

Ridler v. Ridler

Mary Elizabeth Ridler, Plaintiff and Hugh Francis Ridler, Defendant

Newfoundland Unified Family Court

Cameron U.F.C.J.

Judgment: June 26, 1984

Docket: F/83/210

Counsel: Gillian Butler, for Plaintiff

David Day, Q.C., for Defendant

Judgment of Cameron, J.:

June 26, 1984

1 The Plaintiff takes this action pursuant to The Matrimonial Property Act (the Act). The parties were married at Toronto, Ontario, on July 27, 1970. They separated on September 25, 1982. A Decree Nisi was granted to the Plaintiff herein on January 30, 1984. There is no matrimonial home as defined by Section 4 of the Act. The parties have been able to agree and have divided in equal shares all matrimonial assets which may be broadly described as furniture, household effects and recreational equipment.

2 The matters to be considered in this action were limited to four categories: 1. savings and securities; 2. government pension; 3. land at Thunder Bay; and 4. costs.

3 Following argument in this case there was an application by Counsel on behalf of the Defendant to re-open the trial. Subsequently, by agreement of the parties, affidavit evidence was submitted on the tax implications of negotiation of the Defendant's R.R.S.P. and on July 17, 1984, a brief of argument respecting the negotiation of a R.R.S.P., a R.H.O.S.P. and Canada Savings Bonds was submitted on behalf of the Defendant.

1. Savings and Securities

4 Following her marriage the Plaintiff received a small inheritance from her grandmother's estate. \$1,000.00 of this inheritance was placed in a R.H.O.S.P. and the balance consumed by various means. The Defendant concedes that \$1,000.00 of the amount held in the Plaintiff's R.H.O.S.P. is exempt from distribution by s. 16(1)(b)(i). The amounts held by the parties were as follows:

Asset	Value on Separation		Total	Value at Trial	
	Plaintiff	Defendant		Plaintiff	Defendant
Canada Savings Bonds	\$3,000.00 (- A)	13,160.84 (- B)	16,160.84	3,489.51	15,267.55 (- D)
R.H.O.S.P.	3,327.98 (C)	12,276.88	15,604.86	3,893.02 (F)	14,304.89 (- E)
Account No. 5082-599		703.12	703.12		200.00
Plaintiff's Daily Interest Savings Account		1,000.00 (A)	1,000.00		Nil
R.R.S.P.		8,318.04		8,318.04	9,550.40 (E)
Gold		2,529.03	2,529.03		2,683.85 (G)
Total	8,031.10	36,284.79	44,315.89	7,582.53	41,806.69

(A) Purchased from \$4,000.00 given to Plaintiff by Defendant on separation.

(B) Face value of 11 bonds at \$1,000.00 plus interest to separation of \$2,160.84.

(C) Includes \$1,000.00 inheritance which Defendant admits not shareable.

(D) All except one bond cashed December, 1984. One bond cashed December 13, 1982. Face value of bonds \$11,000.00 and interest of \$4,060.60 and \$206.95.

(E) Negotiated by Defendant in 1984 prior to hearing - values including interest on date of negotiation.

(F) Including \$100.00 deposited after parties separated - value at March 1, 1984.

(G) On sale December, 1982.

5 The Plaintiff argues that the date of valuation of matrimonial assets is the date of trial and, therefore,

the amounts to be shared in savings and securities are the amounts held by each of the parties at the date of trial except that portion of principle deposited following separation. The Defendant's position is that the exception provided for under s. 16(1)(b)(vii) excludes from matrimonial assets any amounts added to accounts by deposit or interest following separation, and further that matrimonial assets should be valued at separation.

6 On the happening of one of what has been described as the triggering events enumerated in s. 19 a spouse may make an application for division of matrimonial assets. The most commonly used triggering event, as in this case, is separation of the parties without reasonable prospect of resumption of cohabitation. A matrimonial asset is determined by reference to s. 16(1)(b). Simply put, with certain exceptions, all assets acquired during the marriage up to the point of separation are matrimonial assets. The first step in any division is to determine what assets are to be divided. This task is relatively simple for chattels, the purchase date of which can be easily obtained. It may be more complicated for a matrimonial asset which is a chose in action.

7 Having identified the matrimonial assets the next step is to determine the appropriate date of valuation.

8 Unlike the Acts of some other provinces, The Matrimonial Property Act of Newfoundland does not address this point. (See s. 15 of the Matrimonial Property Act of Manitoba for an example of an Act which directly addresses valuation date.)

9 In a number of cases in this Province the matrimonial home has been valued at the date of trial or the date of sale so that any appreciation after separation is to the benefit of both parties. However, the matrimonial home is treated differently under the Act than other matrimonial assets. Each party has a one-half interest in their matrimonial home. As joint tenants they should benefit from any increase in value to the point of adjudication or sale. (See the comments of Fagan, J., in *Neary v. Neary*, F/80/543, unreported.)

10 With respect to all other matrimonial assets the doctrine of separate property is retained. It is only through the operation of sections 19 and 24 of the Act that the separate matrimonial assets of each of the parties may be shared.

11 There is nothing in the Act to limit the ability of either party to dispose of his or her separate property either before or after separation until an order for division is made. Indeed no interest in the matrimonial assets of one spouse, other than the matrimonial home, may arise for the other spouse until an order (see *Maroukis v. Maroukis* (1981), 24 R.F.L. (2d) 113 (Ont. C.A.) leave to appeal to the Supreme Court of Canada granted 35 O.R. (2d) 38n).

12 Counsel on behalf of the Plaintiff has referred me to decisions of the Court of Appeal of Alberta and the Court of Appeal of Nova Scotia which she submits are persuasive on this point.

13 In *Mazurenko v. Mazurenko* (1981), 23 R.F.L. (2d) 113, Stevenson, J.A., expressed the view that as a general rule property should be valued at trial. The learned judge found support for his view in ss. 7(3)(c) and 8(f) of the Alberta Act. There are no provisions similar to ss. 7(3)(c) and 8(f) in the

Newfoundland Act.

14 The Nova Scotia Supreme Court, Appeal Division, in *Mason v. Mason* (1981), 23 R.F.L. (2d) 68, held, without discussing its reasons, that the increase in value of assets to the time of trial should be considered in dividing assets. However, even accepting that principle Nathanson, J., in *McNeil v. McNeil* (1983), 56 N.S.R. (2d) and 117 A.R. 232, and others in the cases cited in *McNeil* have valued pensions and R.R.S.P.s at the date of separation, presumably on the basis that amounts added afterward were after acquired property.

15 The general principle expressed by Stevenson, J.A., is, I am satisfied, a sound one. For chattels real or personal the date of trial or, if sale of the assets is ordered, the date of sale should generally be the date of valuation. By valuing assets at trial the division is more equitable as of the time it is made. Of course, there will be occasions when another value must be accepted as, in this case, when the gold was disposal of before the date of trial. The value on disposal is the best evidence and, therefore, should be used on distribution. Also, if, for example, there is an unreasonable delay in taking an action this fact, in the absence of statutory direction on the point, might suggest another date of valuation would be appropriate in that case.

16 In respect of savings, presuming there is no question of tracing, any amount deposited to the account following separation and interest on the post separation deposit would be exempt by s. 16(1)(b)(vii). The issue is then narrowed to whether any amounts deposited by way of interest on the balance at separation is after acquired property and, therefore, exempt by s. 16(1)(b)(vii) or an increase in the value of the asset, which existed at separation and which should be shared if the appropriate date for valuation is the date of trial.

17 Further, if the balance at trial is to be divided should withdrawals from savings accounts by one party be considered when dividing the assets. To divide the balance at trial in the face of substantial withdrawals would invite dissipation of the assets. Unreasonable impoverishment or dissipation of assets might give rise to an unequal division under s. 20(i) but the criteria for unequal division are not easily met and not all consuming of funds could be said to be unreasonable impoverishment or dissipation.

18 I am satisfied that the effect of s. 16(1)(b)(vii) is to exclude from the matrimonial asset any amount added as interest following separation. This characterization of the interest payments is consistent with the retention of separate property under the Act. As a result the Defendant's Canada Savings Bonds were valued at \$13,160.84 on separation and the value will be unchanged at trial as interest added would be exempt. Had the bonds been held in the currency of another country I would have determined the amount to be paid in a compensating payment in Canadian currency on the basis of the exchange rate at trial.

19 To those who would argue that this approach would discourage settlement I can only hope that *The Judgment Interest Act*, Statutes of Newfoundland 1983, c.81, which does not apply to this case will promote early divisions of assets in the future.

20 The Defendant argues that in determining the amount divisible regard must be had to the income tax consequences on negotiation of a R.R.S.P. and a R.H.O.S.P. as well as the tax on the interest on the

Canada Savings Bonds. There are a number of cases in this Province which have determined the amount divisible after an allowance for tax. (e.g. *Lush v. Lush*, F/81/195, U.F.C. unreported, and *Parsons v. Parsons*, F/83/337, U.F.C., unreported.) I am satisfied that this is an equitable approach to the division of assets.

21 In this case the Defendant cashed an R.R.S.P., an R.H.O.S.P. and Canada Savings Bonds. He did so in order to reduce his debts and those of his current partner. He deposited the balance after payment of the debts at a greater interest rate than that earned previously under the different plans. He wishes to have deducted to determine the net amount divisible the increase in income tax payable by him as a result of this action on his part.

22 The Plaintiff points out that the Defendant could have divided the R.R.S.P. without attracting immediate tax consequences by rolling over one-half the R.R.S.P. to her pursuant to s. 146(16) of The Income Tax Act. This would have enabled the Plaintiff to control the timing of any tax consequences to her best advantage. It is not possible to determine the cost to the Plaintiff of this action by the Defendant. I allow \$8,900.00 to the Defendant for the tax consequences of cashing securities in 1982. This amount was calculated by adding to the Defendant's income for 1982 the interest on Canada Savings Bonds on separation, the difference in his R.H.O.S.P. and the Plaintiff's on separation and the balance on separation in the Defendant's R.R.S.P.

23 In summary the savings and securities divisible are as follows:

	Plaintiff	Defendant
Canada Savings Bonds	\$3,000.00	\$13,160.84
R.H.O.S.P.	2,218.61 (A)	12,276.88
Savings Account		703.12
Account		1,000.00
R.R.S.P.		8,318.04
Gold		2,683.85
	\$6,921.73	\$36,439.61
	Less	8,900.00
Net	\$6,921.73	\$27,539.61

(A) Net amount having deducted the \$1,000.00 inheritance and one-third the interest as the appreciation in value of that inheritance.

24 Each party is entitled to \$17,230.67. The Defendant shall pay to the Plaintiff a balancing payment of \$10,308.94.

2. Government Pension

25 There are a number of cases in this Province in which pensions have been held to be matrimonial assets (see for example: *Hierlihy v. Hierlihy* (1981), 33 Nfld. & P.E.I.R. 1, affirmed on this point by Supreme Court of Newfoundland, Court of Appeal, 1981 No. 178, unreported; and *Neary v. Neary*, U.F.C. No. F/80/543, unreported). In the *Neary* case the pension was a Newfoundland Government pension as in this case.

26 The parties do not disagree regarding the characterization of the pension but they leave it to the court to determine how best to divide it.

27 The Supreme Court of Newfoundland, Court of Appeal, in *Hierlihy*, supra, has chosen to adopt the approach of the Court of Appeal of British Columbia in *Rutherford v. Rutherford* (1981), 23 R.F.L. (2d) 337, in respect of pension benefits. That is, a portion of the husband's pension cheque becomes payable to the wife, not as maintenance but as her share of the asset and the husband is made a trustee of his wife's share.

28 In *Rutherford* the date of valuation was the date of separation. The Defendant commenced employment on June 4, 1973. He and the Plaintiff were married and residing together at the time of the commencement of employment. They separated on September 25, 1982. The Plaintiff and the Defendant resided together for 9.3 years during which the Defendant was accumulating pension benefits.

29 The Plaintiff's share may be expressed as $\frac{1}{2} \times 9.3/\text{years of contribution to pension} = \text{factor}$ The resulting factor may be applied to a monthly pension or a lump sum. When the Defendant is in a position to receive a full pension the Plaintiff is entitled to receive a portion of that amount determined by multiplying the lump sum or monthly pension by the factor.

30 The Defendant may retire in 19 years or if he chooses to do so work for another 28 years.

31 In summary in respect of the pension it is ordered that:

(1) The Plaintiff is entitled to that portion of the Defendant's pension which is determined by the formula expressed above;

(2) The Defendant be a trustee of the Plaintiff's share;

(3) The Defendant pay to the Plaintiff that portion of her share when he draws his pension; or

(4) alternatively, if, when the Defendant is entitled to retire and receive full pension, he does not retire the Plaintiff may elect to receive as compensation from the Defendant the amount she would have received had he drawn his pension when the election by the Plaintiff is made;

(5) The Defendant shall if and when it becomes possible transfer to the Plaintiff her share of the pension rights.

(6) The Defendant shall not accept any funds other than monthly payments without first giving the Plaintiff 30 days notice of the proposed payment.

(7) The plaintiff is entitled to receive a portion of death benefits payable to the Defendant's estate. That portion is the benefits payable multiplied by the factor expressed above. The Defendant's personal representative is the Plaintiff's trustee of her share.

(8) The Defendant shall provide the Plaintiff with copies of all communications respecting the pension within two weeks of receipt or sending such communication.

32 Unfortunately, the tax implications of this order are unclear. If the Plaintiff's interest cannot be paid to her without attracting liability to the Defendant then leave is granted to the parties to apply for a further order to ensure each party will bear his or her appropriate share of tax liability.

3. Land at Thunder Bay

33 In March, 1982, the Defendant received as a gift from his parents land at Thunder Bay, Ontario. I accept the Defendant's evidence that the land was given to him at that time by his parents to avoid the impact of estate tax in the future. Mr. Ridler's siblings received a similar gift. The land has not been developed. As far as the Defendant is aware it is still being farmed by his father.

34 There was nothing on the evidence to suggest this property is a matrimonial home. Further, I find it is not a matrimonial asset under the Act as it falls within the exception provided by s. 16(1)(b)(i). Its ownership is governed by the law of Ontario (see s. 30(2) of the Act).

4. Costs

35 Each of the parties has been in part successful in the positions taken. However, the Defendant before trial had not been as forthright as he might be with information regarding his pension and his unnecessary action in cashing securities prevented the roll over, which could have benefited both parties. The Plaintiff shall have her taxed costs.

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