

CANADA / JUDGMENT

Gendron v. Gaudreault

[1978] 1 SCR 810

COURT

Supreme Court of Canada

DECIDED

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Date

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Report

[1978] 1 SCR 810

Judges

Ritchie, Roland Almon; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Quebec

Subjects

Family law

Decision Content

Supreme Court of Canada

Gendron v. Gaudreault, [1978] 1 S.C.R. 810

Date: 1977-06-24

Cécile Gendron (Plaintiff) Appellant;

and

Armand Gaudreault (Defendant) Respondent.

1976: June 14; 1977: June 24.

Present: Ritchie, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Matrimonial law—Marriage contract—Lack of assistance to a minor—Absolute nullity—Estoppel—Civil Code, art. 1267, replaced by art. 1262 (1969 (Que.), c. 77, s. 26).

The parties, who were married on September 1, 1947, had signed a marriage contract in which they adopted the regime of separation of property. Appellant failed to tell the notary that she was a minor and signed the marriage contract alone, along with the future husband and the notary. She sought by her action, which was brought in 1969, to have the marriage contract declared null. The Superior Court allowed the action on the grounds that a marriage contract signed by a minor who is not assisted in accordance with the old art. 1267 of the Civil Code is absolutely null. Appellant was ordered to pay all costs since her failure to inform the notary that she was a minor was held to be reprehensible. The Court of Appeal reversed this judgment primarily on the grounds that twenty-one years after the marriage appellant could not be allowed to rely on her misrepresentation to the notary regarding her age. The Court also accepted the theory that a marriage contract entered into by an unassisted minor is subject to relative nullity. In a dissenting opinion, Gagnon J.A. expressed the view that such a contract must be held to be absolutely null.

Held: The appeal should be allowed.

The marriage contract of a minor who is not assisted by a person whose consent is necessary to the validity of the marriage is absolutely null. In the absence of legislation, absolute nullity is more compatible with the special nature of the marriage contract, the formalities prescribed by the Code and the old art. 1267 of the Civil Code.

There is no basis for the estoppel: the trial judge found it reprehensible that appellant did not inform the notary that she was a minor but he did not speak of fraud or misrepresentation as the Court of Appeal did. If he orders appellant to pay the costs, it is because a judgment must be obtained in order to set aside an authenticated document such as the marriage contract and because appellant, by her conduct, made this judgment necessary. He did not take this fact into account in so far as the merits were concerned. The trial judge saw and heard the parties and the notary and there are no grounds for going beyond his dispositions of the case.

Dame Daniel v. Meunier, [1970] C.S. 601; Pelet c. Julien, D.P. 1855. 1. 101; Larrive c. Barsajol, D.P. 1872. 1. 346; Bourde de la Rogerie c. Gobé, D.P. 1880. 1. 415; Besse c. Besse, D. 1972. 173; Garage Maurice Girard Ltée v. Hénault, [1963] C.S. 253; Lebaudy c. Odin, D.P. 1895. 2. 25; Lebaudy c. Hanon, D.P. 1899. 1. 439, referred to.

APPEAL from a decision of the Court of Appeal of Quebec[1] reversing a decision of the Superior Court. Appeal allowed.

Maurice Chevalier, for the appellant.

Roger Lajeunesse, for the respondent.

The judgment of the Court was delivered by

BEETZ J.—The question at issue is one that has long been disputed in civil law both in France and in Quebec: whether the nullity of the marriage contract of a minor for lack of assistance from a person whose consent is necessary to the validity of the marriage is absolute or relative.

The Quebec legislator put an end to the dispute by replacing the old art. 1267 C.C. with art. 1262 C.C., which enacts relative nullity subject to a prescription of one year after the age of majority is reached (1969 (Que.), c. 77, s. 26). This amendment, however, does not affect the case at bar, which was prior to it.

The following are the circumstances that gave rise to the case at bar.

Respondent and appellant were married on September 1, 1947. The act of marriage was signed by the priest, the parties and their two witnesses, one of whom was the bride's father. This act described appellant as the minor daughter of Arthur Gendron and stated that the marriage took place with the consent of the father of the minor party. It also mentioned that [TRANSLATION] "the parties state that they have signed a marriage contract before Mr. Jean-Marie Bonin, Notary, at Montreal".

The marriage contract was signed at Montreal on August 29, 1947. In it the future spouses adopted the regime of separation of property in accordance with the provisions of art. 1422 et seq. (old Code); the future wife renounced dower in consideration of furniture valued at \$1,200 for the matrimonial domicile, to be given by the future husband, and of furniture valued at \$800, which he undertook to purchase. The future husband, however, reserved a life usufruct on this furniture and made the right of the future wife to alienate it subject to his consent. The future husband gave the future wife \$5,000 in contemplation of death and agreed to guarantee this amount by means of insurance on his life. The future wife gave him in contemplation of death all furniture belonging to her on the day of her death.

Appellant did not tell the notary that she was a minor. The marriage contract describes her as the daughter of legal age of Arthur Gendron and Dame Maria Demers. She signed the marriage contract alone, along with the future husband and the notary.

Appellant's minority and the absence of assistance from her father when the marriage contract was signed are admitted.

Appellant sought by her action, which was brought in January 1969, to have the marriage contract declared null; she also sought a declaration that the parties contracted marriage on September 1, 1947 under the regime of community of property.

Bard J. of the Superior Court allowed the action, primarily on the grounds that the marriage contract signed by a minor who was not assisted in accordance with the requirements of the law is absolutely null. He ordered appellant to pay all costs, however, because he found it reprehensible that she had failed to inform the notary that she was a minor.

The Court of Appeal reversed this judgment by majority decision. Owen and Brossard JJ.A. expressed the opinion that twenty-one years after the marriage appellant should not be allowed to rely on her own misrepresentation to the notary regarding her age. In their view, the nullity of the contract is relative since it was ratified by appellant, who received certain furniture, and by her father, who signed the act of marriage just before the ceremony, and since, in addition, appellant neither alleged nor proved any lesion. Finally, the majority of the Court doubted that art. 2233 C.C. had the effect of suspending prescription between spouses where the nullity of their marriage contract is concerned. Prescription would, in this case, be for ten years in accordance with art. 2258 C.C. and appellant's action would be prescribed. In an elaborate dissenting opinion, the late Gagnon J.A. opted for the theory of absolute nullity. This would suffice to affirm the trial judgment, but he nevertheless replied to his colleagues on the other points and expressed the view obiter that, even if the nullity were relative, appellant's action should be allowed.

This division of opinion reflects a similar division in both case law and legal theory in Quebec and in legal theory in France. French case law, however, has consistently supported the theory of absolute nullity for more than a hundred years.

Those who support relative nullity are themselves divided: some incline to an ordinary relative nullity that can be invoked by the minor only on grounds of lesion; others believe that it is not necessary for the minor to prove lesion in order to succeed; still others hold that the minor does not have to prove lesion when he has alienated an immovable; and, finally, some maintain that it is a relative nullity subject to a special regime whereby only the spouse of the incapable person—but not those entitled to act for him—is denied the remedy of nullity.

The two most thorough judicial analyses that I know of in Quebec are those of Gagnon J.A. in the case at bar and of Bélanger J., who was not yet a member of the Court of Appeal, in *Dame Daniel v. Meunier*[2], Bélanger J. opts for relative nullity. It appears to me that everything has been said on both sides in these two decisions and in the numerous opinions to which they refer, and I feel it is unnecessary for me to add to the body of legal writing on this subject. Only the choice remains. My opinion regarding the absolute nullity of the marriage contract is substantially the same as that of Gagnon J.A. and I can add very little to what he has written.

I will merely mention first of all, in support of his opinion, four judgments of the Cour de cassation: *Pelet c. Julien*[3]; *Larrive c. Barsajol*[4]; *Bourde de la Rogerie c. Gobé*[5]; and *Besse c. Besse*[6]. This last judgment is subsequent to the July 13, 1965 law but concerns prior events; it is on the French law of 1965 that the Quebec legislator apparently based his 1969 amendment of the old art. 1267 C.C. *Besse c. Besse* reverses a decision of the Court of Appeal of Paris which, perhaps influenced by the new legislative policy, departed from the consistent opinions of the

Cour de cassation.

The practice of the Cour de cassation seems to me to carry particular weight because art. 1398 of the old French Civil Code does not distinguish, like our old art. 1267 C.C., between benefits conferred on third parties by the minor in his marriage contract and the other covenants and gifts which may be made in such a contract. The analysis of Gagnon J.A. is based partly on this distinction, thus giving the force of an argument a fortiori to the decisions of the Cour de cassation.

The argument of Bélanger J. in *Dame Daniel v. Meunier*, supra, assumes that in view of the first paragraph of art. 763 C.C. the minor may validly consent by his marriage contract to gifts to third parties. This point of view, on which Gagnon J.A. expresses no opinion, as in fact I will not either, is also disputed: Billette, J.E., *Traité de droit civil canadien*, 1933, Vol. I, No. 196; Comtois, Roger, “Essai sur les donations par contrat de mariage” (1967), 70 R. du N. 445, at pp. 451 et seq. The last of these judgments of the Cour de cassation, *Besse c. Besse*, supra, is based solely on the fact that [TRANSLATION] “the matrimonial agreement affects not only the spouses and their heirs and assigns ... it also affects third parties in their relationship with the married couple”. Previous judgments also cited the principle of the immutability of the matrimonial regime, an argument that has been sharply criticized. I am not sure that it is entirely without value, when it is joined to the other argument since it makes determination of the true matrimonial regime depend on all those affected, and not only on the convenience of one of the contracting parties, or even of both parties if they live in harmony.

Like many authors, the majority of the judges on the Court of Appeal cite the absence of any legislation providing for absolute nullity. There is no doubt whatever that the contract is null. If there were a provision imposing relative nullity, it would obviously have to be obeyed. In the absence of any legislation, however, we must opt for the type of nullity most compatible with the particular nature of the agreement and the formalities accompanying it.

There remains the estoppel, on the assumption that it should be applied even in the case of absolute nullity. With all due respect for the contrary view, I see no basis for it. Three days before the wedding, a woman who is a minor is taken before a notary she does not know by her fiancé, who is almost ten years older than she is. The interview lasts for a few minutes. A marriage contract is read and the woman signs it. The trial judge, who saw and heard this woman, her husband and the notary, found it “reprehensible” that appellant did not inform the notary that she was a minor, but he does not go so far as to speak of a fraudulent act or a misrepresentation as the majority on the Court of Appeal did. He summarizes the testimony given by appellant and respondent as follows:

[TRANSLATION] Plaintiff has stated that her age was not mentioned during the meeting with the notary; that she went there only once, to sign the marriage contract, which was ready; and that she did not know the notary at that time. Defendant says the question of plaintiff's age did come up before the notary and that she said she was of legal age; that he himself did not know plaintiff's exact age at the time and that if she had said that she was a minor, the marriage contract would not have been signed on that occasion.

Having noted this contradiction, the trial judge does not return to it in so far as the merits are concerned. If he orders appellant to pay the costs, it is because a judgment must be obtained in order to set aside an authenticated document such as the marriage contract and it is appellant who made such a judgment necessary:

[TRANSLATION] With regard to costs, the Court, exercising its discretion in this matter, is of the opinion that plaintiff should pay all costs, including those of the contestation, for the following reason.

The present dispute arises from the reprehensible fact that plaintiff, who was a minor, stated on a notarized document that she was of legal age, thereby misleading the notary and her future husband. Since the document is authenticated, it can be set aside only by judgment, so that plaintiff was obliged to institute proceedings. In view of the element of doubt concerning absolute or relative nullity, defendant was obliged to contest the action, even in the general interest. Since plaintiff by her action brought about proceedings that otherwise would not have taken place, it is only fair that she pay all the costs of such proceedings.

I conclude from this that if the contract involved had been of a type that could be set aside by some method other than judgment, for example by a subsequent agreement, the trial judge might have awarded the costs differently.

In a part of her testimony that was not contradicted appellant stated that the marriage contract was ready to be signed when she arrived at the notary's office and that her fiancé had told her of certain benefits that she would receive under the contract. Respondent admitted that he knew appellant was a minor when he met her but said he thought she was of age when the contract was signed. He claimed that he never knew her exact age. However, it would have been easy to ascertain appellant's true age: the priest made no mistake about it. In view of these circumstances, I would not go beyond the dispositions of the case by the trial judge.

If it were necessary to go further, art. 1003 C.C. would have to be considered. The legislator's first aim in providing special formalities for the marriage contract of a minor was to protect the family and third parties, but he also took into consideration the inexperience and susceptibility to influence of an incapable person. These factors link up with the principle of art. 1003 C.C., which could perhaps be extended to the case of an agreement that has been pronounced absolutely null when there has been neither fraud nor falsification. (See, by analogy, *Garage Maurice Girard Ltée v. Hénault*[7]; see also *Lebaudy c. Odin*[8]; *Lebaudy c. Hanon*[9], art. 1307 of the French Civil Code on which these latter judgments are based is worded more generally than our art. 1003 CC but it follows arts. 1305 and 1306 dealing with lesion against a minor.)

I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the trial judgment, with cost in this Court and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: Maurice Chevalier, Montreal.

Solicitors for the respondent: Lafontaine & Lajeunesse, Montreal.

[1] [1974] C.A. 33.

[2] [1970] C.S. 601.

[3] D.P. 1855. 1. 101.

[4] D.P. 1872. 1.346.

[5] D.P. 1880. 1.415.

[6] D.P. 1972. 173.

[7] [1963] C.S. 253.

[8] D.P. 1895. 2. 25.

[9] D.P. 1899. 1. 439.

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