

Neary v. Neary

Mary Theresa Neary, Plaintiff and Edward Ashley Neary, Defendant

Newfoundland Unified Family Court

Fagan J.

Judgment: November 5, 1981

Docket: F/80/543

Counsel: Mr. Robert Wells, Q.C., for Plaintiff

Mr. **David Day**, Q.C., for Defendant

Fagan, J.:

1 This is an application pursuant to the provisions of the Matrimonial Property Act, SN 1979, Chapter 32, as amended by SN 1980, Chapter 24 (hereinafter referred to as the Act).

2 The Plaintiff and Defendant were married on the 14th. day of February, A.D., 1955, and to all intents and purposes separated during the month of September, A.D., 1976. This action was instituted on the 14th. day of October, A.D., 1980, as was a Petition for Divorce, Divorce Registry No. 445.

3 I am satisfied on the evidence that the parties hereto were spouses within the meaning of the Act at the commencement of the action and that this Court has jurisdiction to deal with the matters in issue between them. The Plaintiff pleads the Act generally. The Act is deemed to be remedial and it is to receive such fair, large, and liberal construction and interpretation as best ensures the object of the Act and its purposes as set out in Section 3 thereof.

4 The Plaintiff and Defendant from and including the 14th. day of February, A.D., 1976, acquired matrimonial assets and a matrimonial home situate 9 Riverview Avenue in the City of St. John's, Province of Newfoundland.

5 There were five children of the marriage, two of whom are presently living with the Defendant at 9 Riverview Avenue and are attending university. These two children are supported by the Defendant who also maintains the matrimonial home. Both parties filed Statements of Property as required by Section 22 of the Act, which constitutes a list of the matters in issue between them. At the trial the contents of the statements were somewhat varied.

6 On the evidence I am not satisfied the matrimonial home should be partitioned - the Plaintiff has no

desire to partition the property which, in my view, is not practical, realizing two of her five children still reside there with their father. The Defendant wishes to remain in the matrimonial home and the Plaintiff does not wish to have the property sold particularly with her children residing there, but claims full compensation for her interest in the home.

7 At the time of marriage the Plaintiff was employed by the CBC at St. John's and following marriage and until 1974 the Plaintiff was engaged largely in caring for the Defendant and the children, managing the home, and for a brief period assisting her husband in establishing his law practice. Following 1974 the Plaintiff worked with the Government of the Province for a brief period and with her brothers who carried on some small business ventures. Any income earned by her in these jobs was placed at the disposal of the family and used for the general benefit of the whole family.

8 The evidence indicates the Plaintiff stayed with the family unit until 1979 only because of her obligations to her children - there appears to have been some underlying friction between the parties over the several years previous. During the course of the marriage the Defendant provided the Plaintiff with a regular monthly allowance from which the Plaintiff was to maintain the family and pay certain of the family bills. From this allowance she managed to accumulate some small savings to acquire certain properties which she desired to have, particularly in connection with her summer home at Cupids.

9 During the course of the marriage the Defendant arranged the purchase of certain properties in the name of the Plaintiff through finances arranged by him which he personally guaranteed. Certain mortgage loans were arranged for the Plaintiff by the Defendant which were also personally guaranteed by him.

10 While the Defendant intended to make support payments to the Plaintiff, after the separation he discontinued these payments on the grounds the Plaintiff had taken up residence with a third party and he felt no obligation toward her. Because of the change in the lifestyle of the Plaintiff the monies borrowed on properties in her name but guaranteed by the Defendant were called by the lenders and as a result the Registered Retirement Savings Plan investments made by the Defendant for and on behalf of the Plaintiff had to be surrendered to provide the necessary money to meet the Plaintiff's obligations on several loans outstanding in her name. These loans included her car loan and, of course, the payment of other smaller bills outstanding at the time of and following separation.

11 The Plaintiff in her evidence claims, as of the date of separation, to have a one-half interest in the matrimonial home at 9 Riverview Avenue, plus the following:

(a) House and land at Cupids	\$15,000.00
(b) Leasehold lands	1,000.00
(c) Shares in Investment Club	1,000.00
(d) 1979 Chevelle car	4,000.00
(e) Proceeds of RRSP	17,266.00

(f) Jewellery	2,000.00
(g) Furniture at Cupids	2,000.00
(h) Shoe Cove property	39,000.00
(i) Wife's mortgages with O'Dea, Greene	30,218.00
(j) China, crystal, piano, Italian tables, bedroom suite	5,000.00

12 The evidence suggests that the remaining items of furnishings in the matrimonial home at 9 Riverview Avenue, excluding the bedroom suite claimed by the Plaintiff, piano, china and crystal patterns would be valued at \$5,000.00. However, this home is a large home and the appraiser, Mr. Rossiter, clearly indicated that the contents of the home were complementary to its design and function and, in my view, the value suggested is somewhat conservative.

13 With regard to the appraisal of the matrimonial home - Mr. Frank Rossiter of Montreal Trust Company indicates that, in his opinion, as of the date of the trial, his Company would be prepared to lend by way of a mortgage loan ninety percent of his appraised value of \$146,000.00. Mr. Noel of Combined Appraisers and Consultants Company Limited suggested that as of today the matrimonial home would have a fair market value of \$200,000.00. A great deal of evidence was given on this subject during the trial and, in my view, I have to determine a fair market value for the property as of the date of the action since it is a matrimonial home and any appreciation in value would have to benefit the non-occupier since she has an interest in the property until it is disposed of, as opposed to valuation as of the date of separation.

14 Whether or not the property would fetch a sale price of \$200,000.00 appears to be questionable. Evidence of comparable sales in the City of St. John's during 1981 suggests that a \$200,000.00 sale price would not be readily available. I am more inclined to the vice that this property would not sell for \$200,000.00 and that more realistically the fair market value would be something in the order of \$150,000.00 to \$175,000.00, for a general average, in my view, of \$165,000.00. I am satisfied on the evidence that the Plaintiff has a one-half interest in the matrimonial home.

15 The parties to this action are of the same age, approximately fifty years. The Plaintiff has no particular skills in a professional sense, as does the Defendant. The earning capacity of the plaintiff is much lower than that of the Defendant. I am not satisfied on the evidence that it would be grossly unjust or unconscionable to make an equal division of the matrimonial assets. The Defendant is in receipt of a good income which will continue so far as one can determine, leaving him with good earning power and the ability to maintain a high standard of living, whereas the Plaintiff will in the foreseeable future have to settle for modest earnings. On a division of properties between spouses one must deal with the property at hand and unless satisfied that one of the criteria set forth in Section 20 of the Act is applicable then the question of gross injustice or unconscionableness is not a factor.

16 Section 27 of the Act reads as follows:

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 by 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.

17 The Defendant is a shareholder in a number of companies doing business in the City of St. John's, such as renting apartments or holding title to properties and in some cases lending money based on mortgage security.

18 Early in the marriage the Plaintiff described how she and her husband, on holidays or weekends, would drive around the City and look over certain potential properties with a view to perhaps purchasing them. This purchasing was done by the Defendant without any contribution of any sort from her. The evidence of the Plaintiff indicates that she did on several occasions during periods when some of the rental properties were vacant answer telephone calls in response to inquiries made regarding renting the apartments owned by the Defendant, that she did on one occasion redecorate a room in one of the apartments and on another occasion did some cleaning prior to a new tenant moving into a property. This she says she did not because she felt she had any right to or ownership of the property but rather to assist her husband in having the properties re-rented, knowing that the rentals were required to retire the purchase financing debt.

19 There is no evidence of keeping records or issuing receipts by her, but rather it appears that the rentals were collected and payments made to the bank financing through the law offices of her husband, the Defendant. In my view, there appears to have been some contribution by the Plaintiff toward the accumulation of the business assets of the Defendant and I so find. It is very difficult to determine from the evidence to what extent the contribution made by the wife was of any real value since the assistance was rendered several years ago and early in the marriage. Many of the properties have been sold or changed hands since that time. However, in my view, some consideration is justified for her contribution and I would, therefore, order that by way of compensation for the contribution made by the Plaintiff in this regard the Defendant pay to her the sum of \$10,000.00 in exchange for which the Plaintiff will transfer to the Defendant or his nominee all shares held by her in any of the companies listed in the Statement of Properties filed under Section 22 of the Act.

20 The Defendant's matrimonial assets, over and above his interest in the matrimonial home, consist of (1) the furniture remaining in the home valued by him at \$5,000.00; (2) life insurance with a cash surrender value of \$7,160.00 (I would not regard the loan against this cash surrender value to be

deductible since no evidence was offered to explain the use to which that loan was put); (3) the stamp and coin collection valued at \$3,000.00; (4) the Defendant's Omni motor vehicle valued at \$2,000.00; (5) cash in bank of \$800.00; and (6) the chaise lounge valued at \$200.00.

21 The Neary's Pond property was a gift from the Defendant's late father and is exempted under S.16(1)(b)(i) of the Act. The Newfoundland Pension Plan, as of the date of separation in September, 1976, was valued at approximately \$300.00 - the R.R.S.P. of the Defendant was not acquired or established until after separation and is, therefore, not a matrimonial asset.

22 In my opinion the matrimonial home, 9 Riverview Avenue, is a matrimonial home within the meaning of the Act and the Plaintiff has a one-half interest therein. I am also satisfied, on a review of the evidence, that its fair market value today would be \$165,000.00.

23 The list of matrimonial assets possessed by the Plaintiff for purposes of this action are set forth on page 5 hereof and have a value of \$116,484.00. The Defendant is entitled to a one-half interest in and to these matrimonial assets or a credit of \$58,242.00.

24 The list of matrimonial assets possessed by the Defendant for purposes of this action is as follows:

(a) Stamp and coin collection	\$3,000.00
(b) 1979 Omni	2,000.00
(c) Cash on hand	800.00
(d) Furnishings at 9 Riverview	5,000.00
(e) C.S.V. of life insurance	7,160.00
(f) Chaise lounge	200.00
	\$18,160.00

25 The Plaintiff is entitled to a one-half interest in and to these matrimonial assets or a credit of \$9,080.00.

26 Accepting the valuations placed before me, and regarding the items possessed by both parties and listed in this judgment as being the only matrimonial assets and home owned by them, my calculations are as follows:

Possessed and/or owned by Defendant	\$183,160.00
Possessed and/or owned by Plaintiff	116,484.00

Difference

\$66,676.00

27 One-half the difference, therefore, is payable by the Defendant to the Plaintiff, namely, \$33,338.00.

28 The Plaintiff is not desirous of having or owning the matrimonial home, while the Defendant is, particularly since he and two of their children occupy it. There is a small mortgage owing on the matrimonial home which I feel was not for the purpose of acquiring the home or any of its contents, but rather to facilitate the Defendant. It would appear to be more practical for the Defendant to purchase the interest of the Plaintiff in the home.

29 In summary then, in full and final settlement of all claims by the Plaintiff against the Defendant in respect of any claims or rights she may have in and to the matrimonial home and matrimonial assets of the marital unit, the Defendant shall pay to the Plaintiff the sum of \$33,338.00. The Plaintiff shall execute all documents necessary to effectively release and transfer unto the Defendant full legal title to the matrimonial home, 9 Riverview Avenue; the transfer of title to all furnishings excepting that specifically mentioned hereafter, and the motor vehicle of the Defendant. In addition, in consideration of the payment to her of the sum of \$10,000.00 the Plaintiff shall execute all documents of transfer to the Defendant of title to all shares held by her in the several companies listed on page 4 of the Statement of Property filed by the Defendant.

30 The Defendant shall, in addition to making the above payments, execute all documents necessary to effectively transfer and convey unto the Plaintiff full title to the home and land situate at Cupids, Conception Bay, Province of Newfoundland; the three pieces of leasehold land situate 156, 158 and 160 Craigmillar Avenue, St. John's, Newfoundland, the Plaintiff's 1979 Chevelle car, jewellery, furniture in the home in Cupid's; the Plaintiff's mortgage investments upon release of the Defendant from any and all liability therefor contingent or otherwise; the china, crystal, piano, Italian tables and bedroom suite (purchased by the Plaintiff).

31 The Plaintiff will pay to the Defendant the sum of \$1,085.00 paid by him as income tax as a result of the surrender by her of the R.R.S.P. investment in her name but paid for by the Defendant.

32 The result is, then, that the Defendant has to pay to the Plaintiff the sum of \$43,338.00 less \$1,085.00 due by the Plaintiff to the Defendant, leaving a balance of \$42,253.00 which the Defendant shall pay to the Plaintiff. Let judgment be entered accordingly.

33 There will be no order as to costs.

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