IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *McRobb* v. *McRobb,* 2004 YKSC 40

Date: 20040614
Docket No.: 00-D3234
Registry: Whitehorse

Between:

BRUCE JAMES McROBB

Petitioner

And:

JANET HANNA McROBB

Respondent

Before: Mr. Justice L.F. Gower

Appearances:
H. Shayne Fairman — For the Petitioner
Debbie P. Hoffman — For the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is the remainder of an application brought by Ms. McRobb, last fall, seeking a professional valuation of 22 shares in a moving company, held in Mr. McRobb's name.

[2] The parties were married in 1984. They jointly determined to purchase the shares in the company in 1989 for $210,000. Both Mr. and Ms. McRobb made direct financial contributions to the purchase of the shares, until they separated in 1994. Ms. McRobb initially brought legal proceedings shortly after the separation, claiming relief which included a division of the value of the shares. That action was defended by Mr. McRobb

and has been inactive since 1995. Mr. McRobb filed a Petition for Divorce in 2000 on his own behalf. Ms. McRobb filed her Answer and Counter Petition approximately one year later in 2001 seeking "a ½ interest in all the family assets or in the alternative a reapportionment in [her] favour". Ms. McRobb also pled that Mr. McRobb is a "constructive trustee" for one half of the shares in his name in the company.

ISSUES

[3] The parties are agreed that the issues currently before this Court are:

1. As of what date should the shares be professionally valued?
2. Who should bear the expense of the valuation of the shares?
3. How should that expense be accounted for?

BACKGROUND

[4] The company is legally described as Pacific Northwest Moving (Yukon) Ltd., which also carries on business under the trade name of Pacific Northwest Freight Systems. Mr. McRobb purchased the 22 shares on January 1, 1989, for $210,000. I understand it to be agreed between the parties that, although the shares were purchased and are held in Mr. McRobb's name, they are joint property. It is also undisputed that both Mr. and Ms. McRobb borrowed $60,000 from the Canadian Imperial Bank of Commerce (the "CIBC") to partially pay for the shares. The $150,000 balance of the purchase price was financed by Mr. McRobb's family. The other shareholders in the company are Mr. McRobb's brother, Ronald McRobb, and Frank King, who each hold 34 shares.

[5] There is some dispute between the parties about the extent to which the CIBC loan was paid down at the date of separation, which was July 15, 1994. Mr. McRobb says the CIBC destroyed its records of the loan after six years, but he estimates that a loan of that amount, interest rate and amortization period would have had a balance owing of $29,184.25 as of the separation date. Ms. McRobb estimates there was approximately $20,000 owing as of that date.

[6] Mr. McRobb also says that the $150,000 loan from his family was settled in 1997 by a lump sum payment of $15,000 (made by Mr. McRobb's current common-law spouse), with the unstated remaining balance being forgiven. However, at the date of separation in 1994, Mr. McRobb says that the total amount owing on the loans for the shares was approximately $165,000.

[7] Ms. McRobb claims she is presently unable to contribute to the expense of a valuation of the shares. She says that she ceased working after she became disabled in 1996 with a degenerative disk disease, which causes her significant back problems. She currently receives a total long-term disability payment of $2,255.88 per month. She also claims significant debts of approximately $9,000 to Revenue Canada and $7,000 for the purchase of a motor vehicle, which is currently inoperable. She says she is responsible for her own expenses, although she does receive some support from a male friend, in the form of a loaned vehicle. She now resides in Campbell River, British Columbia.

[8] There are two sons from the marriage. As I understand it, the older son remained with Mr. McRobb and is now a self-supporting adult. The younger son, Gordon, lived with Ms. McRobb from October 1994 until October 1996, when she became disabled.

He then returned to reside with Mr. McRobb in Whitehorse. I gather he is still living with Mr. McRobb, although he will turn 19 on September 12th of this year.

[9] Ms. McRobb has agreed to forgo a claim for spousal support, apparently in exchange for Mr. McRobb's agreement to forgo a claim against her for child support.

ANALYSIS

As of what date should the shares be professionally valued?

[10] Ms. McRobb alleged that, when the parties were together, the company paid for certain benefits enjoyed by the family. These included rent, heating, power and other amenities, motor vehicles, gasoline, family vacations, dry cleaning, entertainment, dining expenses, flowers and household basics and necessities (see Ms. McRobb's Affidavit #1, paras. 15 and 16). Mr. McRobb disagreed with this allegation in part, but not altogether. For example, he said that any rent and utilities initially paid for by the company would have subsequently been deducted from his pay cheque. Family vacations were treated in the same way. He said this was a source of tension in the marriage and that he tried to explain to Ms. McRobb over the years that there were certain expenses which could not be charged to the company. However, he did allow that "Any other purchases that were made and charged to the companies [as written] had to be explained and authorized or they to [as written] were payroll deducted …" (see Mr. McRobb's Affidavit of May 20, 2003, para. 16). Also, according to Mr. McRobb's Financial Statement dated July 3, 2003, he continues to indicate zero or nil entries for expenses such as property taxes, heat, hydro, phone, car operation and maintenance,

entertainment/recreation and vacation. This corroborates the allegation by Ms. McRobb, in that the practice during the marriage has apparently continued to date.

[11] It therefore appears as though there is a basis in the evidence for treating the shares as “family assets”. Those are defined in s. 4 of the *Family Property and Support Act*, R.S.Y. 2002, c. 83, (the *Act*) as:

> … property owned by one spouse … and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation, or for household, educational, recreational, social or aesthetic purposes …

[12] Indeed, Mr. McRobb’s counsel conceded at the hearing before me that the shares should be treated as family assets. I take that to be an implicit admission that the family did in fact enjoy at least some of the benefits of the shares alleged by Ms. McRobb and that those benefits would fall within one or more of the purposes set out in s. 4 of the *Act*. Therefore, I have no difficulty in concluding, for the purposes of this application, that the shares may be considered as family assets.

[13] Counsel for Ms. McRobb argued that, at this stage, the Court cannot make a determination about whether the shares are family assets. She says the shares are “business assets” and therefore could be considered either family assets or non-family assets under ss. 13 and 14 of the *Act*. Further, because Ms. McRobb raised the issue of constructive trust in her Answer and Counter Petition, her counsel says the Court must determine that issue.

[14] I confess that I do not entirely follow these arguments. Ms. McRobb's counsel acknowledged that if the shares are determined to be family assets, then s. 15(3) of the *Act* applies. In that case, the shares must "be valued as at ***the earliest date*** on which the marriage breakdown is deemed under subsection 6(2) to have occurred" (emphasis added). Pursuant to s. 6(1) of the *Act*, if a marriage breakdown occurs, each spouse is entitled to have the family assets owned "at the time of the breakdown" divided in equal shares. And, pursuant to s. 15(3), the time of the marriage breakdown is determined by which of the events in s. 6(2) occurred first:

> (a) the date of the decree nisi of divorce;
>
> (b) the date of a declaration that the marriage is a nullity;
>
> (c) the date of separation; or
>
> (d) the date of an application by either party for a division of the family assets under the *Act.*

[15] I thought I heard Ms. McRobb's counsel say that since the most common ground for divorce is separation for one year, then the separation date will almost always be the date of the marriage breakdown. If that is the case, she argued, then what is the purpose behind s. 6(1) of the *Act* stating that the family assets may be divided *at the time of the breakdown*?

[16] While it may be correct to say that in the vast majority of cases the date of marriage breakdown under the *Act* will be the date of separation, that will not always be the case. There are conceivable exceptions to that general rule. For example, a spouse may apply under the *Act* for a division of family assets before divorce proceedings are

commenced and while they are still living together, or even during a period when there is a reasonable prospect of resuming cohabitation.

[17] In any event, the argument of Ms. McRobb's counsel does not support her more important proposition that the Court cannot say at this stage whether the shares are family or non-family assets. I have already concluded that there is a foundation for treating the shares as family assets for the purposes of this application. Further, I can see nothing in the evidence or the law which prevents me from drawing that conclusion.

[18] As for the constructive trust issue, Ms. McRobb's counsel says that the trust would commence at the date of separation and would continue until Ms. McRobb is paid. With respect, that proposition seems contrary to the general principles of constructive trust. Traditionally, such a trust would arise at the time of contribution of money or money's worth, which in this case would have been the date the shares were purchased. That is consistent with the first two of the three elements required to establish a constructive trust set out by Dickson J., as he then was, in *Pettkus* v*. Becker,* [1980] 2 S.C.R. 834: (1) the other party must be enriched (in this case, by Ms. McRobb's monetary and non-monetary contribution towards the purchase of the shares); (2) there must be a corresponding deprivation of the contributing spouse (in this case, Ms. McRobb paid for shares, but has yet to receive their full benefit); (3) there has to be an absence of any juristic reason for the enrichment.

[19] It must also be remembered that the whole point of the common-law constructive trust concept is to place the contributing spouse, who is not the named owner of the property, in a position where he or she stands to receive a fair share of the value of the

property. More often than not, the alleged fair share is an equal share, which is what Ms. McRobb seeks through her pleadings. However, if the 22 shares are treated as family assets, then there is no need to consider the constructive trust issue. The *Family Property and Support Act* has, for most purposes, displaced the need for the application of a constructive trust argument at common law. Under s. 5 of the *Act*, it is presumed that there will be an equal division of the family assets on marriage breakdown (I repeat, this is what Ms. McRobb seeks). And, if an equal division of the family assets would be inequitable, then s. 13 would apply and could result in an unequal division of the family assets. There are a number of circumstances set out in s. 13 which might give rise to an unequal division of family assets, including the date of valuation of the family assets.

[20] Mr. McRobb's counsel informs me that the case law filed by the parties from British Columbia on the question of the valuation date, reflects the fact that the pertinent legislation in British Columbia does not specify a valuation date.[1] As a result, some courts have ruled the valuation date should be at or close to the "triggering event", being the date when the entitlement in each spouse to an interest in the family asset arises.[2] In other cases, a valuation date may be as late as the date of trial. In some cases, it may be unjust to tie the valuation date to the triggering event, because there may have been an increase or decrease in the value of the family assets over time. In making this determination, the courts generally attempt to ensure that the principle of equality of interest is maintained.[3]

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[1] *Jorgensen* v. *Jorgensen*, [1996] B.C.J. No. 1153, para 41 (B.C.S.C.)
[2] *Jorgensen*, cited above
[3] *Jorgensen*, cited above

[21] I assume that this is the reason Ms. McRobb's counsel raises the issue of constructive trust. If the constructive trust arose at the time the shares were purchased and continues until Ms. McRobb receives payment for her interest in the shares, then Ms. McRobb would be entitled to benefit from any appreciation in the value of the shares since the date of separation. While that approach initially seems fair, there are a number of reasons for rejecting it:

1. The question of constructive trust need not be adjudicated at all, for the reasons I have already set out above;

2. The date of the valuation of the shares is required by the *Act* to be the date of separation. In that respect, our legislation differs from the legislation in British Columbia;

3. If that date would result in an inequity, Ms. McRobb can apply under s. 13 for more than ½ of the value of the shares;

4. Ms. McRobb has made no contribution to the shares since the date of separation. If the shares either increased or decreased in value since that date as a result of the actions of Mr. McRobb as a minority shareholder, then presumably Mr. McRobb should bear the benefit or the burden of that change in value; and

5. Mr. McRobb claims that a portion of the shares have been paid for by his new common-law spouse who, as a result, has an arguable interest in the shares at their present value. Thus, it would be unwieldy and

potentially unfair to Mr. McRobb's current common-law spouse to value the shares as of the date of trial.

[22] I conclude that the shares are to be valued as of the date of separation.

Who should bear the expense of the valuation?

[23] The parties say the estimated expense of a professional valuation of the shares would be initially $5,000 to $10,000, and as much as $20,000 if the valuator is required for trial.

[24] While there is some dispute between the parties as to how and why Ms. McRobb came to be in her current financial state, it seems relatively clear on a balance of probabilities that she is not able to make any contribution towards this expense.

[25] Mr. McRobb acknowledges in his Financial Statement that his gross annual income for the year ending July 3, 2003 was $59,844. In addition, a number of expense line items for things such as property taxes, heat, hydro, phone, car operation and maintenance, entertainment/recreation and vacation have zero or nil entries. Ms. McRobb's counsel says that this is consistent with Ms. McRobb's allegation that Mr. McRobb continues to benefit from his ownership of the shares, as the company covers these expenses, or at least some of them. I agree that the real value of his income should be regarded as greater than the amount stated by Mr. McRobb. (Ms. McRobb's counsel also alleged that Mr. McRobb's 2002 T-4 slip indicated his gross income as $94,582, although I was unable to find a copy of that T-4 in the affidavit material.) Finally, there is evidence that the company has significant equity in certain

real property in Whitehorse, which might support an application by Mr. McRobb for bank financing for this valuation, if necessary.

[26] On the whole of the evidence, I find that Mr. McRobb is better able to incur the expense of a share valuation.

[27] I also note that Mr. McRobb has, through his counsel, expressed a reluctant and conditional willingness to initially incur the entire expense of such a valuation. One of the conditions is that the valuation be done as of the date of separation, which I have just ruled is appropriate. The other condition is that Ms. McRobb's 50% portion of that expense should be declared to be an advance against any "settlement" she may receive in this action, which I take to mean any award of entitlement to an interest in the shares. (The parties may, of course, "settle" this claim on any basis they negotiate.) If she receives nothing, then Mr. McRobb expects Ms. McRobb's portion of the expense will be repaid "or otherwise dealt with in the final determination of this proceeding when determining Court costs".[4]

[28] Obviously, it is not up to Mr. McRobb to dictate the terms and conditions of who shall pay and how the payment will be accounted for. Those are the very questions which the parties have asked this Court to decide. And the latter of those questions is the final issue for me to determine on this application.

[4] Chambers Brief of the Petitioner, para. 14

How should the expense be accounted for?

[29] What I understand Mr. McRobb to say is that if he advances Ms. McRobb's 50% share of the expense of the professional valuation, then that advance should be fully accounted for as a setoff either against any award of family assets to Ms. McRobb, or against any award of court costs made in favour of Ms. McRobb. The alternative is that this expense would be added as a disbursement to any award of court costs he may obtain against Ms. McRobb.

[30] It strikes me that there is a significant difference between setting off this expense against a potential award of family assets, as opposed to accounting for the expense within a determination of taxable court costs and disbursements. I have already decided that the shares should be valued as of the date of separation, which was nearly 10 years ago. If Ms. McRobb is awarded a portion of the value of the shares, then I expect the Court will consider whether, in the intervening time, she has been deprived of an opportunity to benefit from using or investing her portion of those family assets. Arguably, if she has been so deprived, there should be some compensation to her as a result. Presumably, the trial judge might consider awarding Ms. McRobb pre-judgment interest on the amount awarded to her as her portion of the family assets. According to s. 35(3) of the *Judicature Act*, R.S.Y. 2002, c. 128, such pre-judgment interest would be calculated from the date the cause of action arose, which I assume would be the date of separation, to the date of judgment. However, if Ms. McRobb's 50% portion of the professional valuation expense is initially setoff against her interest in the family assets, then not only would the quantum value of her interest in the family assets be proportionately reduced, so would the quantum value of any pre-judgment interest on

that amount. If indeed Ms. McRobb is awarded an interest in the family assets, such a result would be inherently unfair.

[31] Rather, it would be preferable to treat Ms. McRobb's portion of the expense of the professional valuation as what it is, a disbursement. In these circumstances, Mr. McRobb will be initially incurring the full amount of that disbursement. The extent to which the parties are relatively successful or unsuccessful at trial has yet to be determined. It is therefore appropriate that it should be the trial judge (if the parties are unable to agree) who makes the determination of who should be awarded which court costs ***after*** a decision is made on the merits. The trial judge will have significant discretion under Rule 57 to take into account the expenses and disbursements necessarily incurred in the conduct of the proceeding, as well as the ability to award costs relating to a particular issue or part of the proceeding. Consequently, I agree with Ms. McRobb's counsel that the fairest approach would be to treat the payment of Ms. McRobb's 50% portion of the share valuation expense as an interim disbursement on her behalf by Mr. McRobb and leave it open to the trial judge to determine the most appropriate award of costs at the end of the day.

CONCLUSION

[32] In summary, I make the following order:

1. Mr. McRobb shall bear the expense of conducting a professional valuation of the 22 shares held in his name in Pacific Northwest Moving (Yukon) Ltd., as of July 15, 1994. That expense will include the total amount necessary for this evidence to be presented at trial.

2. Ms. McRobb’s portion of the expense of the professional valuation shall be determined and accounted for at the conclusion of the trial, as a part of the assessment of taxable court costs and disbursements; and

3. The costs of this portion of the application by Ms. McRobb shall be in the cause.

I understand the parties are able to agree on the appointment of the professional who will perform the valuation.

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GOWER J.