Docket: 2001-1479(IT)G

BETWEEN:

NANCY APA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 3 and 4, 2004 at Toronto, Ontario.

Before: The Honourable D.G.H. Bowman, Associate Chief Justice

Appearances:

Counsel for the Appellant: John David Buote

Counsel for the Respondent: Jocelyn Espejo Clarke

JUDGMENT

The appeal from the assessment made under section 227.1 of the *Income Tax Act*, notice of which is dated June 15, 2000 and amended by notice dated August 8, 2000, is allowed, and the assessment is vacated.

The appellant is entitled to costs in the amount of $5,000, plus disbursements.

Signed at Ottawa, Canada, this 15th day of March 2004.

"D.G.H. Bowman"

Bowman, A.C.J.

Citation: 2004TCC212
Date: 20040315
Docket: 2001-1479(IT)G

BETWEEN:

NANCY APA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowman, A.C.J.

[1] This appeal is from an assessment made under section 227.1 of the *Income Tax Act.*

[2] The appellant alleges that her spouse, Nicola Apa, was assessed $71,644.54. The respondent says the amount was $73,559.49. The precise amount is not relevant to this appeal. It was the unpaid deductions, interest and penalties payable by Nicola Apa's company A.P.A. Landscaping and Concrete Ltd. This amount was assessed against Nicola Apa under section 227.1 of the *Act*.

[3] On January 24, 1996, Mr. Apa transferred to the appellant his interest in 51 Mayall Avenue, Downsview, Ontario. This had been their matrimonial home until they separated in September of 1995.

[4] The Minister of National Revenue assessed Mrs. Apa under subsection 160(1) of the *Act* on the basis that Mr. Apa transferred to her, his spouse, property (his half interest in the property on Mayall Avenue). Therefore, in the Minister's view of the matter, the appellant was jointly and severally with her spouse liable to pay under the *Act* the lesser of the transferor's tax liability (over $70,000) and the excess of the fair market value of the property transferred and the

consideration given by the transferee to the transferor. The respondent calculates this amount to be $37,498, as follows:

Fair market value of property	$200,000.00
Mortgage on property	$125,000.00
Equity available to the spouses	$ 75,000.00
Mr. Apa's share of the equity	$ 37,500.00
Consideration paid by appellant	$ 2.00
Value of equity transferred	$ 37,498.00

[5] The appellant endeavoured unsuccessfully to raise as an issue the fair market value of the property. The respondent had filed an expert witness report in which the property was valued at $200,000. Two days before trial the appellant filed a document signed by a real estate agent expressing the view, if I recollect correctly, that the property was worth about $180,000. Counsel for the respondent objected that the document had not been served and filed 30 days before trial in accordance with section 145 of the *Tax Court of Canada Rules (General Procedure)*. I did not allow this document to be filed or the real estate agent to be called. The court of course has a discretion to permit the late filing of expert reports but there has to be an adequate reason and here I could see none. The rules about filing expert witness reports have a purpose and departures from them should be the exception and must be justified.

[6] I would not have permitted expert testimony on valuation to have been called in any event. Not only does section 145 of the *Rules* require the report of the expert to be filed 30 days before the hearing, it also requires that the evidence be relevant to an issue defined by the pleadings or by a written agreement of the parties. Here the respondent pleaded as an assumption that the fair market value of the property was not less than $200,000. The appellant stated in paragraph 6 of the Notice of Appeal "The fair market value of the Mayall Property was approximately $200,000 . . ." This concurrence of the parties on the value of the property removes, in my view, the issue of valuation from the table. Counsel for the appellant argued that the use of the word "approximately" before $200,000 gave him the required room to manoeuvre and to argue that the property was worth $180,000. I do not think so. If an appellant wants to challenge the Minister's assumption of value, it should be done forthrightly and unambiguously.

[7] Before I come to the main point in this appeal I shall deal briefly with another argument raised by the appellant. The respondent's position is that the property was worth $200,000, and the equity (that amount less the mortgage) was

worth $75,000. Therefore, what Mr. Apa transferred was his half of the equity or $37,500. Not so, says the appellant.

[8] In the separation agreement, which I shall reproduce below, the appellant also assumed Mr. Apa's obligations under the mortgage. Since Mr. Apa's obligation under the mortgage was $62,500 this exceeded the value of the equity and therefore the amount under subparagraph 160(1)(*e*)(i) is nil.

[9] With respect, the mathematical reasoning behind this argument is fallacious. Ignoring for the moment the fact that Mr. Apa remains liable on the convenant and Mrs. Apa as a joint tenant was always liable for the full amount of the mortgage, the fact remains that Mr. Apa did not simply transfer to her his half interest in the equity of $75,000, or $37,500. He transferred to her his interest in the property which is one half of $200,000, or $100,000, subject to a mortgage. If we accept the premise that she assumed an obligation of $62,500, she is still getting something worth $37,500.

[10] The appellant is using the $62,500 obligation (one half the mortgage) twice – once to bring the value down to the amount of the equity and once as consideration for that equity. This, in my view, is double counting.

[11] I turn now to the main point of the case and the one on which I propose to allow the appeal. This is subsection 160(4) of the *Act* which reads:

> (4) Notwithstanding subsection (1), where at any time a taxpayer has transferred property to the taxpayer's spouse pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written separation agreement and, at that time, the taxpayer and the spouse were separated and living apart as a result of the breakdown of their marriage, the following rules apply:
>
> (*a*) in respect of property so transferred after February 15, 1984,
>
> (i) the spouse shall not be liable under subsection (1) to pay any amount with respect to any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and
>
> (ii) for the purposes of paragraph (1)(*e*), the fair market value of the property at the time it was transferred shall be deemed to be nil, and

> (*b*) in respect of property so transferred before February 16, 1984, where the spouse would, but for this paragraph, be liable to pay an amount under this Act by virtue of subsection (1), the spouse's liability in respect of that amount shall be deemed to have been discharged on February 16, 1984,
>
> but nothing in this subsection shall operate to reduce the taxpayer's liability under any other provision of this Act.

[12] The Minister assumed that the parties were not living separate and apart, that there was no breakdown of their marriage and the property was not transferred pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written agreement.

[13] Counsel for the appellant called six witnesses — the appellant; her spouse, Nicola Apa; her sister, Lucy Ussia; the daughter of the Apas, Theresa Apa; the appellant's brother-in-law, Vince Ussia; and Ralph Middlebrook, in whose house Nicola Apa lived during the separation. The following facts have been overwhelmingly and incontrovertibly established through these witnesses.

[14] The Apas were married in 1972 and had three children. Their marriage became increasingly troubled and turbulent in the 1990s and broke down completely in September 1995 when Nicola moved out and lived with his mother for several months. He then moved into the basement of a home owned by his friend Ralph Middlebrook until the time the spouses reconciled in 1998.

[15] On October 10, 1995, they entered into a separation agreement with the assistance of a friend, Giuseppe Graziano Monteleone. The agreement was in three pages and was executed by the spouses and Mr. Monteleone as witness. The handwritten parts were written in by the appellant. Mr. Monteleone translated for Mr. Apa whose English is imperfect. Mr. Monteleone has since died and therefore did not testify.

[16] The agreement is as follows:

Separation Agreement

This agreement is made the 10th of Oct. 1995
Between

Wife NANCY APA
Of the City of TORONTO in the province of ONTARIO

Husband NICOLA APA
Of the City of TORONTO in the province of ONTARIO

Parties were married to each other on August 12 1972
In the Province of

The parties have 3 children
1. NICA APA
2. LORENZO APA
3. TERESA APA

The parties agree to live separately and have lived apart since SEPT. 1995

The parties have assets that will be described in this agreement, which will be a final settlement of the property jointly or separately owned.
The settlement of custody etc.

Both parties agree to live separately and will not interfere with each other or annoy or disturb each other.

This agreement will be binding in the event of divorce or annulment of the marriage, and will continue to be bound by the laws of the Province of ONTARIO

This agreement may only be amended or varied if agreed by both parties and is put in writing by the husband or wife and can only be executed by a court order or unrelated party.

The parties have agreed to JOINT custody of the children and have agreed to the fo.lowing terms THEY WILL LIVE AT THE [redacted] HOME WITH WIFE AND WILL VISIT HUSBAND WEEKENDS AND HOLIDAYS IF SO DESIRED WITH THE NOTICE
The parties have agreed to —— per month and expenses paid by the
—— per month for
The parties have agreed to divide the following ALL CONTENTS OF HOME TO WIFE ALL BUSINESS RELATED ITEMS TOOLS, ETC. TO HUSBAND (INCLUDED CLOTHING & JEWELRY
The parties agree to FULL & FINAL SETTLEMENT
With respect to each parties obligations neither shall be responsible for the others past or future financial obligations or debts each is responsible for their own.

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Continued from page 1.

Neither party hereafter will be held responsible for the either party's debts.

There will be a TRANSFER of the matrimonial home to NANCY APA WIFE
And the party will have exclusive right to occupation and sole possession of the matrimonial home at

The WIFE shall have all interest and right to title of the matrimonial home with

The TRANSFER of title to be executed within 6 MONTHS

For 'LOVE AND AFFECTION'

The party will be responsible for heat, water, and any other charges to keep the matrimonial home

Any maintenance repairs etc. will be the sole responsibility of NANCY APA WIFE

The WIFE also agrees to pay the mortgage solely

It is further agreed that a CAR will also be provided with no obligation to pay.

Each party has received a copy of this agreement

Both parties have agreed the facts in this agreement

Both parties sign this agreement as free agents

This agreement was signed without any influence or pressure

Husband NICOLA APA

Dated Oct 19 1995

Signature of witness

Dated Oct 10, 1995

Wife NANCY APA

Dated Oct 10,1995

Signature of witness

Dated Oct 10, 1995

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Continued from page 1.

The husband will transfer the following property to the wife

51 MAYALL AVE
DOWNSVIEW ONT
M3N-1E7

26 ESTATEVIEW CIR.
BRAMPTON, ONT.
L6R-813

Therefore does now indemnify the WIFE and save harmless from any and all liabilities thereunder.

This agreement is now complete and the parties have signed and witnessed this document.

[17] The evidence is clear that the spouses were living apart as the result of the breakdown of their marriage at the time the separation agreement was executed and at the time the property was transferred. There is no suggestion that the separation or the agreement were shams or that they were simply contrived in order to avoid the provisions of subsection 160(1) of the *Income Tax Act*. Even if that were argued the evidence does not support it. The agreement and the separation were genuine.

[18] The basic assumption on which the assessment is founded, that the spouses were not separated and living apart as the result of the breakdown of their marriage, has been conclusively demolished.

[19] Counsel for the respondent focused most of her argument on the proposition that the transfer was not pursuant to a written agreement. Her argument is that the agreement signed by the spouses on October 10, 1995 was not valid. A number of arguments were advanced:

(a) There was insufficient disclosure of the parties' financial condition.

(b) There were some blanks left in the agreement.

(c) Mr. Apa did not fully understand the agreement because he had an insufficient command of English. At trial he testified through an interpreter.

[20] From my observation of Mr. Apa in the witness stand, it is obvious that he understood very well just what the agreement meant. Mr. Monteleone translated for Mr. Apa.

[21] Counsel for the respondent relies upon subsection 56(4) of the *Ontario Family Law Act* which reads

> (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.

[22] This provision allows a court to set aside a domestic contract in whole or in part if certain conditions are met and if one party applies for such relief. Neither party to the agreement has done so and the contract remains valid and binding until a court sets it aside. How the Attorney General of Canada or the Minister of National Revenue can rely upon this provision to invalidate an otherwise valid agreement is a mystery. In any event there is nothing in the evidence that would justify a court setting the agreement aside. There was ample financial disclosure. The parties knew quite well what their financial situation was.

[23] So far as the blanks in the form agreement are concerned the fact that a couple of words are left out (in the province of _____; the matrimonial home at _____; the matrimonial home with _____;) does not invalidate the agreement. Both parties knew where they were married and what the matrimonial home was. The sentence about monthly payments was deliberately left blank because no payments were contemplated.

[24] I see no merit in the respondent's position. The transfer was pursuant to a valid separation agreement and therefore subsection 160(4) applies. The appeal is allowed with costs and the assessment is vacated.

[25] The appellant was forced to spend two days in court in challenging an assessment that had no merit and that should have been vacated at the objection level. I am fixing costs in the amount of $5,000 for counsel, plus disbursements.

Signed at Ottawa, Canada, this 15th day of March 2004.

"D.G.H. Bowman"

Bowman, A.C.J.

CITATION:	2004TCC212
COURT FILE NO.:	2001-1479(IT)G
STYLE OF CAUSE:	Nancy Apa and Her Majesty The Queen
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 3 and 4, 2004
REASONS FOR JUDGMENT BY:	The Honourable D.G.H. Bowman, Associate Chief Justice
DATE OF JUDGMENT AND REASONS FOR JUDGMENT:	March 15, 2004

APPEARANCES:

Counsel for the Appellant:	John David Buote
Counsel for the Respondent:	Jocelyn Espejo Clarke

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