Date: 19980616
Docket: D081306
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

W[redacted] G[redacted]

PETITIONER/RESPONDENT

AND:

D[redacted] G[redacted]

RESPONDENT/APPLICANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE CLANCY

Counsel for the Petitioner/Respondent:	S. Griffin
Counsel for the Respondent/Applicant:	A. Thiele
Place and Date of Hearing:	Vancouver, B.C. June 11, 1998

[1] In these proceedings a divorce was granted on April 5, 1994. By consent, an order was made providing for corollary relief. The following two paragraphs were included:

> THIS COURT FURTHER ORDERS that in the event the Petitioner shall inherit [redacted], in the City of Vancouver, she shall have the option to place the property up for sale forthwith in which case she shall pay the Respondent one-third of the net proceeds from the sale thereof after all expenses, property, income, and inheritance taxes have been paid for.
>
> THIS COURT FURTHER ORDERS that if the Petitioner chooses not to put the said property up for sale, she shall pay forthwith to the Respondent an amount equal to one-third of the then market value of the home, after deducting all expenses, property, income and inheritance taxes and a notional real estate commission. If the parties are unable to agree upon the value of the home, a certified real estate appraiser shall be appointed by agreement and failing agreement, the matter shall be referred back to this Court for further order.

[2] On a subsequent application for an order for child maintenance, Mrs. G[redacted] filed a Property and Financial Statement dated May 15, 1997, which revealed that she was a registered owner in joint tenancy of [redacted] Street. On October 1, 1996, Mrs. D[redacted], the mother of Mrs. G[redacted], had transferred a fee simple interest in the property to her daughter in joint tenancy. The expressed consideration was the sum of $1.00 and other good and valuable consideration. Dr. G[redacted] now brings this application and seeks the following relief:

a) an extension of time pursuant to s. 68 of the ***Family Relations Act***, R.S.B.C. 1996, c. 128 to allow the court to enquire into the post-nuptial settlement entered into between the parties;

b) an order pursuant to the ***Act*** varying, interpreting or rectifying the term of the consent order;

c) an order declaring that Dr. G[redacted] is entitled to judgment against Mrs. G[redacted] in the amount of $50,000.00, being one-third of the declared value of Mrs. G[redacted]'s current interest in the property; and

d) an order pursuant to the provisions of the ***Act*** declaring that should Mrs. G[redacted] obtain a further one-half interest in [redacted] through the transmission to her as the surviving joint tenant of her mother's interest that Dr. G[redacted] is entitled to a one-third interest in that one-half interest.

[3] The relief claimed assumes that the provisions of the ***Family Relations Act*** are applicable. I have not been referred to the pleadings in this divorce action but for the purposes of this application, I will assume that the provisions of the ***Family Relations Act*** do apply.

Extension of Time

[4] Section 68 of the ***Family Relations Act*** provides as follows:

> **Variation of marriage settlements**
>
> 68. (1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.

> (2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.
>
> (3) The Supreme Court may, on application, if circumstances warrant, extend the period during which an application may be made or power exercised under this section.

[5] An extension of time for the bringing of the application is required because of the limitation period of two years imposed in s. 68(2). The divorce was granted on April 5, 1994. The agreement which provides the basis for the consent order is dated March 31, 1994.

[6] In ***Heslop v. Heslop*** (1984), 52 B.C.L.R. 355, Wallace J. (as he then was) referred to ***Ioannidis v. Ioannidis*** (1982), 39 B.C.L.R. 368 (C.A.), where Hutcheon J.A. stated that he had grave doubts concerning the jurisdiction of the court but preferred to base his decision on whether or not grounds were shown for the court's intervention.

[7] In ***Heslop***, Wallace J. held at p. 359 that "the legislature empowered the court to inquire into all relevant circumstances and exercise a broad discretion to determine what, if any, variations of a post-nuptial settlement were

appropriate". He went on to hold that where there has been a considered settlement the court should be most reluctant to disturb it. I accept without deciding, that I am not prevented from exercising the broad jurisdiction described in ***Heslop***. My decision will be based on whether there are grounds for intervention.

[8] Although the first question which Dr. G[redacted] put before the court is described as an application for an order varying, interpreting or rectifying the consent order, counsel advises that he does not seek to acquire any rights other than those acquired under the terms of the order. That being so, the question before the court is one of interpretation and not variation. The question to be answered is: what interest did Dr. G[redacted] acquire under the terms of the settlement?

[9] In these circumstances, the court will not disturb the settlement reached by the parties. It follows that leave to extend the time to apply should not be granted. There are a number of additional reasons for reaching that conclusion.

[10] The questions of whether Dr. G[redacted] will obtain an interest in the property on the transmission to Mrs. G[redacted] of Mrs. D[redacted]'s interest in the joint tenancy; and whether the transfer of the interest already registered in the name of Mrs. G[redacted] gave rise to a contingent interest in Dr. G[redacted]; do not require the making of a further order under s. 68 of the ***Act***.

The interpretation of the provisions of the order and the agreement will be dealt with later in these reasons.

[11] There is one particular circumstance addressed by counsel for Mrs. G[redacted] with which I should deal specifically. Counsel submitted that because Mrs. G[redacted], who is a member of the Bar, failed to advise the court during her application for child maintenance that Dr. G[redacted] was incorrect in stating in his Property and Financial Statement that he had an interest in the property, she should not now be heard to allege that he does not have an interest. There is no substance to that allegation. Mrs. G[redacted] in no way deceived the court. As her counsel pointed out, her material correctly showed her position in respect of the property. She was entitled during argument to refer to the position taken by Dr. G[redacted] without explanation. On the maintenance application Dr. G[redacted] was represented by counsel who had every opportunity to explain to the court the true circumstances of Dr. G[redacted]'s position as to his interest in the property.

[12] In ***Walji v. Walji Estate***, [1995] B.C.J. No. 1899 (S.C.)(Q.L.), Blair J. dealt with s. 51(1) [now s. 65(1)] of the ***Act*** which authorized the court to divide property into shares fixed by the court where the division of property under a marriage agreement would be unfair. He held that a settlement arrangement achieved through minutes of settlement followed by a consent order is not an agreement to reapportion under s. 51 of

the ***Act*** and went on to find that the action was *res judicata*. It was not open to the parties to re-litigate the matters addressed in the divorce action.

[13] Blair J. did not consider the provisions of s. 54 of the ***Act*** which was the predecessor to s. 68. Wallace J. did consider s. 54 in ***Heslop*** when he concluded there is a broad discretion to vary where the circumstances are appropriate. ***Walji*** dealt only with fairness. Fairness was also the concern of the court in ***Heslop***. There are many reasons apart from fairness for the possible intervention of the court. I would not restrict s. 68 to authorizing intervention only on grounds of fairness. The court in ***Heslop*** held that s. 68 provides the necessary jurisdiction for intervention if intervention is appropriate for any reason. I find, however, that in the circumstances before me, the application of s. 68 is not necessary. Counsel seeks only an interpretation of the agreement. That can be provided without reference to s. 68.

[14] No other basis for setting aside the order was suggested. The law is clear that an entered order may only be amended under the provisions of the "slip" rule or in the case of a grave and manifest injustice: ***Bau-Und Forschungsgesellschaft Thermoform AG v. Paszner*** (1992), 69 B.C.L.R. (2d) 52 (C.A.). No manifest injustice has been demonstrated here. The parties were in litigation for a period in excess of three years before the settlement was reached. Dr. G[redacted] was not represented at the

time of the making of the order but until shortly before that he had been represented by counsel throughout the litigation period. He is well educated and had the means to retain counsel had he chosen to do so.

[15] For all of those reasons, I decline to extend the period during which an application to vary the post-nuptial settlement may be made. It follows that the application to vary the consent order is dismissed.

Whether Dr. G[redacted] is Entitled to Judgment for One-Third of the Declared Value of Mrs. G[redacted]'s Current Interest in the Property

[16] Dr. G[redacted]'s position is that Mrs. G[redacted] holds her joint tenancy interest in the property in trust for her mother. That being the case, the transfer of that interest should fall within a broad definition of the word "inherit" in the order. Alternatively, Dr. G[redacted] alleges that there should be a presumption of advancement in respect of the interest transferred to Mrs. G[redacted] which would also bring the transfer within a broad definition of the word "inherit."

[17] There is no factual basis for finding that Mrs. G[redacted] holds her interest in the property in trust for her mother. The consideration for the transfer refers to $1.00 and other good and valuable consideration. That language is consistent with the making of a gift. There is, further, nothing in the affidavit material filed by Mrs. G[redacted] that would lead to a finding that

a trust has been created. The decision of this court in ***Groves v. Christiansen***, [1978] 4 W.W.R. 64 (B.C.S.C.), is of no assistance to Dr. G[redacted]. It is apparent from the reasons for judgment of Toy J. (as he then was) at p. 69 that if the evidence is consistent with an intended gift, the court would not find a resulting trust.

[18] As to the presumption of advancement, no authorities were provided to me to support the contention that such a presumption should be made nor was any evidence adduced in support of that contention.

[19] More importantly, neither contention assists Dr. G[redacted]. Even if a trust resulted or there should be a presumption of advancement, neither conclusion would support a finding that Mrs. G[redacted] had inherited an interest in the property. There is no need to deal with the authorities which define the meaning of "inherit". Counsel for Dr. G[redacted] has quite properly conceded that the authorities provide that the word should be given its ordinary meaning, that being a right that arises on an inheritance. It contemplates a right of an heir which arises upon death.

[20] If further support is required for that interpretation of "inherit", Dr. G[redacted]'s contention that he understood the word to have a broader meaning is contradicted by the term in the

order which provides for the deduction of inheritance taxes when calculating any amount to which Dr. G[redacted] might become entitled.

[21] I find that the word "inherit" should not be given the broader meaning urged by Dr. G[redacted]. The application of Dr. G[redacted] for judgment for the value of his interest in the property is dismissed.

Whether Dr. G[redacted] will obtain an interest in the property if Mrs. D[redacted]'s interest is transmitted to Mrs. G[redacted] as a Surviving Joint Tenant

[22] The interpretation of the agreement as to its effect in respect of the interest still held by Mrs. D[redacted] is hypothetical and I would decline to answer it in the sense of ruling on what its effect will be at the time of the death of Mrs. D[redacted]. That question could only be answered based on the circumstances at the time of death. The court should not deal with claims based on hypothetical facts which may never occur: ***General Security Insurance Co. v. Warner*** (1980), 20 B.C.L.R. 154 (S.C.).

[23] An interpretation of the effect of the clause as it stands may, however, be of assistance to the parties. Following my reasons, in response to the question of whether Dr. G[redacted] is entitled to judgment for the value of one-third of the current interest in the property held by Mrs. G[redacted], I see no reason to apply a broader definition to the word "inherit" so as to provide Dr. G[redacted] with an interest on transmission of the joint tenancy.

That transmission would not be a right arising on an inheritance. In the particular circumstances before me, there is a provision in the agreement for inheritance taxes to be calculated in determining any interest of Dr. G[redacted]. Inheritance taxes would not be assessed on the transmission of an interest held in joint tenancy.

[24] I find that Dr. Ga[redacted] would not acquire an interest in the property on the transmission of Mrs. D[redacted]'s joint tenancy interest to Mrs. G[redacted].

Conclusion

[25] Dr. G[redacted]'s motion is dismissed. Mrs. Ga[redacted] is entitled to her costs on Scale 3.

"D. L. Clancy, J."

The Honourable Mr. Justice Clancy