

Chandra v. Chandra

Shakti Chandra (applicant / plaintiff) and Ranjit Kumar Chandra (respondent /  
defendant)

Newfoundland Unified Family Court

Wells J.

Judgment: January 24, 1997

Docket: 07335/94, 690/94

Counsel: **David Day**, Q.C., for applicant.

Ranjit K. Chandra, in person.

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

generally considered

Family Law Act, The, S.N. 1988, c. 60

generally considered

Family Law Act, R.S.N. 1990, c. F-2

generally considered

s. 3(5) considered

s. 5 considered

Family Law Act, R.S.O. 1990, c. F.3

generally referred to

Matrimonial Property Act, The, S.N. 1979, c. 32

generally considered

DETERMINATION of validity of domestic agreement.

**Wells J. (orally):**

1 I will deal with this matter forthwith and in so doing, I reserve the right to amplify and edit to ensure proper written expression, however the result will remain the same.

2 What I am required to address and decide is the validity of a mutual domestic agreement purporting to have been signed on December 10th, 1982.

3 In Canadian law there has been an evolution from a position whereby marriage did not generally confer any right to shared ownership of matrimonial assets and the dissolution of a marriage had of itself little effect on the ownership of property. Thus if a person brought assets into a marriage, his or her spouse did not have any particular claim to these assets and if property was acquired by an individual during the marriage, that fact did not give that person's spouse an automatic right to share in it upon separation or dissolution of the marriage.

4 Our thinking has changed and we have embraced the concept that both spouses contribute to a marriage in a multitude of ways and that contributions to the marriage are not limited to the acquisition of physical assets or money but may and do, take many forms. That concept has become reflected in our laws which required that spouses in most cases will share equally in matrimonial assets and particularly the matrimonial home and its contents, whenever acquired. These laws recognized that all contributions to a marriage have a value and should be recognized in any division of assets.

5 This change has meant that spouses, whether working outside the home or rearing children and running the home, now have their contributions recognized in a tangible way. One of the principal objectives of the legislation was to recognize the importance of the homemaking and child rearing roles, which heretofore had not been fully recognized in the application of the law with respect to assets.

6 The *Divorce Act* took steps to recognize these concepts and legislation such as the *Matrimonial Property Act* in Newfoundland, extended the concept. The *Family Law Act* which succeeded the *Matrimonial Property Act* continued and refined these concepts. Section 5 of the *Family Law Act* says:

5. The purpose of Parts I and II is to reform the law with respect to matrimonial property in order to

(a) recognize the contribution made by each spouse to a marriage;

(b) give a 1/2 interest in the matrimonial home to each spouse;

(c) provide for the deferred sharing of most other property acquired during a marriage; and

(d) provide for judicial discretion in sharing business assets built up by a spouse

during a marriage.

7 Not only does the Act recognize the contributions of both spouses but it provides also for the sharing of business assets in certain cases and gives the Court a discretion to do so when appropriate.

8 The *Family Law Act* also allows for domestic contracts and provides that these can take marital property matters outside of the purview of the *Family Law Act* in accordance with the normal principles of contract.

9 That process is referred to in Section 3(5) which says:

3.(5) A domestic contract dealing with a matter that is also dealt with in this Act prevails unless this Act provides otherwise.

It follows that though domestic contracts may provide for the division of assets outside the provisions of the *Family Law Act*, nevertheless the process by which domestic contracts are entered into must be a process that allows for fairness and for full knowledge and understanding on the part of both parties as to what is involved in a contract which has the effect of removing the division of assets from the supervision of the Act.

10 The facts of the present case are as follows. The parties were married in India in the early 1970's. Dr. Ranjit Chandra was a widower at the time and had two small daughters from his previous marriage. Dr. Shakti Chandra who is about ten years younger than her husband, was about to finish her medical studies. After the marriage she immediately assumed the role of wife and mother and began to care for the two daughters of her husband's previous marriage. In due course the couple had two more children.

11 Within a year or two the parties made a decision to emigrate and went first to the United States and in the early 1970's to Newfoundland. They established residence here, began working and clearly established a domicile in Newfoundland. That matter is not disputed.

12 The evidence indicates that although the marriage outwardly appeared to be normal and perhaps was normal in many respects, there were nevertheless troubling and unresolved problems which began in its very early stages. These problems concerned the two children of Dr. Ranjit Chandra's former marriage and Dr. Shakti Chandra's relationship with them. The shadow of the former and deceased wife was very much present in the marriage, in her mind at least, and the evidence is that the marriage was troubled by unresolved problems arising from the foregoing sources.

13 There were serious difficulties in the late seventies when Dr. Shakti Chandra on one or two occasions went to her office where she remained incommunicado for some hours and produced typewritten papers which certainly appear to have been written by her, detailing problems and difficulties which were giving her great concern. Her own evidence and the evidence of Dr.

Ranjit Chandra indicates that she was in these years a troubled person, troubled by her relationship with her stepchildren and by other certain aspects of her life and marriage. It appears that these problems were present throughout and eventually culminated in her leaving the marriage in 1994.

14 It is not necessary for me to deal further with these matters, except to say that in the period leading up to 1982 these difficulties were very much present and the more personal references which are in the alleged domestic agreement, indicate that the marriage was troubled and particularly that Dr. Shakti Chandra was troubled at the time.

15 The evidence is widely divergent as to the contract itself. Clauses 2, 3 and 4 of the agreement say:

2. If one of us leaves home without discussion and specific agreement, then that person shall not be entitled to his/her share of (i) matrimonial home, (ii) household contents, (iii) other jointly held assets.

3. In the event of irretrievable marriage breakdown, we would not be entitled to the other person's (i) pension and RRSP, (ii) bank deposits and certificates, (iii) shares and securities, (iv) jewellery (sic).

4. In the event of marriage breakdown, the division of assets will not in any case exceed our proportionate individual earnings and input into matrimonial assets.

It appears to me that there is confusion between the provisions of the foregoing clauses but it is nevertheless obvious that the maker of the document intended to make it quite clear that the spouse who left would take little or nothing beyond personal assets. The majority of the assets, which would normally be considered matrimonial assets, were not to be shared and would become the property of the spouse who did not leave and wished to remain in the marriage, no matter how troubled or unsatisfactory it might be.

16 Dr. Ranjit Chandra says that in May of 1982 he and his spouse discussed the idea of such a domestic contract and that he discussed it with a lawyer. As a result of his discussions and of his doing some reading in a lawyer's library, he learned something of the law as contained in the Matrimonial Property Act. He says that in discussion between himself and Dr. Shakti Chandra, he suggested that she see a lawyer. He does not know if she ever did so although he thought that she did. Nevertheless he cannot name a lawyer whom she may have seen or a time frame in which this may have occurred. Her evidence is that she did not see a lawyer about any of these matters at any time.

17 Dr. Ranjit Chandra says that in May of 1982 he prepared a single draft of the domestic agreement which is now in evidence. It was not signed at that time and there were no further discussions concerning it for the next seven months. He says that he kept the draft in his possession, but did not copy it for Shakti Chandra. There were no further expressions of intention, however he took the draft to India in his briefcase on a visit in December of 1982. His

wife and children had preceded him to India because the purpose of the visit was to attend the marriage of her brother. One of Dr. Ranjit Chandra's ancillary purposes was to attend a conference in Manila.

18 Dr. Ranjit Chandra returned to Delhi from Manila shortly before the wedding and participated along with his wife and other family members in the wedding preparations. The evidence indicates that it was a very hectic time. There was much to be done and a lot of "running around" in the course of preparations for what appears to have been a quite substantial occasion involving numerous family members and friends.

19 Dr. Ranjit Chandra says that he and his wife made a short visit to the home of his brother in the late afternoon of December 10th which was the day before the wedding. Their children were to spend the night at that home. His brother was away but his sister-in-law Pratiba Chandra and others, including a Mr. Bhattacharya, were present. He says that while they were there, he produced the draft domestic agreement from his briefcase and suggested to his wife that they sign it, she agreed and they signed it without further discussion. Dr. Shakti Chandra says she knows nothing of the signing and that no document was produced to her or signed by her and that the event simply did not take place. That is her evidence.

20 It is of interest and some concern that rather than approaching such an important and far-reaching decision in a spirit of discussion, consultation and mutually agreed language, Dr. Ranjit Chandra produced the document for signature without notice, some seven months after its preparation. During that seven months there had been no discussion and yet it was so produced and Dr. Shakti Chandra was asked to sign it. It seems to me to have been an unusual procedure especially when the document had such potentially far-reaching consequences.

21 I can find nothing in the evidence to explain why such an important matter was broached without notice, on the eve of a stressful occasion, stressful because so much was involved in commitments and preparations for the wedding.

22 As to the agreement itself, there are other unresolved factors. One, which was raised by Dr. Shakti Chandra, is that her signature in 1982 was not the stylized form which she adopted in the fall of 1983 and continues to the present. Prior to the fall of 1983 she signed her full name as Shakti Chandra. In 1983 she felt that this was not a suitable signature and she set about developing a new one which she has used ever since.

23 Her evidence is supported by the documentation which she has placed in evidence which shows that in 1982 and prior years she signed with her full name, Shakti Chandra and not with the stylized "S. Chandra" which she has used since the autumn of 1983. The foregoing does not prove anything conclusively but it is evidence which causes concern about the purported execution of the document in December 1982.

24 Another matter which causes concern is the use in the document of the term "Family Act". As we know and as Dr. Shakti Chandra's counsel observed, the provisions for division of matrimonial property in Newfoundland began in 1979 with *The Matrimonial Property Act*,

which title was used exclusively in the courts and by the legal profession in 1982. It does seem somewhat strange that in the "mutual domestic agreement" which is before me, reference is made not to *The Matrimonial Property Act* but to the Family Act. *The Family Law Act* which is the successor Act to *The Matrimonial Property Act*, was not passed and proclaimed until the late 1980's. *The Family Law Act* was not under discussion in 1982, because at that time the profession was more concerned with how the *Matrimonial Property Act* would work rather than considering a change of its name. That entire process came much later in the decade.

25 Dr. Ranjit Chandra says that he examined other Family Acts and particularly the Act of Ontario. Nevertheless it is interesting that he said that they contemplating at the time a possible return to India or a move to the United States or to the Province of Quebec, none of which would necessarily involve the laws of Ontario. If it had been suggested that he or they, were looking at the laws of Quebec or of a state in the United States, it would be more understandable than to examine the laws of Ontario with which there appears to have been no connection. In any event the words "Family Act/other laws of the land" appear in the document. The arguments in respect of the wording are not conclusive but nevertheless the use of the words Family Act instead of *The Matrimonial Property Act* raises a concern.

26 In support of the authenticity of the document, I have Dr. Ranjit Chandra's evidence that it was signed by both parties in Delhi on the 10th of December, 1982, and it bears the signatures of Pratiba Chandra and Mr. Bhattacharya as witnesses. Mrs. Pratiba Chandra has sworn by commission evidence taken in St. John's, that she was present at the execution of the domestic agreement and that Ranjit Chandra signed the document as did Shakti Chandra and that Mr. Bhattacharya was present and signed as a witness.

27 The foregoing is evidence that the agreement was signed at that time, but it does not allay the concerns raised by Dr. Shakti Chandra evidence that she did not sign the domestic agreement then or ever, and it does not allay the concerns which are raised by the use of the word Family Act as referring to the legislation, nor the concern arising from the purported use of a signature that apparently did not begin to be used until late in the following year.

28 A decision as to whether or not the agreement was knowingly executed by Dr. Shakti Chandra would be a difficult one on a balance of probabilities but there must also be reference to another important factor namely independent legal advice.

29 The authorities are clear on the matter of independent legal advice, not only vis-à-vis domestic agreements but also in respect of other transactions such as banking documents executed by spouses. Independent legal advice means serious and thorough advice which directly addresses the issues, it does not mean simply conversing with a lawyer on the subject generally. It requires a serious consultation and a full review of the problems which are posed by any contemplated document and the course of action which is contemplated together with all of its implications. It means a serious evaluation with advice, usually in writing, as to whether or not it is advisable in the spouse's best interest to execute the document. Such advice is normally given in writing, not only for the protection of the client, but as a protection also for the lawyer involved should a misinterpretation of the advice follow.

30 The evidence is that Dr. Shakti Chandra did not consult a lawyer at any time for advice on this domestic agreement. No lawyer that she consulted has been named nor is there evidence of written or oral advice. In fact, there could not have been any advice sought or given on the document, because on the evidence of Dr. Ranjit Chandra he did not give his wife a copy of it. He put the document in his briefcase and kept it in his possession until he produced it without prior consultation in India. Thus there was no opportunity for Dr. Shakti Chandra to have shown the document to a lawyer and sought independent legal advice on its contents. Therefore, her evidence that she did not seek legal advice on this particular document is corroborated by the evidence of Dr. Ranjit Chandra because the document was in his possession at all times and was not copied.

31 There is no evidence to indicate that when the parties consulted Mr. William Marshall, Q.C., in 1985, about the preparation of wills, that they informed him of the existence of a domestic agreement and there is nothing in Mr. Marshall's notes, which have been placed in evidence, to suggest that there was in existence a mutual domestic agreement or any kind of property agreement. The documentation is silent and Mr. Justice Marshall, as he now is, though available, has not been called as a witness. The evidence is therefore that there was no independent legal advice taken by Dr. Shakti Chandra on the purported mutual domestic agreement nor on the subject of domestic agreements generally and what might be contained in them.

32 The absence of independent legal advice goes to the matter of inequality of bargaining power and thus to the validity of the agreement. It appears that there were discussions in the late 1970's and early 1980's about marital problems. There is no doubt from the evidence of both parties that Dr. Shakti Chandra, for whatever reasons, felt vulnerable and apprehensive. She felt that her husband, whether that was so or not, was more powerful than she in the relationship and she was a very troubled woman, unsure of her marriage and unsure of her relationships with the children of the marriage, particularly her two stepdaughters.

33 When I take all of these factors into consideration together with the inequality of bargaining power in the absence of legal advice, it is very clear that independent legal advice should have been a vital component of any domestic agreement between these parties. On its face the draft agreement placed both parties in the position of taking a serious risk. In it, each party was saying in effect, "if I should leave the marriage for whatever reason, without the consent of the other party, I will receive no share of the matrimonial home, the household contents and other jointly held assets". Legitimate reasons for leaving are not referred to at all in the document, thus if the leaving were to be without consent, the leaving spouse would relinquish all of the rights which the law accords to a spouse upon separation and divorce. That is at the heart of Clause No. 2.

34 I should not; in the light of the evidence of the circumstances of this marriage and its difficulties, validate the purported domestic agreement unless satisfied by the evidence that all of its implications had been fully canvassed with a qualified and competent solicitor who had given clear and unequivocal advice. In this case that did not happen. It did not happen because Dr.

Shakti Chandra did not have the document to take to a solicitor nor is there evidence that she ever saw or discussed the matter with a solicitor. In fact, the evidence is to the contrary and I am satisfied that she did not have independent legal advice or in fact any legal advice.

35 The document if produced, was produced in Dr. Ranjit Chandra's brother's house, among members of his family, without the opportunity for his spouse to consult anyone with any degree of independence who could have advised her in any respect.

36 In considering the concept of inequality of bargaining power as it applies to this case, it appears to me that whatever opportunities there were to obtain legal advice at the time of the discussions and at the time that the contract was drafted, or in the seven months prior to December 10th, 1982, the sudden production of the document on a social occasion in his brother's house immediately prior to the wedding, gave Dr. Shakti Chandra no opportunity to seek legal advice or to consider and reflect on the matter or to comprehend fully the consequences of signing such a document.

37 In my view, that failure and the lack of independent legal advice goes to the root of the validity of the purported domestic agreement and is sufficient to render it invalid and unenforceable.

38 The concept which is at the heart of the document is the antithesis of our concepts of the rights and obligations of spouses on separation and divorce as expressed in the *Divorce Act* and in the *Family Law Act*. Marriage confers a legal status which is freely and voluntarily entered into and it creates also contractual rights and obligations some of which can be abrogated by a domestic agreement. The relinquishing of rights by way of a domestic agreement can be effected only after clear and demonstrable prior knowledge and understanding of the law and the consequences of the particular agreement. In the absence of the foregoing, the spouse who leaves as in this case, has as much right to share in the matrimonial assets as the spouse who stays, or wishes the marriage to continue.

39 This purported domestic agreement was prepared not only without independent legal advice to Dr. Shakti Chandra but also without Dr. Ranjit Chandra having received legal advice as to the effects of the draft document which he prepared. There is no evidence that he showed the draft to a solicitor and asked for advice on its consequences should the parties separate for whatever reasons. Clause 2 of the agreement, if invoked would invite an unconscionable result which would be contrary in my view to the spirit of the *Family Law Act* and the *Divorce Act* and in fact is antithetical to the principles upon which separation and divorce and the division of matrimonial property are based.

40 The agreement says that "it is made in accordance with the Family Act/other laws of the land; we have full knowledge of its contents, having taken independent legal advice -- ". The evidence contradicts the foregoing and accordingly I find that the purported mutual domestic agreement is invalid and unenforceable at law.

*Order accordingly.*

END OF DOCUMENT