

CANADA / JUDGMENT

Dutkowski v. Dutkowski

2007 BCSC 1558

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1558 Dutkowski v. Dutkowski IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Dutkowski v. Dutkowski, 2007 BCSC 1558 Date: 20071023 Docket: E020524 Registry: New Westminster Between: Kimberley Anne Dutkowski Plaintiff And Mark Raymond Dutkowski also known as Mark Raymond Dutowski Defendant Before: The Honourable Madam Justice Ross Reasons for Judgment Counsel for the Plaintiff Gillian L. Canniff Counsel for the Defendant Joan M. Dreyer Date and Place of Trial/Hearing: September 18, 2007 Vancouver, B.C.

- [1] This is an application to settle the terms of the order arising from oral reasons for judgment dated June 22, 2007 (the "Reasons"). In particular, an application has been brought to eliminate the provisions dealing with security for the child maintenance obligations of the defendant. The basis for the application is that there has been a change in circumstances that goes to the underpinning of that portion of the award.
- [2] In the Reasons, I had granted judgment pursuant to rule 18A in the matrimonial action. The parties had four children, three of whom I found remained children of the marriage: Kristie, born June 8th, 1988; Daniel, born January 24th, 1991; and Cindy, born July 29th, 1992. At the time of the hearing, I found that Kristie and Cindy resided primarily with the plaintiff, Mrs. Dutkowski, and Daniel resided primarily with the defendant, Mr. Dutkowski, although from time to time he stayed with the plaintiff.
- [3] At the time of the hearing, Mr. Dutkowski deposed that he had been unemployed for some time and that he had no income. He disclosed annual expenses of \$56,000.00 that he stated he paid using a combination of credit cards and family gifts. He had paid no child support to Mrs. Dutkowski. I found that there was no evidence that Mr. Dutkowski was unable to work and imputed income of \$50,000.00. He was ordered to pay child support of \$469.00 per month commencing July 1, 2007, with respect to basic Guideline Support, that being the difference between his obligations with respect to Cindy and Kristie, and Mrs. Dutkowski's obligations with respect to Daniel.
- [4] There had been a consent order in January 2006 in these proceedings that provided that the matrimonial home was to be listed for sale or refinanced by the defendant to buy out the plaintiff's interest no later than May 1, 2006, and that each party would have the right to obtain a real estate market appraisal of the matrimonial home from a realtor of their choice.

I found that Mr. Dutkowski was in contempt of that order in that he had neither bought out Mrs. Dutkowski's interest nor cooperated in placing the property for sale. At the time of the hearing of the summary trial he remained in the matrimonial home, which had not been listed for sale.

- [5] Mr. Dutkowski had paid no child support. He disclosed no income in his financial statement and the order for support was based upon imputed income. He had been found in contempt of the January 2006 order. In those circumstances, an order was made for security with respect to Mr. Dutkowski's child support obligations. The Reasons provided at para. 44: Security will be provided for child support taking the proceeds from the defendant's share of the matrimonial home. If the home is sold, \$28,140.00 of his share of the proceeds will be placed in an interest-bearing trust account at the office of the solicitor for the plaintiff. Funds then as necessary can be drawn for child support if the defendant does not pay until the funds are exhausted or until further order of the court. The quantum was based upon an estimated obligation of \$5,628.00 per year for five years.
- [6] Mr. Dutkowski was killed in a motor vehicle accident on July 7, 2007, before the order was entered. By consent order of July 20, 2007, Carolyn Leaman, Mr. Dutkowski's sister, was appointed to represent his estate. Ms. Leaman now applies to rescind the provision for security for child maintenance.
- [7] Until such time as an order is entered, the trial judge remains seized of the matter and retains a discretion to amend the order or to reopen the trial. The discretion is unfettered, but one that is to be used sparingly. The purpose is to prevent what would otherwise be a miscarriage of justice. It is not intended to be an alternative method of appeal; see *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296, 13 R.F.L. 4th 273 (C.A.); *Kemp v. Wittenberg*, [1999] B.C.J. No. 810 (S.C.). One basis for reopening or reconsideration is where there has been a change in circumstances between the date of judgment and the application to reopen that goes to the underpinnings of the order; see *Cheema v. Cheema*, 2001 BCSC 298, 89 B.C.L.R. (3d) 179.
- [8] I am satisfied that the unfortunate event of Mr. Dutkowski's passing is such a change in circumstance.
- [9] The following principles appear to be well settled:
- (a) the obligation to pay maintenance is personal and does not extend past the date of the death of the payor in the absence of an agreement or an order that binds the estate; see *Milne v. MacDonald Estate* (1986), 5 B.C.L.R. (2d) 46, 3 R.F.L. (3d) 206 (C.A.); *Despot v. Despot Estate* (1992), 95 D.L.R. (4th) 62, 42 R.F.L. (3d) 218 (B.C.S.C.);
- (b) any application to vary the terms of an order to specify that it is binding upon the estate of the payor must be brought during the payor's lifetime; see *Ducharme v. Ducharme* (1981), 119 D.L.R. (3d) 478, 21 R.F.L. (2d) 309 (Man. Q.B.); *Schwartz Estate v. Schwartz* (1998), 36 R.F.L. (4th) 110, 21 E.T.R. (2d) 9 (Ont. C.J.).

- [10] In the case at bar, there was no agreement charging Mr. Dutkowski's estate with his child support obligations. In the summary trial, the plaintiff did not seek a term of the order binding Mr. Dutkowski's estate with respect to his maintenance obligations. In light of the authorities, the plaintiff cannot now seek such a term. In my view, the order for security was made in relation to Mr. Dutkowski's child maintenance obligation, a personal obligation. It cannot be construed at this juncture as an order binding his estate with those obligations.
- [11] In view of that conclusion, there is no maintenance obligation to secure, and accordingly, the provision for security for Mr. Dutkowski's child support obligations is vacated. Since Mr. Dutkowski's will makes provision for his children, the issue regarding the adequacy of the provisions made for the children falls to be determined in the context of the Wills Variation Act, R.S.B.C. 1996, c. 490. "Ross J." Signed by "Williamson J."

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