1993 CarswellAlta 769, [1993] W.D.F.L. 1101

McIntyre v. McIntyre

Judith Ann McIntyre, Petitioner (Applicant) and Sidney Michael McIntyre, Respondent (Respondent)

Judith Ann McIntyre, Plaintiff (Applicant) and Sidney Michael McIntyre, Defendant (Respondent)

Alberta Court of Queen's Bench

Prowse J.

Judgment: July 8, 1993
Docket: Calgary 4801-19393, 128051

Counsel: *Diann P.* ***Castle***, for the Petitioner (Applicant).

Derek M. Bridges, for the Respondent (Respondent).

Subject: Family

Matrimonial property — Orders for division — Enforcement.

The judgment divorcing the parties in 1978 postponed sale of the matrimonial home until the youngest child reached 18. If the wife were required to make mortgage payments because of default by the husband, she would be entitled to a charge against his half interest, to be realized when the house was sold. The judgment also provided that the wife was responsible for general repairs and maintenance, but that the cost of major structural or mechanical repairs would be shared equally. Costs were awarded to the wife. Through the course of the wife's occupation the husband defaulted in making certain payments. The wife paid out the mortgage in 1990. The house was now about to be sold, and the wife sought to compel the husband to pay $24,147.08 from his share of the proceeds. *Held*, husband to pay $18,695.42 prior to sale; in default, amount to be deducted from his share of proceeds. The husband did not dispute his liability to pay child support arrears or the lawyers' fees that were part of the costs ordered under the previous judgment. Only after foreclosure was threatened due to the husband's default did the wife pay out the mortgage. Accordingly it was not open to the husband to argue that the judgment requiring him to make monthly mortgage payments had been satisfied. The wife was entitled to the amount she paid to retire the mortgage, plus property taxes for the three years of occupation since the mortgage was retired. The husband should pay one half of the 1993 taxes if they were paid by the wife. Sixty per cent of the premiums for fire insurance on the house and contents was a reasonable apportionment to the residence coverage, and the husband should pay one half of that. He should also pay one half the cost of those repairs which enhanced the value of the residence, including certain additions, painting and new flooring. Furnace repairs were structural or mechanical repairs as those words were used in the judgment.

***The Honourable Mr. Justice H.S. Prowse*:**

1 This application concerns the interpretation and enforcement of provisions contained in the Judgment Roll pursuant to a decision of the late Honourable Mr. Justice Morrow rendered the 25th day of January 1978 in an action between these parties. The Petitioner (Applicant) (hereinafter referred to as "the Applicant") seeks an order directing the Respondent to pay her $24,147.08 from his share of the sale proceeds of their residence pursuant to the above judgment.

2 The said judgment determined each party to these actions (4801-19393 and 128051) and to this application were owners each as to an undivided half interest of:

> Lot 2 in Block 20 Plan Southwood Calgary 6300 JK municipally described as 11131 Southdale Road S.W., Calgary, Alberta

3 The further provisions of the Judgment Roll relevant in dealing with this application include:

> 2. AND IT IS FURTHER ORDERED AND ADJUDGED that the sale of the above described property is ordered provided that the said sale shall be stayed on the following terms and conditions:
>
> (a) the sale shall not take place until there are no longer any children of the marriage residing in the said residence with the Petitioner/Plaintiff herein, or until the younger of the said children of the marriage reaches the age of eighteen (18) years, whichever event shall first occur;
>
> (b) if the Petitioner/Plaintiff shall be, because of the default or otherwise of the Respondent/Defendant herein, required to make Mortgage payments, the Petitioner/Plaintiff shall be entitled to a charge for the total of the payments made by the Petitioner/Plaintiff against the Respondent/Defendant's half interest in the property, such interest to be realized by the Petitioner/Plaintiff at such time as the said premises are sold;
>
> (c) the Petitioner/Plaintiff is responsible for the usual repairs and maintenance as if a tenant in the said premises;
>
> (d) the Respondent/Defendant shall share equally the costs of major structural or mechanical repairs.
>
> . . . . .
>
> 3. ...all mechanic's tools and equipment and car parts and a skidoo snow vehicle along with trailer belong to and are the sole property of the Respondent/Defendant herein and are to be removed by the said Respondent/Defendant within a reasonable time, at a time convenient to the Petitioner/Plaintiff.
>
> 4. ...all other furnishings in the said premises belong to and are the sole property of the Petitioner/Plaintiff herein.
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> . . . . .
>
> 7. ...at such time as the premises herein are sold the, Petitioner/Plaintiff has the absolute first right to purchase the said property at whatever bonafide price the property may be sold for.

8. ...the Respondent/Defendant shall pay to the Petitioner/Plaintiff herein costs taxed in an amount equal to one and a half times column 5 of the Rules of Court.

9. ...all payments required to be made hereunder shall commence on the 1st day of February, A.D., 1978, and shall continue on the 1st day of each and every month thereafter, so long as this Order is in force and effect.

4 The particulars of the Applicant's claim arise from her occupation of their residence since 1978 as provided in the judgment and payments not made to her thereunder, including:

1. (a) Lawyers' fees that were to be paid by the Respondent to Walsh Young that were part of the costs ordered under the Judgment Roll in the amount of $377.20 which were paid by the Applicant;

(b) Child support arrears that were to be paid by the Respondent to the Applicant in the amount of $3,733.58;

(c) Mortgage payments in the amount of $3,276.99 that were to be paid by the Respondent but which the Applicant paid May 11, 1990;

(d) City taxes for the years 1990, 1991 and 1992 on the property in the amounts of $1,522.15, $1,619.15 and $1,714.14 that were to be paid by the Respondent but which the Applicant paid;

(e) Home insurance in the amount of $3,256.00 that was to be paid by the Respondent from 1979 to 1992 and was not, and was paid by the Applicant;

(f) House repairs in the amount of $8,647.87 that were to be paid by the Respondent and were not and which the Applicant paid.

5 The Applicant is also seeking an order that the costs of this application on a solicitor/client basis be paid directly from the Respondent's share of the sale proceeds due to the Respondent ignoring her requests that the house be sold. She is also seeking an order that the 1993 City property taxes for the property in question be paid directly to her from the Respondent's share of the sale proceeds as it will be necessary for her to pay the entire 1993 tax levy in June of 1993, although it is the responsibility of and should be paid by the Respondent.

6 The Respondent admits that he is indebted to the Applicant for the above amounts claimed in paragraphs (a) and (b) but disputes in whole or part the other items.

7 As I understand the Respondent's position with regard to items in paragraphs (c) and (d), his denial of liability arises because the said judgment required him to make the monthly mortgage payments (which included principal, interest and taxes) and as the Applicant prepaid the mortgage in May 1990, by paying the balance then owing after application of the tax credit held by the mortgagor of $3,276.99, this satisfied his obligation under the judgment and he is not liable to the Applicant.

8 I find the Applicant paid out the mortgage after foreclosure was threatened by the mortgagor due to default of the Respondent and, in my opinion, there is no merit in the Respondent's denial of liability to the Applicant for the amounts claimed in paragraphs (c) and (d).

9 The Respondent disputes the Applicant's claim set out in paragraph (e) above for recovery of insurance premiums which she paid in the sum of $3,256.00 over the years for fire insurance coverage on the residence and contents. The Ap-

plicant has been unable to obtain an exact apportionment of the annual cost as between residence and contents but her agent suggested 60% can reasonably be apportioned to the residence coverage. While this is hearsay, it is certainly reasonable and I allow the Applicant's claim for 60% of $3,256.00, namely $1,953.60. However, only one-half thereof is payable by the Respondent.

10 The Applicant in paragraph (f) above claims reimbursement of expenses being house repairs to the residence from 1979 (the date of judgment) to 1992 with supporting invoices. She claims one-half of the total of $8,647.87 should be paid by the Respondent as these payments preserved the value of the residence and this value will be realized in the sale.

11 Counsel for the Respondent has reviewed the expense items claimed as house repairs and submits that only two items of claim came within the classification of "structural or mechanical repairs", as those words are used in the said Judgment Roll, these being furnace repair on October 17, 1980 ($112.00) and furnace repair on December 24, 1991 ($104.86). He therefore has submitted that the Respondent must pay the total of those two items $216.86. The Respondent has also classified as "additions" $4,444.29 of the Applicant's house repairs listed in paragraph (f) of her claim. In my opinion, these items enhance the value of the residence which will be reflected in the ultimate sale price and one-half will accrue to the benefit of the Respondent. Therefore, the Respondent will pay the Applicant one-half of the said $4,444.29 in addition to the said $216.86.

12 The Respondent has also classified $4,223.50 of the Applicant's house repairs as being expense for "maintenance and minor repairs" which he submits are the sole responsibility of the Applicant since these would be incurred and paid by a "tenant" within the meaning of paragraph 2(c) of the judgment.

13 I am of the opinion that not all of the items in the said total of $4,223.50 should be disallowed as submitted by the Respondent. I am of the opinion that the following items of claim preserved the condition of the residence and enhanced the value of it and these can and will be reflected in the price received and therefore the Respondent should pay one-half the cost to the Applicant for the following:

1990 - Painting	$ 660.00
1991 - Painting	210.00
1990 - New floor installed in kitchen & bathroom	1,189.60
	$2,059.60

14 Thus the above amounts will be paid to the Applicant by the Respondent as well as one-half of the 1993 taxes if paid by the Applicant. If the moneys payable hereunder are not paid prior to the sale of the residence, they will be deducted from the Respondent's share of the sale proceeds and paid to the Applicant.

15 The Applicant is entitled to her taxable party and party costs which will be paid by the Respondent, and if not paid prior to the sale of the residence, will be paid out of his share of the proceeds of the sale.

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