

CANADA / JUDGMENT

Kopelow v. Warkentin

2006 BCCA 271

COURT

British Columbia Court of Appeal

DECIDED

31 May 2006

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2006 BCCA 271 Kopelow v. Warkentin COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Kopelow v. Warkentin, 2006 BCCA 271 Date: 20060531 Docket: CA030789 Between: Martin Larry Kopelow Appellant (Plaintiff) And Elsie Elizabeth Warkentin Respondent (Defendant) Before: The Honourable Chief Justice Finch The Honourable Madam Justice Levine The Honourable Mr. Justice Smith J.C. Fairburn Counsel for the Appellant S. Mansfield Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia 27 May 2005 Place and Date of Judgment: Vancouver, British Columbia 10 November 2005 Written submissions received: Date of Supplementary Judgment: 31 May 2006 Supplementary Written Reasons of the Court Supplementary Reasons for Judgment of the Court:

- [1] We handed down reasons for judgment on this appeal on 10 November 2005: see 2005 BCCA 551. These supplemental reasons concern the settlement of our order, which has been referred to us pursuant to Rule 49(1) of the Court of Appeal Rules, and costs.
- [2] The orders of the trial judge involved in this appeal were:
5. This Court Declares that the Marriage Agreement made between the parties dated February 20, 1987 is unfair having regard to the factors set out in Section 65 of the Family Relations Act;
 6. The assets of the parties total \$5,478,000.00, net of the trust funds for the benefit of the Children, and the Defendant, Elsie Warkentin, shall receive 35% of that amount, namely, \$1,844,000, which amount shall be credited and paid to the Defendant as follows:
 - a. She shall retain her Abbotsford property and RRSPs valued at \$400,000;
 - b. She shall receive \$171,500 on account of her interest in the former matrimonial home located at 144 West 61st Avenue, Vancouver, British Columbia;
 - c. The Plaintiff shall transfer sufficient RRSPs from his accounts to the Plaintiff [sic] to equalize their respective RRSP holdings;
 - d. The balance is to be paid by the Plaintiff to the Defendant by way of a compensation payment.

7. The former matrimonial home located at 144 West 61st Avenue, shall be listed for sale with the parties having liberty to apply for direction in relation to the sale if necessary;
 8. The parties have liberty to have the Defendant's share of the family assets paid to her by other means by agreement of the parties.
 9. The Plaintiff shall pay to the Defendant spousal support in the amount of \$1,500 per month commencing April 1, 2002 and continuing on the first day of each and every month thereafter with such support to end when the younger child of the marriage reaches the age of majority. . .
- [3] We decided that the trial judge erred in finding that the marriage agreement made by the parties was unfair and in dividing the property covered by the marriage agreement together with the family assets into fixed shares pursuant to s. 65(1) of the Family Relations Act, R.S.B.C. 1996, c. 128. We also decided that an inheritance received by the appellant husband during the marriage, although it was a family asset, should have been allocated entirely to the appellant husband pursuant to s. 65(1) of the Act. Further, we found that the award of spousal maintenance in favour of the respondent wife should have been \$3,500 per month, unlimited as to term.
- [4] The parties agree that our order should set aside order number 5 in the trial judgment. They also agree that our order should state that the wife's cross appeal for reapportionment should be dismissed and that her cross appeal of the award of spousal maintenance should be allowed and that periodic payments be increased to \$3,500 per month.
- [5] The parties disagree on how our order should deal with order number 6 in the trial judgment. They also disagree on the commencement date for the payment of the increased award of periodic spousal maintenance pursuant to order number 9.
- [6] The husband proposes the following form of order in respect of the property:
- a) that she retain her Abbotsford property and RRSPs valued at \$400,000.00;
 - b) that she retain the \$171,500.00 paid on account of her interest in the former matrimonial home located at 144 West 61st Avenue, Vancouver, BC;
 - c) that she retain the RRSPs transferred to her by the Appellant in the amount of \$434,873.00; and
 - d) that the balance in the amount of \$168,127.00 be paid by the Appellant to the Respondent by way of a compensation payment.
- [7] The wife proposes the following in this respect:
- a) The Appellant shall retain:
 - i) His Schedule "A" property; ii) The Trust Shares; iii) The \$225,000.00 paid by his mother's estate; iv) The \$130,000.00 paid by his mother's estate after the separation;

- v) The \$385,000.00 owed to him by Mobel Gafarnick trust; and vi) \$171,500.00 representing one half of the matrimonial home sale proceeds.
- b) The Respondent shall retain:
 - i) Her Schedule "B" assets; ii) The home she inherited from her mother; and iii) \$171,500.00 representing one half of the matrimonial home sale proceeds. AND THIS COURT FURTHER ORDERS that the parties shall each be entitled to one half of the assets acquired by the Appellant from his earnings and personal resources during the marriage, AND BY CONSENT.
- [8] Neither form is appropriate.
- [9] The trial judge found as a fact that the value at the triggering event of the family assets acquired by the husband after the marriage was \$1,280,000. He found that \$74,000 in value of these assets had been transferred to a trust for the children. Thus, the value of the family assets, aside from the matrimonial home and the RRSPs, was subsumed in order number 6. d. made by the trial judge. The wife did not challenge these values on the appeal. Indeed, her counsel agreed with them and agreed that the remaining \$1,206,000 should be divided equally under s. 56(2) of the Act: see our reasons, ¶ 38.
- [10] Further, it was not a matter of dispute on the appeal that, since the trial judgment was pronounced, the husband has transferred RRSPs to the wife in value totalling \$434,873.00 in discharge of his obligation under order number 6.c.
- [11] The wife now takes the position that her interest in the family assets subsists until the date they are actually divided in fact. Thus, her proposed form of order sets out a simple declaration that she is entitled to one half of the RRSPs and other family assets. However, this submission overlooks the fact that the trial judge divided the assets as of the date of his judgment and that he based his division on the values of the assets at that time. Our order represents the order that the trial judge should have made: Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 9(1)(a). Accordingly, it speaks as of the date of the trial judgment and it is no longer open to the wife to challenge the asset values determined and agreed upon as of that date.
- [12] The permissible orders in respect of the property are found in the powers granted by s. 66 of the Family Relations Act.
- [13] The trial judge's declaration that the parties' property as a whole had a certain value had some utility in the context of dividing the property pursuant to s. 65. However, it is no longer material to the order. Pursuant to s. 66(2), the court may declare the ownership of property, order that title to specified property be vested in one spouse or transferred to the other, order that property be sold and the proceeds be divided, and order that a spouse pay compensation to the other spouse for the purpose of adjusting the property division. Thus, our order should set aside order number 6 and substitute orders to achieve the foregoing objectives. It should say: AND THIS COURT FURTHER ORDERS THAT orders numbers 6, 7,

and 8 of the trial judgment be and they are hereby set aside and the following orders substituted:

6. (1) The following are family assets: [LIST (including the \$385,000 inheritance reallocated entirely to the appellant husband)]
 - (2) The matrimonial home at 144 West 61st Avenue, Vancouver, British Columbia having been sold for \$343,000, the parties shall each receive \$171,500 from the proceeds of sale in full satisfaction of their respective equal interests as tenants in common.
 - (3) The inheritance [describe the \$385,000 inheritance] be and it is hereby vested solely in the plaintiff.
 - (4) The plaintiff shall transfer absolutely to the defendant sufficient RRSPs to equalize the values of their respective RRSP holdings.
 - (5) The [remaining family assets] [or list them] be and they are vested solely in the plaintiff and the plaintiff shall pay to the defendant the sum of \$168,127.00 in full and final satisfaction the defendant's equal interest in the said assets as a tenant in common.
- [14] We have not attempted to specify the terms of the order in detail. Counsel are in a better position to do that and to make any necessary revisions to the wording we have set out.
- [15] Turning to the dispute over the commencement date for periodic spousal support payments, the husband's form of order specifies that the payments shall commence on December 1, 2005, the first day of the month following pronouncement of our judgment on the appeal. The wife's form of order states that the increased amount is payable commencing as of April 1, 2002, the date stipulated by the trial judge. The increase in the award of spousal maintenance was intended to reflect the fact that the wife receives a smaller asset base as a result of our judgment than was provided for in the trial judgment. Since it represents the order that the trial judge should have made, it must be effective as of the date stipulated in the trial judgment, that is, as of April 1, 2002.
- [16] The husband seeks an order for costs of the appeal and costs of the trial below. The form of order proposed by the wife contains no disposition of costs. However, in her written submission she submits that the parties should be left to bear their own costs here and below.
- [17] The appeal was successful because the law applied by the trial judge changed when the Supreme Court of Canada handed down its decision in *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550. Accordingly, it is appropriate that there be no order for costs of the trial.
- [18] Costs in this Court should follow the usual rule. The husband should recover his costs of the successful appeal and the wife should recover her costs of the successful cross appeal, the costs to be set off against each other.

[19] As a result, our order should state: AND THIS COURT ORDERS THAT the appellant's costs of the appeal be assessed and the respondent's costs of the cross appeal be assessed AND THAT the registrar set off the said costs of the appellant and the respondent and certify to which of them the balance is due AND THAT the party to whom the balance is due shall recover the balance so certified from the other party forthwith. AND THIS COURT FURTHER ORDERS THAT there be no order for costs of the action below. "The Honourable Chief Justice Finch" "The Honourable Madam Justice Levine" "The Honourable Mr. Justice Smith"

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