

[1979] 5 W.W.R. 289, [1980] 1 S.C.R. 2, 98 D.L.R. (3d) 600, 27 N.R. 554, 13 R.F.L. (2d) 5

▷

1979 CarswellBC 698

Harper v. Harper

HARPER v. HARPER

Supreme Court of Canada

Laskin C.J.C., Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

Heard: May 10, 1979
Judgment: June 28, 1979

Copyright © CARSWELL,

a Division of Thomson Canada Ltd. or its Licensors. All rights reserved.

Counsel: R. **Doell** and D. Acheson, for appellant.

J.W. Horn, for respondent.

Subject: Family

Matrimonial causes -- Applications as to title and possession of property -- Trial judge exercising discretion under s. 8 of Family Relations Act improperly -- Supreme Court of Canada interfering with exercise of discretion.

Matrimonial causes -- Applications as to title and possession -- Application for interest in matrimonial home under s. 8 of Family Relations Act -- Trial judge awarding 1/4 interest -- Trial judge considering irrelevant facts -- Interest increased to 1/3.

Judges and courts -- Supreme Court of Canada -- Appeal as to award of interest in matrimonial home -- Court entitled to review trial judge's exercise of discretion where discretion wrongly exercised.

Judges and courts -- Jurisdiction in appeal -- New evidence -- Plaintiff entitled to adduce new evidence before Supreme Court of Canada -- Equitable jurisdiction.

The parties, husband and wife, separated in 1968. In 1971 the wife started an action for a declaration that the husband held an undivided $\frac{1}{2}$ interest in the matrimonial home in trust on her behalf. After the British Columbia Family Relations Act, 1972, was proclaimed, the trust action was held in abeyance, and in 1975 the wife commenced an action under s. 8 for a $\frac{1}{2}$ interest. At trial the judge decided that, notwithstanding that the title was

Copr. © West 2007 No Claim to Orig. Govt. Works

[1979] 5 W.W.R. 289, [1980] 1 S.C.R. 2, 98 D.L.R. (3d) 600, 27 N.R. 554, 13 R.F.L. (2d) 5

registered in the Director of the Veterans' Land Act, the wife should have a $\frac{1}{4}$ interest and, in so deciding, considered the facts that no attempt at reconciliation had been made, that the wife had made no attempt within 5 years after the separation to advance a claim, that the husband had built a new life centered on the matrimonial home and that he was paying maintenance for the children of the marriage.

The husband appealed. The Court of Appeal held that, as title was registered in the name of the Director of the Veterans' Land Act, and as the wife had tendered no evidence to show that in fact all the payments had been made to the director, the husband did not have a right in the land and therefore the wife had no claim under s. 8.

The wife appealed to the Supreme Court of Canada and applied for leave to adduce fresh evidence to show that all necessary payments had been made by the husband and that the director had in fact conveyed title.

Held:

The appeal was allowed.

Per Laskin C.J.C. (Martland, Ritchie, Dickson and Beetz JJ. concurring):

The wife was allowed to adduce the fresh evidence as the wife's counsel had not known of the new evidence until leave to appeal to the Supreme Court of Canada had been granted, and, as an interest in a matrimonial house was an issue to be judged on equitable grounds, the non-disclosure by the husband of the true state of his right to title could not be condoned.

The trial judge erred in exercising his discretion as he was wrong in stating that the wife had not taken earlier action to advance her claim and was wrong in considering such irrelevant facts as the husband's new life and his payment of maintenance for his children. Further, the trial judge ought to have considered the husband's use and occupation of the property during the years after separation.

As the trial judge acted on irrelevant considerations and as the Court of Appeal, being misled as to the title in the land, did not address itself to the exercise of the trial judge's discretion, the Supreme Court could interfere with the trial judge's discretion and accordingly awarded the wife a $\frac{1}{3}$ interest.

Cases considered:

Brown v. Gentleman, [1971] S.C.R. 501, 15 C.B.R. (N.S.) 274, 18 D.L.R. (3d) 161 -- referred to

Dormuth v. Untereiner, [1964] S.C.R. 122, 46 W.W.R. 20, 43 D.L.R. (2d) 135 -- applied

Rathwell v. Rathwell, [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 1 R.F.L. (2d) 1, 1 E.T.R. 307, 83 D.L.R. (3d) 289, 19 N.R. 91 -- referred to

Statutes considered:

Family Relations Act, 1972 (B.C.), c. 20 [since repealed and replaced by 1978 (B.C.), c. 20], s. 8.

Supreme Court Act, R.S.C. 1970, c. S-19, s. 67.

Veterans' Land Act, R.S.C. 1970, c. V-4, ss. 59(1), 60(2).

Per Estey J. (dissenting in part) (Pigeon, Pratte and McIntyre JJ. concurring):

Copr. © West 2007 No Claim to Orig. Govt. Works

[1979] 5 W.W.R. 289, [1980] 1 S.C.R. 2, 98 D.L.R. (3d) 600, 27 N.R. 554, 13 R.F.L. (2d) 5

The reasons of Laskin J. for admitting new evidence and for interfering with the exercise of the trial judge's discretion were agreed with.

However, a proper exercise of discretion would have entitled the wife to a $\frac{1}{2}$ interest in the matrimonial home. A court in exercising its discretion under s. 8 is not bound by earlier common law decisions. Generally speaking, family property should be divided on a 50-50 basis unless the circumstances otherwise require.

Cases considered:

Atamanchuk v. Atamanchuk (1955), 15 W.W.R. 301, varied 21 W.W.R. 335 (Man. C.A.) -- *considered*

Deleeuw v. Deleeuw (1977), 5 B.C.L.R. 106, 82 D.L.R. (3d) 521 (C.A.) -- *applied*

Garratt v. Garratt, [1974] 6 W.W.R. 659, 16 R.F.L. 168 (B.C.S.C.) -- *considered*

Gissing v. Gissing, [1971] A.C. 886, [1970] 2 All E.R. 780 (H.L.) -- *considered*

Hull, Re, [1943] O.R. 778, [1944] 1 D.L.R. 14 (C.A.) -- *applied*

Murdoch v. Murdoch, [1975] 1 S.C.R. 423, [1974] 1 W.W.R. 361, 13 R.F.L. 185, 41 D.L.R. (3d) 367 -- *distinguished*

Pettitt v. Pettitt, [1970] A.C. 777, [1969] 2 All E.R. 385 (H.L.) -- *considered*

Rathwell v. Rathwell, [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 1 R.F.L. (2d) 1, 1 E.T.R. 307, 83 D.L.R. (3d) 289, 19 N.R. 91 -- *applied*

Rimmer v. Rimmer, [1953] 1 Q.B. 63, [1952] 2 All E.R. 863 (C.A.) -- *applied*

Shehousky v. Shehousky, [1975] 1 W.W.R. 327, 17 R.F.L. 269 (B.C.S.C.) -- *referred to*

Stevenson v. Stevenson (1974), 15 R.F.L. 248, 44 D.L.R. (3d) 762 (B.C.S.C.) -- *applied*

Thompson v. Thompson, [1961] S.C.R. 3, 26 D.L.R. (2d) 1 -- *distinguished*

Wiley v. Wiley (1971), 6 R.F.L. 36, 23 D.L.R. (3d) 484 (B.C.S.C.) -- *referred to*

Appeal on an application for division of matrimonial property.

Laskin C.J.C. (Martland, Ritchie, Dickson and Beetz JJ. concurring)::

1 This appeal, which is here by leave of this court granted on 7th March 1978, concerns the entitlement of the appellant, the divorced wife of the respondent, to an interest in what was their matrimonial home. The action proceeded through trial and to appeal to the British Columbia Court of Appeal on the footing that the title to the property was, as between the respondent, Harper, and the Director of the Veterans' Land Act, in the director, who was and is shown as the registered owner under the British Columbia Land Registry Act, R.S.B.C. 1960, c. 208. The house on the property had been constructed through financing arrangements under the Veterans' Land Act, now R.S.C. 1970, c. V-4, as amended, and title was put in the name of the director pursuant to that Act.

[1979] 5 W.W.R. 289, [1980] 1 S.C.R. 2, 98 D.L.R. (3d) 600, 27 N.R. 554, 13 R.F.L. (2d) 5

2 The appellant brought her action under the Family Relations Act, 1972 (B.C.), c. 20 [since repealed and replaced by 1978 (B.C.), c. 20], on 9th May 1975. Prior to the enactment of this statute, she had commenced a so-called trust action in 1971, when she was still formally married to the respondent, and a *lis pendens* was registered against the property in that action. It has, however, remained dormant, and she later sought relief under s. 8 of the Family Relations Act, which reads as follows:

8. (1) Where the court makes an order for dissolution of marriage or judicial separation, or declaring a marriage to be null and void, and it appears that a spouse is entitled to any property, it may, not more than two years from the date of the order, make any order that, in its opinion, should be made to provide for the application of all or part of the property, including settled property, for the benefit of either or both spouses or a child of a spouse or of the marriage.

(2) Where the court makes an order under subsection (1), it may order that the property be sold and direct the disposition of the proceeds.

3 In her statement of claim, dated 8th August 1975, the appellant asserted, which was a fact, that the property in question was occupied by the respondent and was registered in the name of the Director of the Veterans' Land Act. Paragraphs 6 and 7 of the statement of claim are as follows:

The aforesaid lands and premises were purchased by the Plaintiff and Defendant on or about May 8th, 1962 with funds borrowed jointly from the Port Alberni Credit Union and were transferred into the name of the Director of the *Veterans' Land Act* on the 13th of August 1962.

The aforesaid lands and premises were used as the matrimonial home by the Plaintiff and Defendant from the date of the completion of the construction of the premises on or about June 1st, 1963 until the 21st day of December 1968, when the Plaintiff left the matrimonial home, fearing for her mental health.

4 Alleging, further, that the ownership of the land and premises had always been considered a joint venture, the appellant claimed in para. 9 of her statement of claim an undivided half interest in the property "as a result of her contributions towards the economic wealth of the family as a whole". The respondent denied the allegations in paras. 6, 7 and 9 above-mentioned, and the case went to trial accordingly. The trial judge, Stewart L.J.S.C. of British Columbia, concluded, on the evidence and notwithstanding that the registered title was in the Director of the Veterans' Land Act, that the appellant should have a one-quarter interest in the net value of the property. He noted that the respondent had remarried and that the appellant planned to remarry. He said this in the concluding portion of his reasons:

As far as I can judge, each party was as much to blame as the other for the break-down of their marriage. No attempt at reconciliation was made by either. The defendant eventually obtained the divorce some five years after the separation, and at that time the plaintiff made no effort to advance a claim to the home property. Thereafter the defendant started to build a new life for himself around the home in which the plaintiff claims a half interest. His new wife has invested a substantial amount in improvements. She has one child of the marriage with him. He is contributing to the maintenance of those now with the plaintiff. I have concluded that an allocation equivalent to a one-quarter interest in the net value of the property would be fair.

If the parties are unable to agree on value and the steps required to give effect to this application of the property, I will deal with the matter after hearing counsel, who may also wish to speak to costs.

[1979] 5 W.W.R. 289, [1980] 1 S.C.R. 2, 98 D.L.R. (3d) 600, 27 N.R. 554, 13 R.F.L. (2d) 5

5 The respondent appealed on 5th May 1976, being represented on the hearing of the appeal by Mr. J.W. Horn. His counsel at the trial was R.A. Scofield, who also signed the notice of appeal. That notice contained the following assertions in paras. 1 and 2 thereof:

1. The learned Judge erred in the law in holding that the Appellant is a spouse 'entitled to ... property' the subject of the case at bar, where the legal title to such property is held by the Director, the *Veterans' Land Act*.

2. The learned Judge erred in law in holding that the Respondent is a spouse 'entitled to ... property' the subject of the case at bar, where the legal title to such property is held by the Director, the *Veterans' Land Act*.

6 In his factum on the appeal, counsel for the appellant, respondent on the appeal to the British Columbia Court of Appeal, said this in para. 7 of the factum:

The indebtedness of the Director was retired in 1974 but the husband has not exercised his right pursuant to s. 11 of the *Veterans' Land Act* to call for title to be placed in his name.

7 An affidavit produced in support of the now respondent, Harper, pointed out that there was nothing in the record to support the aforementioned statement.

8 The British Columbia Court of Appeal allowed the appeal on the ground that the now respondent had no interest in the property, which was entirely in the Director of the *Veterans' Land Act*. In the course of his reasons for the court, Farris C.J.B.C. said this:

The title to the land has remained in the director ever since the conveyance to him. At the trial, no evidence apparently was led to show ... the present state of the account between the veteran husband and the director.

Mr. Doell, counsel for the wife, respondent, was unable to point to any evidence in the appeal book to support his statement in the factum, para. 7, that the indebtedness of the director was retired in 1974. So that is the factual situation. It is clear to me, from an examination of the documents, that the arrangements with the Director of the *Veterans' Land Act* were made pursuant to Pt. II of the *Veterans' Land Act*.

Section 59(1) provides for a reconveyance by the director to the veteran when all the necessary payments have been made. We do not know from the evidence here whether all the necessary payments have been made.

Section 60(2) of the Act provides:

'(2) Nothing in this Part and nothing in any contract or collateral agreement entered into under section 55 or 57 shall be construed as conferring upon or vesting in any veteran, prior to the conveyance to that veteran by the Director under subsection 59(1) of the land in respect of which the contract or agreement was entered into, any right, title, interest or estate in that land.'

So, at the time of trial, no conveyance having been made to the veteran by the director, the veteran had no right, title, interest or estate in the land.

This application is brought under s. 8 of the Family Relations Act, which provides, as has been noted

[1979] 5 W.W.R. 289, [1980] 1 S.C.R. 2, 98 D.L.R. (3d) 600, 27 N.R. 554, 13 R.F.L. (2d) 5

above: 'Where ...it appears that a spouse is entitled to any property.'

At the time of the trial, he was not entitled to any property, because the conveyance, the title was in the director, and s. 60(2) expressly says he is not.

Now this was not an action where an application was made, or where it was alleged in the pleadings that all the money had been paid, that the veteran husband had the right to acquire title, and for an application that an injunction be granted ordering him to apply and obtain title. That was not the basis upon which this case was presented. It was on the basis of a claim under s. 8, for an order in relation to the land, and, as I have said, the husband at that stage had no entitlement to it.

Then there is the further difficulty in this case that there was no evidence as to the present value of the property in question.

It seems to me that, in exercising the discretion that is given under s. 8, it can only be properly exercised if you know what you are dividing, and its value ...

Now those proceedings take place after the exercise of the discretion by the trial judge, and, in my view, he had no material before him upon which he could exercise a judicial discretion, which is required under s. 8 of the Family Relations Act.

9 Leave to appeal to this court was given principally to consider the validity and applicability of the Veterans' Land Act and, in the result, both the Attorney General of British Columbia and the Attorney General of Canada intervened.

10 I have enlarged on the pleadings and on the position taken on appeal to the provincial Court of Appeal because of a motion by the appellant in this court, returnable at the hearing of her appeal, to adduce fresh evidence by way of an affidavit sworn by Douglas E. Humphrey, Director, Property and Securities Division in the Veterans' Land Act administration. The affidavit discloses that on 29th July 1974 the respondent applied to the Regional Director, Veterans' Land Act, for a conveyance to him of the property in which title had theretofore been in the Director of the Veterans' Land Act. A conveyance dated 31st July 1974 was executed in the respondent's favour and, pursuant to a letter from the Royal Bank of Canada, which had advanced \$5,916.69 to discharge the respondent's indebtedness under the Veterans' Land Act, the conveyance was sent to the bank to be held as security.

11 The general principles which govern the admission of new evidence in this court were stated in *Dormuth v. Untereiner*, [1964] S.C.R. 122 at 131, 46 W.W.R. 20, 43 D.L.R. (2d) 135, where Ritchie J., speaking for the majority, referred to an earlier case in this court concerning the admission of evidence discovered after trial and sought to be admitted in a provincial Court of Appeal. He then continued as follows:

The above statements were made with respect to the role of a court of first appeal in relation to evidence discovered after the trial but, in my view the same considerations apply when evidence is tendered for the first time before this Court on appeal from a provincial Court of Appeal. The special grounds required in an application made under the proviso to s. 67 [of the Supreme Court Act, R.S.C. 1952, c. 259; now R.S.C. 1970, c. S-19, s. 67] include, in my opinion, being able to show that the evidence could not have been discovered by reasonable diligence before the conclusion of the hearing in the Court of Appeal and being able also to satisfy this Court that the evidence, if accepted, would be practically conclusive.

12 It is clear that Ritchie J. did not lay down an exhaustive test for the admissibility of fresh evidence in the Supreme Court, saying only what the special grounds under the proviso to s. 67 include. In my opinion, they also

[1979] 5 W.W.R. 289, [1980] 1 S.C.R. 2, 98 D.L.R. (3d) 600, 27 N.R. 554, 13 R.F.L. (2d) 5

include a situation where there has been a failure of an officer of the court, e.g., a trustee in bankruptcy, to bring all the relevant matters to the court's attention, although the matters were not newly discovered but existed before trial: see *Brown v. Gentleman*, [1971] S.C.R. 501, 15 C.B.R. (N.S.) 274, 18 D.L.R. (3d) 161. Equally, in my opinion, they will yield to a situation where a solicitor as an officer of the court has not brought to the court's attention pre-existing matters of which he had knowledge or where a party to the proceedings has misled the court as to facts in issue or has misled his own solicitor or counsel, with the result that the action has proceeded on an erroneous factual basis.

13 In view of the disposition of the appeal by the British Columbia Court of Appeal (the appeal was heard on 15th November 1977 and disposed of on that day in oral reasons for judgment), it is clear that that court was misled by the assertion in the now respondent's notice of appeal that "legal title" to the property was in the Director of the Veterans' Land Act. In fact, as between the respondent and the director it was in the respondent long before the action was begun. In his affidavit in support of the motion to adduce new evidence, counsel who appeared for the appellant in the courts below made the following assertions in paras. 21, 22, 23, 25 and 26:

21. THAT I became aware that the indebtedness of the Director had been retired in 1974 in the fall of 1977 prior to the hearing before the British Columbia Court of Appeal, by reason of a telephone call placed to a Mr. Birrell at the Office of the Director, Department of Veterans' Affairs, British Columbia, on or about the 9th day of September, 1977.

22. THAT I was not advised that legal title had been delivered to the Defendant Eldon Stewart Harper during that conversation.

23. THAT the factum of the Appellant, Eldon Stewart Harper, was filed on May 24, 1977. The following is alleged in the statement of facts of that factum:

'8. The Defendant applied to the Director of Veterans' Land Act for financing to build a home and the application was granted. (A.B. p. 179, 1.24)

'9. A contract was entered into with the Director on the 13th day of September, 1962, (A.B. p. 163, Exhibit 7) and the property was conveyed to the Director on the 3rd day of August, 1962. (A.B. p. 174, Exhibit 8)

'10. The Title remained in the Director at the time of action. (A.B. p. 153, Exhibit 3).'

The aforementioned facts of factum are annexed hereto and marked as Exhibit 'II' to this my Affidavit ...

25. THAT in the taxation of the Defendant's bill of costs in the *Family Relations Act* action a further Affidavit of Eldon Stewart Harper was sworn the 5th day of January, 1978 and filed January 9, 1978. THAT annexed and marked as Exhibit 'I' hereto is a copy of the aforementioned Affidavit which reads, in paragraph 2:

'THAT I am purchaser by unregistered agreement for the sale of land where The Director, The *Veterans' Land Act*, is Vendor of lands and premises situate in the Alberni Assessment District, Beaver Creek Improvement District, Province of British Columbia, more particularly known and described as:

'Lot 24, District Lot 166, Alberni District, Plan 1474, (hereinafter referred to as the "Premises").'

26. THAT on or about the 11th day of July, 1978, I received an anonymous telephone call from a male

[1979] 5 W.W.R. 289, [1980] 1 S.C.R. 2, 98 D.L.R. (3d) 600, 27 N.R. 554, 13 R.F.L. (2d) 5

person who disclosed that he was calling from Ottawa. That person advised me that legal title to the said matrimonial property had been reconveyed to the veteran in 1974.

14 It appears, therefore, that the transfer of title to the respondent did not become known to appellant's counsel until the leave to appeal to this court was granted.

15 Counsel for the respondent in this court said that he became aware in late 1977 that respondent's debt to the Director of the Veterans' Land Act had been satisfied but that he did not know of any transfer of title to the respondent. This court does not have any affidavit from Mr. Horn's instructing solicitor, Mr. R. A. Scoffield, who represented the respondent at the trial and who signed the notice of appeal to the British Columbia Court of Appeal, as to what he knew or whether his client, the respondent, had omitted to tell him about the conveyance from the Director of the Veterans' Land Act. Certainly, if there was any knowledge of the conveyance, the proper course would be to disclose it (in answer to the usual notice to produce relevant documents) or to refuse to continue acting for the respondent.

16 Before this court, counsel for the respondent took a technical position on the motion to adduce fresh evidence, contending that he was under no obligation to assist the appellant in her action and that he was entitled to stand by the record of the proceedings before and at trial. It is evident, however, from the material that I have canvassed that the respondent could not properly rest on those proceedings, certainly not after the matter went to appeal and certainly not in the light of what was included in the affidavit of Mr. Humphrey and of Mr. Doell, the appellant's counsel. (I should say here that Mr. Doell did not argue the motion for leave to adduce new evidence.) There are the further relevant facts that we are concerned with a claim to an interest in the matrimonial home, a family issue to be judged equitably, and that, by reason of the non-disclosure of the conveyance, a serious constitutional issue was necessarily raised which brought interventions from the provincial and federal Attorneys General.

17 I am bound to say -- all members of this court reacted the same way -- that I was unable to understand the resistance of counsel for the respondent to the admission of the evidence contained in the Humphrey affidavit. Its admission would mean only that the constitutional issue could be put to one side and the claim of the appellant determined on a proper factual basis as between her and the respondent. Refuge in the pleadings at trial and in the record at trial, as sought by counsel for the respondent, irrespective of the wrongful assertion as to title by the respondent on appeal to the Court of Appeal and, again, in his affidavit on taxation of costs after the appeal was determined in his favour, would mean insistence on a state of facts which were untrue and which would involve this court in a constitutional exercise which would be unnecessary if the truth had been told.

18 The new evidence sought to be adduced would not involve any change in the cause of action, but bespeaks a failure of candour by the respondent in order to take advantage of the appellant if he could. No court can condone attempts to mislead it; and if the respondent put his counsel, be he Mr. Scoffield or Mr. Horn, in an unenviable position, the court is entitled to have their co-operation in clarifying the record once they have become aware of the true state of the title.

19 At the conclusion of the hearing of the motion for leave to adduce new evidence, the court was unanimously of the opinion that the motion should be granted, with costs of the motion to the successful appellant and with reasons to be delivered later. The reasons have been set out in what has gone before, and I turn now to the merits in the light of the newly admitted evidence.

20 The constitutional question has now disappeared, and counsel for the respective Attorneys General asked to withdraw, having no submissions to make on the merits. They were, accordingly, excused and, although they felt they should have some costs in view of the unnecessary trouble to which they were put, a not unreasonable position for them to take, I think it best to follow this court's general rule that no costs are awarded to or against any

