Barrett v. Barrett

Vera Barrett Plaintiff-Appellant v. Bernard Barrett Defendant-Respondent

Supreme Court of Newfoundland, Court of Appeal

Mifflin, C.J.N., Gushue and Mahoney, JJ.A.

Judgment: December 11, 1984
FILING: December 17, 1984
Docket: Doc. 188

Counsel: Mr. **David** C. **Day**, Q.C. for the Plaintiff-Appellant.

Mr. William English for the Defendant-Respondent.

Judgement of the Court delivered by Gushue, J.A.:

1 Vera Barrett has taken this appeal from the judgment of Fagan, J., filed on August 12, 1983, in which he ordered an equal division of the parties' matrimonial assets, including the matrimonial home. The appellant had claimed exclusive possession of the matrimonial home and its contents. As stated, the learned judge denied her claim and consequently ordered as follows:

> (a) that the property situate and known as 10 Waterford Heights is the matrimonial home of the parties in which they each have an equal interest, and that failure of the parties hereto to agree upon its disposition within three months from the date of filing of this Judgment, the said matrimonial home is to be sold and after payment of all outstanding encumbrances such as mortgage, taxes, etc., and all real estate and legal expenses, the net proceeds are to be shared equally between the parties;
>
> (b) that the Defendant pay to the Plaintiff the sum of $12,366.00 representing one-half of the net difference between the pension plans of the parties;
>
> (c) that the Plaintiff execute to the Defendant in writing a release of the Plaintiff's right, title and interest in and to:
>
> (i) the Defendant's motor vehicle;
>
> (ii) the Defendant's pension plan with Canadian National Railway;
>
> (iii) all chattels personal formerly at the matrimonial home and presently in the possession of the Defendant;

(d) that the Defendant execute to the Plaintiff in writing a release of all his right, title and interest in and to:

(i) the Plaintiff's motor vehicle;

(ii) the Plaintiff's pension plan with the Alcohol and Drug Addiction Foundation of Newfoundland;

(iii) all chattels personal presently at the matrimonial home;

2 The essence of the grounds of appeal is that the trial judge misconstrued the evidence in denying the appellant's claim for unequal division of the matrimonial home, and further that he erred in his findings in relation to the monies in bank accounts of the parties and as to the value of their respective motor vehicles.

3 Much of the evidence given at trial by the appellant and her son (who is unmarried and resides with her) was for the purpose of establishing a greater contribution by far to the house by the appellant. She stated that her father had given her $1,500.00 to purchase the land upon which the house was built, which money was in lieu of any subsequent inheritance. This was in 1953. She and her son testified that, over the years, he and some of her relatives had contributed materials and various items which had increased the value of the house, which gifts had been intended for the appellant's benefit only.

4 However, when one reads all of the evidence, it is clear that the respondent also made substantial contribution to the house, not the least of which was payment of the mortgage on the property. Further, there was every good reason why the son should make contributions to the upkeep and improvement of the house when he was paying little or nothing towards his board and lodging.

5 On the evidence, I can find no significant difference in the contributions of both parties and, even if there were such difference, it is obvious that Section 16(2) of the Matrimonial Property Act contemplates that possibility in relation to the matrimonial home when, unlike other real and personal property of the spouses acquired by gift, inheritance, trust or settlement from a person other than the other spouse which are not deemed to be matrimonial assets, it is expressly stated in that section that matrimonial assets "includes a matrimonial home acquired by gift, settlement or inheritance". It cannot be overlooked here as well that the matrimonial home was built in 1954 and was jointly occupied by the parties as such until 1980, i.e., 27 years. In my view, that passage of time makes the fact of the appellant (or her father) paying for the land in 1953 completely irrelevant.

6 In the absence of any other significant, and more recent, evidence relating to inequality of contribution by the parties, it would be impossible for any court to find, as required by Section 20 of the Act, that an equal division "would be grossly unjust and unconscionable". These are very strong words and in my view are in no way apropos to the circumstances of this case. I

agree with the trial judge and would dismiss this ground of appeal.

7 As to the division of the parties' bank accounts, counsel for the appellant has submitted that the only date which may be considered is the date of separation, namely August 2, 1980. He says therefore that the trial judge's finding of an amount of $3,433.95 in the appellant's account was erroneous because on that specific date there was in fact only $33.95. However, I agree with the submission of counsel for the respondent that the trial judge found that, for the purposes of division, the amount was $3,433.95 and further that the learned judge was quite correct in doing so.

8 The evidence is that on July 7, 1980, the appellant received a letter from the respondent's solicitor giving notice of the respondent's intention to separate and making certain proposals regarding division of assets. On the next day, the appellant withdrew $3,400.00 from her bank account which is unaccounted for and not reflected in any other assets of the appellant. In my view, the trial judge was correct in deeming this an asset of the appellant on separation. It would have been inequitable to the respondent to do otherwise and contrary to the intent and purposes of the Act which is that of equity to both spouses. I would dismiss this ground of appeal.

9 It will be noted, however, that while in the body of his judgment the trial judge ordered a payment by the respondent to the appellant of $1,742.36, he omitted to include this in the overall order quoted above. The following should therefore be added:

> (e) that the Defendant pay to the Plaintiff the sum of $1,742.36 representing one-half of the net difference between the bank accounts of the parties.

10 I would also dismiss the appeal as to the value of the motor vehicles. There was no exact evidence of the value of the two vehicles and, based on the evidence before him in that regard and the necessarily imprecise evidence as to the derivation of the funds from which the respondent purchased a new vehicle subsequent to separation, the trial judge did the best that he could in the circumstances to arrive at an equitable determination. In the absence of any error of principle or glaring mistake in calculation, it is not this Court's function to examine such findings or awards with a fine-tooth comb and we do not intend to do so. I see no such error and therefore decline to interfere.

11 In the result, the appeal is dismissed, with costs.

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