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Duff v. Duff

Newfoundland Unified Family Court

Fagan, J.

Judgment: July 1, 1982

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Docket: 1981 F/81/145

Counsel: *David C. Day, Q.C.*, for the plaintiff

Paul Carter, for the defendant

Fagan, J.:

- 1 This is an action for division of matrimonial assets under the *Matrimonial Property Act*.
- 2 The parties were married on September 18, 1938 and separated on March 13, 1981.
- 3 There are some question as to whether the defendant was aware of the separation. Although the parties had shared the same home for more than 11 years prior to the separation, they had not shared a bed or bedroom for any of that period and did not live as man and wife. This particular period of their lives terminated when the wife left the matrimonial home and took up residence outside the province. She subsequently took action for division of the matrimonial assets and the defendant said that only when he was served with the writ was he aware that his wife was not returning to the matrimonial home.
- 4 I am satisfied on the evidence that the parties have been separated and that there is no reasonable prospect of resumption of cohabitation. The application of the plaintiff is therefore in order pursuant to s. 19(1)(c) of the *Matrimonial Property Act*.
- 5 The parties filed a list of matrimonial property pursuant to the requirements of the Act.
- 6 The principal dispute revolved around the ownership of No. 86 Oxen Pond Road, a vacant lot.
- 7 The evidence shows that the father of the defendant gave to him 117 feet of land by deed on May 23, 1953. On the eastern portion of this land a dwelling was built which was occupied by the parties and their children and is still occupied by the defendant.
- 8 There lies to the west of the dwelling house a lot of land having a frontage of 50 feet upon which, according to the evidence, another dwelling may be built. This area may, therefore, be classified as a

building lot.

9 The plaintiff took the position that this was part of the matrimonial home; the defendant considered that it was a separate building lot - a gift from his father - and did not form part of the matrimonial assets.

10 Section 4(1) of the *Matrimonial Property Act*, S.N. 1979, c. 32, defines matrimonial home as follows:

4(1) In this act the term 'matrimonial home' means the dwelling and real property occupied by a person and his or her spouse as their family residence and owned by either or both of them.

11 Section 16(1)(b)(i) reads in part as follows:

16.(1) In this Part

(b) 'matrimonial assets' includes all real and personal property acquired by either or both spouses during the marriage, with the exception of,

(i) gifts, inheritances, trusts or settlements received from a person other than the other spouse and any appreciation in value of them during the marriage,...

12 Section 16(2) of the Act reads as follows:

(2) In the case of a matrimonial home, matrimonial assets includes a matrimonial home acquired before the marriage, and notwithstanding sub-paragraph (i) of paragraph (b) of subsection (1), includes a matrimonial home acquired by gift, settlement or inheritance.

13 Inasmuch as a matrimonial home includes real estate, the land upon which the house is built obviously forms part of the matrimonial home and therefore part of the matrimonial assets. The evidence discloses that the land adjacent was not built on originally not because the land was being retained by the husband as a building lot but because it was damp and not suitable for a dwelling at that time. Over the intervening years, partly through the efforts of the plaintiff but largely through the efforts of the defendant, the land was filled and landscaped.

14 A garden has been maintained there by the plaintiff and it was an area used as a garden and playground for the children of the marriage while they were growing up. It was "occupied" by the parties and their family.

15 I find, therefore, that the "building lot" is part of the matrimonial home and therefore part of the matrimonial assets.

16 There was some dispute over the valuation. Peter Parnham, a professional engineer who does some appraising and has testified in this court on numerous occasions, valued both lots and the dwelling at \$133,000.00. Jerome Kirkland, a qualified appraiser, valued the house and land upon which it is built at

\$57,000.00 and the "building lot" at \$32,000.00 for a total of \$89,000.00.

17 He indicated that if the property were sold as a unit it probably would not fetch the full price as a person purchasing a land and dwelling would not be willing to pay very much extra for additional land. He suggested that for this price the value should be trimmed by 10%.

18 I am unable to accept his reasoning on this. I can quite see that, in an area where 60 feet is required for a dwelling house and land is valued at \$300.00 a foot, a 60 foot lot would sell for \$18,000.00, while a 90 foot lot would not necessarily fetch \$27,000.00 as the entire frontage is not required. It adds to the land's value but not to the same extent as an extra 60 feet would because the extra 60 feet, like the extra 50 feet in this case, represents an area having a resale value as a building lot.

19 In this case, I would not be prepared to trim the given value by 10% or at all. If Mr. Kirkland says the house and land is worth \$57,000.00 and the "building lot" \$32,000.00, there is no logic in trimming.

20 Mr. Kirkland also suggested that the mortgage market would deflate the value of the home somewhat. I would have thought that this would have been taken into consideration in working out the appraisal. No doubt, however, there is a recognized practise among appraisers in this connection so it is not for me to criticize it.

21 Faced with two appraisals by competent people I must take the average which produces a figure of \$111,000.00.

22 That is the value that I place on the home.

23 As the home will not necessarily be sold at this time it is impossible to work any mortgage adjustments into the valuation. If the defendant finds it necessary that the home be sold to satisfy my decision herein, then the necessary adjustments and compensation to the plaintiff will follow from that sale.

24 There was some argument over what constitutes business assets.

25 Section 16(1)(a) of the Act defines business assets as follows:

16.(1) In this Part

(a) 'business assets' means property primarily used or held for or in connection with a commercial, business, investment or other income or...

26 If strictly interpreted this definition would include money saved by a working spouse and invested. I take it, however, that the definition must be read in conjunction with the words defined and that assets invested for the purpose of producing income or profit are only business assets where such investment is the business or part of the business of the spouse.

27 In particular there were savings deposits with the Royal Bank of Canada totalling \$28,000.00

representing the net proceeds of the sale of one of the business properties of the defendant. These properties had been sold some time ago and the proceeds invested. The defendant said that they were so invested to provide income for himself and his wife when he could no longer work. In view of his evidence it is very difficult to make a finding that these constitute business assets although they may once have had that character.

28 There is accumulated in interest thereon the amount of \$2,296.00.

29 There is also the sum of \$2,150.00 on deposit at the Canadian Imperial Bank of Commerce and life insurance policies having agreed values of \$13,400.00.

30 The defendant has a truck which he used partly for domestic purpose. This is true of almost any vehicle being used in business and I cannot accept the plaintiff's argument that 50% of it should be considered a matrimonial asset.

31 The plaintiff has a savings account of \$7,000.00. Putting all these assets together we arrive at the following figure:

House and land	\$111,000.00
Royal Bank of Canada Certificates	28,000.00
Interest thereon (Royal Bank of Canada Acct. No. 751-802)	2,296.00
Insurance Policies	13,400.00
Savings Account (Canadian Imperial Bank of Commerce 6469167)	2,150.00
Canada Permanent Trust Company (Deposit Certifi- cates - plaintiff)	7,000.00
Total	\$163,946.00

32 Half of this amount is \$81,973.00. The wife already holds \$7,000.00 in an investment certificate at the Canada Permanent Trust Company so that for a division of the property the defendant should pay to her the sum of \$74,973.00. In return she should convey to the defendant all her right, title and interest in and to the lands and premises known as Nos. 86 and 88 Oxen Pond Road.

33 Vague valuations were given of the contents of the home. Without an agreement as to value or an acceptable appraisal, I cannot make a "money order" or an order of division in respect of them. If the parties cannot agree on division, they must be sold.

34 As anything legal can be done by agreement, it is not necessary for me to make an order on the matter. My order for sale is intended to guide the parties if they cannot agree.

35 Each party may take what is his or hers and is not a matrimonial asset. The rest should be divided by agreement or sale.

36 For the reasons given above I order that:

- (a) the defendant pay to the plaintiff the sum of \$74,973.00;
- (b) subject to paragraph (d), the plaintiff convey to the husband all her right title and interest in and to the premises known as Nos. 86 and 88 Oxen Pond Road;
- (c) subject to paragraph (d), the plaintiff surrender to the husband all her right, title interest and status to policies owned by the defendant purchased from Sun Life Assurance Company and Dominion Life Assurance Company;
- (d) the obligation of the plaintiff to comply with paragraphs (b) and (c) above shall arise and be performed when the defendant tenders to the plaintiff the said sum of \$74,973.00;
- (e) if the defendant fails to tender such sum within three months from the date of this judgment, the plaintiff shall be entitled forthwith to vacant possession of the said lands and premises known as Nos. 86 and 88 Oxen Pond Road and the provisions of paragraphs (f) to (n) shall apply;
- (f) the lands and premises known as Nos. 86 and 88 Oxen Pond Road, St. John's shall be appraised by an accredited appraiser;
- (g) subject to paragraph (1) the said lands and premises be sold at not less than 90% of the appraised value;
- (h) the conduct of the sale be in the hands of the plaintiff or someone appointed to act on her behalf;
- (i) prior to sale the plaintiff may affect such reasonable repairs, maintenance and cleaning to the said lands and premises as may, in her opinion, render the property more suitable for sale;
- (j) upon sale the proceeds, subject to the rights of persons not before court, shall be applied to the payment of the following amounts:
 - A. outstanding municipal and school taxes;
 - B. the cost of work done pursuant to paragraph (i) for which acceptable vouchers are provided;
 - C. charges having priority; and
 - D. real estate commissions and legal expenses attendant upon the sale;
- (k) the balance remaining after the making of the disbursements under paragraph (j) shall be divided equally and paid to the parties;

(l) if within three months from the date of taking possession the plaintiff is unable to affect a sale of the said lands and premises for a sum greater than 90% of its appraised value she may negotiate a sale at a lower price but subject to the approval of the defendant or the court; if the defendant does not approve the plaintiff may apply to the court for a determination of whether or not a sale at such a price should be approved;

(m) when a sale is negotiated, both parties shall sign all instruments necessary for effectuating the agreement of sale and the conveyance and any other documents that may be necessary in connection therewith;

(n) if either party refuses to execute any such instrument, the other may apply for an order of execution under section 19 of the *Judicature Act*.

(o) following the sale of Nos. 86 and 88 Oxen Pond Road and the distribution of the proceeds of the sale thereof the obligation of the defendant to pay to the plaintiff a sum of money under paragraph (a) shall be reduced to \$19,946.00 (the amount otherwise ordered less one-half the presently appraised value of the lands and premises);

(p) upon such sale the obligation of the plaintiff under paragraph (b) hereof shall be dissolved but the obligation of the defendant under paragraph (c) shall remain intact to be complied with upon tender of the said sum of \$19,946.00;

(q) the contents of Nos. 86 and 88 Oxen Pond Road which are matrimonial assets, if not divided by agreement within three months of the date of this judgment, shall be sold and the proceeds equally divided between the parties;

(r) for the purposes of sale under paragraph (q), the plaintiff shall be entitled to possession of the said contents on demand and the provisions of paragraphs (f) to (n) shall apply mutatis mutandis;

(s) the parties shall bear their own costs.

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