C.A. No. 106194

NOVA SCOTIA COURT OF APPEAL

Freeman, Roscoe and Pugsley, JJ.A.
Cite as: Martin v. Martin, 1994 NSCA 219

BETWEEN:

MARCEL JOSEPH HUDSON MARTIN Appellant	)	The appellant appeared in person
- and -	)	Leslie J. Dellapinna for the respondent
DEBORAH WINIFRED MARTIN Respondent	)	
	)	Appeal Heard: November 10, 1994
	)	Judgment Delivered: December 20, 1994

THE COURT: Appeal dismissed with costs to the respondent in the amount of $1,200.00 plus disbursements.

PUGSLEY, J.A.:

Marcel Martin, the appellant, unrepresented by counsel at this appeal, submits the trial judge erred, when she determined after a four day trial, that:

1) he should pay to his former wife, Deborah Martin, the sum of $500.00 per month for the support of their two children;
2) a share held by Ms. Martin, as a matrimonial asset, should be valued at only $5,000.00.

Facts

- at the time of trial in April 1994, Mr. Martin was 41, his wife 39;
- they were married on December 19, 1981, and separated on July 18, 1991;
- the parties agreed Ms. Martin should have custody of Cassandra (born May 29, 1984) and Alysanne (born September 18, 1989), the only children of the marriage;
- after an interim contested application in January 1993, Mr. Martin was ordered to pay interim child support in the aggregate amount of $700.00 per month;
- support payments in the amount of approximately $1,600.00 were in arrears at the time of trial;
- Mr. Martin is employed as a civilian truck driver with D.N.D., earning $24,600.00 per annum;
- Ms. Martin is employed as a manager for Regal Agencies Limited (Regal), a national wholesale business, earning $31,500 per annum. She receives, as well, a car allowance of $400 a month. She is paid approximately $370 a month board from her nephew;
- the parties agreed that Ms. Martin received, by way of gift from her father, in 1985, one common share in the capital stock of Regal. At the time of trial she was a director, secretary/treasurer, and manager of the only store outlet in Canada operated by Regal, located in Burnside, Nova Scotia. A total of twelve shares are outstanding, nine of which are owned by one F.A. Bernard, the president of Regal, who resides in Alberta. No dividends have been paid at any time.

  Shortly before trial (on March 22, 1994) Mr. Bernard wrote to Ms. Martin as follows:

> "Re: Value of Regal Agencies Shares and Offer to Purchase
>
> Ms. D. Martin:
>
> In June of 1991 we purchased controlling interest (five shares) from OSO Investments Ltd. for the sum of $23,000.00, $4,600.00 per share giving us 9 shares or 75% interest.
>
> Up until 1993 Regal Agencies Ltd. made a very small profit and for the year of 1993 will suffer a loss.
>
> Therefore we are prepared to offer you $5,000.00 for your share. This offer will expire December 31, 1994."

Valuation of Regal Agencies Share

The trial judge, in an oral decision given on April 11, 1994, stated in part:

> " There was considerable evidence, albeit speculation and not supported by any expert analysis on the value of the share. Mrs. Martin stated that it represented one of twelve shares in the company. The holder of nine shares has offered to purchase the share for $5,000.00 and indicated the offer is open until December 31, 1994. Mr. Martin, without supporting evidence, states the value of the share is greater than the $5,000.00 offer. The family did use a value of anywhere between $25,000.00 to $30,000.00 on loan applications. In order to ensure her employment, Mrs. Martin would prefer to retain the share with a credited value of $5,000.00.
>
> Unless Mr. Martin produces a cash offer to purchase the share, either by himself or through another person for an amount greater than $5,000.00 within two months from the date hereof and within fifteen days thereafter Mrs. Martin is unable to match the offer then the value of the share shall be treated as $5,000.00 regardless of whether Mrs. Martin retains the share for her own account or sells it to the existing majority shareholder. In other words, Mr. Martin has sixty days to make a cash offer greater than $5,000.00 subject to the right of Mrs. Martin within fifteen days after receipt of the offer being able to match the terms of the offer. Each party will bear responsibility for half of any taxes that may arise on the sale or deemed sale of the share."

Subsequent Events

Mr. Martin brought an application post-trial, on May 18, 1994, to the trial judge for an order directing Ms. Martin to release to him "financial information available to her as a shareholder of Regal" to assist Mr. Martin in attracting a potential purchaser, and for an extension of the sixty day time limit imposed in the decision of April 11, 1994.

Ms. Martin resisted the application arguing that the distribution of financial information could harm Regal.

Her concern was supported by a letter from Mr. Bernard who had written to the trial judge on May 3, 1994, stating in part:

> "As the majority shareholder of the privately owned corporation of Regal Agencies Limited I object to any private and confidential information of the company being disclosed to any public person. I have been advised by our corporate counsel that whereas Regal Agencies is not a party to this court proceeding it has no obligation to disclose that information. Mrs. Martin is a minority shareholder and she does not have the authorization of the company to disclose our private information. . . . these disclosures could affect our present position in the marketplace of both competitors and customers alike . . ."

The trial judge extended the sixty day time limit until June 30, 1994, but determined that only the most recent financial statement be made available to Mr. Martin.

Mr. Martin appeals, as well, from this determination, submitting that he has been denied a "good and fair opportunity" to sell the share to any "potentially interested third party".

Issue No. 1

Mr. Martin submits that he does not have the means, or the capability, to pay the $500 a month for the support of his children.

He points out that he earns only $24,600 per year, but that the gross income available to Ms. Martin aggregates $48,700 per annum.

The trial judge clearly recognized that the needs of the children exceeded the income of the parties when she stated:

> " . . . Maintenance is the responsibility of both parents and the proposed budget for the children of $2,270.00 although exaggerated, will, even after adjustment, exceed Mr. Martin's ability to meet his proportionate share. . . .
>
> . . . maintenance of $500.00 does not reflect the real needs of the children but rather the realities of Mr. Martin's present day level of income. In the event of a future variation, consideration should be given to the fact that the amount of the maintenance award was determined having regard to Mr. Martin's income rather than the real needs of the children . . ."

This Court should not interfere with the decision of the trial judge unless we are persuaded that her reasons disclose material error, or she acted on a wrong principle.

The authorities make is clear that this Court does not have an "independent discretion to decide afresh" the question of maintenance (**Moge v. Moge** (1992), 3 S.C.R. at 832, approving the comments of Morden, J.A., in **Harrington v. Harrington** (1981), 22 R.F.L. (2d) 40, Ont. C.A.).

In my opinion, Mr. Martin has not identified any material error by the trial judge, nor has he established that she misapprehended the evidence, or that she went wrong in principle.

Child support aggregating $500.00 per month for two children aged 10 and 4, is not, in the circumstances of this case, excessive for an individual earning approximately $25,000.00 per annum.

While Mr. Martin submitted on this appeal that he could only afford to pay $100.00 per month to the children, it is noteworthy that the pre-trial memorandum filed by his counsel on March 29, 1994, requested that child support be set at $300.00 per month.

When this discrepancy was pointed out to him, Mr. Martin justified that reduction in his ability to pay maintenance because of legal bills he had received since March 29, 1994 incurred as a consequence of trial.

I do not accept the proposition that obligations incurred to a lawyer take precedence over child support. Child support is a parent's first obligation.

In viewing Mr. Martin's submissions concerning his ability to pay, it is pertinent to consider the following comment made by the trial judge, albeit relating to valuation of items removed from the matrimonial home:

> ". . . Mr. Martin, on occasion, was not as forthright with the Court as he could have been - not necessarily untruths but half-truths were presented to leave an impression, ..."

I would dismiss the first ground of appeal.

Second Issue

In support of his contention that the value of one share in Regal held by Ms. Martin was greatly in excess of $5,000.00, Mr. Martin refers to a form executed by both he and Ms. Martin, on December 1, 1987. The paper was given to the Canadian Imperial Bank of Commerce in support of a loan application. The form recites a value for the share at $20,000.00. Subsequent forms signed by both Mr. and Mrs. Martin, in 1988, 1991, and 1993, recite a value for the share of $25,000.00, and ultimately $28,000.00.

Ms. Martin explained that when she signed the loan application form, she calculated a value for the share at $28,00.00 by simply taking retained earnings of the company and dividing by twelve.

In 1993 when she signed the last form, she testified "I was just so happy that they were lowering the mortgage payments so I could keep the roof over our heads, I didn't even look" (ie. at the value placed on the Regal share).

Ms. Martin further testified that she did not believe the share could be sold for a sum in excess of $5,000.00.

As she points out:

> "There's no money, there's no dividends, there's no control, there's no power. I don't see where it would be of any value to anyone but someone like myself who needs it for job security."

While Mr. Bernard's offer of March 22, 1994, was "disappointing" Ms. Martin considered it represented fair value.

Mr. Martin's own evidence supports this position. He acknowledged that Mr. Bernard "has no reason to buy it now . . . because it doesn't affect the operation of his business".

When asked whether or not Ms. Martin could obtain $25,500.00 for the share he testified "probably not", and conceded that he had "no idea" what the share was worth.

The trial judge was faced with conflicting evidence on the valuation of the share, none of it of an expert nature.

In my opinion, the best evidence of value as determined by the trial judge was that given by Ms. Martin. She was familiar with the operations of the company, managed the only outlet of the company, had access to the financial statements, and produced an offer in writing from the major shareholder.

It is a matter of common knowledge that the value of a minority interest attracts a substantial discount. While no expert evidence was offered in this case as is often the situation (**Nickerson v. Nickerson** (1983), 59 N.S.R. (2d) 133 at 136), the lack of evidence of this nature does not prevent the trial judge from determining a value in the light of Ms. Martin's evidence based on her firsthand knowledge of Regal's operations.

In valuing the share at $5,000.00, in my opinion, the trial judge committed no error.

The second point on this issue raised by Mr. Martin is that the trial judge in her corollary decision of May 18 reversed her trial decision of April 11.

It is clear when one examines the transcript of the discussion between counsel for both parties, and the court, on May 18, that the trial judge, in view of the failure of Mr. Martin to adduce expert evidence on the value of the Regal share, fashioned an imaginative remedy to enable Mr. Martin to purchase the share for a sum in excess of $5,000.00, if he believed it was worth in excess of that amount.

The solution was not intended to enable Mr. Martin to distribute detailed financial information concerning Regal's operations to anyone he considered a prospective purchaser.

As the trial judge points out, she determined that Mr. Martin simply had "an interest" in the share held by Ms. Martin.

The corollary decision, in my opinion, did not reverse the decision of April 11, but simply served to further explain the intention intially expressed. I see no conflict between the two.

In my opinion, the trial judge committed no manifest error in law.

I would accordingly dismiss the appeal on this issue as well.

Disposition

I would dismiss the appeal with costs to the respondent in the amount of $1,200.00 plus disbursements.

J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.