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Hierlihy v. Hierlihy

Supreme Court of Newfoundland, Court of Appeal

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

FILING: June 29, 1984

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Vernon Ira Gilbert Hierlihy Appellant v. Ruth Hierlihy Respondent

Supreme Court of Newfoundland, Court of Appeal

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

Judgment: January 24, 1984
FILING: June 29, 1984
Docket: Doc. 178

Counsel: Mr. Bernard Coffey for the Appellant.

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

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

1 This is an appeal from a decision of Goodridge, J. wherein he ordered a division of matrimonial assets pursuant to the provisions of The Matrimonial Property Act, S.N. 1979, c. 32, as amended.

2 The respondent sought an order under the Act for exclusive possession of the matrimonial home at Gander for life or for such lesser period as the Court might decide and for an order dividing the matrimonial assets of the parties, other than the matrimonial home, in equal or unequal shares. The appellant sought an equal division of all matrimonial assets.

3 The learned trial judge denied the respondent's application for exclusive possession of the matrimonial home on the grounds that the prerequisite for exercising jurisdiction under Section 13 of the Act did not exist and, even if it did exist, the factual situation did not support the making of such an order. He therefore proceeded to value the matrimonial assets, including the capitalized value of the appellant's retirement pension, and ordered an equal division of the total valuation so found.

4 There are two issues raised on this appeal, namely:

(i) Whether the pension benefits earned by the appellant during marriage are matrimonial assets and, if so, what is the value to be placed on them for the purposes of division?

(ii) Whether the appellant's coin collection, valued at $19,062.80, was a matrimonial asset or a business asset?

5 The appellant was employed by the Newfoundland Government for some two years prior to his marriage, on August 17, 1949. Upon confederation he became an employee of the Federal Government and was still so employed at the date of the trial. The parties separated in June 1975 and since then have been living separate and apart. The respondent petitioned for a divorce and corollary relief in support but the divorce proceedings have been held in abeyance pending the determination of the present action.

6 During his years of service the appellant had contributed to a retirement pension plan under which he could retire on full pension upon attaining the age of 55 years and after completing 35 years of employment. He would have reached the minimum retirement age and have completed 35 years employment by mid 1981. Had he elected to retire on July 1, 1981 he would have been entitled to receive an annual pension of some $13,300.00. The learned trial judge held that the percentage of the capitalized value of the pension, earned during the marriage, represented personal property acquired by the appellant during that period and therefore constituted a matrimonial asset.

7 There was no evidence adduced as to the terms and conditions of the pension plan nor was there any actuarial evidence of the capitalized value of the pension rights. Having determined that the respondent was entitled to one-half of the capitalized value of the pension and assuming that the appellant would retire on July 1, 1981, the trial judge proceeded to capitalize that value by using a complicated formula that takes into consideration the life expectancy of the employee, the annual benefits he would receive on retirement and an appropriate discount rate of interest. His conclusion that the appellant had a life expectancy of 20 years was reached by consulting mortality tables and he used a discount rate of 15% which he deemed appropriate. By use of the formula he calculated the capitalized value of the pension to be $83,259.50. The pension had been earned over a period of 35 years. The couple had lived together for some 25 years being 72% of the 35 year period. That percentage of the total capitalized value of the pension, in his view, constituted matrimonial assets subject to division. The value of that asset was found by him to be $59,946.84, of which the wife was entitled to one-half. For the purpose of achieving equal division of the matrimonial assets, the trial judge ordered that the husband retain the whole pension but he had to transfer to his wife substantially all of the remaining assets, including the matrimonial home and furniture.

8 The first question is whether or not this pension is a matrimonial asset within the meaning of Section 16 of the Act which states:

> (b) "matrimonial assets" includes all real and personal property acquired by either or both spouses during the marriage, with the exception of,
>
> (i) , (ii) and (iii) not applicable

(iv) business assets

(v) and (vi) not applicable

(vii) real and personal property acquired after separation.

9 The Act recognizes the contribution made by each of the spouses, financially and otherwise, that entitles each spouse to an equal division of the matrimonial assets acquired during the course of the marriage. Contributions made to a pension plan may represent a significant diversion of income and I agree with the trial judge that, to the extent that pension rights are derived from employment during the marriage, they form part of the matrimonial assets as defined by Section 16(1)(b) of the Act and are subject to division. The difficult question to be determined is the value to be placed on this asset.

10 It is possible, on the basis of actuarial evidence, to estimate the present day value of a pension that has matured, in the sense that the wage earner is eligible to receive it. The greatest possible value the pension may have is the product of the future periodic payments and the future life expectancy of the wage earner. To offset the effect of inflation, however, that total value has to be diminished in proportion to the decline in the real value of money. That an inflationary trend exists is a matter of which a court may take judicial notice but the precise monthly or yearly inflation rate is a question of fact to be established unless there is agreement between the parties. (See *Lindal v. Lindal*, [1981] S.C.R. 433.)

11 The wage earner may die before the full period of his projected life expectancy has been reached. If such an event occurs and an equal distribution of the capitalized value of the pension has been made, the wage earner will have received only a fraction of the benefits it was estimated he would receive. Thus any distribution to be made must reflect all contingencies that may have the effect of diminishing the actual value of the pension rights. Another factor to be considered is the relative value of the pension in relation to the total value of the matrimonial assets to be distributed. A wage earner should not be required to make a lump sum payment to the non-employed spouse equal to his or her share of the pension when he or she does not have the present means to make such payment. In that event some other mode of distribution of pension benefits should be adopted. One such mode of distribution is an order vesting in the non-employed spouse a share of the pension benefits as and when received. That method of distribution was adopted by the Court of Appeal of British Columbia in *Rutherford v. Rutherford* (1981) 23 R.F.L. (2d) 337.

12 In that case, Seaton, J.A. recognized that, in a given case, a fair division of matrimonial assets might well be achieved by awarding the whole of the pension to the one spouse where its value can be offset by other assets. In that case, however, he agreed with the trial judge that the assets in question did not make such a distribution feasible. He accordingly ordered that Mrs. Rutherford be entitled to a proportionate share of the pension benefits, paid to her husband, not to be regarded as maintenance, and that the husband be trustee of the wife's share of the pension right.

13 In the case at bar the evidence before the Court respecting the husband's pension rights was very scanty. We do not know whether or not the pension was guaranteed for a fixed period; what, if any residual benefits accrued to the pensioner's widow, nor do we know whether or not a lump sum payment would be paid the pensioner's estate if he died within a certain period of time following his first pension payment. As well the matrimonial assets, in this case, were not such as to make the capitalized value approach feasible. Even if the capitalized value of the pension rights could properly be used, there was, in my view, insufficient evidence from which that value could be determined with any degree of accuracy. The anticipated annual pension was approximate, and there was no evidence adduced nor agreement reached on the life expectancy of the husband having regard to his age and his known state of health nor was there any agreement or proof of the appropriate inflationary rate to be applied. In these circumstances the formula used by the trial judge to determine the capitalized value of the pension rights was of doubtful validity and, with the greatest respect, neither that, nor any other formula, should have been used.

14 In fairness to the trial judge I must point out that he, himself, expressed some concern over his valuation of the pension rights in question. He stated:

> 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.
>
> 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.
>
> 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.
>
> 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.

15 I agree with the trial judge that it would be more desirable, in this case, to order the husband to pay his wife one-half of that portion of the pension cheque earned during the marriage and I appreciate his concern with respect to the implementation of such an order. He, however, did not consider the possibility of imposing a trust on the wife's share of the pension benefits; the method adopted by Seaton, J.A. in the *Rutherford* case. In my opinion such a method would obviate most, if not all, of the difficulties envisaged by the trial judge and afford the wife adequate protection.

16 In my view the wife is entitled to receive one-half of 72% of the amount of each pension

cheque paid to the husband, not as maintenance but as her share of that particular asset and I would constitute the husband as trustee of his wife's share of the pension rights and order him to do all things necessary to protect her interest. The wife is also entitled to receive the same proportion of any death benefits payable to the husband's estate from the pension fund and his personal representative is deemed to be the wife's trustee of her share. In the event that the husband did not elect to retire when qualified to do so, the wife is still entitled to receive her percentage of the pension as of the qualifying retirement date as though he had in fact retired.

17 As to the coin collection, the evidence is supportive of the trial judge's finding that it is a matrimonial asset within the meaning of the Act and I would dismiss that ground of appeal.

18 The main issue on this appeal, as stated, was the proper division of the husband's pension pursuant to The Matrimonial Property Act. My conclusions in that regard necessitate a complete reassessment of the appropriate division of all the matrimonial assets. That issue was not argued before us nor, indeed, could it have been. It obviously must be addressed now and, in my opinion, can more appropriately be dealt with by the trial judge. We do not know whether the husband has in fact retired nor the precise amount of pension payable when he reached retirement age. Furthermore the circumstances of the parties may have changed since judgment was delivered by the trial judge and additional evidence may have to be adduced.

19 For these reasons I am of the opinion that the proper disposition of this appeal would be to refer the matter back to the trial judge to hear further evidence and argument and make such order as he may deem appropriate in light of our conclusions with respect to the husband's pension rights.

20 In the result the appeal is allowed in part, the valuation to be placed on the husband's pension right is varied as indicated above and the matter is referred back to the trial judge for disposition. There will be no order as to costs.

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