IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Dewinetz v. Dewinetz,***
2003 BCSC 607

Date: 20030423
Docket: EO21702
Registry: Vancouver

Between:

Patricia Louise Dewinetz

Plaintiff

And

Richard Mark Dewinetz

Defendant

Before: The Honourable Madam Justice Allan

Reasons for Judgment

Counsel for the plaintiff/applicant	Lewis Spencer
Counsel for defendant/respondent	Frank Potts
Date and Place of Hearing:	April 9, 2003 Vancouver, B.C.

[1] The plaintiff seeks a declaration pursuant to s. 57 of the ***Family Relations Act*** ("***FRA***") that the parties have no reasonable prospect of reconciliation. The defendant opposes that relief.

[2] In 1988, after 26 years of marriage, the parties decided to separate. They executed a Separation Agreement on July 8, 1988. That agreement divided family assets and set out a schedule for payments of lump sum and periodic maintenance to the plaintiff.

[3] The plaintiff alleges that the parties reconciled for a number of years between 1988 and 1994. They have never divorced.

[4] In 2002, the plaintiff commenced these proceedings, seeking a divorce, division and reapportionment of assets, spousal maintenance and an order setting aside the Separation Agreement on the basis that it is unconscionable and unfair, and that it was entered into without proper financial disclosure, under duress, and without adequate legal representation. The plaintiff also asserts that the Agreement is void on the basis of a reconciliation clause that purports to void the contract if the parties reconciled for more than 6 months.

[5] A trial is set for July 2003 to determine the issues relating to the Separation Agreement.

[6] Section 56 of the ***FRA*** sets out the events that comprise a triggering event:

> (1) Subject to the Part and Part 6, each spouse is entitled to an interest in each family asset ... when
>
> (a) a separation agreement,
> (b) a declaratory judgment under section 57,
> (c) an order for dissolution of marriage or judicial separation, or
> (d) an order declaring the marriage null and void
>
> respecting the marriage is first made.

[7] The triggering event transforms the nature of ownership of property held in joint tenancy to a tenancy in common and crystallizes the family asset pool for division.

[8] In this case, it is obvious that in fact there is no reasonable prospect of reconciliation. However, the plaintiff seeks the s. 57 declaration for purposes of establishing a triggering event. There is clear authority that the order sought is discretionary and the Court may, in appropriate circumstances, decline to make the declaration.

[9] In both ***Chancey v. Chancey*** (1994), 94 B.C.L.R. (2d) 391 (S.C.) and ***Mineault v. Mineault*** [1996] B.C.J No. 212 (S.C.), judges of this Court exercised their discretion and declined to make a s. 44 (now s. 57) declaration on grounds that to declare the triggering event at that time would significantly prejudice the respondent and to decline to do so would not correspondingly prejudice the applicant to any equivalent extent. In ***Chancey***, there was a real possibility that the husband, who was unemployed and had psychiatric problems, might incur debt and, following a s. 44 declaration, his interest could be attached by creditors. In ***Mineault,*** there was a possibility that the applicant wife might recover damages in a tort action and a s. 44 declaration would estop the respondent from relying on her financial recovery as a factor in the judicial reapportionment of assets she was seeking.

[10] In this case, the plaintiff seeks a reapportionment of family assets that were apportioned in 1988. The defendant argues that he will be prejudiced if the Court grants a further triggering event in 2003, citing ***Blackett v. Blackett*** (1989), 63 D.L.R. (4th) 18 (B.C.C.A.): "... where the triggering event antedates the trial, it is important that only matters up to that date be taken into account in deciding whether to vary the division". Mr. Potts submits that a s. 57 declaration made now would unfairly upset the *status quo* and that the plaintiff would assert a right to disclosure of the defendant's assets between 1988 and the present time.

[11] There was a triggering event in 1988. If the plaintiff succeeds in her assertion that the Separation Agreement is unfair, the Court may reapportion the assets. However, the finding that Agreement is unfair will not render the Agreement void and it will continue to constitute the triggering event. On the other hand, it is possible that the Separation Agreement may be declared void if, e.g. the reconciliation clause is upheld and the Court finds that the parties reconciled for a period in excess of six months. Counsel disagree as to whether the Separation Agreement will continue to constitute a triggering event for the purpose of s. 56 of the ***FRA*** in that event.

[12] However, unless and until the Separation Agreement is declared void, it remains the triggering event and, in my view, there simply cannot be two triggering events co-existing in a single case.

[13] Accordingly, I decline to make the order sought. If, following the trial of the issue in July 2003, the Court subsequently holds that the Separation Agreement is void and if the triggering event is thereby expunged, an application for a s. 57 declaration can be made at that time.

[14] The plaintiff's application is dismissed.

"Allan, J."