

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

LORETTA ALBERTA KAPALKA

Plaintiff

- and -

BERNARD JOHN KAPALKA and BERNIE'S LTD.

Defendants

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Application for interim injunction restraining disposition of family assets granted.

Heard at Yellowknife on November 28, 1994

Judgment filed: December 1, 1994

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REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Counsel for the Plaintiff: K.R. Peterson, Q.C.

Counsel for the Defendants: G.K. Phillips

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**REASONS FOR JUDGMENT**

1                   The plaintiff seeks an interim injunction restraining the defendants from disposing of family assets pending the trial of this action.

2                   The plaintiff and the personal defendant have been married since 1962. They separated earlier this year. The corporate defendant was incorporated as a private company in 1974. The husband holds 99 shares and the wife holds 1 share in its issued capital stock. Numerous assets, including real property, have been accumulated during the course of the marriage. Most of these assets are in the names of the husband or the company.

3                   The plaintiff commenced these proceedings by filing a Statement of Claim in which she seeks:

- (a) a declaration that the Plaintiff has an equal interest in all property acquired by the parties during the course of the marriage in accordance with the principles of trust and equity;
- (b) a valuation of the assets and property of the parties acquired during

the course of the marriage;

- (c) an equitable division of the value of all property acquired during the course of the marriage, or payment of funds of an equivalent amount in lieu thereof;
- (d) an interim injunction restraining the defendant Kapalka from disposing of, transferring, encumbering or otherwise dealing with the property, or any part thereof acquired by the parties during the course of the marriage pending the Court's determination of the parties' interests therein;
- (e) an interim injunction restraining the defendant Bernie's from disposing of, transferring, encumbering or otherwise dealing with the assets of the company or any portion thereof pending the Court's determination of the parties' interests therein;
- (f) an interim injunction restraining the defendants and each of them from transferring or issuing shares in defendant Bernie's, and from electing or removing any of the officers or Directors of the defendant Bernie's pending the Court's determination of the parties' interests therein.

4 Proceedings have also been commenced in British Columbia. The plaintiff has resided there since 1982 on a farm owned as to one-half by the company and as to the other half jointly by she and her husband. Earlier this month an order was issued by the Supreme Court of British Columbia, on consent, restraining all parties from the disposition of family assets.

5 The plaintiff fears that, since the assets are under the direct control of her husband, there is nothing to prevent him from transferring assets or removing funds. This application was prompted in part by a notice received by the plaintiff respecting a special general meeting of the company's shareholders to be held for the purpose of removing the plaintiff as a director of the company. The husband does not deny that he has been attempting to dispose of assets, but he says that this is necessitated by the large debt load carried by the company.

6                   There is no question that this Court has the jurisdiction to grant the relief requested on this application. Section 41(1) of the *Judicature Act*, R.S.N.W.T. 1988, c. J-1, expressly provides for the granting of an interlocutory injunction "in all cases in which it appears to the court to be just or convenient that the order should be made". This is essentially an equitable remedy. And since the plaintiff claims an equitable interest in family assets, her interest may be protected, at least as an interim measure, by the equitable remedy of injunction.

7                   There is a tripartite sequential test for granting an interim injunction:

1. Is there a serious issue to be tried?
2. Will the applicant suffer irreparable harm if the injunction is not granted?
3. Does the balance of convenience (or inconvenience) between the parties favour the applicant?

See *Attorney-General of Manitoba v. Metropolitan Stores (MTS) Ltd. et al.*, [1987] 1 S.C.R. 110; *Law Society of Alberta v. Black et al.* (1983), 8 D.L.R. (4th) 346 (Alta. C.A.); *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (H.L.).

Serious Issue:

8                   The plaintiff's action is founded on the principles of constructive and resulting trust and on the provisions of the *Matrimonial Property Act*, R.S.N.W.T. 1988, c. M-6. The constructive trust doctrine is recognized as the remedy for proprietary unjust enrichment as between spouses. The remedy applies whether the spouse has contributed to the acquisition of assets or to their preservation, maintenance or improvement. The discretionary power granted by s.27 of the *Matrimonial Property Act* to a judge to make any order that he or she considers fair and equitable, notwithstanding that the legal or equitable interest of the husband and wife in the property in question is in any other way defined, is the statutory equivalent of the constructive trust doctrine: *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70. Indeed, it has been suggested that the purpose of the legislation is to prevent unjust enrichment: see annotation to *Slocki v. Slocki* (1981), 25 R.F.L. (2d) 366 (N.W.T.S.C.).

9                   In my opinion, the plaintiff has established at least a *prima facie* case for an equitable interest in the assets accumulated during the marriage. While there is no legislated mandate of equalization of family assets as between spouses, there is certainly an underlying philosophy (as there is in other jurisdictions) of equal sharing. There is some evidence to suggest that the plaintiff participated in her husband's business ventures and made some contribution to them. She says, for example, that over the years any salary she would have earned from the company was reinvested in the business and the company in turn paid their personal expenses.

10                   There is, in my view, a serious issue to be tried as to the extent of the plaintiff's interest in these assets.

Irreparable Harm:

11                   The issue of irreparable harm is sometimes expressed as whether damages could provide adequate compensation for any loss suffered pending trial. Inherent in this test is the probability of harm occurring before trial.

12                   There is evidence that the company has significant financial obligations. There may be little equity in some of the assets. But most of the assets are registered to either the company or the husband. He has effective control over them including their disposition and the terms of any such disposition. He is currently negotiating potential sales. There are some complex arrangements as to the use of some of the assets.

13                   It seems to me that there would be little point in claiming a property interest in an asset (especially income producing assets) if the asset is not likely to be still there at the end of the trial. And it may be of little comfort to say that the proceeds of any disposition can be secured if only one party has the power to determine the terms of any disposition.

14                   I have therefore concluded that damages could not adequately compensate the plaintiff for any losses incurred pending trial. Therefore this factor has been met.

15                   With respect to the notion of irreparable harm to the defendants should an injunction be granted, the plaintiff has met the usual condition of giving an undertaking to pay any damages the defendants sustain by reason of the injunction. This is normally considered an adequate safeguard.

Balance of Convenience:

16 In weighing the balance of convenience, there is some merit in favouring the maintenance of the status quo pending trial. As stated by Lord Diplock in the American Cyanamid case, where all else is equal, "it is a counsel of prudence to ... preserve the status quo".

17 The husband complains that an injunction would unnecessarily bind his hands in trying to deal with the company's financial problems. There is a legitimate concern about the company's viability should it be unable to sell some of its assets and engage in its usual course of business. I do not see how an interim injunction would interfere in those bona fide efforts. The company would still be able to carry out transactions in the normal course of its business. The husband has even offered to give the plaintiff the power to review and possibly restrain any intended dispositions. He says in his affidavit:

With respect the question of whether or not I should continue to be able to pursue sales of the company's properties here in Yellowknife, I am prepared to agree to provide the Plaintiff or her lawyers with copies of any sales agreement the company may enter into for such sales forthwith upon execution thereof for their review. I will make each such agreement conditional upon the Plaintiff not successfully applying to this Honourable Court to restrain the sale, so that the Plaintiff will be able to block the sale if she so desires. I will further agree to provide her lawyers, forthwith upon closing of each sale, a full accounting of the sale proceeds,

(either through my lawyers or accountant), with said proceeds to go towards paying off only the outstanding mortgages on said properties and any balance to be used to pay off trade payables and the legal fees and disbursements incurred in connection with the said

sales.

18                    In my opinion this position would be no different if an interim injunction were granted. If a sale is negotiated, the parties could agree to conclude it and then agree as to the disposition of the sale proceeds. If they could not agree, then the defendants can come to court for an order lifting the injunction for that particular transaction. It should cause no more inconvenience than the process suggested by the husband. Furthermore, it will ensure that both spouses have a say in any disposition until their respective interests are determined by the court.

19                    I have therefore concluded that the balance of convenience favours granting the injunction.

20                    For the foregoing reasons I order as follows:

1.    The defendants, and each of them, are hereby restrained and enjoined from disposing of, encumbering, transferring or otherwise dealing with the property acquired by the defendants and the plaintiff during the course of the marriage of the plaintiff and the defendant, Bernard John Kapalka, including any real property presently registered in the name of either defendant, until further order of the Court or by agreement of the parties.
  
2.    The defendants, and each of them, are hereby restrained and enjoined



from disposing of, encumbering, transferring or otherwise dealing with the assets or property of the defendant, Bernie's Ltd., without leave of the Court, until further order of the Court or by agreement of the parties.

3. The defendant, Bernie's Ltd., is hereby restrained and enjoined from undertaking any business out of the ordinary course of business, and is further restrained and enjoined from issuing any shares from treasury, transferring any issued shares and electing or removing officers and/or directors of the said company until further order of the Court or by agreement of the parties.

21 My earlier order freezing the funds in the company bank account is hereby vacated. Costs of this application will be left to be determined by the trial judge.

John Z. Vertes  
J.S.C.

Counsel for the Plaintiff:  
Counsel for the Defendants:

K.R. Peterson, Q.C.  
G.K. Phillips

