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Silva v. Silva
(C.A.)

1 O.R. (3d) 436

[1990] O.J. No. 2183

Action No. 501/90

ONTARIO
Court of Appeal for Ontario

Blair, Finlayson and Carthy JJ.A.

November 23, 1990

Family law -- Property -- Partition -- Partition and sale of matrimonial home deferred if substantial prejudice to Family Law Act, 1986 rights would result -- Partition Act, R.S.O. 1980, c. 369, s. 2.

Family law -- Property -- Division of assets -- Unconscionability -- Claim to unequal division based on unequal financial contribution to matrimonial home unlikely to succeed -- Family Law Act, 1986, S.O. 1986, c. 4, s. 5(6).

The issues to be determined at trial were the wife's claim for the partition and sale of the matrimonial home and the husband's claim for an unequal division of net family property. The trial judge ordered an immediate partition and sale of the matrimonial home with the proceeds to be paid into court pending trial. The husband appealed, seeking an order that the home should not be sold. The wife cross-appealed for an order that the net proceeds of the sale be paid forthwith to the husband and wife in equal shares.

Held, the appeal should be dismissed and the cross-appeal allowed.

The Family Law Act, 1986 does not oust the Partition Act. However, an application under the Partition Act should be deferred where it can be shown that it would prejudice the substantial rights of either spouse to property held jointly under the Family Law Act, 1986.

The husband's claim to an unequal division of net family property under s. 5(6) of the Family Law Act, 1986 was unlikely to succeed, given the legal interest of the wife and the Act's recognition of marriage as a form of partnership. Although the husband was entitled to a hearing on this issue, there were no equities on his side and no reason to delay the sale or pay the proceeds of the sale into court.

Scanlan v. Scanlan (1990), 73 O.R. (2d) 271, 25 R.F.L. (3d) 241 (H.C.J.), overd

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.); Breau v. Breau (1989), 22 R.F.L. (3d) 108 (Ont. Dist. Ct.); Brown v. Brown, [1953] 1 D.L.R. 158, [1952] O.W.N. 725 (H.C.J.); Davis v. Davis, [1954] O.R. 23, [1954] 1 D.L.R. 827 (C.A.); Hutcheson v. Hutcheson, [1950] O.R. 265, [1950] 2 D.L.R. 751 (C.A.); Jollow v. Jollow, [1954] O.R. 895, [1955] 1 D.L.R. 601 (C.A.); Maskewycz v. Maskewycz (1973), 2 O.R. (2d) 713, 44 D.L.R. (3d) 180, 13 R.F.L. 210 (C.A.); Rush v. Rush (1960), 24 D.L.R. (2d)

248 (Ont. C.A.); Smith v. Smith (1989), 22 R.F.L. (3d) 173 (Ont. H.C.J.) [additional reasons at (1989), 22 R.F.L. (3d) 393 (Ont. H.C.J.)]; Szuba v. Szuba, [1951] 1 D.L.R. 387, [1950] O.W.N. 669 (H.C.J.), consd

Statutes referred to

Act respecting the Partition and Sale of Real Estate, S.U.C. 1850 (14 & 15 Vict.), c. 6, s. 24
Act respecting the Partition and Sale of Real Estate, C.S.U.C. 1859 (22 & 23 Vict.), c. 86
Act respecting the Partition and Sale of Real Estate in the Province of Ontario, S.O. 1868-69 (32 Vict.), c. 33, s. 4
Act to Provide for Partition of Real Estates, S.U.C. 1832 (2 Wm. 4), c. 35, s. 3
Family Law Act, 1986, S.O. 1986, c. 4, ss. 5(6), 10, 12, 14(a), 17, 18
Married Women's Property Act, R.S.O. 1950, c. 223, s. 12
Partition Act, R.S.O. 1877, c. 101
Partition Act, R.S.O. 1937, c. 157, s. 2
Partition Act, R.S.O. 1950, c. 269
Partition Act, R.S.O. 1980, c. 369, s. 2

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 55.06, 55.06(5), 66.01

APPEAL by the husband from an order directing the partition and sale of the matrimonial home, the proceeds to be paid into court, seeking a stay of the sale pending the trial of the issue as to division of net family property under the Family Law Act, 1986; CROSS-APPEAL by the wife from the same judgment, seeking to vary it to direct that the net proceeds of the sale of the matrimonial home be paid forthwith to husband and wife in equal shares.

John L. O'Kane, for husband, appellant and respondent by cross-appeal.

Mary Lou Parker, for wife, respondent and appellant by cross-appeal.

The judgment of the court was delivered by

FINLAYSON J.A.:-- The appellant husband is the respondent in the application of the respondent wife for an equalization of the net family property of the parties under the Family Law Act, 1986, S.O. 1986, c. 4, as amended (F.L.A.) and for partition and sale of the matrimonial home under the Partition Act, R.S.O. 1980, c. 369. The husband is the cross-applicant for an unequal division of net family property. There is also a claim by the wife for support and interim support of the child of the marriage with which we are not concerned.

The husband appeals the judgment of Klowak J. wherein she ordered that the matrimonial home owned by the parties in joint tenancy be immediately partitioned and sold under the direction of the master and that all necessary accounts be taken and the proceeds of such sale be paid into court pending the outcome of the trial of an issue of the claims for child support and the division of net family property. After the completion of argument, counsel for the wife was permitted to serve a notice of cross-appeal asking that the order of Klowak J. be varied to direct that the net proceeds of sale be paid forthwith to the husband and wife in equal shares.

The parties were married in England on December 21, 1982 and have one child who was born in England on January 1, 1983. They were divorced in Ontario on June 1, 1988, and the divorce judgment provided that custody of the infant child was to the wife with reasonable access to the husband. The divorce judgment contained no provision for the payment of spousal or child support. At the present time the wife is living in England with her daughter and is supported on welfare. She has received no support payments from her husband and support payments for the child of the marriage were not ordered until August of this year.

The matrimonial home is the only family asset. It was purchased in September of 1986 and title was registered in the names of both parties as joint tenants and not as tenants in common. The purchase price was $94,000. The purchase funds came by way of a first mortgage in the amount of $70,000 executed by both the husband and wife as joint mortgagors, a joint personal bank loan for $17,000 and $12,000 from the husband's personal savings. The home is

presently valued at somewhere between $170,000 and $200,000 and is subject to the first mortgage on which there is outstanding a debt of approximately $68,000.

The husband is making the mortgage payments and has paid off the joint loan. He lives in the home with another woman. The husband asserts that his gross annual earnings from his employment are approximately $39,000 and his wife's gross annual earnings from the English welfare authorities and others are approximately $6,612.

The basis of the husband's appeal is that he does not wish the matrimonial home to be sold until the issue between himself and his wife as to the division of net family property has been resolved. He asserts that he is entitled to an award of an amount that is more than one-half of the net family property pursuant to s. 5(6) of the F.L.A. Since there is no other asset to realize upon, he expects his equalization payment to be credited to him and paid out of the proceeds of the sale of the home. He wishes to bid on the matrimonial home once it is put on the market for sale, but not until he is aware of the state of accounts between himself and his wife. The effect of this arrangement is that he will continue to reside rent free in the matrimonial home until it is put on the market. The purchase price to him will be the net selling price less the amount of his anticipated award under s. 5(6).

The legal argument submitted in support of this position is that Klowak J. had no jurisdiction to give the judgment that she did. It is submitted that she had no jurisdiction to order partition and sale under the Partition Act because the effect of the divorce was to vest jurisdiction over family property in the F.L.A. In any event, it is submitted, neither statute provides for what counsel describes as an interim distribution of net family property. Counsel relies on Scanlan v. Scanlan (1990), 73 O.R. (2d) 271, 25 R.F.L. (3d) 241, a decision of Misener D.C.J. sitting as a local judge of the Supreme Court of Ontario.

Section 2 of the Partition Act provides as follows:

> 2. All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.

The applicable Rules of Civil Procedure, O. Reg. 560/84, are rules 55.06 and 66.01. I quote from them in part as follows:

> 55.06(1) Where a sale is ordered, the referee may cause the property to be sold by public auction, private contract or tender, or partly by one method and partly by another.
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> . . . . .
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> (3) The conditions of sale by auction or tender shall be those set out in Form 55F, subject to such modifications as the referee directs.
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> . . . . .
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> (5) All parties may bid except the party having carriage of the sale and any trustee or agent for the party or other person in a fiduciary relationship to the party.
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> . . . . .
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> 66.01(1) A proceeding for partition or sale of land under the Partition Act may be commenced by notice of application by any person who is entitled to compel partition.

There is a conflict in the case law on the question of whether an order for partition and sale under s. 2 of the Partition Act can be made with respect to jointly owned matrimonial property in view of the provisions of the F.L.A. Some background may assist as to how this developed.

The history of the Partition Act is traced in the judgment of Laidlaw J.A. in Hutcheson v. Hutcheson, [1950] O.R. 265, [1950] 2 D.L.R. 751 (C.A.). The issue determined in that case was whether a judge has discretion to refuse to grant

an order for partition and sale of the matrimonial home under s. 2. It was held that he did. The language of the 1937 statute considered in that case [Partition Act, R.S.O. 1937, c. 157] does not differ significantly from the present section.

The jurisdiction of courts to order the partition and sale of jointly held property dates as far back as 1832, when the Act to Provide for Partition of Real Estates, S.U.C. 1832 (2 Wm. 4), c. 35, s. 3, permitted courts to order the sale of such property, provided that "if no sufficient reason shall appear why partition should not be made, the Court shall proceed to order such partition" (see Hutcheson, supra, at p. 268 O.R.). This section gave the applicant a prima facie right to an order for partition and sale.

At a later date the discretion given to the courts to grant partition and sale appears to have been expanded in the enactment of the Act respecting the Partition and Sale of Real Estate, S.U.C. 1850 (14 & 15 Vict.), c. 6, s. 24, when the courts were authorized in certain cases "to make partition of real estate, to direct the sale of the same if they shall think it right so to do" (Hutcheson, supra, at p. 269 O.R.; emphasis added). The use of the words "if they shall think it right so to do" appeared to give the courts greater flexibility in refusing to grant orders for partition and sale.

The Acts relating to partition and sale of jointly held property were consolidated in 1859 (22 & 23 Vict.) in the Consolidated Statutes of Upper Canada, c. 86. This legislation required the courts to allow an application for the partition and sale of land as a rule. In 1869, the law in this area was further consolidated after confederation in the Act respecting the Partition and Sale of Real Estate in the Province of Ontario, S.O. 1868-69 (32 Vict.), c. 33. Section 4 of that Act closely resembles s. 2 of the present Partition Act, except that the words "shall and may be compelled to make, or suffer partition and sale" appear, while, in the present section, only the permissive "may" is employed. The word "shall" was permanently removed from the section in the Partition Act, R.S.O. 1877, c. 101, and did not appear in the 1937 Partition Act which was considered in Hutcheson. The majority of the Court of Appeal in Hutcheson determined that the omission of the word "shall" rendered the grant of an application for partition and sale under the Act discretionary.

Cases subsequent to Hutcheson agreed that the courts had discretion to refuse to grant an order for partition and sale, but limited that discretion to cases where the applicant had behaved maliciously, oppressively or with a vexatious intent toward the respondent. In Szuba v. Szuba, [1951] 1 D.L.R. 387, [1950] O.W.N. 669 (H.C.J.), after noting that Hutcheson had announced a discretion under s. 2, but had not defined the limits of it, the court examined the ambit of judicial discretion under the 1937 Partition Act. It determined that an order for partition and sale under s. 2 is as of right, provided that the applicant acts without vexation or oppression and comes to the court with "clean hands" (at p. 673 O.W.N.). In Brown v. Brown, [1953] 1 D.L.R. 158, [1952] O.W.N. 725 (H.C.J.), the court similarly acknowledged the discretion enunciated in Hutcheson and adopted the limits of discretion imposed in Szuba (at p. 727 O.W.N.). The court, in that case, also stated [p. 726 O.W.N.] that it "is common ground" that the discretion exercised under the Partition Act must be exercised judicially and based upon the circumstances of each case. In a later case, Davis v. Davis, [1954] O.R. 23, [1954] 1 D.L.R. 827 (C.A.), Laidlaw J.A. described the nature of the discretion under the Partition Act. At p. 29 O.R. of his judgment, he stated that, in spite of the discretion under s. 2, joint tenants have a prima facie right to partition and sale so that the courts must compel such a sale in the absence of sufficient reasons not to do so.

Very recent cases have fleshed out the application of judicial discretion under the Partition Act. Most notable of these is Batler v. Batler (1988), 67 O.R. (2d) 355, 18 R.F.L. (3d) 211 (H.C.J.). In Batler, a husband sought an order for partition and sale of jointly owned recreational property. Although Granger J. found that he had no jurisdiction to order the sale of the property under the F.L.A., he found that the sale could be ordered pursuant to the Partition Act. Granger J. noted, at p. 358 O.R., p. 215 R.F.L., that "an application by a joint tenant for sale should only be refused if the application is vexatious or malicious". He then stated that if the wife were to resist the order for sale successfully, she should have obtained an order for exclusive interim possession of the property or have demonstrated that her claims at trial would be prejudiced by an immediate sale. It appears that Granger J. held that the boundaries of judicial discretion to refuse an order under s. 2 of the Partition Act extended to cases where immediate sale would prejudice the claims of the respondent under the F.L.A. at trial (see pp. 358-59 O.R., p. 215 R.F.L.).

In Binkley v. Binkley (1988), 14 R.F.L. (3d) 336 (Ont. C.A.), this court held that a matrimonial home should not be sold while the wife who still lived in the matrimonial home had "an arguable case" for an unequal division of assets and a vesting of the home in her name alone. Breau v. Breau (1989), 22 R.F.L. (3d) 108 (Ont. Dist. Ct.) followed Batler and allowed an order for partition and sale because the respondent wife failed to show that such an order should not be made (at p. 112). The court held that Binkley did not apply, since the respondent no longer lived in the house. Similarly, Smith v. Smith (1989), 22 R.F.L. (3d) 173 (Ont. H.C.J.) [additional reasons at (1989), 22 R.F.L. (3d) 393 (H.C.J.)] stands for the proposition that "the court does have jurisdiction to order, by an interim order pending trial of the issue of

equalization of net family property, the sale of a jointly owned matrimonial home, so long as such order would not prejudice the party's right at trial such as a claim to exclusive possession or a claim of sole ownership" (at p. 175). In Smith, the court refused to grant the husband's order for partition and sale, since to do so would prejudice the wife's position. The wife wished to purchase the matrimonial home from the husband and an immediate sale would have prevented this. The wife had moved from the home because the husband's failure to pay the agreed support had made it impossible for her to meet the mortgage payments and maintenance costs of the house. The husband had agreed in a written contract to transfer the title of the house to her for $10,000 less certain debts. If the house were ordered sold, the husband would have been unable to meet his obligations under the contract.

A series of cases appear to conflict with the notion that the Partition Act, s. 2, can be utilized to force a sale of property prior to the trial settling the equalization of net family property under the F.L.A. Jollow v. Jollow, [1954] O.R. 895, [1955] 1 D.L.R. 601 (C.A.) was decided by a different panel of the Court of Appeal just four years after the decision in Hutcheson. Jollow did not undermine the discretion under s. 2 of the Partition Act that was permitted in Hutcheson, but it did hold that an order for partition and sale under the Partition Act, R.S.O. 1950, c. 269, could not apply to jointly owned matrimonial property until any dispute relating to the property was first determined with reference to the Married Women's Property Act, R.S.O. 1950, c. 223 (M.W.P.A.). The M.W.P.A., s. 12, provided that questions of title or possessory rights with respect to jointly owned property could be referred to a Supreme Court, District or County Court judge. The section gave the judge a wide discretion to consider all the facts related to the case, and to make such order "as he thinks fit" (see Jollow, at p. 902 O.R.). Given this wide discretion, the court felt that it was the M.W.P.A. that applied to disputes over marital property, and that its application in these situations was exclusive. The Partition Act, s. 2, could not apply until after rights under the M.W.P.A. were resolved. There was a strong dissenting judgment in this case, delivered by Chevrier J.A. He felt that since an order under the Partition Act was unrelated to questions concerning possessory rights or title to jointly owned property, it had a separate sphere of application from the M.W.P.A. Chevrier J.A. held that the Partition Act was available when a party sought an order to have jointly owned property sold and the M.W.P.A. applied when possession of and title to jointly owned property was in dispute. One statute did not exclude the application of the other to the same piece of property. The Acts applied without contradiction to separate situations depending on the nature of the dispute between the two parties.

Jollow was considered in Rush v. Rush (1960), 24 D.L.R. (2d) 248 (Ont. C.A.). In that case, Schroeder J.A., speaking for the majority, said at p. 255:

> It is very clear that an application for an order of partition or sale under the provisions of the Partition Act cannot properly be heard and adjudicated upon until after the rights of the parties have been first determined on those well-settled principles enunciated in the authorities relating to the scope and effect of s. 12(1) of the Married Women's Property Act.

Rush v. Rush thus makes it clear that the Partition Act can apply to marital property, but only when matters under the M.W.P.A. have been dealt with first. Thus, a husband could not seek an order for partition and sale until the wife's titular and possessory rights under the M.W.P.A. had been settled. Maskewycz v. Maskewycz (1973), 2 O.R. (2d) 713, 44 D.L.R. (3d) 180, 13 R.F.L. 210 (C.A.) affirmed that the law as stated in Rush still applied.

In spite of Batler, supra, and the recent cases which follow it, Misener D.C.J. resurrected the conflict over the application of the Partition Act in May 1990, in Scanlan v. Scanlan, supra. He was of the view that the Partition Act, s. 2, cannot apply to jointly owned matrimonial property. In stating this, the judge rejected the law as it stood in Jollow, where it was held that matrimonial legislation had the primary jurisdiction over matrimonial property, but that the Partition Act could apply to matrimonial property once rights under the M.W.P.A. were settled. It was the view of Misener D.C.J. that, when s. 10 of the F.L.A. replaced s. 12 of the M.W.P.A., it provided substantive rights that are incompatible with the concurrent jurisdiction of the Partition Act. He stated that the F.L.A., s. 10, empowers the court to order a partition and sale under certain circumstances, and in the case of matrimonial property, it is this Act which applies when a sale is sought, not s. 2 of the Partition Act. At pp. 277-78 O.R., Misener D.C.J. said:

> Obviously, therefore, s. 10, read in conjunction with the other sections of the Family Law Act that I have just mentioned (ss. 9, 11 and 24), is incompatible with the rights conferred by s. 2 of the Partition Act, as declared by Szuba and Brown. But quite apart from that -- and indeed more importantly than that -- there is now no need to look to the Partition Act to fully dispose of the rights of the parties.

This judgment counters the law as stated in Batler, where it is clearly accepted that the Partition Act can apply to jointly owned matrimonial property. In my opinion, Scanlan v. Scanlan was incorrectly decided on this point.

From a review of the case law, it appears that there was a limited discretion to be exercised in an application under the Partition Act where the parties were not husband and wife. However, in disputes between spouses where the M.W.P.A. was applicable, it was held to be preferable that a judge hearing an application under the Partition Act should exercise his discretion by way of deferring it until all disputes under the M.W.P.A. had been resolved.

The F.L.A. is much broader than the M.W.P.A. which dealt with questions between husband and wife as to the title to or possession of property (s. 12). The F.L.A. provides for the orderly and equitable settlement of the affairs of the spouses. It gives the court jurisdiction over all of the property of the spouses. The definition of "property" includes any interest in real or personal property. The "matrimonial home" comprises not only the realty and structure of the house, but the contents (see ss. 17 and 18). Section 10 of the F.L.A. empowers the court to order the partition and sale of the matrimonial home and thus overrides the legal title in one or both spouses.

The F.L.A. authorizes the court to do whatever is necessary with the collectivity of spousal assets to bring about an equal division of them. It should be the statute of first resort in matrimonial disputes, but it is not necessarily the only one. I think it is significant that s. 14(a) of the F.L.A. states that "the fact that property is held in the names of spouses as joint tenants is prima facie proof that the spouses are intended to own the property as joint tenants". This is a recognition of the identical legal title of both spouses to an undivided ownership in the whole of the property. In my opinion, it is wrong to say, as it was said in Scanlan v. Scanlan, that the F.L.A. ousts the jurisdiction of the Partition Act when dealing with jointly owned spousal property. The two statutes are not incompatible, but where substantial rights in relation to jointly owned property are likely to be jeopardized by an order for partition and sale, an application under the Partition Act should be deferred until the matter is decided under the F.L.A. Putting it more broadly, an application under s. 2 should not proceed where it can be shown that it would prejudice the rights of either spouse under the F.L.A.

In the case on appeal, the contemplated partition and sale does not prejudice either spouse's claim with respect to the home under the F.L.A. The wife does not want the home at all and the husband wants the right only to bid on it once it is up for sale. He is entitled to do so under rule 55.06(5). While he wants an unequal division of family assets, any later determination of this claim is irrelevant to the sale of the home as such. His stated concern with respect to an immediate sale is that there will be no longer any security upon which to realize his F.L.A. award. Such a sale also means that the husband will have to finance the purchase by raising one-half of the net purchase price, instead of some lesser sum. I can think of no reason why the husband should hold the house hostage until his claim has been adjudicated. The wife needs the money now and I do not think that his concern about collecting a subsequent award, in the circumstances of the case, amounts to prejudice within the meaning of the case law.

Binkley v. Binkley is cited against the submission that a sale can be made now when the spouse occupying the home claims an unequal division of net family assets. The report of Binkley is very brief and a reading of it does not disclose the basis of the wife's "arguable case". However, she did claim a vesting of the home in her name and the court accepted that there was some basis for that assertion. The facts in the case on appeal relate solely to the husband's contention that since he contributed more in money to the purchase of the house, that it would be "unconscionable" under s. 5(6) of the F.L.A. to have an equal division of the one family asset, namely the home. This will be a difficult argument to sustain given the legal interest of the wife at common law and the recognition in the F.L.A. that marriage is a form of partnership.

On the facts before us it cannot be said that the husband's case for unequal division is an easy one, but he is entitled to a hearing. However, there is no reason why in the meantime the home should not be sold now and the net proceeds divided equally. The husband and wife can continue with their cross-applications under the F.L.A. and, if the husband is successful, he can attempt to collect a money judgment from his wife in England. There are no equities on his side in this matter and the partition and sale of the home should proceed as soon as a sale can be arranged. There is no point in leaving the proceeds of the sale in court pending the trial of an issue as ordered by Klowak J.

Accordingly, I would dismiss the appeal and allow the cross-appeal to the extent of varying the order of Klowak J. to provide that the net proceeds of the sale of the matrimonial home are to be divided equally between husband and wife and be paid out of court to each forthwith by the judge who confirms the master's final report on the said sale. The wife is entitled to her costs of the appeal and cross-appeal, and of the application before Klowak J.

Appeal dismissed;
cross-appeal allowed.