NOVA SCOTIA COURT OF APPEAL
Citation: ***Baker v. Baker***, 2012 NSCA 24

Date: 20120302
Docket: CA 347495
Registry: Halifax

Between:

Thomas Arthur Baker

Appellant

v.

Joyce Marie Baker

Respondent

Judges:	Oland, Fichaud and Farrar, JJ.A.
Appeal Heard:	February 14, 2012, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Fichaud, J.A.; Oland and Farrar, JJ.A. concurring
Counsel:	Daniel J. MacIsaac, for the appellant M. Louise Campbell, Q.C., for the respondent

Reasons for judgment:

[1] The question is whether the judge committed an appealable error by setting aside a separation agreement.

Background

[2] The pleadings describe the respondent as Joyce Baker. The respondent now uses the name Joyce Gosbee, which is how I will identify her in these reasons.

[3] Mr. Baker and Ms. Gosbee are now 61 and 58 years of age, respectively. They married in October 1971 and were together for 34 years until they separated in early November 2005. They have four children, all over the age of majority. Their daughter Viola, now 38, has severe epilepsy, needs attention, and still lives with her father.

[4] Mr. Baker worked in auto body repair. But health problems forced him to give that up in 1987. He has lung and heart afflictions. At the separation in 2005, his only income was a CPP disability pension of about $10,000 annually.

[5] Ms. Gosbee had taken accounting and tax preparation courses. During the marriage she worked for 14 years part time with Canada Post, and at a retail operation in the Antigonish Mall. At the separation in November 2005, her only income was Employment Insurance of about $10,000 per annum, which was near expiry.

[6] In October of 2004 Ms. Gosbee learned she had breast cancer, and re-evaluated her life path. She decided to leave the marriage and move to Calgary. At the beginning of November 2005, she told Mr. Baker of her intention:

> So I said to him [Mr. Baker] and Viola, I have to think of myself. My daughter, my youngest daughter had just got her Masters, and I said it's time for me to get some sanity, live on my own. I just wanted peace. I wanted some peace. And I said if I have two years or five years or whatever, I just want to live it peacefully.

[7] In a discussion at the kitchen table Mr. Baker and Ms. Gosbee agreed to a quick separation agreement. Mr. Baker's lawyer drafted it. Ms. Gosbee took it to

another lawyer for independent legal advice. They signed it. The executed Separation Agreement, dated November 3, 2005, included the following:

1. **DEFINITIONS:**

In this agreement,

...

(b) "matrimonial home" means house and land at South Side Harbour, in the County of Antigonish, Province of Nova Scotia;

...

2. **BACKGROUND**

...

(2) The children of the marriage are as follows: There are no longer children of the marriage.

(3) The husband and wife are living separate and apart from each other and desire to settle by way of agreement all their rights and obligations which they have or may acquire with respect to their property and maintenance or support from the other.

(4) The parties separated on the 2nd day of November, A.D., 2005.

3. **AGREEMENT**

The husband and the wife agree to be bound by the provisions of this agreement.

...

6. **MAINTENANCE**

The parties hereto covenant and agree to make ***no demands for maintenance*** upon each other whether under any provincial, or federal statute or common law. This renunciation shall exist irregardless of any change in the circumstance.

...

9. **DEBTS AND OBLIGATIONS**

...

(4) the husband agrees to assume responsibility for any family debt incurred prior to this agreement.

10. **RELEASE OF RIGHTS TO AND INTEREST IN PROPERTY**

...

(f) ***The wife does covenant and agree to convey the matrimonial home*** and land situate at South Side Harbour, Antigonish County, Nova Scotia, ***to the husband***.

...

13. **SEPARATION AGREEMENT TO SURVIVE DIVORCE**

If either the husband or the wife obtains a decree of divorce under the laws of any jurisdiction, all the terms of this agreement shall be incorporated into and form part of the decree of divorce.

...

15. **EXECUTION**

The husband and the wife acknowledge that each of them:

(a) understands his or her rights and obligations under this agreement;

(b) has had satisfactory disclosure of the financial circumstances of the other; and

(c) is signing this agreement voluntarily.

...

18. **INDEPENDENT LEGAL ADVICE**

Each party hereto acknowledges and agrees that they each had the opportunity to seek independent legal advice and they are each signing this Agreement voluntarily and are not under any duress or undue influence. [emphasis added]

I have emphasized clauses 6 and 10(f), that were the focus of the submissions on this appeal.

[8] The Separation Agreement also provided that Mr. Baker would have the furniture in the matrimonial home, each party would have their personal effects and belongings, and each would be responsible for his or her own debts after the Agreement.

[9] Attached to the Separation Agreement were Certificates of Independent Legal Advice signed by the solicitors for Mr. Baker and Ms. Gosbee. The Certificate signed by Ms. Gosbee's solicitor said:

> CERTIFICATE OF INDEPENDENT LEGAL ADVICE TO WIFE
>
> I, Meghan MacGillivray, of Antigonish, in the County of Antigonish, Barrister and Solicitor, DO HEREBY CERTIFY that I was this day consulted in my professional capacity by Joyce Marie Baker, named in the annexed Separation Agreement, dated as of the 3rd day of November, 2005, as to her obligations and rights under the said Agreement, that I acted solely for her and explained fully to her the nature and effect of the said Agreement and she did acknowledge and declare that she fully understood the nature and effect thereof and did execute the said document in my presence and did [*sic*] acknowledge and declare that it appeared to me that she was executing the said document of her own volition and without fear, threats, compulsion or influence by Thomas Arthur Baker or any other person.

[10] Ms. Gosbee testified that she signed the Separation Agreement against the advice of her lawyer. Her lawyer was not called as a witness.

[11] Ms. Gosbee signed the deed to the matrimonial home, as provided in clause 10(f) of the Separation Agreement.

[12] Shortly after signing the Separation Agreement, Ms. Gosbee moved to Calgary. She testified:

> I stayed with my sister. I was there for ... at her place for two and a half months. It took me a week, exactly a week, to get a job.

[13] Ms. Gosbee is still employed where she was hired upon her arrival in Calgary. She manages inventory at three stores. At the trial in 2011, she discussed her income:

> Q. And you were showing income of $39,000 per year?
>
> A. When I started working in Calgary, yes.
>
> Q. And what do you earn now?
>
> A. Approximately 39 to 40,000 a year.

[14] Since the separation, Mr. Baker's income virtually has been unchanged, and is confined to his CPP disability pension. The trial judge found:

> [12] Mr. Baker's income since the separation in 2005 has remained around $10,000.00 per year.

[15] In May 2009, Mr. Baker petitioned for divorce. Ms. Gosbee responded by claiming that the 2005 Separation Agreement should be set aside under s. 29 of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275. Section 29 permits the court to set aside a separation agreement that "is unconscionable, unduly harsh on one party or fraudulent". Mr. Baker's position was that the Agreement should stand but, if it were set aside, he was entitled to retroactive and prospective spousal support.

[16] Justice Douglas MacLellan of the Supreme Court of Nova Scotia conducted the trial on March 24, 2011 and issued a written decision on June 23, 2011 (2011 NSSC 272). The judge: (1) set aside the Separation Agreement under s. 29; (2) ruled that Mr. Baker must pay to Ms. Gosbee an equalization payment of $88,360 to allocate the matrimonial net worth, principally the value of the matrimonial home; and (3) said the following about spousal support:

> [33] The issue of spousal support to Mr. Baker still hangs over this proceeding. I conclude that if the property had been settled fairly in 2005 that Mr. Baker would, in the years following, have been entitled to spousal support.

The judge did not quantify spousal support, but left that for later litigation. His decision said:

> [36] In the circumstances, I would order that there be no payment of the property settlement until the issue of spousal support is dealt with by the Court.

The judge noted (para 38) the situation "is complicated by the fact that Mr. Baker might not have any capacity to buy-out his wife's share of the property".

[17] Spousal support has not yet been determined. The judge has retired. So spousal support would have to be re-litigated afresh before another judge.

[18] Mr. Baker has appealed. He says that the judge erred by setting aside the Separation Agreement under s. 29.

Issue

[19] The issue is whether the judge's reasons disclose an appealable error in his interpretation or application of s. 29 of the *Matrimonial Property Act*.

Standard of Review

[20] In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, Justice L'Heureux-Dubé for the Court said:

> Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong.

This Court's standard of review, involving deference but permitting appellate interference to correct an error in principle, applies to both support issues and property division: *Lace v. Gray*, 2009 NSCA 26, para. 12, per Roscoe, J.A.; *Ezurike v. Ezurike*, 2008 NSCA 82, at para. 6, per Bateman, J.A.; *MacLennan v. MacLennan*, 2003 NSCA 9, at para. 9, per Cromwell, J.A.

[21] The issue on this appeal is whether the judge erred in principle.

Analysis

[22] Section 29 of the *Matrimonial Property Act* says:

> **Harsh or fraudulent contract or agreement**
>
> **29** 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.

[23] The principles that govern a judicial departure from a Separation Agreement stem from *Miglin v. Miglin*, [2003] 1 S.C.R. 303. Justices Bastarache and Arbour for the majority established a two stage test (summarized at paras 79-91), with two components in stage one.

[24] At stage one, the court first examines the circumstances that led to the separation agreement to determine whether oppression, pressure or vulnerabilities tainted the integrity of the negotiation. Justices Bastarache and Arbour added three qualifiers:

> 82 We pause here to note three important points. First, we are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution. Next, the court should not presume an imbalance of power in the relationship or a vulnerability on the part of one party, nor should it presume that the apparently stronger party took advantage of any vulnerability on the part of the other. Rather, there must be evidence to warrant the court's finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation process. Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement. If separating or divorcing parties were generally incapable of making agreements it would be fair to enforce, it would be difficult to see why Parliament included "agreement or arrangement" in s. 15.2(4)(c). Finally, we stress that the mere presence of

> vulnerabilities will not, in and of itself, justify the court's intervention. The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties.

Justices Bastarache and Arbour summarized the first component of stage one:

> 83 Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.

Earlier, in their Introduction, Justices Bastarache and Arbour had distilled the point even further:

> 4 ... The court would inquire whether one party was vulnerable and the other party took advantage of that vulnerability.

[25] Where the agreement survives this circumstantial analysis, the court, in the second component of stage one, determines whether the agreement substantially complies with the objectives of the *Divorce Act*, "thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown" (para 84). Justices Bastarache and Arbour said that "[O]nly a significant departure" from those objectives will warrant the court's intervention (para 84) and that "a court should be loathe to interfere with a pre-existing agreement unless it is convinced that the agreement does not comply substantially with the overall objectives of the *Divorce Act*" (para 46). Those objectives "include, as well as the spousal support considerations in s. 15.2, finality, certainty, and the invitation in the Act for parties to determine their own affairs" (para 85). The court must examine the agreement "in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves" (para 84).

[26] Stage two moves the gauge forward in time to assess whether the parties "find themselves down the road of their post-divorce life in circumstances not contemplated" (para 87). Justices Bastarache and Arbour said:

> 88 ... the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

[27] In *Rick v. Brandsema*, [2009] 1 S.C.R. 295, Justice Abella for the Court noted that *Miglin* also guides the court's assessment of the property aspects of separation agreements:

> [39] While *Miglin* dealt with spousal support agreements in the context of a divorce, it nonetheless offers guidance for the conduct of negotiations for separation agreements generally, including negotiations for the division of matrimonial assets.

Justice Abella summarized *Miglin*'s approach:

> [44] Where, therefore, "there were any circumstances of oppression, pressure or other vulnerabilities", and if one party's exploitation of such vulnerabilities during the negotiation process resulted in a separation agreement that deviated substantially from the legislation, the Court in *Miglin* concluded that the agreement need not be enforced (paras. 81-83).
>
> [45] Notably, the Court also stressed the importance of respecting the "parties' right to decide for themselves what constitutes for them, in the circumstances of their marriage, mutually acceptable equitable sharing" (para 73). Parties should generally be free to decide for themselves what bargain they are prepared to make.

[28] With those principles in mind, I will turn to this appeal.

[29] The judge did not cite *Miglin* or any judicial authority. He referred only to s. 29, that the agreement may be set aside if it "is unconscionable, unduly harsh on one party or fraudulent". The judge said:

> [18] There is no question in my mind but that the separation agreement must be set aside under Section 29 of the ***Matrimonial Property Act***. I have serious concerns about Ms. Gosbee's state of mind in November 2005 when she did not follow the legal advice given to her by her lawyer not to sign the agreement. She was at that time facing an uncertain medical situation and was very unhappy in her

> present circumstances. She simply just wanted out, to spend her last years of her life out of the marriage.

The judge concluded:

> [20] I find that at the time of the separation agreement there was, in effect, no discussion about spousal support. I therefore find that the separation agreement is unconscionable and unduly harsh on Ms. Gosbee and I set it aside. The terms of the agreement indicating that neither party has a claim to spousal support and/or that Ms. Gosbee has no claim to property.

[30] The judge concluded that the agreement was "unconscionable and unduly harsh" in two respects. First, the property division was unduly harsh to Ms. Gosbee. This refers particularly to clause 10(f) [quoted above, para 7], that allocated the matrimonial home to Mr. Baker. Second, clause 6 [quoted above, para 7], that precluded claims for spousal support, also was unconscionable and unduly harsh. From the judge's ruling (quoted above para 16) - "if the property had been settled fairly in 2005 ... Mr. Baker would, in the years following, have been entitled to spousal support" - it appears that the preclusion of spousal support was unduly harsh to Mr. Baker.

[31] What is missing from the judge's reasons is any analysis of whether the *net* result of the Separation Agreement's property allocation and spousal support provisions is unconscionable or unduly harsh to either party.

[32] The judge unstitched property allocation and spousal support. Then the judge calculated that Ms. Gosbee was entitled to equalization payment of $88,360 for the division of matrimonial net worth. The judge said Mr. Baker would have been entitled to spousal support in the years following 2005, but did not quantify that spousal support.

[33] Mr. Baker's factum to this Court used the parties' incomes since 2005 to estimate Mr. Baker's spousal support entitlement at $9,375 per annum, based on a conservative application of the *Spousal Support Advisory Guidelines.* At the appeal hearing, Ms. Gosbee's counsel was asked to comment on what might be an appropriate quantum of spousal support. Counsel for Ms. Gosbee replied that the calculation in Mr. Baker's factum was generally satisfactory.

[34] The judge said that Mr. Baker would have been entitled to spousal support "in the years following" 2005. At the separation, Mr. Baker and Ms. Gosbee were 55 and 52 years of age, respectively. The parties' 34 year marriage was long term under the *Spousal Support Advisory Guidelines.* So spousal support likely would continue for an indefinite period, barring a material change of circumstances. At $9,375 per annum, or thereabouts, it is not difficult to see that the cumulative spousal support, retroactive and prospective, payable to Mr. Baker, soon would exceed Ms. Gosbee's equalization payment of $88,360 from the allocation of matrimonial net worth.

[35] My point is not to pre-judge the calculation of spousal support. The point is that, had the judge considered the *net* effect of the Separation Agreement's provisions respecting (1) property division and (2) spousal support, the conclusion would not have been (1) a ruling that property division was unduly harsh to Ms. Gosbee and (2) a separate ruling that elimination of spousal support was unduly harsh to Mr. Baker. Rather, the conclusion would have been, to quote *Miglin,* that the Separation Agreement "in its totality" achieved "an equitable sharing of the economic consequences of [the] marriage and its breakdown", and therefore neither party "took advantage of the vulnerability" of the other.

[36] As a matter of principle, the Separation Agreement is to be considered as a whole. Property division and spousal support are not siloed for two opposing assessments of harshness. In *Miglin*, Justices Bastarache and Arbour said (para 84):

> The court must not view spousal support arrangements in a vacuum, however; it must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.

[37] The judge effectively acknowledged the inextricable linking in his ruling that Ms. Gosbee's equalization amount not be paid until after Mr. Baker's spousal support was calculated. The judge contemplated that, in the end, there should be a net payment. The harshness analysis similarly should have contemplated the net impact of the Separation Agreement's provisions.

[38] In my respectful view, the judge erred in principle by not assessing the provisions of the Separation Agreement governing property allocation and spousal support in their totality, bearing in mind that those provisions were linked. Had he

done so, the conclusion would have been that the Separation Agreement achieved an overall equitable sharing of the consequences of the marriage and its breakdown, and that neither party exploited the vulnerability of the other.

Conclusion

[39] I would allow the appeal, and overturn the ruling that the Separation Agreement, or any of its provisions, be set aside.

[40] This was a divorce. The judge has retired. Before retiring, the judge did not issue a final order, as I have explained. The post-retirement date when the judge may finalize outstanding matters has passed. I would remit the wording of the divorce order to The Supreme Court of Nova Scotia, to be finalized by another judge, consistently with the reasons and order of this Court.

[41] Mr. Baker did not request costs. The parties should bear their own costs.

Fichaud, J.A.

Concurred in:

Oland, J.A.

Farrar, J.A.