IN THE SUPREME COURT OF NOVA SCOTIA
Citation: John Heisler v. Oona O'Connell, 2004 NSSF 117

Date: 20041231
Docket: 1201-52027
Registry: Halifax

Between:

John Foley Heisler

Petitioner (Respondent by Counter-Petition)

v.

Oona Olivia O'Connell

Respondent (Petitioner by Counter-Petition)

Judge: The Honourable Chief Justice Kennedy

Heard: May 25, 2004, in Halifax, Nova Scotia
Decision: December 31, 2004

Counsel: Michael I. King, Q.C., for John Heisler
Margot MacDonald, for Oona O'Connell

By the Court:

BACKGROUND

[1] This is a divorce proceeding. The parties were married September 9, 1994, in Halifax. Both were 41 years of age. They had cohabited beginning in December of 1992. They both came to this Province from the United States as part of the substantial Buddhist community that has settled in this Province in the last two decades or so.

[2] The petitioner, husband is a medical doctor who commenced his practice in Nova Scotia as a family practitioner, but now has switched to alternative medicine.

[3] The respondent, wife has a masters degree in psychology and is a psycho-therapist.

[4] There are no children of the marriage.

[5] The parties separated a little more than a year into the marriage; in October or November of 1995. They got back together and cohabited during a

reconciliation for approximately six weeks, commencing in August of 1996, after which they again separated and have remained so.

[6] The husband petitioned for divorce on June 19, 1997, seeking only a divorce judgment. The wife filed an answer and counterclaim on August 15, 1997, seeking spousal support, division of assets and costs. The husband answered the counter petition on September 5, 1997, asking that the wife's request for marital assets and support be dismissed.

[7] Both want to be divorced but disagree on the terms.

[8] The divorce order will be granted.

[9] There was a pre-nuptial agreement signed the day before the marriage ceremony. It is central to this proceeding.

[10] The wife wants this contract declared void and seeks an equal division of assets that were acquired during their entire relationship, from December 1992, onward. She also seeks spousal support.

[11] The husband responds that the marriage agreement is valid and binding and the wife is, therefore, not entitled to any assets (other than those that she previously possessed and brought into the marriage).

[12] He claims further that the wife's claim for spousal support is precluded by the contract and that she should not be entitled to spousal support in any event.

[13] Central to the dispute between the parties is that marriage contract that was entered into the day before the ceremony on September 8, 1994. It contained the following clauses of significance:

> 2. Property Not Matrimonial Asset
>
> No Property however or wherever acquired by either Party shall be considered to be a matrimonial asset or to constitute matrimonial property.
>
> 3. Property Acquired Before Marriage
>
> (a) Property owned by John or Oona prior to their marriage shall remain their respective property during and after their marriage;

(b) Proceeds from the sale of a person's Property remains the property of that person and if invested in some other form of Property, that other form of property remains the property of the person to the extent his or her property was used to purchase it;

(I) by way of example, if John were to sell the house he now owns and use the proceeds to purchase a new house, the house would be his property to the extent it was purchased with his funds.

4. Property Acquired After Marriage

Property acquired after marriage by John or Oona shall be and remain the Property of the person acquiring the Property, whether directly or through providing funds for the Property purchase or otherwise, as if that person had acquired the Property before marriage.

5. For Greater Certainty

Here follows examples of the above principles not meant to limit the scope of those principles:

(a) the value of John's professional practice, expertise, goodwill, training, etc. is and shall remain his property whenever acquired;

(b) R.R.S.P.s registered to John or Oona are and will remain their respective property, as will inheritances received by either;

(c) Where money is entrusted to Oona by John for the purchase of Property, such property when acquired shall be John's property unless a contrary intention on John's part were clearly demonstrated.

6. Maintenance or Alimony

(a) If the marital union is dissolved by separation or divorce neither John or Oona will be liable to pay the other any money for the other's support.

...

7. <u>After 5 Years of Marriage</u>

(a) Notwithstanding the foregoing if the parties are not divorced or separated after having been married for 5 years, then whatever home they are then living in and whatever tangible personal property has been acquired by either of them during the marriage for their joint use in the home or outside it shall become their joint property and, with respect to the home, the then registered owner of it shall execute and deliver a deed vesting joint title to the Parties. Provided that this provision does not apply to tangible personal property acquired by inheritance.

(b) For the purposes of the previous provision "tangible personal property ... acquired for joint use" would include household furnishings and jointly used vehicles but would not include stocks, bonds, investments, the value of a professional practice or other intangible things not used in connection with the habitation of a house or the day to day affairs of a family.

8. <u>Waiver and Acknowledgment</u>

John and Oona acknowledge the importance of understanding their rights in connection with their marriage as set out in applicable Canadian and U.S. legislation. They acknowledge either having sought legal counsel with respect to such rights or having voluntarily and knowingly chosen not to do so.

[14] The circumstances surrounding the signing of the contract are relevant.

[15] As indicated, the document was signed by the parties the day before the wedding.

[16] The wife testified that she had known that the husband wanted an agreement that would exclude his medical practice and his "family money" from the matrimonial property, and she agreed with that, but she said that when she saw a draft of the contract, "it excluded everything", I said, "you've got to change it".

[17] The new draft, the second draft, presented to her the day before the ceremony had the same exclusions and now had the "no spousal support" clause.

[18] She testified that in retrospect, she shouldn't have signed the agreement, but she believed that the ceremony wouldn't go ahead if she refused and "their families were already in town".

[19] The lawyer "told me to get my own legal advice," but it was too late. She thought that if she didn't sign, there would be no wedding ceremony.

[20] On cross examination she continued, “I wasn’t clear headed. I was under a tremendous amount of emotional stress. I had no money to pay for legal advice. I wasn’t working at the time.” and she believed that she couldn’t legally work in Canada unless she wed the husband.

[21] The husband testified that the lawyer was not his personal lawyer, but rather a mutual friend from the Buddhist community.

[22] The parties, he says, had discussed the contract for one to three months prior to the signing. He said that he wanted the agreement because of the disparity in assets that each brought to the union.

[23] He had a house in Shubenacadie, furnished, a motor vehicle, an RRSP and mutual funds.

[24] The wife, on the other hand, had only some furniture, personal items and her own vehicle. Additionally, she had a “sizeable” education debt to be addressed.

[25] The *Matrimony Property Act,* R.S. 1989, c. 275, s.1, of Nova Scotia provides for a limited form of marriage contract:

Section 23 states:

> "A man and woman may enter into an agreement, to be known as a marriage contract, before their marriage or during their marriage while they are cohabiting, in which they agree on their respective rights and obligations
>
> (a) under the marriage;
>
> (b) upon separation;
>
> (c) upon the annulment or dissolution of the marriage;
>
> (d) upon the death of either spouse.

[26] However, a Court may set aside such contract in whole or in part.

[27] Section 29 of the *Act* says:

> Upon an application by a party to a marriage contract or separation agreement, the court may, where it is satisfied that any term of the contract or agreement is unconscionable, unduly harsh on one party or fraudulent, make an order varying the terms of the contract or agreement as the court sees fit.

[28] The wife says that this contract was both "unconscionable and unduly harsh".

[29] Notwithstanding the “rushed” circumstances of the signing of the document and the failure by the wife to obtain independant legal advice, I do not consider the terms of the contract (with the exception of the reference to spousal allowance which I will subsequently address) to be either “unconscionable” or “unduly harsh”.

[30] The parties were mature professionals (both 41 years of age) and at the time of the marriage the husband was obviously bringing the great bulk of the assets into the union.

[31] Although the final draft of the agreement was presented to the wife shortly before the wedding, in fact the document had been discussed for some time prior thereto.

[32] The husband testified that the discussions had gone on “for one to three months prior to the signing”.

[33] The wife acknowledged that discussions had gone on for some time “we talked about it when we were away in August”.

[34] The wife acknowledged that she understood that she was not to receive any interest in his medical practice or a house that he owned in Shubenacadie, at the time of the marriage.

[35] When considering the viability of the contract, I am particularly mindful of clause 7(a) which provides for joint ownership of the matrimonial home and the personal property acquired for their joint use after five years, if they remain married and are not separated at that time.

[36] The husband testified that he had first suggested a three year term and it was in fact the wife who suggested five. The wife agreed that this was possible.

[37] The couple had cohabited in the Shubenacadie house prior to the marriage and continued to do so for a few months after the wedding.

[38] That house was sold and the parties moved to Halifax, living in a house that was partially purchased from the proceeds of the sale of the Shubenacadie residence, together with a mortgage that the husband paid on exclusively. The wife did not contribute to the purchase of this Halifax property.

[39] The wife acknowledges s. 3(b) of the agreement that speaks to a scenario that appears to address these circumstances.

[40] The wife though, argues that she should have a share in the appreciated value of that home.

[41] The property was purchased for $168,000.00 says the husband and now is assessed for tax purposes at $199,600.00 (there was no appraisal of this property put into evidence).

[42] I find that the contract, although clumsy, sets out the terms of the arrangement reference assets roughly as the wife says she had anticipated. Despite the wife's explanation of the circumstances under which she signed the agreement, I do not consider that she did so under duress.

[43] I find the marriage contract valid to the extent that it speaks to assets.

SPOUSAL

[44] Notwithstanding my finding as to potential matrimonial assets, I find that clause 6(a) of the marriage agreement does not preclude the wife from seeking spousal maintenance.

[45] I gave a decision in *Bood v. McGunnigle*, [1998] N.S.J. No. 534 that addressed the validity of marriage agreements that spoke to spousal support after divorce.

[46] In that decision, I determined that marriage agreements in this Province are restricted to the division of matrimonial assets and cannot govern the entitlement to spousal support. I stated as follows at paras. 35 - 48:

> 35 Marriage contracts, at common law, are void or being contrary to public policy. Further, they attempt to take away from one or both of the parties the right to submit questions of law to a court.
>
> 36 Lord Denning said in v. Lee v. Showmens Guild of Great Britain, [1952], 1 ALL E.R. 1175 at 1181. As quoted in Cheshire, Fifoot and Furerston's Law of Contracts, 13th Edition, Butterworths, pg. 407:
>
> > Parties cannot by contract oust the ordinary courts from their jurisdiction ... They can, of course, agree to leave questions of law, as well or questions of fact, to the decision of the domestic

> tribunal. They can indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decision being examined by the courts. If the parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the court in cases of error or law, then the agreement is to that extent contrary to public policy and void.

And, at page 408 of the noted text:

> Another example of this principle is an agreement by the wife not to apply to the court for maintenance. It is clear that there is a public interest against such promises, since if the husband does not maintain his wife, her support may become a charge on public funds ...

37 Secondly, marriage contracts are void of common law because the public has an interest in the sanctity of marriage.

38 Friedman, *The Law of Contract in Canada,* 3rd Edition, Carswell 1994, pg. 387 states:

> While an agreement under which spouses agree immediately to separate, and which contains the terms of such separation, for example, financial arrangements, custody of the children, is valid, an agreement under which spouses agree that they will separate in the future is against public policy, as it tends toward the disruption of matrimony. A separation agreement (or an agreement made on or before divorce), under which a wife undertakes not to pursue a remedy in the courts, even if made for due consideration, namely a promise to make regular payments to the wife, is against public policy and unenforceable.

39 Also, *Pollock on Contract*, 11th Edition, 1942, Stevens & Sons Ltd. London, sets out the difference between a marriage contract and a separation agreement:

> The distinction rests on the following ground...An agreement for an immediate separation is to meet a state of things which, however undesirable in itself has in fact become inevitable. Still the state of things is abnormal and not to be contemplated beforehand.
>
> > It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate ...
>
> Or, in other words, to allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves. (Pg. 289)

40 Especially, the law should not encourage contracts that make separation more profitable than marriage (Emphasis added)

41 Having found this contract to be a marriage contract, I am satisfied that it would be void at common law.

42 The *Matrimonial Property Act of Nova Scotia* does, however, legalize a limited marriage contract.

43 Section 23 states:

> A man and woman may enter into an agreement, to be known as a marriage contract, before their marriage or during their marriage

> while they are cohabiting, in which they agree on their respective rights and obligations
>
> (a) under the marriage;
>
> (b) upon separation;
>
> (c) upon the annulment or dissolution of the marriage;
>
> (d) upon the death of either spouse.

> 44 Although this statute legalizes marriage contracts, they are legal only in the context of the *Matrimonial Property Act* and so are restricted to the division of matrimonial assets.
>
> 45 Terms in a contract that are specific to custody, access, child support and spousal support are beyond the scope of the legislation and remain subject to the common law.

[47] The *Bood* decision did not go on appeal. (On the other hand, I am not aware that it has ever been followed.) It was cited to me by counsel for the wife in this matter, and I still consider it to be good law.

[48] As a result, I again determine for the reasons set out in the *Bood* decision, that marriage contracts made in this Province, cannot restrict the right to spousal maintenance after divorce.

[49] In the alternative should my reasoning in *Bood* be incorrect, I find, on these facts, that clause 6(a) of the marriage contract that spoke to spousal support, is "unduly harsh". Although it makes reference to either spouse not seeking support, in the circumstances of this couple, it clearly was meant to govern the wife.

[50] Further, the five year term that addresses the matrimonial assets and serves to make the agreement reasonable with respect to those items, does not apply to spousal support.

[51] The husband's explanation for the agreement was that it addressed the disparity of assets going into the marriage. This explanation does not justify the restriction on spousal support after divorce.

[52] To require the wife on the eve of her marriage to waive any future entitlement to spousal support, should the marriage dissolve, and she be otherwise entitled is not equitable. It is, in fact, "unduly harsh" and I find it not to be a valid enforceable term of the agreement.

[53] Having determined that, notwithstanding the marriage agreement, the wife can claim for spousal maintenance, the question becomes, is she entitled?

[54] The availability of spousal support is, of course, governed by s. 15.2 of the *Divorce Act* R.S., 1985, c. 3 (2nd Supp.). It reads in part:

> 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of th other spouse.
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> ...
>
> (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
>
> Factors
>
> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and

> (c) any order, agreement or arrangement relating to support of either spouse.
>
> ...
>
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[55] Considering the factors set out in s. 15.2(4), this was a relatively short marriage. Even considering the pre-marital cohabitation, it only lasted three years plus a six week period of reconciliation.

[56] There were no children of the marriage, and although the wife participated in activities during the husband's access to his children of a previous marriage, this

does not appear to have been either onerous (she said she enjoyed the contact) or compromising her ability to function outside the home.

[57] Although the wife was not employed during the full period of the marriage, it is apparent on the evidence that the union did not affect her ability to be employed.

[58] On the contrary, the evidence discloses that had the marriage not taken place, the wife would not have been able to continue to work in Canada.

[59] Notwithstanding, as to s. 15.2(6)(a) of the *Divorce Act*, I conclude that there were demonstrative economic disadvantages to the wife caused by the breakdown of the marriage.

[60] During the marriage she had support - a roof over her head - food on the table, which support allowed her to function, employed or otherwise. She had a choice.

[61] After the separation, she was on her own as surely as she was when she first met the husband.

[62] In response, the wife has developed a modest level of self-sufficiency since the split. The wife testified that she had no income for two years after the final separation.

[63] She eventually went back to New York City, where she moved in with her family for a period and has been able to secure a number of part time jobs.

[64] Her 2003 United States income tax return listed a gross income of $32,180.00 (U.S.).

[65] It is relevant that despite what the marriage agreement, post-separation, these parties negotiated an agreement designed to address the wife's economic circumstances.

[66] The wife testified, that in May of 1998, the parties had conversation in which the husband agreed to pay her $16,000.00 (four payments of $4,000.00) to bring finality to their marriage. However, the suggestion broke down when they squabbled over the tax payable.

[67] They met again at a book store in Halifax, the following year (1999). She testified, that on this occasion, after pointing out that “he didn’t have to pay her anything” the husband asked her what amount she would be comfortable with. She responded that she would accept “the same amount as before”, meaning the $16,000.00 figure.

[68] The wife testified, “He said, o.k. fine - there was no tax talk that time, no animosity, we shook hands, but we had no time lines (for payment).” No payment was forthcoming.

[69] In February 2000, they met again. She said, “I had second thoughts, I thought I should get more. Others told me that.” The negotiations broke down.

[70] Subsequently, he told her that “he wouldn’t pay unless a court of law forced him to”.

[71] The husband agrees that negotiations did take place, but he said there was never any agreement. “She was seeking about $20,000.00. I came in at around

$10,000.00" - but, subsequently he concluded that he owed her nothing because the pre-nuptial was in place.

[72] I believe the wife when she testified that at one point the husband had agreed to a sum of $16,000.00 in full settlement of her claim for spousal benefits.

[73] It is of significance in coming to a proper determination of the spousal maintenance issue, that this negotiation occurred.

[74] I conclude that on the totality of the evidence, given the wife's disadvantages, circumstances after the separation, but keeping in mind the level of self-sufficiency attained since separation and the husband's ability to pay, that the $16,000.00 figure is a reasonable lump sum spousal support payment at the termination of the union, even as of this date.

[75] I have considered and reflect the wife's argument that she receive interest on that figure from 1998, the year of the oral negotiation.

[76] The husband raised the “doctrine of laches”. He submits that the wife, not having pursued her counter-petition for more than six years, her claim should be dismissed based on that doctrine.

[77] I find that, on these facts, that doctrine does not compromise the wife’s claim.

[78] In so concluding, I am mindful that it was the husband who started the action and he likewise was inactive in proceeding towards finalization of the matter. Further, I am satisfied that negotiations were taking place between the parties during that period of delay.

[79] If necessary, I will receive written submissions as to costs.

Chief Justice Kennedy