

CANADA / JUDGMENT

Kraft v. Kraft

2019 BCCA 204

COURT

British Columbia Court of Appeal

DECIDED

7 June 2019

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2019 BCCA 204 Kraft v. Kraft

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kraft v. Kraft,

2019 BCCA 204

Date: 20190607

Docket: CA45501

Between:

Virginia Anne Lily Kraft

Appellant

(Claimant)

And

Klaus Helmut Kraft

Respondent

(Respondent)

Corrected Judgement: The text of the judgement was corrected at paragraphs 3, 5, 17, 23, 24, 25 and 26 where changes were made on June 10, 2019.

Before:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia,
dated July 13, 2018 (Kraft v. Kraft, 2018 BCSC 1184,
Smithers Docket E16952).

Counsel for the Appellant:

G.E. Greene

Counsel for the Respondents:

C.B. MacEachern

Place and Date of Hearing:

Vancouver, British Columbia

May 15, 2019

Place and Date of Judgment:

Vancouver, British Columbia

June 7, 2019

Written Reasons by:

The Honourable Mr. Justice Savage

Concurred in by:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Goepel

Summary:

After making a final order concerning pension division, the trial judge in a family dispute dismissed the appellant's application to reopen the issue of entitlement to survivor benefits under the pension. The appellant appeals the judge's refusal to reopen the issue of pension survivor benefits, as well as the award of double costs made in favour of one of the respondents for successfully defending a trust and unjust enrichment claim advanced by the appellant. Held: Appeal allowed in part. The issue of survivor benefits under the pension is remitted to the trial judge for reconsideration. Consideration of the relevant case law and provisions of the Family Law Act, S.B.C. 2011, c. 25, and Pension Benefits Standards Act, S.B.C. 2012, c. 30, is required to dispose of the issue of entitlement to survivor benefits. There is no basis for interfering with the award of double costs as the respondent was wholly successful in defending the claim against her.

Reasons for Judgment of the Honourable Mr. Justice Savage:

Introduction

- [1] This is an appeal from orders in a family proceeding declining to reopen the question of entitlement to survivor benefits under a pension and awarding double costs to the successful respondent on a trust and unjust enrichment claim.
- [2] The judge below declined to reopen the question of entitlement to survivor benefits under a pension in circumstances where she addressed pension benefits generally at trial. She awarded double costs against the appellant, Virginia Kraft, in favour of one of the respondents, Sylvia Kempenaar, as Ms. Kraft had been wholly unsuccessful in a trust and unjust enrichment claim that sought an interest in land owned by Ms. Kempenaar, and had refused a reasonable offer to settle.
- [3] Ms. Kraft says the judge erred in both respects: the judge erred in not reconsidering entitlement to pension benefits due to inconsistencies in her reasoning, and erred in awarding double costs. The respondents support the judge's orders. For the reasons that follow, I would allow the appeal on the reconsideration issue and dismiss the appeal on costs.

Background Facts

- [4] The Krafts were married in 1970. They lived together as husband and wife until separation in 1997 when Mr. Kraft left the marriage and commenced cohabiting with Ms. Kempenaar. Ms. Kraft, who suffered from depression, did not commence a family claim until 2014. The Krafts were divorced in 2015.
- [5] Mr. Kraft retired from BC Hydro in 2015. Upon retirement he was entitled to a defined benefits pension plan (the "Pension"). He initially designated Ms. Kraft as his beneficiary and then later designated Ms. Kempenaar as his beneficiary. The form of pension payment was "joint and survivor 100%".
- [6] In these proceedings, Ms. Kraft claimed division of family assets and retroactive spousal support, and made an unjust enrichment and trust claim against Ms. Kempenaar who, she said, acquired property paid for by Mr. Kraft while he underpaid spousal support. The claim proceeded to trial in 2017 and judgment was released in March 2018, in reasons indexed as Kraft v. Kraft, 2018 BCSC 496, which I will refer to as the Trial Decision.

Decisions Below

- [7] Germane to this appeal are those parts of the decisions below dealing with pension division and the costs awarded to Ms. Kempenaar.
- [8] In the Trial Decision, after dealing with property division and spousal support, the trial judge ordered that the Pension be divided as follows:

- [175] In the result, I order that Mr. Kraft's BC Hydro pension be divided equally between Mr. and Ms. Kraft at source as at the first day of trial.
- [176] Since the pension has already commenced, its division must be dealt with under s. 117 of the [Family Law Act]. Under this section, Ms. Kraft is entitled to receive her proportionate share of the benefits payable under the plan until Mr. Kraft dies.
- [9] Ms. Kraft then sought to reopen the question of survivor benefits under the Pension. Ms. Kempenaar also raised the issue of an offer to settle not accepted by Ms. Kraft. The judge addressed these issues in what I will call the Reconsideration Decision, indexed as Kraft v. Kraft, 2018 BCSC 1184.
- [10] On whether to reopen the pension issue, the judge said only this:
- [56] Ms. Kraft in essence sought to reopen the issue of the pension by arguing the survivorship issue of Mr. Kraft's pension and hers. The pension has been divided at source and is the property of each respective party which he or she can do what he or she sees fit. This issue, accordingly, has been determined and will not be further addressed.
- [11] Relevant to the question of costs, in an earlier decision in the same proceeding, this Court dismissed an appeal from a judge's refusal to allow Ms. Kraft to amend her notice of family claim to advance claims "premised on the idea that Mr. Kraft's failure to pay adequate maintenance to Ms. Kraft has allowed the new spouse to enjoy a higher standard of living than she otherwise would have, and to accumulate assets": Kraft v. Kraft, 2016 BCCA 191 at para. 2.
- [12] With respect to the unjust enrichment and trust claims advanced against Ms. Kempenaar, the judge said this in the Trial Decision:
- [178] In respect of the claim against Ms. Kempenaar, I dismiss the claim against her in its entirety. I find that the pleadings do not disclose any cause of action against Ms. Kempenaar. The unjust enrichment and trust claim, I find, was conclusively determined by the Court of Appeal in the decision referred to earlier in these reasons.
- [13] Because Ms. Kraft's claims against Ms. Kempenaar were wholly unsuccessful, and Ms. Kraft refused a reasonable offer to settle, the judge applied Rules 11-1(5) and (6) of the Supreme Court Family Rules and awarded double costs of the trial to Ms. Kempenaar (Reconsideration Decision at paras. 42-48).

On Appeal

- [14] Only the Reconsideration Decision has been appealed. On appeal, although counsel for Ms. Kraft asked us to deal with the merits of the pension issue, Ms. Kraft did not appeal the Trial Decision. Moreover, the substantive issue concerns the provisions of the Pension, which are not before us.

- [15] Albeit somewhat obliquely, Ms. Kraft did raise as an issue whether the pension issue should have been reopened, saying "[t]he trial judge's failure to analyze (or 'open' to begin with) the 'survivorship issue' in any detail is exactly the error in law on appeal here."
- [16] In my view, the issues on appeal are the failure to reopen the pension issue, not the ultimate disposition of the pension matter, and the award of costs, so I will address those issues.

Reconsideration Issue

- [17] Although a trial judge has discretion not to reopen a trial, the discretion is not unfettered, but is circumscribed by the requirement that it be "exercised 'judicially', in a principled and consistent way": *Hansra v. Hansra*, 2017 BCCA 199 at para. 44, citing *Fan v. Chana*, 2011 BCCA 516 at para. 61. I agree with Ms. Kraft that the judge's order on survivor benefits under the Pension is problematic with respect to both its content and effect. The real issue to be addressed, which was not addressed, were the competing interests of Ms. Kraft and Ms. Kempenaar.
- [18] One interpretation of the order is that the pension account itself was divided at source, such that Mr. and Ms. Kraft now each hold (or have the ability to acquire) their own pension account from which they will receive benefits. By saying that "[t]he pension has been divided at source and is the property of each respective party which he or she can do what he or she sees fit", and finding that "[t]his issue, accordingly, has been determined" (Reconsideration Decision at para. 56), the judge appears to have thought she divided the pension account itself, rather than the benefit stream payable from the Pension.
- [19] If the pension account was divided such that Mr. and Ms. Kraft would each have their own pension account from which they would receive benefits and could do what they wanted (e.g., designate their own survivor in accordance with the terms of the plan), then there would not be a problem. Dividing the Pension at source would "ensure that Ms. Kraft's ongoing support needs are met" (Trial Decision at para. 182).
- [20] Although the judge may have intended to divide the Pension at source, this is not the effect of her order. Paragraph 6(a) of the judge's order provides that Ms. Kraft is entitled to become a limited member of the Pension:
6. Virginia is entitled:
- (a) to file the prescribed forms under Part 6 of the Family Law Act to become a limited member of the [Pension]; and

- [21] A "limited member" is defined in s. 110 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], as "a person designated under section 113 [designation of limited members] as a limited member of a local plan". A "local plan" is also defined in s. 110 and includes various types of pension plans. As the Pension has commenced, Ms. Kraft's benefits as a limited member of the Pension would be payable pursuant to s. 117 of the FLA. Under s. 117(2), Ms. Kraft would be entitled to receive benefits only until the death of Mr. Kraft (or the termination of benefits).
- [22] A second interpretation of the judge's order is that the pension account itself was not divided but Ms. Kraft is entitled to her share of Mr. Kraft's benefits, but only until his death. Of course, if this interpretation is correct and Mr. Kraft were to die tomorrow, then Ms. Kraft would get nothing, and, arguably, all of the reasoning that the judge conducted in determining spousal support and arrears and offsetting the various awards would be without any benefit to Ms. Kraft.
- [23] Additionally, as I have said, the judge did not refer to the competing claims of Ms. Kempenaar and Ms. Kraft. In this case, Ms. Kempenaar is the designated beneficiary of the survivor benefits under the Pension, and she would have a claim to survivor benefits under s. 124(5)(a) of the FLA. At material times (from 1997 and continuing), Ms. Kempenaar was Mr. Kraft's common law spouse, and she is his only spouse under s. 1(3) of the Pension Benefits Standards Act, S.B.C. 2012, c. 30 [PBSA].
- [24] The judge was referred to but did not discuss this Court's decision in *Tarr Estate v. Tarr*, 2014 BCCA 315. In *Tarr Estate*, the Court held that upon pension commencement, the survivorship interest in a member's pension becomes irrevocably vested in the member's spouse. Under the PBSA Ms. Kempenaar was the member's spouse when the pension commenced. The judge did not refer to, or expressly consider, the consequences of *Tarr Estate* in her analysis.
- [25] There are differences between the circumstances in *Tarr Estate* and the circumstances of this case. For example, Ms. Kraft does not meet the definition of a spouse under the PBSA, unlike the spouse in *Tarr Estate*, and *Tarr Estate* was decided under the Family Relations Act, R.S.B.C. 1996, c. 128, and a now repealed version of the PBSA, rather than the FLA and the current version of the PBSA.
- [26] In fairness to the judge it is not apparent that she was referred to the appropriate statutory provisions of the FLA or the PBSA that could have assisted her. For example, she could have made an order with reference to s. 126(2)(b) of the FLA, which provides that the Supreme Court must expressly refer to this subsection in allocating all or part of survivor benefits to a person other than the spouse. Moreover, s. 114 of the FLA (which the parties also did not refer to in argument before us), if applicable, allows benefits to be divided upon giving appropriate notice under s. 136.

[27] Although Ms. Kraft urges us to deal with the substantive pension issue underlying this appeal, in my view, it would be inappropriate for this Court to do so. The only appeal before us was brought from the order declining to reopen the issue of survivorship rights. I would therefore remit the matter back to the trial judge to reconsider the issue of the right to survivorship under the Pension. These reasons should not be taken as a suggestion of any particular disposition, but merely a direction that the judge reconsider the issue.

Costs Issue

[28] With respect to the order for double costs, Ms. Kraft says that the order should be set aside if she is successful on appeal. I disagree. The survivorship rights under the Pension were not dealt with as a major issue at trial and it is not apparent that the judge was referred to all of the relevant statutory provisions. Indeed, Ms. Kraft says, the difficulty only became apparent after the trial in dealing with the Pension administrator's counsel, Mr. Brandt. In my view, it was incumbent on the parties to have properly raised the issue before the trial judge, which was not done. The only claim pleaded by Ms. Kraft against Ms. Kempenaar at trial was the issue on which Ms. Kempenaar was wholly successful: the unjust enrichment and trust claim.

Disposition

[29] In the result, I would allow the appeal in part, and remit the matter of the pension survivorship rights to the judge to reconsider. I would dismiss the appeal against the order for double costs at trial. As success has been divided in this Court, I would make no order for costs of the appeal.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Mr. Justice Goepel"

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Prepared on 27 October 2026 · Esheria