SUPREME COURT OF YUKON

Citation: *AJF v MLF*, 2014 YKSC 58

Date: 20141002
S.C. 13-D4592
Registry: Whitehorse

BETWEEN:

AJF

Plaintiff

AND:

MLF

Defendant

Before the Honourable Mr. Justice J. Groves

Appearances:
Malcolm E.J. Campbell — Counsel for the Plaintiff
H. Shayne Fairman — Counsel for the Defendant
Kelly McGill — Child Advocate

REASONS FOR JUDGMENT

[1] GROVES J. (Oral): This is an application in a family law proceeding in which the plaintiff wife seeks payment by the defendant husband of legal costs of the plaintiff wife as ordered by a judge from time to time.

[2] Initially pursuant to this request the plaintiff, who I will refer to as "the wife", requests that the husband, the defendant, who I will refer to as "the husband", advanced the sum of $10,000 to allow her to retain the services of Mr. Ian Maxwell, formerly of Vancouver, who is an experienced family law lawyer, who I understand has some recent experience in litigating complex family law matters in the Yukon.

[3] The facts are that the wife is 51 years of age, as is the husband. They have been married for approximately 20 years. They have two children, ages 17 and 14. The action was commenced by way of a divorce proceeding and the divorce is sought, perhaps unusually, on the basis of physical and mental cruelty. These allegations in the original claim are of course allegations only and pleadings essentially and unproven, but it is interesting in that they are somewhat prophetic as to what transpired in this matter.

[4] The allegations of cruelty include the wife's claim that the husband threatened to burn down the house and hire a team of lawyers to ensure that she does not get a penny if she leaves him. The allegations of cruelty include also threats to move money offshore.

[5] In regards to another aspect of the alleged cruelty, it is alleged by the wife that when the husband is angry with her he stops paying bills, including the heat, internet, and providing money for groceries. Essentially, when he does not like what she does, that is his reaction. Additionally, she claims in the initiating proceeding as a ground of cruelty that it is the husband's pattern to put assets in company names.

[6] These of course are allegations in pleadings and they are untested at this point, but these allegations made prior to service of the proceedings on the husband, as I have noted, are almost prophetic as to what has happened in this family law proceeding to date.

[7] The affidavit evidence of the wife in regards to the husband is, however, particularly telling. It is sworn evidence of the wife. And the attested to actions of the husband since November 18, 2013, a time at which an early intervention order was served upon him, I characterized at the hearing as the husband's waging of economic

warfare. Upon reflection and reviewing the materials, I am satisfied that those initial reactions are well borne out in the evidence.

[8] There are several points which ground this conclusion, most notably of which relates to the husband divesting himself of assets. There are documents attached to the wife's number 2 affidavit. I will stop here to say that there appear to be two number 2 affidavits and I am referring to the one which was sworn on December 18, 2013. In that affidavit number 2 documents are provided which disclose the following:

[9] On November 18, 2013, a search was done of the Whitehorse Mining Recorder's Office and it is noted on that date that the husband is the owner of numerous mineral claims.

[10] On November 19, 2013, an emergency intervention order is obtained and I am advised it is served on the husband on that date.

[11] On November 20, 2013, the original Statement of Claim is filed in the Supreme Court of Yukon, and in that Statement of Claim there is a claim for pending litigation, a CPL, requested over the mining claims noted in the Whitehorse Mining Recorder's Office report.

[12] By November 21, 2013, the CPL is sent to the Whitehorse Mining Recorder's Office for registration and then counsel for the wife is advised that it could not be registered because the mineral claims had been transferred. In fact, the evidence suggests that on November 20, 2013, the day after the husband was served with the emergency intervention order, he transferred all of his claims to a company called Constellation Mines Ltd.

[13] I note, and it is significant to me, that despite this clear evidence in the December 18, 2013 affidavit and the documents attached would show that on November 18, 2013, the disputed mineral claims were in the husband's name, he still swears, in para. 50 of his affidavit of February 13, 2014, approximately two months later, the following:

> ... The claims were transferred at the Mining Recorder's Office prior to the Emergency Intervention Order being served on me and I had no prior notice that it was going to be served.

[14] That is simply not true. I have concluded it is a deliberate lie. It is not a slight historical error. This gives me considerable pause in assessing the husband's evidence. He cannot, I have concluded, be believed, and I prefer the evidence of the wife when their evidence conflicts.

[15] In her affidavit number 2, and this is a different affidavit number 2, sworn March 28, 2014, the wife claims that she was informed by the husband that the claims involved were worth $4 million. To date, other than a general denial of the allegations of the wife, the husband has not denied specifically that claim.

[16] The husband says that he transferred these claims prior to the early intervention order to this company Constellation because they had advanced him funds to pay $350,000 in a negotiated settlement of a lawsuit. He apparently has transferred $4 million worth of assets to satisfy a $350,000 advance. He says these funds had been advanced. There is attached to one of his affidavits a Memorandum of Understanding which is purportedly dated February 12, 2013. This document is relatively straightforward and simple when one considers the amount of money involved. It perhaps was not drafted by lawyers; I cannot conclude that. Constellation Mines Inc.

appears to have four parties, of which the husband and his company Livingstone Placer Ltd. are one. The agreement requires him, in order to get the $350,000 transferred to him, to assign, as indicated, these mineral claims, which the evidence before me suggests are worth $4 million. It is clear that the money, according to the evidence of the husband, if it can be believed, was advanced in the absence of these claims being transferred because they were not transferred until November and it seems clear that the advances in order to pay this obligation were for the most part made prior to that date.

[17] As for the document dated February 12, 2013, and all that being said about it, it is of significance to me that despite an obligation in this agreement to transfer these mining claims in February, March, April, May, June, July, August, September, October, and half of November 2013 the husband did not transfer these claims. He only transferred them after he was served. Suffice it to say this, in my view, is indicative of someone correctly described by his estranged spouse in her affidavit and in the initial pleadings someone who is prepared to dispose of assets to prevent a division. That, in my view, constitutes what I have characterized as economic warfare.

[18] There is a second aspect of the economic warfare. The wife has always resided in the family home and for the most part she has resided there since separation with the children. The children are there now. They have resided with their father over the summer while he was in camp. As an aside to the issue before me, the wife alleges that the husband has manipulated the children such that they blame her for the separation. Their blaming the mother is clearly set out in the text messages they had sent to her while they were in their dad's care. But getting back to the home, the home

appears to have been a significant asset, purchased by the parties some time ago, and perhaps the only asset in the wife's name. The corporate assets do not appear to be in her name in any capacity.

[19] In 2003, the wife says reluctantly but nonetheless, a mortgage was placed on the family home in the amount of $113,000 to secure some funds advanced by a friend of the husband, Mr. Tom Wood. I am advised that the interest rate on this mortgage is high and yet no explanation is provided as to why a traditional bank mortgage at the current low interest rates and the low interest rates that have existed essentially since 2003 could not have been obtained. I am further advised that approximately one year ago, coincidentally close to the time of separation, the husband stopped making the mortgage payments to his friend Tom Wood.

[20] Sometime after the separation the husband agreed to pay a relatively modest amount of spousal support, a thousand dollars a month, and apparently agreed to on the basis that the wife would be responsible for the utilities on the family home. I do not doubt that such an agreement would not have been agreed to by the wife if she was aware that the husband was not making mortgage payments on the home. In any event, whatever happened between the parties, the husband, despite his income and an ability no doubt to pay something towards the family home, which his children for the most part have resided in, stopped making or did not make the mortgage payments. The house is now threatened by foreclosure.

[21] I note in regards to this matter that it is unusual and perhaps suspicious that a mortgage of the one asset owned by the wife would be held by a friend of the husband and would be held at a high interest rate when no explanation is provided as to why it

was necessary for high interest to be paid. In any event, the asset is being put at risk by the actions of the husband. I note he lives in a camp for much of the year. He earns $9,000 a month. He does not appear to pay taxes, has not for several years at least. It is my view that the husband's action or lack thereof in regards to the family home, diminishing an asset and potentially putting at risk an asset, the asset being one if not the only assets in the wife's name, is a second example of economic warfare.

[22] A third example of economic warfare, and this one is in fact one in which there is absolutely no defence for the husband, is his decision to unilaterally impose upon the wife a tax liability.

[23] A bit of history: The parties have not filed tax returns for some time. The husband owns a company called Livingstone Placer Ltd. A few months after the separation, in fact on January 17, 2014, the husband caused Livingstone Placer Ltd. to issue T4 slips to the wife for, in 2010, the sum of $34,350, with no tax deducted, and in 2011 the sum of $27,450, again with no tax deducted. Of course if this stands, that imposes on the wife, by the actions of the husband, a large tax liability. Again, there is no other word for it other than economic warfare.

[24] The wife admits that she did some work for the company and received a small amount of money in the years in question. That is asserted to in her affidavit dated March 28, 2014, and again it is not expressly denied by the husband.

[25] In addition to these three egregious acts, the wife also alleges that the husband has threatened – and this is attested to in an affidavit – to spend $300,000 on a lawyer to ensure that she gets nothing. Additionally, he does not pay his support on time, no

doubt making it difficult for the wife to budget, to pay her expenses on her modest means.

[26] What this has to do with the wife's application is, I believe, obvious. The husband has chosen a litigation path of disposing of assets, unfairly imposing financial obligations on the wife, and threatening security of the assets in the wife's name, particularly the family home. He has chosen not to be forthright but has chosen a path that on the evidence before me can only be described as hostile and disreputable. The wife has modest income as a hairdresser. The husband controls large corporate assets, it appears; he is alleged in the evidence to have gold which is readily convertible by him to cash, and he lives in a realm in which that appears to take place. It is clear to me that he is taking the approach that he will use his economic advantage of control of assets as leverage to not only punish but to destroy the wife's claim.

[27] With those facts in mind I turn to the law. I was not provided nor could I find case authority in the Yukon for an application such as this. Though I was not pointed to this matter by counsel, my review of Rule 63 of the Supreme Court *Rules of Court* in the Yukon, in sub (26), under the heading "Security for costs", I note the following:

> (26) The court may, in a family law proceeding, make an order for payment of, or for security for, the costs of a party, including interim or advance costs in appropriate cases.

[28] In terms of the law that was presented, the counsel for the wife relies on the Supreme Court of Canada decision, the principal decision, in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71. In that case the Supreme Court of Canada majority recognizes the discretionary power of courts to award what they characterized as interim costs. The test as articulated by the Supreme Court in that case is, as suggested by counsel, threefold: a question of impecuniosity, a meritorious

case, and a case falling within the narrow class of appropriate cases. I note the dissent comments that one of the noted or appropriate classes of cases is matrimonial litigation where some liability is presumed.

[29] Defence counsel has provided a number of cases from various jurisdictions on this issue, all cases in which the court did not make orders for interim costs or advances to fund litigation. I note, however, with respect, that those cases are not complex property litigation, not cases in which, as I have characterized it here, litigation has been conducted by the husband in an aggressive and egregious manner, with a clear effort after service to dispose of or devalue assets.

[30] Additionally, being a B.C. judge, I am aware of a number of B.C. court decisions which have allowed, under the British Columbia *Rules of Court*, as they then were, and under the *Family Relations Act*, R.S.B.C. 1996, c. 128, in British Columbia, as it then was, advances to fund litigation.

[31] I will start off by noting that in British Columbia there are traditionally two legal bases on which advances and/or sale of property pending final court determination are made. The first of those is what was in British Columbia Rule 46(1) and what is in the Yukon *Rules of Court*, the Rules of the Supreme Court Yukon Rule 46(1). I rule with exactly the same language in the Yukon as it was in British Columbia, or so I believe, which says:

> Where in a proceeding it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

[32] That is the traditional rule in British Columbia, a rule which appears, as I have said, identical in the Yukon, which has allowed the courts in British Columbia to make interim sales and divide property on the interim based on their sale. That is not exactly what is requested here, but it is a foundation for many of the decisions which I will soon cite.

[33] What is the fundamental foundation for interim sale of property in British Columbia was s. 66 of the *Family Relations Act*, and that, when compared with s. 11 of the *Family Property and Support Act*, R.S.Y. 2002, c. 83, of the Yukon, I note very similar language. Rule 66 of the *Family Relations Act* says in part that the Supreme Court "may make orders that are necessary, reasonable or ancillary to give effect to the determination," and the determination referred to there is determination of ownership under the *Family Relations Act*.

[34] Section 11 of the *Family Property and Support Act* of the Yukon says :

> The Supreme Court may determine any matter between spouses respecting
>
> > (a) the division of family assets or other property if a marriage breakdown has occurred; ...

[35] And then going to the latter part of the paragraph:

> > and the Supreme Court may make any orders as are necessary or reasonable to give effect to its determination.

[36] As indicated, the former s. 66 of the *Family Relations Act* was the foundation in British Columbia for interim advances of property to parties involved in complex litigation. Under that provision there was a two-part test established as to whether property may be distributed in advance pursuant to s. 66 of the *Family Relations Act*.

The case of *Jiwa v. Jiwa*, 1992 B.C.J. No. 3024, is a case commonly cited and sets out a twofold test for interim property division pursuant to the *Family Relations Act*. In particular the Court is directed to consider: 1. whether the advance is required to mount a challenge to the other spouse's position at trial, and 2. whether the advance or payment on an interim distribution basis jeopardizes the other spouse's position at trial.

[37] In *Pierce v. Pierce*, [1994] 2 B.C.L.R. (3d) 31, the following citation is noted as a focus of the *Jiwa* test and the requirement to consider equity. Paragraph 17 of *Pierce* says as follows:

> Thus the focus in ordering an advance is not whether it is required for one spouse to fund his or her lawsuit against the other, but rather whether, in order to make a determination regarding assets, as contemplated by s. 52 of the *Family Relations Act*, such an advance is, in equity, required. Or to characterize Mr. Justice Melvin in the case *Erskine v. Erskine*, (1991) 31 R.F.L. (3d) 273, whether it would be inequitable not to do so. (as read)

[38] These cases, *Jiwa*, *Pierce*, and *Erskine*, not only allow advances for specific requests, such as business valuations or appraisals, but they also authorize advances for the conduct of litigation generally.

[39] Getting back to the twofold test set out in *Jiwa* and applying it to the facts here. The wife is facing an aggressive battle with an estranged spouse who has disposed of assets, put assets in jeopardy, and by his action caused her indebtedness to income tax authorities for income I find she has not received. And she also faces a spouse who I accept has threatened to spend $300,000 to defeat her claim. She has, I accept, a modest income of $12,000 annually and spousal support of a similar amount. She has had health problems and that has, I find, affected at least in part her ability to earn the modest income she does.

[40] I accept the wife's assertion that the husband has said that the assets he transferred after being served with an order in a family law proceeding in the Yukon in November of 2013, the assets were worth $4 million. He says he transferred those assets pursuant to a nine-month-old agreement, but I have already said how much I believe of his statement in that regard.

[41] Frankly, considering what the wife is facing, the request for the litigation advance is at this point modest in light of the battle that she has before her, which will no doubt, if the husband continues in the manner he has chosen, continue to be a difficult and aggressive family litigation.

[42] One does not have to be a family law lawyer to know some of the options that need be explored in this case. Clearly there is some question about this mortgage to Mr. Wood. Is that a fraudulent preference or a fraudulent conveyance of some sort? Additionally; is the transfer to Constellation a fraudulent conveyance; need they be joined in the proceeding. There is obviously an issue about garnering the evidence about the husband's apparent unusual dealings in gold and his ability to operate outside the traditional financial system of money by using gold, collecting gold, and selling gold for cash. There is the requirement of tracing of assets and the suggestion in the materials that in the past when the husband has been challenged about assets, the efforts he has gone to to hide what he owns, including an effort of having decals placed on equipment so it could not be seized so it appeared to be owned by other persons. Clearly there will have to be a number of personal investigations into those associated in the past in business dealings with the husband, including, no doubt, Mr. Moriarti and

no doubt the wife's brother, who, it appears, has much to say about how the husband operates his business.

[43] This is a battle royale, a battle which has only been made more difficult by the deceptive and egregious actions to date of the husband. I am satisfied, based on my reading of Rule 63(26) that the *Rules of Court* in the Yukon allow expressly an interim distribution or advanced costs in appropriate cases. It would seem to me that the test in *Jiwa* is an appropriate test to consider here, whether the advance is required to mount a challenge to the other spouse's position at trial and whether the advance or payment or interim distribution jeopardizes the other spouse's position at trial.

[44] In terms of the second aspect of the test, I cannot make a determination, because no evidence has been provided by the husband, as to whether or not he would be at jeopardy. I simply do not know, despite this litigation having gone on for some 10 months, what the husband is saying his assets are. Clearly in the circumstances where it is impossible to determine if he would be at jeopardy as a result of an interim distribution, the Court should consider more effectively the first branch of the test. I am beyond satisfied that the wife has a battle ahead of her and an advance of funds is clearly required to mount a challenge to the husband's position at trial, which appears to be that he is of little or no value and that she is entitled to little, if anything.

[45] What I do know about the husband based on the evidence before me is this, that he is now a quarter owner of a mining claim and the assets that he transferred to this mining operation, this Constellation group, which had a value of $4 million, a quarter of which is at least is still $1 million. It is very questionable whether one would transfer $4 million worth of assets to satisfy a $350,000 advance. But even accepting that that

is true for the sake of an analysis, I am satisfied he has still a million dollars equity in that joint venture, if that is what it is, and as such a modest interim distribution of $10,000 as requested would not jeopardize his position at trial.

[46] As for his ability to pay, I do not know that there is much I can say about that. I consider again the misleading evidence of the husband, his clear attempt to mislead in his affidavit. In response to the application for advance of funds, there does not appear to be much, if any, information provided about his assets, other than a general non-believable plea about his inability to pay anything towards his wife's litigation costs. Just like the bulk of the husband's suggestion in his affidavit, I believe that statement to be worth nothing. He has the ability to pay.

[47] I am directing that the husband is to provide by October 15, 2014, a cheque payable to Ian Maxwell's firm in trust in the amount of $10,000, and that the wife is entitled to advanced costs for the purpose of this litigation generally and it will be up to Mr. Maxwell to make further requests at further times and justify those requests based on a litigation plan and whatever information he has been able to achieve to date.

[48] On the issue of costs, sir.

[SUBMISSIONS BY COUNSEL RE COSTS]

[49] THE COURT: All right. I will order the costs of $1250 payable forthwith to the wife’s counsel.

[50] MR. FAIRMAN: My Lord, if I --

[51] THE COURT: Sure.

[52] MR. FAIRMAN: -- if I could address one --

[53] THE COURT: Yeah.

[54] MR. FAIRMAN: -- one point, which would be, and I do so with some trepidation, as to the timing of the payment. MLF works out of town at a camp some distance from Whitehorse. He will need to make the arrangements necessary for these funds to be paid. I am not sure that he is going to be able to -- you have made your order that he is to pay $10,000 and I guess I'm looking for a little bit more time for him to pay. He would normally be back in town for the winter by early November, so I am asking that perhaps he be given one further month to pay that. I am hopeful that Mr. Maxwell, with the knowledge that this order has been made, may be able to initiate -- may be able to initiate matters.

[55] THE COURT: I am not prepared to give him any time.

[56] MR. FAIRMAN: Okay.

[57] THE COURT: He is clearly using time to his advantage and it's time that time worked to his disadvantage. He should be happy with the 15 days.

[58] MR. FAIRMAN: Very well, My Lord.

[59] THE COURT: Okay. Thank you.

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GROVES J.