# SUPREME COURT OF YUKON

Citation: *C.B. v. C.B.,* 2020 YKSC 19

Date: 20200514
S.C. No.: 17–D5004
Registry: Whitehorse

BETWEEN:

C.B.

PLAINTIFF

AND

C.B.

DEFENDANT

Before Chief Justice R.S. Veale

Appearances:
Michelle Chan (by telephone) — Counsel for the Plaintiff
H. Shayne Fairman (by telephone) — Counsel for the Defendant

## REASONS FOR JUDGMENT

[1] VEALE C.J. (Oral): The wife, age 63, and the husband, age 67, met in the spring of 1991 while travelling in Chile. The wife became pregnant and they married on January 24, 1992, in Vancouver. The wife moved from Colorado to the Yukon that year and they resided together. They had two children; the first born on June 12, 1992, and the second on June 28, 1994.

[2] The wife trained as an architect but primarily worked at the home raising the children and looking after the house. The husband worked at the Government of Yukon and retired in 2017.

[3] The family assets are the family home in Whitehorse; the husband's superannuation from the Government of Yukon. There is also an issue about whether an insurance policy, the Manulife/Commercial Union insurance policy on the husband's life, is a family asset.

[4] I should indicate that I am only going to consider the insurance policy with respect to the cash surrender value.

[5] The parties agree that they had a difficult relationship but do not agree on the date of separation. The wife's position on the date of separation is the following, generally:

1. The wife decided to retrain as a teacher and was qualified to teach in the Yukon and Alaska in 2004.
2. She was unable to get a teaching job in the Yukon despite great efforts but was successful in Alaska and moved to Juneau in August 2007. As I understand it, she remains there today.
3. An important reason for her taking the Juneau teaching job was that she alleges the husband had a serious drinking problem and that he had been convicted of impaired driving.
4. The wife did not consider herself to be separated and intended to return to Whitehorse, which she did on several occasions between 2008 and 2010, including long summer visits, when she resided with the children and the husband in the family home in Whitehorse.
5. She describes family trips and staying at the family home during most school breaks, December holidays, and summers in 2008, 2009, 2010,

and part of 2011. The December holidays apparently continued to 2015. She describes these as continuing the relationship.

6. The wife initially rented a house but eventually purchased a house in Juneau that she signed an agreement on in January 2009. She took possession of the house on March 30, 2009.

7. The husband and wife continued to exchange Christmas gifts right up to 2017.

8. The husband invited her to attend a long-service luncheon and his retirement dinner in 2017.

9. The husband passed along an invitation to his sister's 60th birthday in England. Neither party was able to attend.

10. The wife filed her 2007 tax return in Canada but from 2008 onwards she filed in the United States as a head of household.

11. The wife used a joint credit card for her expenses and the children until 2017, when the husband cancelled it.

12. The wife states that separation occurred in the summer of 2011, when she and her husband had a heart-to-heart discussion while in Whitehorse with the children.

13. The wife filed a statement of claim for divorce on November 16, 2017, stating a separation date of September 12, 2008, but she amended it on April 22, 2020, to state that the separation date was September 1, 2011. I questioned her counsel about that and was advised that the wife did not

understand the significance of the separation date and chose a date that she thought her husband would agree to.

[6] The husband's position on the date of separation is as follows:

1. In 1994, when they were expecting their second child, the husband and wife began to construct the family home and completed it substantially in 1996.
2. The husband says that their relationship had deteriorated to such an extent that he was residing alone in the basement of the family home, eating his meals alone, and essentially living separate lives.
3. They did not have a sexual relationship after the late 1990s and that, I believe, is agreed upon by both parties.
4. The husband says that their relationship was so strained that he avoided conversing with the wife except as it related to the children.
5. The husband states that he always considered the separation date as August 2007, when she informed him that she was moving to Alaska to take up a teaching position.
6. The husband states that in January 2009, she decided to purchase a house in Juneau for $200,000 and she entered possession on March 30, 2009. He signed a quitclaim relinquishing any interest in the property in order that the wife could purchase it and finance it as her own home.
7. The husband states that in late 2008 or early 2009, he offered the wife $200,000 for her interest in the family home in Whitehorse. The wife acknowledged this offer but considered it to be insufficient.

8. The wife obtained an appraisal on August 17, 2010, valuing the family home in Whitehorse at $495,000.

9. The husband filed his income taxes as married in 2008, but from 2009 onwards he described himself as separated.

10. The wife and husband maintained separate bank accounts but he permitted her to use a companion Visa credit card for her expenses and the children, which he paid until he cancelled in 2017. His total payment was $347,471.97 from August 2007 to October 2017.

11. The husband says that his wife retained all her income and made no contribution to the family home after August 2007.

12. The husband claims that all visits and family trips were for the children's benefit with little communication between them, so as to avoid the conflict in their toxic relationship.

13. At no time did they discuss reconciliation.

14. The husband prepared a separation agreement in 2013, stating that the separation agreement was on or about December 31, 2007.

15. The husband notes that the wife filed a statement of claim on November 6, 2017, stating a separation date of September 12, 2008.

[7] The law on the date of separation — the *Family Property and Support Act*, R.S.Y. 2002, c. 83 — provides the following in s. 6(2):

> (2) A marriage breakdown shall be deemed to occur on
>
> . . .
>
> (c) the beginning of the parties to live separate and apart without reasonable prospect of the resumption of cohabitation;

. . .

[8] The *Family Property and Support Act* defines "cohabit" as "to live together in a conjugal relationship, whether within or outside marriage."

[9] A useful case to set out the principles of living separate and apart is *Al-Sajee v Tawfic*, 2019 ONSC 3857, although it has the limitation of being based on living separate and apart under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). However, living separate and apart is the same wording in s. 8(2) of the *Divorce Act* and s. 6(2) of the *Family Property and Support Act*.

[10] At para. 26, *Al-Sajee* sets out 26 different factors that may be considered but no one factor is determinative and a weighing of all factors is required. Clearly, the parties must physically live separate and apart and there must be an intention on the part of one or both to live separate and apart. A lack of a sexual relationship is not necessarily determinative but it is certainly a factor to be considered. Documentary evidence is relevant. Attendance at family events with the children is relevant but not necessarily determinative.

[11] There are further generally accepted considerations found in *M. v. H.*, [1999] 2 S.C.R. 3, as set out in *Al-Sajee* at para. 29. They are divided into categories of Shelter, Sexual and Personal Behaviour, Services, Social, Societal, Support (Economic), and the Children.

[12] As to the wording of "reasonable prospect of the resumption of cohabitation", *Al-Sajee*, at para. 37, says that there are two determinations to be made: (i) the date of separation; and (ii) the point at which there was no reasonable prospect of the resumption of cohabitation.

[13] Paragraph 37 in *Al-Sajee* further states:

> 37 . . . The notion of "reasonableness" is at the heart of this analysis. Half-hearted suggestions or discussions about possible reconciliation will not necessarily move the valuation date forward in the absence of sincere action by the parties to put their relationship back on track (*Strobele*, at para. 32). As Beckett J. stated in *Torosantucci*, a reasonable prospect of resumption of cohabitation "must be more than wishful thinking on the part of either party. There must be more than residual affection that may linger by one or both of the parties. The Act does not speak of a "prospect" of reconciliation but a "*reasonable* prospect." He added that in order to find that there is a reasonable prospect of resumed cohabitation, "there must be some indication or step taken by both of them in that direction" (see also *Rosseter*, at paras. 57-58; *Tesfatsion*, at para. 56). A sincere desire on the part of one party to resume cohabitation and efforts by that party to advance this objective will not generate a reasonable prospect of resumed cohabitation if the other party has no mutual interest in exploring this possibility. . . . [emphasis already added]

[14] The husband and wife clearly had a very different recollection of their activities after August 2007, when the wife moved to Juneau with the children and the husband remained in the family home in Whitehorse.

[15] However, I consider the following facts to be determinative of the date of separation:

1. The wife, in her statement of claim filed November 16, 2017, with legal advice, stated that they had stopped living together on September 12, 2008. The statement of claim was amended on April 21, 2020, stating that the separation date was September 2011.
2. The wife moved to Juneau, Alaska, in August of 2007 and did not resume cohabitation with the husband, except for visits with the children. The wife states that she was continuing cohabitation. The husband says that he

was interested in seeing the children and did not care whether the wife was included in the trips or not. I do not find any evidence of a discussion of resumption of cohabitation or evidence of continuing cohabitation.

3. The wife filed income tax in 2008 in the U.S. as “head of household”. By 2009, the husband was filing as “separated” for his Canadian income tax.

4. The wife purchased a house in Juneau in the spring of 2009 for $200,000 and the husband signed a quitclaim so that the wife was the sole owner and mortgagor. She made all the payments on her house and the husband made all the payments on the family home that he occupied since August 2007.

5. The husband offered the wife a settlement offer of $200,000 in late 2008 or early 2009, which the wife rejected as insufficient. The wife also obtained an evaluation of the family home in Whitehorse on August 17, 2010, which was valued at $495,000, and this formed the basis of the husband's draft separation agreement in 2013. That draft agreement had a separation date of December 31, 2007.

6. There has been no sexual relationship between the husband and wife since approximately 1999. I find that they had a toxic relationship from the husband's perspective and based primarily on the wife's view that the husband had a very serious drinking problem. On the other hand, I must commend the husband and wife for maintaining a respectful relationship with the children after the wife moved to Alaska, but I find that there was

> no reasonable prospect for a resumption of cohabitation after the wife's move to Alaska and continuing there into her second year.

[16] I therefore order that the date of separation is September 12, 2008, the date initially stated by the wife in her statement of claim filed in 2017.

**Manulife/Commercial Union Insurance Policy: a family asset**

[17] As I indicated previously, I am just considering the issue of the cash surrender value in this analysis.

[18] Turning to the husband's Affidavit No. 1, filed May 4, 2020, paras. 64 through 77 reads as follows:

> 64. On February 21, 1962, my father, [A.J.B.], purchased a life insurance policy on my life from the Commercial Union Life Assurance Company Ltd. Attached hereto and marked as Exhibit "F" is a copy of the original Commercial Union policy.
>
> 65. The basic life insurance amount was $25,000.00 and this was a full participating whole life policy. The basic annual premium was set at $271.75 and was due on February 1st each year, during my lifetime.
>
> 66. Contrary to paragraph 44 of [C.B.'s] Affidavit, she has never been the named beneficiary of the insurance policy, and it has always been my "estate". That has not changed at any time.
>
> 67. As this is a whole life, fully participating closed series policy, it earns annual dividend payouts in the form of additional insurance coverage, which results in the value of the policy increasing.
>
> 68. On November 19, 1969, my father signed an unconditional assignment for value letter transferring right, title and interest in the policy to myself. This designation was filed and recorded with Commercial Union on December 9, 1974 when I was 21 years old.

69. My father had taken out separate whole life insurance policies on me and my three siblings. The policies were transferred to each of us as a form of inheritance from our father.

70. No annual premiums on this policy have been directly paid for by me, the annual premiums are paid for by the policy itself.

71. In April, 2001 the Commercial Union Life Assurance Company became a subsidiary of the Manufacturers Life Insurance Company (Manulife).

72. In 1995 I was advised by my father that there was a policy loan option with respect to this policy. Prior to the policy being transferred to me, my father had exercised the loan option, and he advised me that dividend payouts on the policy far exceeded the interest payments and premium amounts, which allowed the policy value to continue to increase. He advised me that I would similarly have a loan option against the policy.

73. In January, 1996 I withdrew $48,780.21 from the life insurance policy to assist with the rebuilding of our Family Home. I have not withdrawn or made any other additional loans from the policy since that amount in 1996, other than annual loans and repayment up to the same amount to reduce tax liability.

74. At the time that I took out the initial policy loan, Canada Revenue Agency had changed its position and deemed life insurance policy loans to be taxable in the year taken and repayments tax deductible. As a result, each year I would get a very short term loan to pay back the previously loan in late December, and then reborrow the same amount early in January of the next year to reduce my tax liability.

75. Attached hereto and marked as Exhibit "G" is a copy of the annual policy statement prepared January 9, 2008, the first such statement after our separation in August, 2007. This statement showed that the amount payable upon my death at that time would be $592,965.00. If the policy were cashed out, the cash surrender value would only be $131,277.68.

> 76. Since our separation, I have repaid the loan amount that was taken from the policy to build the Family Home at that date.
>
> 77. I acknowledge and agree that the amount taken from the policy and invested in the Family Home should be considered a family asset, as that portion of the policy was used for a family purpose, however, the remaining balance of the value of the policy should be excluded as a family asset, as that portion was never used for any family purpose and effectively represents an advance in my inheritance from my now deceased father.

[19] I find that the loan of $48,780.21 for the building of the family home was used from January 1996 to at least 2008.

[20] Counsel for the husband relies upon *Lamb v. Lamb*, 2007 BCSC 1466 to conclude that the cash value of the insurance policy is not a family asset.

[21] The facts in the *Lamb* case are important. The parties began to cohabit in 1981 and married in 1986. The wife went to Australia to look after her parents in 2003 and met another man. When her parents died, the wife received an inheritance of $200,000. She returned to Canada and her husband in 2004. In 2005, the husband heard about her relationship with another man in Australia and ended the marriage.

[22] One of the issues in the *Lamb* case was whether the wife's inheritance was a family asset. The Court found it was not. The funds had always been in an account in Australia and although they talked about it as a fund for retirement, that discussion did not convert it into a family asset. Significantly, there was no suggestion that either the capital or any income had been used for a family purpose.

[23] It is also clear that discussions about whether or not it would be applied to the family took place on the eve of separation rather than during the marriage.

[24] It is also a fact that the wife's inheritance was received shortly before the separation took place.

[25] In my view, the *Lamb* case stands for the principle that mere discussion of the use of an inheritance as a family asset without any action or steps to that end is not enough to make it a family asset. Thus, the discussion alleged by the wife in the case at bar — the insurance policy was discussed as a safety net — does not make it a family asset.

[26] However, it is important to note that the Yukon has a broader definition of "family asset" than the British Columbia *Family Relations Act*, R.S.B.C. 1996, c 128. In the British Columbia *Family Relations Act*, s. 58(2) states that:

> Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

[27] However, s. 4 of the *Family Property and Support Act*, S.Y. 2018, c. 8, reads:

> "family assets" means . . . property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation, or for household, educational, recreational, social, or aesthetic purposes, and includes . . .

[28] Breaking s. 4 of the *Family Property and Support Act* into its constituent elements, I consider that the result is that the cash surrender value of the policy was a family asset:

1. The insurance policy was owned by one spouse, the husband; and
2. For the period of 1996 to at least 2008, the loan of $48,780.21 was ordinarily used or enjoyed by both spouses and the children for shelter while they were residing together.

[29] In my view, a Court may give a narrow interpretation to the words "ordinarily used or enjoyed" to suggest that if there is only a single payment, it would not suffice to make the cash surrender value of the insurance policy a family asset.

[30] However, in this case, the single payment was not for "ordinarily used" household purchases but, rather, a significant investment in the new family home “ordinarily enjoyed” by all members of the family from 1996 forward to the date of separation. The husband's inheritance of an insurance policy from his father still has a significant cash pay out on his death and that is not part of this decision. He retains the ownership of the insurance policy with respect to the cash value on his death. In my view, it is no answer to say that the sum invested is now realized in the equity of the shared family asset, the family home.

[31] I conclude that the cash surrender value was ordinarily enjoyed for a period of approximately 12 years for shelter and the sum of $131,277.68 is a family asset.

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VEALE J.