

CANADA / JUDGMENT

Williams v. Unrau Williams

2004 BCCA 577

COURT

British Columbia Court of Appeal

DECIDED

16 November 2004

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2004 BCCA 577 Williams v. Unrau Williams

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Williams v. Unrau Williams,

2004 BCCA 577

Date: 20041116

Docket: CA31466

Between:

Murray Ronald Williams

Appellant

(Plaintiff)

And

Cynthia May Unrau Williams

and John Unrau

Respondents

(Defendants)

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Huddart

The Honourable Mr. Justice Smith

Appearing on own his behalf

Appellant

Appearing on their own behalf

Respondents

Place and Date of Hearing:

Vancouver, British Columbia

4 November 2004

Place and Date of Judgment:

Vancouver, British Columbia

16 November 2004

Reasons of the Court

Reasons for Judgment of the Court:

- [1] The appellant, who was the plaintiff below and to whom we will refer as the husband, appeals from certain orders made following a trial of a family law action in the Supreme Court. The respondents are his former wife and his father-in-law. The trial judge granted a divorce, made orders regarding child and spousal support and division of the family assets, and dismissed the appellant's claim that the matrimonial home was a family asset in which he was entitled to share: see [2003] B.C.J. No. 2642 (QL), 2003 BCSC 1232.
- [2] On this appeal, the husband challenges the dismissal of his claim to an interest in the family home, the award of spousal support to the wife, and the failure of the trial judge to order that his specified access to the children be enforced by the police. As a subsidiary issue of his first ground, he alleges that the trial judge prejudiced his ability to present his case by refusing to order adequate discovery of documents during the trial. As well, he complains that the trial judge interfered unduly in his presentation of his case. In a cross appeal, the wife alleges that the trial judge ought to have imputed certain income to the husband in respect of her claim for child support.
- [3] The parties were married in September 1991. They have two children, now aged twelve and ten. At the time of the marriage, the husband was an undischarged bankrupt. It appears that he was discharged in about 1993. The marriage suffered from financial and domestic difficulties. While they cohabited, the wife was a full-time mother and homemaker and the husband was employed by various employers as a truck-driver. As well, he operated his own landscaping business for a period of time. Following two earlier separations, the parties separated finally in 2000.

- [4] Before the marriage, the wife's father, the respondent Unrau, offered to pay for a large wedding or, alternatively, to give the couple a small wedding and \$10,000 toward the purchase of a home. They chose the second alternative.
- [5] The parties discovered the residential property in question in 1994. They wanted to purchase it for their family home but had no capital for the down payment and were unable to obtain a mortgage because of the husband's bankruptcy. Mr. Unrau purchased the property for \$226,000. He paid \$58,000 cash on account of the purchase price, which he raised by mortgaging his own home. He financed the balance of \$168,000 by way of a mortgage loan on the property. Subsequently, he spent a further \$10,000 to finish a basement suite in the residence so that it could be rented out to assist in paying the mortgage instalments.
- [6] It was agreed that the husband and wife would pay Mr. Unrau \$600 bi-weekly from their own resources together with the monthly rental of \$600 from the suite. These amounts were to cover the monthly instalments due on the mortgage on the property. It was also agreed that they were to obtain their own financing within three years and, in that event, Mr. Unrau would convey the title to them.
- [7] The husband and wife made the monthly payments to Mr. Unrau's bank account and Mr. Unrau paid the mortgage instalments to the mortgage holder. Mr. Unrau also paid all of the property taxes and property insurance premiums and, as well, paid for all improvements requested by the married couple. In addition, he paid for necessary repairs and on several occasions covered the shortfall in the monthly mortgage payments when the husband and wife were unable to raise the full instalment. In all, he invested more than \$60,000 in the property. Despite the improvements, the value of the property declined and the trial judge valued it at \$200,000 at the time of the trial.
- [8] As it turned out, the husband and wife did not obtain their own financing, and the title to the property remained in Mr. Unrau and was never conveyed to them.
- [9] The parties conducted this litigation themselves from its inception. The husband claimed at trial that the property purchased by Mr. Unrau was a family asset in which he was entitled to share. Shortly before the trial commenced, he joined Mr. Unrau as a defendant in the action. His pleadings do not assert any material facts that would support a claim to an interest in the property against Mr. Unrau. In his statement of defence, Mr. Unrau denied the claim to what he characterized as an "implied joint family asset or joint property." Alternatively, he sought an order for reimbursement of monies he expended on the property. The wife did not join in the husband's claim to the property.
- [10] In his submission to the trial judge, the husband argued that the property was a wedding gift from Mr. Unrau. The trial judge rejected this claim. He said:

[32] ...The plaintiff's claim to the family home is denied. There was a time that the husband and wife would have been entitled to have the title transferred to them, certainly within the first three years following the original purchase. Given that they elected not to do so and given that J.U. was required, on a great number of occasions, to make financial contributions to the cost of ownership, to a significant total value, I find that the claim of the husband (made on his behalf and that of his wife) cannot succeed. The family home is the property of J.U.

[11] Before us, the husband alleges that the trial judge erred in failing to recognize that Mr. Unrau made a gift to him and his wife of the beneficial ownership of the property and that Mr. Unrau was, in effect, their mortgage holder. However, none of the parties to the alleged gift testified that the property was a gift.

[12] The husband did not testify that Mr. Unrau ever said to him that the property was to be a wedding gift. Rather, he relied on what he was told by his wife. In describing the early years of the marriage in his evidence in chief, the husband said:

During that time we bought a home, with the help of Mr. Unrau, who's Cindy's dad. He'd apparently made an offer to Cindy, which I didn't -- don't recall being made, for -- that if we had a small wedding that he would contribute at least \$10,000 --

THE COURT: Okay. Now, hold on for a moment. That's not anything that you heard him say, is it?

THE WITNESS: Well, Cindy told me -- did tell me that, though.

[13] Shortly after that, the trial judge permitted the husband to state what his wife had told him. He said:

THE WITNESS: Okay. Cindy told me on several cases that -- several times -- more than several times that, you know, that this is what had been said. So in January --

THE COURT: What -- what had been said? I'm sorry.

THE WITNESS: That her dad had offered to -- basically to give us a down payment on a home, or \$10,000. This apparently had been said prior to us getting married. I only knew of this later on when we started talking about looking for a home. We started looking for a home in January of '94, and in March -- in -- in -- at the end of January of '94 we'd found a home and we contacted the -- a real estate lady -- person to -- to help us with it. And subsequently, then, Mr. Unrau got involved in the -- in the purchase, and he -- we subsequently -- we -- we moved into the home on March the 15th of '94.

[14] When pressed for the details of the alleged agreement during his cross-examination by the wife, the husband said that he "wasn't party to all of the negotiations. A lot of it was done between you and your father."

[15] In her evidence, the wife said:

THE WITNESS: When I told my dad that I was -- Murray and I were getting married, he asked -- he said to me that would I like to have a large wedding or would I like to have \$10,000 to put towards the purchase of a house? And I said that I didn't really want a big, frivolous wedding, it wasn't my style, and I would gladly take a \$10,000 down payment on a house.

[16] She went on to say that the arrangement reached was that her father would buy them a home to live in and that she and her husband would cover the mortgage payments, taxes, and expenses and then "within three years, if not sooner, we could buy it off him." The husband cross-examined her on this issue as follows:

Q When was the first time that you discussed with your father this gift for \$10,000 that you talked about as a wedding present or...?

A After I told him that you and I were getting married.

Q When did you ever discuss that with myself?

A I don't think I discussed it. I think that I told you that I had decided that I wanted a small wedding and what my father was going to give the \$10,000 gift for a down payment on a home to us.

[17] Mr. Unrau's evidence was to similar effect. During his direct evidence, he testified:

I would like to speak on this idea of a gift. This gift theory, I had never heard of this gift theory until one day my daughter phoned me and said that Murray had fill out -- filled out affidavits saying that everything, all the improvements, all the expenses were gifts. And I had never heard that before that date.

THE COURT: When was that?

THE WITNESS: It was when the proceedings started here, within the last year.

THE COURT: So at the -- in the early, early --

THE WITNESS: Early stages of these, yes.

THE COURT: -- stages of the lawsuit.

THE WITNESS: Correct.

[18] The husband did not put to Mr. Unrau in cross-examination his contention that Mr. Unrau made a gift of the property in its entirety. However, the trial judge questioned Mr. Unrau at the end of his testimony to clarify several matters. During that examination, the following exchange occurred:

Q Now, as I understand your evidence, sir, initially when your daughter and Mr. Williams were married, you indicated that you intended to assist them by making a contribution towards a home for them; is that right?

A Correct.

Q How much was it your intention to assist?

A My intention was I offered my daughter \$10,000 and whatever she wouldn't use on a wedding would go to the balance of a down payment. And she used approximately \$3,000 on the cost of a wedding, so that left a balance of \$7,000.

Q Now, as matters turned out, you took the steps to buy the house, right?

A Right.

Q And that included obtaining financing?

A Correct.

Q Was it your intention at some point they would take over the financing and essentially take you out?

A Yeah, eventually, within three years was the agreement that within three years he would qualify for a mortgage and I would be -- the mortgage that I have would be paid out and they would have their own mortgage.

- [19] Thus, the evidence does not support the husband's submission that the property was given to him and his wife by Mr. Unrau and the trial judge did not err in rejecting that submission.
- [20] It appears that the trial judge viewed the transaction as an offer to finance the purchase of the house for a period up to three years. On that basis, it may be, as the trial judge suggested, that so long as Mr. Unrau's offer remained in effect the husband and wife had an interest in the property that equity would have protected. However, the husband and wife never satisfied the condition by raising their own financing and, as a result, Mr. Unrau's offer lapsed.
- [21] The husband also submits that the trial judge should have found a constructive trust in his favour. He did not make this submission before the trial judge and, as a result, there are no factual findings or any opinions expressed by the trial judge about the validity of this claim. This Court will not generally hear an argument raised for the first time on appeal unless it can be shown that an injustice has been done and that all of the relevant evidence is in the record. No injustice has been shown here, nor is the evidential record complete on this issue. Accordingly, the husband is not entitled to argue this point. In any event, we see no merit in this submission. To be entitled to the remedy of a constructive trust, the husband would have to show, among other things, that Mr. Unrau has been unjustly enriched by the transaction. There is no basis in the evidence for such a finding. In fact, the value of the property at the time of trial was significantly less than the purchase price paid by Mr. Unrau without taking into account his expenditure of more than \$60,000 on capital improvements and maintenance.

- [22] It follows that the trial judge did not err in rejecting the husband's claim that the home was a gift and in concluding that it was the property of Mr. Unrau at the time of the trial. The husband failed to establish that either he or his wife had any legal or beneficial interest in the property.
- [23] The husband alleges next that the trial judge erred in refusing to order Mr. Unrau to produce to him during the trial a number of documents, including his banking records and income tax returns. As we understand his submission, the failure of Mr. Unrau to make full disclosure of these documents prevented him from demonstrating that the payments made to Mr. Unrau by him and his wife were payments on account of the purchase of the property. This demonstration turned, apparently, on the validation of the husband's suspicion that Mr. Unrau did not account for these monies as rental income. The husband's position has changed since the trial; the reason he gave the trial judge for requiring the documents was to enable him to demonstrate that Mr. Unrau had lied on his income tax returns. It was entirely within the trial judge's discretion to conclude that this was an irrelevant or marginally relevant issue and that disclosure of documents for that purpose would not be ordered. However, the trial judge acceded, at least in part, to the husband's application.
- [24] Although the husband had applied unsuccessfully in Chambers before trial for an order that Mr. Unrau disclose his income tax returns and other financial records, the trial judge directed Mr. Unrau to produce several categories of documents requested by the husband, including his bank statements and income tax returns. As a result, Mr. Unrau produced numerous documents, although he testified that there were some banking records that he could not find. When the trial judge asked him if he was satisfied with the disclosure provided to him, the husband replied in the affirmative. The trial judge vetted the documents for relevance and it appears that all of them except the income tax returns, were produced to the husband and that he used them in his cross-examination of Mr. Unrau.
- [25] In *Blendec International Inc. v. 347518 B.C. Ltd.* (1996) 2 C.P.C. (4th) 49 (B.C.C.A.), the appellant submitted that the trial judge erred in refusing to order the production during the trial of banking records and various other documents on the ground that to do so could open up further inquiries and would result in a delay of the trial. This Court, per Southin J.A., addressed these submissions as follows:

7 Although a trial judge has the power to require a party, even in the middle of a trial, to produce documents, he is in control of the trial and in the exercise of his discretion has also the power to decline to make such an order in the absence of proper pre-trial proceedings when to do so will disrupt, in his opinion, the trial. As in all exercises of judicial power, a trial judge must proceed on proper principles. Nothing put forward by the appellant before us shows any impropriety in the exercise by the learned judge of his discretion.

- [26] Those remarks are apt in the circumstances before us. The trial judge exercised his discretion judicially and there is no merit in this ground.

- [27] The husband submits that the trial judge interfered unduly with his presentation of his case. He identified no specific examples of his point. In rare circumstances, judicial intervention may be so egregious as to render a trial unfair. Here, the trial judge intervened frequently to question the parties and the witnesses. His interventions were not confined to the appellant's case but occurred during the respondents' presentations as well. However, the parties were not represented by counsel at trial. In such circumstances, a trial judge has a duty to assist the litigants to present their cases properly. As well, a trial judge is entitled to question witnesses in order to clarify the evidence. The interventions by this trial judge were directed to those purposes. In our view, he was scrupulously fair and afforded the appellant every opportunity to present his case fully. There is no merit in this ground of appeal.
- [28] Next, the husband submits that the trial judge erred in awarding excessive spousal support.
- [29] Since the parties separated in 2000, the wife and their children have continued to live in the family home. The wife pays Mr. Unrau a below-market rent of \$800 per month. Her mother, Mr. Unrau's ex-wife, occupies the basement suite and pays rent as well. The wife has supported herself and the children from income assistance, child support payments, child tax credits, student loans, and loans from Mr. Unrau. The husband refused to pay spousal support before trial. The wife is enrolled in a diploma program in Youth and Child Care at a regional college. She expects to earn the diploma by May 2005 and to obtain employment in the field thereafter. Her mother assists her by caring for the children when necessary.
- [30] The husband took some time to get on his feet financially after the separation and subsisted on social assistance for a period of time. At the time of trial, he was employed as a truck driver, earning \$44,000 annually. This appeared to the trial judge to be secure employment. The husband was living with another woman and her son in a second residence that he purchased in 2002, although they were temporarily separated at the time of trial. He had listed that property for sale at the time of the trial and expected to make a substantial gain on the sale.
- [31] The trial judge did not give extensive reasons for his award of spousal support. He noted that the wife stayed home as homemaker and primary caregiver to the children during the marriage and concluded that she is therefore entitled to both compensatory and non-compensatory support. He found that an equal division of the modest family assets would be unfair in light of the respective capabilities of the parties, the wife's ongoing custodial obligations, and her need to become eventually self-sufficient. Accordingly, he divided the family assets unequally in favour of the wife. He then concluded that the wife requires and the husband is able to pay \$600 per month in spousal maintenance.
- [32] The husband objects to the manner in which the trial judge treated many items of income and expense of both parties. These matters were all before the trial judge and were considered by him.

- [33] Appellate courts give significant deference to trial judges in relation to support orders. The reason for this deference was explained by L'Heureux Dubé J. in *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at ¶ 12:
- [12] ...This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.
- [34] We are not convinced that the trial judge made any error in law or in his appreciation of the evidence that would justify our interfering with the order that he made for spousal support. We reject this ground of appeal.
- [35] Finally, the husband submits that the trial judge erred in refusing to order that the police enforce his access rights to the children. Custody and access were not before the trial judge for disposition, since there was an existing custody and access order with which the parties were content. However, when it appeared during the trial that the husband was asserting difficulties with his access under the existing order, the trial judge referred the parties to another judge to deal with that issue in an informal conference. Apparently, that judge refused to make a police enforcement order. The parties reached an agreement during this conference to abide by the earlier order with certain modifications. The trial judge noted that agreement and incorporated the modifications in his order after obtaining the express agreement of both parties to do so.
- [36] If the trial judge had jurisdiction to make a police enforcement order, we are not convinced that he erred in failing to do so in the circumstances of this case. We will leave for another day the question of whether a judge of the Supreme Court has jurisdiction to direct the police to deploy their resources so as to enforce a parent's access rights with his or her children.
- [37] As we cannot accede to any of the grounds of appeal raised by the husband, the appeal is dismissed.
- [38] The wife cross appeals, alleging that the trial judge erred in failing to impute rental income to the husband from his property. The trial judge found that the husband's common-law spouse and her adult son had paid him rent while they lived in the house, although the spouse characterized her payments as contributions to household expenses. She and her son had moved out at the time of trial and the wife submits that the trial judge should have imputed rental income to the husband arising from the vacancy they created.

- [39] The trial judge found that the husband's annual employment income was \$44,000. He awarded child support of \$618 per month, which is the table amount in the Federal Child Support Guidelines, SOR/97-175 for two children given that level of income. Thus, he did not take potential rental income of the husband into account.
- [40] The wife relies on s-ss. 19(1)(d),(e), and (f) of the Child Support Guidelines:
19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- ...
- (d) it appears that income has been diverted which would affect the level of child support to be determined by these Guidelines;
 - (e) the spouse's property is not reasonably utilized to generate income;
 - (f) the spouse has failed to provide income information when under a legal obligation to do so;
-
- [41] In relation to s. 19(1)(d), the wife points to the cross-examination of the husband in which he was unable to explain the origin of approximately \$12,000 in his bank account. She argued that it was accumulated rental income. She submitted, as well, that the husband had the ability to rent a portion of his house and that income ought to be attributed to him pursuant to s. 19(1)(e) as if he were doing so. As for s. 19(1)(f), she referred to comments of the trial judge critical of the husband's attempts to limit disclosure of his financial affairs.
- [42] The trial judge took pains during final submissions to clarify and understand the positions of the parties and made careful note of them, including the wife's claim to have rental income imputed to the husband. This is apparent from the colloquy in which he engaged them during their respective submissions. While the trial judge made no mention in his brief reasons of the wife's submission on this issue, we cannot conclude that he overlooked it. In dividing the family assets unequally in favour of the wife, he took into account all of the financial circumstances of the parties as of the date of trial. That analysis would have included a consideration of the unexplained credit in the husband's bank account. Further, as the common-law spouse and her son had moved out, it was apparent that the husband was not receiving rental income at the time of the trial. Moreover, as the house was on the market and was expected to be sold, it would not have been appropriate to impute rental income from the house to the husband on an ongoing basis. Finally, an order imputing income on the basis of s. 19(1)(f) is a discretionary order and, while the trial judge's criticisms of the husband's approach to financial disclosure were fully justified, we are not satisfied that any error has been demonstrated in his exercise of that discretion.
- [43] In the result, the wife has failed to show that the trial judge made any error in principle or in his appreciation of the evidence in respect of this issue.

[44] Accordingly, the cross appeal is also dismissed.

"The Honourable Chief Justice Finch"

"The Honourable Madam Justice Huddart"

"The Honourable Mr. Justice Smith"

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