Date: 19961128
Docket: D098715
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DOROTHY DONALLE BARKLEY

PETITIONER

AND:

ROBERT ARTHUR KASTING

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE LAMPERSON

Counsel for the Petitioner: Jack Aaron

Counsel for the Respondent: Frank Potts

Place and Date of Hearing: Vancouver, B.C.
October 21, 22, 23, 24 and November 5, 1996

[1] The petitioner, who was divorced from the respondent on May 3, 1996 seeks:

1. To set aside the separation agreement dated August 7, 1991 as being unfair, and
2. Maintenance for the three children of the marriage who are in the joint custody of their parents.

I. WAS THE SEPARATION AGREEMENT UNFAIR?

[2] The parties married on June 15, 1985 after living together for approximately a year. At that time the husband, who is a lawyer, owned, amongst other things, an interest in a law practice, several R.R.S.P.s, a part interest in vacant land located on Thetis Island and two houses in Vancouver. One was the parties' residence on Quesnel Drive and the other was a house on 41st Avenue. Both houses were mortgaged. The petitioner on her part brought some household furnishings into the marriage.

[3] Shortly before the wedding the parties entered into a marriage agreement, the important clauses of which are:

6. Subject to Paragraph 8 herein, all property owned by Dorothy before the marriage is her property exclusively, and all property owned by Robert before the marriage is his property exclusively.

7. Subject to Paragraph 8 herein, all property acquired during the marriage by either party will be owned jointly by both parties.

8. Notwithstanding Paragraphs 6 and 7 herein:

(a) The family residence at 4460 Quesnel Drive, Vancouver, B.C., remains the sole property

of Robert until the lapse of five (5) years from the date of the marriage of the parties (if they are living alone and childless), or until the birth of any child who lives and is supported by the parties. Upon the occurrence of the first of these events, the family residence shall become the joint property of the parties, with each party entitled to one-half of the net proceeds therefrom and responsible for one-half of the cost of the maintenance thereof.

(b) Robert's shares in Mount Burchell Holdings Ltd., Overbury Farm Resorts Ltd., and any interest which he may have in real estate on Thetis Island, British Columbia, shall remain his sole property.

(c) Robert's interest, present or future, in any law practise shall remain his sole property.

(d) Any inheritance received by either party is that party's sole property.

(e) Gifts from a spouse or third party are the separate property of the donee.

(f) Wedding presents and property purchased from the proceeds of wedding gifts are owned jointly.

(g) Monies accumulated in R.R.S.P. accounts before marriage are the separate property of the parties and monies accumulated since marriage are the joint property of the parties.

9. In the event that either party sells any of his or her assets, s/he has the right to dispose of the proceeds however s/he deems fit. If the proceeds are used for the purpose of contributing to a family asset, the spouse shall be deemed to have contributed the value of the same to the marriage and for the joint benefit of the parties.

[4] The petitioner obtained legal advice before signing the agreement.

[5] Lindsay, the first child of the marriage, was born on October 14, 1986. Consequently the petitioner became a half owner of the Quesnel Drive house by virtue of clause 8(a) of the agreement. In April 1987 the parties purchased a home on Wesbrook Crescent for $335,000.00. The Quesnel Avenue home and the 41st Avenue home were sold in order to finance the acquisition of the Wesbrook Crescent house which was registered in the names of the petitioner and the respondent as joint tenants. Roughly $50,000.00 derived from the sale of the Quesnel Drive home and $50,000.00 from the sale of the West 41st home provided most of the down payment for the Wesbrook property. The balance came from other resources which the respondent had.

[6] After purchasing that house the parties installed new floors, repainted the interior, renovated the kitchen and did a lot of yard work. The roughly $18,000.00 spent in renovating the house came from an overdraft which the respondent had with his bank.

[7] It was at this time that the respondent obtained a job with the Department of Justice in Yellowknife. Consequently the parties did not occupy the Wesbrook house but rented it to tenants. The respondent had to subsidize the house to some extent because the rents did not cover all the expenses connected therewith.

[8] They moved to Yellowknife in October 1987. It was there that their second child Forbes was born on March 13, 1988. Their third child Stephanie was also born in Yellowknife on September 5, 1989.

[9] The parties rented accommodation in Yellowknife until September 26, 1990 when they purchased a house and property referred to as the Matonabe house. In order to purchase it the respondent sold a car which he had in storage, incurred a substantial debt with the bank, and mortgaged the Matonabe house for $252,571.00.

[10] It should also be noted that the respondent received an inheritance of $26,000.00 at the beginning of 1989, of which $6,000.00 was spent on items for the family while the balance of $20,000.00 was paid toward the mortgage on the Wesbrook house.

[11] In December 1990 the petitioner, who had become involved with another man, told her husband that the marriage was over. Eventually the parties entered into a separation agreement dated August 7, 1991. The following are the portions relevant to this litigation:

15(a) The party not having de facto custody of the children shall pay to the other as support for the children such amounts as may be determined and agreed upon from time to time by the parties. If the parties cannot agree then either one of them may refer the issue to counselling or mediation or seek decision by a Court of competent jurisdiction. Both parties agree to participate in such reasonable counselling or mediation sessions as may be requested by either one of them.

(b) The Husband agrees to not make any claim for support for the children from the Wife for so long as she may be unemployed.

16. The parties agree to disclose to each other complete, accurate and current records of their financial status during any negotiations to determine the amount of child support to be paid by either one of them.

17. The Husband agrees to pay to the Wife the sum of $250,000.00 in consideration of which, the Wife shall, subject to the terms contained herein, release all of her claims, right, title or any interest whatsoever she may have in 1650 Wesbrook Crescent (Lot 3, Block 85, Plan 5449, DL. 140), Vancouver, B.C. ("the Vancouver property").

The Husband shall have sole responsibility for all costs of maintenance, debt, servicing and upkeep of the Vancouver property and shall be free to sell or dispose of it at his discretion. The Wife shall not bear any liability for any debts, costs or losses associated with the Vancouver property and the Husband agrees to indemnify the Wife in respect of the same.

18. The aforementioned sum of $250,000.00 to be paid by the Husband to the Wife shall be paid as follows:

(a) The sum of $47,613.21, plus interest thereon at 10.75% per annum from December 23, 1990 to date of payment of this sum, to be paid as soon as possible and in any event no later than March 23, 1992. In the event of a partial payment of this amount, interest shall accrue on the unpaid portion or portions;

(b) sums to be agreed upon from time to time, payable directly into the Wife's RRSP account;

(c) $50,000.00 on or about September 1, 1992, payable at the Husband's option, in cash or by transfer of the Husband's employee pension holdback to the Wife's RRSP account, or by a combination of the two;

(d) the balance on or about October 1, 1993, payable at the Husband's option in cash or by RRSP contribution, or a combination of the two.

(e) The Husband may elect to pay $100,000.00 to the Wife by October 1, 1992 of which at least $50,000.00 shall be in cash. If he does so, the balance owing to the Wife in paragraph (d) herein is decreased by $50,000.00 and becomes due on October 1, 1994.

Provided that, if the Vancouver property is sold by the Husband prior to October 1, 1994, all of the monies owing to the Wife shall be paid forthwith upon such sale.

19. As security for payment of the sum of $250,000.00 by the Husband to the Wife, or any portion thereof, the Wife shall retain her name on title to the Vancouver property until she is either paid in full or alternative security arrangements, satisfactory to the Wife, have been made. The Wife acknowledges that her interest in the Vancouver property is limited to the amount set out herein.

20. The Wife agrees that her interest in the 4913 Matonabe Street (Lot 23, Block 51, Plan 140) Yellowknife, N.W.T. (the "Yellowknife property") shall be held by her until such time as the Husband, in his sole discretion and with the best interests of the children in mind, requests that the Yellowknife property be sold. At such time, the Yellowknife property shall be sold and all the proceeds paid to the Husband for the purpose of paying all debts relating to the property including but not limited to property taxes, the first mortgage, the costs of capital improvements, and the value of the demand loan taken out by the Husband to allow the Wife to purchase it. For these purposes, the Husband may request of the Wife a power of attorney for sale of the property. Until the Yellowknife property is sold, the Husband shall have sole responsibility for all costs of its maintenance, debt servicing and upkeep. The Wife shall not bear any liability for any debts, costs or losses associated with the property. The Husband shall indemnify the Wife in respect of the same.

[12] The petitioner alleges that the separation agreement is unfair to her for two reasons:

1. That because the Wesbrook house is currently worth roughly $1.2 million, she is entitled, if she is to receive a half share, to $413,000.00 not $250,000.00, and
2. That she is not netting $250,000.00 because many of the payments were made by way of R.R.S.P. roll overs which, when cashed in, are subject to income tax at her marginal rate. This means that her net receipts will in the end be considerably less than $250,000.00.

[13] In order to decide whether the separation agreement is unfair one must look at the parties' circumstances at the time that the agreement was entered into rather than the situation as it now exists.

[14] The marriage was a modern one in the sense that the petitioner worked and pursued her career throughout the marriage. At the time of separation the petitioner was earning $45,000.00 as the Executive Director of the Yellowknife Chamber of Commerce. The parties did not mingle their monies and, except for a relatively short time, maintained their own bank accounts. During the marriage the petitioner paid for the household expenses and the costs of a nanny while the respondent assumed responsibility for all other expenses including mortgages, paying taxes, and upkeep of their residences.

[15] The petitioner considered the implications of ending her marriage for sometime before speaking to her husband about this in December of 1991. By that time she had read books on the subject and consulted her lawyer.

[16] It is fair to say that the parties' financial position was

poor. The value of the Matonabe house was dropping and in fact later sold for a capital loss of $30,000.00. They were responsible for two large mortgages and were deeply indebted to the bank. Their only asset of substance was the Wesbrook house which at that time was valued somewhere between $760,000.00 to $800,000.00. It was subject to a mortgage of roughly $185,000.00 thereby leaving the parties with an equity of approximately $600,000.00. If the other debts were to be paid from the proceeds of the Wesbrook house there would of course be significantly less money available to the parties. Another factor was that the profits on the sale of the Wesbrook house would be subject to capital gains tax because it was not the residence of the parties. The petitioner intended to quit her job and to move to Kingston, Ontario to take up residence with the other man. Thus to realize the full value of the house, the respondent would have to return to Vancouver and take up residence there. This would entail giving up a good job in Yellowknife and finding other work in Vancouver. The petitioner knew this. It was obvious to both that the respondent was about to suffer serious and unpredictable financial reverses.

[17] Although the parties had agreed to joint custody of the children it was decided that they would remain in the day to day care of the respondent which meant that he would have to employ a nanny. He also agreed to share the transportation cost for the children's visits to their mother in direct proportion of their incomes and not to seek maintenance payments from the petitioner while she was unemployed.

[18] It was in this context that the petitioner, through her lawyer, proposed that the respondent assume all debts and pay her $250,000.00 for her interest in the matrimonial assets. The respondent agreed to this but negotiated the method of payment which entitled him to pay her by rolling over certain R.R.S.P.s into her name. It is evident from the material filed that both the petitioner and her lawyer were aware of and considered the tax implications resulting from such roll overs. The advantage of the settlement from the petitioner's point of view was that she was free of debts, guaranteed a certain amount of money and not subject to the vagaries of the real estate market.

[19] Counsel for the petitioner contends that both the amount and the method of payment provided for in the separation agreement are unfair to the petitioner. He argues that she is entitled to one-half of the equity of the Wesbrook property by virtue of s.43 of the Family Relations Act, R.S. 1979 c. 121 and by virtue of her joint tenancy in the property. Section 43 provides that a court should, when dealing with matrimonial property, start with the assumption that the property should be divided equally. The one-half interest mandated by s.43 is of course subject to the considerations enumerated in s.51 of the Act.

[20] It is evident from the British Columbia Court of Appeal decision in Clark v. Clark (1991) 31 R.F.L. (3d) 383 that a separation agreement must be reviewed objectively as of the date of execution, keeping in mind the provisions of s.51 of the Family Relations Act. In Gold v. Gold (1993) 82 B.C.L.R. (2d) 165 at p.173 McEachern C.J.B.C. discussed how s.51 should be considered:

> Section 51 provides a standard against which to measure unfairness; but neither the Act nor the authorities direct that unfairness may only be cured by equality. As already mentioned, the prima face provision for equality in s.43 is made expressly subject to s.48, which authorizes marriage agreements,and s.51 only mandates fairness, not equality.

[21] Between the time of signing the separation agreement and the commencement of the proceedings the respondent quit his job in Yellowknife so that he could move to Vancouver. He worked for a time with the Legal Services Society and when that job ended commenced to reestablish himself in private practice. This resulted in a loss of income and it is only now that his earnings promise to reach approximately $90,000.00 per year.

[22] The Wesbrook property has appreciated due to market forces

and he will make a financial gain if he sells the house. It is he, however, who assumed the risk since market forces could also have driven the property value downward. He accepted the burden of the family debts and undertook the care of the children without any assurance as to the amount of financial assistance he would receive from the petitioner.

[23] The separation agreement fixed the petitioner's profit on the Wesbrook property so that she was not subject to the vagaries of the marketplace while the respondent assumed all costs and risks and indemnified her from any losses. It is evident from material filed that the petitioner was at the time quite aware of financial problems which the respondent assumed. When negotiating with the petitioner he fully disclosed his financial situation. It cannot be said that the petitioner's judgment was clouded at the time she entered into the agreement.

[24] In my opinion, the separation agreement and the terms of payment were not unfair in light of the situation faced at that time by parties generally and the respondent in particular.
[25] The petitioner has not satisfied me that there was at that time an unequal division of the family assets flowing from the separation agreement and even if there were, I do not, after reviewing the factors enumerated in s.51, consider this to be a situation which warrants a reallocation. There are no grounds for changing the terms of the separation agreement.

[26] The respondent has not fulfilled all his obligations under the separation agreement and owes the petitioner $135,000.00 which he does not dispute and which he is prepared to pay forthwith in cash. Accordingly she will have judgment in that amount.

II. MAINTENANCE FOR THE CHILDREN OF THE MARRIAGE:
[27] Lindsay is now age 10, Forbes, age 8, and Stephanie, age 7. Although the parties have joint custody of the children, they have for much of the time been in the primary care of their father. He has paid all their expenses with very little financial help from the petitioner even when she was working and obliged to pay child maintenance pursuant to the separation agreement. Both parties have done their utmost to make joint custody work with the result that the children have enjoyed extensive access to their mother.

[28] The petitioner's relationship with the other man ended after a year. Hence she moved to Vancouver in April of 1993 in order to be close to the children. She rented an apartment near the Wesbrook house where the husband lives with his new partner by whom he has two children. The present arrangement is that the three children reside with their father from Sunday evening until Thursday afternoon, after which they stay with their mother until Sunday evening. Both parties are content with that arrangement.

[29] The petitioner contends that the children should have two autonomous homes. It is for that reason that she occupies a rather large apartment. They have toys and clothing in each parent's home so that no possessions move back and forth except for some specialty items. She wants both the children's homes to be equal. The petitioner who is currently unemployed says that the respondent should pay her $750.00 per month child support because even when she is working he earns roughly twice as much as she. According to her, $750.00 per month is reasonable because if she had full custody of the children he would, with his income, have to pay roughly $1,500.00 pursuant to the child support guidelines. She asks for half that amount because he has the children for 50% of the time. She wants the children to have the same things at her house as they have at their father's house.

[30] The respondent opposes her claim on the following grounds:
1. That the petitioner when living in Kingston did not meet her obligations under the separation agreement to pay him child support and furthermore refused to allow him to deduct these monies from the monies which he owed her with respect to the $250,000.00 property settlement, and
2. That he provides the children with everything that they need and pays for all of their activities and that he should not be forced to pay monies to the

petitioner so that she can duplicate the things which they have in his residence.

[31] Although one can understand the respondent's exasperation and position with respect to the first ground, I do not consider it to be a basis in law for disallowing child maintenance at this stage. The second ground does not lend itself to an easy resolution. Counsel for the respondent argues that the petitioner is indirectly asking for spousal support in an attempt to maintain an unrealistically high standard of living. He says that her insistence on living in the same area as the children means that she is paying rent which she cannot afford and that it is not prudent for her to duplicate everything that the children have at the respondent's house. The husband contends that the imposition of maintenance payments will tend to make the expenses pertaining to the children contentious because there would be a constant question as to who should pay for such things as school supplies and summer camp.

[32] This is clearly a situation where the children will not do without even if maintenance payments are not ordered. The present arrangement is good for the children because it allows both parents to play a significant role in their children's lives. The question remains, however, should the father be obliged, not only to provide for the children, but to contribute to the duplication of things that they have at his residence. How far must he go in ensuring that the children's mother has easy and convenient access which incidently involves her living in an expensive neighbourhood? Is it realistic to insist that children must enjoy the same standard of living when with their mother as they do when they are with their father?

[33] At this stage he has the potential of earning roughly twice the amount as she. The fact is therefore that she cannot afford to live in the same type accommodation as he. In my opinion it is unrealistic to suggest that there is an obligation on the respondent to pay money to the petitioner in order to ensure that there is equality in the two homes. Nonetheless the situation is that she currently has no income. He saves some money, albeit very little, by virtue of the fact that the children spend half their time with their mother. Consequently I have decided rather arbitrarily to order him to pay some maintenance which I fix at $150.00 per month per child until such time that the petitioner has been employed for three consecutive months.

[34] The respondent made a with prejudice offer to pay the petitioner the $135,000.00 which he owes her. In light of that fact and the outcome of this case, I award the respondent his court costs on scale 3.

"Lamperson J."
LAMPERSON J.