26 Nfld. & P.E.I.R. 433

Cook v. Cook

Supreme Court of Newfoundland, Court of Appeal

Gushue, J.A.

Judgment: February 26, 1980

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Dorothy Lorraine Cook Plaintiff-Appellant v. Armand Francis Cook Defendant-Respondent

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Judgment: February 26, 1980
Docket: Doc. 343

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

Raymond Halley, Q.C. for the Defendant-Respondent.

Judgment of Gushue, J.A.:

1 This is an appeal from a judgment of Goodridge, J. of the Trial Division of this Court, wherein he dismissed the claim of the appellant that she was entitled to a one-half (or, at least, some) interest in the family home which she and the respondent had occupied during the years 1961 - 1970, while they were married to each other.

2 The appellant and the respondent were married on December 11, 1961, after an approximately two year courtship. By an indenture dated June 30, 1961, his father conveyed by way of gift to the respondent a parcel of land on which to erect a dwelling house. Approval to erect the house was received from the St. John's Municipal Council in June 1961, and construction was commenced shortly thereafter. The respondent's father loaned him something in the order of $5,700.00 which was used to pay contractors to complete the basement and build the shell of the house. That work was done in 1961. In 1962, the electrical and plumbing work was completed and some of the interior walls, etc. The parties moved into the house in December of that year, but much was left to be done. In March, 1963 the respondent entered into a mortgage for $13,000.00 with Canada Permanent Mortgage Corporation, using the proceeds to retire the debt to his father and to further complete the house.

3 The respondent was steadily employed during the term of the marriage, and continued to work on and contribute financially to the completion of the house. The appellant was employed in several secretarial positions until 1966 when their daughter, the only child of the marriage, was born. The appellant did make some contribution to family finances during her working

years, such as paying the rental of an apartment occupied for a while by her and her husband prior to moving into the house, and by purchasing groceries and other necessities from time to time until the time that she quit work, and by paying a share generally of the family expenses. However, the extent of her contribution to the finances of the family is uncertain. It is stated by her in her evidence that she made substantial contributions, but this is disputed by the respondent and not clarified by her evidence. The respondent also denied the appellant's claim that it was agreed between them that they would delay having a child for several years in order that she could continue to work and assist her husband financially.

4 A general overview of the evidence, in my view, indicates that the completion of the family home was the prime object of the respondent during the first four or five years of the marriage. It should be noted as well that a degree of assistance was received from the parents of both parties, including some physical labour by the fathers of both the appellant and the respondent.

5 It should be pointed out at this stage, and it is not disputed by the respondent, that there was at least some contribution made by the appellant, as will be seen from the following excerpts taken from his cross-examination:

> *Mr. Day*:
>
> ...would it be fair to say that both her earned income and your income from Bells, and the money from the mortgages went into the house, for the cost of your living in the house, groceries, heat, light and the like....
>
> *Mr. Cook*:
>
> Yes. (Transcript - p. 177)
>
> *Mr. Day*:
>
> ...from 1961 ... until 1966 when ... she stopped working, to what extent did you have reason to protest that she was not putting her money towards household budget and the cost of the house?
>
> *Mr. Cook*:
>
> None, not really. (Transcript - p. 178)

6 I shall have some further comment below on these quotes, but the fact of contribution was further confirmed by the learned trial judge in his examination 'per curiam' of the respondent, and, in his judgment, he concludes:

> In view of the fact that the land was a gift and the house was paid for out of the mortgage proceeds I find that the plaintiff made no direct financial contribution towards the cost of

> acquiring the land or building the house.
>
> I am satisfied, however, that the plaintiff continued to work to improve the financial position of the couple and that she did contribute either directly or indirectly to meeting ordinary household expenses, acquiring furniture and other family assets.
>
> There is no indication that the plaintiff was wasteful with her earnings or that they were diverted to uses other than for family expenses.

7 In light of the fact that the title to the property was expressed to be in the respondent alone, Goodridge, J. properly stated that:

> To find that the wife has an interest in the same I must find the existence of some sort of trust.

However, because of his finding that the appellant made no direct financial contribution towards land or house, he then concluded (having reviewed the law) that:

> The mere sharing of household expenses creates no trust. The contribution of each spouse is not identifiable with a particular asset. Without evidence of a common intention, a court cannot attribute to a wife a proprietary interest in lands or chattels vested in the husband's name.
>
> I cannot in the circumstances therefore find any trust which would entitle me to say that the plaintiff has any interest in the marital home.

8 It will be seen from the judgment of the learned trial judge, who researched the law on the matter in some considerable detail, that it was the lack of proof of a common intention in the parties that the appellant was to share in the ownership of the property which led him to his conclusion. He pointed out as well that some courts have been quicker than others to find this common intention, and (perhaps by way of prophecy) stated that there was a need for legislative reform in this field. We know now of course that there has been such legislative reform in the Province of Newfoundland in the form of *The Matrimonial Property Act*, 1979, which comes into force on July 1st of this year.

9 There is a line of decisions which asserts the requirement of common intention in the parties in order to establish a proprietary interest; - see *Pettitt v. Pettitt* (1970) A.C. 777, *Gissing v. Gissing* (1971) A.C. 886, and *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, all of which are referred to by Goodridge, J. in his judgment. However, there are as well other decisions, notably *Rimmer v. Rimmer* (1953) 1 Q.B. 63, which say that a constructive trust can be imposed by the court if "justice and equity" require it. As Dickson, J. said in the case of *Rathwell v. Rathwell*, [1978] 12 S.C.R. 436, the application of trust principles to matrimonial property disputes:

> ...has been bedevilled by conflicting doctrine and a continuing struggle between the

> "justice and equity" school, with *Rimmer v. Rimmer* the leading case and Lord Denning the dominant exponent, and the "intent" school reflected in several of the speeches delivered in the House of Lords in *Pettit v. Pettit* and *Gissing v. Gissing*, and in the judgment of this Court in *Murdoch v. Murdoch*. The charge raised against the former school is that of dispensing "palm-tree" justice; against the latter school, that of meaningless ritual in searching for a phantom intent.

10 It would appear from certain recent decisions; notably *Rathwell*, which is heavily relied on by counsel for the appellant, that, contrary to the statement made by Goodridge, J., (at pages 4 and 5 above), the "justice and equity" school rather than the "intent" school is prevailing at the present time - at least in some jurisdictions.

11 The facts in *Rathwell* had to do with a divorced couple in Saskatchewan. They had been married in 1944, both having served in the armed forces. On returning to civilian life, they decided to go into farming and operated a joint bank account into which both put their savings. This was the only bank account they ever had and the initial purchase, as well as later purchases, of farm land was made from it. All such purchases were made in the husband's name. In the early years in particular, the farming business was carried on by them as a "joint effort". Even while bringing up a family, the wife continued to assist her husband in many ways. After the marriage broke up in 1967, the wife commenced an action claiming a one-half interest in all the property acquired in her husband's name during the marriage. This claim was dismissed at the trial level, but allowed on appeal-although the reasoning of the various appeal judges differed somewhat. The Supreme Court of Canada dismissed the further appeal by the husband. Although there was some disagreement between the members of the Court as to whether the doctrine of constructive trust or resulting trust applied, and also as to the proportionate interest to which the wife was entitled, all agreed that she was entitled to some interest in the matrimonial property.

12 Dickson, J. (with whom Laskin, C.J.C. and Spence, J. concurred), after reviewing the law and the facts of the case, said that:

> It seems to me that Mrs. Rathwell must succeed whether one applies classical doctrine or constructive trust. Each is available to sustain her claim. The presumption of common intention from her contribution in money and money's worth entitles her to succeed in resulting trust. Her husband's unjust enrichment entitles her to succeed in constructive trust.

13 Ritchie and Pigeon, J.J., felt that the doctrine of resulting trust applied, and that it was not necessary to consider that of constructive trust. The other four judges who sat on the appeal appear to have implied a trust, s it can be concluded that the majority allowed the wife's claim the basis of resulting trust.

14 In the recent case of *Harper v. Harper*, 98 D.L.R. (3rd) 600, also in the Supreme Court of Canada, all nine judges agreed that the wife, who had made some small direct contribution, but most of whose contribution was indirect and the normal duties of a wife, was entitled to an interest in the matrimonial home. While it may be somewhat dangerous to treat this case as

precedent-setting because of discretionary powers given the trial judge in British Columbia as to partition of matrimonial property by the *Family Relations Act* of that province, it is significant that both judgment in *Harper* do appear to cite with approval the judgment of Dickson, J. in *Rathwell*, Further, Estey, J. says:

> ...the realities of life today require a recognition in the Courts that the parties enter into not the marital contract but the ensuing social joint venture on the basis that each spouse will play his or her assigned role without deliberate and finite agreement, and certainly without daily or periodic accounting. The common and basic intent is clearly a sharing of the good with the bad, the debts and the assets.

15 Another interesting case is that of *Becker v. Pettkus* (1979) 5 R.F.L. (2nd) 344, an Ontario Court of Appeal case in which the Court found that a constructive trust arose in favour of the appellant wife because of the "joint effort" and "team work" of the parties during the time they were living together - the fact of marriage not being seen to be necessary, as it was not by Estey, J. in *Harper*. This appears to directly follow the constructive trust proposition put forward by Dickson, J. in *Rathwell*.

16 Thus, as a result of *Rathwell* and the extended interpretation of constructive trust put foward therein by Dickson, J. (even though that decision on its own cannot be said to have been decided on the issue of constructive trust), at least some Canadian courts are moving from the "intent" school to the "justice and equity" school. As Dickson, J. said in *Rathwell* (at page 455):

> *The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another*. That principle is not defeated by the existence of a matrimonial relationship between the parties; *but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation*, and the absence of any juristic reason - such as a contract or disposition of law for the enrichment. (My emphasis)

And at p. 456:

> The emergence of the constructive trust in matrimonial property disputes reflects a diminishing preoccupation with the formalities of real property law and individual property rights and the substitution of an attitude more in keeping with the realities of contemporary family life. The manner in which title is registered may, or may not, be of significance in determining beneficial ownership.

17 I would agree fully with this proposition and with the above-quoted statement of Estey, J. in *Harper* and feel that such an attitude properly reflects modern socio-economic thinking and thus should be adopted by the courts, if such is possible without legislation - and it would appear that it is. It follows from this that, with respect, I must disagree to some extent with the statement

by Goodridge, J. in his judgment in the instant case that:

> Without evidence of a common intention, a court cannot attribute to a wife a proprietary interest in lands or chattels vested in the husband's name.

In my view, in light of the various above cases, this statement is too limiting. However, from comments made by the learned Judge in the last two pages of his judgment, it is possible that he might have stated the law otherwise had he seen *Rathwell* and the later cases. At any rate, generally speaking, the problem will in this province become an academic one after July 1 of this year because of the effect of the *Matrimonial Property Act*, 1979, which will divide ownership of the matrimonial home and other matrimonial property on an equal basis.

18 The real issue in this matter is to determine whether the facts warrant the finding of some form of trust, and thus an interest in the matrimonial home in the appellant. There is of course no question of there being any express trust. Neither in my view can a trust be implied in the sense that the language or actions of the parties demand or warrant such an inference. In this regard, counsel for the appellant lays much emphasis on her allegation that the respondent told her he would have legal documents drawn which would put title to the property in both their names, which counsel says was accepted as a fact by Goodridge, J. It is somewhat difficult to determine from the judgment whether the learned judge did so or not, but it is clear that he felt it was of no significant weight. Having had the advantage of reading all of the evidence, I agree with him because even from the evidence of the appellant herself, any such statement was obviously made in an off-handed fashion. That is of course assuming that it was made at all.

19 Neither, as admitted by appellant's counsel, is there any question of resulting trust. We are therefore left with constructive trust and whether *Rathwell* 'et seq' are of assistance to the appellant; i.e. whether the principles of justice and equity should be invoked in her behalf.

20 In dealing with the principle of constructive trust as put forward by *Rathwell*, there is one over-riding factor or prerequisite which must not be overlooked. That is simply that the doctrine should be utilized only where a relationship can be established between the contribution made and the asset (e.g., the matrimonial home), the ownership of which is in dispute. Dickson, J., in his judgment in *Rathwell*, says, at pages 454-455:

> Where a common intention is clearly lacking and cannot be presumed, but a spouse does contribute to family life the court has the difficult task of deciding *whether there is any causal connection between the contribution and the disputed asset. It has to assess whether the contribution was such as enabled the spouse with title to acquire the asset in dispute*. That will be a question of fact to be found in the circumstances of the particular case.
>
> (My emphasis)

21 He said further (at page 461) that, as far as the Rathwell property was concerned:

> Analyzing the facts from the remedial perspective of constructive trust, *it is clear that only through the efforts of Mrs. Rathwell was Mr. Rathwell able to acquire the lands in question*. Assuming 'arguendo', that Mrs. Rathwell had made no capital contribution to the acquisition, it would be unjust, in all of the circumstances, to allow Mr. Rathwell to retain the benefits of his wife's labours. *His acquisition of legal title was made possible only through "joint effort" and "team work" as he himself testified*; he cannot now deny his wife's beneficial entitlement. (My emphasis)

22 The first part of the last above passage was quoted and approved in *Becker v. Pettkus* (supra) and expressed by Wilson, J.A. to be the ratio of the judgment of Dickson, J. The same sort of connection is seen in all the various cases, both early and late, in which the doctrine has been applied. Another example is *Sikora v. Sikora* (1978) 2 R.F.L. (2nd) 48. Some causal connection or relationship, which in my view need not be a direct one, must be shown between the contribution and the asset in question. Further, the Court must be satisfied that the result is inequitable in the sense that the person holding legal title has been unjustly enriched and the other party unjustly deprived.

23 In the case at bar, there would appear to be no question that the land on which the house was built does not form part of the matrimonial property. That was brought into the marriage by the respondent, having been a gift from his father. As stated by Dickson, J. in *Rathwell*:

> The mere fact of marriage does not bring any pre-nuptial property into community ownership or give the courts a discretion to apportion it on marital breakdown.

24 We are thus concerned here only about the contribution of both parties to the house itself. The evidence is clear as well that neither party brought any money to the marriage, or, at least, any that was put into building of the matrimonial home. It is apparent that all of the funds for the building of the house came initially from loans from the respondent's father and later from mortgage loans - the equity or initial security for the purpose of obtaining the mortgage being the land and the house shell. As seen, the total amount of the mortgage taken to complete the house was $13,000.00 and, according to the respondent, only a small amount was spent in addition to this - at least to bring it to the stage it was at the time of breakup of the marriage. All mortgage payments were made by the respondent. These however amounted to only $103.82. per month - not a large amount and in fact scarcely more than the amount required to meet the interest payments.

25 The appellant has claimed that between the years 1961 - 1966, she paid approximately $9,000.00 to the respondent "on account of the house". The learned trial judge rejected her contention that this amount was shown to have been paid or that any monies were paid toward the house, and I agree with his finding. Further, while she paid something towards living expenses, the evidence as to the amounts she actually paid towards these expenses is very scanty. At all times during the marriage she maintained her own bank account and while the respondent admits that the appellant contributed to household expenses, he denies that there was any substantial contribution. She herself was unable to document any specific amounts paid, but gave evidence only in most general terms. On per curiam examination by Goodridge, J. who asked her

about such specific proof and concerning various payments out of her account which she claimed had gone to her husband, her answers were unsatisfactory, if not evasive. I find myself therefore unable to determine the amounts paid out by her, and thus (more importantly) from the point of view of this matter, whether they were of any substance. Also, as to contribution to the building of the house by her father, there is evidence of a 'quid pro quo' because of assistance given by the respondent to the father on properties owned by him.

26 I am in agreement with the statement made by Goodridge, J. that the mere sharing of household expenses is not sufficient to establish a trust. It must go further than that. For example, if one spouse could establish that she paid certain family expenses so as to free the other spouse's earnings for acquisition, or building of, e.g., the matrimonial home, then I would have no hesitation in finding a trust. This would be sufficient 'causal' connection and is what happened in *Rathwell, Becker* and other cases referred to. However, in my view, this has not been demonstrated here. The appellant did pay some expenses, which fact is admitted by the respondent. But how much, and where her money was directed, is not known. Neither the respondent or appellant were earning substantial salaries, and very little was paid by the respondent by way of mortgage repayment, with the result that the amount of equity built up in the house was very small. Why then, if both parties were working to make ends meet, should she not contribute something towards everyday living expenses in the same manner as did her husband? What proof is there that she contributed in any significant degree to her husband's living expenses in order to free his earnings for the home? Further, how is it known that she did not spend monies on furniture and other assets, which she afterwards recovered? In fact, there is evidence of a car having been purchased by her.

27 I am unable to find satisfactory answers to the above questions from the vague evidence presented and I say this despite the respondent's answers at page 3 above to the carefully phrased questions of counsel. I am thus unable to reach the conclusion that she contributed to this marriage to her prejudice, and thus that the respondent was unjustly enriched so as to warrant this Court invoking the equitable remedy of constructive trust to correct the situation. The learned trial judge found no direct contribution by the appellant to the house. I agree with his finding, and am further unable to find any ascertainable indirect contribution.

28 It may well be that had the appellant made an application to the Court at the time of the divorce proceedings, the trial judge might have found her entitled to some lump sum settlement. This is of course speculation, but in my view that would have been the proper time and place for any claim by her. However, whether or not she might have been entitled at that time does not justify this Court in imposing or construing a trust in relation to marital property when no connection between monies paid out and the property itself is established, or, in my view even indicated, and thus that the respondent has received an inequitable benefit therefrom. As I see it therefore, the appeal must be dismissed.

29 The appeal is dismissed. In the circumstances, there will be no order as to costs.

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