NI v NJ
[2006] SGHC 198

Case Number : D 2955/2004

Decision Date : 27 October 2006

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Koh Geok Jen (Jen Koh & Partners) for the petitioner; Jeyabalen (Jeyabalen & Partners) for the respondent

Parties : NI — NJ

Family Law – Maintenance – Wife – Respondent-husband past retirement age and security of employment uncertain – Applicable principles when determining appropriate amount of maintenance to award wife

Family Law – Matrimonial assets – Division – Family trust created by respondent-husband for sole benefit of children – Whether trust created with primary object of reducing means to pay maintenance or to deprive petitioner-wife of any rights to trust assets – Applicable principles for determining equitable distribution of assets – Section 132 Women's Charter (Cap 353, 1997 Rev Ed), r 52 Women's Charter (Matrimonial Proceedings) Rules (Cap 353, R 4, 2006 Rev Ed)

Family Law – Matrimonial proceedings – Appropriate order as to costs of ancillary hearing where party awarded costs at hearing of petition behaving unreasonably or inappropriately

Family Law – Women's charter – Court considering ancillary matters to uncontested divorce – Petitioner-wife insisting on continuing to enjoy expatriate lifestyle without seeking employment – Whether petitioner-wife should have to seek employment to contribute to preserve pre-breakdown lifestyle – Appropriate approach when considering requirement under s 114(2) Women's Charter regarding placing parties to divorce so far as practical in financial position in which they would have been if marriage had not broken down – Section 114(2) Women's Charter (Cap 353, 1997 Rev Ed)

27 October 2006

V K Rajah J:

Introduction

1 The parties married on 4 July 1997 and remained together for seven years until 2004. They have two daughters ("the Children"). The elder child, M1, is eight years old while the younger child, M2, is now six years old. They are both currently schooling. Both parties had prior marriages. The petitioner has two other children from her first marriage, both of whom are still minors while the respondent has three other children from his first marriage, all of whom have now attained majority. Custody of the petitioner's children from her first marriage was awarded to her first husband.

2 The petitioner is now 49 years old. She was employed as a nurse until 1984. She then joined the respondent's current employer as an assistant operations manager. In 1996, she developed a relationship with the respondent. Soon after marrying the respondent, the petitioner stopped working, although she went on to acquire a Montessori diploma after the births of the Children. She currently does not work.

3 The respondent is an employee of Company A and concurrently a director of Company B, an affiliated company. He is now 61 years old. As he is past the company's mandatory retirement age of 60, his current employment continues on a "goodwill" basis; this implies that the security of his tenure

is uncertain and may be terminated if and when a suitable replacement is found.

4 An uncontested decree *nisi* was granted to the parties on 8 October 2004 on the basis of the respondent's unreasonable behaviour. Just prior to this the petitioner moved out of their rented home. She now lives in her own rented premises with the Children.

5 The marriage collapsed under the burden of acrimonious exchanges between the parties that culminated in the petitioner accusing the respondent of adultery. Despite an uncontested petition, the bitterness between the parties has not dissipated and the parties continue with undiminished albeit misconceived vigour to engage in hurtful exchanges. This has been singularly unhelpful in resolving the matters at hand. In all, the parties have filed no less than 28 affidavits and counter-affidavits in these entire proceedings.

6 The outstanding issues that emerged before me were:

(a) the issue of access in relation to the Children;

(b) maintenance for the petitioner and the Children;

(c) the division of the matrimonial assets; and

(d) costs of the proceedings.

7 The petitioner has appealed against my decisions on the issues of maintenance, division of assets and the costs of the proceedings, *ie*, issues (b), (c) and (d) above. I now set out the reasons for my decision.

8 Before I address the issues, I am constrained to make an observation on the manner in which the parties contested the access issue. While the respondent was clearly unfair and less than polite in several of his criticisms of the petitioner's conduct and dealings, the petitioner in many of her bitingly personal, not to mention largely irrelevant, contentions clearly exceeded the bounds of propriety. She did her very best to portray the respondent as an unfit parent referring to him in a montage of variegated epithets as "monster", "liar" and "asinine". Much fruitless time and effort were unnecessarily expended by both parties in responding to and in developing predominantly petty concerns. I am disappointed that the respective solicitors did not see it fit to rein in their clients' inappropriate use of language and attempts to use the court proceedings as another avenue to bitterly lash out at each other. I will return to this point later when addressing the issue of costs.

The issues

Maintenance

9 Income tax notices of assessment for 2003 and 2004 exhibited by the respondent reveal that he was receiving between $10,000 to $12,000 per month from Company A. In addition, he has acknowledged receiving benefits such as a rental allowance, medical coverage and education subsidies for the Children. The petitioner alleged that as a result of income received outside Singapore from Company B, the respondent's actual monthly income was between $20,000 and $23,000 per month. The respondent, however, insisted that he earned a total combined income of S$8,000 and NZ$3,000 per month. In addition, he asserted that he has had to continue paying his first wife NZ$4,000 per month as maintenance. This particular assertion was not disputed. I noted, however, that the respondent has not disclosed any current documentation from his present employers (and in

particular Company B) confirming his gross monthly remuneration. I was therefore inclined to think that his remuneration would be better reflected by the approximation asserted by the petitioner.

10 The petitioner asked that her monthly maintenance be assessed at $13,500 comprising:

(a) $4,000 as an allowance for personal use;

(b) $1,800 per month as maintenance for the Children including school fees (excluding school fees the sum allegedly needed was $908.82);

(c) $3,700 per month for rental; and

(d) $4,000 per month for household expenses.

11 In assessing the maintenance of the petitioner, regard must be given to her current earning capacity, assets and all other financial resources: see s 114(1)(*a*) of the Women's Charter (Cap 353, 1997 Rev Ed) ("the Act"). The petitioner maintained that an arrangement had been made with the respondent during the course of the marriage dictating that she would receive $3,000 to replace her loss of income. The respondent, while unreservedly agreeing to provide for all the needs of the Children, has only offered to pay the petitioner a paltry sum of $2,000 per year as maintenance while insisting at the same time that she seek re-employment. The petitioner in response has strenuously insisted that she is entitled to maintain an "expatriate" lifestyle and that it would not be in the Children's interests for her to be away at work for 12 hours or more a day. I have concluded that both parties are being thoroughly unreasonable on this issue. $2,000 is clearly inadequate. On the other hand, the petitioner could still seek part-time employment while the Children are in school. While every case will have to be assessed in its proper context, I am inclined to think that there is persuasive force in the observations of Lai Kew Chai J in *Quek Lee Tiam v Ho Kim Swee* [1995] SGHC 23 at [22]:

> [The wife] has to exert herself, secure a gainful employment, and earn as much as reasonably possible. She should, *if able*, contribute to preserve her pre-breakdown lifestyle and standard of living and her reasonable contribution will reduce pro tanto the obligations of the husband. [emphasis added]

It is pertinent to note that the observations of Lai J were made in the context of a failed marriage where the wife had "no special skill" and after the failure of the marriage she "had applied and was unsuccessful in 178 job applications" (at [13]). It is noteworthy that the petitioner has made no attempt to seek employment and is entirely dismissive of the notion.

12 In the course of arguments for interim maintenance on 15 September 2005, the petitioner requested for:

(a) $4,000 as household expenses;

(b) $3,700 as rental; and

(c) $800 for the Children (given that the respondent would pay for all schooling expenses).

13 When queried about the details pertaining to the purported lease, the petitioner's counsel conceded that she had no documentary evidence to support the claim. I then fixed rental at $2,700 which I deem to be a reasonable amount, the petitioner's maintenance (inclusive of the household

allowance) at $4,000 per month and the Children's maintenance at $800, constituting a total monthly maintenance payment of $7,500.

14 When ancillary issues subsequently came up for assessment, counsel for the petitioner submitted that the maintenance be increased from $4,000 to $6,000 per month and that the Children's allowance be increased from $800 to $900. I readily acceded to an increase in the Children's allowance without varying the amount awarded for the petitioner's interim maintenance. She has failed to adduce any additional or legitimate grounds to persuade me that a variation is warranted. The lease agreement was never produced; in so far as her purported household expenses are concerned, it appears after analysis that there are considerable savings that can reasonably be implemented without any serious compromise on the lifestyle she has grown accustomed to. I am further entirely unimpressed by her total apathy in seeking any kind of gainful employment. The petitioner has a multifaceted employment history both as a former nurse and administrative assistant. In addition, she now holds a Montessori diploma. She has clearly acquired a range of work skills which, if combined with a positive attitude, will afford her gainful employment part-time or otherwise. Even if she is not inclined to seek employment, a cumulative household and personal allowance of $4,000 used sensibly and in moderation will allow her to have a comfortable lifestyle. She was previously married to a Singaporean and married the respondent only when she was about 40 years old. Her insistence that she should continue to enjoy an "expatriate" lifestyle (which I construe as an abbreviated reference incorporating a generous allowance without any effort on her part to seek employment) is plainly unreasonable in the present circumstances. Nor am I particularly impressed by her flimsy assertion that "we live and shop at Orchard Road where the cost and standard of living is comparatively high". It is entirely unnecessary for her and the Children to continue to live in that neighbourhood even if the Children are schooling there. One should take into account the respondent's age and the uncertainty of his future employment and income prospects. It bears mention that the respondent himself has adopted a fairly frugal lifestyle. He does not own a car and cycles to work. In fairness to the respondent, he should be allowed to put aside some money for his impending retirement.

15 While I recognised that in assessing maintenance, a court is pursuant to s 114(2) of the Act enjoined to "endeavour so to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other", it has been rightly remarked that this directive, modelled on what used to apply in England, can be problematic. *Halsbury's Laws of Singapore* vol 11 (LexisNexis, 2006 Reissue) at para 130.853 astutely notes:

> Two problems are glaring. One, the court appears to be directed to ignore what is the most significant fact in every application, namely the spouses have terminated their marital relationship. It cannot be right that maintenance for one of them is calculated in ignorance of the very fact that activated the application. Two, of the two caveats that are provided to limit the achievement of the former wife's financial preservation, that of the practicability of the order is appropriate but the other, that only conduct of the spouses reflects upon the justice of the order, is too narrow. There may well be other reasons from the circumstances as presented to the court why the applicant cannot get all that she asks for.

16 It is essential that the statutory directive be applied in a commonsense holistic manner that accords with and takes into account the new realities that follow a failed marriage. The petitioner's insistence that she should continue to enjoy an "expatriate" lifestyle and live in and shop at Orchard Road was thus not a position to which I was inclined to restore her upon the breakdown of her marriage with the respondent after a consideration of all the circumstances. Instead, I considered

that it would be more sensible to base my decision on the general principles as regards the courts' exercise of its wide discretion and extensive powers to rearrange the finances of the family after termination of the marriage as can be perceived from decisions by the courts both in Singapore and in England. It was succinctly observed by MPH Rubin JC, as he then was, in *Wong Amy v Chua Seng Chuan* [1992] 2 SLR 360 at 371, [40]:

> But there is one perceptible trend in all the reported decisions pointing to the construction by the courts both in Singapore and in England of two major principles: Firstly, adequate provision must be made to ensure the support and accommodation of the children of the marriage. Secondly, provision must be made to meet the needs of each spouse. At the end of the day, it is the court's 'sense of justice' which demands and obtains a just solution to many a difficult issue, as has been pointed out by Balcombe J in *Backhouse v Backhouse* [[1978] 1 WLR 243].

17 It appeared to me that the maintenance orders as decided in [14] above ensured that the Children were adequately provided for, and took into consideration the petitioner's (reasonable) needs as well as the respondent's financial capability to meet those needs and the overarching need to arrive at a just solution.

Division of assets

18 The division of matrimonial assets is a subject to be approached with a certain latitude; it calls for the application of sound discretion rather than a purely rigid or mathematical formulae. All relevant circumstances should be assessed objectively and holistically. Generally speaking, however, when a marriage ends a wife is entitled to an equitable share of the assets she has helped to acquire directly or indirectly.

19 The respondent insists that although his employment tenure is uncertain, he will at any cost maintain the Children. A trust he created in 2004 will also provide for their needs in their later years, should anything happen to him. It is pertinent to note that he continues to sustain close relationships with the three adult children from his first marriage. In these proceedings he states that his major concern is "centred on the children's long term financial security" in the light of both the petitioner's spending habits as well as the constraints of his limited prospective working life. Despite the petitioner's relentless attempts to paint him in an extremely unfavourable light, I see no reason to doubt his emphatic commitment to the future welfare of M1 and M2.

20 The petitioner has failed to contribute in any substantial or direct way towards the accretion of matrimonial assets save for the purchase of the matrimonial home at 17 Elfrida Street, Sydney, Australia, and some shares. The petitioner currently has assets of about $200,000. She also claims to have invested substantially in endowment policies for the Children to the tune of a few hundreds of thousands of dollars. Lamentably she has failed to support such a claim with any concrete evidence.

21 Both parties made financial contributions to the matrimonial property at 17 Elfrida Street, Sydney, Australia. The respondent has recently paid the property tax assessment of A$48,000 in addition to mortgage instalments as and when they fell due. Given that the property was vacant since August 2005, there has been no rental income to set off and ameliorate the mortgage burden. In addition, the respondent has with his own resources sought to maintain and restore the property to ensure that the market value of the property may be realised from the sale of the property. Taking into account all these circumstances as well as the length of the marriage, it appears to me only right that the sale proceeds from this matrimonial property be equally divided.

22 In so far as the assets held in joint names are concerned, the petitioner's counsel has

conceded that there is no evidence to suggest that they were acquired after the marriage. Given the petitioner's long employment history and the relatively short marriage, I am inclined to think that they were acquired before marriage. I have determined that the petitioner should receive 25% of such assets although it has been persuasively argued by the respondent's counsel that the petitioner made no direct and, if at all, merely a tangential contribution towards their acquisition.

The trust

23 On 3 November 2004, the respondent created a family trust in which he placed a property, 66 Maskell Street, Auckland, New Zealand; money from his ANZ Growth Fund investment; some debenture stock investments; as well as his UOB savings ("the trust assets"). There is no dispute that the trust assets were acquired prior to his marriage to the petitioner. The sole beneficiaries of the trust are the Children. The respondent claims that the setting up of the trust was discussed with the petitioner in 2003. He also claims to have set up the trust to ring-fence the trust assets for the sole benefit of the Children. The respondent further confirmed that he would regularly account to the petitioner and the Children for the income and asset status of the trust. Not surprisingly the petitioner was unhappy with this arrangement and has asked the court to disregard it. She also claims that the trust breached s 132 of the Act, *ie*, that no property should be disposed of during the matrimonial proceedings.

24 Yet, given that the sole beneficiaries of the trust are the Children, I am not inclined to view the trust as being created with the primary object(s) of reducing the respondent's means to pay maintenance or to deprive the petitioner of any rights in relation to the trust assets. It appears that the respondent was merely concerned that adequate provision be made for the Children and this was rightly so as it may be plausibly said, on the basis of the adduced evidence, that the petitioner, perhaps on the basis that she was entitled to an expatriate lifestyle, has adopted a rather generous spending approach from time to time. While I cannot agree with the respondent's characterisation of her as "profligate", it does appear that she is hard put to satisfactorily account for how the funds she once controlled have now been entirely depleted. In any event, the petitioner did not make a separate application to set aside the disposition in accordance with r 52 of the Women's Charter (Matrimonial Proceedings) Rules (Cap 353, R 4, 2006 Rev Ed) and accordingly, it was not open to her to seek to avoid such a disposition: see *Lim Keng Hwa v Tan Han Chuah* [1996] 3 SLR 593 at 600, [26]. The interests of the Children in this matter do not exactly dovetail with that of the petitioner.

25 The petitioner has sought 30% of both the trust assets as well as the free assets standing in the name of the respondent alone. Taking into account the petitioner's current personal assets as well as the substantial amount she is likely to receive from the sale of the matrimonial home, the length of the marriage, the intent of the trust and the paucity of the petitioner's causal contributions, I have assessed a 10% entitlement to be appropriate. The petitioner should not complain as the trust is entirely for the Children who should in the circumstances of this case constitute the paramount consideration for both parties. They are still very young. It should be recalled that one of the main considerations in such assessments by the court is to ensure that adequate provision is made to support the children of the marriage: see [16] above. It is pertinent that the respondent himself will no longer derive any benefit from the trust assets. As the remaining personal assets in the respondent's sole name are not substantial, I determined a lump sum payment of $5,000 as equitable in the circumstances. There remains a piece of land in Golden Bay, New Zealand that the respondent purchased in 1970 with his first wife. This is intended to benefit the adult children from his first marriage. Given that the petitioner did not contribute in any way to the acquisition or improvement of this particular asset, there is simply no basis to award her an interest in it pursuant to the terms of s 112 of the Act. It is clearly not a matrimonial asset.

Costs

26 The numerous acrimonious, albeit peripheral, matters in the affidavits filed by both parties not only significantly contributed to the length of these proceedings but also soured the entire tone and tenor of the litigation. While generally speaking the party awarded costs at the hearing of a petition is also entitled to the costs of the ancillary hearings, this may not be necessarily the case if it appears that the party has been unreasonable or has behaved inappropriately: see *Tham Khai Meng v Nam Wen Jet Bernadette* [1997] 2 SLR 27 at [50]. The petitioner claims to have incurred an expense of $5,000 in hiring a private investigator and has in addition asked for legal costs to the tune $8,000. However, this matter could have been satisfactorily and relatively quickly resolved through the filing of two or three short affidavits seeking to address both directly and precisely the real issues at hand. This was not done. The petitioner could also have chosen to conduct these proceedings in a more restrained tone. She should not be allowed to recover costs for unnecessary work that only served to prolong the length and tedium of these proceedings through the exchange of prolix and unhelpful affidavits. In the result I have fixed costs in her favour at $8,000 inclusive of disbursements.

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