COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Harrison v. Harrison,***
2007 BCCA 120

Date: 20070226
Docket: CA33330

Between:

Dianne Mary Harrison

Respondent
(Plaintiff)

And

Arthur Lewis Harrison

Appellant
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Chiasson

J.G. Dubas — Counsel for the Appellant

J.M. Dreyer — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
January 8, 2007

Place and Date of Judgment: Vancouver, British Columbia
February 26, 2007

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Chief Justice Finch:

I. INTRODUCTION AND ISSUES

[1] On 13 October 2004, at a family law Judicial Case Conference, the Case Conference Judge made a "section 57 order", without consent, under the provisions of the ***Family Relations Act***. Although not expressed in terms by the judge when making the order, s. 57 gives the Court a discretion to declare " … that the spouses have no reasonable prospect of reconciliation with each other." A s. 57 declaration is a "triggering event" for the purposes of determining and dividing family assets under the legislation.

[2] No formal order containing the s. 57 declaration was entered. Rather, a notation was made on the last page of the "Case Management Plan":

> PART V. OTHER ORDERS/DIRECTIONS GIVEN AT JCC
>
> ORDERS: Section 57

[3] The Case Management Plan was signed by the judge and by both counsel. The original of the Case Management Plan was stamped and filed in the Court Registry at New Westminster where the case conference was held.

[4] On 12 November 2004, the last day of the appeal period from the order of 13 October, Mr. Harrison died unexpectedly. In the interim Mrs. Harrison had taken no steps indicating an intention to appeal from the order.

[5] On 8 February 2005 counsel for Mrs. Harrison filed an application under Rule 41(24) (the "Slip Rule") and pursuant to the inherent jurisdiction of the Supreme Court to vacate the s. 57 order. On 18 August 2005 the Slip Rule application was heard by the Case Management judge who had made the s. 57 declaration. He "vacated" the earlier order. In his reasons for doing so he said:

> [2] When I made the order, however, I did not consider the effect of making that order was to sever the joint tenancy. In the interests of justice, therefore, I am satisfied that this is a case where the order that was made by me should be vacated. This is without prejudice to any further action that may be taken by either side in this matter.

[6] The estate of Mr. Harrison, now represented by his former common law wife, Patricia Wilton, appeals from the order of 18 August. Ms. Wilton was appointed Mr. Harrison's legal representative by court order on 5 August 2005. She is the mother of three children, of whom Mr. Harrison was the father.

[7] The issues arising on this appeal therefore appear to be:

1. Whether the order of 13 October 2004, having been made without consent, was a "valid order";

2. If the order was valid, did the judge have a discretion pursuant to Rule 41(24), or otherwise, to vacate the s. 57 order; and

3. If the judge had a discretion to vacate the s. 57 order, was the discretion exercised judicially?

II. FACTS

[8] Acting on her own behalf, Mrs. Harrison issued a Writ and Statement of Claim on 26 October 2001. She asserted in paragraph 20 of the Statement of Claim that "there is no possibility of reconciliation." She claimed, *inter alia*, spousal support, a determination of family assets, an order for partition and sale of all assets, and payment of "not less than 50% of the net proceeds."

[9] Mr. Harrison retained a solicitor. In the Defence and Counterclaim filed on his behalf he sought a declaration under s. 57 of the ***Family Relations Act*** that "there is no possibility of reconciliation" between the parties.

[10] At the Judicial Case Conference on 13 October 2004 [the "JCC"] both parties appeared by counsel. A transcript of the proceedings, which were held in camera, has been filed. It appears that the main topics of discussion were the division of family assets, and in particular the matrimonial home, and disclosure of documents.

[11] Mr. Dubas, counsel for Mr. Harrison, asked the Court to make a declaration that there was no prospect of reconciliation under s. 57 of the ***Family Relations Act***. Ms. Dreyer, counsel for Mrs. Harrison, opposed the making of such an order. The respondent's disagreement to the making of such an order seemed to focus on the question of the date at which the matrimonial home should be valued.

[12] The following exchange occurred:

> [MR. DUBAS] Where I think this thing needs to go is I think there needs to be disclosure. I've asked my friend for three orders today, two of which I believe are going by consent, one being ---
>
> THE COURT: And what are they?
>
> MR. DUBAS: -- one being a declaration of no prospect of reconciliation --
>
> THE COURT: That's s. 57 and s. 67?
>
> MR. DUBAS: Fifty-seven.
>
> THE COURT: And 67?
>
> MR. DUBAS: And my friend's nodding, no, she's not --
>
> MS. DREYER: No, we're not agreeable. I've got an outstanding settlement proposal and these issues are very narrow and the values of these properties are very notional and my client wants there to be some serious consideration as to what she's proposed or not. She's inclined to not muddy the issue with yet a further triggering event date, in the event this matter goes to full hearing -- …
>
> . . .
>
> MS. DREYER: My client's entitled to make her arguments at trial for reapportionment and show the contributions she made prior to the marriage and subsequent to the ending of the marriage, and the court shouldn't be confused with valuation dates. She's prejudiced significantly by the fact that she --
>
> MR. DUBAS: Well --

MS. DREYER:-- represented herself for a large part of these proceedings and didn't pursue the s. 57 declaration in the first year of separation, but albeit she didn't know where Mr. Harrison was.

MR. DUBAS: On that issue, and I – the court can't make an order today, but the court might – quite frankly, I know of no case – the only issue is whether the parties are going to reconcile. My client's now had a child with another woman, he's living in another relationship. There is no doubt that, as soon as we bring the application, there will be a s. 57 declaration. I think all we're doing, quite frankly, is wasting money for the parties if it's not agreed to today.

THE COURT: Is there a no reconciliation order?

MR. DUBAS: Yes.

THE COURT: That's – well, I don't see any problem making that order, the section – that's s. 67, is it?

MR. DUBAS: Section 57.

THE COURT: Fifty-seven, all right. I will make the s. 57 order. I do not need consent for that. …

[Emphasis added.]

[13] The s. 57 declaration was subsequently noted on the Case Management Plan, the plan was signed by the judge and by both counsel, and the original of the plan was stamped and filed in the Court Registry.

[14] There matters rested until Mr. Harrison suddenly passed away on 12 November 2004 as the result of a blood clot. As mentioned above, no Notice of Appeal was filed within the period for appeal following the s. 57 declaration, and Mrs. Harrison took no other steps indicating an intention to appeal on her part.

[15] From the material filed on the application for Ms. Wilton's appointment as legal representative for the estate of Mr. Harrison, it appears that she and Mr. Harrison had three children together, born 7 April 2001, 15 December 2002 and one in the spring of 2005, after Mr. Harrison had passed away.

[16] It also appears from affidavit material that the Harrison matrimonial home was the parties' main family asset, that it had, according to one appraisal, a market value of $160,000 as at 1 April 2001, that there was a mortgage against the property of approximately $150,000, that the mortgage was "life insured", and that the mortgage was subsequently discharged upon the death of Mr. Harrison.

III. DISCUSSION

1. Was the order of 13 October 2004 valid?

[17] Family Law Judicial Case Conferences are governed by Supreme Court Rule 60E. It provides in part:

> (12) At a judicial case conference, the judge or master may
>
> (a) make any of the following orders, whether or not on the application of a party:
>
> (i) the pleadings be amended or closed within a fixed time;
>
> (ii) a party deliver a list of documents or a statement in Form 89 within a fixed time;
>
> (iii) interlocutory applications be brought within a fixed time;
>
> (iv) examination for discovery be conducted within a schedule that the court directs;
>
> (v) setting limitations on discovery procedures;
>
> (vi) experts' report be exchanged within a schedule that the court directs;
>
> (vii) the parties attend a mini-trial or settlement conference;
>
> (viii) the proceeding be set for trial on a particular date or on a particular trial list, subject to the approval of the Chief Justice, and
>
> (b) make any other order with the consent of the parties.

[18] It is common ground that a declaration under s. 57 is not encompassed by any of subrules 12(a)(i)(viii). The order ought, therefore, only to have been made, if at all, by consent under subrule 12(b).

[19] Counsel for Mr. Harrison argues that the consent of Mrs. Harrison may be inferred from her pleadings that there was no prospect of reconciliation. He says both parties agreed that a divorce order should ultimately be made, and that Mrs. Harrison had moreover sought partition of assets and sale of the matrimonial home. He also argues that because counsel for Mrs. Harrison signed the Case Management Plan indicating that a s. 57 declaration had been made, and had taken no steps to set that order aside, within the appeal period, it should be inferred that Mrs. Harrison consented to the order by "acquiescence."

[20] I am, with respect, not persuaded by any of these arguments. A statement made in support of divorce pleadings that there is no possibility of reconciliation is no indication of consent for the making of a s. 57 order at a Judicial Case Conference. There is nothing on the Case Management Plan signed by counsel to suggest that the declaration was made by consent. The facts that a divorce order was sought by both parties, that assets would ultimately be divided, or that the order was not appealed, are similarly to my mind quite

insufficient to show that the consent of Mrs. Harrison might be inferred from the circumstances.

[21] In any event, none of these circumstances can outweigh the clear position taken by counsel for Mrs. Harrison at the JCC that she opposed the making of a s. 57 declaration. Counsel for Mr. Harrison acknowledged that, in the absence of consent, " … the Court can't make an order today."

[22] I am therefore of the view that there was no mutual consent to a s. 57 declaration being made at the Judicial Case Conference, and that the case conference judge erred when he said that he did "not need consent" to make the order. It is clear that in the absence of consent, the s. 57 declaration was an order not contemplated by Rule 60E(12), and ought not to have been made at the Judicial Case Conference.

[23] It does not, however, follow that the s. 57 declaration made on 13 October 2004 was not a valid order. Rule 2(1) of the Supreme Court Rules provides:

> 2(1) Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding.

[24] In ***Canada Transport v. Alsbury***, [1953] 1 D.L.R. 385 (B.C.C.A.), Mr. Justice Bird described the general effect of an order made by a Superior Court judge:

> The order under review is that of a superior court of record, and is binding and conclusive on all the world until it is set aside or varied on appeal. No such order may be treated as a nullity.

[25] Mr. Justice Sidney Smith said:

> … the order of a superior court is never a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. (Authorities omitted.)

[26] In ***Wilson v. The Queen***, [1983] 2 S.C.R. 594 the majority of the Supreme Court of Canada approved of this statement made by Mr. Justice Monnin (as he then was):

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

[27] In my view therefore, the making of a s. 57 declaration at a Judicial Case Conference without the consent of both parties did not comply with Rule 60E. Although irregular, the order was not a nullity. It was valid when made, and remained so unless or until it was reversed on appeal, or otherwise set aside.

2. Did the judge have a discretionary power pursuant to Rule 41(24) or otherwise to vacate the s. 57 order?

[28] The scope of a trial judge's discretion to vary an order after pronouncement depends on whether a formal order has been entered. So long as the order remains unentered, the judge retains "an unfettered discretion" to re-open the matter. That discretion should be used sparingly: ***Sykes v. Sykes*** (1995), 6 B.C.L.R. (3d) 296 (C.A.). Although this discretion is sometimes treated as part of the discretion granted by Rule 41(24), the "Slip Rule", it is in fact a common law discretion recognized by this Court in ***Clayton v. British American Securities Ltd.***, [1934] 3 W.W.R. 257, [1935] 1 D.L.R. 432.

[29] Once an order has been entered, however, the court which made the order is *functus officio* with respect to the issues therein: ***Piyaratana Unnanse et al v. Wahareke Sonuttara Unnanse et al***, [1950] 2 W.W.R. 796 (P.C.). Once the judge is *functus*, the power to re-visit an order is much narrower. Generally speaking, that power is confined to making corrections or amendments in two situations: first, under Rule 41(24) of the ***Supreme Court Rules*** where there has been a 'slip' in drawing up the order or where a matter should have been but was not adjudicated upon; and second, where there has been an error in expressing the manifest intention of the court: ***Buschau v. Rogers Communications Inc.***, 2004 BCCA 142; see also ***Chandler v. Alberta Association of Architects***, [1989] 2 S.C.R. 848.

[30] Thus, the source and scope of the discretion in this case depends on whether the Case Conference judge was *functus officio* with respect to the s. 57 declaration. In most cases, this would be a simple question, determined by whether a formal order had been entered, or not. This is not such a case.

[31] No formal order was ever drawn and entered prior to Mrs. Harrison's Slip Rule application. However, counsel for Mr. Harrison's estate argues that the endorsed Case Management Plan effectively takes the place of a formal entered order, and he takes the position that the judge was thereafter *functus officio*. Counsel points to Rule 41(10) and argues that the Case Management Plan, with the notation "ORDERS: Section 57", is an "other document" within the meaning of that Rule:

> 41(10) If an order has been made substantially in the same terms as requested, if the court endorses the notice of motion, petition or other document to show that the order has been made or made with any variations or additional terms shown in the endorsement, it is not necessary to draw up the order, but the endorsed document must be filed.

[32] In this case there was no notice of motion or petition presented on the JCC, and counsel for Mrs. Harrison says it is therefore unclear what order was made. She says the Case Management Plan does not refer to the ***Family Relations Act***, and there is nothing to link the reference to s. 57 in the plan opposite the word "ORDERS" to that enactment, to make it clear what was being ordered. Counsel for Mrs. Harrison maintains that the notation on the JCC Plan could never be enforced as an order of the Court, and that for example, the Land Title Office would never accept that plan as sufficient to show the transfer or vesting of an interest in land from one spouse to another. She says the notation on the plan is not "the Order" but rather a summary of the directions made at the Case Conference, in much the same way a clerk's notes are a summary of orders and directions made in chambers. She argues that the signature on the plan does not signify or imply counsel's consent to the making of the orders and she says the tapes or transcripts of a JCC are not available to parties, for the purpose of clarifying the orders made, unless the court so orders. So she

says the notation on the Case Management Plan does not bring the document within the ambit of Rule 41(10).

[33] There is no doubt the judge made a declaration under s. 57 of the ***Family Relations Act***. It is clear from the context of the discussions during the case conference that "s. 57" could only be a reference to s. 57 of the ***Family Relations Act***. Both counsel and the judge were fully aware of what legislation was under discussion, and the nature of the order Mr. Dubas sought. Section 57 contemplates the making of only one order, namely, " … a declaratory judgment that the spouses have no reasonable prospect of reconciliation." The entry of "Section 57" is made on the Case Management Plan on page 7 under "Part V":

> PART V. OTHER ORDERS/DIRECTIONS GIVEN AT JCC
>
> ORDERS: Section 57

[34] Noted in that way, it is evident that a s. 57 order was "given" and not refused.

[35] It is admitted by counsel that the judge's signature appears immediately below that notation, and that adjacent to the judge's signature are the initials or signatures of both counsel. It is also admitted that the original of the Case Management Plan was filed in the Court Registry at New Westminster, and stamped.

[36] However, these facts establish only that the order was made, that the parties were certain as to its terms, and that the Case Management Plan was filed with the Court Registry. To determine whether this is sufficient to satisfy Rule 41(10), however, one must consider the purpose behind drawing and entering an order.

[37] In *Conduct of Civil Litigation in British Columbia*, looseleaf (Markham: LexisNexis Canada, 2978), Fraser and Horn describe that purpose as threefold:

> (a) the successful party may show his authority for proceeding under its terms;
>
> (b) the unsuccessful party may have proper material upon which to base an appeal; and
>
> (c) what is then *res judicata* between the parties is defined with some precision.

[38] There is nothing before us to show that an endorsed Case Management Plan has ever been treated for any purpose as an "other document" within the meaning of Rule 41(10), or as the equivalent of a formal order signed and entered. Unlike a formal order, there is nothing on the face of the Case Management Plan to show the affidavit or other evidence on which the order was made, and hence the basis on which the judge exercised his discretionary power. In this case there is a transcript of what counsel said, but that is not part of the order.

[39] In my opinion a Case Management Plan is not an "other document" similar to a notice of motion or a petition, which Rule 41(10) gives as examples of documents which when endorsed render a formal order unnecessary. In *Conduct of Litigation in British Columbia, supra,* the authors suggest that a draft order might constitute an "other

document". Notices of motion, petitions and draft orders have common features not shared by a Case Management Plan, such as a standard appearance based on Court Forms, and a recitation of the evidence heard or referred to when the order was made.

[40] I agree with counsel for the respondent that the Plan is more like a summary of the orders and directions made at the JCC in much the same way that a clerk's notes are a summary of orders and directions made in chambers. The signatures of counsel are evidence that the Plan notation accurately represents those orders and directions, as the proceedings on a JCC are confidential and will not be transcribed without an order of the Court, pursuant to Supreme Court Practice Directive, 18 October 2002.

[41] In my opinion Rule 41(10) does not apply and there was no equivalent to an entered order. It follows that the case conference judge was not *functus officio* and, he had a broader discretion to re-consider the order dated 13 October 2004 than if the order had been entered. The scope of that broader discretion was described in ***Clayton v. British American Securities Ltd., (supra).***

3. Was the reversal of the earlier order a proper exercise of discretion?

[42] The primary consideration in whether to re-open a case, or set aside an earlier unentered order, is whether a miscarriage of justice would otherwise occur: see ***Kemp v. Wittenberg,*** [1999] B.C.J. No. 810 (S.C.); ***Dudas (Guardian ad litem of) v. Munro***, [1993] B.C.J. No. 2035 (S.C.) and ***Bell v. Bell***, 2001 BCCA 148.

[43] Circumstances in which an earlier order will be revisited include fresh evidence not available when the earlier order was made, or a change in circumstances between the date of that order and the application to re-open: see ***Foster v. Kockums Cancar Division Hawker Siddeley Canada Inc.*** (1993), 83 B.C.L.R. (2d) 207 (C.A.); ***Grigg v. Berg Estate***, [2000] B.C.J. No. 1080 (S.C.). Here, the death of Mr. Harrison after the s. 57 declaration was made was an important new circumstance that might reasonably cause the judge to reconsider the way he exercised his discretion. It was, in my opinion, open to him to hear Mrs. Harrison's application, and to set aside the earlier order, if that was necessary to avoid a miscarriage of justice. The discretionary power to set aside or vary an earlier order must of course be exercised judicially: ***Federal Business Development Bank v. Mission Creek Farm Inc.*** (1988), 25 B.C.L.R. (2d) 188 (C.A.); and ***Galiano Conservancy Association v. British Columbia (Ministry of Transportation and Highways)*** (1996), 17 B.C.L.R. (3d) 392 (S.C.).

[44] The only statement in the chambers judge's oral reasons for judgment on 18 August 2005 to indicate the basis for his order is this:

> [2] When I made the order, however, I did not consider the effect of making that order was to sever the joint tenancy. In the interests of justice, therefore, I am satisfied that this is a case where the order that was made by me should be vacated. This is without prejudice to any further action that may be taken by either side in this matter.

[45] It is evident that the judge did not have before him a transcript of the discussion at the Judicial Case Conference on 13 October 2004, and apparently did not have his mind directed to Mrs. Harrison's opposition to a s. 57 declaration, namely that it would be a "triggering event" with respect to family assets and their division. If the judge had had his

attention drawn to that earlier discussion he could not, I think, have made the statement that he "did not consider the effect of the order would be to sever the joint tenancy" in the matrimonial home.

[46] What the judge did have before him on 18 August 2005 was evidence that Mr. Harrison died on 12 November 2004, and that prior to his death the matrimonial home was registered in the parties' names as joint tenants.

[47] The judge also had before him Ms. Wilton's affidavit deposing to the fact that she and Mr. Harrison had three children, her personal circumstances and limited financial means, and the children's need for financial support from Mr. Harrison's estate.

[48] There is nothing in the chambers judge's reasons to show that he took these conflicting interests into account, before setting aside the s. 57 declaration. In particular, there is nothing to show that he considered the needs of the children, and the fact that vacating the earlier order would deprive them of any opportunity to benefit from their father's interest in the family assets affected by the s. 57 declaration.

[49] Remembering that the principal reason for setting aside an earlier order is to prevent a miscarriage of justice, the question is whether the order of 18 August 2005 can be said to have been a judicial exercise of the judge's discretion. I do not think it can. It appears to me that the judge considered only Mrs. Harrison's interests with respect to the severed joint tenancy, to the exclusion of the interests of Mr. Harrison's children with Ms. Wilton.

[50] I can see no basis for saying that to leave the s. 57 order of 13 October 2004 in place would result in a miscarriage of justice. Indeed, the order setting it aside is more apt to lead to such a result in my view.

[51] I would set aside the order of 18 August 2005.

[52] I have considered whether in these circumstances the Court should remit the case to the B.C. Supreme Court for a reconsideration of Mrs. Harrison's application to set the order of 13 October 2004 aside. I do not think that would be in the interests of justice. These proceedings have already been far too long and expensive. The modest assets of the Harrisons' marriage cannot withstand much further depletion in the litigation process.

[53] I would allow the appeal and set aside the order of 18 August 2005. The order of 13 October 2004 will remain in effect. If the parties remain unable to resolve their differences, any unfairness to Mrs. Harrison in the restoration of the s. 57 declaration might be addressed on an application to reapportion the family assets.

[54] In the circumstances described, I would order that each party bear its own costs of the appeal.

"The Honourable Chief Justice Finch"

I agree:

“The Honourable Mr. Justice Donald”

I agree:

“The Honourable Mr. Justice Chiasson”