the Member shall be payable to the Member in the manner designated by the Member in the Termination Form... 7.05 Upon termination of employment with the Company, the value of the Member Account and the Company Account established on behalf of the Member shall be payable to the Member in the manner designated by the Member in the Termination Form...
- [9] The chambers judge identified the issue as: Is London Drugs required under s. 116 of the Income Tax Act (spousal rollover) to transfer \$9,453.59 to Ms. Cook from the Employer Basic Account upon completion of the necessary authorizations by Mr. Cook?
- [10] The learned chambers judge held, having reviewed the submissions of the parties: I agree with the legal analysis advanced by London Drugs. The fact that an RRSP is a family asset subject to division does not change the nature of the asset that is subject to the division. What Mr. Cook had to divide was his interest in the Employer Basic Account. That interest was a vested interest, but one that could not be exercised until he retired or resigned. In the absence of legislation to the contrary, Ms. Cook is not entitled to a greater interest than that of Mr. Cook. The order of the court does not direct London Drugs to do anything. Rather it requires Mr. Cook to effect the transfers. Unbeknownst to anyone, Mr. Cook was unable to do that. The intention of the Consent Order was therefore frustrated. The supplemental argument advanced by Ms. Cook does not cause me to alter this conclusion. She may accurately describe the position she finds herself in, but that does not change the fact that she is not entitled to more than what Mr. Cook had. London Drugs is therefore not required under s. 116 of the Income Tax Act (spousal rollover) to transfer \$9,453.59 to Ms. Cook from the Employer Basic Account upon completion of the necessary authorizations by Mr. Cook. The existing court order is amended to say that Ms. Cook is entitled to any growth on her portion of the Employer Basic Account. The Issues
- [11] The appellant raises three grounds of appeal:
1. that there is error in the characterization of the issue before the Court; 2. that the chambers judge failed to distinguish between rights and restrictions in rem, and those rights and restrictions that operate in personam, as they relate to the Employer Basic Account; and 3. that the chambers judge erred in failing to make orders and declarations necessary to give effect to the determination of division of assets made pursuant to Part 5 of the Family Relations Act, R.S.B.C. 1996, c. 128. [12] At the hearing of the appeal the appellant's submission was two-fold: that the transfer of funds from the Employer Basic Account to the appellant was not contrary to the provisions of the Personal Plus Retirement Program For Employees of London Drugs Limited, and that even if it was contrary to the provisions of that program, s. 66 of the Family Relations Act required London Drugs Limited to make the transfer. Discussion Interpretation of the RRSP Program

- [13] The learned chambers judge concluded that the language of the program did not entitle Mr. Cook to take the funds from the plan until he either retired or resigned, notwithstanding that his interest had vested. In my view this interpretation is sound. Under para. 7.02 Mr. Cook is "prohibited from withdrawing funds" from the account while in the employment of the company. The exception in para. 7.02(a) "except with the Company's consent on Program termination" does not apply because the Program was not terminated. Absent a change in the terms of the plan, Mr. Cook's interest in the account was subject to condition 7.02(a) that no funds may be withdrawn so long as Mr. Cook continued in his employment with the company.
- [14] The appellant's factum describes the interest of Mr. Cook as one in rem and the condition as an in personam qualification. In my view those descriptions are not apt, and their invocation does not advance our understanding of Mr. Cook's interest in the account. He is the legal and beneficial owner of the funds in the Employer Basic Account, but he is restricted in their use until the occurrence of certain events in Mr. Cook's life. Those events have not occurred.
- [15] I conclude that the Program does not allow transfer of these funds to Mr. Cook. In the absence of statutory language entitling Mrs. Cook to call on the funds in circumstances where the legal and beneficial owner is not entitled to call upon the funds, Mrs. Cook is not, in my view, entitled to their transfer into her name. Effect of Section 66 of the Family Relations Act
- [16] Section 66 in Part 5 of the Family Relations Act provides: 66 (1) In proceedings under this Part or Part 6 or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 65, or under Part 6 and may make orders that are necessary, reasonable or ancillary to give effect to the determination. (2) Without limiting subsection (1), the court may do one or more of the following in an order under this section:
- (a) declare the ownership of or right of possession to property; (b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years; (c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division; (d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts; (e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child; (f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property and may order that the spouse waive or release in writing any right, benefit or protection given by section 23 of the Chattel Mortgage Act, R.S.B.C. 1979, c. 48, or section 19 of the Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373; (g) if property is owned by spouses as joint tenants, sever the joint tenancy.

- [17] Mrs. Cook's entitlement to share the funds derives from s. 56: 56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset ... (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common. (3) An interest under subsection (1) is subject to (a) an order under this Part or Part 6, ...
- [18] Mrs. Cook contends that s. 66 allows the court to order transfer of the funds in dispute notwithstanding that Mr. Cook was not entitled to call upon such a transfer to himself. But I see nothing in s. 66 that allows the Court to change the nature of the asset that is the subject of the division, or the conditions that may attach to it from its inception through contracts between a party to the litigation and a third party.
- [19] Nor have we been referred to authority supporting the proposition that a court may make an order avoiding such contractual terms in the absence of legislative provisions directing that result. Indeed, in my view, the history of Part 6 of the Act and the jurisprudence on orders directed to pension plan administrators prior to its passage, are contrary to the appellant's position. Part 6 of the Family Relations Act deals with division of pension entitlement. Prior to its passage, this Court declined to order a trustee or administrator of a pension plan to pay certain pension benefits to the petitioner's spouse: *Rutherford v. Rutherford* (1981), 30 B.C.L.R. 145 (B.C.C.A.). Application of this principle is seen in *Jennings v. Jennings* (1987), 14 B.C.L.R. (2d) 232; [1987] B.C.J. No. 1142 (S.C.). With the enactment of Part 6 of the Family Relations Act, a spouse could be designated a member of a pension plan, but Part 6 does not apply to this registered retirement savings plan program.
- [20] In my view, the approach to s. 66 advocated by the appellant effectively would ignore the particular language of Part 6 and produce a judicial amendment to the legislation. I would not accede to this interpretation. Other
- [21] The reasons of the chambers judge in this case are admirably concise and, as I have indicated, I am in full agreement with them. I am bound, however, to express, respectfully, my concern over the form in which they were issued.
- [22] The reasons were issued in the form of a memorandum addressed to counsel, entitled "Re: Reasons for Judgment". As such, they are not in the usual form of reasons for judgment long utilized in this province. Not being so constructed, it is likely they have not been recognized as reasons for judgment by the reporting publishers and by those who make reasons for judgment available to the community at large. For example, a check of the Supreme Court of British Columbia website, which is fast becoming a major research tool for the public and the bar, and of QuickLaw, does not reveal the memorandum. The result is that a decision on a substantive point of law which may well be of interest to the practice generally, has been kept quasi-private to the parties. Although the court file is a public record and the memorandum undoubtedly has been filed within it, it is not realistic to say that the reasons have been made known to the public, particularly considering the restrictions found in Rule 60(41) of the Rules of Court on the public's ability to search family law files. Nor has the memorandum been read in an open court, which would have put it into the category of oral

reasons for judgment subject to the tracking procedures of the reporting houses.

- [23] The usual form of reasons for judgment, on the other hand, allows for both public witness to the proper administration of justice and accessibility of jurisprudence to the public, the legal profession and, not least, other members of the judiciary.
- [24] I recognize in these comments that those engaged in litigation, particularly in the family law area, often regret the public nature of the proceedings. This sentiment, no doubt, is increasing with the growth of the Internet and the near instant availability of information about litigants that can be gained with the push of a button. However, in appropriate cases, this privacy concern may be protected by the manner in which the litigants and identifying features are referred to in the decisions and by such other tools as the court may properly employ. The quasi-private method of issuance of memoranda, in my view, is not one of those proper tools.

## Conclusion

- [25] For these reasons, I would dismiss the appeal. "The Honourable Madam Justice Saunders" I AGREE: "The Honourable Mr. Justice Hall" I AGREE: "The Honourable Mr. Justice Thackray"

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