

CANADA / JUDGMENT

Ellis v. Ellis

2000 BCSC 1576**COURT**

Supreme Court of British Columbia

DECIDED

26 October 2000

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Source record**2000 BCSC 1576****Citation: Ellis v. Ellis Date: 20001026****2000 BCSC 1576 Docket:****DO40773****Registry: New Westminster****IN THE SUPREME COURT OF BRITISH COLUMBIA****BETWEEN:**GLORIA JEAN ELLIS
PLAINTIFF**AND:**EDWARD KENNETH ELLIS
DEFENDANT**AND:**FAMILY MAINTENANCE ENFORCEMENT PROGRAM
(ADDED AS A PARTY PURSUANT TO THE ORDER OF MACKENZIE, J.
DATED JANUARY 27, 2000)**REASONS FOR JUDGMENT****OF THE****HONOURABLE MR. JUSTICE McKINNON****(IN CHAMBERS)****Counsel for the Plaintiff: Plaintiff appeared in person****Counsel for the Respondent: G.W.D. Abrams****Counsel for Peterson Stark: G.C. Scott****Counsel for Family Maintenance****Enforcement Program: A.M. Accettura**

Date and Place of Hearing: August 17, 2000

New Westminster, BC

- [1] On November 4, 1998 I provided reasons for judgment consequent upon a Rule 18A trial of various matrimonial issues. Some debt issues could not be resolved and were left to the parties to either agree upon or to place before me on another day.
- [2] On February 25, 1999, Ms. Ellis appeared, acting on her own behalf, with Mr. Abrams continuing to act for Mr. Ellis. The issue on this occasion was, among other things, to make an order respecting sale of the matrimonial home. Mr. Abrams sought costs of that application which was adjourned for ultimate argument.
- [3] On October 1, 1999, Mr. Scott appeared for Ms. Ellis and Mr. Abrams appeared again for Mr. Ellis. I was then informed that an appeal had been taken from the Rule 18A trial respecting the valuation of the contents of the home. The Chief Justice deferred the appeal with a suggestion that new material be placed before me on this application. I accepted that invitation and determined that a global valuation of \$10,000 was reasonable.
- [4] I declined to accept a claim respecting alleged debts owed to family members but did direct that certain other debts were family debts. Various other aspects were resolved and orders for costs made. Finally I commented, "It is nice to see the end of the file."
- [5] Alas, it was not the end of the file. In January, 2000, cross applications were filed seeking relief against not only the parties, but also the law firm of Peterson Stark, based upon an alleged failure to respect the legal requirements of garnishing proceedings.
- [6] In the result, the following motions were before me on August 17, 2000:
 - 1. The plaintiff's claim that the defendant is obliged to contribute to the 1999 property taxes respecting the family home.
 - 2. The plaintiff's claim for "special costs" payable by Mr. Abrams personally to the plaintiff's solicitors consequent upon their compliance with a garnishing order from the Family Maintenance Enforcement Program.
 - 3. The plaintiff's claim for costs "in any event of the cause" respecting the August 17 motion.
 - 4. The defendant's claim for \$771.71 said to have been wrongly deducted from his share of the sale proceeds of the home (this tracks the plaintiff's claim for a property tax contribution).
 - 5. Defendant's claim for \$25,301.47 said to have been wrongly paid to the Family Maintenance Enforcement Program.
 - 6. A further claim by the defendant for \$500, being the plaintiff's contribution towards the defendant's debt to Revenue Canada for G.S.T.

- [7] On January 27, 2000, MacKenzie J. ordered that the Family Maintenance Enforcement Program [F.M.E.P.] be added as a party in respect of the claim for monies paid to it pursuant to attachment notices.

The property tax issue:

- [8] It is conceded that no mention was made of the property tax issue at the Rule 18A trial, but the plaintiff contends I should "re-open" that proceeding and make an order for equal division as an equitable solution, in keeping with the spirit of the division made at trial.
- [9] The defendant says that given the home was registered to the plaintiff, that she had exclusive occupancy of it for a lengthy period, and that in all the many letters between counsel no claim whatever to a contribution to these taxes was made, he ought not to have to pay any portion.
- [10] The defendant was compelled by Court order to leave the matrimonial home on January 28, 1998. He complied. The home was then mortgage-free. Although a claim was initially made by the plaintiff for a contribution from Mr. Ellis for the 1998 taxes, it was not pursued. Subsequently, and following the Rule 18A judgment, a great deal of correspondence flowed between solicitors respecting various claims and in particular the pending sale of the home.
- [11] On June 22, 1999, Ms. Ellis, through her solicitor, forwarded a list of "family debts", some of which Mr. Ellis accepted and others he rejected. A claim for 1998 property taxes was rejected. There was no claim for any contribution to the 1999 taxes. Ms. Ellis actually sent the funds to the taxing authority to pay the 1999 taxes but later cancelled the cheque, anticipating (rightly) that it would be adjusted by the conveyancing solicitor.
- [12] Ms. Ellis' solicitors acted (by consent of all) as the conveyancing solicitors. They proceeded to adjust the unpaid taxes in the usual manner and then arbitrarily assessed Mr. Ellis one-half the amount debited to the vendors. I am satisfied that they ought not to have done so.
- [13] Most everything about this action was contentious. The exchange of correspondence between solicitors relative to shared debts made no mention whatever of the 1999 property taxes. Ms. Ellis abandoned her claim for any share of the 1998 taxes. She actually paid the 1999 taxes without thought of any contribution from Mr. Ellis but cancelled the cheque when she thought an adjustment could be made without further discussion. She was in sole occupancy of this mortgage free home from January, 1998. In the result, Mr. Ellis is entitled to a return of the amount charged to him.

The G.S.T. claim

- [14] My judgment of October 1, 1999 provided at page 5(e) for equal division of the "GST debt of Quality Gloves in an amount to be determined (the "GST Debt"). Subsequently the parties agreed that Ms. Ellis' contribution would be limited to \$500. That sum was retained by her solicitors and was to be paid upon proof of the claim but by the time the claim was verified, the F.M.E.P. had issued garnishing proceedings and the \$500 was paid to them.
- [15] This leads to the major issue in these proceedings, which is whether Ms. Ellis' solicitors were obliged at law to forward the amounts admittedly paid to the F.M.E.P. Mr. Ellis' right to recover this \$500 depends upon his claim for the other sums paid to F.M.E.P.
- [16] Ms. Ellis' solicitor says he acted upon both the garnishing orders and the telephone instructions from F.M.E.P. and paid in the sum of \$25,301.47 on October 25, 1999 and the \$500 amount on December 7, 1999. This was in partial satisfaction of a claimed amount of \$28,035.36.

The issue respecting attachment notices

- [17] On completion of the sale of the matrimonial home and after interim payments to both parties and after considerable negotiations and discussion between the respective solicitors concerning shared debts, the sum of \$26,314.00 became available for distribution to Mr. Ellis, subject only to a holdback of \$500 for G.S.T. as indicated.
- [18] On October 5, 1999, one day after calculating the above balance due to Mr. Ellis, two notices of attachment were received by Ms. Ellis' solicitor from the F.M.E.P. One for a Sandra Ellis was in the sum of \$3,096.08 and the other for a Fawn Joyce Curtis was in the sum of \$14,996.25.
- [19] Contemporaneously with these attachments, duplicate attachments were served upon Mr. Ellis' solicitor, who forthwith paid both sums to the F.M.E.P. When apprised of the claim directed to Ms. Ellis' solicitor, Mr. Abrams immediately informed Mr. Scott of his payment, requesting that since the amounts had been discharged, he ought not to make payment.
- [20] Correspondence flowed back and forth between lawyers, with Mr. Abrams placing Mr. Scott on notice that if he complied with the attachment demands he did so at his peril. Mr. Scott contacted an officer with the F.M.E.P. and was told, on October 13, that the attachment relative to the claim for \$3,096.08 had been withdrawn but he was also informed that the other attachment was still valid. In fact, the officer dealing with the claim advised Mr. Scott that an error had been made and that the figure was not \$14,996.25 (the amount in the attachment documents) but rather it was \$28,035.36.
- [21] Since the amount due Mr. Ellis on the matrimonial settlement was less than the FMEP claim, Mr. Scott paid over the entire amount to the F.M.E.P. in partial satisfaction of the claim.

[22] Although there is no issue taken by Mr. Ellis that he did owe the amount claimed, he says that since the attachment proceedings claimed the limited amount of \$14,996.25 and since that sum, to the knowledge of the plaintiff's solicitor, had been paid by Mr. Abrams, he should be reimbursed.

[23] The following issues arise from these facts:

1. Does the case law regarding the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 ["COEA"] have any application to proceedings under the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 ["FMEA"]? If so, to what extent?
2. What is the authority of the Director of Family Maintenance regarding "Notices of Attachment"?
 - a. What is the nature of the Notice and how is it binding?
 - b. Was Mr. Scott required to comply with the Notices of Attachment that he received, despite any payment into F.M.E.P. by Mr. Abrams on the same matters?
 - c. Does the Director of Family Maintenance have the authority to verbally vary a Notice of Attachment?
 - d. Was Mr. Scott entitled to rely upon a telephone conversation with an officer of the F.M.E.P. that the amount in the Notice of Attachment was incorrect and that a larger amount was due?
3. What applications, if any, should either counsel have made to the Court?
 - a. Should Mr. Scott have made an interpleader application (BCSC Rule 48)?
 - b. What applications should Mr. Abrams have made between October 5 and 20, 1999?

[24] Although not argued, given the issues, the provisions of s. 24(1) of the FMEA might have application. That section states:

If at a default hearing or other proceeding the court finds that a debtor who has defaulted in a payment required under a maintenance order is receiving or entitled to receive wages, salary or other remuneration from a person employing or engaging the services of the debtor, or is receiving or entitled to receive a benefit, the court must make an attachment order unless it would be unfair to the debtor to do so.

THE INTENT OF THE FMEA LEGISLATION

[25] In *British Columbia (Maintenance Enforcement Director) v. I.W.A. Forest Industry Pension Plan (Trustees Of)* (1991), 61 B.C.L.R. (2d) 264 (B.C.C.A.) the court determined that the focus of the act is "social legislation" and that it must be interpreted in light of its purpose. At p. 268-269 the court stated:

The Family Maintenance Enforcement Act is an example of what is sometimes referred to as "social legislation". It is designed to address the evil of widespread default in payments required to be made by family maintenance payment orders. In essence it makes available to persons entitled to maintenance payments the power and the resources of the state to enforce payment and thereby alleviate the distress which is the frequent consequence of non-payment. It is of the class of enactment to which the court has traditionally given a "purposive" construction. The Court Order Interest Act, R.S.B.C., 1979, Chap. 75 [now R.S.B.C. 1996, c. 78] contains garnishment powers for judgment creditors which constitute a statutory debt collection code. There is a long line of case authority to the effect that in order to uphold a garnishee a judgment creditor must conform strictly to the requirements of the statute. As well that line of authority has imposed rigid limitations of form and content on the exercise of garnishee powers.

Having regard to the different purposes and contexts of the two enactments, it is our opinion that garnishment cases under the Court Order Enforcement Act should not be applied to attachment or garnishment cases under the Family Maintenance Act without examining them carefully to ensure that such an application would be consistent with fairness and with the social purposes of the Family Maintenance Enforcement Act.

[26] Subsequently, in *Goudreau v. Goudreau* (1996), 23 R.F.L. (4th) 348 at para.27, and *Mackechnie v. Mackechnie*, [1998] B.C.J. No. 2096 (Q.L.) (B.C.S.C.) at para. 29, courts have determined that although COEA situations were not inapplicable to FMEA proceedings, there was a need to give the FMEA a more informal, less technical, and more purposive interpretation. It would seem therefore that cases decided under the COEA may be applied to interpret the FMEA if it serves to provide fairness to the parties and promote the social purposes of the statute.

THE AUTHORITY OF THE DIRECTOR OF FAMILY MAINTENANCE ENFORCEMENT RELATIVE TO ATTACHMENT PROCEEDINGS

[27] Three provisions of the Act govern attachment, ss. 15, 16 and 24.

NOTICES OF ATTACHMENT

[28] Section 15 refers to a "Notice of Attachment" issued by the director. The director issues this Notice on his own initiative, as an administrative procedure, without any application to the court. While it is essentially a form of garnishing order, it differs from one because it is issued without any of the parties to the matter making any application, and is not subject to the Court Order Enforcement Act (unlike garnishing orders made under s. 18 of the FMEA).

[29] Under s. 15(3) a Notice is binding on an attachee from the date of service until the expiry date specified on the notice or until it is withdrawn or "ordered otherwise" by the court, all as set out under s. 15(5).

- [30] Section 15(1) permits the director, at his discretion, when a "debtor" (the spouse in arrears of maintenance) is in default to the FMEP, to issue a Notice and have it served on a person (the "attachee") who is or may be indebted to the debtor.
- [31] Once the attachee is served, the director must file a copy of the Notice with the court (along with the maintenance order, if not already filed), per s. 15(2).
- [32] The only evidence before me in this regard is that contained in the affidavit of Mr. Ellis dated November 30, 1999. In that affidavit, he deposed that he received only two Notices and only through his counsel. Both bear the notation "Court location Richmond Unified Family". Though these indicate that they were forwarded to Mr. Ellis at an address in Surrey, he deposed that he had not lived there for some time and he did not receive the Notices. The Notices sent by the director to Mr. Scott do not appear to have been forwarded to Mr. Ellis.
- [33] Section 15(4) requires the director to deliver a copy of the Notice to the debtor, although it also provides that inability to deliver "after a reasonable effort...does not render the notice of attachment ineffective."
- [34] In Mackechnie (cited above) the court considered the phrase "after reasonable effort" in s. 7(4) of the FMEA. Applying the "purposive" approach, Martinson J. concluded on the facts of that case that the director had made a "reasonable effort".
- [35] Given the "purposive" interpretation against the facts of this case and in the absence of any argument on the issue, I accept that the correspondence between respective counsel and the various actions of the parties leads to a conclusion that a "reasonable effort" has been made by the director.

Withdrawal of notice

- [36] Withdrawal is governed by s. 16 which also governs issues respecting liability and amounts owing.
- [37] The Family Maintenance Enforcement Act Regulation, B.C. Reg. 346/88 (including amendments to B.C. Reg. 91/88), s. 9 requires that attachees respond in the given form within 10 days from service. Under s. 16(1) of the Act, the director then must consider serving a "Notice of Withdrawal", or refuse to withdraw. Section 16(1)(a) only permits the withdrawal if the attachee owes nothing to the debtor during the term of the Notice, or the director failed to provide the attachee with sufficient information. Otherwise s. 16(1)(b) prohibits the director from issuing a withdrawal.
- [38] This differs from the remedy the director can grant debtors under s. 16(2). First, the debtor must apply for the relief, unlike the mandatory review set out in s. 16(1). Second, the only basis on which the director can issue the withdrawal is if "the notice contains or is based on a material error."

- [39] Section 16(3) sets out the remedy available to the director from the court if the attachee fails to respond or to pay. However, this is permissive and the court can decline to make such an order if the circumstances warrant: see *Ellery v. Viara*, [1995] B.C.J. No. 2812 (Q.L.) (Prov. Ct.).
- [40] An attachee or debtor who is refused a withdrawal by the director may apply to the court under s. 16(4). This section is broader than the provisions that apply to the director in the first instance. Like s. 16(3), the relief is also discretionary. Disputes under the Act must go by the procedure set out in the Act, rather than by originating motion, see *I.W.A.* (cited above).
- [41] On the facts of this case, s. 16 does not seem to have direct application, though it offers some guidance. It would apply if Mr. Ellis disputed the correctness of the Notice, or if Mr. Abrams or Mr. Scott was contesting his liability to Mr. Ellis. However, none of those issues is in dispute before me.

WAS MR. SCOTT REQUIRED TO COMPLY WITH THE NOTICES OF ATTACHMENT THAT HE RECEIVED GIVEN PAYMENT UNDER THESE SAME NOTICES BY MR. ABRAMS?

- [42] In his letter to Mr. Abrams dated October 22, 1999 (Mr. Ellis' affidavit exhibit "MM"), Mr. Scott relied upon s. 24(5) of the FMEA as the authority requiring him to remit the money.
- [43] However, s. 24(5) deals with "Attachment Orders", not "Notices". The former are made by the court, the latter by the director. Mr. Scott erroneously referred to the Notice as a "court order".
- [44] Although Mr. Scott was in error in relying upon s. 24(5), he was, in my respectful view, correct in concluding that he was bound at law by the Notice. He was bound under s. 15(3) and remained obliged under that section as none of the events listed under s. 15(5) had occurred.
- [45] Mr. Ellis does not dispute the amounts in the Notices served on Mr. Abrams, but Mr. Abrams does object to "double payment" of the amount to the FMEP. This is the root of the entire dispute between the parties regarding the FMEP. Thus, while s. 16 provides remedies for attachees and debtors regarding Notices (including attachees with disputes as between them and the debtor, i.e. liability of the attachee to the debtor), there is no provision in the statute to deal with disputes between attachees and other attachees.
- [46] That situation seems to prevail in the COEA as well. There is no provision to resolve situations where multiple garnishees pay in duplicate (or more) in regard to the same judgment debtor. In those situations, garnishees usually come to an accommodation themselves, or make application to the court for resolution.

WHAT IS THE AUTHORITY OF THE DIRECTOR TO VARY A NOTICE OF ATTACHMENT?

- [47] There is no authority in the statute, regulations, or case law (so far as I can discern) for the director to vary, amend, or correct a Notice of Attachment. There is as well nothing in the authorities or statute to permit a verbal change of notice. However, s. 16(9) states that the

withdrawal of a Notice does not prohibit the issuance of another Notice having regard to the same debtor and same attachee. Thus, in the event of an error, the procedure requires the director to withdraw the erroneous Notice and issue a new one, in accordance with the requirements of s. 15 for issuing Notices.

- [48] It seems from the material that the FMEP enforcement officer, Mr. Duffy, acknowledged as much. In para. 17 of his affidavit he states: "I would have immediately issued another Notice of Attachment in the full amount of child maintenance arrears owing had I realized my error, or realized that it would become an issue."
- [49] In *Goudreau and Mackechnie* (cited above) the courts, when considering ss. 15 and 16 in situations involving amounts claimed that were higher than what was actually due, referred to ss. 16(2) and 16(4)(a)(ii) and determined that, "the notice contains or is based on a material error".
- [50] It seems clear to me that in the case at bar, where the amount in the Notice is lower than the total owing, had the proper procedures been followed, the lower amount would have been properly paid and upon issuance of a new Notice, the difference could have been collected.
- [51] It may be that Mr. Duffy relied upon s. 15(3)(b) which stipulates that the attachee is bound in respect of any money that comes due and owing after the date of service. This is reflected in the "Notice of Attachment" form under item 1(b) ("To Attachee") which requires payments for "ongoing maintenance payments as they become due". Below that the Notice states "Add amounts noted in paragraph 1(b) which have become due to the arrears stated in paragraph 1(a) above". There is nothing to state that all future maintenance must be paid in advance by an attachee, and nothing to prohibit an attachee from paying to the debtor any money it owes in excess of the money it remits to the FMEP.
- [52] In the case at bar, on the Notice delivered to Mr. Scott dated October 5, 1999 regarding Fawn Joyce Curtis, Mr. Scott was required to submit \$14,996.25 for the arrears (due and owing as of the date of attachment, set out on the Notice at 1(a)), and then was required to submit \$300 on the first of each month and \$50 on the 15th of each month.
- [53] According to Shelley M. Riley's affidavit sworn January 24, 2000, Mr. Scott telephoned Mr. Duffy of the FMEP on October 25, 1999. Therefore, at that time the amount owing over the \$14,996.25 that Peterson Stark, as attachee, was liable for to the FMEP was the \$50 payment due October 15th. To require Peterson Stark to pay anything more required the director to issue and serve a new, subsequent Notice.
- [54] Given that there is no authority for the director to vary Notices (other than by withdrawing a Notice and serving a new one or by serving a further Notice for any remaining balance due), and that no Notices were served on Mr. Scott after October 5, 1999, there was nothing to compel Mr. Scott to pay anything over that amount other than the monthly maintenance as it came due on the 1st and 15th of each month. The excess of funds held by Mr. Scott was a debt due Mr. Ellis upon which the FMEP had no claim.

- [55] I do not intend to engage in a discussion as to what, if anything, Mr. Scott or Mr. Abrams might or should have done by way of interpleader or other application. I have considered the obligations of all involved in this particular issue as those obligations are stated in statute and how aspects have been considered in case law. It remains to provide a judgment that will bring an end to this rancorous affair that not only has litigants pitched against one another but counsel as well.
- [56] Given the purposive approach required for a statute described as "social legislation" and the fact that there is no issue that Mr. Ellis owes these amounts, it strikes me as contrary to the spirit and intent of the Act to direct the payment of any sums in issue to Mr. Ellis even though there has been a failure to strictly comply with the statute.
- [57] I will invoke s. 24(1) of the FMEA and make an order attaching the sum of \$10,305.22. This represents (subject to any arithmetical error on my part) the amount that Mr. Scott paid the FMEP that should have been paid to Mr. Abrams in trust for Mr. Ellis.
- [58] I conclude that the sum of \$10,305.22 is a "benefit" Mr. Ellis is "entitled" to receive and thus would be subject to an attachment order under s. 24(1).
- [59] Notwithstanding the acrimony between counsel and the obvious conclusion that matters might have been handled differently (and better), I can find no "bad faith". The simple fact is that Mr. Ellis owes the money so it would be difficult to see how such an order could be "unfair to the debtor".
- [60] Given the divided success and the conduct of both parties, I consider it appropriate that each bears his and her costs for this application.
- [61] Judgment accordingly.

"R.A. McKinnon, J."

The Honourable Mr. Justice R.A. McKinnon

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