
CANADA / JUDGMENT

P. (R. E.) v. P. (M.)

2003 BCCA 130

COURT

British Columbia Court of Appeal

DECIDED

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Court of Appeal for British Columbia

Citation:

R.E.P. v. M.P.

2003 BCCA 130

Date: 20030303

Docket: CA027354

Between:

R.E.P.

Plaintiff

(Respondent)

And

M.P.

Defendant

(Appellant)

Before:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Lambert

The Honourable Mr. Justice Thackray

B.E. Bulmer

Counsel for the Appellant

R.S. Tretiak, Q.C.

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

January 17, 2003

Place and Date of Judgment:

Vancouver, British Columbia

March 3, 2003

Written Reasons by:

The Honourable Mr. Justice Thackray

Concurred in by:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Lambert

Reasons for Judgment of the Honourable Mr. Justice Thackray

- [1] This appeal is from a Supreme Court of British Columbia order pronounced 30 May 2000 reflecting the reasons for judgment of Madam Justice Humphries following a trial in which the division of assets between the parties was the major issue.
- [2] The tenor of this case is well illustrated in the opening paragraphs in the competing factums. The appellant, M.P., states that the parties "lived together from 1977." The respondent, R.E.P., says it was 1978. The appellant states that they married in 1980. The respondent says they married in 1982. The appellant states that she was told by the respondent in 1996 that he wished to separate. The respondent says that they lived "separate and apart in the home from 1995 when the wife left the matrimonial bedroom in July 1995."
- [3] The parties presented to the trial judge a difficult task and they have not made it any easier for this Court. The trial judge noted that a schedule of assets was filed by each party but that they "do not correspond". She worded it well when she said "There is a bewildering array of assets in dispute and they vary widely in significance and value."
- [4] Even yet, the parties cannot give to the Court a clear picture as to one of the major assets: the inheritance. In fact, they do not even agree as to whether the asset in question is an inheritance much less as to its value.

- [5] The failure or refusal of the parties to agree upon basic matters, to say nothing of disagreement about the division and value of every asset of any substance, might account for the trial, that commenced in August 1998, stumbling along in October of that year and then further in April, May and July of 1999. Written submissions by counsel were filed in October 1999 and in February and April 2000.
- [6] Subsequent to the release of her reasons for judgment the trial judge held a hearing on 26 October 2001 on an application to reopen the trial on the issues of reapportionment and spousal maintenance. She gave oral reasons on that day dismissing the application. However, she reserved judgment on an application to rule on the transfer of assets. She ordered that written submissions and a list of questions be directed to the Registrar.
- [7] The written submissions were filed in November 2001. A hearing was held on 12 December 2001. On 4 June 2002 Madam Justice Humphries issued reasons which directed a hearing by the Registrar as to the value of the assets. That hearing, unfortunately, has not yet been held. On the hearing of this appeal, Mr. Justice Lambert expressed his reservations, because of the piecemeal approach, as to whether the parties would have a right of appeal to this Court from any decisions made in the future by the Registrar.
- [8] The conduct of this litigation was a significant problem for the trial judge. At the conclusion of the evidence she commented, with respect to retaining in her memory all of the evidence, that her "immediate sense of the evidence is lost." She encouraged the parties to try to attain a settlement or, failing that, to file their written submissions without delay. It is a credit to the trial judge that she was able to produce reasons for judgment in as timely a way as she did.
- [9] In order to give some context to these reasons I will set forth, as accurately as possible in the circumstances, some background.

Background

- [10] Both M.P. and R.E.P. are in their mid-50's. R.E.P. is a lawyer. He met M.P. when she attended upon him as a client. M.P. is a certified dental assistant. They began living together in the late 1970's at which time R.E.P. was in the midst of a divorce. The trial judge concluded that they were married in April of 1982. They separated in the mid-1990's. The trial judge held that "the separation took place more than a year prior to trial" and granted a divorce. There are no children of the marriage.
- [11] When they began living together it was in a house on Brodie Road, Delta, that was owned by M.P. M.P. sold that house and together the parties purchased a home on 56th Street in 1980. M.P. claims that she put all of the proceeds of the sale of the Brodie Road home into the 56th Street house. R.E.P. says that she contributed \$80,000 towards the new house and put the balance in "her own account" but used some of that to purchase furniture. R.E.P. paid the \$1,000 deposit and guaranteed the \$67,100 mortgage.

- [12] In 1992, the parties bought a farm in Delta and M.P. sold the 56th Street house.
- [13] The parties agree that they both worked full-time throughout the marriage. R.E.P. says his net professional income was \$51,232 in 1995, \$28,721 in 1996 and \$17,005 in 1997. His taxable income from the practice of law was \$15,270 in 1998. R.E.P. claims that M.P.'s income exceeded his. M.P. submits that they earned "equivalent income" and all of her income "went to the family." R.E.P. does not agree.
- [14] R.E.P. had, and continues to have, significant health problems. The trial judge noted that he had a period of good health in the late 1980's but that his health deteriorated thereafter. The trial judge said "his malady remains undiagnosed." R.E.P. claims that his condition is one of multiple sclerosis. M.P. accepts that the symptoms are consistent with multiple sclerosis. R.E.P. asserts that it adversely affects his ability to practice law and that his condition is deteriorating.

Reasons for Judgment of the Trial Judge

- [15] The trial judge set out the position of the parties in her reasons. I will repeat what she said and note that the position taken by the parties remains the same on this appeal.
- [21] In very general terms, M.P. takes the position that all assets held by either spouse or by Antenna Farms Inc. are family assets and should be divided equally. R.E.P. takes the position that only the matrimonial home on the farm is a family asset, and everything else, aside from a few individual items, is not. He submits that any family assets should be reapportioned in his favour because they were acquired through significantly larger contributions on his part or through inheritance, and because M.P. has not supported him in his deteriorating physical condition which affects not only his self-sufficiency but his anticipated future expenditures for health care.
- [16] The trial judge concluded that what M.P. brought into the marriage was a contribution of \$80,000 towards the purchase price of \$147,000 for the 56th Street house plus a purchase of expensive leather furniture. (M.P. submits that she also brought into the marriage a government pension from employment and a car.)
- [17] The trial judge held that the assets that R.E.P. brought into the marriage were a 36 foot boat, a Bronco motor vehicle, a gun collection, two short wave radios, an interest in a law practice, a settlement from a previous law partnership (between ten and fifteen thousand dollars), some furnishings, tools and an RRSP which the trial judge said had a value of \$19,000 at the time of the marriage and which R.E.P. claimed had a value at the time of the trial of \$78,000.

- [18] The trial judge reapportioned the farm 65% in favour of R.E.P. She further held that M.P. was not entitled to any share "in the inheritance, other than the portion that was used to purchase the farm." The trial judge said "R.E.P. inherited cash, shares in P. Holdings, art, carvings, silverware, etc." The appellant's factum says that the carvings had a value of \$118,000.
- [19] A determination as to how the financing of the purchase of the farm evolved requires a consideration of P. Holdings Ltd., a family company, and of an inheritance by R.E.P. This is a most convoluted matter in this litigation and I will deal with it later in these reasons.
- [20] The trial judge determined that bank accounts, securities accounts, a contingent interest in the estate and outstanding mortgage funds belonged to Antenna Farms Inc., the new name for P's Holdings Ltd., and were not family assets. However, a portion of the funds on deposit in a Midland Walwyn account that was attributable to the sale of the 56th Street house, together with accrued interest, was to be divided equally between the parties.
- [21] It was held by the trial judge that the law practice, including a Toyota Forerunner and a strata lot in which the practice was situated, were family assets. She said that R.E.P. brought the practice into the marriage, needed it for his livelihood and that M.P. had not been required to make sacrifices to allow R.E.P. to maintain his law practice. She therefore concluded as follows:

In view of their respective roles and contribution and the other relevant factors as set out in section 65 [of the Family Relations Act], I reapportion the law practice 80-20 in R.E.P.'s favour, minus the vehicle, which has always been used by R.E.P., and which is reapportioned 100% to him.

- [22] On the basis that the "parties brought their assets into the marriage with the intention of working together and sharing responsibilities, duties and benefits", the trial judge held that the joint bank accounts, RRSPs and pension would be equally divided. However, there were to be adjustments so that M.P. could maintain her pension undivided and so that R.E.P. could offset his RRSP contribution after the section 57 declaration, as that was purchased with money from the inheritance and thereby was not a family asset.
- [23] Boats and a boathouse were held to be family assets to be divided 80% in favour of R.E.P. Guns, taxidermy and radios brought into the marriage by R.E.P. were held to be family assets but were reapportioned solely to R.E.P. Some jewellery was identified by the trial judge and reapportioned, mainly to R.E.P. Art and some carvings were reapportioned solely to M.P. as was her car.
- [24] The claim of M.P. for spousal maintenance was dismissed.

The "Inheritance"

- [25] Prior to 1978, possibly as early as 1960, R.E.P. owned 82 non-voting shares of P. Holdings Ltd. Mrs. P. Sr. died in 1977 and pursuant to her will 50 voting shares and 161 non-voting shares were transferred to each of R.E.P. and his brother, K. in March 1981. The voting shares had a nominal value of \$1.00 each. The non-voting shares were the equity shares.
- [26] In May 1991 R.E.P.'s father gifted fifty voting shares to R.E.P. and 49 to K. In June 1991 the company redeemed the father's 314 shares by way of a tax-free capital dividend of \$449,891 paid by the company. This money made up part of the cash in the father's estate when he died on 4 July 1992.
- [27] In August 1992 the company redeemed K.P.'s 99 voting shares and his 243 non-voting shares. R.E.P. thereby owned all of the issued common shares of P. Holdings Ltd. On 13 November 1992 he changed the name to Antenna Farms Inc.

[28] In his examination in chief R.E.P. testified about this as follows:

Q. And what occurred to P. Holdings? What was the disposition of that?

A. In 1991, when my father was quite sick we went through a complicated share redemption whereby, I believe it was 313 Class B non-voting shares held by my father, were redeemed by the company. That is where a good deal of the cash in my father's estate came from. At the same time, my father gifted 50 Class A shares and - to myself and 49 Class A shares to my brother. The understanding was that the control, daily operation and the income from P. Holdings would continue to flow to my father and that is what happened.

Q. And?

A. On my father's death, I took control of the corporation.

Q. And?

A. In the sense, My Lady, in the sense that I had one share more than my brother, but the arrangement was with my brother. He did not want to stay interested in the company and so after my father's death, his shares in the corporation were redeemed by the corporation, leaving me with sole control of the corporation.

- [29] Mr. P. Sr. left an estate of in excess of two million dollars. He bequeathed a life interest of \$500,000 to his wife of which the residue was on her death to be shared by R.E.P. and his brother. Mrs. P. Sr. died during the course of the trial and R.E.P. thereupon became vested of \$250,000. The trial judge declined to reopen the trial to consider this event.
- [30] R.E.P. testified that his father's house was sold for \$1.3 million and that there was also \$819,000 cash in the estate. By deducting the \$500,000 to be held in trust plus probate expenses the trial judge calculated that there was \$313,000 in cash to be shared equally by R.E.P. and his brother. This figure was rounded off at \$310,000 resulting in a cash inheritance by R.E.P. of \$155,000. The brother's \$155,000 was borrowed by R.E.P. and put into the purchase of the farm.

The Farm

- [31] In 1992 the parties decided to buy a farm on 96th Street in Delta. The trial judge noted that,
- [6] The couple moved onto a farm in Delta in January of 1993. Forty five percent of the farm is owned jointly by Mr. and Mrs. P. Fifty five percent of the farm is owned by Antenna Farms, Inc., a company managed entirely by R.E.P., who contends that the company is not a family asset.
- [32] M.P. claimed an interest in the entire farm. R.E.P. asserted that only the residence should be considered a family asset. The trial judge noted that the parties agreed that money from the inheritance was needed to finance the purchase of the farm.
- [33] The trial judge found that Antenna Farms Inc. contributed \$380,525 to the purchase of the farm. This amounted to 55% of the total purchase price.
- [34] The trial judge held that the other 45%, amounting to \$311,388, came "from Mr. P's inheritance and from M.P.'s contribution of \$31,657.00, which was her share from the proceeds of the sale of the 56th Street property (half of \$63,314.40)."
- [35] On this appeal M.P. agrees that she realized that "some inherited money would be used." She also submits that she contributed \$63,000 towards the farm and subsequent improvements. R.E.P. contends that there was no contribution by M.P. to the purchase but seems to concede that she contributed \$25,000 towards repayment of the loan made to R.E.P. by his brother.
- [36] The trial judge found that the portion of the inheritance that R.E.P. put into the farm became mingled with family assets and would have to be dealt with in the same manner as the farm, about which the trial judge held as follows:
- [38] I am of the view that the farm, including the interest of Antenna Farms Inc. in it, was a family asset in its entirety. I am persuaded the farm was purchased for the family. Notwithstanding the effort of R.E.P. to keep the inheritance money separate from everything else, he clearly used this portion of it for a family purpose. This was a family project and treated as such by both M.P. and R.E.P. R.E.P.'s financial contribution to the farm was substantially greater than M.P.'s, through the use of his inheritance, but her work on the home and around the farm was greater than his. Given the difference in contribution and all the other factors surrounding the farm and its acquisition, including the length of time it constituted the family home, I am satisfied that R.E.P. has established that an equal division of this asset would be unfair. I find that the farm, which includes the manufactured home, any profits from the sale of the truck and the insurance proceeds from the All Terrain Vehicle, should be apportioned 65-35 in favour of R.E.P.

Conclusions

[37] The appellant submits that a legal error was made by the trial judge in separating out assets owned by the company and distributing them unequally. She says there is no legal basis for this and refers to s.58(3) of the Family Relations Act, R.S.B.C. 1996 c.128, which provides that it is the shares of a company that form the family asset, not the company assets.

Section 58(3) reads as follows:

the definition of family asset includes the following:

- (a) if a corporation or trust owns property that would be a family asset if owned by a spouse,
- (i) a share in the corporation

[38] The respondent does "not concede" that there was an error in not applying section 58(3) but says if there was "it was of no consequence." I agree. If the trial judge had divided the shares she would have done no more than equate the share value that went into the farm to the remainder of the shares, and apportion this remainder to R.E.P. Monetarily this would have made no difference to the result that she attained.

[39] A further error alleged by the appellant is the trial judge's conclusion that the company shares were inherited. Counsel for the appellant submitted that "The trial judge seemed to think that everything in the name of the company was inherited. The fact is that R.E.P. had 243 of the 800 common shares as early as 1981."

[40] On this appeal, R.E.P. maintained that the trial judge's conclusion was correct and in keeping with the findings in "P." v. "P." (1980) 20 B.C.L.R. 393 (S.C.), the action arising out of R.E.P.'s first marriage. Therein Mr. Justice Wetmore said as follows:

The husband owns a minority interest in [P. Holdings Ltd.] in the form of non-voting shares in this company. It is a corporation set up by his father basically for estate and tax planning purposes. The husband and his brother own 82 non-voting shares, the father owns the balance of the 1,000 shares issued, which are the voting shares. These shares were given to the husband long before the marriage. I have nothing in evidence to indicate the 82 shares of the respondent husband were ever used for a family purpose or that the petitioner wife ever made a contribution directly or indirectly to the acquisition or operation of that holding.

[41] My analysis of the chronology of the shares in the company satisfies me that the trial judge's conclusion in the case at bar that R.E.P. acquired his interest in the company by inheritance is basically correct. There were 82 shares owned by R.E.P. before any inheritance took place but to say that the company was, in effect, gained by inheritance is not a misnomer as the majority of R.E.P.'s equity in the company was received in that manner.

- [42] The appellant further submits that the timing of the receipt of the equity in the company has significance. The point she makes is that R.E.P.'s equity position has remained the same since inheriting his mother's shares in 1977, because the share transactions that occurred later were simply share redemptions. That is, the asset, in terms of value, has been held in its entirety by R.E.P. since 1977.
- [43] However, in my opinion, that does not bear upon the finding of the trial judge that there was no evidence that M.P. could be said to have "had any expectations concerning the inheritance." She also held that there was no evidence that the equity that R.E.P. had in the company, apart from that in the farm, was "used for family purposes, either directly or indirectly."
- [44] The trial judge held that R.E.P. "did maintain the degree of separateness required to rebut the allegation that these [various accounts and income from the inheritance] are family assets apart from that portion used to purchase the farm."
- [45] What she said is as follows:
- [49] In respect of the various accounts and sources of income which derived from the inheritance (apart from that portion used to purchase part of the farm), I am satisfied that R.E.P. has proven that he did maintain the degree of separateness required to rebut the allegations that these are family assets, notwithstanding the deposit of the 56th street moneys into the investment account. There was no evidence from which I could conclude that M.P. had any expectations concerning the inheritance, which accrued to R.E.P. in 1991 near the end of the marriage. In fact, she had no knowledge of any of it, except insofar as it helped purchase the farm. This would not in itself protect these assets from a claim by her, but there is no evidence that the rest of the inheritance was used for family purposes, either directly or indirectly. All the evidence is to the contrary. M.P. assisted in some way with the duties which came with the death of R.E.P. senior, but given all the circumstances, this is not a situation where she is entitled to share in the inheritance, other than the portion that was used to purchase the farm.
- [46] It is not, in my opinion, open to this Court to say that the trial judge's findings of fact as set out above contain any errors, much less palpable ones. Nor can it be said that her conclusion as to the disposition of the asset contained any legal error. Consequently, whether it be called an inheritance or a gift, and whether it vested in 1977 or much later, I would not vary her disposition of the inheritance.
- [47] I would further note that while the trial judge found that "this is not a situation where she [M.P.] is entitled to share in the inheritance", that finding was subject to a major exception - that exception being that the lack of entitlement to share in the inheritance was "other than the portion that was used to purchase the farm." Consequently M.P. does share in the inheritance to the extent that this Court decides that she is to share in the farm.

- [48] With respect to the farm, the trial judge rejected the submission of R.E.P. that only the farm residence should be a family asset. I agree with that conclusion and that the interest of Antenna Farms Inc. in the farm is a family asset.
- [49] That leaves for consideration the trial judge's reapportionment of the farm whereby 65% of the entire farm was to go to R.E.P.. Section 56 of the Family Relations Act provides for an equal division of assets between divorcing parties. A power to vary that division is contained in section 65 of the Act, which sets out the criteria required to avoid unfairness. With respect to section 65 of the Act, and in particular the listed factor of "duration of the marriage", the trial judge said as follows:
- [65] This was a marriage of fairly long duration, although not a traditional one in the usual sense as both parties pursued careers and M.P.'s children were grown. Both parties shared responsibilities and duties in varying degrees and worked together at a common enterprise - their marriage and the accumulation and preservation of property. This has been reflected in the division of assets.
- [50] The trial judge noted that it was not contested that M.P. did a large amount of work on the farm residence. She also held that M.P. "contributed a large amount of work to the farm as a whole, not just the residence", that "the farm was purchased for the family" and that "this was a family project treated as such by both R.E.P. and M.P." This grounds the appellant's submission that the farm should be equally divided.
- [51] However, the trial judge held that, considering R.E.P.'s use of "inheritance" money, his financial contribution "and all other factors" more than offset the fact that M.P.'s "work on the home and around the farm was greater than his." She thereby apportioned the farm 65% in favour of R.E.P.
- [52] Mr. Justice Lambert in *Murchie v. Murchie* (1984), 39 R.F.L. (2d) 385 (B.C.C.A.) held at 387: it is proper to look at the totality of the assets and the equality of ownership given by s.43 [now 56]. It is also proper to look at each individual asset and decide whether that asset should remain in equal ownership as tenants in common or whether that would be unfair within the meaning of s.51 [now 65].
- [53] Until the Registrar's hearing is completed and values are assigned it cannot be calculated how equally dividing the farm, as opposed to the 65/35 division held by the trial judge, would affect the total monetary division. The parties' monetary analysis on this appeal vary so widely as to be of no value. However, assigning to the farm a rough value of \$1.2 million, an equal division would give to M.P. a further \$180,000.

[54] Looking at both the "totality of the assets" and at the farm as an "individual asset" I am of the opinion that the farm should be divided equally. While the state of the evidence does not allow for a proper quantification of an equal division of the farm, I am satisfied that an equal division would be in keeping with the provisions of sections 56 and 65 of the Act. That is, the application of section 56 would not be unfair to R.E.P. Further, in my opinion, it would satisfy the principle of allowing M.P. to be self-sufficient.

[55] I would dismiss the appeal on the issue of spousal maintenance.

Summary

[56] I would vary the trial judge's reapportionment of the assets only to the extent of equally dividing the farm in its entirety.

[57] I would dismiss the appeal on the issue of spousal maintenance.

[58] I would record the agreement reached by the parties during the course of this appeal that the value of the boat (including the trailer and boathouse), the RRSPs, the land (farm) and the law practice including the strata title be set by the Registrar. Further that the boat, RRSPs and law practice will be valued as of 31 May 2000 and that the land will be valued as of the date of the hearing before the Registrar.

"The Honourable Mr. Justice Thackray"

I AGREE:

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Mr. Justice Lambert"

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