COURT OF APPEAL FOR ONTARIO

CITATION: Buttar v. Buttar, 2013 ONCA 517
DATE: 20130815
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Rosenberg, Goudge and Tulloch JJ.A.

BETWEEN

Doris Marion Buttar

Applicant (Respondent)

and

Bruce Edgar Buttar

Respondent (Appellant)

Aaron M. Franks and Michael Zalev, for the Appellant

Donald R. Good, for the Respondent

Heard: April 30, 2013

On appeal from the judgment of Justice Mary J. Hatton of the Superior Court of Justice, dated April 18, 2012 and the costs order dated September 19, 2012.

Rosenberg J.A.:

[1] This appeal arises out of a judgment by Hatton J. resolving a number of issues following the parties' separation after a 36-year marriage. During most of that time, the appellant husband and the respondent wife were engaged in a dairy farming operation and accumulated a number of properties for that purpose. The appellant raises issues concerning the calculation of Net Family Property ("NFP") and spousal support. However, the principal issue involves the application judge's order dividing the six jointly-owned farm properties between the appellant and the respondent in satisfaction of the equalization and spousal support payments. .

[2] For the following reasons, I would allow the appeal in part, and set aside the order distributing the properties between the parties. I would allow the appellant to deduct his disposition costs from his NFP, but I would dismiss his appeal as it relates to the exclusion of the milk quota from his NFP and the payment of spousal support.

A. THE FACTS

[3] The following summary sets out this family's history and the history of the acquisition of the jointly held properties.

[4] The appellant and respondent married in 1972 and separated in 2008. They have three adult children. The appellant's parents were farmers. After the parties, who had met in college, graduated,

the appellant began to work on the farm with his father, although he also held another job. The respondent worked as a teacher. In 1973, the parties built a house on the Donaldson Road property that was owned by the appellant's parents. In 1976, the appellant started farming full-time. Two years later, the appellant's parents gave the parties the Donaldson Road property.

[5] In 1979, the appellant's parents transferred ownership and control of their farming business to their son and his wife. As part of the transaction, the Home/Main farm, including its properties, was gifted to the appellant and the respondent jointly. 5,970 kg of milk quota and equipment were gifted to the appellant alone. The livestock was sold to the appellant for $55,000. The transfer was structured so as to minimize income tax consequences. Particularly, by structuring the milk quota part of the disposition of the farm as a gift to his son, the appellant's father was able to avoid tax consequences in accordance with s. 73 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp). The Dairy Farmers of Ontario confirmed that there was no selling price listed on the application to transfer the quota.

[6] In 1980, the appellant started farming with his cousin David. He and David purchased the Watt farm. The joint farming operation continued until 1988. At that time, the appellant and David divided their milk quota and the appellant purchased some of David's quota, leaving the appellant with 8,785 kg. of quota. In the meantime, the parties and their children had moved into the Home/Main Farm and the appellant's parents had moved into the Donaldson Road Property.

[7] In 2002, the parties purchased another farm, the Blezard Farm. In 2004, they purchased David's interest in the Watt farm. In 2007, they purchased David's Farm. Finally, at some point the parties also purchased the School Farm.

[8] Thus, at the time of separation, the parties jointly owned six properties:

- The Home\Main Farm;
- The Donaldson Road property, which is comprised of two severed lots;
- The Watt Farm;
- The Blezard Farm, which is also comprised of two lots;
- David's Farm, and
- The School Farm

[9] The parties also jointly held a time-share interest in a Collingwood property, which was also transferred as part of the trial judge's order.

[10] In the 1990's, the parties began a series of improvements to the family farm business and borrowed heavily from Farm Credit Canada to finance the improvements. At the date of separation, the gross value of the farm properties was $2,330,000 and the jointly owed debt to Farm Credit Canada was $1,411,574.00. The appellant also owned 27,561 kg of milk quota with a value of $1,867,572.30 (before capital gains tax) and farm equipment and cattle with a value of $370,072.12 (before capital gains tax). The parties had other assets as follows: the appellant, $74,269.16; the respondent $56,594.

[11] After the separation, the parties and their children conducted some negotiations about what to do with the dairy operation. The parties have different views as to why those negotiations failed. In the

event, the appellant sold the dairy quota in two lots in early 2010 for $1,867,572.30, which he used to pay off the FCC debt. The balance of $358,253.46 was paid into the respondent's lawyer's trust account. These funds were eventually disbursed by agreement between the parties. Later in 2010, the appellant sold the dairy herd and farm equipment. He used some of this money to purchase other equipment, including farm machinery and a tractor trailer. As a result of the various sales, the appellant incurred $280,000 in capital gains taxes after using his $750,000 lifetime capital gains exemption.

[12] At the time of application, the respondent was 65 years of age and the appellant was 62 years of age. During the marriage, the respondent held a number of jobs to supplement the farm income. She also assisted with the dairy operation until it was sold in early 2010. During the last years of the marriage, the respondent had only sporadic employment with a local service club. Thus, from 2007 to 2009, she earned less than $3,000 a year. In 1989, the respondent was diagnosed with breast cancer. A second cancer diagnosis was made in 2006. As a result of the cancer and subsequent treatment the respondent has difficulty with heavy manual labour.

[13] The farm business was successful. The income was reported on the appellant's tax return and reached almost $900,000 in 2010. After the dairy operation ended, the appellant derived income from various jobs. He expected his annual income to be less than $20,000. The appellant paid spousal support of $2,000 per month from the date of separation to February 2010, when the dairy operation ceased. He had not paid any spousal support since that time.

B. THE ISSUES

[14] By the time of the application, many financial issues had been settled. The application judge dealt with six issues, four of which remain issues on this appeal as follows:

> 1. Whether the appellant can deduct from his NFP the present value of the disposition costs, and in particular the capital gains tax, that he will incur upon sale of the properties.
>
> 2. Whether the appellant can exclude from his NFP the milk quota his father gave him in 1979.
>
> 3. How much spousal support is owed to the respondent.
>
> 4. Whether, and if so how, the jointly-owned properties should be distributed.

ISSUE 1: DISPOSITION COSTS

(1) The Reasons of the Application Judge

[15] The appellant claimed that, in calculating his NFP, he was entitled to claim as a debt any capital gains he would incur after using his $750,000 lifetime exemption. The application judge allowed the appellant to claim as a debt the capital gains already incurred at the time of the application. She did not, however, allow him to claim the expected capital gains tax liability that would arise from the proposed sale of all the farm properties. The appellant sought to claim $270,000.

[16] The application judge concluded that the sale of the properties was not inevitable. Her reasoning was related to her ultimate conclusion that each party would be given specific property as a result of the judgment in this case. She speculated that the parties, in deciding what to do with the properties respectively allotted to them, might choose to retain the properties or transfer them to their children.

She therefore held that neither party would be given a capital gains deduction for the future sale of any property, and that each would individually bear the costs of any capital gains tax incurred on future dispositions. It should be pointed out that this would not be a serious hardship for the respondent, since she still had her lifetime capital gains tax exemption available to her.

(2) Analysis

[17] In my view, the application judge erred in not permitting the appellant to treat as a debt under s. 4(1) of the Family Law Act, R.S.O. 1990, c. F.3 ("the Act") the capital gains taxes he would incur on the proposed sale of the properties. There are a couple of reasons for this, including, as will be discussed below, that the appropriate order in this case would have been to order the sale of the properties in question. Once sold, the disposition costs would be inevitable.

[18] Quite apart from the appropriateness of an order for sale in this case, the application judge erred in law in refusing to allow the capital gains tax as a cost of disposition.

[19] The test for deducting disposition costs from NFP as set out in Sengmueller v. Sengueller (1994), 1994 CanLII 8711 (ON CA), 17 O.R. (3d) 208 (C.A.), at pp. 213, is as follows:

> In my view, it is equally appropriate to take such costs into account in determining net family property under the Family Law Act if there is satisfactory evidence of a likely disposition date and if it is clear that such costs will be inevitable when the owner disposes of the assets or is deemed to have disposed of them. In my view, for the purposes of determining net family property, any asset is worth (in money terms) only the amount which can be obtained on its realization, regardless of whether the accounting is done as a reduction in the value of the asset, or as deduction of a liability: the result is the same. While these costs are not liabilities in the balance sheet sense of the word, they are amounts which the owner will be obliged to satisfy at the time of disposition, and hence, are ultimate liabilities inextricably attached to the assets themselves. This is consistent with McPherson but goes beyond it. [Emphasis added.]

[20] This court had, in the earlier case of Starkman v. Starkman (1990), 1990 CanLII 6793 (ON CA), 75 O.R. (2d) 19 at pp. 23 and 26, adopted the approach from McPherson v. McPherson (1988), 63 O.R. 2(d) 641, as set out in the following passage from McPherson, at p. 647:

> ... an allowance should be made in the case where there is evidence that the disposition will involve a sale or transfer of property that attracts tax consequences, and it should not be made in the case where it is not clear when, if ever, a sale or transfer of property will be made and thus the tax consequences of such an occurrence are so speculative that they can safely be ignored. [Emphasis added.]

[21] The test used by the application judge is stricter than the tests in Sengmueller and McPherson. The application judge looked to whether the disposition of the assets was inevitable. Instead, she should have determined whether it was more likely than not that the assets would be sold, at which point disposition costs would inevitably be incurred.

[22] Quite apart from the appropriateness of ordering the properties sold, the evidence established that the appellant would have to sell some of his property interests in order to pay the taxes he owed on

the sale of equipment and to pay the costs order. At that point, the appellant would inevitably incur capital gains tax, inasmuch as he had already used up his lifetime exemption.

[23] The NFP of the parties must be adjusted accordingly. Of course, the respondent will also be entitled to deduct her costs of disposition.

ISSUE 2: THE 1979 MILK QUOTA

(1) The Reasons of the Application Judge

[24] At the application, the appellant sought to exclude from his NFP the value of the milk quota provided to him by his father in 1979 on the basis that it was a gift within the meaning of s. 4(2) of the Act, which provides as follows:

> 4(2) The value of the following property that a spouse owns on the valuation date does not form part of the spouse's net family property:
>
> 1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage.

[25] The application judge found that the milk quota was transferred in 1979 as part of a larger transaction involving the transfer of the family farm from the appellant's parents to the parties. She found that the transfer was structured so as to minimize tax consequences. As a result of this transaction, both parties assumed all the liabilities associated with the transfer. The respondent shared equally in assuming the liabilities and paying the expenses of all the assets, including the milk quota.

[26] The application judge found that the transfer of the milk quota was not a gift because there was consideration for the transfer. This consideration took the form of a life interest given to the appellant's parents in the family farm. The father lived on the farm until his death, while the mother remained until she moved to a retirement home. As the application judge said:

> [The appellant's parents] were both financially provided for by the parties for the rest of their lives from income generated by all the transferred assets, including the milk quota. The wife cared for both the husband's parents until their deaths.

[27] The application judge found that, in any event, the appellant had not shown that the quota that was transferred in 1979 was still in the appellant's possession at the time of separation. The application judge referred to a history of sales and purchases of quotas over the years, and concluded that the quota ultimately sold in 2010 had been acquired through the combined efforts of both of the parties.

(2) Analysis

[28] The term "gift" is not defined in the Act. In McNamee v. McNamee, 2011 ONCA 533 (CanLII), 106 O.R. (3d) 401, this court set out the elements of a gift in the following way, at para. 24:

The essential ingredients of a legally valid gift are not in dispute. There must be (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration, (2) an acceptance of the gift by the done, and (3) a sufficient act of delivery or transfer of the property to complete the transaction: Cochrane v. Moore, (1890), 25 Q.B.D. 57 (C.A.), at pp. 72-73 Q.B.D.; Mossman and Flanagan, supra, at p. 441, Bruce Ziff, Principles of Property Law, 5th ed. (Toronto: Carswell, 2010), at p. 157.

[29] In Peter v. Beblow, 1993 CanLII 126 (SCC), [1993] 1 S.C.R. 980, at pp. 991-92, McLachlin J. referred to giving without expectation of remuneration as the "central element of a gift at law". The only element in dispute in this case is whether the appellant's father intended to make a gift of the milk quota without consideration or expectation of remuneration.

[30] In support of his argument that there was no consideration for the transfer, the appellant points to the following pieces of evidence, among others: that the appellant's father followed the advice of his accountant to gift the quota at a deemed valued of 'Nil' to minimize income tax consequences at the time of the transfer; that the Dairy Farmers of Ontario confirmed "there was no selling price listed" on the quota transfer application, and that the appellant testified that he "did not pay anything for [the quota]". The appellant also relies upon this court's decision in McNamee and submits that the application judge focused on the motive for the transfer (deferring taxes) instead of the nature of the transaction.

[31] In McNamee, the father executed a Declaration of Gift at the time he issued common shares to his sons, which included the appellant husband, as part of an estate freeze. The husband was not aware of the details of the estate freeze transaction. This court held that the trial judge in McNamee erred in finding that the transfer of the shares was not a gift. With respect to the trial judge's finding that there was consideration for the transfer, this court explained, at para. 29, that consideration "is the value that flows from a promisee to a promisor as a result of a bargain. There can be no consideration, however, when there has been no bargain". The court continued:

[C]onsideration cannot flow from a promisee who does not know he or she is negotiating, much less passing value to a promisor in an exchange he or she doesn't know exists.

[32] In that case, this court held that the share transfer was unilateral on the part of the appellant's father, and that the sons had no meaningful input with respect to it. This court also held that the fact that the appellant's father was able to accomplish his corporate planning goals did not amount to consideration flowing from his son to him.

[33] The application judge's statement that this case can be distinguished from McNamee because this was not an estate freeze is less helpful than her ultimate conclusion that the transfer was not a "true gift to the husband as there was consideration provided by both the husband and the wife". That consideration consisted of the life interest in the family farm, the fact that the parents continued to live on the farm, that they were both financially provided for from income generated by the transferred assets, including the milk quota, and that the respondent cared for the parents until their death.

[34] The application judge's conclusion that the transfer of the milk quota to the appellant was not a true gift is based on findings of fact that are entitled to deference. The appellant is required to identify a palpable and overriding error: Housen v. Nikolaisen, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, at para. 10.

[35] I have not been persuaded that the application judge erred. The application judge's findings as to the nature of the arrangement between the parties and the appellant's parents are supported by the evidence. The evidence shows that this appellant, unlike the husband in McNamee, was involved in the transaction. The milk quota was part of a much larger transaction for which there was consideration. The items identified by the application judge are capable of constituting consideration when the transfer

of the milk quota transaction is placed within the context of the entire transaction and this family's history. The application judge also did not improperly focus on the motive for the transaction. The application judge's reasons show that she was properly concerned with the question whether or not there was any consideration for the 1979 transfer of the milk quota.

[36] Finally, the appellant has not demonstrated that the fact the transaction may have been driven by tax advice was a basis for finding a gift. As the respondent points out the tax treatment of family farms is complex and it is not clear that this transaction was contrary to the public policy underlying the tax treatment of such farms. I would not give effect to this ground of appeal.

ISSUE 3: SPOUSAL SUPPORT

(1) The Reasons of the Application Judge

[37] There was no dispute about the respondent's entitlement to spousal support, although her need for it was disputed. At the application, the most contentious issues were the appellant's actual income and the amount that should be imputed to him.

[38] The appellant took the position that he was entitled to retire from farming and to work less for less money. The application judge found the appellant's evidence as to his inability to earn a greater income to be questionable. He was an experienced farmer and had purchased farm machinery and a tractor trailer to generate income. He had no health problems and continued to incur substantial personal expenses. The application judge found that the appellant's claimed drastic income reduction from an inferred income of between $60,000 to $80,000 to less than $20,000 annually was neither reasonable nor credible. The application judge imputed to the appellant an annual income of $40,000.

[39] The application judge also considered the respondent's circumstances. This was a long-term marriage where the respondent was in a very vulnerable position because of her health and her limited ability to earn an income. While the appellant had paid other expenses, he had paid no spousal support since February 2010. On the other hand, the application judge stated that the respondent would have some income, either from the sale of the properties or by renting them out. This last appears to relate to the application judge's ultimate decision to divide the jointly-held properties between the parties.

[40] The application judge determined that the respondent would be entitled to indefinite spousal support, given her age and the fact that this was a long-term marriage, but instead ordered a lump sum payment. She considered the Spousal Support Advisory Guidelines and made an award around the midpoint. The application judge ordered the appellant to make a lump sum payment of $160,000 for spousal support. The application judge did not expressly state why the spousal support should be a lump sum rather than periodic payments.

(2) Analysis

[41] The appellant does not contest the application judge's decision to order a lump sum spousal support award. He does, however, take issue with the amount awarded. He submits that the application judge erred in failing to consider the respondent's significant capital base, erred in imputing an excessive amount of employment income and erred in calculating the lump sum on the basis of indefinite support. I would not give effect to these submissions.

[42] A decision as to the amount and duration of support is entitled to considerable deference, especially where, as here, the decision is based in part on findings of credibility: Hickey v. Hickey, 1999 CanLII 691 (SCC), [1999] 2 S.C.R. 518 at paras. 11-12. In view of the length of the marriage and the respondent's vulnerable position, as identified by the application judge, it was open to the application judge to make an order for indefinite support. Given the appellant's investment in income-earning property and his experience, imputing $40,000 in annual income to him is, in my view, a relatively modest order. The application judge did take into account the respondent's ability to earn income from any property settlement.

[43] I would not give effect to this ground of appeal.

ISSUE 4: DISTRIBUTION OF PROPERTIES

(1) The Reasons of the Application Judge

[44] The appellant's position at the application was that the jointly-owned properties should be sold, with him in control of the sale. The respondent proposed that the eight properties be divided between the parties pursuant to the Partition Act, R.S.O. 1990, c. P.4.

[45] The application judge accepted the respondent's proposal, holding that such a division would resolve all property and support issues between the parties. She found that this was a high-conflict case in which it was better that the issues between the parties be resolved as soon as possible. The wife's proposal would allow her to remain in the family home close to her family and friends. In the application judge's view, the appellant's proposal would likely result in longstanding issues between the parties because of the difficulty of selling the properties.

[46] The application judge attached a schedule to her reasons in which she set out her calculation of the net equalization payment owed by the appellant to the respondent. She held that each party was entitled to half of the properties and the time share. She added together the equalization payment of $112,986.69 owed by the appellant to the respondent, the value of the properties, and the lump-sum spousal award, and calculated that the appellant owed the respondent $1,441,486.69 in total. The application judge then assigned to each of the properties the value they had on the date of separation, and distributed the properties between the parties to give effect to a value transfer from the appellant to the respondent of $1,441,486.69. I have attached the application judge's Schedule to these reasons to show how she arrived at the distribution of property.

(2) Analysis

[47] The appellant submits that the Family Law Act does not give any jurisdiction to divide property in specie. He also submits that if the application judge made her order under the Partition Act, and it is not clear that she did, that Act does not permit a court to effect the sale of properties between the parties at a set price under the guise of "partitioning". The appellant submits that an ordered sale of the properties on the open market was more appropriate in this case. The respondent submits in this appeal that the application judge had jurisdiction to make the order transferring the jointly-held properties pursuant to either s. 9(1) of the Family Law Act or under the Partition Act.

[48] While the application judge had valid reasons for seeking a quick resolution of the issues between the parties, in my view, she had no jurisdiction to make the order she did. The application

judge referred to the Partition Act as the basis for the respondent's proposal, but did not identify how that Act authorized the division of properties that she made. In my view, neither the Family Law Act nor the Partition Act supports the order made by the application judge in this case.

(a) The Family Law Act

[49] The relevant sections of the Family Law Act are ss. 5(1), 7(1) and 9(1)(d), which provide as follows:

> 5. (1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.
>
> 7. (1) The court may, on the application of a spouse, former spouse or deceased spouse's personal representative, determine any matter respecting the spouses' entitlement under section 5.
>
> 9. (1) In an application under section 7, the court may order,
>
> …
>
> (d) that, if appropriate to satisfy an obligation imposed by the order,
>
> (i) property be transferred to or in trust for or vested in a spouse, whether absolutely, for life or for a term of years, or
>
> (ii) any property be partitioned or sold.

[50] In 1986, soon after the Family Law Act came into force, Galligan J. described the legislative scheme in Skrlj v. Skrlj (1986), 2 R.F.L. (3d) 305 (Ont. H.C.J.) at p. 310, in these terms:

> The scheme of the Act, insofar as it relates to property, is to determine the value of each spouse's net family property as at the valuation date as defined in the Act. … Once the value of each spouse's net family property is determined, the spouse with the lesser value is entitled to one half of the difference, subject to any adjustment if unconscionability, as set out in s. 5(6) of the Act, is proved.

[51] Earlier in that case, Galligan J. dealt with the proposal that properties could be distributed. He rejected this approach, in emphatic terms, at p. 309:

> In this case certain suggestions were put to the court about how this dispute could be resolved by transferring assets to discharge corresponding liabilities. In my view, that is the stuff of settlement. Separating spouses can settle their differences as they see fit but if they do not settle them and decide to come to trial, they are entitled to, and should expect to get adjudication, not mediation.

[52] Justice Galligan returned to this issue as a judge of this court, in Berdette v. Berdette (1991), 1991 CanLII 7061 (ON CA), 3 O.R. (3d) 513 (C.A.) at p. 524:

> The intent of this legislation is to establish partnership and equal sharing of property accumulated during marriage. That intent is not effected, however, by the sharing of the assets themselves as was done under the Family Law Reform Act, R.S.O. 1980, c. 152, which preceded the FLA. It is done by the sharing of the value of the assets. The distinction is crucial and is one that is not infrequently overlooked. For example, in his "Annotation to Rawluk v. Rawluk" (1990), 23 R.F.L. (3d) 338, at p. 345, Professor James G. McLeod speaks of "a statute that, by its terms, provides for the equitable distribution of property". In my view, the definition of "net family property" contained in s. 4(1), the opening words of s. 4(2), s. 5(1) and s. 5(6) all show that the FLA does not provide for the distribution of property. Rather, it provides for the payment of money when the net family property of one spouse is less than that of the other.
>
> I make particular reference to s. 4(1), which defines "net family property" as the value of all property which a spouse owns on valuation day. In this way, net family property is distinct in nature from "property" in the statutory sense found in s. 4(1) and from the word "property" in its ordinary sense.

[53] I agree with Justice Galligan. The scheme of the Act does not support the proposition that an application judge can simply redistribute properties among the parties. To interpret the Act in this way would be inconsistent with its overall scheme, which gives a judge only a very limited power to distribute properties in the circumstances set out in s. 9. That is, section 9 gives the court the power to transfer properties only “if appropriate to satisfy an obligation imposed by the order [for the equalization of net family properties]”. In other words, the transfer power under section 9 is specifically connected to the satisfaction of the order for the equalization of net family properties rather than a general transfer power for the settlement of disputes arising from marital breakdown.

[54] To a similar effect is the recent decision of this court in Thibodeau v. Thibodeau, 2011 ONCA 110 (CanLII), 104 O.R. (3d) 161. In that case, Blair J.A. endorsed this interpretation of the legislative scheme of the Family Law Act, albeit in the context of a bankruptcy proceeding. As explained by Blair J.A. at para. 37, “[s]eparating spouses are not entitled to receive a division of property. … An equalization payment is the chosen legislative default position”. He continued, at paras. 39 and 40, by observing that the enhanced remedies available under s. 9(1) can give rise to proprietary rights if the record justifies such an exception in the equalization payment regime, but only if a “real need” is shown.

[55] Trial courts have consistently adopted this interpretation. One example is Zadegan v. Zadegan, [2002] O.J. No. 2190 (S.C.J.), in which, after referring to the fact that the parties had provided her with proposals as to how their real properties might be distributed, J. Mackinnon J. held as follows, at paras. 90-92:

> 90 In this way, both parties have, in effect, asked the court to redistribute their assets, in order to achieve what each of them regards as the proper outcome. In my view, this is not the type of order that the court can make under the Family Law Act. That Act does not direct the court to redistribute assets in order to make an equal distribution. See Berdette v. Berdette (1991), 1991 CanLII 7061 (ON CA), 3 O.R. (3d) 513 (C.A.). Rather, it directs the court to determine the net family property of each spouse. Then, if one spouse's net family property is less than that of the other, s. 5(1) provides for equalization. … [T]he powers of the court to give effect to the equalization are set out in s. 9(1):

…

> 91 Thus, while s. 9(1)(d) permits the court to transfer property in order to satisfy an obligation imposed by the order, this is not the same thing as rearranging ownership of assets.
> …
>
> 92 Accordingly, the court could order the transfer of an asset between the parties in order to satisfy an equalization payment, or part of it, but cannot order the transfer of various assets between the parties in order to bring about an equitable distribution of assets.

[56] Speaking to when an order under s. 9 may be required, Whalen J. held in Colquhoun v. Colquhoun, [2007] O.J. No. 9, 2007 CarswellOnt 18 (S.C.), at para. 168, that there would need to be "a proven concern that [the equalization payment] will not be honoured".

[57] The record in this case does not suggest that an order under s. 9 was needed in order to enforce the equalization payment. In any event, the equalization payment calculated by the application judge was just over $100,000. The effect of the application judge's order was the compulsory transfer of ownership interests in excess of one million dollars, which is far in excess of the equalization payment amount.

[58] To conclude, the order made by the application judge in this case cannot be supported by the Family Law Act. I turn now to the Partition Act.

(b) The Partition Act

[59] I would make this preliminary comment about the application of the Partition Act to this case. In Silva v. Silva (1990), 1990 CanLII 6718 (ON CA), 1 O.R. (3d) 436, this court accepted that the Partition Act is not ousted by the Family Law Act, but stated that the Family Law Act "should be the statute of first resort in matrimonial disputes". Accordingly, it would be an unusual result if the Partition Act, which deals generally with jointly-owned property, could be applied so as to effect a result that is inconsistent with the specific provisions and the legislative policy of the Family Law Act.

[60] The governing provisions of the Partition Act, with unnecessary terms removed are as follows:

> 2. All joint tenants, tenants in common, … 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.
>
> 3. (1) Any person interested in land in Ontario … may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested.

[61] Each of the properties in question in this case was originally registered as a joint tenancy. In August 2010, the parties agreed to sever the joint tenancies and the parties now hold the properties as tenants in common.

[62] The application judge's order in this case raises two issues. First, does the Partition Act permit, not the partition of individual jointly-owned properties, but a wholesale distribution of several previously jointly-held properties between the parties. Second, even if partition could encompass such a distribution, was an order of that type appropriate in this case. In my view, this case can be resolved on the basis of the second question. However, since the distribution issue was fully argued, and the matter

appears to be one of first impression in this court, I will make some brief comments on that issue as well.

[63] To start with the question of the appropriateness of the order, the fundamental problem with the judge's order in this case was that it took away the appellant's right to the highest price for his interest in the properties. The values used by the application judge in redistributing the properties were the valuations as at the date of separation, and as fixed by the parties for the purposes of calculating the equalization payment at trial. There was no evidence that those values represented the market value of the properties as at the time of the application or that they represented the highest price. As Granger J. said in Batler v. Batler (1989), 1988 CanLII 4726 (ON SC), 67 O.R. (2d) 355 (H.C.J.) at 356:

> A joint tenant is entitled to the highest price for his or her interest which may be more than the appraised value of the property. In today's real estate market, the appraised value of the property may not reflect the fair market value. The true test of the fair market value is to sell the property in an open market. Unless the parties agree to a transfer of the property at an agreed price, the property should be listed for sale and sold, to ensure that fair market value is obtained.

[64] This court has jealously guarded the rights of joint owners to the best price for jointly-owned property. Martin v. Martin (1992), 1992 CanLII 7402 (ON CA), 8 O.R. (3d) 41 (C.A.) provides an example of this principle in a slightly different context. In that case, this court explained the rationale behind the rule that one party cannot be given a right of first refusal with respect to matrimonial property ordered sold. As Osborne J.A. explained in Martin at p. 48:

> 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. …
>
> 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.

[65] The order of the application judge was, in effect, a forced sale of the jointly-owned properties between the parties, without the benefit of fair market value. That is not an appropriate use of the Partition Act: see Miller v. Hawryn, 2010 ONSC 6094, at para. 25.

[66] For that reason, even if the division of the farm properties were permissible generally under the Partition Act, it would not have been an appropriate order in this case.

[67] Given this conclusion, it is not strictly necessary to consider whether the application judge had jurisdiction to make the order that she did. I offer, however, these brief additional comments. Partition is the physical division of land among co-owners such that each is entitled individually to a separate parcel: Jeffrey W. Lem and Rosemary Bocska, Halsbury's Laws of Canada – Real Property, 1st ed. (Markham, Ont: LexisNexis Canada, 2012), at HRP-46. There is virtually no authority supporting the respondent's submission that the order that was made could be characterized as a partition, even if it were clear that this was the basis on which the application judge made her order. The distribution of different properties between joint owners as was done in this case is simply not partition; rather, it is an

enforced sale between two parties at a set price. And, as I have said, it is fundamentally inconsistent with the scheme of the dominant legislation, the Family Law Act.

[68] The application judge did not refer to any authority to support the order made. On appeal, we were referred to only one case in support of the argument that the Partition Act could be used to distribute separate properties between joint owners: see Suddick v. Schwenger (2007), 52 R.P.R. (4th) 306 (Ont. S.C.J.).

[69] The facts of Suddick are somewhat complicated. In short, the case involved a cottage property in Eastern Ontario ("Lot 3"). The parties to the dispute were three siblings, the children of Charles and Elena Schwenger. In 1966, Charles Schwenger obtained Lot 3 from his father. In 1982, he severed Lot 3 into two lots, the West Lot and the East Lot, and transferred the East Lot to his wife, Elena. After Charles Schwenger died, the West Lot passed to Elena such that she owned all of Lot 3. She died in 2006 leaving Lot 3 to her three children as tenants in common.

[70] After many years of disputes amongst the siblings, the parties made an application under the Partition Act. The application judge was satisfied that there must be partition or sale. He decided that the appropriate remedy was partition, with one of the siblings getting the West Lot and the other two siblings getting the East Lot. The sibling getting the West Lot was to compensate the other two siblings for the difference in value between the two lots.

[71] The application judge in Suddick held that the parties were the joint owners of the entire property of Lot 3. That was the "land" in question, referring to sections 2 and 3 of the Partition Act. The fact that, for planning purposes, the two parcels could be separately conveyed without further approvals had no bearing on that conclusion. As can be seen, this case is not authority for the in specie division of separate properties, as took place in this case, under the Partition Act, but was a proper partition. It is only in a notional sense that the Partition Act was used in this case to distribute separate properties. Finally, detracting from the case's value as a precedent is that an appeal was taken and allowed, see (2009), 69 R.P.R. (4th) 318 (Ont. Div. Ct.), apparently on consent in accordance with minutes of settlement.

[72] In my view, the Partition Act cannot be used to support the in specie distribution of properties, as was done in this case. The application judge should have ordered the sale of the properties. Obviously, it would be open to the parties to bid on any of the properties.

C. DISPOSITION

[73] Accordingly, I would allow the appeal and vary the order of the application judge in accordance with these reasons, varying paragraph 1 of the Order (the equalization payment) to take into account the parties' claims for disposition costs; and paragraph 3 of the Order (distributing the properties) and ordering that the properties be listed for sale, sold and the net proceeds divided equally between the parties, subject to necessary adjustments. The appeal is dismissed as it relates to the payment of spousal support and the 1979 milk quota.

[74] As to costs, if the parties cannot agree, they may make brief written submission. The appellant shall make submissions within 15 days of release of the decision; the respondent will have 15 days to respond.

Released: “MR” August 15, 2013

“M. Rosenberg J.A.”

“I agree. S.T. Goudge J.A.”

“I agree. M.H. Tulloch J.A.”

Appendix A

Schedule B

Determination of Division of Property

a) each party is entitled to half of the eight farm lots and the time share, therefore each party received $1,168,500.00 in property.

b) the husband owes to the wife a net equalization payment of $112,986.69.

c) the husband owes to the wife lump sum spousal support, retroactive to March 1, 2010, in the amount of $160,000.00

d) the total of a), b) and c) above, owed to the wife, is $1,441,486.69

e) wife to receive	main farm	$700,000.00
	Blezard farm, Lot 1	240,000.00
	Lot 2	150,000.00
	Donaldson Road	270,000.00
	with lot	80,000.00
	Total	1,440,000.00
f) husband to receive	David's farm	370,000.00
	School farm	120,000.00
	Watt farm	400,000.00
	Time share	7,000.00
	Total	897,000.00

g) Husband owes wife $1,486.69 at the time of the property transfers set out in e) and f) above.