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Hierlihy v. Hierlihy

Newfoundland Supreme Court, Trial Division

Goodridge

Judgment: September 9, 1981

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Ruth Hierlihy, Plaintiff v. Vernon Ira Gilbert Hierlihy, Defendant

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Judgment: September 9, 1981

Docket: Doc. 1309

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

Bernard Coffey, Esq., for the defendant.

Goodridge, J.:

1 The plaintiff seeks orders under the Matrimonial Property Act for exclusive possession of the matrimonial home at Gander for life or for such lesser period as the Court decides and for an order dividing the matrimonial assets of the parties other than the matrimonial home in equal or unequal shares.

2 The defendant seeks an equal division of the matrimonial assets.

3 The plaintiff was born on April 28, 1923. She married the defendant on August 17, 1949. Four children were born to that union: All except one have left the matrimonial home.

4 She does not enjoy good health. She has over the years undergone gall bladder surgery, an appendectomy, a hysterectomy; two of her children were born by caesarean section.

5 She has a peculiar form of heart disease involving the small blood vessels to the heart. The symptoms include angina and, at times, fast irregular heart rhythms.

6 She has had within recent years a leg operation.

7 She is able to carry on normal household activity but exertion will produce chest pain and some shortness of breath. She requires continued medication.

8 Apart from limitations that may be placed upon her due to her physical condition she has no basic

skills. Prior to her marriage she worked as a telephone operator for C.N.T. In accordance with the policy of the employer at the time this employment terminated when she married.

9 Since her separation from her husband, to which I will make later reference, she worked for a short time at Hotel Gander but found that she could not discharge her duties and resigned.

10 Her son, James, lives with her. Although the exact date of his birth was not given he was at the date of the trial (January 20, 1981) 22 years old. At that time he was employed by Home Hardware, a business carried on by Goodyear Humber Stores Limited. His gross salary per month is \$606.00 and he has accumulated \$4,300 in savings from that job since he commenced work in 1976.

11 James Hierlihy suffers from epileptic seizures. He said that these seizures result from a buildup of electricity in his nervous system which discharges causing the seizure.

12 He experiences seizures about every three weeks. In respect of each seizure he has about ten seconds warning. During this brief period it is necessary for him to find some sort of haven where he will not injure himself during the period of the seizure itself which lasts about two minutes.

13 The seizures may occur at home or at work. His employer is aware of this condition, and his fellow employees assist him in coping with the seizures when they occur at work.

14 Sometimes the seizures are of sufficient severity to require brief hospitalization.

15 He requires medication for this condition and cannot live alone.

16 The defendant was born on May 26, 1926.

17 He was employed initially in 1947 by the Newfoundland Government and following Confederation in 1949 became an employee of the Canadian Government and has remained in its employ ever since. His salary at the time of trial was \$21,931.00 per annum.

18 He is entitled to retire on full pension after 35 years of service and after having reached the age of 55.

19 His pension is determined by multiplying 2% of his average annual salary (based on his six highest annual salaries) by the years of service not exceeding 35.

20 The trial of this matter took place on January 20, 1981 at Gander. The argument was heard at St. John's on February 17, 1981. At that time particulars of the pension were not available. The final submission on the pension was received on August 12, 1981.

21 If the defendant retired on July 31, 1981, his annual pension would be \$13,301.66 or \$1,108.47 per month.

22 The defendant himself does not enjoy good health. In 1975 he underwent a heart operation and had

four coronary by-passes. That was on May 28, 1975. Following the operation he did not return to his wife and son at the matrimonial home but took up residence with one Helen Rose with whom he had apparently had some relationship prior to his operation.

23 In 1973 the defendant took the cash surrender value of some insurance which he carried which yielded \$4,000. This money was withdrawn around August 23, 1973 when the defendant bought a house trailer. Apparently, Helen Rose established residence in this trailer and lived there until it was sold in 1977. She and her children lived there by themselves until 1975 when the defendant took up residence with them.

24 In 1977 the house trailer was sold and the defendant purchased a property at 7 Elizabeth Drive in Gander where he continued residence with Mrs. Rose and her children.

25 The \$4,000 was a matrimonial asset that can be traced into the post-separation period. I am therefore including it in the matrimonial assets for the purpose of this decision.

26 This home was evidently purchased for \$27,000.00 and according to the information given in court there is a mortgage on it of \$25,000.

27 The matrimonial home is located at 52 Hawker Crescent in Gander. In this home the plaintiff and her son, James, live by themselves. The home is 23 years old and in need of repairs. Evidence of its value was somewhat unsatisfactory. The plaintiff valued it at \$52,500. The defendant valued it at \$45,000. A building contractor, Mr. Boyd Brown, estimated it to be worth between \$55,000 and \$60,000 if repairs were made. He listed the necessary repairs as follows:

| | |
|---------------|--------------------|
| Basic repairs | \$ 5,090.00 |
| Clapboard | 1,000.00 |
| Siding | 4,500.00 |
| TOTAL | <u>\$10,590.00</u> |

28 There is a mortgage balance of \$1,823.95 charged on the property as of September 30, 1980.

29 I consider the evidence of Mr. Brown to be reliable. I value the building subject to repairs being done at an average of the two figures. This produces a figure of \$57,500.

30 Deducting the cost of repairs (\$10,590) and the mortgage debt (\$1,823.95), we find the building has a net value of \$45,086.08.

31 The pension is mandatory in the sense that there is no election on the part of the beneficiary to draw either the pension or its capitalized value. There was no information before the court as to whether or not it was guaranteed for a fixed period. If it was guaranteed, presumably if he died before the expiration of the period, the pension relating to the unexpired portion of that period would be capitalized and paid to his estate.

32 Such information would not be of assistance to me. I am proceeding on the assumption that it

continues to his death. (I understand that there are residual benefits to his widow but these do not affect its present valuation as the parties have indicated that following this decision the divorce proceedings between them, already in progress, will be concluded.)

33 The valuation of the pension is not an easy matter. The life expectancies of the parties are factors; so too are the time of retirement, the six best annual incomes of the defendant at that time and the appropriate per centage figure for capitalization.

34 The problem is compounded by the fact that contribution after separation would normally be higher than before and the amount of the pension higher by virtue of higher salaries after separation. Perhaps these are offsetting factors. In any event their impact in this case is lessened by the fact that there were lower salaries and lower contributions before the marriage.

35 Using the best information available, I will endeavour to determine a capital value for the pension.

36 The plaintiff is 58 and has a life expectancy based on mortality tables of 20 years; the defendant is 55 and has a life expectancy of 23 years. I must assume therefore that the wife would have had an interest in the pension for 20 years had the divorce not interceded. It can only constitute a matrimonial asset for the shorter period in this case; by its nature, the pension could have no value to the plaintiff after her death and, as its capital value is not realizable at any time, its matrimonial value must relate to the shorter life expectancy of the two parties. (If a portion of the pension continues to a widow after the pensioner's death then perhaps a further capital value might be added but that is not a matter for consideration in this case where the life expectancy of the plaintiff is shorter.)

37 Although the defendant has not retired, I understand that he now is or may shortly be entitled to retire. The entire 20 year period therefore may be used for capitalization.

38 The calculation of pension benefits indicate an income of \$13,301.66 a year of \$1,108.17 a month.

39 I am using a percentage figure of 15%. While I have no evidence of it, I believe such a figure to be appropriate in todays investment market - perhaps a bit low even.

40 The formula for capitalization is:

$$S = A \cdot \frac{(1+i)^n - 1}{i(1+i)}$$

where S is the capitalized value, A is the periodic income i is the rate of interest and n is the number of periodic payments.

41 Where A = \$13,301.66, i = 15% and n = 20, S = \$83,259.50. The last figure is the capitalized value of the pension.

42 The couple lived together for 25 years and two months. This period is 72% of 35 years, the period over which the pension was earned. Such a percentage of the capitalized value of the pension represents personal property acquired by one of the spouses, namely the defendant, during marriage and therefore constitutes a matrimonial asset. The value of this asset is \$59,946.84.

43 Only one other matrimonial asset needs to be considered separately. This is a coin collection of the defendant in the possession of the plaintiff. This is valued at \$19,062.80. Judging from the date of the coins they were all minted after the marriage and must be considered a matrimonial asset.

44 As of this date based on figures submitted by the parties I arrive at the following value for matrimonial assets:

| | |
|---|--------------|
| 53 Hawker Crescent | \$45,086.08 |
| Pension (capitalized) | 59,946.84 |
| Coin collection | 19,062.80 |
| Furniture, appliances and other miscellaneous assets | 2,300.00 |
| 22 shares in Newfound- land Light and Power Company Limited | 1,210.00 |
| Bank accounts in the name of the defendant | 5,050.00 |
| Bank accounts in the name of the plaintiff | 3,380.00 |
| Cash surrender value of Mutual Life Insurance Policy | 1,085.00 |
| Proceeds of insurance surrendered in 1973 being a matrimonial asset applied to purchase assets after separation | 4,000.00 |
| TOTAL | \$141,120.72 |

45 Under the provisions of the Matrimonial Property Act, 52 Hawker Crescent is deemed to be owned by the parties as joint tenants. Under Section 13 of the Act I have power to direct that one spouse be given exclusive possession of the matrimonial home for life or for a lesser period if I am satisfied that either

- (a) other provision for shelter is not adequate in the circumstances; or
- (b) it is in the best interests of a child to make such an order.

46 There is no child involved in this case. It was argued before me that James Hierlihy may be considered to be still a child because of his infirmity. I cannot agree with this. He testified in court and appeared to me to be a mature adult. He is well aware of his infirmity and knows how to deal with it to the extent that he has the power to do so. He has demonstrated some thrift in the handling of his funds.

He has made inquiries about alternate accommodation and has generally demonstrated that he is a mature person.

47 Quite apart from that there is no legislative provision that would permit me to treat him legally as a child. He is not a child under the Maintenance Act. There may be some question as to whether he is a child within the meaning of the Divorce Act. There is no statutory or other provision of the law which would entitle me to find that he is a child and I do not do so.

48 Nor am I able to make a finding that other provision for shelter is not adequate in the circumstances. While the plaintiff has a natural reluctance to leave the home, she has made inquiries about apartments. Although these cost more in rent and heat than she would like to pay, I believe that in making such calculations she has disregarded the economic value of the home in which they reside.

49 If this property were sold she would net something over \$20,000.00 and would be relieved of costs of home ownership. This would offset to some extent if not entirely the additional cost of renting.

50 I believe that the basic features of the Matrimonial Property Act has gone as far as is necessary to overcome the injustices that existed in the past in respect of married women who had few rights to the assets accumulated during marriage. The economic contribution of a husband to a marriage was easily recognized because it could be quantified in terms of money, while the economic value of a non-working wife to a marriage could not be so easily quantified and for that reason was quite unjustly disregarded.

51 I do not think it was necessary for the court to go beyond the point of equalization by providing a greater property interest in the matrimonial home except in various obvious circumstances. The most obvious is where a separation occurs while there are still a number of children to be reared. Such is not the case here. The property is housed by two adults quite capable of finding shelter and living elsewhere in the town of Gander.

52 The application therefore for exclusive possession of the matrimonial home under section 13 of the Act is denied for two reasons. First, the prerequisites for exercising jurisdiction under that section do not exist; secondly, even if they did exist, I do not think that the factual situation supports the making of such an order.

53 Section 19 provides that where a petition for divorce is filed, either spouse is entitled to apply to a court to have the matrimonial assets divided in equal shares notwithstanding unequal ownership. I propose, therefore, to make an equal division of matrimonial assets. Section 24 provides that the court may order that one spouse pay to another such amount as may be set out for the purpose of dividing the property and may make and give such other orders or directions as are ancillary thereto. For this purpose I propose to draw on the power of section 24 by ordering payment.

54 The following is the division of assets between the couple at the present time.

| | Plaintiff | Defendant | Total |
|-------|-------------|-------------|-------------|
| House | \$22,543.04 | \$22,543.04 | \$45,056.08 |

| | | | |
|-----------------|-----------|-------------|------------|
| Pension | | 59,946.84 | 59,946.84 |
| Coin Collection | | 19,062.80 | 19,062.80 |
| Furniture, etc. | 1,150.00 | 1,150.00 | 2,300.00 |
| Shares | 1,210.00 | | 1,210.00 |
| Bank Accounts | 3,380.00 | 5,050.00 | 8,430.00 |
| Mutual Life | | 1,085.00 | 1,085.00 |
| Traced assets | | 4,000.00 | 4,000.00 |
| Total | 28,283.04 | 112,837.68 | 141,120.72 |
| Difference | 42,277.32 | (42,277.32) | - |
| Total | 70,560.36 | 70,560.36 | 141,120.72 |

55 The following are the proposed adjustments for equal division:

| | | |
|-----------------|--------------------|----------------------|
| House | \$22,543.04 | (\$22,543.04) |
| Coin Collection | 19,062.80 | (19,062.80) |
| Furniture | 1,150.00 | (1,150.00) |
| 9 Shares | (495.00) | 495.00 |
| Cash | 16.48 | (16.48) |
| | <u>\$42,277.32</u> | <u>(\$42,277.32)</u> |

56 It is with some concern that I deal with the pension as I do. I have no doubt that that portion of it that was earned from the date of marriage to the date of separation is a matrimonial asset.

57 It would be more desirable to order that the husband pay to the wife one half of that portion of each pension cheque that related to the period of cohabitation after marriage and that, upon the death of the husband, his estate pay a lump sum equal to the capitalized value of that portion of a widow's benefits that related to the same period of cohabitation.

58 Such an order is fraught with difficulties. I do not know that there is provision in the appropriate pension legislation allowing assignment of portions of pensions to estranged spouses. Without it, the wife is very much at the mercy of the husband and his creditors.

59 There would always be some uncertainty with respect to widow's rights because the estranged wife would not be a widow and would have no claim to the benefits herself and the husband's estate would not necessarily be able to honour such a debt.

60 That might require amended legislation at the Federal level (and also perhaps at the Provincial level because the Act may not be sufficiently clear to permit an order for payments of indefinite amounts).

61 There is also the practical difficulty of assessing the capitalized value of the widow's benefits. This could not await the husband's death but nevertheless would require assessment only in the event his wife survived him.

62 It should be observed that this order is made solely for the purpose of complying with the Matrimonial Property Act to ensure that there is an equal division of the assets of the parties. It has nothing whatsoever to do with maintenance. Any maintenance that is to be awarded may be awarded

either under the Divorce Act or the Maintenance Act whichever shall be appropriate. No doubt in fixing the amount of maintenance the judge hearing the matter may give consideration to the assets of the plaintiff including those vesting pursuant to this order.

63 It does not abrogate any maintenance order now in existence.

64 The amount due on the mortgage on the matrimonial home is relatively small. Although I make no order in respect thereof, I observe that to protect her equity the plaintiff will probably have to assume the responsibility for the mortgage.

65 It seems to me that whatever maintenance order, if any, is made the plaintiff will find that she will have to realize on this asset. She will probably be unable to justify retaining such an asset in an unproductive form when it provides shelter for two persons only and involves the costs of ownership too.

66 By realization of assets not required for family use, she should have over \$65,000 for investment which, at 15%, would give her \$9,750 annually. If her son is able to bear his full share of the cost of accommodation, the plaintiff should be able to provide most if not all of her needs.

67 I do not and cannot make any order relating to any existing or future maintenance. I note, however, that the plaintiff, unlike many other wives, has no skills to return to and is probably unable to provide for herself.

68 I would think that apart from seeking to divide matrimonial assets the act seeks also to the extent possible to free each spouse from an obligation to the other. This is readily achievable in the case of a wife with skills to return to who has no children at home or who has children at home but elects to or must of necessity work.

69 A person without skills might properly be entitled to maintenance where one with skills might not.

70 The question of maintenance is not before me and my comments are purely gratuitous.

71 For the purpose of achieving equal division of the matrimonial assets, I order that:

(a) The defendant forthwith execute and deliver to the plaintiff a conveyance of all his right, title, interest and equity of redemption to the land and premises known as 52 Hawker Crescent, Gander to be hers absolutely and, in the deed of conveyance, the defendant bar in favour of the plaintiff the vesting or reversion of any interest in the said lands and premises that may at any time vest in or revert to him by virtue of The Matrimonial Property Act;

(b) The defendant forthwith execute and deliver to the plaintiff a bill of sale of

(i) the coin collection; and

(ii) the furniture, appliances and other such contents of the said lands and premises and,

in the bill of sale, the defendant warrant title and agree to indemnify the plaintiff for loss resulting from defects of title now existing and not of the plaintiff's making;

(c) The plaintiff transfer, free of encumbrance, nine shares of Newfoundland Light and Power Company Limited to the defendant;

(d) The defendant pay to the plaintiff \$16.48; and

(e) The parties shall bear their own costs.

72 Let judgment be entered accordingly.

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