Date: 19981216 Docket: C.A. 143713

NOVA SCOTIA COURT OF APPEAL
Cite as: Murphy v. Murphy, 1998 NSCA 192

Glube, C.J.N.S., Hart, Freeman, JJ.A.

BETWEEN:

ROBERT HENRY MURPHY

Appellant

- and -

CAROL ANITA MURPHY

Respondent

In Person

Melinda J. MacLean, Q.C.
for the Respondent

Appeal Heard:
December 9, 1998

Judgment Delivered:
December 16, 1998

THE COURT: Appeal dismissed as per reasons for judgment of Freeman,J.A., Glube, C.J.N.S., and Hart, J.A., concurring.

FREEMAN, J.A.:

The only issue of substance in this appeal is whether the home in Economy, N.S., in which the appellant husband and respondent wife lived during some ten years of their marriage prior to their separation, was matrimonial property. It was owned by the father of the respondent Carol Anita Murphy, who paid the expenses including taxes and insurance. He transferred it to her in 1988.

Justice Hall of the Supreme Court of Nova Scotia found it was not matrimonial property because their cohabitation ceased in 1987.

The appellant Robert Henry Murphy says he gave up a promising career in country music when he and his wife moved back to Economy, and her father had promised the home to both of them. The appellant apparently made little financial contribution to his wife and their son, now a university student, but he asserts the marriage relationship was unconventional and he was supportive in other ways. The parties received assistance from his wife's family and his mother. When his mother became ill in 1987 he went to reside in her home some ten miles away in Portapique, N.S. to care for her; she died in 1995. He says he never really moved out of the home in Economy.

The appellant was not represented by counsel. He has not filed a factum. The respondent moved to strike his notice of appeal for failure to perfect but the application was withdrawn at the hearing.

Shortly before the hearing the appellant applied to amend his notice of appeal and to admit fresh evidence; he sought an adjournment for these purposes and to complete his factum. He had

been granted a number of previous adjournments for similar purposes on frequent appearances in Chambers, where he had been advised that the matter would go forward for hearing on December 9th. His request for adjournment and leave to amend the notice of appeal were refused. The appellant presented oral argument and he was not required to confine his submissions to the original grounds of appeal. Rather, he addressed the matters he considered relevant and the panel considered the appeal on it's merits.

Mr. Murphy did not pursue the application to admit fresh evidence, which was dated Monday, December 7th , less than two clear days before the hearing on December 9th. It consisted of his affidavit referring to a number of documents he wished to have admitted, but the documents were not filed with the court. The affidavit describes documents that must clearly have been available at the time of the trial but, with one exception, with no explanation why they were not put into evidence at that time. In his oral submission he said he did not understand the procedure and waited after court expecting the trial judge to return and take possession of a walrus hide suitcase full of assorted documents which he had proffered up. As the documents had not been disclosed to his wife's counsel nor introduced through a witness, Justice Hall committed no error in not accepting them.

Quite apart from the late filing of the affidavit and the failure to attach exhibits, it would have been necessary to deny the application for failure to meet the test for the admission of fresh evidence in civil matters set out by McIntyre, J., writing for the Supreme Court of Canada in **R. v. Palmer and Palmer**(1979), 30 N.R. 181; 50 C.C.C. (2d) 193 (S.C.C.):

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases . . .
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

In my view the appellant's application failed the first, second and fourth branches of this test.

The exceptional document mentioned above was referred to in the appellant's affidavit as follows:

> (10) Letter to Honourable Justice Hall regarding, among many things but specifically the "Wood Gundy" file. At the Corollary Relief he admitted that he did not bring it to court, lost or misfiled it.

At the point when the matter was brought to his attention Justice Hall suggested that the appellant's recourse would have to be by way of appeal. The affidavit of Mrs. Murphy filed with the Supreme Court in connection with the corollary relief hearing explains the significance of the Wood Gundy account as follows:

> 2. That in December 1989 as part of his estate planning my father settled money on my brother and me, his only two children, as an advance on our inheritance from him. His instructions to me were that the money was to be invested and was to be used only as necessary for myself and Jason. My father had earlier settled the Economy property on me in 1988, and a separate property upon my brother, again as part of his estate planning. The Respondent and I had been living separate and apart since the respondent moved to his mother's home in 1987. Because my father had never been satisfied that the Respondent had ever accepted responsibility to maintain Jason and me, it was extremely important to him that the Respondent did not have access to this money and directed that it should not be made available to him.
>
> (3) That as appears from the contents of paragraph two (2) of the Respondent's "Proposed Divorce Settlement" dated October 17, 1997, the Respondent has known of monies advanced to me by my father. There has never been any issue of disclosure between us with respect to such monies. As well, the Respondent had

> easy access to the regular Wood Gundy statements of account to me which were received at the Economy property and maintained openly by me in a mail basket. As both parties testified at trial, the Respondent came and went from this property until the restraining order was issued on May 6, 1997.

Mrs. Murphy said she instructed Wood Gundy to close the account and return the money to her father prior to signing the divorce papers because she did not consider it to be a matrimonial asset. The appellant suggested the money was used for matrimonial purposes but it appears the only portion of it used for his benefit was a loan for unrelated legal expenses which he says he repaid. It must be noted that Mr. Murphy did not avail himself of the opportunity to cross examine his wife on her evidence.

Mr. Murphy did not manage to bring the question of the money to the surface as an issue in the trial, so it is not an issue in this appeal. Given the finding that cohabitation ended in 1987 it was clearly not a matrimonial asset.

Mr. Murphy's oral submissions on the appeal contained allegations of fact that were at variance with the facts found by the trial judge and with the record of testimony at the trial, particularly with regard to the issue of cohabitation. His aborted application to admit fresh evidence did not include fresh testimony by himself and if it had, it would have failed on the grounds given above. In my view his submissions, even if accepted into evidence, tested by cross-examination, and believed, while not irrelevant, were not of sufficient cogency to have affected the result. In the present circumstances, this court is bound by the record below.

I have carefully considered that record and the submissions of the parties, and having regard

to the insufficiency of the appeal documents, I have sought to determine whether there are any matters of substance requiring review.

Issues raised in the notice of appeal as to the credibility of the respondent are without merit in light of the findings of Justice Hall. They ring hollow in the absence of cross-examination.

The appellant suggested the respondent's counsel, Melinda MacLean, was in conflict of interest. Ms. MacLean explained before the trial judge, apparently to his satisfaction, that her only previous involvement with the appellant was when she acted for his mother in preparing a deed to him in 1991. While Mr. Murphy may have been a conduit for his mother's instructions, his mother was the client. Ms. MacLean also took the affidavit of a witness to his mother's signature on a power of attorney. In my view the conflict of interest allegation is without substance.

A few hours after the hearing the appellant submitted a document that might well have served as a factum. It was accepted at that late time as to authorities only after he excised from it all materials other than citations of case authorities, and on his undertaking to provide a copy to Mrs. Murphy's counsel.

It contained a number of citations in support of his argument that he had wrongly been denied adjournments in the Supreme Court. I have considered these, but a trial court has a wide latitude to control its own process and the record does not disclose any prejudice suffered by Mr. Murphy as a result of denial of adjournments.

In my view the question of the appellant's interest in the home at Economy raises the only arguable issue. If the wife's father had not waited to transfer it to her until after the couple had ceased cohabitation, there might be merit in the appellant's position. He asserted at trial and on the appeal that cohabitation did not cease in 1987 but continued until after his mother's death in 1995. Justice Hall made this key finding:

> Having carefully considered all of the evidence and the submissions of the parties, I have concluded that the final breakdown of the marriage occurred in 1987 when the respondent went to his mother's home in Portapique to care for her. It was at that time that any semblance of a normal marital relationship ended and was never resumed. In this respect, where the testimony of the parties differs I accept the version of the petitioner as being more accurate. In any event, even with the allegations of the respondent as to the subsequent sexual relations and other interaction between the parties, they were of such a sporadic and rare nature as to be inconsequential.

This is a finding of fact made on the basis of evidence by a trial judge who heard the parties. This court has consistently expressed its refusal to interfere with such findings in the absence of error on the part of the trial judge. In my view Justice Hall did not err. It was not apparent that Justice Hall's conclusion would have been different even if Mr. Murphy's submissions at the appeal hearing and his documents had been accepted into evidence.

It is noteworthy that the respondent's father was present at the trial of the divorce. His evidence might have been relevant to the understanding Mr. Murphy claims he had that the house was to belong both to his wife and himself, as well as to the termination of cohabitation and the timing of the conveyance. The appellant was specifically invited to call him by the trial judge, but declined to do so.

I would dismiss the appeal with costs which I would fix in the amount of $750 plus

disbursements.

Freeman, J.A.

Concurred in:

Glube, C.J.N.S.

Hart, J.A.

C.A. No. 143713

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REASONS FOR JUDGMENT BY: Freeman, J.A.