IN THE SUPREME COURT OF BRITISH COLUMBIA

Date of Release: April 30, 1993

No. D727316

Vancouver Registry

BETWEEN:)
)
PATRICIA ANN POUSETTE)
)
Petitioner)
AND:)
) REASONS FOR JUDGMENT
RONALD DANIEL POUSETTE)
)
Respondent)

AND

No. C923072 OF THE HONOURABLE

Vancouver Registry

BETWEEN:)
)
PATRICIA ANN POUSETTE)
)
Plaintiff)
AND:) MR. JUSTICE LYSYK
)
RONALD DANIEL POUSETTE)
)
Defendant)

Counsel for the Petitioner/Plaintiff: M.E. Mortimer, Q.C.

Counsel for the Respondent/Defendant: F.G. Potts and S. Mansfield

Dates and Place of Hearing: October 21, and
December 1, 1992 and

April 7, 1993

Vancouver, British Columbia

1. The central issue

At the time of their divorce some 15 years ago, Patricia and Ronald Pousette, through their lawyers, negotiated a written agreement (the Agreement) to settle their financial affairs. A term of the Agreement provides that he is to pay her a specified monthly sum during their joint lives, terminating upon her remarriage. She has not remarried. Until the end of 1991, he made the payments called for by this Agreement.

In 1992, Ronald Pousette unilaterally reduced the amount of his monthly payments and then stopped making them altogether. This gave rise to three applications, brought on for hearing before me at the same time. The central issue in each of them is the same. Should Ronald Pousette be held to or relieved from his contractual commitment?

His position is simply that he should not have to continue payments because Mrs. Pousette no longer needs the money. She says that he can afford to pay and should do so because, as it was put by counsel, "a deal is a deal". Mr. Pousette concedes that he has the ability to pay, although he says he is required to draw on capital assets in order to do so and still maintain his present standard of living.

2. Background

The parties married in 1957 and separated in 1973. The decree nisi, pronounced on October 27, 1977, provided that Patricia Pousette and the four infant children were entitled to maintenance, the quantum of which was referred to the district registrar for inquiry and recommendation.

The hearing before the registrar was set for November 7, 1978 but was rendered unnecessary when the parties on that date reached the compromise embodied in the Agreement. Under the terms of the Agreement, maintenance was set at $3,000.00 per month, to be reduced by $200.00 per child as each reached adulthood. Spousal maintenance in the amount of $2,200.00 was, as previously mentioned, to continue during the parties' joint lives or until Mrs. Pousette remarried. The decree absolute, made June 18, 1979, was silent as to maintenance and made no reference to the Agreement.

The marriage had been of the sort that is sometimes described as "traditional". Mrs. Pousette left a teaching position to devote her full time to managing the household and caring for their infant children. After the separation, she was left with responsibility for the care of their four children and a dated teaching credential.

At the time the Agreement was entered into, it appears that the parties assumed that if Mrs. Pousette re-entered the work force at all it would be as a teacher or perhaps in other employment providing roughly comparable income. She pursued graduate studies in Education but did not go back to teaching. Instead, she qualified as a real estate salesperson and she has excelled in that line of work. Over the last three years her income from commissions has, on average, been in the order of $200,000.00 per year and she has significant capital assets. The husband's employment income has dropped to a present level of about $44,000.00 per year but he has investment income and substantial capital assets resulting, primarily, from the sale of the family business. I will return to the matter of their present financial circumstances later in these reasons, although it will not be necessary to examine their financial positions in fine detail for purposes of these proceedings. For the moment, it will suffice to note that Mr. Pousette does not contest ability to pay and Mrs. Pousette is hardly "needy" in the ordinary sense of that word.

From January 1 to May 1, 1992, Mr. Pousette made monthly payments at the reduced level of $1,000.00 and since then he has made no payments at all.

On May 14, 1992, Mrs. Pousette commenced an action claiming arrears of maintenance (the maintenance action). In his defence and counterclaim, Mr. Pousette seeks to have the decree nisi varied under s. 17(1) (a) of the **Divorce Act, 1985**, to eliminate the obligation to pay spousal maintenance or, alternatively, to reduce the amount payable.

3. The applications

On July 2, 1992, Mr. Pousette filed a notice of motion in the original divorce action seeking essentially the same relief as sought in his defence and counterclaim to the maintenance action. On October 5, 1992, Mrs. Pousette filed a notice of motion under Supreme Court Rule 18A seeking judgment and costs in the maintenance action. On October 8, 1992, Mr. Pousette responded with his notice of motion under Rule 18A seeking judgment on his counterclaim in the maintenance action. These are the three applications brought on for hearing together before me.

There is no dispute as to the amount payable according to the terms of the Agreement. Arrears as at the date of filing of Mrs. Pousette's application on October 5, 1992 stood at $17,000.00. The variation to the decree nisi proposed by Mr. Pousette would eliminate or reduce entitlement to maintenance or, alternatively, incorporate the Agreement into the decree nisi and then eliminate or reduce entitlement to maintenance payable under the amended decree nisi.

4. Preliminary issues

On behalf of Mrs. Pousette, it is argued that this court ought to decline to entertain Mr. Pousette's applications for three reasons unrelated to the merits. First, it is submitted that his applications should not be heard by the court until arrears of maintenance have been paid. Second, it is contended that while he is in breach of the Agreement, he should not be able to invoke it for the purposes of having it incorporated into the divorce decree. Third, it is argued that his application to incorporate the maintenance terms of the Agreement into the decree nisi ought to have been brought by originating application, not a notice of motion, because the relief he seeks is a corollary relief proceeding, as opposed to a variation proceeding, within the meaning of the relevant provisions of the **Divorce Rules**

On the first of these issues, Mrs. Pousette's counsel relies upon **Parkinson v. Parkinson** (1973), 11 R.F.L. 128 (Ont. C.A.) for the proposition that the court ought not to entertain Mr. Pousette's application until arrears of support under the Agreement have been paid. In that case, the appellant had applied for permission to vary the decree nisi by adding rights of access to infant children of the marriage. The court adjourned the appeal *sine die* concluding, in brief oral reasons, that the appeal ought not to be entertained until either arrears of maintenance were paid or the court was satisfied that the appellant could not pay them. Nothing in the judgment indicates that the court was enunciating a general principle to the effect that a person in arrears who has the capacity to pay should in every case be denied hearing of an application to vary the decree nisi. The **Parkinson** decision was adopted in **Bucholtz v. Bucholtz** (1977) 1 R.F.L. (2d) 289 (B.C.S.C.), where an application for reduction or cancellation of maintenance for an infant child was dismissed having regard to the applicant's misconduct, including non-disclosure of assets. Both decisions are readily distinguishable and the paucity of authority suggests that they do not exemplify a general principle. I reject this submission advanced on behalf of Mrs. Pousette.

For similar reasons, I am of the view that her position on the second preliminary issue must also fail. Her counsel argued that Mr. Pousette should not be permitted to seek incorporation of the Agreement into the decree nisi

for purposes of barring Mrs. Pousette's claim so long as he, Mr. Pousette, fails to honour the terms of the Agreement. The sole authority cited in support of this proposition is **McVeetors v. McVeetors** (1985) 43 R.F.L. (2d) 113 (Ont. C.A.). In that case, a husband was not permitted to set up the terms of a separation agreement, which he himself had breached in a number of ways, to bar the wife's claim for further maintenance. The court considered that the terms of the separation agreement and the circumstances surrounding its execution were unconscionable. Moreover, the facts in **McVeetors** do not provide a true parallel. Here it is Mrs. Pousette, not Mr. Pousette, who seeks to enforce the Agreement; he does not attempt to invoke it either as a shield, as did the payor husband in **McVeetors**, or as a sword.

The third preliminary issue relates to the appropriateness of the procedure followed by Mr. Pousette. Counsel for Mrs. Pousette submits that this court lacks jurisdiction to entertain Mr. Pousette's claim insofar as it involves incorporation of the maintenance provisions of the Agreement into the decree nisi. Counsel for Mrs. Pousette argues that this amounts to a claim for corollary relief, which ought to be initiated by an originating application. A notice of motion is appropriate in the case of a variation proceeding.

The relevant provisions of the **Divorce Act, 1985** read as follows:

2. (1) In this **Act,**

"corollary relief proceeding" means a proceeding in a court in which either or both former spouses seek a support order or a custody order or both such orders;

"spouse" means either of a man or woman who are married to each other;

"support order" means an order made under subsection 15(2);

"variation order" means an order made under subsection 17(1);

"variation proceeding" means a proceeding in a court in which either or both former spouses seek a variation order.

. . .

Term not restrictive

(3) The use of the term "application" to describe a proceeding under this **Act** in a court shall not be construed as limiting the name under which and the form and manner in which that proceeding may be taken in that court, and the name, manner and form of the proceeding in that court shall be such as is provided for by the rules regulating the practice and procedure in that court.

Jurisdiction in corollary relief proceedings

4. A court has jurisdiction to hear and determine a corollary relief proceeding if the court has granted a divorce to either or both former spouses.

Jurisdiction in variation proceedings

5.(1) A court in a province has jurisdiction to hear and determine a variation proceeding if

(a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or

...

Definition of "spouse"

15.(1) In this section and section 16, "spouse" has the meaning assigned by subsection 2(1) and includes a former spouse.

Order for support

(2) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump and periodic sums, as the court thinks reasonable for the support of

(a) the other spouse;

(b) any or all children of the marriage; or

(c) the other spouse and any or all children of the marriage.

Order for variation, rescission or suspension

17. (1) A Court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; or ....

The relevant provisions of the **Divorce Rules** are subrules (54) and (55) of Rule 60B:

Rule 60B

Corollary relief proceeding

(54) An application to the court for a support order or a custody order by way of corollary relief proceeding shall be made by originating application.

Variation proceeding

(55) A variation proceeding shall be commenced

(a) where the order sought to be varied was made in a proceeding in the court, by notice of motion in that proceeding, or

....

I should say at the outset that I do not agree with the suggestion by Mrs. Pousette's counsel that the alleged defect is jurisdictional, as opposed to procedural, in nature. Under the **Divorce Act, 1985**, this court has jurisdiction either pursuant to s. 4 (corollary relief) on the basis of the divorce having been granted by this court or pursuant to s. 5 (variation) on the basis of ordinary residence of the spouses in the province.

Counsel for Mrs. Pousette relies on **Evans v. Evans** (1987), 6 R.F.L. (3d) 166 (B.C.S.C.) and **Currie v. Currie** (1987), 6 R.F.L. (3d) 40 (Man. Q.B.). In **Evans**, the jurisdiction of the court was in issue because the divorce had been granted in another province and by virtue of s. 4 of the **Divorce Act, 1985** jurisdiction with respect to corollary relief lies with the court which granted the divorce. The decree nisi was silent as to support or maintenance except for incorporating minutes of settlement, which merely reserved a right to apply for

maintenance. Proudfoot, J. (now J.A.) concluded that the matter was not one of variation, but rather was in the nature of a corollary relief proceeding (at p. 169). Similarly, in **Currie**, where the decree nisi was completely silent as to maintenance, Carr J. concluded that "a variation proceeding is only available when a party seeks to vary an order that specifically provides for support" (at p. 43).

In my view, **Evans** and **Currie** are distinguishable in that the Pousette decree nisi specifically provides for support. Quantification of Mrs. Pousette's maintenance was to await the report and recommendation of the registrar, but the decree nisi contains an initial determination of entitlement. Accordingly, the earlier cases do not preclude a finding that there is in existence a support order which is capable of being varied or terminated. See, also, **Zacks v. Zacks**, [1973] S.C.R. 891, at 911 and 914 (per Martland J., for the court).

Moreover, Mr. Pousette applies for judgment under R. 18A based on his counterclaim in the maintenance action. I do not understand counsel for Mrs. Pousette to suggest that Mr. Pousette is precluded from bringing a counterclaim in her action or from applying by way of notice of motion under R. 18A for judgment on that counterclaim. In any event, no authority has been cited which is capable of supporting those propositions.

Accordingly, I find that the submission advanced on behalf of Mrs. Pousette on the third preliminary issue also fails.

5. The Agreement

The Agreement entered into by Patricia and Ronald Pousette was not confined to provision for maintenance. It dealt with custody of and access to the four children. It provided for transfer of his interest in the matrimonial home to her and for sale and division of the proceeds of a residential lot. It contained terms relating to such matters as his life insurance coverage and medical and dental coverage for the children. It provided for two initial lump sum maintenance payments by him, each in the amount of $31,700.00, as well as the periodic maintenance payments to which reference has been made, to be continued during their joint lives or until Patricia Pousette remarried. It concluded with this clause relating to the Agreement's finality:

> The Petitioner and the Respondent agree each with the other that this Agreement and its provisions shall operate as a full, complete and final settlement, satisfaction, distribution and adjudication of any and all rights, claims or demands of either party against the other for support, maintenance, alimony, or any other interest, right or demand which might otherwise than for this instrument be asserted by either party against the other party, or the property or estate of such other party.

Mrs. Pousette states, and Mr. Pousette acknowledges, that it was specifically agreed at the time the Agreement was made that it would not be incorporated in any court order. This is evidenced by a letter from his lawyer to hers, bearing the same date as the Agreement, in which it is stated that:

> (9) It is understood that this Agreement settles all financial matters between the parties and that the same is not to become a Rule of Court nor be incorporated in any Judgment or Decree:

Mrs. Pousette states that this understanding was reached in order to forestall subsequent litigation to alter the Agreement. She says that she considered the maintenance provisions to represent only one component of their overall settlement. She states further that the lawyer through whom she negotiated the Agreement advised her that its terms, including those relating to maintenance, were final and would remain binding on the parties. The response of Mr. Pousette is that if she was advised that continued payment of maintenance in accordance with the Agreement was assured, that advice was unsound in law.

It would appear, nonetheless, that the parties did what they could to give legal vigour to this domestic contract. The pertinent terms of the contract are clear and unambiguous. Both parties had the benefit of independent legal advice. No one suggested then or suggests now that the settlement embodied in the Agreement was, at the time, harsh, unconscionable or unfair to either party. They expressly agreed to refrain from seeking incorporation of the Agreement in a court order and no move was made to do so for the next thirteen years. Without doubt, the parties intended the Agreement to be final.

If the Agreement were an ordinary commercial contract, it seems clear that there would be no basis for resisting its enforcement. The question is whether, because it is a domestic contract, the law entitles the payor to have the Agreement rewritten on the basis that the payee now enjoys economic self-sufficiency.

6. The authorities and their application to this case

As to a claim for spousal maintenance inconsistent with the terms of a separation or settlement agreement, the leading authorities are the trilogy of Supreme Court of Canada decisions delivered on the same date: **Richardson v. Richardson**, [1987] 1 S.C.R. 857, **Pelech v. Pelech**, [1987] 1 S.C.R. 801, and **Caron v. Caron**, [1987] 1 S.C.R. 892. All were proceedings under the 1970 **Divorce Act**. Mrs. Richardson sought maintenance under s. 11(1) in an amount different from that agreed upon in an antecedent agreement. Mrs. Pelech and Mrs. Caron sought variation of court-ordered maintenance under s. 11(2) where, in each case, the order had incorporated spousal maintenance terms from an antecedent agreement. In all three of the trilogy cases, the terms of the settlement agreement prevailed and the claim for maintenance additional to that provided for in the agreement ultimately failed.

In the recent decision of the Supreme Court of Canada in **Moge v. Moge**, [1993] 1 W.W.R. 481, L'Heureux-Dubé J., delivering the principal judgment, drew a clear distinction between those cases which, like the trilogy, involve financial settlement agreements and those cases which, like **Moge**, do not involve consensual agreements but relate simply to variation or termination of spousal support orders made under the governing legislation. Noting the view of some commentators that the trilogy cases applied beyond situations involving final agreements, she stated (at pp. 494-95):

> With respect, I cannot agree. A careful reading of the trilogy in general and **Pelech** in particular indicates that the Court has not espoused a new model of support under the **Act**. Rather, the Court has shown respect for the wishes of persons who, in the presence of the statutory safeguards, decided to forego litigation and settle their affairs by agreement under the **1970 Divorce Act**. In other words, the Court is paying deference to the freedom of individuals to contract. I quote from the reasons of Wilson J. at pp. 849-53 those portions which make the point clearly:
>
> ...I believe that every encouragement should be given to ex-spouses to settle their financial affairs in a final way so that they can put their mistakes behind them and get on with their lives. I would, with all due respect, reject the Manitoba Court of Appeal's broad and unrestricted interpretation of the court's jurisdiction in maintenance matters. It seems to me that it goes against the main stream of recent authority, both legislative and judicial, which emphasizes mediation, conciliation and negotiation as the appropriate means of settling the affairs of the spouses when the marriage relationship dissolves.
>
> However, as I stated at the outset, the **Hyman** principle that parties cannot by contract oust the jurisdiction of the court in matters of spousal maintenance is an established tenet of Canadian law. *The question thus becomes the nature and extent of the constraint imposed on the courts by the presence of an agreement which was intended by the parties to settle their*

affairs in a final and conclusive manner.

It seems to me that where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled on the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration.

Absent some causal connection between the changed circumstances and the marriage, it seems to me that parties who have declared their relationship at an end should be taken at their word. They made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should thereafter be free to make new lives for themselves without an ongoing contingent liability for future misfortunes which may befall the other. *It is only, in my view, where the future misfortune has its genesis in the fact of the marriage that the court should be able to override the settlement of their affairs made by the parties themselves.*

Where parties, instead of resorting to litigation, have acted in a mature and responsible fashion to settle their financial affairs in a final way and their settlement is not vulnerable to attack on any other basis, it should not, in my view, be undermined by courts concluding with the benefit of hindsight that they should have done it differently.

(Emphasis is that of L'Heureux-Dubé J.)

In **Moge**, therefore, the court appears to reaffirm the views expressed in the above-quoted passages from **Pelech** relating, in particular, to the respect to be accorded to spousal support provisions of an agreement intended to finally settle the economic aspects of marriage dissolution.

The trilogy and most other cases where the opening up of a final settlement was in issue were ones in which the applicant spouse alleged that changed circumstances had resulted in economic hardship. Either the payee spouse claimed that the level of support called for by the agreement had become inadequate or the payor spouse claimed inability to maintain that level of support. The present case is one of those relatively rare situations where neither spouse claims present economic hardship. The neat question is whether Ronald Pousette's claim to be relieved from the contractual obligation to pay spousal maintenance ought to succeed on the basis that Patricia Pousette has achieved financial independence.

Before addressing this central issue, I pause to consider the source of the court's authority to grant the relief Mr. Pousette seeks. A court cannot, of course, rewrite a legally valid commercial contract at the behest of one party to it on the basis that the other no longer needs the contractual benefit. Subject to the doctrine of frustration, the parties are expected to live up to their contractual commitments. In the case of domestic contracts, as noted in the above-quoted extract from **Pelech**, the parties cannot oust the jurisdiction of the court with respect to spousal maintenance. Section 15 of the **Divorce Act, 1985** provides authority to make a support order in the first instance and s. 17 provides authority to vary such an order. Nothing in that enactment deals expressly with the varying of a contractual arrangement for spousal maintenance. What the court may do, if it sees fit, is make a support order under s. 15 which is inconsistent with the parties' agreement. If the level of court-ordered maintenance is higher than that called for by the agreement, the latter becomes irrelevant. Where, however, the court is asked, as it is by Mr. Pousette in this case, to eliminate or to reduce the amount of maintenance stipulated for by contract, issues may arise concerning election of remedy or relating to the question of whether the contract survives or merges with the court order. Such issues have been considered in a number of decisions

of this court: see, e.g., **Coburn v. Coburn** (1971), 5 R.F.L. 1, **Furber v. Furber** (1972), 9 R.F.L. 289 and **Mitchell v. Mitchell** (1982), 35 B.C.L.R. 392.

Mr. Pousette's primary position is that the decree nisi contains an order for support, albeit unquantified, which can now be the subject of an application to vary under s. 17. I noted that submission in the course of addressing the third preliminary issue. His position in the alternative is that the court has jurisdiction to incorporate the support provisions of a separation agreement in a divorce decree retroactively for the purpose of allowing a variation proceeding under s. 17. Doubt has been expressed concerning the court's jurisdiction to do this: **Payne on Divorce** (2nd ed.; 1988), at p. 127. However, there is authority (cited by the author) which supports such jurisdiction and which is binding on this court:**Posener v. Posener** (1984), 49 B.C.L.R. 184 (S.C.), aff'd (1984), 4 D.L.R. (4th) 385 (B.C.C.A.), lv. to app. to S.C.C. den., 55 N.R. 159 n. See, also **Leroux v. Leroux**, June 5, 1990, unreported, B.C.S.C. No. A900719; **Foster v. Foster**, April 22, 1992, B.C.S.C. No. A911913.

Given jurisdiction to grant relief, perhaps it is of little consequence whether or not the proceeding is characterized as one involving variation of an existing order. In **Richardson**, Wilson J., delivering the principal judgment of the court, considered the applicability of the **Pelech** principles, set out in the context of a variation proceeding under s. 11(2) of the 1970 **Divorce Act**, to an application for an initial order under s. 11(1) of that enactment. Having noted the difference in wording between the two provisions, she stated (at S.C.R. 866):

> Nevertheless, in my view, despite the difference in the statutory language, when a court is confronted with a settlement agreement reached by the parties the same criteria should be applied under both sections. The underlying rationale is the same under both, namely 1) the importance of finality in the financial affairs of former spouses and 2) the principle of deference to the right and responsibility of individuals to make their own decisions. It is true that in an application under s. 11(2) the settlement agreement is incorporated in a *decree nisi* and this is not so in the case of an application under s. 11(1). However, as was noted by Zuber J.A. in ***Farquar v. Farquar, supra***, at p. 250:
>
> In this case, the parties not only agreed to settle their own affairs but the agreement was incorporated into a divorce decree. In my view, the additional fact of the decree confirming the agreement adds little, if anything, to the problem. The centre of the problem is the agreement itself set out in the minutes.
>
> If Zuber J.A. is correct in this, and I think he is, it is not surprising that when faced with a settlement agreement the courts have applied the same criteria in deciding when to depart from that agreement in both s. 11(1) and s. 11(2) applications.

Wilson J. went on to conclude that the **Pelech** test was applicable to a s. 11(1) as well as a s. 11(2) application. There would seem to be no compelling reason why her analysis ought not to apply to the counterpart provisions in the **Divorce Act, 1985**, ss. 15 and 17.

In what circumstances is it appropriate to make an order which has the effect of relieving a payor spouse from the obligation to pay spousal maintenance in accordance with a settlement agreement which engages the trilogy principles? **Pelech** states that what must be demonstrated is "radical change" in circumstances. Further, the change in circumstances must have been unforeseen and causally connected to the marriage.

Pelech concerned the claim of a payee spouse. Are all elements of the **Pelech** test, and in particular the requirement of causal connection, applicable where a payor spouse seeks variation? This question was answered in the

affirmative by the majority in **Masters v. Masters** (1991), 34 R.F.L. (3d) 34 (Sask. C.A.), lv. to app. to S.C.C. granted December 17, 1992: 145 N.R. 392. Two decisions in this province, on the other hand, hold that in the case of an application by a payor spouse, causal connection need not be shown: **Ritchie v. Ritchie** (1988), 16 R.F.L. (3d) 163 (B.C.S.C.) and **Carter v. Carter** (1991), 34 R.F.L. (3d) 1 (B.C.C.A.). So far as this court is concerned, the two latter decisions are controlling.

In both **Ritchie** and **Carter**, a prior separation agreement had been incorporated into the decree nisi. In the present case, the Agreement followed the decree nisi and was not incorporated in any subsequent order of this court. The essential question in each of these cases is nonetheless the same. In **Ritchie**, Prowse, L.J.S.C. (now J.A.) expressed it this way (at p. 166):

> The primary issue which arises in this case is the extent to which the principles enunciated by the Supreme Court of Canada in ... (the "**Pelech** trilogy"), apply to an application by a payor spouse to reduce or rescind spousal maintenance. The narrow issue is whether a court may rescind spousal maintenance in the face of express terms of an agreement and order where the recipient spouse has become economically self-sufficient for reasons not causally connected to the marriage.

Although **Ritchie** is not referred to in **Carter**, the two decisions are consistent on the material points. In both, as previously noted, lack of causal connection was determined to be irrelevant. In the former, Mrs. Ritchie was found to have become self-sufficient and maintenance was terminated. In the latter, a new trial was ordered to permit certain material evidence relating to the parties' financial circumstances to be adduced and, in particular, evidence as to the amount of an inheritance received by Mrs. Carter.

The **Ritchie** case resembles this one in a number of aspects. The Ritchies' separation agreement provided for payment of spousal maintenance to the wife until her remarriage or death. The agreement contained a finality clause and the court found that both parties intended the agreement to be a full and final settlement of all issues between them. The husband did not rely on any change in his own means and circumstances or claim inability to pay. (His annual earnings were in the order of $150,000.) Like Mr. Pousette in the present case, Mr. Ritchie relied solely on the change in circumstances of his former wife.

Mrs. Ritchie had progressed from a dependence on support payments to substantial financial autonomy. At the time of the court proceedings she was engaged in full-time employment from which she earned some $50,000 to $60,000 per year. It was held that there had been a radical change in her financial circumstances, satisfying this requirement of the **Pelech** test. It was also found that variation of the support order would meet the objective expressed in s. 17(7)(d) of the **Divorce Act, 1985** (and also in s. 15(7)(d)) of promoting, insofar as practicable, the "economic self-sufficiency" of each former spouse. As to the latter element, Prowse L.J.S.C. stated (at p. 171):

> I am also satisfied that the change in Mrs. Ritchie's circumstances is not causally connected to the marriage. Despite that fact, I conclude that the objectives set forth in s. 17(7)(d) must be given effect. To apply the causal connection test in these circumstances would be to give insufficient weight to the overriding policy considerations which Parliament intended the courts to apply in enacting s. 17. I note that the conclusion I reach in this regard is consistent with the effect achieved in the **Pelech** trilogy, namely, the termination of the bond of dependency which spousal maintenance maintains. Given the fact that maintenance is founded on economic need, it makes little sense to continue the bond where the need no longer exists.
>
> Can it be said that Mrs. Ritchie is economically self-sufficient within the meaning of s. 17(7)(d)? I take "economic self-sufficiency" to be synonymous with "financial independence" - the ability to reasonably provide

for one's own financial needs.

In **Carter**, the separation agreement called for spousal maintenance to be paid to the wife "until such time as she remarries or lives in a state resembling marriage". She had done neither at the time of her husband's application for an order terminating or reducing his monthly maintenance payments. Delivering the judgment of the Court of Appeal, Proudfoot J.A. stated that to justify variation "there should be a change in circumstances that is substantial, unforeseen, and of a continuing nature" (at p. 10). A re-hearing was ordered on the basis that the inheritance received by the wife (the amount of which had not been disclosed) or the husband's retirement could constitute a sufficient change in circumstance to justify a variation in maintenance.

Returning to this case, Patricia Pousette's income tax returns for 1989, 1990 and 1991 show employment earnings, almost entirely from real estate commissions, of $277,000, $108,000 and $203,000 (rounded to the nearest $1,000). Counsel agree that the present net value of her assets is in the area of $800,000. Counsel for Mrs. Pousette declined to concede that she has achieved economic self-sufficiency, taking the position that she has structured her affairs to take account of the maintenance payments from Mr. Pousette. This position, in my view, fails to accord with the meaning given to economic self-sufficiency in **Ritchie** or, indeed, with any other commonly accepted understanding of those words. I find that Mrs. Pousette is now economically self-sufficient, that this development was not foreseen at the time of entering into the Agreement, and that the change in her financial circumstances can fairly be characterized as radical in nature.

The pending appeal to the Supreme Court of Canada in **Masters, supra**, raises for authoritative determination the question of the circumstances in which a party to a final settlement agreement ought to be permitted to discontinue periodic spousal maintenance payments called for by that agreement where the payee has achieved economic self-sufficiency. On the basis of authority which is presently controlling for this court, and in particular the **Ritchie** and **Carter** decisions, I conclude that the question of whether or not Patricia Pousette's change in financial circumstances is causally connected to their marriage is of no relevance and that the magnitude of the change in circumstances, coupled with her achievement of economic self-sufficiency, entitles Ronald Pousette to be relieved from a continuing obligation to pay maintenance.

The remaining question relates to the effective date for termination of maintenance. Of the three applications brought on for hearing before me, one had been filed in June, 1992 and two (the Rule 18A applications) in October, 1992. For the first five months of 1992, Mr. Pousette made payments at the reduced level of $1,000 per month and then stopped payments altogether. These were actions taken unilaterally by him and I am not persuaded that he should be relieved of arrears payable under the Agreement prior to the hearing of these applications. Counsel agree that arrears in early October, 1992 stood at $17,000 and Mrs. Pousette will have judgment in that amount.

Result

Mr. Pousette is entitled to succeed to the extent of being relieved from the obligation to pay further maintenance to his former wife. Mrs. Pousette will, however, be entitled to arrears payable under the Agreement to the beginning of October, 1992, agreed upon at $17,000, together with interest. If necessary, counsel may speak to the terms of the orders.

"Lysyk, J."

Lysyk, J.

April 30, 1993

Vancouver, British Columbia