Date: 20030207
Docket: E021702
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Master Groves
February 7, 2003

BETWEEN:

PATRICIA LOUISE DEWINETZ

PLAINTIFF

AND:

RICHARD MARK DEWINETZ

DEFENDANT

Counsel for Plaintiff: L. Spencer

Counsel for Defendant: F.G. Potts

Place and Date of Hearing: Vancouver, B.C.
February 7, 2003

[1] **THE COURT:** This is my decision on the matter of ***Dewinetz versus Dewinetz***. I, first off, want to thank counsel for their effective arguments on behalf of their clients. Both their clients were represented well at this hearing today.

[2] This case is somewhat unusual, though the application that is before the court is not.

[3] The history of the matter appears to be that the parties, Mr. and Mrs. Dewinetz, were married quite young and that this was a traditional marriage.

[4] After 26 years of cohabitation, the parties separated in or about 1988, and a separation agreement was negotiated with counsel on behalf of the parties at that time.

[5] The case is unusual in that it appears that Mr. Dewinetz was of particular and considerable skill in matters of business, and at the time of separation, the parties had acquired considerable assets and Mr. Dewinetz had, from his business activities, a considerable income.

[6] The separation agreement provided, and I accept, that the wife received substantially less than 50 percent of what could be considered family assets at the time. Depending on how you view periodic tax-free payments to her, the wife also received virtually no spousal support, despite what is not disputed as the husband's 1987 income in excess of $500,000 for that year.

[7] The unusual aspect to this case is that after approximately a 14-year hiatus, the wife, Ms. Dewinetz, reactivates litigation and has brought on an application to vary the agreement, essentially, to have it set aside as being unfair or unconscionable. I am advised that a trial is set on

that issue in July of this year, 2003, and that trial is to be focussed on the issue of the validity of the agreement, and that is the first issue to be tried.

[8] As a result of an agreement between the parties, disclosure to date has only been of the value of assets at the time of the agreement in 1988, and I really do not have any idea of the parties' current financial affairs.

[9] The wife seeks, in this application, and this is what is not unusual, an order under s. 67(1) of the ***Family Relations Act***. Section 67(1) reads as follows:

> On application by a party to a proceeding under this Part or Part 6, the court must make an order restraining another party to the proceeding from disposing of a family asset or any other property at issue under this Part or Part 6 until or unless the other party establishes that a claim made by the applicant under this Part or Part 6 will not be defeated or substantially impaired by the disposal of that family asset or other property.

[10] This section essentially provides an onus on the court upon application to make the order sought. The term "must" is used in this section. It creates what has been referred to in the cases and referred to before me today as a reverse onus. The onus shifts from the applicant to the respondent to show, if they do not wish the order to be put in place, that there

is essentially security for the claim of the applicant in the absence of the order, the restraining order being made.

[11] That appears to be the conclusion of Justice Spencer in the decision of ***Lovick v. Brough*** [1988] B.C.J. 539, a decision relied on by both counsel before me today.

[12] That case is helpful. In that case, Spencer, J. found that the husband did not meet the test of showing, based on the disclosure available, that the wife's claim would not be substantially defeated by the disposal of family assets, and he granted the restraining order.

[13] In this case, Ms. Dewinetz' claim is ultimately a claim for 50 percent of the family assets, plus she is also making a claim for reapportionment. She appears to be taking the position that the subsequent payments in the agreement of $575,000 were payments made akin to maintenance and not really akin to property.

[14] An analysis of the parties' respective financial statements which have been drawn now to reflect 1988 values shows the following: Accepting the husband's value of the companies that he has, despite the claims by counsel for the wife that they are appraised inappropriately, leaves me to conclude that the husband had assets of $2.883 million, and

debts of $452,000, for net assets of $2.431 million. The wife's assets based on the separation agreement and based on her disclosure totalled $330,000. That provides for a total family assets over debts of $2.761 million, or 50 percent of that being approximately $1.38 million. The wife's claim is essentially a claim for, on the basis of equal division, and on the basis of the disclosed values, if those are accepted, a little over $1 million. Certainly, the claim would be higher than that if the wife is successful in valuing the business higher, or if the wife is successful in reapportionment. And I do note that based on the law as I understand it to date, the wife's claim for reapportionment is not a claim that is necessarily far-fetched.

[15] Counsel for Mr. Dewinetz argues that the lis pendens filed by the wife provide security in real property assets, but in my view, that security is not to an extent which would provide for security for her entire claim, plus her claim for reapportionment.

[16] Of course, I am restricted in my analysis today, restricted quite correctly, and I make no disparaging comment in that regard by not knowing what the current assets of the parties are. That is how they have litigated the matter to date and there can be no criticism of either party for that.

[17] Going back to s. 67(1), that section reads that the court must make an order restraining another party, but it also says that the order must be a restraining order on family assets, to use the words in the legislation, or "any other property at issue." In my view, that language, on these facts, create some restriction. Family assets and property at issue must, on these facts, clearly relate to property that the parties held in 1988 or prior to it.

[18] Again, I am restricted in making the order I am about to make in not knowing if these assets still exist, but, really, based on how this matter has been litigated to date, that is all I can really do.

[19] I am going to make an order that Mr. Dewinetz is restrained from disposing of, encumbering, hypothecating or assigning certain assets which I will now describe, and I refer to his Property and Financial Statement, Part 3.

[20] Mr. Dewinetz is prohibited from disposing of the real property which is currently subject to a lis pendens, as well as the Maui condominium, if he still has it. I have gleaned from the materials that the strata lot in Whistler has, subsequent to the separation agreement, been sold. Mr. Dewinetz is prohibited from disposing of the real property which is currently subject to a lis pendens, as well, the 1980

Mercedes disclosed in paragraph -- in part 3, section 2. He is prohibited from disposing of the financial assets set out in part 3, section 3, which consists of a number of shares. He is prohibited from disposing of his RRSPs and pensions, which are set out as a Midland Doherty account, which I am sure does not exist in its current form because Midland Doherty does not exist in its current form, but that is the order that I can make today. And finally in regard to Dewinetz Holdings Ltd. and Winmark Holdings Ltd., he is prohibited from disposing of those assets, and I am going to make an exception here, except that he is allowed to continue to operate those assets in their ordinary course of business and if that involves selling any asset with a value in excess of $50,000, he is to disclose immediately upon sale the asset that he has sold and the remuneration that he received for that asset.

[21] I am making this order in the belief, and, again, it is only a belief on which I may be completely wrong, that Dewinetz Holdings and Winmark Holdings continue to exist, that they continue to hold a number of properties, and Mr. Dewinetz makes his living from the management of those properties, and from either the buying or selling, or investment of them.

[22] In regards to my order, again, I am making this order in a bit of a vacuum, not knowing what the parties' current financial circumstances are, or what their current asset holdings are, Mr. Dewinetz has liberty to apply, as does Mrs. Dewinetz, in the event the order I am making today is somehow ineffectual or inappropriate based on their later discovery as to the parties' actual assets.

[23] Now, counsel, do you have any questions of what I have ordered?

[24] MR. SPENCER: I'm wondering if Your Honour would consider, particularly, for example, with respect to the Hawaii condominium as an illustration, if it's been a situation where Mr. Dewinetz has sold that and bought another condominium, is Your Honour enjoining him from disposing of that condominium?

[25] THE COURT: Based on what the pleadings are about to date, which is the validity of the separation agreement, I do not know how subsequently-acquired property would necessarily be family assets or property at issue. I think you have to make that claim first, establish that claim first before it would become at issue in the litigation. So no, I am not.

[26] MR. SPENCER: And I'm sorry, but Your Honour, perhaps while I'm on my feet, you could assist me, what was the figure, was it 50,000, $100,000, any transaction in --

[27] THE COURT: I said anything over $50,000. Now, again, I am making that on the assumption that that is what Mr. Dewinetz is doing. I do not know, but I get the impression that that is what he is doing.

[28] MR. SPENCER: I'll let my friend speak, but I wanted to address the court on the issue of costs after that.

[29] THE COURT: Yes, okay. Mr. Potts, any questions?

[30] MR. POTTS: I just want to make sure I understand. The order is that to the extent Mr. Dewinetz maintains any assets listed in his Property and Financial Statement, he's restrained from dealing with them?

[31] THE COURT: That is right.

[32] MR. POTTS: With the exception of the holdings companies and as to those, he can operate them in the ordinary course of business subject to a proviso that he notify immediately in the event there's a sale of any asset or anything involving worth more than $50,000?

[33] THE COURT: Right.

[34] MR. POTTS: Liberty to both parties to apply?

[35] THE COURT: Right.

[36] MR. SPENCER: I think that the plaintiff, the applicant, was successful on her application and I'd ask the court to order costs in any event of the cause. For simplicity' sake, I'd ask the court also to set those and I would think that perhaps $700 inclusive of all taxes and disbursements would be an appropriate figure. It saves the parties dealing with the issue.

[37] THE COURT: Right. Mr. Potts?

[38] THE POTTS: The application was to restrain Mr. Dewinetz from dealing with any assets he had, whether they were in dispute or whether they were after acquired. In my submission, the plaintiff has not been successful on that issue and I say costs should be in the cause.

[39] THE COURT: Thank you. I think what I have done here is I have, for lack of a better term, cut the baby in half, which is not, of course, a precise legal term, but I do not think any party has been completely successful in the application so

I am going to order that costs of this application be in the cause. Thank you, both.

Master Groves