

CANADA / JUDGMENT

Hartwick v. Hartwick

2001 BCSC 1706

COURT

Supreme Court of British Columbia

DECIDED

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Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRUCE GARY HARTWICK
PLAINTIFF

AND:

ELIZABETH ANNETTE HARTWICK
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE ROSS

(IN CHAMBERS)

Counsel for Plaintiff: M. Smyth

Counsel for Defendant: B.E. Bulmer

Date and Place of Hearing: 21 September 2001

14 November 2001

Vancouver, B.C.

- [1] This is an application brought by the plaintiff, Bruce Hartwick, for an order for the disposition of certain funds currently held in trust and for a further order to provide security for the award of maintenance made in favour of the defendant, Elizabeth Hartwick.

BACKGROUND

- [2] The parties were married on February 8, 1964. They separated October 11, 1991. Following separation, two actions were commenced; one for relief under the Family Relations Act, R.S.B.C. 1996, c. 128 and a petition under the Divorce Act, R.S.C. 1985 c.3.
- [3] Both actions were tried together before Justice Parrett in May 1993, whose Reasons for Judgment provided that the defendant would require and should receive spousal maintenance for the rest of her life. He set the level of maintenance at \$5,000 per month and ordered that there be a review as to quantum at the time of the plaintiff's retirement. Finally, his reasons provided that the plaintiff's maintenance was to be secured by the irrevocable assignment of 50% of the proceeds of the plaintiff's Great West Life Assurance policy in an amount not less than \$200,000. This policy was subsequently permitted to lapse at the time of the plaintiff's retirement.
- [4] Following the divorce, the plaintiff purchased a property at Argyle Avenue in West Vancouver (the "Argyle Property"). The defendant registered the Order of Justice Parrett against the title to the Argyle Property in order to secure the payment of maintenance. At that time, the Argyle Property was subject to a mortgage in the amount of \$300,000.
- [5] The plaintiff subsequently sought to refinance the property. He brought an application to discharge the charge and to enjoin the defendant from registering any further charge against the property unless the plaintiff was in arrears in connection with his maintenance obligations. Justice Blair ordered, by reasons dated January 25, 1994, that the charge on the Argyle Property be postponed to permit registration of the new financing arrangements. In doing so, he considered both the plaintiff's financial situation and the need to protect the defendant's income stream.
- [6] In 1994, the Argyle Property was sold for \$671,000 and the plaintiff purchased, for \$400,000, a property at Duchess Avenue in West Vancouver (the "Duchess Property"). The plaintiff brought an application to discharge the charge against the Argyle Property. Justice Boyd, in reasons dated June 20, 1994 held, [at p. 2]:

I will order that the charge be discharged on condition that the net proceeds of sale of \$275,000.00 be set aside and held in trust, pending the purchase of Mr. Hartwick's new property. I have selected the \$275,000.00 figure specifically on being alerted by Ms. Bulmer that when the charge was originally registered, the notional equity in the property was some \$275,000.00. It has now apparently risen and it is expected that the net proceeds of sale will now be some \$370,000.00. Those net proceeds are not being required to be set aside in total. Rather, the \$275,000.00 figure will be held in trust pending the closing of the transaction involving the purchase of the new property, and at that point the charge will be re-registered and the

\$275,000.00 available for disbursement to Mr. Hartwick.

- [7] The plaintiff retired from his employment effective October 31, 1994. Thereafter, Justice Macdonald, by reasons dated February 6, 1995, ordered that the quantum of maintenance to be paid to the defendant be reduced to \$3,000 per month. Justice Macdonald made an order of special costs in favour of the defendant on the basis of what he considered to have been improper and inaccurate financial disclosure by the plaintiff both at the trial and in relation to the application before him.
- [8] The plaintiff had borrowed \$100,000 to finance the purchase of the Duchess Property, to be secured by a first mortgage. An agreement was reached for the maintenance orders of Justices Parrett and Macdonald to be registered as charges subsequent to the first mortgage on the Duchess Property.
- [9] The plaintiff and his fiancée, Sharon Slusarenko, decided to marry and to sell the Duchess Property in order to purchase, for \$425,000, a property at Spruce Avenue in Coquitlam (the "Spruce Property"). They acquired the Spruce Property as joint tenants, subject to a first mortgage in the amount of \$425,000.
- [10] Subsequently, after negotiations between the solicitors for the parties, it was agreed that the Spruce Property would be registered solely in the name of the plaintiff. The proceeds of the sale of the Duchess Property were applied to the Spruce Property. In the result, the property was registered in the name of the plaintiff, subject to a first mortgage, now in the amount of \$147,000, and the two maintenance orders as subsequent charges.
- [11] In addition, Ms. Slusarenko contributed \$25,000 to the purchase of the Spruce Property. This amount was to have been documented by a mortgage but this step was not taken. Her interest was therefore not recorded against title.
- [12] After the plaintiff and Ms. Slusarenko married, they decided to move to the Nicola Valley, (the "Merritt Property"). They wished to build a home and to this end the Spruce Property was sold. The plaintiff brought an application to discharge the charge on the Spruce Property respecting the maintenance orders. That application was dismissed by Justice Maczko by reasons dated February 25, 2000, on the basis that the Order of Justice Parrett was clear that maintenance was payable to the defendant for her life; in other words, the obligation to pay maintenance charged the estate of the plaintiff.
- [13] The net proceeds of the sale of the Spruce Property were approximately \$236,000. \$31,000 of these proceeds were paid out to the plaintiff who used the funds, inter alia, to repay Ms. Slusarenko for her contribution to the Spruce Property.
- [14] Thereafter the proceeds of the sale of the Spruce Property have been held in trust pending resolution of the issue regarding security for the maintenance orders.

- [15] The parties entered into lengthy negotiations to attempt to achieve a resolution. These efforts culminated in what counsel for the defendant characterizes as an agreement, wrongfully repudiated by the plaintiff, and what plaintiff's counsel characterizes as an agreement to agree. In any event no action was taken by the defendant to enforce the alleged settlement.
- [16] A new home was constructed on the Merritt Property using funds that Ms. Slusarenko contributed. Title to the Merritt Property is currently registered in her name. The property has an appraised value of \$405,000.

ISSUE

- [17] Each party before me proposed several alternatives to resolve the disposition of the funds in trust and the security for the maintenance orders. Specifically, and in order of preference, the plaintiff has proposed:
- a) That he would put in place a policy of insurance on his life, in the amount of \$200,000, with the defendant as beneficiary, which policy he would own and the premiums for which he would pay. He proposed that the premiums could be paid a year in advance. In addition, to provide for security during his life, there would be an attachment order against his pension. The funds in trust would be paid out; or
 - b) That a half interest in the Merritt Property be transferred into the plaintiff's name as a tenant-in-common. The charge with respect to the maintenance orders would be registered as a first charge against this half interest. The funds in trust would be paid out; or
 - c) That the Merritt Property would be registered in the plaintiff's name with a \$215,000 first mortgage registered against title in favor of Ms. Slusarenko, representing the funds that she contributed to the property. The charge with respect to the maintenance orders would be registered as a subsequent charge and the funds would be released from trust.
- [18] The defendant proposes:
- a) That \$100,000 of the funds in trust be paid to her and that the plaintiff co-operate with the defendant's efforts to obtain a policy of insurance on his life. The defendant would own the policy and she would pay the premiums. There would be an attachment order against the plaintiff's pension. The balance of the funds would be released from trust; or
 - b) That the plaintiff return the \$36,000 which was paid to him out of the trust funds and that the entire \$236,000 remain in trust to stand as security; or
 - c) That title to the Merritt Property be registered in the plaintiff's name and that \$236,000 be registered against title as a first charge; or

- d) That a half interest in the Merritt Property be registered in the plaintiff's name as tenant-in-common and a charge registered against that interest. In addition, the plaintiff would provide security in the amount of an additional \$50,000 or that amount would remain in trust with the balance to be paid out.

Analysis and Disposition

[19] The reasons of Justice Rosenberg in *Kumar v. Kumar* (1988), 63 O.R. (2d) 572 (H.C.) articulate a number of factors which are to be considered in such applications. These principles were adopted and applied by Justice Blair in the application referenced earlier in these reasons.

[20] Having considered the circumstances of this case in light of those factors, I direct as follows:

That the funds being held "in trust" by the former solicitor for the plaintiff and the solicitor for the defendant, in the approximate sum of \$200,000 plus interest to date, from the sale of the plaintiff's former property located at 800 Spruce Avenue, Coquitlam, British Columbia, be paid out to the plaintiff on the following terms:

- (a) The plaintiff receive a registered one-half interest as a tenant-in-common in the property located at 42 Miller Road, Merritt, British Columbia; and
- (b) The defendant be at liberty to register a charge against the said interest in relation to her maintenance orders in priority to any other charge.

[21] In reaching this decision I have considered, in particular, the need to protect the defendant's income stream, the financial situation of the plaintiff and the concerns and reservations advanced by counsel with respect to each of the proposals.

[22] In my view, the amount of the security of, which the proceeds from the sale of the Spruce Property is the latest incarnation, is not a fixed amount which must be preserved. Rather it represents, to large degree, the fluctuations of the real estate market. Moreover, the quantum of maintenance has declined since the time of Justice Parrett's order, while the effluxion of time has also diminished somewhat the amount required securing the defendant's interest. The amount secured in this case has never been a calculated amount based upon a computation of required security in any event. Therefore I do not accept counsel's submissions that the amount secured must be at least \$236,000.

[23] I have rejected both proposals with respect to the purchase of insurance policies. The proposal offered by the plaintiff provides insufficient protection to the defendant in the event that the plaintiff fails to keep up the premiums. She could be left in that event without other viable security. However, the defendant's proposal suffers from the problems identified in the affidavit evidence filed by the plaintiff and in any event constitutes a form of further re-distribution of the assets which is not called for in the circumstances of this case. I note that, while there have been problems in the past with financial disclosure, the plaintiff has fully complied with the maintenance orders. There have been no arrears.

[24] Given that Ms. Slusarenko contributed financially to the acquisition of the Merritt Property, I do not find it appropriate to make an order which would result in her being deprived of her share of the equity in the property.

[25] I make no order for costs.

"C. Ross, J."

The Honourable Madam Justice C. Ross

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