
CANADA / JUDGMENT

Willie v. Willie

2013 BCCA 318

COURT

British Columbia Court of Appeal

DECIDED

4 July 2013

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2013 BCCA 318 Willie v. Willie

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Willie v. Willie,

2013 BCCA 318

Date: 20130704

Docket: CA040007

Between:

Raymond Edward Willie

Respondent

(Claimant)

And

Suzanne Marion Willie

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Neilson

The Honourable Mr. Justice Hinkson

On appeal from: A decision from the Supreme Court of British Columbia,

dated March 15, 2012, (Willie v. Willie, 2012 BCSC 377,
New Westminster Docket No. E020933).

Counsel for the Appellant:

D. Manson

Counsel for the Respondent:

G. Laughlin

Place and Date of Hearing:

Vancouver, British Columbia

May 15, 2013

Place and Date of Judgment:

Vancouver, British Columbia

July 4, 2013

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Madam Justice Neilson:

- [1] The sole issue on this appeal is whether the chambers judge who approved the sale of the respondent/husband's interest in the matrimonial home to the appellant/wife erred in failing to deduct a notional real estate commission of \$33,000 from the sale price.

Background

- [2] In May 2006, the parties separated after a 35-year marriage. They were able to settle the issues between them and, on April 23, 2008, obtained a consent order that dealt with spousal support and the division of family assets.
- [3] The following parts of that order have relevance to this appeal. The parties agreed there would be an unequal division of family assets in favour of the appellant on the basis that she would forego her claim to spousal support. This was to be accomplished by an "Adjustment Payment" of \$1,013,000 to the appellant, payable by an immediate installment from the respondent of \$350,000, with the balance to come from his interest in the net sale proceeds of the matrimonial home. If there was a shortfall due to a poor real estate market, the

respondent was to make this up with a further payment. If the net sale proceeds exceeded the amount required for the Adjustment Payment, the respondent was to receive the balance.

- [4] As to the sale of the matrimonial home, the order provided that the respondent would transfer his half-interest to the appellant, who would list the property and have conduct of the sale. She could not accept an offer of less than \$820,000 plus defined "Sales Expenses" (incurred to prepare the home for sale) without the respondent's consent or a court order. Upon the sale, the sale proceeds were to be applied, first, to the customary expenses associated with a real estate transaction, including the mortgage of approximately \$105,000 and "real estate commission payable on the sale". As set out above, the net proceeds were then to be applied to the amount outstanding on the Adjustment Payment, with any residue going to the respondent. Until the home was sold, the respondent was responsible for paying defined "Extra Expenses" of benefit to the appellant. These included the mortgage payment, a monthly payment to her of \$1,200, and other smaller expenses.
- [5] The appellant listed the house for sale from October 2008 to May 2009 but received no offers. Due to a falling market, the parties agreed not to continue the listing. For reasons that are not fully explained, it was not listed again until August 2011 when, following an unsuccessful attempt by the appellant to obtain an order that she retain the matrimonial home, she relisted the property for \$1,288,000. During the hiatus between the listings, the respondent was delinquent in paying the Extra Expenses under the 2008 order.
- [6] Several offers well below the listed price were received and the appellant offered to match each of these, but the respondent rejected both her offers and those of the third parties as too low. On December 13, 2011, the parties received an offer of \$1,100,000. The respondent indicated he wished to counter with an offer of \$1,140,000. The appellant then made an offer to purchase the property for \$1,107,100, and pointed out to the respondent that this would net \$100 more than his proposed counter-offer, since a sale to a third party would require a payment of \$33,000 for real estate commission.
- [7] The respondent refused to accept the appellant's offer, and brought an application for an order giving him conduct of sale. The appellant countered with an application for an order that the home be sold to her for \$1,140,100, less the notional real estate commission of \$33,000, and for an order that the respondent pay the delinquent Extra Expenses. The applications were heard at the same time.
- [8] In reasons issued on March 15, 2012, the chambers judge ordered the respondent to pay most of the outstanding Extra Expenses. As to the matrimonial home, he mistakenly stated that the parties had agreed to a purchase price of \$1,107,000 because commission did not have to be paid, and ordered the sale of the matrimonial home to the appellant on that basis. The parties drew this error to the judge's attention and submitted further argument to rectify it. The chambers judge then issued a memorandum on May 15, 2012, in which he stated:

I recognize now that I was wrong at para. 6 of my Reasons in saying that the claimant had agreed to the purchase price. The claimant had made an offer of \$1,140,000 and the respondent had countered that offer at \$1,107,000, saying that her offer was equivalent to his offer taking into account that real estate commission would not have to be paid.

Claimant's counsel submits to me that I should not have taken a notional real estate commission off the \$1,140,000 when the claimant's interest was being sold to the respondent and not to a third party, relying on *Wheatley v. Oliver*, 133 D.L.R. (4th) 729, 21 B.C.L.R. (3d) 209, and other cases where a notional real estate commission was not taken into account in the transfer of one spouse's interest to the other.

Respondent's counsel on the other hand submits that the *Wheatley* decision is distinguishable because it was a valuation case and this is not.

On reflection I am satisfied I should have applied the *Wheatley* line of cases and not deducted a notional real estate commission from the \$1,140,000 offer of the claimant, because his interest was being sold to the respondent and there is no evidence before me that she was going to re-sell it in the near future and incur a real estate commission.

- [9] The chambers judge then acknowledged that he had no jurisdiction to order the appellant to pay more than her offer of \$1,107,000 for the property and, since there was no agreement on the purchase price, stated the property would have to go back on the market unless the parties agreed otherwise.
- [10] The parties evidently reached an agreement that instead of relisting the property the appellant would purchase it for \$1,140,000, but retain her right to appeal the chambers judge's refusal to deduct the notional real estate commission from the purchase price.

Discussion

- [11] The case relied on by the chambers judge, *Wheatley v. Oliver* (1996), 21 B.C.L.R. (3d) 209, 133 D.L.R. (4th) 729 (C.A.), endorsed the widely accepted principle that, in valuing family assets, costs of disposition should not be deducted if they are hypothetical or speculative, and thus unlikely to be incurred. In *Wheatley*, the trial judge divided the matrimonial home on a 60/40 basis in favour of the husband, and ordered that it be sold unless the husband purchased the wife's interest within 60 days. The husband had continued to reside in the home since separation and the trial judge reasonably assumed he would purchase the wife's interest, but deducted \$25,000 from its value as notional real estate commission. This Court overturned that deduction because there was no evidence the husband intended to sell the property to a third party. In doing so, it followed its earlier decision in *Vetter v. Vetter* (1994), 8 R.F.L. (4th) 290, 50 B.C.A.C. 14. There, the matrimonial home had been equally divided and the husband purchased the wife's interest. The main issue was the equalization of their interests as the husband had obtained the benefit of an increase in market value between the valuation date and the transfer. After dealing with that issue the Court stated:

- [22] Before making an order with respect to the home, however, it is necessary to deal with the learned trial judge's order that a notional real estate commission be deducted from the value of the home in the event the husband purchased the home. In my view, there was no justification for such an order in this case since it is clear that the husband intended to continue to live in the home and would not, therefore, incur such an expense. The effect of that order was to further devalue the wife's interest in the home.
- [12] The appellant accepts the general rule that disposition costs will not be deducted unless they are likely to be incurred. She argues, however, that these cases are distinguishable because they deal with the valuation of family assets for the purpose of apportionment. She says in this case valuation and apportionment of the family assets took place in 2008, as reflected in the 2008 consent order. As a result, these cases have no application and the trial judge erred in following them. She maintains the deduction of commission from the sale price here is not speculative or hypothetical, as the 2008 order states clearly that real estate commission is to be payable on the sale of the matrimonial home, and the respondent is only entitled to the net profit after that deduction.
- [13] Alternatively, the appellant argues that if disposition of the proceeds from the sale of the property is viewed as the effective valuation of the respondent's interest in it, the chambers judge should have adopted the more flexible approach to transactional costs recognized by this Court in *Halpin v. Halpin* (1996), 27 B.C.L.R. (3d) 305, 26 R.F.L. (4th) 30 (C.A.). There, Madam Justice Huddart, writing for the Court, adopted the view of the Ontario Court of Appeal in *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208, 111 D.L.R. (4th) 19 (C.A.), and *McPherson v. McPherson* (1988), 48 D.L.R. (4th) 577, 13 R.F.L. (3d) 1 (Ont. C.A.), that there is no absolute rule as to whether transactional costs should be taken into account in the valuation of assets or the determination of the amount of a compensation order. Instead, the overriding principle is fairness, the costs and benefits of disposition should be shared equally, and each case should be dealt with on its own facts. The appellant says there is no prejudice to the respondent in accepting her offer of \$1,107,000 since that is all he would have obtained had the sale with the third party completed, and he is simply trying to penalize her by unfairly raising the price.
- [14] In response, the respondent argues that fairness in the division of assets was fully considered at the time of the 2008 order. The appellant obtained an unequal division in her favour, and he assumed the potential risk or benefit of real estate market fluctuations in tying his share in the matrimonial home to its future sale. As well, he was obliged to undertake the payment of Extra Expenses required by the 2008 order for three years before the disposition of the matrimonial home was finalized. He contends the appellant is now unfairly trying to achieve an effective redistribution of family assets by artificially reducing the value of his share in that property.

- [15] Despite the comprehensive terms of the 2008 order, it is clear it did not value the matrimonial home in the traditional manner. Instead, it provided a formula by which its value, and the respondent's share of that, were to be determined by an anticipated sale to a third party and the distribution of the sales proceeds as described earlier. Since the respondent was to receive the residue of the net sale proceeds, the deduction of any real estate commission directly reduces the value of his share of the matrimonial home.
- [16] When the appellant decided to keep the matrimonial home, this formula no longer had application since there was no sale as envisaged in the order. The property was already in her name. The proceedings before the chambers judge were thus directed to effecting the necessary variations to the 2008 formula to accommodate this change, and to ultimately value the respondent's interest in the matrimonial home.
- [17] I am not convinced that, in accomplishing that end, the failure of the chambers judge to deduct a notional commission was unfair to the appellant. It is abundantly clear there were no actual costs of disposition. Nor was there any evidence to suggest she might sell the home in the foreseeable future.
- [18] It cannot be said that the price of \$1,140,000 was unfair to her. The property was appraised at \$1,200,000 as of June 28, 2011. Moreover, at the conclusion of the proceedings before the chambers judge, the appellant had the option of placing it back on the market but chose instead to accept the respondent's offer and take the risk of this appeal.
- [19] There are clear advantages to the appellant in keeping the property. She retains the home of her choice, and avoids the costs of moving and relocation.
- [20] Not a great deal can be made of the respondent's risks and obligations during the hiatus between listings since he did not always pay the Extra Expenses in a timely way, and he was the main beneficiary of the increase in the market value of the home between 2008 and 2011. Nevertheless, I acknowledge the Extra Expenses incurred during that period that he was ultimately required to pay were substantial.
- [21] In short, I am satisfied that on the totality of the circumstances before the chambers judge he did not err in applying the usual rule that hypothetical dispositional costs should not be deducted when valuing a family asset, and in finding it was inappropriate to deduct a notional commission derived from a fictional sale of the matrimonial home to third party.
- [22] I would dismiss the appeal.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Hinkson"

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Prepared on 29 October 2026 · Esheria