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Fahey v. Fahey

Newfoundland Unified Family Court

Fagan, J.

Judgment: October 17, 1980

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

Fagan, J.:

1 The parties to this action were married August 9, 1974, and separated in October, 1976. A decree nisi of divorce was granted to the plaintiff on the grounds of marriage breakdown under s. 4(1)(e) of the *Divorce Act* of Canada on June 20, 1980. There are no children of the marriage.

2 The *Matrimonial Property Act* of Newfoundland (the *Act*) came into force in the Province on July 1, 1980, and the writ of summons endorsed with a statement of claim herein was issued on the 18th. day of August, 1980, claiming relief under that *Act*. The defendant has not appeared or filed any defence or answer to the claim.

3 The defendant, during the marriage and while living together, worked for approximately three to four months and thereafter received Unemployment Insurance Benefits until their expiry. This appears to be his only financial contribution to the family unit.

4 Shortly after the marriage the defendant obtained a grant or lease of Crown land from the Government on which they partially built the home in question. The home was not lived in by the parties because of its incompleteness in construction. The defendant, I am advised, was unable to arrange credit to purchase building materials for the home but instead such materials were charged to the credit of the plaintiff. The plaintiff worked full time and for a period of time during the marriage held two part-time jobs in addition to the full time job to earn money to help pay the cost of the building materials. She states that she helped the defendant build the home. Her savings which she had at the time of the marriage were used to build the home as well. After separation she continued to retire all outstanding family debts without help from the defendant.

5 At the time of coming into force of the *Act*, while a decree nisi had been granted, the plaintiff, in my view, comes within the definition of "spouse" as defined by s. 2(1)(e)(ii) of the said *Act*, which reads as follows:

> 2.(1) In this *Act*

(e) "spouse" means either of a man and woman who

(i) ...

(ii) are married to each other by a marriage that is voidable and has not been voided by a judgment of nullity.

6 Upon the granting of a decree absolute under the *Divorce Act* of Canada, each party to the former marriage may marry again. They are then no longer spouses within the meaning of s. 2(1)(e) of the *Act*, and hence have no status under s. 16(1) of the *Act*.

7 In her statement of claim the plaintiff seeks a number of declarations and orders, all of which are not essential to a fair and reasonable disposition of the matters in issue, nor were some of the matters raised clearly aired to afford a declaratory pronouncement.

8 I propose to deal with the matters raised which, in my view, will allow me to settle the plaintiff's claim.

9 The matter is properly before this court and the plaintiff is entitled to make an application under s. 19 of the *Act* to seek the relief sought.

10 In my view, rights and remedies between spouses provided for in the *Matrimonial Property Act* of the Province of Newfoundland must be determined by the court, and, that the more appropriate form of pleading is by writ of summons endorsed with a statement of claim.

11 While s. 22 of the *Act* (Statement of Particulars of Property) does not specifically state when the statement must be filed, I feel it is impilicit in the section that "*when* an application is made ... each spouse *shall* file ...", the two must go hand in hand. There is always uncertainty as to when the answer or defence will be filed, or that the nonfiling of the statement might tend to delay filing an answer or defence, or should an answer or defence be filed before the statement there may be other procedural difficultiess or perhaps insufficient pleading of ones cause.

12 To avail of the protection offered in s. 23 of the *Act*, the statement must be filed under s. 22. The court must be satisfied that public disclosure of the information contained therein would constitute a hardship, in which event the court may order the statement and any cross-examination thereof be treated (a) confidential, and (b) not form part of the public record. Where such confidentiality is desired the party filing "would surely apply to the court or judge for the desired order".

13 Section 22 of the *Act* requires *each* spouse to file a statement setting out the "particulars of *all* property owned by the spouse" whenever and however acquired. What assets are matrimonial assets as of the date on which a spouse becomes entitled to apply to have the matrimonial assets divided as provided in s. 19(1) of the *Act*, must be determined in accordance with s. 16 of the *Act*. If there is not full disclosure of all property owned by the spouse, the court could not

properly and fully divide all such assets between them.

14 While the *Act* is not specific as to what is meant by "particulars of all property owned" which is to be considered a matrimonial asset to be divided by partition or sale, such particulars must, in my view, list all property, real and personal, owned by a spouse at the date on which a spouse applies to have matrimonial assets divided pursuant to s. 19(1) showing the date of acquisition of the property, its location, its current market value, outstanding mortgages or liens (showing date, names of parties, amount of debt, interest rate, monthly repayment installment, terms, etc.), identification particulars of property, clogs on title (if any), names and addresses of others with an interest therein and type thereof and all known information and particulars which might affect rights, ownership, value, title, etc., of either party. Such statements should require little amplification or explanation at trial.

15 The evidence in this case was that of the plaintiff only, and she filed with the court a statement setting forth the particulars of all the property owned by her. Counsel for the plaintiff now seeks an order affording confidentiality to her statement, her direct examination thereon, and reference thereto in his brief of argument. No evidence was offered at the trial to indicate that public disclosure of the information contained in her statement would constitute a hardship to her or to the defendant. In the circumstances I am not prepared to accede to the request of counsel to afford confidentiality to the statement filed in this cause.

16 In the case at bar the only asset for consideration is the house and land at Bellevue, Trinity Bay. The automobile mentioned in the evidence was sold in August of 1979, long before this action. The life insurance policy owned by the plaintiff was purchased by her before her marriage to the defendant but must be regarded as personal property within the definition of matrimonial assets set forth in s. 16(1)(b) of the *Act*. As is usually the case, the policy offers a face value protection to the estate or named beneficiary in the policy upon certain conditions, one being the regular payment of the annual premium. Failure to pay premiums, the policy will lapse. Payment of the premium preserves the right to demand payment of the policy benefits. While it (the payment of premiums) preserves these rights, there is also the accumulation of a vested benefit, that is, the cash surrender value aspect. This is brought into the marital unit and is the equivalent of money which, in my view, becomes a matrimonial asset. However, based on the evidence before me, I am satisfied the defendant should not share in any value accumulated in the life insurance policy owned by the plaintiff in view of their long separation and the short duration of their marriage.

17 Section 20 of the *Act* provides for an unequal division of the matrimonial assets. That section reads as follows:

> S.20 The court may make a division of matrimonial assets that is not equal where the court is satisfied that a division of these assets in equal shares would be grossly unjust or unconscionable taking into account any of the following factors:
>
> (a) the income, earning capacity, property and other financial resources that each of the spouses has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities that each of the spouses has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the spouses before the breakdown of the marriage;

(d) the age of each party;

(e) the duration of the marriage;

(f) any physical or mental disability of either of the spouses;

(g) the contributions made by each of the spouses to the welfare of the family, including any contribution made by a spouse in looking after the matrimonial home or caring for the family;

(h) the loss of a potential benefit that a spouse loses by reason of a dissolution or annulment of the marriage;

(i) the unreasonable impoverishment or dissipation of matrimonial assets by either of the spouses;

(j) the length of time that the spouses have lived separate and apart from each other during the marriage; or

(k) the date of acquisition of each matrimonial asset.

18 Counsel for the plaintiff asks the court to consider a division of the matrimonial assets, namely, the house and land at Bellevue in an unequal basis under s. 20 of the *Act*.

19 For the plaintiff to succeed in this regard the court must be satisfied on the balance of probabilities that to divide the assets in equal shares would be (a) grossly unjust, or (b) unconscionable, or perhaps grossly unconscionable, taking into account any of the factors listed in s. 20, (a) to (k).

20 Obviously then the court may only depart from the prima facie right of the spouses to equal division of the matrimonial assets if it is satisfied that there would be gross injustice or gross unconscionableness if one or more of the criteria set out in paragraphs (a) to (k) were established. I am inclined to the view that the legislature did not intend the court to be entitled to exercise any broad jurisdiction to divide matrimonial assets in accordance with what an individual judge may think is fair in a particular case. The property law in this Province is of vital importance to married persons and, in my view, that law not only should be but is in fact now clear and precise. The rule of law now is that there is equal sharing of matrimonial assets.

21 I accept the view expressed by Galligan, J., in the case of *Silverstein v. Silverstein* (1978), 1 R.F.L.(2d) 256, when he says that a court should be loathe to depart from that basic rule, and it should exercise its power to depart from that rule only in clear cases where gross injustice or unconscionableness would result having regard to one or more of the statutory criteria set out in paragraphs (a) to (k). I do not think that the property law as between spouses in this province is now to be vague and uncertain and dependent upon the sense of fairness of an individual judge in an individual case. The legislature is responsible to the people of the province for the enactment of the laws that govern property rights. Judges do not share in that responsibility. It seems to me that the legislature has spoken and expressed its intent clearly and without ambiguity and I can see my duty to apply that law in accordance with the obvious intention of the legislature.

22 Section 4(1) of the *Act* provides 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 whether that occupation occurred before or after the commencement of this *Act*. (emphasis mine)

23 In the case at bar the "matrimonial home" referred to in the evidence does not, in my opinion, fall within the above definition. The home was and still is incomplete and was never occupied by the parties as a family residence.

24 In my view, the home of the parties falls within the definition of "matrimonial assets" set forth in s. 16(1)(b) of the *Act*, which reads, in part, as follows:

> 16.(1)(b) "matrimonial assets" include *all real* and personal property acquired by either or both spouses *during* the marriage, ... (emphasis mine)

25 The property in question being real property falling within s. 16(1)(b), I will deal with it in the light of s. 20 of the *Act*.

26 The evidence before me is that the defendant obtained the land in question from the Crown for nominal consideration. Both the plaintiff and defendant expended labor on the house, the cost of construction was borne almost entirely by the plaintiff, the defendant having no credit with suppliers nor a regular job. I understand that any savings the defendant might have had were exhausted by him prior to the commencement of construction. The plaintiff on the other hand states that she put at least $5,000.00 between 1974-1976 into the construction of the building and in fact since 1976 and as late as August of 1979 continued payment toward the retirement of the cost of construction materials.

27 Counsel for the plaintiff argues that the only criteria set forth in s. 20 which may allow regard to be had to financial contributions to assets, in determining whether the division of assets would be equal or unequal is to be found in paragraph (g) of s. 20. The meaning of s. 20(g) turns on the interpretation of the words "the contributions ... to the welfare of the family, ...". It is

suggested that the words following in that paragraph are illustrative of rather than limiting the overall meaning of that paragraph.

28 In order to accede to the request on the part of the plaintiff that she be granted an unequal division of the matrimonial asset in her favor the court must, on the evidence, conclude that it would be grossly unjust or unconscionable in the light of any one of the criteria set forth in s. 20 to deny her the unequal division of the assets.

29 I think it is important to note that since the separation of the parties the plaintiff, while she has not added to the completion of the premises she has retired family debts in respect of the purchase of building materials already forming part of the structure.

30 On the evidence before me, I am satisfied the plaintiff contributed considerably, financially, to the acquisition of the present marital property and that in the circumstances her claim for an unequal division on the grounds of gross injustice or unconscionableness in accordance with sub-paragraph (g) in that her contribution to the welfare or well being or prosperity of the family by far exceeds that contributed by the defendant and, in my view, is entitled to be granted her request.

31 It is remembered that when the parties separated in October, 1976, the defendant left the Province of Newfoundland and went to Toronto, Province of Ontario, to seek employment. When the plaintiff visited with him at Christmas of that year he told her that he did not want her and as a result she returned to the province in early January, 1977, and has not lived with the defendant since that time, nor has he provided her with any support and maintenance.

32 The plaintiff asks that the property in question be sold and that the net proceeds be shared unequally in her favor. The home in question is not quite complete on the outside. I believe the back side of the building has not been clapboarded nor has any work been done on the inside. Obviously some work will need to be done to put the property in a marketable condition which responsibility will fall to that of the plaintiff in order to effectively and fairly quickly dispose of this asset.

33 On the question of what valuation is relevant in ascertaining the plaintiff's share of the matrimonial asset, it is my view that the interest in a matrimonial asset is at least joint on an equal basis and, therefore, any appreciation in the asset enures to the benefit of both spouses. Conceivably if some particular improvement were made to the property at the expense of one of the parties there may be reasons to justify an allowance for the cost of such improvement and/or perhaps some consideration of sharing in the increased value as a result of such improvements. However, in the case at bar I am satisfied that the value of the asset is to be ascertained as of the date of adjudicating the rights of the plaintiff.

34 In view of the relationship of the parties in this matter and the evidence presented to me, I order that the house and land of the parties at Bellevue, Trinity Bay, in the Province of Newfoundland, be sold, that the expenses incurred incidental to making the home more suitable for sale, including such things as repairs and painting, advertising costs, reasonable legal and real

estate and other expenses incidental to sale, be deducted from the proceeds of the sale and the net balance divided as follows:

(a) Eighty percent to the plaintiff; and

(b) Twenty percent to be paid to the Registrar of the Supreme Court of Newfoundland to be held in trust for the defendant, William Fahey;

(c) Costs, to be taxed.

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