# COURT OF APPEAL FOR YUKON

Citation: *Hedmann v. MacNeil*
2012 YKCA 11

Date: 20121109
Docket: CA11-YU680

Between:

**Cynthia Lynn MacNeil**

Respondent

And

**David George Clinton Hedmann**

Appellant

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hinkson
The Honourable Mr. Justice Harris

On appeal from: Supreme Court of the Yukon Territory, May 27, 2011
(*Hedmann v. MacNeil*, Whitehorse registry No. 09-D4165)

## Oral Reasons for Judgment

Appellant appearing on own behalf:

Counsel for the Respondent: D. Hoffman

Place and Date of Hearing: Whitehorse, Yukon Territory
November 9, 2012

Place and Date of Judgment: Whitehorse, Yukon Territory
November 9, 2012

COURT OF APPEAL
Cour d'appel
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[1] **HARRIS J.A.**: This is an appeal of a judgment in which the trial judge upheld the validity of a marriage agreement dated July 7, 2006 that dealt with the division of property in the event of marital breakdown. In the event that he was wrong in his conclusion that the marriage agreement bound the parties, the trial judge went on to consider how he would apportion the assets under ss. 6 and 13 of the *Family Property and Support Act*, R.S.Y. 2002 c. 83. The principal assets forming the subject matter of the trial were two properties, although other assets were also involved.

[2] The trial judge identified the existence and validity of the marriage agreement as being very much at issue in the case. Later, he described the question whether or not the marriage agreement was revoked either by the actions of the parties or revoked by its destruction, or revoked by further oral agreement as very much in issue. At para. 32 of the reasons for judgment the trial judge recites Mr. Hedmann's position that the marriage agreement had been vacated by the actions of the parties. He says:

> [32] He states that on numerous occasions, after the end of his bankruptcy, he requested of MacNeil that she set aside the Agreement. He testified that she verbally consented to this. Additionally, his sister, Caroline Cohen testified that after separation, in October 2009, she had a discussion with MacNeil and MacNeil at that point indicated that she had lied to Hedmann about cancelling "the pre-nup" but still intended to get rid of the "pre-nup" and was intending to instruct her lawyer to do so.

[3] The judge then analyzed the evidence, observing:

> [33] It seems clear on the evidence that on a number of occasions, particularly as their relationship was breaking down and as they were separating, MacNeil in an attempt to salvage the relationship with Hedmann, offered in discussions to set aside the Agreement. This however was never done. On every occasion that it appeared to be discussed, MacNeil backed away from cancelling the Agreement once she had a chance to think on her own.

> [34] The Agreement, in itself, has language which talks of a variation of the Agreement. This language requires that any variation to the Agreement must be done in writing in a similar manner to which the Agreement was executed.

[4] He stated his conclusions on this issue at para. 36:

> [36] I concluded that this Agreement is binding between the parties. Although there was some discussion of "setting aside" the Agreement, this discussion was done in the context of attempting to reconcile their relationship. The parties entered into this Agreement with full knowledge of its consequences. One of the consequences of the Agreement was that it was binding on the parties, it set up a separate property regime, and that the only way to vary the Agreement was to do so in writing. There is no suggestion in the evidence that any "pen was put to paper" to vary this Agreement in writing, as the Agreement requires.

[5] Mr. Hedmann points out that Exhibit 19 at trial was a written document signed by both the parties and witnessed by Ms. MacNeil's two sons dated April, 2009. This, he argues, demonstrates that the parties did put pen to paper to vary, modify or possibly revoke the marriage agreement. There is, he argues, no dispute that Ms. MacNeil signed the document and evidence about it and the circumstances under which it was executed and its purpose was given at trial.

[6] On my review of the evidence, it is apparent that the document was signed in the context of discussions about revoking or changing the marriage agreement. On its face, it identifies that the two properties were registered in Ms. MacNeil's name because of Mr. Hedmann's bankruptcy. It then goes on to state that the parties are joint tenants of the two properties, that Ms. MacNeil has a specified, pre-marriage interest in one of the properties, but that the couple have an equal interest in the other. This April 2009 document describes the parties holding property on terms inconsistent with the marriage agreement. If it is valid, it could be that the April 2009 document revokes or amends the marriage agreement. Ms. MacNeil contended that the document was not effective because she signed it under coercive pressure from

Mr. Hedmann. The judge did not address this issue and made no explicit reference to the April 2009 document in his judgment.

[7] His comment that, "There is no suggestion in the evidence that any pen was put to paper," suggests that the trial judge may have simply overlooked this issue when he came to consider the case. The evidence is that pen was put to paper. The issue whether the April 2009 document did affect the validity of the marriage agreement was not simply a live issue; it was critical to the question whether the marriage agreement continued to define the rights between the parties. The issue is a complex one involving questions of fact and questions about the formalities and conditions of a binding variation agreement.

[8] It is evident that the trial judge was alive to the importance of this issue during the trial. He asked Ms. MacNeil questions about the circumstances under which she signed it. He suggested that Ms. MacNeil's two sons, who had witnessed the document, be called to testify and questioned them about their witnessing the document. He appeared to acknowledge that he would be drawing the required legal conclusions from the evidence and challenged Mr. Hedmann's apparent view that the April 2009 agreement was binding, although the marriage agreement itself was not.

[9] In her closing submissions, Ms. MacNeil argued that she had signed the April 2009 document under undue influence and duress. Mr. Hedmann also expressly relied on the April letter in his written submissions to support his argument that the marriage agreement was void.

[10] While a trial judge need not grapple with every piece of evidence or every argument advanced by the parties, reasons, read in conjunction with the record, should reveal the path the judge took to reach a conclusion on the matter in dispute. Counsel for Ms. MacNeil argues that when the record and the reasons are read together, the path the judge took to reach a conclusion on this issue is revealed. She argues that the trial judge did not overlook the issue of the validity of the April document. She points first to a comment by the trial judge made in Mr. Hedmann's

case in which he questioned Mr. Hedmann's position that while the marriage agreement was invalid, the April agreement was valid, assuring that the judge concluded that the April agreement was invalid. She then connected that comment to passages in the reasons for judgment, which I have quoted above, about the conditions for and manner of varying the marriage agreement that she submitted demonstrated that the trial judge implicitly concluded that the April 2009 document was legally ineffective to vary, amend or revoke the marriage agreement.

[11] I am unable to accede to this argument. The comment of the trial judge does not express the view that the April 2009 document was invalid; rather, it reflects skepticism about the plausibility of Mr. Hedmann's argument that the marriage agreement was invalid. Moreover, I cannot read the reasons for judgment as implicitly considering the 2009 document and concluding that it is invalid. In my opinion, the reasons do not address the issue at all. The trial judge appears to have forgotten, ignored or misconceived the evidence about the April 2009 document in a way that affected, or may have affected, his conclusion.

[12] In my opinion, the issues surrounding the signing of the document in April 2009 were critical to resolving the question whether the marriage agreement remained binding on the parties. To answer that question, the trial judge had to undertake some analysis of the evidence and find facts relating to whatever legal effect, if any, the document may have had. The trial judge did not undertake that analysis. The reasons, when considered in the context of the record, do not reveal the path the judge took to reach his decision.

[13] In any event, the trial judge's failure to make findings on a key disputed issue, namely, the continuing validity of the marriage agreement in the face of the April 2009 document, prevent us from determining the correctness of his decision. This is an error of law that requires us, in my opinion, to allow the appeal and order a new trial.

[14] In the circumstances of this case, we are not in a position to make our own findings of fact and then draw legal conclusions from them. I would allow the appeal,

and direct that there be a new trial on all issues. Accordingly, it is unnecessary to deal with the fresh evidence motion in this appeal.

[1] **GROBERMAN J.A.**: I agree.

[2] **HINKSON J.A.**: I agree.

[3] **GROBERMAN J.A.**: The appeal is allowed and a new trial is directed.

D Harris JA

The Honourable Mr. Justice Harris