1 of 1 DOCUMENT

Martin v. Martin

8 O.R. (3d) 41

[1992] O.J. No. 656

Action No. 888/91

ONTARIO
Court of Appeal for Ontario,

Goodman, Tarnopolsky and Osborne JJ.A.

March 2, 1992

Family law -- Property -- Right of first refusal -- Motions court judge erring in granting spouse right of first refusal as part of order for sale of matrimonial home -- Family Law Act, 1986, S.O. 1986, c. 4, s. 10.

A motions court judge on an interlocutory application under the Family Law Act, 1986 ordered the sale of a jointly owned matrimonial home and acceded to the husband's request that he be granted a right of first refusal. The wife appealed the granting of first refusal rights to the husband, disputing the jurisdiction of the motions court judge to make the order as well as the correctness of the order. The appeal was dismissed. The wife appealed further.

Held, the appeal should be allowed.

The right of first refusal was dependent upon the motions court judge's jurisdiction to order the sale of the matrimonial home. He concluded that he had that jurisdiction under s. 10 of the Family Law Act, 1986. However, the scope of s. 10 is limited to cases where there has been an application to determine a question of ownership or possession. In this case, the parties did not raise any question of ownership or possession; accordingly, s. 10(1)(c) of the Act did not, in the circumstances, provide authority to order the sale of the parties' matrimonial home.

Although there was clear jurisdiction under the Partition Act to order the sale of the matrimonial home, an order directing the sale of a matrimonial home before trial should only be made in cases where, in all the circumstances, such an order is appropriate. Orders for the sale of a matrimonial home made before the resolution of Family Law Act issues should not be made as a matter of course.

Because the order for sale could not be made under s. 10 of the Family Law Act, 1986 , its provision granting authority to make "ancillary" orders and directions could not provide the required statutory authority for granting one spouse a right of first refusal.

A right of first refusal is a substantive right which has economic value and which falls outside the boundaries of what is ancillary to, or what is reasonably necessary to implement, the order for sale of the matrimonial home. The motions court judge erred in concluding that the right of first refusal would not prejudice the wife.

Arlow v. Arlow (1991), 33 R.F.L. (3d) 44 (Ont. C.A.), distd

Other cases referred to

Batler v. Batler (1988), 67 O.R. (2d) 355, 18 R.F.L. (3d) 211 (H.C.J.); Binkley v. Binkley (1988), 14 R.F.L. (3d) 336 (Ont. C.A.); Dibattista (in trust) v. Menecola (1990), 75 O.R. (2d) 443, 74 D.L.R. (4th) 569, 42 O.A.C. 44, 14 R.P.R. (2d) 157 (C.A.); Rawluk v. Rawluk, [1990] 1 S.C.R. 70, 71 O.R. (2d) 480 (note), 65 D.L.R. (4th) 161, 36 E.T.R. 1, 103 N.R. 321, 38 O.A.C. 81, 23 R.F.L. (3d) 337; Silva v. Silva (1990), 1 O.R. (3d) 436, 75 D.L.R. (4th) 415, 42 O.A.C. 5, 30 R.F.L. (3d) 117 (C.A.)

Statutes referred to

Family Law Act, 1986, S.O. 1986, c. 4 (now Family Law Act, R.S.O. 1990, c. F.3), Parts I, II, ss. 9, 10, 10(1), 10(1)(a) to (d), (c), 19, 21, 23, 24 [am. 1989, c. 72, s. 18], 24(1)(f)
Partition Act, R.S.O. 1990, c. P.4, s. 2

Authorities referred to

(1991), 13 Advocates' Quarterly 12, p. 20
New Family Law Act for Solicitors (1986), p. J-7
Ontario Family Law Act Manual, ed. by Terry Hainsworth (Toronto: Canada Law Book, looseleaf, November 1989 release), p. 10.1

APPEAL by the wife from the judgment of the Divisional Court (1991), 34 R.F.L. (3d) 173, which affirmed the judgment of the High Court of Justice (1990), 31 R.F.L. (3d) 210 (H.C.J.), granting a right of first refusal to the husband as part of an order for the sale of the matrimonial home.

Michael A. Menear, for appellant.
Terry W. Hainsworth, for respondent.

The judgment of the court was delivered by

OSBORNE J.A.:--This appeal raises the issue whether a motions court judge, on an interlocutory application under the Family Law Act, 1986, S.O. 1986, c. 4 (now Family Law Act, R.S.O. 1990, c. F.3), may order the sale of a jointly owned matrimonial home and, as part of the order of sale, grant one spouse a right to match any offer acceptable to the other spouse (a right of first refusal).

The facts

The facts are not in dispute and may, therefore, be briefly stated. The appellant and respondent were married in June 1965 and separated in October 1990, when the appellant, Mrs. Martin, left the matrimonial home. The respondent, Dr. Martin, has continued to reside in the matrimonial home.

At the time of their separation, Dr. and Mrs. Martin jointly owned their matrimonial home, valued by Mrs. Martin at $800,000 and by Dr. Martin at $500,000. Dr. Martin is living in the matrimonial home with Mrs. Martin's consent.

Both Dr. and Mrs. Martin agree that the matrimonial home should be sold. Dr. Martin wanted to purchase it, and thus sought a right of first refusal. It is that right which is the crux of the dispute between the parties.

The proceedings before the motions court judge and in the Divisional Court

On June 6, 1990, on the appellant's motion for interim relief, Gautreau J. dealt with a number of issues including interim custody, interim access, interim spousal support, interim child support, the sale of the matrimonial home and Dr. Martin's request that he be given a right of first refusal as part of the order for sale of the matrimonial home.

In his reasons (1990), 31 R.F.L. (3d) 210 (H.C.J.), Gautreau J. said at p. 212, pp. 211-12 respectively:

> I think the Court has an inherent jurisdiction to provide for this in a court-directed sale and in addition I think there is jurisdiction for this under s. 10(1)(c) of the Family Law Act, 1986, S.O. 1986, c. 4, which

> provides that a court can order that property be partitioned or sold for the purpose of realizing the interests in it and may make ancillary orders or give ancillary directions. . . . . .
>
> In relation to the matrimonial home, the parties agree that it should be sold. The question is whether Dr. Martin should have a right of first refusal to buy it. Mrs. Martin is opposed to this although she is content that he be given the opportunity to buy the house by putting in an offer in the usual manner. I think Dr. Martin should have the right of first refusal when the property is listed on the terms that if an offer is received that Mrs. Martin is prepared to accept, he shall have the right to purchase on the same terms and conditions.

Having concluded that both parties wanted to sell the matrimonial home, and that Mrs. Martin would not be prejudiced by the right of first refusal sought by her husband, the motions court judge ordered that the matrimonial home be sold and that Dr. Martin be granted the "right to purchase the matrimonial home on the same terms and conditions" as contained in any offer acceptable to Mrs. Martin.

On April 17, 1991, the Divisional Court heard Mrs. Martin's appeal concerning the jurisdiction of the motions court judge to make, and the correctness of, the motions court judge's order granting Dr. Martin first refusal rights on the sale of the matrimonial home. Mrs. Martin did not appeal the order for the sale of the matrimonial home. The Divisional Court reserved judgment.

On May 30, 1991, this court's endorsement in Arlow v. Arlow, now reported 33 R.F.L. (3d) 44, was released. On June 28, 1991 the Divisional Court dismissed Mrs. Martin's appeal, without costs (now reported 34 R.F.L. (3d) 173).

The Divisional Court concluded that the right of first refusal issue was determined by Arlow, and that there was no basis upon which to interfere with the order directing the sale of the matrimonial home and Granger J., who gave the Divisional Court judgment said at p. 174 R.F.L., after referring to Arlow:

> Accordingly, s. 10(1)(c) of the Family Law Act, 1986, S.O. 1986, c. 4, allows a judge when ordering a sale of property to grant one spouse a right of first refusal. Gautreau J. had jurisdiction to make the order which he did, and I see no error in principle in the manner in which he exercised his discretion.

Because this court's judgment in Arlow was obviously critical to the disposition of the appellant's appeal in the Divisional Court, during the argument of this appeal, counsel were specifically asked what their positions were on the question whether Arlow determined the issue raised by the parties on this appeal. Both Mr. Menear, for the appellant, and Mr. Hainsworth, for the respondent, took the position that, in Arlow, the court's jurisdiction to provide one spouse with a right of first refusal on the court-ordered sale of a matrimonial home, was not in issue.

In Arlow, the appellant (Mrs. Arlow) resided in the matrimonial home and was the beneficiary of an interim exclusive possession order issued under s. 24 of the Family Law Act. Some months after she obtained that order, Mr. Arlow applied for an order that the matrimonial home be sold under the Partition Act, R.S.O. 1990, c. P.4. On the return of that application, the motions court judge rescinded Mrs. Arlow's interim exclusive possession and ordered that the matrimonial home be sold. The order for sale was made under s. 10 of the Family Law Act and Mrs. Arlow was granted a right of first refusal. Mrs. Arlow appealed to this court. On her appeal, the right of first refusal part of the order for sale of the matrimonial home was not in issue. Mr. Arlow did not cross-appeal, and thereby take issue with the right of first refusal granted to his wife.

The issue on the Arlow appeal was the correctness of the motions court judge's decision to set aside Mrs. Arlow's interim exclusive possession order. This was important because that interlocutory order had to be set aside before the order for the sale of the Arlow matrimonial home could be made. When the appeal was heard the trial was scheduled to begin in a very short time. This court's judgment restored Mrs. Arlow's interim exclusive possession order until trial (or August 1, 1991, an arbitrary date some weeks after the trial was scheduled to commence), and postponed until such time the date upon which the order for the sale of the matrimonial home would become operative. The validity of the order directing the sale of the matrimonial home on an interlocutory application under the Family Law Act and that part of the order granting Mrs. Arlow a right of first refusal were not challenged by either of the parties and this court was not required to deal with those issues.

I can readily understand how the Divisional Court concluded, wrongly in my view, that the Arlow judgment of this court determined that the interlocutory order for sale of the Arlow's jointly owned matrimonial home, with an

accompanying right of first refusal, could be made under s. 10 of the Family Law Act. As noted, that hybrid issue was not determined by this court.

Thus, the Divisional Court's judgment in this case must be determined on the basis of its correctness; the critical issues have not been determined by Arlow .

The jurisdiction to make an interlocutory order for the sale of a matrimonial home

Both the appellant and respondent took the position that a motions court judge had jurisdiction to order the sale of the matrimonial home under s. 10 of the Family Law Act. Mrs. Martin, the appellant, takes issue only with the respondent being granted a right of first refusal.

Because the right of first refusal, in issue on this appeal, is dependent upon the motions court judge's jurisdiction to order the sale of the matrimonial home, I will deal with that issue of jurisdiction first.

The motions court judge concluded that he had an inherent jurisdiction and jurisdiction under s. 10 of the Family Law Act, to make the sale of the parties' matrimonial home. Mr. Hainsworth conceded that the motions court judge erred in concluding that he had an inherent jurisdiction to order the sale of the matrimonial home.

I turn, therefore, to consider whether s. 10 provides jurisdiction to order the sale of the parties' matrimonial home, on an interlocutory application. Section 10 provides:

> 10.(1) Any person may apply to the court for the determination of a question between that person and his or her spouse or former spouse as to the ownership or right to possession of particular property, other than a question arising out of an equalization of net family properties under section 5, and the court may,
>
> (a) declare the ownership or right to possession;
> (b) if the property has been disposed of, order payment in compensation for the interest of either party;
> (c) order that the property be partitioned or sold for the purpose of realizing the interests in it; and
> (d) order that either or both spouses give security, including a charge on property, for the performance of an obligation imposed by the order,
>
> and may make ancillary orders or give ancillary directions.

By its plain wording, s. 10 of the Family Law Act provides a procedural vehicle through which questions of ownership or possession may be determined. The court's powers, set out in s. 10(1)(a) through (d) are substantive, and are designed to permit the court to complete the resolution of questions of ownership or possession referred to in s. 10(1).

A useful example of the operation of s. 10 can be found in Rawluk v. Rawluk , [1990] 1 S.C.R. 70, 65 D.L.R. (4th) 161 where Mrs. Rawluk's claim to an ownership interest in property, the title to which was in her husband's name, was determined under s. 10, before her equalization payment was determined. See also the Ontario Family Law Act Manual ed. by Terry Hainsworth (Toronto: Canada Law Book, looseleaf, November 1989 release), p. 10.1, Law Society of Upper Canada and Canadian Bar Association, the New Family Law Act for Solicitors (1986), at p. J-7 and (1991), 13 Advocates' Quarterly 12, at p. 20.

In this case, the parties have not raised any question of ownership or possession. There is no doubt that s. 10 of the Family Law Act permits the court to order that property (the matrimonial home) be "sold for the purpose of realizing the interests in it" (s. 10(1)(c)). However, the basis upon which the court's power may be exercised is clearly set out in s. 10(1) which, in my view, limits the scope of the section to those cases where there has been an application to determine a question of ownership or possession. In my opinion, s. 10(1)(c) does not, in the circumstances, provide authority to order the sale of the parties' matrimonial home.

Sections 21, 23 and 24 [am. 1989, c. 72, s. 18] of the Family Law Act contemplate orders authorizing the sale of a matrimonial home before trial. They may be contrasted with the provisions of ss. 9 and 10 of the Family Law Act (both of which are contained in Part I of the Act), which specifically provide for orders providing that any "property be partitioned or sold". I do not think that any of ss. 21, 23 or 24 have application here. Those sections, therefore, need not be discussed in any detail. It will be sufficient to note that s. 21 prevents the disposition of a matrimonial home, unless

the court has authorized its sale (under s. 23), or has released the property from the application of Part II of the Family Law Act.

Mrs. Martin did not take the position here or below that in insisting on a right of first refusal Dr. Martin was unreasonably withholding his consent to the sale of the parties' matrimonial home. Nor did she purport to resort to s. 24(1)(f) which could, in some circumstances, provide authority for an order authorizing the sale of her interest in the matrimonial home.

There is, however, ample authority for an order for the sale of the jointly owned matrimonial home to be made pursuant to the provisions of s. 2 of the Partition Act . See Batler v. Batler (1988), 67 O.R. (2d) 335 (H.C.J.) and Silva v. Silva (1990), 1 O.R. (3d) 436, 75 D.L.R. (4th) 415 (C.A.).

Although there is clear jurisdiction under the Partition Act to order the sale of the parties' matrimonial home I do not wish to be taken to have endorsed the wholesale issuance of these orders. In my view, an order directing the sale of a matrimonial home before trial should only be made in cases where, in all of the circumstances, such an order is appropriate. Orders for the sale of a matrimonial home made before the resolution of Family Law Act issues (particularly the determination of the equalization payment), should not be made as a matter of course. See Binkley v. Binkley (1988), 14 R.F.L. (3d) 336 (Ont. C.A.). In addition, spousal rights of possession (s. 19) and any order for interim exclusive possession should be taken into account.

The right of first refusal issue

Because I do not think the order for sale can be made under s. 10 of the Family Law Act , it follows that its provisions granting authority to make "ancillary" orders and directions cannot provide the required statutory authority for granting one spouse a right of first refusal.

There is nothing in the Family Law Act to suggest that, absent consent, one spouse should have a special right to purchase the matrimonial home. As a matter of general principle, while a matrimonial home occupies a special and separate place in the statutory scheme established by the Family Law Act, once the matrimonial home is ordered to be sold, each spouse is entitled to receive fair market value for his or her interest in it. See Batler v. Batler , supra.

In Dibattista (in trust) v. Menecola (1990), 75 O.R. (2d) 443, 74 D.L.R. (4th) 569 (C.A.), this court held that in proceedings taken under the Partition Act, neither party should be given a right of first refusal, if the property (held by the parties as tenants in common) were to be ordered to be sold. Brooke J.A. dealt with the right of first refusal issue, in this way, at p. 449 O.R., p. 575 D.L.R.:

> Neither party can be given a right of first refusal. Both parties are free to bid at such sale and can be expected to act to protect their investment.

In my opinion, a right of first refusal, such as was granted to the respondent, is a substantive right. It is a right which has some clear, albeit difficult to quantify, economic value. It is a right which falls outside the boundaries of what is ancillary to, or what is reasonably necessary to implement the order for sale of the matrimonial home.

A right of first refusal will most often work to discourage other interested buyers. If a spouse is granted a right of first refusal, the effect of it is to remove that spouse from the competitive market for the matrimonial home. The existence of a right of first refusal distorts the market, because it provides a benefit to one party, which eliminates the need for that party to compete with any other interested purchaser. Finally, if the spouse with a right of first refusal is in possession, the existence of the right of first refusal will provide a disincentive to maintaining the property, so as to increase its value and saleability. I acknowledge that, in some degree, the same disincentive may operate if a spouse in possession, without a right of first refusal, wants to buy the matrimonial home. In my view the motions court judge erred in concluding that the right of first refusal would not prejudice Mrs. Martin.

Both Dr. and Mrs. Martin have a right to buy the matrimonial home. If Dr. Martin wants to exercise that right he should be in a position of having to compete with any other interested purchaser. It is only in that way that Mrs. Martin's interest in the property will be fairly and justly quantified.

Conclusion

In result, I would allow the appeal, but without costs, to the extent of setting aside that part of Gautreau J.'s order granting the respondent a right of first refusal. The order for sale of the matrimonial home will stand.

Appeal allowed.