

43 Nfld. & P.E.I.R. 151

Duff v. Duff

Supreme Court of Newfoundland, Court of Appeal

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

Written reasons: September 12, 1983

Duff v. Duff

Valentine Duff Defendant-Appellant v. Ann Duff Plaintiff-Respondent

Supreme Court of Newfoundland, Court of Appeal

Mifflin, C.J.N., Morgan and Gushue, J.J.A.

Judgment: May 16, 1983

Written reasons: September 12, 1983

Docket: Doc. 157

Counsel: Mr. Paul Carter for the Defendant-Appellant.

Mr. **David Day**, Q.C. for the Plaintiff-Respondent.

Judgment of the Court delivered by Morgan, J.A.:

1 This is an appeal by Valentine Duff from the decision of Fagan, J., dated July 1, 1982, wherein he ordered a division of matrimonial assets pursuant to the provisions of The Matrimonial Property Act, Statutes of Newfoundland 1979, c. 32 as amended.

2 The assets of the parties were a matrimonial home, household furniture and effects, insurance policies having an agreed value of \$13,400.00, a bank account in the amount of \$2,150.00 and Canada Permanent Trust Company Deposit Certificates in the respondent's name totalling \$7,000.00. In addition the appellant held Royal Bank of Canada Certificates totalling \$28,000.00 on which there was accrued interest in the amount of \$2,296.00. These latter certificates were purchased by the appellant with the net proceeds from the sale of a business premises that he owned and which he claimed were "business assets" and thus exempt from the provisions of the Act. However, the learned trial judge held that these certificates and accrued interest constituted matrimonial assets within the meaning of the Act and, having determined that the house and land should be valued at \$111,000.00, he itemized the matrimonial assets subject to division as follows:

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 Certi- ficates - plaintiff)	7,000.00
	<u>\$163,946.00</u>

(Note: The correct total is \$163,846.00)

3 He then stated:

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 property the defendant should pay to her the sum of \$74,973.00.

4 His final order reads:

(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) and (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 effect 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.

5 The grounds of appeal may be summarized as follows:

1. The trial judge erred in his determination of what real property constituted the matrimonial home and in valuing the matrimonial home at \$111,000.00;
2. The trial judge erred in finding that the monies invested by the appellant in Royal Bank of Canada Certificates were not business assets;
3. The trial judge erred in finding that the whole amount of \$2,150.00 on deposit at the Canadian Imperial Bank of Commerce, was a matrimonial asset when that amount included Old Age Pension Cheques received by the appellant subsequent to the date of separation of the parties.

6 As to the first ground of appeal, the relevant facts are that in 1953 the appellant's father gave him a parcel of land off Oxen Pond Road in the City of St. John's. The land measured 117 feet on Oxen Pond Road and extended back some 101.7 feet. A dwelling house was erected on the western portion of the land which was occupied by the parties and their children as the family home and it is still occupied by the appellant. It has the civic address of 88 Oxen Pond Road.

7 On the eastern extremity of the land there was a lot measuring 50 feet on the road and was partially separated by a hedge from the lot on which the house was built. Over the years, that lot, although sufficiently large for a separate building lot, was used as a garden and a playground for the children. It contained a hot-house and barbeque and has the civic address of 86 Oxen Pond Road.

8 "Matrimonial Home" is defined in Section 4 which provides in part:

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.
- (2) Where property that includes a matrimonial home is used for other than residential purposes, the matrimonial home only includes that portion of the property that can reasonably be regarded as necessary for the use and enjoyment of the family residence.

9 Although the land occupied by the parties as a family residence had two civic numbers, 86 and 88 Oxen Pond Road, it was in fact one unit. The house was erected on the western extremity by reason of the terrain. The eastern portion was low-lying and damp and over the intervening years it was filled and landscaped. As stated above, that portion was used as a garden and playground for the children. It contained a barbeque and hot-house and, for all intents and purposes it was part of the family residence. In my opinion, then, the learned trial judge was correct in determining that the property comprising 86 and 88 Oxen Pond Road was the matrimonial home.

10 Evidence of value was presented by Mr. Peter Parnham on behalf of the respondent and by Mr. Jerome Kirkland on behalf of the appellant. Both were accepted as qualified appraisers.

11 Mr. Parnham valued the house and land, known as 88 Oxen Pond Road at \$78,000.00 and the lot known as 86 Oxen Pond Road at \$35,000.00 for a total of \$113,000.00. (It is to be noted that the trial judge erred in stating that the valuation of both properties by Mr. Parnham totalled \$133,000.00. His final calculations are therefore in error to the extent of \$10,000.00).

12 Mr. Kirkland also gave separate valuations of the land in question. He valued the house and land at \$57,000.00 and the adjoining lot at \$32,000.00 for a total of \$89,000.00. He stated in evidence that if the land and premises were to be sold as one unit he would reduce his total valuation by 10%.

13 After referring to both appraisals the trial judge stated:

Faced with two appraisals by two competent people, I must take the average which produces a figure of \$111,000.00. (*N.B.* that figure should be corrected to read \$101,000.00).

14 With great respect, the trial judge erred in averaging the value given by the two appraisers. As stated in *Atlantic and North West Railway v. Judah* (1891) [20 R.L. 527](#) at p. 536 "such a practice would relieve the courts from the exercise of their judicial functions, to adopt those of an accountant, and would, in most cases, lead to unjust and absurd results".

15 Contradictory evidence of value must be carefully weighed by the trial judge and, if he is unable to arrive at a fair and reasonable valuation based on all the evidence adduced so as to order one spouse to pay to the other an amount to provide for a division of the property, his only recourse is to order the property to be sold and the net proceeds divided between the parties.

16 It is all the more important for the trial judge to arrive at a proper assessment of the value of the matrimonial home, if possible, when, as here, one of the parties wishes to retain the home. In such circumstances that party should have an opportunity of paying the other one-half of the assessed market value rather than be dispossessed.

17 In this case Mr. Kirkland filed a detailed report in which he gave a full description of the property to be valued. This included the age and type of structure, the interior finish and the general condition of the house as a whole. He noted that it was an "older type" house, having been built some 34 years previously on a concrete foundation but with no basement. In determining the market value of the house and land, Mr. Kirkland used the depreciated cost approach as well as the market data approach. The latter approach involved a comparison of the subject property with known sales of comparable property at or about the appraisal date. After correlating these two approaches he arrived at a final indication of market value of \$57,000.00 as of July 22, 1981. Mr. Kirkland adopted a similar market data approach in valuing the vacant lot at \$32,000.00 for a total of \$89,000.00.

18 Mr. Parnham, on the other hand, did not do a full appraisal of the property. He simply visited the site, took measurements and photographs, and expressed the opinion that the fair value of the house and

land was \$78,000.00. He valued the vacant lot at \$35,000.00 for a total of \$113,000.00. No reasons were advanced by Mr. Parnham in support of his opinion.

19 The opinion of witnesses possessing peculiar skills is admissible when, as here, the subject matter of the inquiry is such as to require this type of assistance in forming a correct judgment. It must not be forgotten however that the final verdict is the responsibility of the trial judge and, where there is a marked difference of opinion among experts, regard must be had to the relative skill or experience of the witnesses on either side, and to the strength of the reasons which were advanced by the witnesses in support of their respective opinions. A mere expression of opinion without supporting reasons, whatever the experience and expertise of the witness expressing that opinion, can be of little assistance to the court.

20 Both witnesses here were accepted by the trial judge as accredited appraisers, but only the opinion of Mr. Kirkland was supported by reasons and factual evidence. His method of appraisal was in accordance with well accepted principles of valuation and his reasoning cannot be faulted. For that reason, I am of the opinion, that the evidence of Mr. Kirkland ought to have been accepted over that of Mr. Parnham.

21 Counsel for the appellant contended that the property should have been valued as a unit and not as two separate and distinct lots, in light of Mr. Kirkland's evidence that if sold as a unit, the market value valuation of the property would be less. I cannot accept that argument. To make an order for one spouse to pay to the other spouse an amount to provide for the division of matrimonial assets in equal shares, as provided by the Act, the Court must assess the value of the property as being the best price obtainable if sold in the open market. In my view, then, Mr. Kirkland correctly valued the property at \$89,000.00.

22 As to the second ground of appeal the appellant contends that the net proceeds of sale of a business premises, presently invested in saving certificates, are business assets within the meaning of Section 16(1) (a) of the Act and as such, do not fall for division under the Act.

23 "Business Assets" are defined in subsection (a) of Section 16, which reads:

16(a) "business assets" means property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose; ...

At first glance it would appear that monies invested in bonds, guaranteed investment certificates or even those placed in a non-chequing savings account would constitute business assets. Such a broad interpretation could result in removing virtually all assets, other than the matrimonial home, from the classification of matrimonial assets. On the other hand, too narrow an interpretation of Section 16(a) could have the opposite result. Each case must be determined on its own particular facts.

24 Circumstances may arise where certain assets, that had been held as "business assets" were later converted into matrimonial assets by the sale thereof and the placing of the proceeds of sale into an account or securities for the purpose of use by the husband and wife. That, it seems to me, is the case here.

25 In this case a business asset had been sold and the net proceeds of sale invested in savings certificates. The appellant did not intend to reserve these monies for business purposes; instead, on his own evidence, the monies were invested to provide income for himself and his wife when he could no longer work. In these circumstances the trial judge was correct, in my view, in declaring these assets to be matrimonial assets. I would accordingly dismiss the second ground of appeal.

26 As to the third ground of appeal, counsel for the respondent agrees that monies totalling \$1,466.00 received by the appellant by way of Old Age Pension subsequent to the date of separation and deposited at the Canadian Imperial Bank of Commerce are not matrimonial assets and should have been excluded by the trial judge in his calculations. The correct amount subject to division, therefore, is \$684.00.

27 To recapitulate, the total matrimonial assets, subject to division, and their respective values are as follows:

ASSETS	VALUE
House and land	\$ 89,000.00
Royal Bank of Canada Certificates	\$ 28,000.00
Interest thereon (Royal Bank of Canada Account No. 721-802)	\$ 2,296.00
Insurance policies	\$ 13,400.00
Savings Account (Canadian Imperial Bank of Commerce 6469167)	\$ 684.00
Canada Permanent Trust Company (Deposit Certificates in name of respondent)	\$ 7,000.00
TOTAL:	<u>\$140,380.00</u>

28 The respondent is thus entitled to \$70,190.00 representing one-half of the matrimonial assets. She already holds \$7,000.00 in an investment certificate at the Canada Permanent Trust Company and is thus entitled to receive \$63,190.00 in full settlement of her claim.

29 In the result, I would allow the appeal in part by directing the appellant to pay the respondent the sum \$63,190.00 in full settlement and satisfaction of her claim against all matrimonial assets. If that amount is not paid within four months, I direct that the property known as 86 and 88 Oxen Pond Road be sold and one-half of the net proceeds of the sale be paid to the respondent together with the sum of \$18,690.00 representing the balance owing in respect of her one-half interest in the matrimonial assets other than the matrimonial home. I would affirm the Order of the trial judge as to the division of the contents of the matrimonial home. If the parties cannot agree on the appropriate method of sale, either party may apply to the judge of the Unified Family Court for directions.

30 The appeal is allowed in part, the Order of the trial judge is set aside and the foregoing Order substituted. There will be no order as to costs.

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