

2014 CarswellOnt 15794  
Ontario Superior Court of Justice

Kates v. Kates

2014 CarswellOnt 15794, [2015] W.D.F.L. 126, [2015] W.D.F.L. 72, 246 A.C.W.S. (3d) 143

**Mary Kates v. Sheldon Kates**

Backhouse J.

Heard: September 30, 2014

Judgment: October 1, 2014

Docket: FS-13-385880

Counsel: James Marks, for Ms Kates  
Ron Shulman, for Mr. Kates

Subject: Family; Property

**Headnote**

Family law --- Division of family property — Order for division of property — Interim order

Parties were married for 25 years — Parties worked together in family furniture business and had four properties in wife's name — Wife brought motion for \$500,000 advance on equalization payment and for temporary spousal support — Motion granted — Wife would be owed equalization payment greater than \$500,000 — Wife had reasonable requirement for funds to complete her valuations, continue with and complete litigation, and assist in her support — Husband had ability to satisfy advance from liquid assets — Husband had retained and had control of virtually all of parties' assets since separation.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Interim support — Entitlement

Parties were married for 25 years — Parties worked together in family furniture business and had four properties in wife's name — Wife brought motion for \$500,000 advance on equalization payment and for temporary spousal support — Motion granted — Husband was ordered to pay wife temporary spousal support of \$2,500 per month — There was no doubt, based on his credit card expenses and own representation, that husband's income exceeded \$69,000 per annum — Wife was in need — Husband had advantage of sole possession of matrimonial home and contents.

MOTION by wife for advance on equalization payment and for temporary spousal support.

**Backhouse J.:**

1 Ms. Kates seeks a \$500,000 advance on an equalization payment which she states is owed in the amount of \$1.9 million. If successful on the constructive trust claim, she states she is owed \$2.7 million. She claims temporary support of \$2500/month. Mr. Kates today concedes that an equalization payment is owed to Ms. Kates of \$285,000. Having advanced \$75,000 pursuant to Justice Paisley's order of December 13, 2014, he submits that an order of \$210,000 would be

appropriate. With respect to spousal support, he submits that \$1350/month is appropriate.

2 The parties were married for 25 years. Ms. Kates claims that the parties cohabited for 8 years prior to marriage. Mr. Kates disputes this. There is no dispute that the parties worked together in the family furniture business, Kates & Co. Inc. and that Ms. Kates was in charge of the financial end of the business for 33 years. In addition to the business, there are 4 properties in Mr. Kates' name, 3 of which were purchased during cohabitation according to Ms. Kates. One of the properties is the matrimonial home, 139 Dowling Avenue, which was owned at the date of marriage and therefore the value at that date is not excluded. All 4 properties are mortgage free. Ms. Kates has had the 4 properties appraised at the date of separation at \$4,065,000 and states that if they have increased only 10% since separation, they are now worth approximately \$4,500,000. Mr. Kates has had the properties appraised at \$3,535,000 as at the date of separation.

3 Mr. Kates relies on appraisals performed by Tracy Smith for the increase in the properties during marriage which on their face appear inherently unreliable. For example, two of the properties are commercial properties in Forest Hill near the Allen Expressway: 1092-1094 Eglinton Avenue W. and 1096-1098 Eglinton Avenue W. According to Ms. Smith 1092-1094 Eglinton W. increased by \$832,000 or seven times in value in just five years from the date of purchase to the date of marriage but then over the next 25 years of marriage only increased in value by \$460,000 or 23.8%. If Ms. Kates is successful in regard to her constructive trust claim, the values of the properties at the date of marriage may not be relevant.

4 Approximately \$500,000 of the difference in the parties' positions on the equalization payment is based on a difference in their valuations of Kates & Co.Inc. For the purpose of determining whether Ms. Kates has satisfied the burden of establishing that there is little doubt that she will be owed an equalization payment of at least \$500,000, I deduct this amount from Ms. Kates' calculation.

5 When Ms. Kates brought her motion before Justice Paisley for an advance on equalization heard on December 10, 2013, Mr. Kates filed a net family property statement which showed that Ms. Kates owed him an equalization payment. Had he disclosed at that time that he owed \$220,000 on a promissory note at the date of marriage, that alone would have supported an advance of \$110,000. Although this was brought to Mr. Kates' attention in 2013, he has continued to assert that his assets were acquired through the goodwill of his family. The marriage date debt was only acknowledged in his financial statement dated September 26, 2014.

6 Mr. Kates' expert incorrectly stated that 40% of \$968,711 was \$766,299, resulting in a \$378,815 overstatement of his capital gain tax, which incorrectly reduced his net family property by \$378,815 in Melanie Russell's net family property report. This was pointed out to Mr. Kates at the motion before Justice Paisley but 10 months went by before this mistake was corrected in Ms. Russell's revised report.

7 Mr. Kates does not include in his net family property \$123,000 in executor fees he swore he was entitled to for work done during the marriage. He claims he will not receive these fees. In court on May 22, 2014, counsel for Mr. Kates advised that the matter was before the court in September, 2014. I ordered that Mr. Kates make ongoing disclosure regarding his executor compensation. He has not done so. Mr. Kates also does not include in his net family property 2 Wachovia investment accounts worth \$381,119 at the date of separation over which he was in litigation. He did not disclose that the litigation was settled in 2009, prior to separation. He takes the position that this was an inheritance because he had the right of survivorship. It is unclear what portion of these funds were contributed by Mr. Kates and would therefore form part of his net family property. Mr. Kates should at least have disclosed the value of this asset on his financial statement because it is relevant to a determination of support.

8 Mr. Kates continues to assert that his assets were purchased with gifts from his family when no evidence of this has been produced. To the contrary, he now acknowledges a loan from his sister at the date of marriage which was paid off during the marriage through a mortgage placed on one of the properties.

9 Mr. Kates has access to at least \$800,000 in liquid assets as set out in Para. 17 of Ms. Kates' Factum which are not subject to a preservation order and could be used to pay an advance. Ms. Kates has incurred legal and professional fees similar to Mr. Kates. She requires funds to continue with the lawsuit which is not yet close to trial. There are currently 12 volumes of the continuing record. Much of this is due to unreasonable, hardline positions taken by Mr. Kates. There is a scorched earth policy in the way Mr. Kates has conducted himself. She requires funds to do her own income report and to

critique the valuation of the business obtained by Mr. Kates.

10 Taking all of the above into account, I am satisfied that Ms. Kates will be owed an equalization payment greater than \$500,000. I am satisfied that she has a reasonable requirement for the funds to complete her valuations, continue with and complete the litigation and to assist in her support. Mr. Kates clearly has the ability to satisfy this advance from liquid assets. Although the parties were married for 25 years, Mr. Kates has retained and had control of virtually all of the assets since separation. I consider it just to order an advance payment on equalization of \$500,000.

### **Spousal Support**

11 Ms. Kates is 60 years of age. Mr. Kates is 69 years of age. Ms. Kates' only income is from CPP and OAS. Until separation the parties ran a furniture business, Kates & Co. Inc., together for 33 years. Mr. Kates continues to run the business. Since separation, he has remained in the matrimonial home. Ms. Kates is locked out with no access to her personal belongings. She has rented an apartment for \$2200/month including heat and electricity and had to furnish it. She estimates her monthly expenses at \$4700.

12 Mr. Kates relies on an income valuation prepared on his behalf by Martin Pont received by Ms. Kates shortly before today's motion which concludes that Mr. Kates' 2013 annual income is in the range of \$37,000 to \$40,000. Ms. Kates submits that his actual income is much higher than this and relies upon the following. Mr. Kates uses his personal credit card to pay for legal fees and his monthly credit card balance is paid in full by Kates & Co. Total legal fees paid by Mr. Kates and reimbursed in fiscal 2013 were \$97,957 and until July 27, 2014 were \$78,600. In his income valuation, Mr. Pont seems to only have added back \$7965 in arriving at his opinion of Mr. Kates' 2013 income. In an addendum report, Mr. Pont states that payment of personal and professional fees by Kates & Co. would not automatically result in an inclusion of those fees in Mr. Kates' income because they may have been accounted for by way of a debit against Mr. Kates' shareholder loan balance. However, his shareholder loan balances seem to be on the increase rather than the decrease. Mr. Pont states that he did not have and therefore did not review the credit card statements paid for by Kates & Co. When asked to respond to the issue of legal and professional fees paid on Mr. Kates' behalf by the company, Mr. Pont states that he then did review the credit card statements for the period July 1, 2012 to June 30, 2013 and there were no further legal fees identified. He does not seem to have conducted an analysis of the credit card expenses incurred by Mr. Kates on an annual basis and reimbursed by the company which would normally be done in an income valuation when there is one controlling shareholder. It is not disputed that the legal fees set out above were paid on Mr. Kates' behalf by Kates & Co. As of December 13, 2013, Mr. Kates' credit card expenses were more than \$144,362. As of July 31, 2014, his credit card expenses were more than \$108,000.

13 Ms. Kates further relies on Mr. Kates' representation of his income as \$100,000 on an investment account application dated May 6, 2011. He pays minimal income taxes

14 Mr. Kates submits that the quantum of support sought by Ms. Kates requires imputing income to him in the amount of approximately \$69,000. There can be no doubt based on his credit card expenses and own representation that his income exceeds that amount. Ms. Kates is in need. Mr. Kates has the advantage of sole possession of the, matrimonial home and contents. I do not agree that after 33 years in the family business and at the age of 60 years, it is reasonable to expect Ms. Kates to find employment or that she would be able to find appropriate employment. In the circumstances, Mr. Kates shall pay \$2500/month temporary support pending trial.

15 The \$75,000 advance awarded by Justice Paisley was uncharacterized as to whether it was an advance against equalization, for interim disbursements or for support. Taking this into account, I make no award of retroactive support. This is without prejudice to this claim being considered by the trial judge. For clarity, the \$500,000 advance on equalization is without deduction for the \$75,000 already received.

16 Mr. Kates shall forthwith produce the income and deduction printouts filed with CRA from 1979 to 2010.

17 Ms. Kates shall have 14 days from the release of these reasons to deliver brief written submissions on costs. Mr. Kates shall have 14 days thereafter to respond.

*Motion granted.*

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