Butty v. Butty

99 O.R. (3d) 228

Court of Appeal for Ontario,
Gillese, Blair and MacFarland JJ.A.
December 3, 2009

Family law -- Domestic contracts -- Marriage contract -- Setting aside -- Parties entering into marriage contract which protected husband's farm property from equalization regime -- Both parties mistakenly believing when marriage contract was signed that farm property consisted of one parcel rather than two parcels -- Wife having independent legal advice and not being subject to duress -- Trial judge erring in setting aside marriage contract on basis that husband failed to make proper disclosure at time contract was entered into -- Mistaken belief that property consisted of one parcel being common and innocent and not detracting from fact that wife was aware that she was giving up all claims against whole of property.

The parties entered into a marriage contract which protected the appellant's farm property from the statutory equalization scheme. The respondent subsequently brought an application to set aside the marriage contract on the basis of duress or unconscionability. The trial judge found that the appellant failed to make proper disclosure at the time the contract was entered into. In particular, he found that the appellant failed to disclose the fact that the farm property was two parcels of land, not one; that there was confusion about the nature of the appellant's mother's interest in the farm property; that the estimated value of the appellant's interest in the farm property was incorrect; and that the estimated value of the appellant's liabilities was overstated. The trial judge exercised his discretion under s. 56(4)(a) of the Family Law

Act, R.S.O. 1990, c. F.3 and set aside the contract. The appellant appealed.

Held, the appeal should be allowed.

In his reasons for judgment, the trial judge was highly critical of the lawyer who acted for the appellant at trial, finding that he suppressed the fact that the family farm consisted of two parcels in a deliberate attempt to mislead opposing counsel and the court. That finding was wrong. Both parties were initially under the mistaken belief that the farm property consisted of one parcel. When the appraiser retained by the appellant discovered that the property was actually two separate parcels, that information was immediately brought to the attention of counsel for the respondent.

The trial judge erred in setting aside the contract on the basis of a failure to make proper disclosure. The respondent had independent legal advice, although she failed to act on it, and was not subject to any pressure or duress when she signed the contract. She was aware that the primary purpose of the contract was [page229] to exclude the farm property from the equalization scheme. The mistaken belief that the farm property consisted of one parcel was innocent and common between the parties. It did not detract from the fact that the respondent knew that she was giving up all claims against the whole of the farm property. She also knew the exact nature of the appellant's mother's interest in the property, although there may have been some confusion about the correct legal label to attach to that interest. Any uncertainty about the value of the farm property could not be viewed as a failure of disclosure within the meaning of s. 56(4)(a) because the respondent knew she was giving up any claim t o the appellant's interest in the farm property, was aware of the uncertainty around the value of that interest, had been given the information and/or documents that disclosed that uncertainty and chose not to pursue the matter. The overstatement of the appellant's liabilities by approximately $23,500 because a full debt was shown, whereas the appellant had paid down some of that debt, did not amount to a failure to disclose as the respondent's lawyer was aware that the appellant was making regular payments and that the

debt had been reduced.

Cases referred to
LeVan v. LeVan (2008), 90 O.R. (3d) 1, [2008] O.J. No. 1905, 2008 ONCA 388, 51 R.F.L. (6th) 237, 2008 CarswellOnt 2738, distd
Other cases referred to
Hartshorne v. Hartshorne, [2004] 1 S.C.R. 550, [2004] S.C.J. No. 20, 2004 SCC 22, 236 D.L.R. (4th) 193, 318 N.R. 1, [2004] 6 W.W.R. 1, J.E. 2004-723, 194 B.C.A.C. 161, 25 B.C.L.R. (4th) 1, 47 R.F.L. (5th) 5, 129 A.C.W.S. (3d) 748; Raaymakers v. Green, [2006] O.J. No. 124, 25 R.F.L. (6th) 54, 145 A.C.W.S. (3d) 105 (C.A.); Rodaro v. Royal Bank of Canada (2002), 59 O.R. (3d) 74, [2002] O.J. No. 1365, 157 O.A.C. 203, 22 B.L.R. (3d) 274, 49 R.P.R. (3d) 227, 113 A.C.W.S. (3d) 68 (C.A.)
Statutes referred to
Family Law Act, R.S.O. 1990, c. F.3, s. 56(4),(a), (b), (c)

APPEAL from the order of Pazaratz J., [2008] O.J. No. 2017, 168 A.C.W.S. (3d) 340 (S.C.J.) setting aside a marriage contract.

D. Smith and Patricia Robinson, for appellant.

Melinda Graham and Victoria Loh, for respondent.

Philip M. Epstein, Q.C., and Aaron M. Franks, for intervenor Stanley Jaskot.

[1] BY THE COURT: -- This appeal revolves around a single question: was a marriage contract properly set aside at trial?

[2] Before answering that question, however, this court wishes to address a serious matter arising from the reasons for judgment given by the trial judge.

The Treatment of Mr. Jaskot

[3] Stanley Jaskot served as counsel for Julius Butty at the trial of this matter before Pazaratz J. in April of 2008.

[4] The issues at trial included the value of Mr. Butty's interest in a family farm at the date of marriage and date of separation, [page230] and the enforceability of a marriage contract entered into by the parties.

[5] In his written decision, the trial judge was extensively and highly critical of Mr. Jaskot, based on his mistaken belief that Mr. Jaskot had suppressed information in a purposeful attempt to mislead opposing counsel and the court. The trial judge believed that Mr. Jaskot tried to hide the fact that the family farm consisted of two parcels of land by treating it as a single parcel.

[6] As we will explain, this belief is misguided. It cannot stand, given the evidence at trial.

[7] When the present litigation commenced in 2006, both parties and their counsel were under the mistaken impression that the family farm was a single property consisting of 151 acres of land. In fact, the farm is not a single property, but rather two adjacent properties (a 125 acre parcel and a 26 acre parcel) separated by a narrow strip of land that was sold to Ontario Hydro in 1953, long before Mr. Butty or his family acquired an interest in the farm. For ease of reference, the properties will be referred to as the "farm property".

[8] This misunderstanding was first brought to light in or about February 2007 by Eugene Catania, the property appraiser retained by Mr. Butty to appraise the then-believed-to-be-single farm property.

[9] Upon doing background work for his appraisal, Mr. Catania discovered that despite the farm property being described on one legal deed, and despite a single instrument being used to transfer and charge both parcels in the past, the farm property was actually two separate parcels, each with a distinct Parcel

Identifier Number ("PIN"), separated by the thin strip of Hydro property.

[10] On April 3, 2007, Mr. Jaskot's associate, Ms. Hughes, hand-delivered a letter to Ms. Graham, counsel for Ms. Butty. There were several attachments to the letter, including copies of the separate parcel registers for each parcel of land and the PIN diagram, which showed the two parcels separated by the Hydro land.

[11] On May 9, 2007, Mr. Jaskot sent Ms. Graham a signed authorization and direction allowing her to speak with Mr. Catania directly. The cover letter states that the report would not be finalized until Ms. Graham had spoken with Mr. Catania.

[12] As of May 24, 2007, Ms. Graham still had not spoken to Mr. Catania. Mr. Jaskot's associate again asked that she speak with him so that the report could be completed. [page231]

[13] On October 1, 2007, Ms. Graham was provided with a copy of Mr. Catania's preliminary summary. That summary clearly shows a value for two separate properties.

[14] Mr. Catania appraised the properties as two separate parcels of land, and he delivered two separate appraisal reports. The reports for the two properties were delivered to Ms. Graham on October 10 and 11, 2007. On consent of both parties, the two separate appraisals were introduced as two separate exhibits at the outset of trial.

[15] An actuarial report served on Ms. Graham on March 28, 2008 (for the purpose of valuing a remainder interest) also clearly references two separate properties. This report was also entered into evidence at trial, on consent.

[16] After receiving Mr. Catania's appraisals, Mr. Butty's subsequent financial statements and net family property statements showed the farm property as two separate properties. These statements were filed as evidence at the outset of the trial.

[17] Notably, Ms. Butty's subsequent net family property statements also show the farm property as consisting of two separate properties. Again, these were entered into evidence at trial.

[18] As we have mentioned, the trial judge believed that Mr. Jaskot tried to hide the fact that there were two separate properties. In his reasons for decision, he describes Mr. Jaskot as having purposely suppressed information in an attempt to mislead opposing counsel and the court into believing that the farm property was a single parcel of land.

[19] In light of the foregoing evidence, this characterization of Mr. Jaskot is completely unfounded. Opposing counsel and the court had documents clearly showing that the farm property consisted of two separate properties.

[20] As a result of the reasons for judgment, Mr. Jaskot has suffered unwarranted personal and professional embarrassment.

[21] This unfortunate situation could have been prevented in either of two ways. First, when the trial judge realized at the end of the trial that there were two parcels of land rather than one, he should have used a procedural remedy to resolve his concern about the matter. He could have -- and should have -- invited counsel to make submissions on the matter. If necessary, the parties could have re-opened their cases, counsel for the respondent could have been given an adjournment to allow her an opportunity to deal with the matter or a mistrial could have been declared. Second, when the trial judge expressed some [page232] concern about the matter at the end of trial, counsel for Ms. Butty should have made it clear to him that she was under no misapprehension that the farm property consisted of two parcels of land. The suggestion that Mr. Jaskot's theory that the two parcels could only, or would only, be sold as a single piece of farmland in no way explains away these failings. That theory could hav e been tested and challenged in the normal fashion. It does not amount to an attempt to deceive the court into believing there was a single property at issue.

[22] This court cannot truly repair the damage that Mr. Jaskot has suffered. Having said that, its comments are intended to serve as an unequivocal statement that there was nothing improper in his conduct in this matter. We regret what appears, on this record, to be unwarranted judicial criticism levied against him.

Background

[23] The appellant, Julius Butty, and the respondent, Dusica Butty, were married in 1996 and separated in 2006.

[24] Mr. Butty's father died in November 1979. He left the farm property to Mr. Butty and his sister, Paula. Mr. Butty's mother, Mary Butty, held the farm property in trust for the two children until December 1992, at which time she transferred it to them.

[25] As has been mentioned, the farm property is comprised of two parcels of land, separated by a thin strip of land belonging to Hydro. The larger of the two lots -- 280 Golf Club Road -- consists of approximately 125 acres of land. Mary Butty built a house on this parcel of land and has lived in it ever since. She does not own the house but does have the right to occupy it until she chooses to leave or the farm property is sold. When the farm property is sold, Mary Butty is to be paid $400,000. These arrangements are documented in an agreement that Mary Butty entered into with her two children in December 1992 when she transferred the farm property to them.

[26] The second parcel of land -- 700 Highway 20 -- is approximately 26 acres in size. The house that became the matrimonial home is situated on this parcel of land.

[27] In 1993, Mr. Butty bought his sister's interest in the farm property for $151,000. The purchase price was based on an appraisal prepared by Mr. Grant Phinney. The appraisal excluded the value of the house which Mary Butty occupies. Mr. Butty borrowed the $151,000 from his mother. His indebtedness is secured by way of a promissory note. He has consistently made monthly payments to his mother to reduce this [page233] debt. At the date the marriage contract was signed, he had repaid his

mother some $23,500.

[28] Before they were married, Mr. Butty told Ms. Butty that he wanted them to enter into a marriage contract so that he could protect certain of his assets from the statutory equalization scheme. His chief concern was the farm property. As has been explained, at that time, Mr. Butty (and all other witnesses) believed that the farm property was a single parcel of land.

[29] In the weeks that followed, both Mr. Butty and his mother repeatedly asked Ms. Butty to retain independent legal counsel before signing the marriage contract.

[30] Initially, Ms. Butty retained Ms. Vujnovic. They met on May 9, 1996. At that time, Ms. Butty gave Ms. Vujnovic a draft agreement that had been prepared by Mr. Butty's lawyer, Mr. von Anrep, and explained her understanding of Mr. Butty's financial circumstances. Ms. Vujnovic advised Ms. Butty in no uncertain terms that she should not sign the contract. She told Ms. Butty that she would pursue the matter further with Mr. von Anrep.

[31] Mr. von Anrep gave Ms. Vujnovic background information and documents, including the December 1992 agreement between Mary Butty and her two children, land transfer documents that disclosed the $151,000 purchase price that Mr. Butty had paid for his sister's interest in the farm property, and mortgage documents that showed details of the $400,000 charge in favour of Mary Butty.

[32] Between May and August 1996, Ms. Vujnovic and Mr. von Anrep tried to negotiate a mutually acceptable agreement. They exchanged letters and draft agreements. Mr. von Anrep prepared four such drafts and Ms. Vujnovic prepared two. While Ms. Butty periodically spoke with Ms. Vujnovic on the phone throughout this period, the trial judge found that Ms. Butty failed to take reasonable steps to participate in discussions regarding the terms of the proposed agreement.

[33] Ms. Vujnovic conducted a title search of the farm property and identified concerns about it in correspondence to

Mr. von Anrep. While it was understood by all that Mary Butty had a right to occupy the house on 280 Golf Club Road and to receive $400,000 by way of compensation for the house when the farm property was sold, Ms. Vujnovic wanted to clarify the nature and extent of Mary Butty's interest in the house and farm property. She also questioned the basis on which Mr. Butty's interest in the farm property had been valued. She expressed concerns to Ms. Butty that the draft agreement was overbroad in its [page234] application, given the parties' stated intent, and suffered from a lack of clarity and inconsistencies.

[34] From August 2 to August 19, 1996, Ms. Vujonic was away on vacation. By letter dated August 1, 1996, she advised Mr. von Anrep of her impending absence. By the time Ms. Vujnovic returned, Ms. Butty had signed the marriage contract.

[35] While Ms. Vujnovic was away, Ms. Butty agreed to sign the contract that Mr. von Anrep had prepared. Before doing so, she picked the name of a lawyer -- Ms. Godwin -- out of the telephone book. Ms. Godwin was not retained to give Ms. Butty legal advice; her role was to simply "sign her up". Ms. Butty and Ms. Godwin met briefly on one or two occasions. Ms. Butty testified that she did not believe that Ms. Godwin even reviewed the agreement and that she probably told Ms. Godwin she was there "because the prenup needs to be signed". Ms. Godwin made a single change to the contract, and the marriage contract (the "Contract") was finalized in August 1996.

[36] Schedule "A" to the Contract lists the assets that Mr. Butty sought to have excluded from any equalization that might take place in the future. It reads as follows:

SCHEDULE "A"

ASSETS OF JULIUS JEFFREY BUTTY

House/Farm, 151 Acres -- 280 Golf Club Road E.,	
R.R. #1, Hannon, Ontario	$302,000.00
(exclusive of his mother's house valued at 400,000.00 subject to a $120,000.00 mortgage held by	

C.I.B.C.)	
Studio Equipment	$50,000.00
C.I.B.C., RRSP's as of February, 1996	$12,511.79
Life Insurance, $150,000.00 face value, no cash surrender value	
1990 Toyota 4 x 4 truck	$10,000.00
Total:	$374,511.79

LIABILITIES OF JULIUS JEFFREY BUTTY

Butty Bros., $151,000.00 promissory note payable interest only current in the sum of $750.00	$151,000.00
C.I.B.C. Loan Outstanding amount re Studio Equipment	$16,388.22
Total:	$167,388.22

[page235]

[37] By the summer of 2006, the parties were experiencing serious marital problems. On September 5, 2006, Ms. Butty was served with an application for divorce. She filed an answer in which she sought to have the Contract set aside on the basis of duress or unconscionability. She asked that the assets listed in Schedule "A" to the Contract be included for purposes of equalization.

[38] Following a nine-day trial, the trial judge ordered that the Contract be set aside and that the farm property be included for purposes of equalization.

[39] The trial judge found "clear" evidence that Ms. Butty

knew from the outset what she was signing: an agreement to protect Mr. Butty's interest in the farm property. He also found that she entered into the Contract of her own free will. He observed that both Mr. Butty and his mother repeatedly told Ms. Butty that she needed to obtain independent legal advice before signing the Contract. He rejected Ms. Butty's allegation that she was pressured or coerced into signing the Contract, finding there was no type of threat or evidence of negative consequence or deprivation if she failed to sign the Contract on Mr. Butty's terms. He also rejected Ms. Butty's claim that she signed the Contract under duress.

[40] However, the trial judge found that Mr. Butty failed to make proper disclosure at the time the Contract was entered into. The failures in disclosure can be summarised as follows:

(1) The farm property consisted of two parcels of land, not one;
(2) there was confusion about the nature of Mary Butty's interest in the farm property;
(3) the estimated value of Mr. Butty's interest in the farm property was incorrect; and
(4) the estimated value of Mr. Butty's liabilities in Schedule "A" was overstated because the amount owing by Mr. Butty on the promissory note was incorrect.

[41] The trial judge acknowledged that the first disclosure problem was the result of inadvertence because at the time that the Contract was entered into, neither Mr. Butty nor his lawyer, Mr. von Anrep, knew that the farm property consisted of two parcels, rather than one. Nonetheless, given the misdescriptions of Mr. Butty's property in the Contract, which he stated were "material", he concluded that Ms. Butty's ability to assess her rights and options was compromised. The trial judge was fortified [page236] in his conclusion based on the drafting of the Contract, which he found suffered from ambiguities and inconsistencies.

[42] Accordingly, the trial judge exercised his discretion under s. 56(4)(a) of the Family Law Act, R.S.O. 1990, c. F.3. (the "Act") and set aside the Contract.

The Issue

[43] At the oral hearing of the appeal, the appellant abandoned his claim that the start date for support was incorrect. Thus, a single issue remained for resolution on appeal: did the trial judge err in setting aside the Contract pursuant to s. 56(4)(a) of the Act?

Section 56(4) of the Act

[44] Section 56(4) of the Act reads as follows:

> 56(4) A court may, on application, set aside a domestic contract or a provision in it,
>
> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract.

A Preliminary Observation

[45] There was some suggestion that the trial judge may have relied on s. 56(4)(c) of the Act as an alternate basis for setting aside the Contract. We do not see him as having done so and have dealt with the appeal accordingly. We come to this view for two reasons.

[46] First, as described above when summarizing the trial judge's reasons, we see his discussion of inadequacies in the drafting of the Contract simply as further support for his view that inadequate disclosure was made in terms of s. 56(4)(a). We do not see that discussion as providing a "stand alone" basis for setting the Contract aside on the basis of s. 56(4)(c) of the Act.

[47] Second, the respondent's case was based on duress and unconscionability. It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings and the case as developed by the parties. [See Note 1 below] Deciding a matter on a [page237] basis raised by the court on its own motion is unfair and raises concerns about the

reliability of the decision. [See Note 2 below] We are not prepared to assume that the trial judge acted in such a fashion.

Setting Aside the Contract Pursuant to s. 56(4)(a) of the Act

[48] The trial judge set aside the Contract pursuant to s. 56(4)(a) of the Act. Accordingly, he must have concluded that Mr. Butty failed to disclose significant assets or debts as the time the Contract was made.

[49] In our view, he erred in reaching this conclusion and in exercising his discretion to set aside the Contract.

[50] For the purposes of the following analysis, it is important to keep in mind that courts should respect private arrangements that spouses make for the division of their property on the breakdown of their relationship, particularly where the agreement in question was negotiated with independent legal advice: see Hartshorne v. Hartshorne, [2004] 1 S.C.R. 550, [2004] S.C.J. No. 20, at para. 9.

[51] Next, we note that (1) the primary purpose of the Contract was to exclude the property that Mr. Butty held on the date of marriage from any equalization obligations that might arise as a result of marriage; and (2) Ms. Butty fully appreciated this when she entered into the Contract.

[52] We turn now to the shortcomings in disclosure as found by the trial judge. Those, it will be recalled, can be summarized as follows:

(1) The farm property consisted of two parcels of land, not one;
(2) there was confusion about the nature of Mary Butty's interest in the farm property;
(3) the estimated value of Mr. Butty's interest in the farm property was incorrect; and
(4) the estimated value of Mr. Butty's liabilities in Schedule "A" was overstated because the amount owing by Mr. Butty on the promissory note was incorrect.

[53] Item #1 -- the fact that the farm property consisted of two parcels of land rather than one. The description of the

farm property as a single parcel was an error made through inadvertence. At the time the Contract was entered into, all those who [page238] testified believed that the farm property was a 151-acre farm with two houses on it and a Hydro easement across it. The mistake was innocent and common between the parties. This mistake does not detract from the fact that Ms. Butty knew that she was giving up all claims against the whole of the farm property. Moreover, Ms. Butty's lawyer had concerns about the value and ownership of the farm property, which were not pursued because of Ms. Butty's actions. In these circumstances, the mistake cannot be laid at the feet of Mr. Butty as a breach of his statutory disclosure obligation.

[54] Apart from item #1, Ms. Butty was aware of the shortcomings in disclosure listed as items #2 through #4, above, at the time she entered into the Contract. Ms. Butty's first lawyer raised these very concerns and advised Ms. Butty not to enter into the Contact. When efforts were made by her lawyer to investigate these matters, Ms. Butty chose to fire her and hire a new lawyer to complete the transaction without further investigation. In our view, a party to a marriage contract cannot enter into it knowing of shortcomings in disclosure and then rely on those shortcomings as the basis to have the contract set aside: see Raaymakers v. Green, [2006] O.J. No. 124, 25 R.F.L. (6th) 54 (C.A.), at para. 40.

[55] Furthermore, Ms. Butty did not misunderstand items #2 through #4.

[56] In relation to item #2, the only confusion that existed was about the correct legal label to attach to Mary Butty's interest in the farm property. Ms. Butty knew that Mary Butty had the right to live in the house on 280 Golf Club Road. She also knew that on sale of the farm property, Mr. Butty was obliged to pay Mary Butty $400,000 as compensation for having constructed the house on 280 Golf Club Road. Mr. Butty disclosed these matters and his lawyer, Mr. von Anrep, gave copies of the relevant legal documents to Ms. Butty's first lawyer. Whether Mary Butty's interest is best legally described as a conditional life interest, a determinable life interest or a licence coupled with an interest in land, does not change the

fact that Ms. Butty understood how Mary Butty's interest impacted on Mr. Butty's interest as owner of the farm property.

[57] Item #3 relates to the value of Mr. Butty's interest in the farm property as disclosed in the first line of Schedule "A". From that document, it appears that Mr. Butty's interest in the farm property was valued at $302,000, after allowing for his obligation to pay his mother $400,000 when the farm property was sold. On this view, the value of the property was $702,000, a figure considerably higher than the value of $600,000 as found by [page239] the trial judge. We do not see how this could have prejudiced Ms. Butty as it means she was willing to give up any claims she might have had to an asset with a higher value. But, in any event, in the circumstances of this case, the confusion over the value of his interest cannot be viewed as a failure of disclosure within the meaning of s. 56(4)(a) because Ms. Butty: (1) knew she was giving up any claim to Mr. Butty's interest in the farm property; (2) was aware of the uncertainty around the value of that interest because of Mary Butty's interest and because the appraisal on which the value rested had been prepared for a different purpose; (3) had been given the information and/or documents that disclosed these uncertainties; and (4) chose not to pursue the matter.

[58] Issue #4 -- the value of Mr. Butty's liabilities was overstated by approximately $23,500 because the full debt of $151,000 to his mother was shown as outstanding. We query whether the difference is of a sufficient magnitude in the circumstances of this case to meet the statutory requirement that it is a failure to disclose a "significant" asset or debt. Having said that, again, we are not persuaded that it amounts to a failure to disclose. Ms. Butty was aware of the debt and of Mr. Butty's obligation to repay the loan amount. If not aware of the precise amounts that had been paid, Ms. Butty's first lawyer knew that Mr. Butty was making regular payments and the debt was being reduced.

[59] Accordingly, this case is very different from LeVan v. LeVan (2008), 90 O.R. (3d) 1, [2008] O.J. No. 1905, 2008 CarswellOnt 2738 (C.A.), in which this court recently affirmed

a trial judge's exercise of discretion pursuant to s. 56(4) of the Act. In LeVan, the following factors led to the exercise of that discretion [at para. 35]:

(1) The husband failed to disclose his income tax returns and the value of his significant assets.
(2) The wife did not receive effective independent legal advice and some advice provided was wrong.
(3) The wife did not understand the nature and consequence of the marriage contract.
(4) The husband misrepresented the nature and terms of the marriage contract to the wife.
(5) The husband's failure to disclose his entire assets to his wife was deliberate. [page240]
(6) The husband interfered with the wife's receipt of legal assistance from her first lawyer.

[60] As we have explained, none of those factors is present in this case. In the present case, Mr. Butty disclosed his assets and liabilities. Ms. Butty received independent legal advice at Mr. Butty's urging. She understood the nature and consequences of the Contract. Mr. Butty did not misrepresent the nature and terms of the Contract to Ms. Butty. While there was a mistaken understanding in respect of the farm property, it was an innocent mistake and did not result in a misstatement of the size of the property in question or Mr. Butty's interest in it.

Disposition

[61] Accordingly, the appeal is allowed and para. 17 of the order is set aside. Equalization of net family property, after taking into consideration the Contract, is $0. The appellant is entitled to costs of the appeal which are fixed at $25,000, all inclusive. As the trial dealt with custody and access matters as well as property issues, this court is not in a position to determine how, if at all, costs of the trial should be altered in light of the result on appeal. If the parties are unable to resolve that matter between themselves, and if so advised, they are to return to the trial judge to have that matter resolved.

Appeal allowed.

Notes

Note 1: Rodaro v. Royal Bank of Canada (2002), 59 O.R. (3d) 74, [2002] O.J. No. 1365 (C.A.), at para. 60.

Note 2: Ibid., at paras. 61-62.
