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Moss v. Moss

Newfoundland Unified Family Court

Cameron J.

Judgment: October 31, 1986

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Docket: No. F/84/121

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

W.G. Dymond, for defendant.

Cases considered:

Elliott v. Elliott [\(1985\), 56 Nfld. & P.E.I.R. 110](#) (Nfld. U.F.C.) -- considered

Hart v. Hart (No. 3), Nfld. U.F.C., No. F/84/339, 1984 (unreported) -- considered

Neary v. Neary [\(1985\), 52 Nfld. & P.E.I.R. 263](#) (Nfld. U.F.C.) -- applied

Statutes considered:

Matrimonial Property Act, S.N. 1979, c. 32

s. 4(5)

s. 6(1)

s. 16(1)(a)

s. 16(1)(b)(iii)

s. 20

s. 27

Authorities considered:

Todd, *The Law of Expropriation* (1976), c. 7.

Action by wife for distribution of matrimonial property pursuant to Matrimonial Property Act.

Cameron J.:

1 The plaintiff ("wife") seeks pursuant to the Matrimonial Property Act, S.N. 1979, c. 32 ("the Act"), a division of matrimonial assets. She also seeks compensation for contribution to business assets. The defendant, in argument filed 18th March 1986, admits that matrimonial assets should be divided equally (see pp. 1 and 12). However, the parties cannot agree on the value of the matrimonial home. In respect of business assets, the parties were unable to agree on either the contribution of each, the valuation of the assets or the valuation date.

Background

2 The parties were married on 5th May 1955. The defendant, in pleadings, admits that they separated in June 1982. I am satisfied that there is no reasonable prospect for resumption of cohabitation by the parties.

3 Prior to the parties' marriage in 1955 the defendant had begun construction of a home on land acquired from his father. The home, situate in Jamestown, Newfoundland, was completed after the couple married. Mr. and Mrs. Moss resided there with their children from 1955 to 1974.

4 Around 1974 Mrs. Moss developed the idea of opening a nursing home in the family home. She then acquired a provincial licence and equipment necessary to open the home called Seaside Lodge. The Moss family continued to reside in Seaside Lodge with a small number of patients until 1976 when the family moved into a mobile home which had been placed on the same lot as Seaside Lodge.

5 Sometime during 1981 Mr. Moss convinced his wife that the home should be expanded to enable them to accommodate more patients. Construction was begun on the expansion and most of the exterior work completed before January 1982 when Mrs. Moss ceased to have anything to do with Seaside Lodge. The expansion, to enable the number of patients to be accommodated to go from 10 to 17, was completed after January 1982 by which time Mr. Moss was managing the home.

6 Prior to 1982, Mr. Moss played no role in running Seaside Lodge. He did, from time to time, participate in renovating or extending the home, directing and assisting workmen. Mr. Moss also contributed financially either by providing lumber produced in his sawmill or by purchasing some materials. The precise value of this contribution is not known. By the evidence of Wendell Moore, C.A., between 1982 and 1984 Mr. Moss invested in excess of \$25,000 in Seaside Lodge. Further, \$7,350 of the revenue from the trucking business was invested in Seaside Lodge during 1982 and 1983.

7 Of course, in operating Seaside Lodge both parties had the assistance of staff. However in the case of Mrs. Moss, particularly in the early years, she did much of the physical labour required in such institutions including cooking and caring for patients. The home was well established when Mr. Moss took over.

8 At some time after the separation of the parties the licence for Seaside Lodge was transferred from Mrs. Moss to Mr. Moss.

9 During the time the parties cohabited the earnings from Seaside Lodge were used for the general maintenance of the family; for example, the purchase of food or payments on the loan for the mobile home.

10 Since separation Mr. Moss has continued to occupy the mobile home at Jamestown.

Land at Jamestown

11 The evidence was vague respecting the title to the land on which Seaside Lodge and the mobile home are located. It is not clear if title is in the name of the defendant alone or both parties or in Moss Ltd. However, the parties agree that 50 per cent of the land should be valued with the mobile home (matrimonial home) and 50 per cent with the nursing home (see defendant's brief p. 12, para. 22; plaintiff's brief p. 16). I accept the evidence of Mr. Edwards that the value of the land, if vacant, is \$1,200 at the time of trial.

Matrimonial Assets

(i) Mobile Home

12 The parties agree that the mobile home is a matrimonial home in which each spouse has a one-half interest (see ss. 4(5) and 6(1) of the Act).

13 Each party having an interest in the property, it is appropriate that the matrimonial home be valued as of the date of trial so that any appreciation in value is to the benefit of both parties: see *Neary v. Neary* (1985), 52 Nfld. & P.E.I.R. 263 at 265 (Nfld. U.F.C.).

14 I accept the evidence of Mr. Moss that the mobile home was acquired in 1976 for \$16,500. The down payment made by Mr. Moss was \$2,500. It appears that the purchase price included furniture but it is not necessary to determine that point to arrive at the value of the asset at trial.

15 Following purchase, certain work was completed on the mobile home which enlarged it and added to its value but results in it being no longer mobile. Some of that work was completed following separation. The parties agree that the defendant should be compensated for the work completed following separation. They disagree regarding the method to be used. The precise cost to the defendant (the figure I prefer to use) is not known. The defendant asks that if Mr. Derek Edwards' opinion of the value of the matrimonial home is accepted there be deducted from the estimated value the estimated cost of the extension completed following separation, and division be made on basis of the net figure. The plaintiff asks that I allot a percentage of the increased value of the home, from the date of separation to the date of valuation, to the defendant. This request by the plaintiff is coupled with a request that either party be allowed to bid on the home.

16 Mr. Derek Edwards, Certified Engineering Technician, opined that the matrimonial home

exclusive of land was valued at trial at \$32,784. Mr. Edwards has had several years experience in costing. He is not an appraiser.

17 Mr. Edwards' opinion was based on the cost approach. This method is one of three commonly used to determine market value of property. The others are the comparative and income approaches. The comparative approach compares the subject property and others which have been sold to arrive at a price the subject could be expected to fetch in a free market. That approach was not used in this case because of lack of comparables in Jamestown, a small community. The income approach determines the income actually or potentially to be derived from the subject, and that income is capitalized at an appropriate rate to determine the amount a buyer might pay to acquire the future earnings. The cost approach estimates the current cost of reproducing the improvements and reduces that amount by the estimated depreciation. Ideally, two or three of these methods are used to arrive at a value (see Todd, *The Law of Expropriation* (1976), c. 7, for a discussion of the three approaches).

18 The cost approach assumes that the cost of production and market value are the same, an assumption I cannot accept in this case. \$32,784 would be the maximum one might expect to receive under optimum conditions. Optimum market conditions do not exist in Jamestown. The location of the home, so near Seaside Lodge, would lessen its value. There is a small market in the community of Jamestown. The defendant has suggested that before the post separation additions the value of the mobile home would be \$15,000 to \$17,000 (see p. 11 of defendant's brief). If I were to use the highest opinion of rental value and the same capitalization and vacancy rates as used for Seaside Lodge, the valuation would be \$23,500. Post-separation improvements of 14 per cent must be deducted for a valuation for division on the basis of \$20,210. (14 per cent represents the percentage of estimated cost of reproduction which relates to post-separation improvements. I have not been satisfied on the evidence that I should, as Mr. Day has submitted, allow for materials acquired pre-separation in respect of the matrimonial home. Lumber acquired before separation was used in Seaside Lodge.) However, I am not satisfied the rental rate is \$300 per month. Mr. Moss has acquired since separation another mobile home for \$18,000. On the basis of available evidence, I conclude division should be based on \$19,000.

19 Since the matrimonial home and Seaside Lodge are so near the party who it is agreed between the parties will be managing Seaside Lodge should have an opportunity to purchase the other spouse's interest before the property is placed on the market. That party may purchase the other spouse's interest on payment of one half (\$19,000) or \$9,500 to the other party. If purchase is not complete within 60 days of filing of this decision the matrimonial home (including lot with 50 per cent of land or less if agreed by both parties) shall be sold.

20 Conduct of the sale shall be in the hands of the plaintiff who may sell the matrimonial home for not less than 90 per cent of \$23,000. Prior to the sale the plaintiff may effect such repairs, maintenance and cleaning of the matrimonial home as may, in her opinion, render the same more suitable for sale. The defendant may occupy the property until the date of the sale. The defendant shall provide the plaintiff with a key and cooperate in the showing of the property to prospective purchasers.

21 Upon the sale, the proceeds, subject to the rights of persons not before the court, shall be applied to pay the following:

1. Municipal and school taxes outstanding;
2. The cost of work under the above paragraph for which acceptable vouchers are provided;
3. Real estate commissions and legal expenses attendant upon the sale;
4. The balance of any mortgage outstanding; and
5. 14 per cent of the purchase price shall be paid to the defendant in compensation for work performed post-separation.

The balance remaining after making the disbursements referred to shall be divided equally between the parties.

22 If within six months from the listing of the property the plaintiff has not been able to effect sale, she may negotiate a sale for a price less than 90 per cent of \$23,000, but subject to the approval of the defendant, provided that if the defendant does not approve she may then apply to the court for a determination of whether or not the sale at such price should be approved. When a sale is negotiated both parties shall execute or cause to be executed and deliver all instruments necessary to effectuate the agreement of sale and conveyance and any other documents that may be necessary in connection therewith.

(ii) Occupation Rent

23 Since June 1982 the defendant has occupied the matrimonial home. From August 1983 to July 1985 a companion shared the home with Mr. Moss and paid him \$75 per month rent. Seventy-five dollars per month does not represent fair market rental. Mrs. Moss seeks occupation rent.

24 In *Elliott v. Elliott* (1985), 56 Nfld. & P.E.I.R. 110 (Nfld. U.F.C.), I reviewed the basis for an order for occupation rent under the Matrimonial Property Act. This is an appropriate case. The factors outlined in the *Elliott* case for denying occupation rent are not present. Mr. Moss stated his wife had left their home of her free will and that she had been free to come home during the period for which occupation rent was claimed. During much of this period another person aside from Mr. Moss was occupying the matrimonial home. In the circumstances it was unreasonable to expect Mrs. Moss to live there as well.

25 Mr. Moss did assume certain expenses associated with the home but he is compensated for these either in calculation of the value of the home or in calculation of the payment for occupation rent.

26 Three different rentals have been suggested as being appropriate: \$200 to \$250 (Mr. Edwards); \$250 to \$300 (Mr. Moore) and \$300 (the plaintiff, based on amount being received by Mr. Moss for another property).

27 The matrimonial home has been described as being well maintained. Against this one must consider the fact that it is located near Seaside Lodge and the prevalent rental rates in the area. I concluded that \$225 is a fair rental rate for the property. For 17 months after separation Mr. Moss continued to make the mortgage payments. Mrs. Moss is entitled to one half (fair rental less mortgage payments):

$$28 \quad 1/2 (\$11,700 - 4,270.23) = 3,714.88$$

29 Following separation Mrs. Moss received payments of \$200 per month from Mr. Moss for a period. A total of \$1,500 was received in this way. This amount was in Mr. Moss' view to provide Mrs. Moss with accommodation. \$1,500 shall be deducted from \$3,714.88 for a balance of \$2,214.88 owing to date of judgment in respect of occupation rent. Further, upon presentation of proof that Mr. Moss has paid the garbage collection fee of \$25 for the years 1982 to 1986 inclusive, there shall be deducted from the amount payable 1/2 (\$25 x 5) or \$62.50. No other taxes are payable for the area (see D.E. No. 1). There was no evidence respecting payment of insurance for the matrimonial home and it is not considered in the calculation.

30 Until the sale of the matrimonial home the defendant shall pay to the plaintiff occupation rent at the rate of one half (\$225 less monthly taxes and insurance) per month as long as he occupies the matrimonial home from 1st November 1986.

(iii) Furniture and Effects of the Parties

31 Personal effects are not matrimonial assets and are not divisible under the Act (see s. 16(1)(b)(iii)). Each party shall retain his or her personal effects. Although both parties accept that the furniture in the matrimonial home acquired from their marriage to June 1982 is subject to division, neither party has attempted to value this property. The parties may divide the furniture in specie. If they are unable to agree on division the furniture shall be sold and the proceeds divided equally between the parties.

(iv) Bank Accounts

32 The parties agree on the principle to be applied in dividing their bank accounts. The balance in the accounts as of the date of separation is unknown. The defendant's accountant was able to confirm that as of January 1982 the balances were: in CIBC, \$433, and in the Bank of N.S. account, \$6,743. In respect of the latter the account was in the name of the parties and their son Craig. The parties agree that Mrs. Moss is entitled to 50 per cent of the balance in the CIBC account and one third of the balance in the Bank of Nova Scotia account. Mr. Moss has had total control of the accounts since separation. During most of the period from January 1982 to June 1982 the parties lived apart and Mrs. Moss had no access to the accounts and received no

benefits from them. For the purpose of this application the balances as of January 1982 shall be used and Mrs. Moss is entitled to receive \$2,464.16 as her share.

(v) Debts

33 On separation there were two debts owed by Mrs. Moss. She paid, after separation, approximately \$800 to Chargex. The debts represent the cost of normal household purchases and is properly a matrimonial debt. On separation Mrs. Moss also owed money to Revenue Canada. I conclude from the evidence of Mrs. Moss that the couple's debts to Revenue Canada were paid by Seaside Lodge. Since I have concluded that both have an interest in this asset I make no order in respect of that debt. Mrs. Moss is entitled to reimbursement for one half \$800 or \$400.

34 Amounts payable in respect of the business are not properly dealt with under this heading. They are reflected in the valuation of the business.

Business Assets

35 Section 27 of the Act states:

27 Where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall order

(a) direct the other spouse to pay such an amount as the court orders to compensate the contributing spouse therefore; or

(b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,

and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

36 The plaintiff claims an interest in Seaside Lodge and a trucking business. In respect of Seaside Lodge it was the defendant's evidence that effective 1st January 1982 this asset was transferred to Moss Limited, a company in which the defendant holds or controls 98 of the 100 shares issued. The plaintiff has no shares in Moss Limited.

(i) Seaside Lodge

37 Seaside Lodge (now Moss Ltd.) is a business asset as defined by the Act (see s. 16(1)(a)). It is clear that the present business is the result of hard work by both parties. Each has had sole management for a period (Mrs. Moss, 1974 to January 1982 except for a period when the home was closed for renovations; Mr. Moss, January 1982 to date). The operation has grown over the years and is more profitable with more patients. The concept was Mrs. Moss'; the expansion was

Mr. Moss' idea. A former family home is the major asset of the business. Both parties have contributed money or moneys' worth to the renovation and expansion. Mr. Moss has contributed trucking funds to this asset. A precise quantification of contributions is not possible but I conclude that considering the factors in s. 27 the contributions of the parties are equal.

38 Counsel for Mr. Moss argues that if Mrs. Moss is to be awarded 50 per cent of the market value, it should be as of separation in 1982. He argues that Mr. Moss has expanded the operation after 1982 and to award Mrs. Moss 50 per cent of the value at trial date is to allow Mrs. Moss to reap the benefits of his client's work. The assessment must be made at trial because it is on the basis of the contributions of each of the parties to that date that I concluded the contributions were equal.

39 Valuation of business assets is made more difficult in this case because of the intermingling of accounts. The parties seemed to use personal and business accounts indiscriminately. Mr. Moss applied trucking account funds to Seaside Lodge. If there were insufficient funds in one account another was used to pay debts whether the debt was personal or related to Seaside Lodge or the trucking business.

40 Since the separation Mr. Moss has acquired a second mobile home, which he rents. He states the money (\$18,000) came out of Moss Ltd. I have interpreted this to mean that his source of money was his income from Moss Ltd., not that the company purchased the mobile home.

41 By s. 27 I may order one party to compensate the other for the contribution, or award a share of the interest of the husband (the majority shareholder in Moss Ltd.) to the wife (the contributing spouse). Generally with small business it is preferable to award an amount in compensation because the personal differences between the parties make continued involvement in business extremely difficult if not impossible.

42 In *Hart v. Hart* (No. 3), Nfld. U.F.C., No. F/84/339 1984 (unreported), I outlined the four basic approaches to valuation of a business. Only two of these, the assets approach and the earnings approach, would have application in this case. While some of the information needed to calculate the value on either of these approaches is available, it is not sufficient for me to be able with any certainty to make the determination.

43 The assets approach would be appropriate if the business were not earning an adequate return on its invested capital. This method assumes liquidation of the business. There are in evidence opinions respecting the value of the physical structure itself, but phase down costs and the tax implications of liquidation are not clear.

44 The earnings approach involves a determination of potential earnings less estimated tax. Using the figures used by Mr. Edwards in his calculation, assuming 17 patients and the tax rate specified by Mr. Moore, the valuation would be \$53,000 but I have no way of knowing if the liquidation method would support this figure.

45 While I am reluctant to do so for the reasons already expressed, in fairness to the parties I

see no alternative but to order that Mr. Moss transfer to Mrs. Moss 49 shares in Moss Ltd. pursuant to s. 27.

(ii) Trucking Business

46 During the parties' cohabitation Mr. Moss began a small trucking operation. However, for the most part the trucks were in the name of Mrs. Moss and the income was reported on her income tax returns. Mr. Moss ran the operation. The proceeds were deposited to an account in his name. Mrs. Moss would sometimes assist by picking up required parts. Subsequently Mrs. Moss transferred all vehicles to Mr. Moss. There was little if any trucking business operated after January 1982.

47 The assets relating to this business were four vehicles:

48 (1) A four-wheel drive which was sold for \$2,000;

49 (2) A 1980 pickup which Mr. Moss still operates;

50 (3) A 1975 Ford Trailmaster which was sold after separation for \$4,000; and

51 (4) A 1978 G.M.C. tandem which was sold after separation for \$11,000.

52 Mr. Moss also had an arc welder. It was sold in 1983 for \$500. There was no evidence to connect Mrs. Moss to the operation of this machine.

53 While Mrs. Moss was the nominal owner of the trucking business her contribution to its running and to acquisition of the assets was small. I am satisfied she has been compensated for her contribution by the \$1,000 she received when the four-wheel drive vehicle was sold and by the "trucking account's contribution" to Seaside Lodge (see p. 3).

(iii) Longliner

54 In 1954 the husband purchased a boat. Initially it was used for commercial fishing and for transportation to a sawmill being run by Mr. Moss. Subsequently, the boat was used for family outings. However, as it was purchased prior to the marriage it is not a matrimonial asset as defined by s. 16(1)(b) of the Act and is not subject to division.

(iv) Sawmill

55 The plaintiff makes no claim in respect of a sawmill which the defendant has given to the parties' son.

Unequal Division

56 Section 20 of the Act permits an unequal division of matrimonial assets but only if equal

division of matrimonial assets would be grossly unjust or unconscionable taking into account the factors listed in the section. There is no evidence in this case to support an unequal division of assets.

Costs

57 Each party shall bear his or her own costs.

Order accordingly.

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