

CANADA / JUDGMENT

Exelby & Partners Ltd. & Norquay v. Norquay

2006 BCSC 1242

COURT

Supreme Court of British Columbia

DECIDED

14 August 2006

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2006 BCSC 1242 Exelby & Partners Ltd. & Norquay v. Norquay

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Exelby & Partners Ltd. & Norquay v. Norquay,

2006 BCSC 1242

Date: 20060814

Docket: 0626281

Registry: Prince George

Between:

Exelby & Partners Ltd., Trustee of

The Estate of John Gerald Norquay, A Bankrupt

Petitioner

And

Margie Marie Norquay

Respondent

Before: Master Baker

Reasons for Judgment

In Chambers

Counsel for the petitioner:

R.M. Stewart

Counsel for the respondent:

G. Lilienweiss

Date and Place of Hearing:

July 24, 2006

Prince George, B.C.

ISSUE

- [1] The petitioner, trustee ("the trustee") for Mr. Norquay, a bankrupt, applies for an order for partition and sale of the former matrimonial home of Mr. Norquay and Ms. Norquay. He applies under the Partition of Property Act[1] ("the Act") and Ms. Norquay, who resides in the home, opposes the application.

BACKGROUND

- [2] Mr. and Ms. Norquay are separated spouses. On separation Ms. Norquay remained in the family home, located in Quesnel, B.C., and Mr. Norquay moved to Fort McMurray, Alberta. Mr. Norquay made his assignment in bankruptcy on August 20th, 2004, and Ms. Norquay began divorce proceedings on October 15th, 2004. None of the matrimonial issues arising from their separation have been formalized, either by agreement or by court order and there has been no triggering event under s. 56 of the Family Relations Act[2]. There are no children of the marriage.
- [3] The home is worth approximately \$165,000.00 and is charged with a mortgage of about \$46,000.00, leaving a net value of roughly \$120,000.00. The trustee was registered on title to the home respecting Mr. Norquay's one-half interest October 13th, 2004; that application declared the one-half interest to be worth \$53,450.00. The trustee and Ms. Norquay have, it seems, been in discussions about her purchasing Mr. Norquay's one-half interest, but Ms. Norquay to date has been unable to arrange financing to meet the trustee's price.
- [4] Mr. Norquay's Statement of Affairs declared \$230,593.00 worth of assets, including RRSP's (locked into a pension) of \$48,793.00 and the home (declaring, apparently, the full value of the home, rather than one-half). He declared \$56,926.00 unsecured debts, and of these only \$9,428.13 were later proven. The trustee has provided Ms. Norquay with a draft statement of receipts and disbursements together with particulars of time spent on the administration, disbursements, and dividends to creditors. He has also delivered some details of the trustee's fees (\$12,222.61) and legal fees charged to the estate (\$5,144.00).
- [5] Apparently the estate has received \$12,737.35, either through payments by Mr. Norquay or from other sources. The draft statement refers, in a handwritten note, to a further amount of \$15,942.37, received as "partial payment of equity in house", although this sum was not

explained or discussed during this application. I do not know whether it was received or not. Ms. Norquay's evidence is that she understands that only the \$12,737.35 has been received. I have not seen a final form of the accounts, or any form indicating that they have been approved by the Registrar in Bankruptcy.

PARTIES' POSITIONS

- [6] The trustee. Ms. Stewart is clear and direct in stating the trustee's position: as the trustee of Mr. Norquay's one-half interest in the home, the trustee is entitled under the Act to an order for partition and sale of the home which, of course, would include the sale of Ms. Norquay's interest. Negotiations with Ms. Norquay having come to naught, I infer that the trustee regards this as the only means of redeeming the value in Mr. Norquay's one-half interest. Ms. Stewart argues that much of the evidence in Ms. Norquay's affidavit in opposition is irrelevant. The value of the proven claims or the fees of the trustee or counsel do not bear, she says, on whether or not the property should be partitioned.
- [7] Ms. Stewart argues further that Ms. Norquay, in any event, can still pursue an interest in Mr. Norquay's pensions, as I understand her argument, because the matrimonial proceedings predate Mr. Norquay's assignment.
- [8] Ms. Norquay. Mr. Lilienweiss acknowledges that the trustee has a prima facie right to apply for partition, but submits that it should not be granted, at least not summarily in the first instance. He argues that s. 4(2) of the Act gives the court considerable leeway:

4(2) The court may order inquiries as to the nature of the property, the persons interested in it and other matters it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration, but all persons who, if this Act had not been passed, would have been necessary parties to the proceeding must be served with a notice of the order.

This section authorizes an enquiry, he argues, into the background of the parties' relationship, the particulars of the bankruptcy and its administration, and Ms. Norquay's attempt to finance the purchase of Mr. Norquay's one-half interest.

- [9] Mr. Lilienweiss argues further that it would be particularly inequitable to order the partition and sale of the home when the contributions to Mr. Norquay's estate during his bankruptcy (\$12,737.35) already exceed his proven unsecured claims (\$9,428.13). Any further receipts, he submits, will be applied solely to the costs of administration of the estate i.e. the trustee's fees and legal expenses.
- [10] Mr. Lilienweiss argues that the court should do one of the following:
- limit the trustee's recovery from Mr. Norquay's one-half interest to \$10,000.00, a sum that Ms. Norquay can finance to purchase the interest, a limitation that he argues is permitted by s. 4(2) of the Act;

- delay the process so that Mr. and Ms. Norquay can continue negotiations and, presumably, conclude an agreement respecting their family assets;
- direct an enquiry under s. 4(2) of the Act, so that all of the circumstances pertaining to Mr. Norquay's bankruptcy estate, including the trustee's fees and legal expenses can be examined.

ANALYSIS

- [11] First, it must be noted that counsel for both the trustee and Ms. Norquay are mistaken in certain of their assumptions. Ms. Stewart is mistaken, in my view, in her assertion that Ms. Norquay can still pursue an interest in Mr. Norquay's pensions in the matrimonial proceedings. Upon his assignment all of Mr. Norquay's property (with certain exceptions) vested with his trustee. The only means by which Ms. Norquay could have asserted a prior right to that property is if a triggering event had occurred under the Family Relations Act[3] and no such triggering event has happened. Moreover, the irony is that the trustee's view is that Mr. Norquay's pensions are exempt property under the Bankruptcy and Insolvency Act, s. 67(1)(b)[4] ("the BIA"). Mr. Lilienweiss is correct, therefore, in pointing out the further irony of Mr. Norquay retaining his pensions while Ms. Norquay is, potentially, forced to leave her home (even if she receives one-half of its value on sale).
- [12] Further, Mr. Lilienweiss is mistaken in his expectation that, somehow, Mr. and Ms. Norquay can continue negotiating their separation agreement, at least respecting property. As I have said, with his assignment Mr. Norquay's property vested with his trustee. Ms. Norquay must now negotiate with the trustee respecting that property, and any court-initiated delay will not assist her in that respect.
- [13] Mr. Lilienweiss did not offer any case authority supporting his argument that the terms of s. 4(2) of the Act, and specifically its reference to "other matters it thinks necessary or proper" permit the court to limit the trustee's recovery from Mr. Norquay's one-half interest in the home. I would be surprised if such authority existed, permitting the generality of s. 4(2) to override, somehow, the specific terms of the BIA that vest Mr. Norquay's property, subject only to certain clear exceptions, with his trustee.
- [14] Mr. Lilienweiss did offer *Re Yale and MacMaster*[5], a decision of the Ontario High Court of Justice which refused an application virtually identical to this one. In dismissing the application Galligan J. reviewed then-recent appellate authorities in Ontario and concluded at p. 556:

It is now clear from the four judgments to which I have just referred that in a case to which both of those Acts apply, the Court has the right, and I think therefore the duty, to weigh the relative hardship that would be occasioned to the parties by the making or the refusing of the order.

Galligan J. was referring to two Ontario statutes, the Partition Act and the Married Women's Property Act, but his remarks, in my view, remain a propos to situations that involve British Columbia's Family Relations Act and Partition of Property Act.

- [15] Moreover, there was no discussion before me whatever about any support obligations by Mr. Norquay to Ms. Norquay, or whether the matrimonial pleadings include such a claim. Support orders, of course, are not expunged by bankruptcy[6] and it is open to Ms. Norquay, if necessary, to apply under s. 69.4 of the BIA for an order that the stay against creditors not apply respecting any support claim she may wish to bring.
- [16] I have concluded that there is insufficient information before the court by which it can "weigh the relative hardship. . . " that Galligan J. referred to. I know the approximate value of the home and its approximate mortgage. I know the amount of unsecured claims proven in the bankruptcy. I know the amount of funds that Ms. Norquay says she can raise (\$10,000.00) to purchase the trustee's one-half interest in the home. I do not know the basis for this limitation i.e. why she cannot borrow more. I do not know her financial circumstances or her income (or, for that matter, whether she is employed at all). I do not know the availability of alternative housing for Ms. Norquay, its cost, or what financial impact overall the sale of the home would have on Ms. Norquay, nor do I have any information about any further claims or rights, if any, of Mr. Norquay's creditors. Finally, although I have hand-drawn draft accounts before me respecting Mr. Norquay's estate, I do not know the reliability of those accounts. I am confused, in fact, by the reference in those accounts to the sum of \$15,942.37 supposedly received respecting Mr. Norquay's interest in the home (para. 5, above).
- [17] The only appropriate result, therefore, is to accept Mr. Lilienweiss' third suggestion, and to direct a reference to the registrar under s. 4(2) of the Act and Rule 32, and that the registrar conduct an enquiry into the nature of the property, the persons interested in it and the status and circumstances of Mr. Norquay's bankruptcy and his estate, including the costs and fees of the estate's administration. The registrar is further directed to report his findings to the court.
- [18] Should the parties agree, and if they feel it mutually convenient, the registrar's hearing may be conducted in Quesnel.

"Master D. Baker"

- [1] R.S.B.C. 1996 ch. 347
- [2] R.S.B.C. 1996 ch. 128
- [3] viz. Biedler v. Biedler (1983) 33 R.F.L. (2d) 366 and Walters v. Walters (1985) 62 B.C.L.R. 334
- [4] R.S. 1985 ch. B-3. I am not as sure: s. 67(1)(b) exempts property that is exempt from seizure by provincial legislation. I am not certain that Mr. Norquay's pension, now a locked-in RRSP, is exempt under provincial legislation.

[5] (1974) 3 O.R. (2d) 547

[6] Bankruptcy and Insolvency Act s. 178(1)(b)

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