

1 of 1 DOCUMENT

Indexed as:

Lasch v. Lasch

[1988] O.J. No. 488

64 O.R. (2d) 464

13 R.F.L. (3d) 434

10 A.C.W.S. (3d) 33

Ontario
High Court of Justice

Granger J.

May 11, 1988.

Counsel:

L. Pawlitza, for plaintiff.

S.E. Lang, for defendant.

1 GRANGER J.:-- The parties were married on August 31, 1972, and separated on December 15, 1987. Notwithstanding the separation the parties have continued to occupy the matrimonial home at 33 Breckonwood Crescent, Thornhill, Ontario, which is registered solely in the name of the wife. An investment property was purchased in Cambridge, Ontario (the "Cambridge property") and registered solely in the name of the husband. In order to complete the purchase of the Cambridge property, a line of credit was established with Canada Trust in the amount of \$100,000, and \$28,267 of the line of credit was used to effect the purchase of the property. The line of credit was secured against the matrimonial home. During October, 1987, the wife, after the husband had withdrawn her signing authority on the Toronto-Dominion Bank account, withdrew \$40,000 from Canada Trust on the line of credit. Eventually, the \$40,000 was given by the wife to the husband. The line of credit has been fully extended and \$100,000 is presently owing to Canada Trust.

2 On February 4, 1988, Master Cork granted an order which in part read as follows: "THIS COURT ORDERS that on an interim interim basis, the assets owned by the Plaintiff and the assets owned by the Defendant be preserved."

3 Subsequent to Master Cork's order, the husband sold the Cambridge property. He proposes to use the sum of \$28,267 and the \$40,000 which he received from his wife, to purchase a new home in Toronto in his name. The wife objects, and wishes the husband to repay to Canada Trust \$68,267 to reduce the balance on the line of credit. The wife submits that the order of Master Cork should have prevented the sale of the Cambridge property and as the property has been sold, the funds should be paid to Canada Trust along with the sum of \$40,000. In the event that the order of Master Cork did not prevent the sale of the Cambridge property and the use of the sale proceeds, the wife seeks an order requiring such funds to be applied against the line of credit.

4 The husband submits that the order of Master Cork does not prevent the sale of the Cambridge property, relying on the statement of Master Cork in *Patti v. Patti* (1982), 37 O.R. (2d) 209 at p. 210, 27 R.F.L. (2d) 353 at p. 354, 29 C.P.C. 10.

As I have stated before, it is my understanding that due to the limitation of my jurisdiction regarding restraining orders, the effect that can be anticipated from an order preserving family assets by a master, under s. 9 of the Family Law Reform Act, is to raise at the trial an onus of responsibility as to where those assets went, or an accounting thereof, from the party in whose care those assets were put. It would then be up to the trial court to determine the propriety of care or preservation, and order accordingly.

5 The limitation on the jurisdiction of the master is found in s. 114 of the Courts of Justice Act, 1984, S.O. 1984, c. 11:

114(1) In the Supreme Court, the District Court or the Unified Family Court, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

6 The jurisdiction of a master in Supreme Court proceedings is found in the Rules of Civil Procedure: see s. 20(3) of the Courts of Justice Act, 1984. Rule 37.02(3) states that a master has all the jurisdiction of a High Court judge except where the power to grant the relief sought is conferred expressly on a judge by a statute or rule. The Courts of Justice Act, 1984, s. 114, expressly confers upon a judge jurisdiction to grant injunctive relief or to make a mandatory order and, accordingly, a master is precluded from making such an order. In *Schuster v. Schuster* (1986), 53 O.R. (2d) 665, 50 R.F.L. (2d) 256, Montgomery J. found that an order restraining a husband from disposing of his share of the proceeds of sale of the matrimonial home was not a restraining order in the sense contemplated by s. 114(1) of the Courts of Justice Act, 1984.

7 In my opinion proceedings under the Family Law Act, 1986, S.O. 1986, c. 4, are no different than proceedings under any other statute, and if the order of Master Cork herein precludes the sale of any asset of the husband, then the order is clearly injunctive in nature and is beyond the jurisdiction of a master. It does not seem to me that the difficulty in bringing the motion before a High Court judge on short notice can be used to clothe the master with jurisdiction which he does not otherwise have. I agree that for practical reasons the master should have such jurisdiction but until the Courts of Justice Act, 1984, is amended, the master is without such jurisdiction.

8 In *Angelopoulos v. Angelopoulos* (1986), 55 O.R. (2d) 101, 9 C.P.C. (2d) 285, Mr. Justice Henry found that an order for injunctive relief must be made by a judge and not by a master, but found the authority to make restraining orders in the Family Law Act, 1986, which he found paramount to the general authority in the Courts of Justice Act, 1984.

Mr. Justice Henry stated at p. 106:

The Family Law Act provides for a variety of proceedings relating to the disposition of family property, spousal and child support and domestic contracts. Proceedings may be commenced by the action or application (s. 2(3)). It is the "court" that is given jurisdiction over those proceedings, which includes the Supreme Court of Ontario. The Act does not allocate functions between judicial officers of the court -- hence, jurisdiction of judges, local judges and masters is left to be determined under the Courts of Justice Act and the rules. As I have said, in the present context, a master has all the jurisdiction of a judge of the High Court of Justice except where it is specifically required to be exercised by a judge. I do not find such an exception in the relevant provisions in the Family Law Act with which we are concerned, or in the rules.

9 I agree with Mr. Justice Henry that there is not an exception in the Family Law Act, 1986, which would prevent the master from making the restraining order, but in my opinion the exception is to be found in s. 114 of the Courts of Justice Act, 1984, which requires injunctive relief to be granted by a judge of the High Court.

10 I am of the opinion that an order which prevents the sale of assets pursuant to s. 12 of the Act is injunctive in nature and must be made by a judge of the High Court if the proceedings are pending in that court.

11 I find, however, that Master Cork intended his order to have the same effect as that in Patti, supra, thus I find that the order was made within the master's jurisdiction.

12 The purpose of an order under s. 12 of the Act is to ensure that there are sufficient assets to make an equalization payment once the court determines such payment and makes an order under s. 9 of the Act. If I am correct that an order made by a master pursuant to s. 12 of the Act merely requires a spouse to account for his or her assets at the trial, it is difficult to appreciate the purpose of such an order. To say that a spouse must account for his or her assets as to the date of trial will be of little assistance if the assets have been squandered or disposed of prior to the trial. Under the Family Law Reform Act, R.S.O. 1980, c. 152, the effect of an order by a master would be to place an onus on the spouse required to preserve the assets to account for his or her assets as of the date of trial. Under the Family Law Act, 1986, the valuation date is the date of separation and the purpose of an order under s. 12 of the Act is to ensure that there are sufficient assets available to satisfy the equalization payment as of the date of trial.

13 I am of the opinion that Mr. Lasch was entitled to sell the Cambridge property and to use the proceeds of sale and the sum of \$40,000 to purchase another asset as there was no order in existence to restrain him from such action.

14 I am, however, concerned, having regard to the past history of this case, that the ability of either party to satisfy an equalization payment will be impaired unless I make an order restraining the disposition and/or encumbrance of certain assets.

15 I would be reluctant, in any case, to make an all-encompassing preservation order as it would prevent a spouse from dealing with his or her assets, and could prevent a spouse from paying support from his or her savings or dealing with his or her assets despite the fact that he or she would be the recipient of the equalization payment.

16 A restraining order should be restricted to specific assets and there should be an onus on the party seeking the restraining order to prima facie show that he or she is likely to receive an equalization payment equal to the value of the specific assets.

17 In this case, Mr. Lasch shall be entitled to use the sum of \$68,000 to purchase his new home provided that he gives Canada Trust a collateral second mortgage on his new home similar to the collateral mortgage on the matrimonial home. Further, Mr. Lasch shall be responsible for any future interest payments on the sum of \$68,000.

18 The wife also requests an order for exclusive possession of the matrimonial home as a result of an incident which occurred in the home on May 3, 1988. If I accept the wife's affidavit, she would be entitled to exclusive possession of the matrimonial home, but the husband's affidavit paints a completely different picture. If I accept his affidavit, he should be entitled to continue to reside in the matrimonial home.

19 I am unable, without cross-examination, to determine which affidavit to accept and accordingly, I must dismiss the wife's motion for exclusive possession of the matrimonial home.

20 The costs of this application are reserved to the trial judge.

Order accordingly.