

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.17 OF 2002

BETWEEN:

TIMOTHY STONICH

Appellant

and

TAMARA STONICH

Respondent

Before:

The Hon. Mr. Albert Redhead
The Hon. Mr. Adrian D. Saunders
The Hon. Mr. Ephraim Georges

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. J. Carrington for the Applicant/Appellant
Ms. T. Small-Davis for the Respondent

2003: June 19; 20;
September 29.

JUDGMENT

[1] SAUNDERS, J.A.: Mr. and Mrs. Stonich were married in the United States in 1987. The couple had no children together. Mr. Stonich and a former deceased wife of his had adopted a boy and a girl. At the time the Stoniches were married, these children were ages 5 and 7 years respectively. Mrs. Stonich had one son. He was 7 years old when his mother married Mr. Stonich.

The Trial Below

[2] The divorce decree absolute ending the marriage was granted in June 2002. A hearing was conducted to determine how the couple's assets should be divided.

The assets in question comprised:

- [a] A trust account with Morgan Stanley Dean Witter;
- [b] A luxury yacht called "Rendezvous Cay" to which the Judge ascribed a value of \$500,000;
- [c] An IRA account held at Morgan Stanley;
- [d] A share in a condominium said by Mr. Stonich to be valued \$70,000;
- [e] Real estate in Florida said by Mr. Stonich to be valued \$90,000; and
- [f] Investments in United Bank and CDP1 worth about \$105,000 according to Mr. Stonich.

[3] The trial Judge looked at the assets as a whole and decided that the husband should be entitled to 70% of the same while Mrs. Stonich's entitlement should be 30%. Both spouses are dissatisfied with the Judge's order. The husband thinks the Judge was too generous to Mrs. Stonich. The wife is content to accept the 30% awarded in the assets referred to in (c) to (f) above. She takes the view however that she should be entitled to one half of the assets mentioned in items (a) and (b) in addition to the 30% ordered in respect of the remaining assets. Mr. Stonich has appealed the Judge's order and Mrs. Stonich has cross-appealed.

[4] At the trial below, both parties were cross-examined at length. It does not appear that Mrs. Stonich cut a very favourable picture. For example, the trial Judge did not believe her when she testified that she did not understand the financial consequences to her of the establishment of the trust account with Morgan Stanley. Further, contrary to her testimony, the trial Judge did not believe that there was an agreement that she, a college educated person, should stay at home and not work. The Judge did find however that, by remaining in the home, she had made "undoubted contribution" to the welfare of the family and, in this regard, the Judge referred to affidavit evidence from witnesses that described her as "a loving, attentive and caring mother". In order better to understand the order made by the trial Judge, it is helpful briefly to review the evidence as to how the assets came into being and how each party contributed.

The Background

- [5] There is no dispute that Mr. Stonich was the income earner in the relationship. By the time of the marriage he already had personal and financial assets valued at approximately \$150,000 and he had just obtained employment in a new job earning a salary in excess of \$200,000 annually. Mrs. Stonich was earning a net salary of \$3,000 monthly before she ceased working, which she did shortly after the marriage.
- [6] The couple had agreed to reside in Mr. Stonich's home but, with a household that now included three children, it was decided to acquire a bigger home shortly after the marriage. The spouses therefore sold their respective pre-marital dwelling houses, pooled the sums realized by these sales and purchased a home in Winnetka, Illinois for \$615,000. The entire net proceeds realized by Mrs. Stonich on the sale of her home and provided by her to acquire the new home was \$15,000. Mr. Stonich netted \$250,000 from the sale of his old house. The mortgage on the new home was paid by Mr. Stonich but the Winnetka home was placed in the joint names of the parties.
- [7] The spouses operated a joint account into which the wife alleges she placed all her earnings throughout the brief period of the marriage during which she was employed outside of the home. In 1990 Mr. Stonich inherited \$278,826.62 from the estate of his deceased mother. He then transferred this sum together with a significant amount of his other assets to an account at Prudential Bache Securities. That portfolio was subsequently transferred to Morgan Stanley Dean Witter. Both the Prudential Bache and the Morgan Stanley accounts were at all times joint between the spouses.
- [8] Mr. Stonich explained the circumstances of the joint character of these accounts. It was asserted vigorously, both before the trial Judge and this Court, that he had been threatened by his wife with divorce proceedings if he failed to transfer the

assets to a joint account. There is however no indication that the trial Judge accepted this assertion.

- [9] In 1994 Mr. Stonich acquired a considerable amount of shares and stock options as a result of his employment with US Can. That company was then going public. Mr. Stonich was given fiscal advice. He decided to create the Timothy W Stonich trust account as a mechanism for estate and tax planning. He transferred to the trust account all the assets in the Morgan Stanley joint account together with his US Can acquisitions. He became the sole beneficiary under the trust. His evidence was that partly because of the huge tax advantages and partly because the trust afforded her a larger resource base from which to draw income, Mrs. Stonich stood to gain from the creation of the trust. According to him, notwithstanding the fact that he was the only trustee and had in effect regained sole control over almost all of the family assets, she agreed to the creation of the trust as her overall financial position had improved. Moreover, the house at Winnetka, still in their joint names, was not included in the trust.
- [10] In his judgment, the learned Judge referred to Mrs. Stonich's role in the home but did not go into details. The evidence is that the children, particularly Mr. Stonich's, were difficult. Prior to the marriage to Mrs. Stonich they had been cared for by a succession of nannies some of whom had seriously mistreated them. They suffered from severe emotional and psychological problems. Mrs. Stonich did her utmost to provide a stable home environment for them. She enrolled them in sports programmes and summer camps. She played a very active role in their school and extra-curricular activities. She said that she managed the household, cleaned, did laundry and prepared meals. Mr. Stonich admitted that she made a contribution to the welfare of the family during the course of the marriage but sought to minimise the extent of that contribution by stating that the pair had a cleaning lady three times per week and a live-in maid on weekends.

- [11] In 1998 the spouses decided to change their way of life. Mr. Stonich resigned his job. They sold the Winnetka house and all their possessions – cars, clothes, furniture and the like. The proceeds yielded just over \$500,000. This money was placed briefly in the trust account and then an approximate sum was used from the trust to purchase the luxury yacht *Rendezvous Cay*. The yacht was put in the name of a company. Each spouse held one share in the company. The ship was lavishly outfitted and the couple began sailing the seas. Unfortunately, the marriage did not last much longer. The parties separated in 2001.

The Appeal

The respective values placed on *Rendezvous Cay*; the Investments in United Bank and CDP1; and the Condominium

- [12] Counsel for Mr. Stonich objected to the decision by the Judge to ascribe a value of \$500,000 to *Rendezvous Cay*. Counsel submitted that neither of the spouses had suggested that figure of \$500,000 nor was the figure based on any expert valuation.
- [13] The evidence adduced by the husband at the trial was that the ship was at the time insured for \$550,000 but that it was then worth only \$400,000. The wife gave two values. At trial she alleged on one occasion that the ship was valued \$700,000 and on another occasion she suggested that it was worth \$600,000.
- [14] Bearing in mind that the likelihood was always that Mr. Stonich would pay out Mrs. Stonich for her share, each spouse naturally had an interest to serve in suggesting a value that would give that spouse some relative advantage. The trial Judge took the view that neither of them could accurately be relied upon. The Judge had before him a range in value provided by the parties as well as the insured value of the ship. In light of his assessment of the evidence the learned Judge was entitled to ascribe the value that he did if he considered that value to be fair and reasonable. He may well have taken the insured value and reduced it somewhat to take account of some depreciation occurring subsequent to the time that value

was given to the insurers. Mrs. Stonich does not challenge the \$500,000 value and I hardly see how Mr. Stonich, who insured the ship for \$550,000, can properly complain. I find no merit in this ground of appeal.

[15] As regards the value of the investments in United Bank and CDP1, the husband also complains to this Court that, because those investments are subject to market fluctuations, the trial Judge erred in placing a definitive value of \$105,000 on them. Curiously enough it was Mr. Stonich himself who suggested this figure to the Judge. When he did so his suggestion was unqualified.

[16] The same circumstances arise with respect to the \$70,000 value placed on the condominium. Prior to the hearing of the appeal, counsel for Mr. Stonich sought to adduce fresh evidence to show that the condominium had since been sold and the realized proceeds were only \$55,000. The Court disallowed the application to introduce this fresh evidence because we were of the view that, at the material time, Mr. Stonich neglected fully and frankly to disclose all his knowledge about this asset. Indeed, the transcript reveals that the Court below was only made aware of the acquisition of this asset in a quite accidental manner. In the circumstances Mr. Stonich is stuck with the \$70,000 valuation which he gave on affidavit and which at the time was also not qualified by him in any manner.

[17] The wife does not complain about the \$500,000 value placed on the *Rendezvous Cay* by the Judge. Nor did she take issue, either at the Court below or during the appeal, with the values of \$105,000 and \$70,000 respectively for the other two assets. At all material times the husband was in control of all three assets. It was *his* obligation to obtain and present at the hearing either professional valuations of them or cogent evidence to support the view that the respective values were subject to significant fluctuation over time. He neglected so to do. It is my view that in all the circumstances he cannot now be heard to complain about the values adopted by the Judge since the Court relied on Mr. Stonich's own unqualified evidence as to those values.

Payments made to the wife between the separation and the hearing

- [18] Counsel for Mr. Stonich submits that the Judge erred when he refused to give the husband credit for various sums of money that were made available to the wife between the period April 2001 and June 2002 after the breakdown of the marriage.
- [19] In an affidavit filed on 21st June, 2002, Mrs. Stonich acknowledged that her husband had written her a cheque for \$20,000 when she left the boat in April, 2001. She also admitted liquidating a brokerage account in her name of roughly \$31,000. She stated that she and Mr. Stonich shared a joint tax refund of approximately \$24,000 in the year 2000 and that each received cheques from Morgan Stanley for \$50,000 in 2002. She also drew cheques on their joint checking account to pay rent, groceries and for household supplies and she made credit card charges of \$30,841 to pay for legal fees in Florida and miscellaneous personal expenses.
- [20] Mr. Stonich produced a document drawn up by him evincing monthly living expenses of \$3,300. Apart from this however, the trial Court did not have the benefit of a similarly candid account from him of the actual expenses incurred by him after the break-up.
- [21] Upon the specific request of counsel for the husband, the learned trial Judge, Matthew, J., stated that in making his award he had taken into account all these sums that were made available to the wife. I see no reason whatsoever to take the view that the Judge had wrongly done so. It has to be borne in mind that, upon the breakdown of the marriage, Mrs. Stonich, a lady who by then was accustomed to a high standard of living, left with nothing. She had neither a home nor employment. Throughout this time Mr. Stonich continued his life of leisure in possession of the couple's luxury yacht. The Judge may well have concluded that the sums paid by Mr. Stonich to his wife were in lieu of maintenance pending suit.

The Rendezvous Cay

- [22] Mrs. Stonich is aggrieved at the decision that she should be awarded only a 30% share in *Rendezvous Cay*. Mr. Stonich argues that his wife's share in the yacht should be significantly less than 30%. This latter submission is premised on the circumstances in which the house in Winnetka was acquired.
- [23] Counsel for Mr. Stonich submitted to the following effect. The wife's contribution to the acquisition of the Winnetka matrimonial home was only \$15,000 or 2.4% of the purchase price. There was no express agreement between the parties to suggest that the wife should have any share in the house that was greater than the extent of her contribution to its acquisition. The Court should infer that the only probable common understanding was that their respective interests in the house would be dependent upon their respective contributions. The yacht virtually took the place of the home. The beneficial interests in the yacht should therefore mirror what would have been the beneficial interests in the house. The cases of *Stoutt v Stoutt*¹ and *Pettitt v Pettitt*² were cited in support of these propositions.
- [24] I cannot agree with counsel's submission. I make no comment as to how the Court might have determined the respective beneficial interests in the house if the occasion for so doing had arisen. However, the purchase of the yacht by a company in which each spouse had an equal share appears to me highly indicative of the intention of the parties as to the ownership in that vessel. There is no question that both the legal and beneficial ownership in the yacht vested in the parties in equal shares. I therefore agree that Mrs. Stonich should be entitled to a half share in *Rendezvous Cay* valued by the Court at \$500,000 and I so order.

¹ British Virgin Islands Civil Appeal No. 10 of 1994 (unreported)

² (1969) 2 A.E.R. 385, 406

The Trust Account

- [25] The trust account is the most important asset of the couple. It has a fluctuating balance. Its value as at 28th February, 2002 was almost \$2.2million. Mrs. Stonich is dissatisfied that she was awarded only 30% of the value. She urges this Court to increase her entitlement to 50%. In order properly to consider the matter, it is helpful to revisit the reasoning of the learned trial Judge.
- [26] The Judge looked at sections 23 through 26 of the Matrimonial Proceedings and Property Act (MPPA) and enumerated the various factors to which the Court was obliged to pay regard. The learned Judge stated at paragraphs 24 and 59 respectively of the judgment:
- “.....it cannot be disputed that the [husband] earned all the assets. The [wife] is entitled to a share for the contribution she made to the marriage which the [husband] admits, in accordance with the provisions of the Matrimonial Proceedings and Property Act”.
- “By far the greater contribution to the welfare of the family has been made by the [husband]. He provided all the assets which included pre-marital assets and an inheritance of over a quarter million dollars from his deceased mother. I am not convinced that there was any partnership agreement between the parties. And I cannot discern any intention that the parties should have an equal interest in the matrimonial assets”.
- [27] One of the useful features of the MPPA is that it gives the Court a broad discretion in apportioning assets built up over the course of the marriage. The ultimate and overriding objective that the Court must strive at is fairness. In apportioning the assets, the Court must consider the various factors the legislature has asked it to take into account and then arrive at a solution that is, in all the circumstances, fair to the parties. The wide discretion available permits the Court the ability to interpret fairness in light of prevailing societal standards.
- [28] In assessing the respective contributions of husband and wife, there was a time when one regarded the fruits of the money-earner to be more valuable, more important than the childrearing and homemaking responsibilities of a wife and

mother. If the man was reasonably successful at his job and the family fortunes were vastly improved, his contribution was almost automatically treated as being greater than that of the wife who remained at home. Ironically, if the man's business failed, whether through bad luck or ineptitude, the wife invariably shared equally the couple's hard times.

[29] The Court should not pay too much regard to a contribution merely because it is easily quantifiable in hard currency and too little to a contribution that is less measurable but equally important to the family structure. In the vast majority of cases where these two types of contribution are in issue – that of a homemaker and that of an income earner, it is the wife who has stayed at home while the husband has performed the role of breadwinner. There is therefore an element of gender discrimination in degrading the woman's role in the home.

[30] The MPPA does not rank in any order of preference any of the factors to which Courts are obliged to have regard. It is for the Court to consider all of them. In one case, the facts and circumstances may call for a particular factor to be given special importance. In another case another factor may assume most significance. The point is that there is no basis in law for Courts to regard always as decisive or of special importance the *financial* contribution made by a party to the welfare of the family. In the normal course of things any such contribution should be weighed in the same scales as a contribution of a different nature. Spouses may choose to perform different roles in a marriage. If the husband's skill, initiative, hard work and drive yield handsome financial rewards, it is entirely unfair to regard those rewards as being any greater in value than those of the wife who might have employed equal skill, initiative and dedication at home bringing up the children and keeping a stable household. In such a case I see no reason why the assets acquired during the marriage ought not to be equally divided. As Lord Nicholls states, each in their different spheres contributed equally to the family and, as a general guide, equality

in the distribution of matrimonial assets should be departed from only if, and to the extent that, there is good reason for it ³.

[31] What then are the concrete facts of this case? The husband is currently 55 years of age. The wife is 52. They are apparently both in good health. This was not a particularly long marriage. But it can't be said that it was a short one either. It lasted some 13½ years. A fair amount of the assets that found their way into the trust account was either inherited by Mr. Stonich from his deceased mother or had been accumulated by him before the marriage. It is true to say however that most of the assets in the trust fund were acquired in the course of the marriage. I have already referred to Mrs. Stonich's role at home raising difficult children. Even the husband grudgingly admitted the value of her contribution. In a case of this nature I would be particularly mindful of the standard of living enjoyed by the parties before the marriage.

[32] In all these circumstances I agree with the learned Judge that Mrs. Stonich should not receive 50% of the trust account. But equally, I find 30% to be somewhat on the low side. I believe not enough consideration was given to her role in the home. I would increase her award under this head to 40%. I believe such an award to be more in line with the modern authorities of *White v White* and *Lambert v Lambert*⁴ and I would respectfully rely upon them in support of this order.

[33] I would therefore allow this appeal and vary the Judge's order to the extent that Mrs. Stonich should be entitled to \$250,000 representing her one half share of the *Rendezvous Cay* and that she should also receive 40% of the trust account. I would order each party to bear his/her own costs.

Adrian Saunders
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal

³ See *White vs. White* (2001) 1 A.C. 596

⁴ (2002) EWCA Civ 1685

- [34] GEORGES, J.A.[AG.]: I have had the privilege of reading the draft judgment of Saunders J.A. and whilst I appreciate the rationale of his judgment as set out at paragraphs 28, 29 and 30 in respect of sections 23 through 26 of the Matrimonial Proceedings and Property Act (MPPA), I find myself unable to agree with his conclusion (at paragraph 32) that the Judge's award of 30% in the trust account to Mrs. Stonich was 'somewhat on the low side' and he accordingly increased that head to 40%; having himself acknowledged at paragraph 31 that 'a substantial amount of the assets that found their way into the trust account was either inherited by Mr. Stonich from his deceased mother or had been accumulated by him before the marriage.'
- [35] It is my considered view that the award of 30% of the trust account to Mrs. Stonich by the learned trial Judge is right and just and fair in the light of those factors. And all the more so as the marriage itself according to Justice Saunders at paragraph 31 was "not a particularly long marriage."
- [36] I now turn to the division of the luxury yacht "Rendezvous Cay" to which the trial Judge ascribed a value of \$500,000.00 of which Mrs. Stonich was awarded 30%. That asset represented the proceeds of sale of the matrimonial home in Winnetka Illinois which the parties had purchased shortly after their marriage for \$615,000.00. Mrs. Stonich provided \$15,000.00 towards the purchase price from the sale of her own home and Mr. Stonich's contribution was \$250,000.00.
- [37] Part of the agreement was that Mrs. Stonich would pay the mortgage on the new home but she in fact never did so. The mortgage on the new home which was in the joint names of the parties was paid by Mr. Stonich. Mrs. Stonich ceased work some months after the house was acquired to look after Mr. Stonich's two adopted children by a previous marriage and her own child by a former marriage.

- [38] Learned Counsel for Mr. Stonich contended that in the absence of an agreement between the parties that the wife's share in the house should be not greater than the extent of her contribution to its acquisition the only probable common understanding being that their respective interests would be dependent upon their respective contributions relying on the case of 'Pettit v Pettit.'
- [39] Like Saunders J.A. I beg to differ especially having regard to the factors enumerated at Sections 23 through 26 of the MPPA. I do not however agree (as Saunders J. A. decided) that the fact that the purchase of the yacht by a company in which each spouse had an equal share (i.e one share) is necessarily determinative of the ownership in the vessel and that Mrs. Stonich should *ipso facto* be entitled to a half share in it as valued by the Court.
- [40] Rather I am of the view that whilst it is recognized, as the learned Judge found, that 'by far the greater contribution to the (material) welfare of the family has been made by the husband', Mrs. Stonich over the years made an invaluable contribution in the looking after and upbringing of Mr. Stonich's children as well as her own, the former of which proved particularly difficult from all accounts.
- [41] For my part I would have awarded Mrs. Stonich one third of the value of Rendezvous Cay in lieu of the one half share which she seeks and which Justice Saunders in fact awarded her, the latter amount being in my view somewhat over generous having regard to all the circumstances. However inasmuch as my apportionment does not significantly differ from that of the Court below I would not interfere with it - *de minimis non curat lex*.

Ephraim Georges
Justice of Appeal [Ag.]