Case Name:
D.K.N. v. M.J.O.

Between
D.K.N., respondent (plaintiff), and
M.J.O., appellant (defendant)

[**2003] B.C.J. No. 2164**

2003 BCCA 502

232 D.L.R. (4th) 323

187 B.C.A.C. 129

18 B.C.L.R. (4th) 247

41 R.F.L. (5th) 142

125 A.C.W.S. (3d) 1031

Vancouver Registry No. CA030171

British Columbia Court of Appeal
Vancouver, British Columbia

Ryan, Oppal and Lowry JJ.A.

Heard: July 17, 2003.
Judgment: September 19, 2003.

(57 paras.)

Family law -- Separation agreements, domestic contracts and marriage contracts -- Grounds for setting aside -- Inequitable result -- Husband and wife -- Marital property, distribution orders -- Matrimonial home -- Maintenance of wives and children -- Maintenance of wives -- Effect of wife's ability to work.

Appeal by the husband from a decision re-opening a separation agreement so as to reapportion the equity in the matrimonial home and to grant the wife $2,500 monthly spousal support. The parties had an 18-year traditional marriage. The wife had a university degree in education but performed the homemaking chores, taking care of the parties' two children and running a daycare centre out of her home. This earned her $24,000 annually. At separation, the parties agreed that the children, ages 12 and 15, would remain with the wife in the matrimonial home. The home was to be sold within

three years and the proceeds divided equally, with the proviso that the wife could use the husband's portion, if necessary, to buy another home. The wife expressly waived spousal support after having received independent legal advice. She then moved with a new partner out of the province, and the matrimonial home was sold. Six months later, the wife returned to British Columbia, but the husband refused to allow her to use his share of the proceeds to buy a home. A trial court refused to award the wife specific performance regarding the proceeds, construing the agreement to mean that the wife was required to purchase a new home concurrent with the sale of the old home, in effect meaning that she had forfeited her right by leaving for six months. The wife's claims for reapportionment and spousal support were adjourned and heard later by another trial judge, who held that the wife had been financially disadvantaged by the marriage and was in need of support while she retrained and reorganized her life. The trial judge re-apportioned the equity in the home 65 per cent in favour of the wife, and ordered spousal support. The effect was to increase what the husband was paying the wife by $23,000 per year. The husband argued that the trial judge erred in re-opening a fair separation agreement, pointing out that the wife had abandoned her profitable daycare work.

HELD: Appeal dismissed. There was no basis on which to disturb the re-apportionment of the equity in the home. The agreement contemplated unequal division where it permitted the wife's use of the husband's equity in their home. However, because of the way the agreement was construed, that unequal division was not realized. The re-apportionment helped to right that. Further, the way the agreement was construed at the first trial was contrary to the objectives of the Divorce Act. It caused the wife to bear the financial burden of the marital breakdown.

Statutes, Regulations and Rules Cited:

Divorce Act, R.S.C. 1985, c. 3, s. 15.2.

Family Relations Act, R.S.B.C. 1996, c. 128, s. 65(1).

Counsel:

S.J. Henshaw, for the appellant.
T.L. Jackson, for the respondent.

The judgment of the Court was delivered by

1 **LOWRY J.A.**:-- D.K.N. and M.J.O. separated and ultimately divorced after what may be characterized as a traditional 18 year marriage. They executed a settlement agreement that made provision for the division of their assets of $377,000 in value, the release of all claims for spousal support, and Mr. M.J.O.'s support of their two children. This appeal is taken from an order of the Supreme Court reapportioning the equity in the matrimonial home in favour of Ms. D.K.N. and granting her an award of spousal support. The question, in the main, is whether the trial judge, who disposed of the matter on conducting a summary trial, erred in declining to hold Ms. D.K.N. to the agreement the parties had made.

2 I begin by outlining the circumstances that gave rise to Ms. D.K.N.'s application for relief.

The Circumstances

3 Mr. M.J.O. has long been employed in the construction industry. When the parties separated he was earning $75,000 a year. During the marriage his work frequently took him away from home for extended periods of time. The burden of raising the children fell primarily on Ms. D.K.N. She has a university degree in education but she was never employed as a teacher, nor did she work outside of the home in any capacity. For some years preceding the separation she ran a daycare service out of her home earning about $24,000 a year. The family lived in West Vancouver.

4 The parties separated in June 1998 and executed their agreement after lengthy discussions in February 2000. Both took and acknowledged having taken independent legal advice.

5 They were then in their mid-forties. Ms. D.K.N. was to be primarily responsible for the care of the children who were then 12 and 15 years of age.

6 With respect to the matrimonial home the agreement provided:

> The family home shall be sold within a period of three (3) years from the date of this Separation Agreement and the parties hereby agree to list it for sale at not less than the then appraised value . . .

7 Ms. D.K.N. was to retain all of the household furnishings and, until it was sold, she and the children were to occupy the home. She was to make the payments on the first mortgage which was $54,000. Some RRSPs were cashed and sufficient money was put on deposit to permit monthly interest payments to be made on a line of credit that was drawn down by $120,000 and secured by a second mortgage. Mr. M.J.O. was to make monthly payments toward discharging a $60,000 debt to his grandmother that was incurred to finance the acquisition of the home. The remaining RRSP investments were equally divided. The purpose in having the home sold appears to have been principally to discharge debt.

8 The parties were to receive an equal share of the net proceeds of the sale of the home. The agreement contained the following somewhat unusual provision:

> The Husband hereby agrees that if the Wife's share of such net proceeds is not sufficient to enable her to purchase another residential home for herself and the children in West Vancouver or North Vancouver for a price such that the Wife is able to qualify for the balance of the mortgage funds which would be required to complete the purchase of the said residential home, then the Husband hereby agrees that he will allow the Wife to use his share of the net proceeds to the extent required to complete the purchase of the other residential home, provided that the Husband approves the price of such residential home so as to ensure that the share of his net proceeds so used is adequately secured. . .

9 Mr. M.J.O. agreed to permit Ms. D.K.N. to use his share of the equity in the home to the extent necessary to enable her to acquire another home. The price of the new home was subject to his approval so that he could be satisfied his money was secure. The agreement provided that the proceeds of the sale of the first matrimonial home that he had to contribute could be secured by a second mortgage (on terms agreeable to his solicitor) and that Ms. D.K.N. was to repay Mr. M.J.O. fully within ten years or sooner upon both children reaching the age of majority and completing their formal education.

10 With respect to child support, the agreement provided that Mr. M.J.O. was to pay Ms. D.K.N. $2,000 a month. That amount was about twice as much as the Federal Child Support Guidelines required, although there was no additional provision for the payment of extraordinary expenses.

11 Under the agreement, Ms. D.K.N. waived any claim to spousal support as follows:

> The Wife covenants and agrees that she will support and maintain herself and that neither she nor any person on her behalf will maintain an action against the Husband for the maintenance of the Wife and the Wife hereby remises, releases and forever discharges the Husband from any claim for maintenance which the Wife may have on her own behalf.

12 Shortly after the agreement was executed, Ms. D.K.N. informed Mr. M.J.O. that she was involved in a romantic relationship and was going to move with the children to Stony Plain, Alberta. The children were reluctant to leave West Vancouver so the move was to be made for a trial period of one year.

13 Ms. D.K.N. wanted to have the matrimonial home rented; Mr. M.J.O. wanted it sold. It was sold to the municipality for $450,600 which was considerably more than its appraised value. The sale completed in May 2000. The parties each received $103,000 as their respective shares of the net proceeds.

14 About six months later, in November, Ms. D.K.N. informed Mr. M.J.O. that she planned to return to West Vancouver at the end of the school year in 2001. She informed him that she would require his share of the proceeds from the sale of the matrimonial home to qualify for financing. He told her that he would not allow her to use his money.

15 Ms. D.K.N. returned as planned. However, without the use of Mr. M.J.O.'s share of the equity in the matrimonial home, she was unable to purchase a new home. She found rental accommodation and commenced this action in July 2001.

16 She first sought to enforce the settlement agreement. She had an opportunity to buy a home for $470,000 that she considered would meet the children's needs and permit her to operate a day-care business. Her claim was for a decree of specific performance with respect to using Mr. M.J.O.'s equity in the matrimonial home. In the alternative, she claimed that, notwithstanding the agreement, she was entitled to a reapportionment of the proceeds of the sale of the matrimonial home and spousal support.

17 Ms. D.K.N.'s claim for specific performance was dismissed on August 31, 2001. The reason given in the judgment rendered was that the agreement "contemplated" the purchase of a new home being concurrent with the sale of the matrimonial home; it did not "contemplate" Ms. D.K.N. moving to another province for a period of time and Mr. M.J.O. having to hold his share of the sale proceeds until she wanted to purchase a new home, whenever that might be. She had effectively forfeited her entitlement to the use of that money during the six months that elapsed before she asked for it. In my view, the effect of the judgment was to imply a term that Ms. D.K.N.'s use of Mr. M.J.O.'s share of the equity required that she purchase a new home concurrent with the sale of the matrimonial home.

18 Ms. D.K.N.'s alternative claims for reapportionment and spousal support were adjourned and became the subject of a second hearing in August 2002. In the year that elapsed, Ms. D.K.N. arranged to rent the matrimonial home from the municipality on a monthly basis. She obtained municipal approval and attempted to re-open her daycare business, but she was completely unsuccessful. She attributes her difficulties to the fact that she was renting the premises on a short term basis which made her situation unattractive to parents looking for a secure, long term daycare relationship for their young children. Ms. D.K.N. made attempts to find employment outside of her home, but was unable to find work that would provide her with an acceptable income on a long term basis. Apparently by fortuitous investment, she had increased her capital by some $47,000 during the year she lived in Alberta but, without the daycare income she had planned on earning, she found that she was encroaching on her capital by $3,000 a month or more to support herself and the children.

19 By contrast, Mr. M.J.O.'s income increased to $97,000 and, using his share of the equity in the matrimonial home, he was able to enhance his capital and make significant acquisitions. After the parties separated he formed a new relationship with an employed woman with whom he shares living expenses. They purchased a home in North Vancouver. They also purchased a share in recreational property, and Mr. M.J.O. purchased a relatively expensive pleasure boat to further his long-standing passion for barefoot waterskiing.

20 Ms. D.K.N. abandoned further pursuing the daycare business and decided that she should consider teaching. She determined what courses she would have to take, the cost, and the time she would require to complete them. If fully employed, she could earn perhaps $45,000 a year, but she would have to expect to do substitute teaching, probably for some time, before she would be able to find a permanent position.

21 The judgment appealed from was rendered September 6, 2002. The trial judge reapportioned the equity in the matrimonial home 65/35 in favour of Ms. D.K.N. and ordered that Mr. M.J.O. pay spousal support of $2,500 a month. The spousal support is to be reviewed in September 2004 or earlier, at Mr. M.J.O.'s request, if Ms. D.K.N. has not pursued her educational plan for becoming a teacher. The trial judge reduced the child support payable by Mr. M.J.O. to $1,192 a month, plus his share of the children's extraordinary expenses, being the amount his income required that he should pay under the Guidelines.

22 Had the parties made no separation agreement, it must be accepted that the circumstances of their lengthy, traditional marriage were such that an equal division of the family assets, in the absence of any spousal support for Ms. D.K.N. who had the primary care of the children, would have left her to suffer the financial consequences of the breakdown of the marriage beyond what the law would anticipate. Mr. M.J.O.'s contribution to the family unit has enabled him to establish a construction career from which he earns a good income. Ms. D.K.N.'s contribution in maintaining the home and caring for the children has been such that, subject to some training, she is substantially unable to generate an acceptable level of income to support herself. This is particularly so in light of her being unable to re-open her daycare business. It is common that, in such circumstances, the court will reapportion the family assets, or order limited spousal support, or both. By the agreement they made, the parties sought, with the benefit of independent advice, to provide for what they perceived to be the proper sharing of the financial burden to be suffered as a consequence of their separation. However, the governing legislation affords the court a discretion to grant the kind of relief Ms. D.K.N. seeks notwithstanding the existence of a settlement agreement. The trial judge was required to decide first whether and then in what way that discretion should be exercised in this case.

23 It is appropriate to consider the disposition made with respect to the reapportionment of the equity in the family home before turning to the award of spousal support.

Reapportionment

24 The Family Relations Act, R.S.B.C. 1996, c. 128, makes provision for the reapportionment of property that is the subject of a marriage agreement. There is no suggestion here that the settlement agreement is not a marriage agreement. The Act provides:

> 65. (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (a) the duration of the marriage,
> (b) the duration of the period during which the spouses have lived separate and apart,
> (c) the date when property was acquired or disposed of,
> (d) the extent to which property was acquired by one spouse through inheritance or gift,
> (e) the needs of each spouse to become or remain economically independent and self sufficient, or
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
>
> the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

25 The trial judge held that the equal distribution of the proceeds of the sale of the matrimonial home for which the settlement agreement provides is, as contemplated by s. 65(1) of the Act, unfair and reapportioned the equity such that Mr. M.J.O.'s share of the proceeds becomes $73,000 and Ms. D.K.N.'s becomes $133,000. In the result, he must pay her $30,000.

26 As is implicit in what this Court said at the outset in Gold v. Gold (1993), 106 D.L.R. (4th) 179, 82 B.C.L.R. (2d) 165, and what was stated in Gurney v. Gurney, [2000] B.C.J. No. 13, 2000 BCSC 6 at [paragraphs] 31-36, an agreement may be unfair as contemplated by s. 65(1) not only in its formation, but in its operation. The trial judge considered the agreement Mr. M.J.O. and Ms. D.K.N. made from that perspective.

27 With reference to the factors to be considered under s. 65(1) of the Act, ss. (a), (b) and (e) being germane, the trial judge observed that, after a long traditional marriage and a relatively short period of separation, Ms. D.K.N. has a much greater need than Mr. M.J.O. to become and remain economically self-sufficient. She took the view that the provision of the agreement that allowed Ms. D.K.N. to occupy the home for up to three years amounted to a reapportionment and that Ms. D.K.N. having the benefit of Mr. M.J.O.'s equity to enable the financing of another home created an unequal division. However, she concluded the agreement was unfair in its operation because Ms. D.K.N. did not actually obtain the advantage of either of those two provisions. In addition, Mr.

M.J.O. did not lose the use of his share of the proceeds of the sale of the home for up to 10 years as was agreed he might when the agreement was made.

28 The trial judge saw the position in which Ms. D.K.N. has been left as being far different from what the parties intended when the agreement was made. She is unable to purchase a home and cannot re-open her daycare business. Had she been able to purchase a home as had been intended, her future would have been more secure.

29 Mr. M.J.O. contends now that the trial judge erred in concluding that the agreement was unfair in its operation by failing to consider the fact that Ms. D.K.N. acted voluntarily in closing down her daycare business, agreeing to the sale of the matrimonial home in which she carried on her business, and moving to Alberta to pursue a new relationship. He maintains the loss of her livelihood and her ability to be economically independent was a foreseeable consequence of her move and entirely of her own creation. These, he maintains, are "other circumstances" to be considered for which s. 65(1)(f) provides.

30 I do not consider there is any error in the trial judge's reapportionment of the equity in the matrimonial home.

31 As the trial judge said, the agreement itself reflects a somewhat unequal division of the parties' interests in the matrimonial home. But, because of the way it was construed, that unequal division was not realized. Ms. D.K.N. did not get the advantage of the use of Mr. M.J.O.'s share of the sale proceeds of the matrimonial home. Her need to become and remain economically self-sufficient, which in some measure was addressed by the terms of the agreement, was not addressed in the way it operated. It was unfair and a reapportionment is required to cure the unfairness.

32 It is well recognized that, while the court must seek to uphold bargains, it cannot abdicate its responsibility to respond to unfairness as required by the Act. The risk of the reapportioning of family assets rests on the party who benefits from the unfairness: Clarke v. Clarke (1991), 55 B.C.L.R. (2d) 273 at 280 (C.A.).

33 I do not consider the fact that Ms. D.K.N. acted voluntarily in respect of her move to Alberta or what may have been the foreseeable consequences of that move, are in any way determinative of the fairness of the settlement agreement. Further, I do not consider that s. 65(1)(f) has any application here. It provides specifically for the consideration of other circumstances rendering the settlement agreement unfair that relate to the acquisition, preservation, maintenance, improvement or use of the matrimonial home or the capacity or liabilities of a spouse. I do not see on what basis it can be said subsection (f) pertains to the decision taken by Ms. D.K.N. to move to Alberta and then back to West Vancouver.

34 There is, in my view, no sound basis on which to disturb the reapportionment that the trial judge has made.

Spousal Support

35 The trial judge held that, notwithstanding Ms. D.K.N. had waived any claim for spousal support in executing the settlement agreement, she is, nonetheless, entitled to the $2,500 a month awarded from June 1, 2002.

36 The reduction from $2,000 to $1,192 a month in the child support Mr. M.J.O. is to pay also commenced June 1, 2002. The children's extraordinary expenses to which he must also contribute

are said to be about $3,500 a year. He is then required to pay $14,304 plus about $2,400 (being 69% of the extraordinary expenses) for a total of $16,704 in child support each year instead of the $24,000 for which the settlement agreement provides.

37 Thus, the difference between what Mr. M.J.O. is to pay to Ms. D.K.N. each year under the agreement ($24,000) and under the order appealed from ($47,000) is about $23,000 a year. That is just under $2,000 a month which is the amount she was earning from her daycare business.

38 The effect of the award of spousal support is to burden Mr. M.J.O. with paying what Ms. D.K.N. might have been expected to earn had she been able to re-open her daycare business and generate the income she earned before moving to Alberta. What Mr. M.J.O. will pay, until it is reviewed, will substitute for the income Ms. D.K.N. does not have during the period in which it is expected she will be able to obtain the teaching qualifications she requires and be able to obtain employment.

39 The Divorce Act, R.S.C. 1985, c. 3 (2d Supp.) governs the exercise of the court's discretion to award spousal support. It provides in material respects:

> 15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
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> (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).
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> (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
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> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
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> (a) the length of time the spouses cohabited;
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> (b) the functions performed by each spouse during cohabitation; and
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> (c) any order, agreement or arrangement relating to support of either spouse.
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> (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
>
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to spouses arising from the marriage or its breakdown;
(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

40 It is important to note that the existence of an agreement relating to spousal support is but one of the factors to be taken into account in exercising the jurisdiction to make an award.

41 No issue is taken with Mr. M.J.O.'s ability to pay the spousal support ordered. He does not accept that Ms. D.K.N. cannot operate a daycare business out of rented premises but her experience is otherwise. Once it is accepted that she has attempted to re-open her daycare business, and to find other suitable employment, and has been unable to do so, there can be little question that she has a need for spousal support to permit her to obtain the qualifications she requires to become a teacher.

42 The trial judge relied on the decision of the Ontario Court of Appeal in Miglin v. Miglin (2001), 16 R.F.L. (5th) 185 at [paragraphs] 95-96 (leave to appeal granted, [2001] S.C.C.A. No. 328) in determining that, notwithstanding the waiver of spousal support in a settlement agreement, it should be awarded in accordance with the provisions of s. 15.2 of the Divorce Act when there has been a material change in circumstances. In Miglin the applicant wife sought an order for spousal support when her childcare responsibilities proved to be more than anticipated such that her opportunities for employment were limited, and income it was expected she would receive from a business she and her husband had operated was, at the instance of the husband, to be terminated.

43 Here, the trial judge found a material change in circumstances in that, at the time Ms. D.K.N. waived any claim she might have to spousal support, the intention of the parties was that she would have a home where she and the children could reside and she could operate a daycare business. The trial judge found that Ms. D.K.N. no longer had that opportunity. She had given up the prospect of re-opening her business and planned to embark on a teaching career. Her financial circumstances had deteriorated. Her plans to become a teacher were said to be reasonable and the changes substantial, unforeseen, and of a continuing nature.

44 Since the trial judge made her decision in this case, the Supreme Court of Canada has heard and, dividing seven to two, allowed the appeal in Miglin, 2003 SCC 24, 224 D.L.R. (4th) 193. Based largely on the premise that parties must take responsibility for the contracts they execute as well as for their lives, the "material change in circumstances" test was rejected in respect of initial applications for spousal support in favour of a two stage approach to determining the weight to be given to a settlement agreement where spousal support has been waived.

45 The first stage of the approach (summarized at [paragraph] 4 and discussed at [paragraphs] 80-86) is to consider the circumstances under which a settlement agreement was negotiated and executed to determine whether there is any reason to discount it. If not, it is then necessary to consider the substance of the agreement to determine whether when it was made it substantially complied with the general objectives of the Act which include both the equitable sharing of the financial con-

sequences of the breakdown of the marriage under s. 15.2 as well as certainty, finality and autonomy.

46 At the second stage (summarized at [paragraph] 4 and discussed at [paragraphs] 87-91) consideration is to be given to whether the agreement continues to reflect the intention of the parties and whether it remains in substantial compliance with the Act. The applicant is said to have to show that the new circumstances that have arisen were not reasonably anticipated by the parties and have led to a situation that cannot be condoned. In that the parties must be presumed to anticipate change, it is only where the current circumstances fall outside what is described as the reasonable range of outcomes anticipated, putting them at odds with the objectives of the Act, that little effect may be given to the agreement.

47 There is no suggestion raised here that the agreement should be discounted because of the circumstances under which it was made. However, the parties are otherwise at odds on the application of the criteria in both stages of the approach prescribed by the Supreme Court.

48 With respect to the first stage, Mr. M.J.O. contends that the settlement agreement is in all respects consistent with the objectives of the Divorce Act. It afforded Ms. D.K.N. the opportunity to remain in the matrimonial home for three years and then to obtain another home were she could carry on her daycare business which, at the time the agreement was made, is what she maintained she wanted to do. Further, the agreement provides the parties with both certainty and finality with respect to the financial issues arising out of the breakdown of their marriage. I do not, however, consider the position he takes to be supportable in light of the way the agreement has been construed.

49 On its face, the agreement does go some way toward enabling Ms. D.K.N. to be financially independent through the operation of her daycare business, although, without a reapportionment of the family assets and some spousal support, it is questionable that it provides her with a real prospect of an acceptable level of long term self-sufficiency. At best, she could have taken advantage of Mr. M.J.O.'s equity in the matrimonial home for a period of no more than ten years. She would have had neither the time nor the money to retrain for employment to enable her to earn a more substantial income, and she would have had to sell her home and give up her business in order to repay Mr. M.J.O. as soon as the children's formal education was completed. At that time, all of the child support the agreement required Mr. M.J.O. to pay would have ended and Ms. D.K.N. would have had no source of income apart from what the capital she retained might then generate.

50 In any event, the way in which the settlement agreement has been construed has, in my view, served to render it clearly at odds with the objectives stated in s. 15.2 (6)(a), (c), and (d) of the Divorce Act. The requirement that Ms. D.K.N. purchase a home concurrent with the sale of the matrimonial home or forfeit the use of Mr. M.J.O.'s equity defeats compliance with the objectives of the Act, particularly inasmuch as the requirement was not one of which Ms. D.K.N. was aware. It is certainly not a stated requirement. It was not evident to Ms. D.K.N. when the agreement was made or at any time before it was too late, nor is it said that it ought to have been apparent to her. And it was a requirement that if not met would cause Ms. D.K.N. to lose much of the financial assistance that was intended to enable her to own a home in which to continue to care for the children and to operate a business from which she could derive a modest income.

51 The consequence of Ms. D.K.N. losing the financial advantage that she negotiated is that she is now bearing the financial burden of the breakdown of the marriage. She is in need of retraining,

she is earning no income, and her capital is being significantly eroded while Mr. M.J.O. is enjoying increased employment earnings, making acquisitions, and adding to his net worth.

52 Once it is determined that a settlement agreement is unfair for the purposes of the Family Relations Act because it fails to adequately address the need of one spouse to become economically independent and self-sufficient, it must generally follow that, in the absence of a reapportionment, the agreement does not substantially comply with the objects of the Divorce Act which include recognizing the economic disadvantages arising from the marriage or its breakdown, relieving any economic hardship arising from the breakdown of the marriage, and promoting the economic self-sufficiency of each spouse within a reasonable time. It may be that a reapportionment will serve to render a settlement agreement in compliance with the objectives of the Divorce Act but that is not the case here.

53 Given that the value of the parties' assets when they separated was $377,000, and that it was divided equally, the reapportionment made by the trial judge is relatively modest. Instead of Mr. M.J.O. being deprived of the use of as much as $103,000 for up to ten years, he will, as indicated, now have to pay Ms. D.K.N. $30,000. But, while that goes some distance toward meeting Ms. D.K.N.'s need to become economically self-sufficient, it is not sufficient in the short term. She requires financial support that will enable her to obtain the qualifications she requires to become a teacher and obtain employment.

54 Mr. M.J.O. complains that Ms. D.K.N. has vacillated over what she is going to do and that he should not have to pay spousal support to accommodate her failure to make up her mind more quickly that she has. He says that, until the first hearing in August 2001, she was committed to operating a daycare business and was adamant that she had no intention of obtaining teaching qualifications. It was not until a whole year later, at the time of the second hearing, that she had changed her mind and wanted to pursue a teaching career. But it is significant that, at the time of the first hearing, Mr. M.J.O. himself observed that there was a demand for teachers and that it was open to Ms. D.K.N. to attend university and obtain her teaching qualifications. Then, at the time of the second hearing, after she had tried and failed to re-open her daycare business, he was advocating that she should do as she had planned when the settlement agreement was made. I consider that, in the circumstances that have prevailed, some delay on Ms. D.K.N.'s part in determining how best to rebuild her life after the breakdown of the marriage was to be expected. She ought not to suffer financially because it has taken some time for her to decide on her best course of action to fulfilling her obligation to do her best to become economically self-sufficient.

55 Given that, with respect to the first stage of the approach, I find the settlement agreement was not substantially in compliance with the objectives of the Divorce Act, it is unnecessary to consider the second stage.

56 I consider that, while the trial judge employed reasoning to award spousal support that the Supreme Court has since rejected in preference for a different approach, the award, coupled with the reapportionment of the equity in the matrimonial home, was entirely appropriate.

Disposition

57 I would dismiss the appeal.

LOWRY J.A.
RYAN J.A.:-- I agree. OPPAL J.A.:-- I agree.