COURT OF APPEAL OF YUKON

Citation: *MacNeil v. Hedmann*,
2015 YKCA 6

Date: 20150206
Whitehorse Docket: 14-YU734

Between:

Cynthia Lynn MacNeil

Respondent
(Plaintiff)

And

David George Clinton Hedmann

Appellant
(Defendant)

Before: The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Schuler
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of Yukon, dated March 18, 2014 (*MacNeil v. Hedmann*, 2014 YKSC 16, Whitehorse Docket 09-D4165).

The Appellant appeared on his own behalf

Counsel for the Respondent: D.P. Hoffman

Place and Date of Hearing: Whitehorse, Yukon
November 20, 2014

Place and Date of Judgment: Vancouver, British Columbia
February 6, 2015

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurred in by:
The Honourable Madam Justice Schuler
The Honourable Mr. Justice Goepel

Summary:

This appeal considers duress in the context of an agreement to amend or supplant an existing marriage agreement and the extent to which the decision of the Supreme Court of Canada in Hartshorne v. Hartshorne applies in Yukon. Held: appeal dismissed. There was ample evidence to support the trial judge's finding that a pre-nuptial agreement was valid and not supplanted by a subsequent agreement which the respondent signed under duress. In Yukon, the court has very limited authority to interfere with matrimonial agreements. Hartshorne was concerned with legislation in British Columbia, which, unlike legislation in Yukon, permitted the court to review matrimonial agreements for fairness.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This appeal considers duress in the context of an agreement to amend or supplant an existing marriage agreement and the extent to which the decision of the Supreme Court of Canada in *Hartshorne v. Hartshorne*, 2004 SCC 22, applies in Yukon.

Background

[2] The parties began to cohabit in approximately the year 2000. In April 2001, the relationship was terminated. Although they saw each other periodically over the next two years, the parties did not cohabit again until 2004. In late 2004, the respondent sold a duplex she owned and purchased a house at 91 Wilson Drive in Whitehorse, Yukon. The appellant did not contribute financially to the purchase. He did assist in renovating the duplex and 91 Wilson and was paid for his work by the respondent.

[3] On July 7, 2006, the parties entered into a marriage agreement. They were married the next day. The agreement went missing. A replacement agreement was prepared and signed by the parties on October 4, 2007.

[4] The replacement agreement, which also is dated July 7, 2006, is almost identical to the original 2006 prenuptial agreement. It recites the income of the

parties and notes that they live in "the residence of [the respondent]". It was agreed that the respondent owned 91 Wilson, which was listed in Schedule A entitled "Cynthia's Assets & Liabilities". In a recital, the agreement states:

> I. The Parties are entering into this Agreement:
>
> (a) to determine ownership, management, and division of all property either or both of them own or may acquire
>
> (i) during the time they live together,
>
> (ii) if the Parties' relationship or marriage ends, and
>
> (iii) if one of them predeceases the other while they are still living together;
>
> (b) determine spousal support obligations should the Parties' relationship or marriage [end]; and
>
> (c) avoid acrimony and litigation in the unlikely event that their relationship or marriage ends.
>
> J. (1) The Parties are aware that the law provides for judicial intervention in some circumstances if this Agreement is found to be unfair now or in the future.
>
> (2) The Parties wish to confirm that:
>
> (a) each of them relies on this Agreement to be enforced according to its terms, and
>
> (b) neither of them would have entered into this Agreement had it been anticipated that the other would ever apply to vary the Agreement.
>
> (3) The Parties acknowledge that each of them is prepared to abide by the terms of this Agreement because each recognizes that:
>
> (a) the importance to each of them of being able to rely on the Agreement far outweighs the risk that it may operate unfairly at some future date, and
>
> (b) the impossibility of returning the Parties to the position they occupied before they entered this Agreement would make any variation, however fair, viewed solely in the changed circumstances, unfair on the whole because all dealings with their property during the course of their relationship will have been based on the binding nature of this Agreement.

[5] Each party warranted that his or her statements of fact were true and that the other party relied on them. They were to have separate bank accounts which remained their individual property. Any joint bank accounts were to be true joint

accounts with a right of survivorship and equal division should the parties "no longer reside together". Responsibility for personal debt is addressed. Clause 5 of the agreement reinforces the separate ownership of existing property and states that neither party has a claim to the other's property. It provides in subparagraphs (6), (7) and (8):

> (6) Cynthia's Separate Property will remain her separate property during the relationship and after it ends and David gives up forever any claim to Cynthia's Separate Property.
>
> (7) David's Separate Property will remain his separate property during the relationship and after it ends and Cynthia gives up forever any claim to David's Separate Property.
>
> (8) Each party may dispose of that party's Separate Property without the consent of the other.

[6] Clause 6 deals with gifts and provides in 6(3):

> (3) Unless a third party specifically provides to the contrary,
>
> (a) a gift from the third party is the recipient's Separate Property, and
>
> (b) a gift from the third party who is a parent or close relative of one of the parties is deemed to be a gift to that party, except for gifts, inheritances and damages received by David which shall be dealt with in accordance with paragraph 5(4) of this Agreement; and
>
> (c) a gift from a third party that is used as a down payment for the purchase of land or a residence
>
> (i) is traceable into the purchased property and any substitute for it, and
>
> (ii) remains the Separate Property of the recipient.

[7] The appellant's contributions to the respondent's home by renovations or upkeep were declared to be a gift to her. The appellant has no claim against 91 Wilson as a result of any such contributions.

[8] Clause 8 provides:

> 8. (1) Any property acquired by a party during the relationship is the separate property of the party who acquired it, unless
>
> (a) it is registered in both parties' names, or
>
> (b) the parties record in writing that it is co-owned.

> (2) For the purpose of this Agreement, "Shared Property" means property owned by both parties.
>
> (3) Unless the parties otherwise agree in writing, ownership of Shared Property will be in the same proportion as the contribution made by each party to the purchase.
>
> (4) For the purpose of subclause (3), "contribution" means a direct financial contribution and does not include value for labour unless otherwise agreed in writing.
>
> (5) Neither party will pledge Shared Property as security for any liability without the written consent of the other party.
>
> (6) Neither party will dispose of an interest in Shared Property without the written consent of the other party.
>
> (7) When Shared Property is sold, the net proceeds, if any, will be divided between the parties in proportion to their ownership as determined under subclauses (3) and (4).

[9] The agreement recites that "[e]ach party has adequate independent means of support". The parties agreed that if the relationship were to end, the appellant would have no claim against the respondent for support. If she were unable to support herself because of her hepatitis C, she could seek support from the appellant.

[10] Clauses 12 and 21 provide:

> 12. Neither party will claim an interest in, or a right to compensation with respect to, the Separate Property of the other and, without limiting the generality of the foregoing, neither will make a claim based on
>
> (a) the law pertaining to trusts or unjust enrichment,
>
> (b) the *Family Property* [*and*] *Support Act* or similar legislation whether or not the property was used for a family purpose, or
>
> (c) any direct or indirect contribution to property owned by the other.
>
> …
>
> 21. Except as otherwise provided in this Agreement, each party gives up all claims at law, in equity, or by statute against the other relating to a division of property, including, without restricting the generality of the foregoing, all claims under the *Family Property and Support Act*, the *Estate Administration Act* and the *Dependent's Relief Act*, with respect to
>
> (a) support for David,
>
> (b) property,

(c) succession rights, and

(d) any other matter arising from their relationship or marriage.

The agreement is governed by the "laws of the Yukon Territory".

[11] The agreement may be varied "only [by] a written agreement executed in the same manner as this Agreement". The parties agreed that they received or had been encouraged strongly to obtain independent legal advice. They acknowledged the agreement was signed "voluntarily without any undue influence or coercion" and each believed that the agreement "will not result in circumstances that are unconscionable or unfair to the other party". They also agreed that the court could review and vary the agreement if it was found to be "substantially unfair due to the non-disclosure of a material fact".

[12] It is clear that the appellant wanted to void the agreement, but the respondent declined to do so.

[13] The appellant had ongoing financial difficulties and declared bankruptcy in 2007. He was discharged in July 2008.

[14] In late 2006, the respondent opened CMAC, a specialized, approved day-home that contracted with the Yukon government to provide residential care for disabled persons. In 2008, the appellant opened a similar business called Serenity Care. It was agreed that there was some intermingling of the finances between the appellant, the respondent, CMAC and Serenity. For a period of time, CMAC paid Serenity's expenses. This became known as the "Serenity Debt".

[15] In the spring of 2009, the respondent entered into an agreement to purchase a house at 88 Wilson Drive. She required money for a down payment and asked the appellant for repayment of the Serenity Debt. She travelled from Whitehorse to Kelowna, British Columbia to meet the appellant. As a condition of providing the requested funds, the appellant required the respondent to sign an agreement. It stated:

> For reasons relating to his 2007 bankruptcy alone, the titles at 91 Wilson Drive and at 88 Wilson Drive are in the name of Cynthia (Cindy) MacNeil.
>
> The property at 91 Wilson is the matrimonial home in which David Hedmann and Cindy MacNeil (the Parties) are joint tenants. Cindy MacNeil has a pre-marriage interest in 91 Wilson which is $90,000 in which David Hedmann does not share. In addition, the Parties have an equal interest in a CIBC line of credit in the name of Cindy MacNeil currently at -$50,000 (approximate).
>
> BMO requested that David Hedmann's name not appear on the title at 88 Wilson Drive which the Parties purchased in April 2009, again for reasons relating to his 2007 bankruptcy alone. Though David Hedmann's name does not appear on the title, the Parties are in fact joint tenants in the property at 88 Wilson and have an equal share and interest in the property.
>
> The statements in this document are facts and so cannot be altered.

The respondent's two sons witnessed the signatures of the parties on this document.

[16] The requested funds were paid. The property at 88 Wilson was purchased and title was registered in the name of the respondent alone.

[17] The parties do not agree on the extent to which the appellant contributed to the operation of the businesses or the extent to which Serenity was funded by CMAC.

[18] In November 2010, the parties divorced. On May 27, 2011, Mr. Justice Groves delivered reasons addressing the division of the parties' property. He upheld the validity of the 2006 agreement, as replaced in 2007, and awarded the respondent full ownership of the two Wilson Drive properties. The decision was set aside by this Court because the effect of the 2009 agreement was not addressed. A new trial on all issues was ordered.

[19] At the subsequent trial, Mr. Justice Stach held that the 2009 agreement was of no force and effect because the respondent was subjected to undue influence; she signed the agreement under duress. He concluded that the 2006 agreement, as replaced in 2007, governed the relationship of the parties and awarded the Wilson Drive properties to the respondent.

[20] The appellant appeals seeking an order setting aside the judgment and directing that the assets of the parties be divided equally or ordering a new trial.

Trial decision

[21] The trial reasons are thorough and extensive. I shall endeavour to refer only to those portions that are relevant to the issues on this appeal.

[22] After reviewing the background of the parties' relationship, the judge found "that their relationship as common law spouses was 3½ years, their marriage 3 years and their combined relationship as common law and married spouses 6½ years". He concluded "that, from a financial perspective, [the appellant] constituted a drain on the financial resources of [the respondent] throughout their pre-marriage relationship".

[23] Referring to the renovations to the respondent's duplex and 91 Wilson Drive, the judge found that the appellant "was paid both for the work and his management fees". The judge stated that the respondent "is the sole owner on the certificate of title to 91 Wilson [Drive]", took out a $150,000 mortgage in her name only on the property and paid the monthly mortgage payments and for all utilities.

[24] The judge discussed CMAC stating:

> [18] A contract for a 'specialized approved home' was signed between [the respondent] (CMAC) and the Yukon Government. C.M.A.C. is an unincorporated sole proprietorship created by [the respondent] as a business vehicle for this undertaking. CMAC's first residential care patient came to live at 91 Wilson in December 2006. It is a contract that [the respondent] retains to this day.
>
> [19] CMAC turned out to be a reasonably profitable venture for [the respondent]. [The appellant] contributed to that success directly and indirectly by measures both large and small. [The respondent] and CMAC benefited from [the appellant's] business acumen, his organizational skills, and his energy. During [the respondent's] medical treatment for breast cancer and her temporary absences from Whitehorse, [the appellant] was especially instrumental in providing stability to CMAC and support for her. Indeed, his contributions in that regard are generally acknowledged by [the respondent]. [The appellant's] attempts at trial, however, to portray himself as the lead figure, primarily responsible both for CMAC's creation and its success, overreach the trial evidence as I see it, often significantly. Although his role does not attain the near-heroic proportions that he, by times, ascribed to it, I am nevertheless persuaded that his personal belief in the importance of his role fed, and continues to feed [the appellant's] sense of entitlement.

[25] The judge then discussed the development of Serenity and the contentions of the parties. He stated "I believe there is truth in the testimony of each of them" and found:

> [25] … despite [the appellant's] protestations to the contrary, a substantial percentage of Serenity's operational expenses to the end of March 2009 - and thereafter as well - continued to be paid by CMAC, until the parties separated in June 2009.

He continued:

> [26] It must be said that the mostly conjoint operations of CMAC and Serenity, the multiplicity of accounts in existence, their frequently indiscriminate intermingling, the contradictory evidence of the parties, and the access by each of them to these accounts, makes it quite impossible for me to assign precise numbers to any overpayments by CMAC to Serenity. Yet, I am persuaded that [the respondent] almost inevitably wound up 'on the short end', and that, by April 2009, Serenity 'owed' CMAC a substantial sum of money.

[26] The judge then turned to the marriage agreements beginning with the 2006 agreement. He observed that the respondent "wished, in short, to protect her assets as her own," and stated:

> [36] The trial testimony of the parties differs as to the intended duration of the prenuptial agreement. [The appellant] says there was an understanding between them that the prenuptial agreement would be voided after his financial difficulties were sorted out or - if he declared bankruptcy, after his discharge from bankruptcy. [The respondent] indicated that it was always her intention that the prenuptial agreement be enduring. [The appellant's] view of the intended duration of the agreement is reflected in the repeated requests he made, after their marriage, that she void the agreement. [The respondent's] view that the agreement's duration was to be longstanding is reflected in her repeated attempts to deflect attention from his frequent requests to void it. I conclude that there was no common understanding as alleged by [the appellant]. [The appellant] may well have believed that, once married, he would be able to persuade her to void the agreement. [The respondent's] intention as to the agreement's duration is reflected in the resistance she routinely offered to the repeated attempts made by [the appellant] to persuade her to do away with the prenuptial agreement.

[27] The judge referred to the testimony of the appellant concerning the circumstances under which he agreed to sign the agreement and stated:

> [37] … To the extent this triad of assertions are offered by [the appellant] as an attack on the status of the prenuptial agreement, they have no purchase in my opinion. They are, however, consistent with the tack taken by

> him at trial to use any pretence available to devalue the agreement. I accept the testimony of [the respondent] that [the appellant] had a copy of the agreement beforehand and the opportunity to read it prior to the wedding. I accept her testimony that there was no ultimatum. I do not accept the notion that [the appellant] lacked either the capacity to sign or an understanding of the terms and consequences of the agreement.

[28] The testimony of the respondent that the appellant admitted destroying the 2006 agreement was accepted by the judge. Exhibit 7 at trial was an unsigned recreation of that agreement, produced in 2007. The judge referred to it stating:

> [40] [The respondent] testified that [the appellant] had disclosed the fate of the original (signed) prenuptial agreement to her around September 2007. She testified that once [the appellant] made the disclosure she knew immediately that she had to get another one and that it was important for her to seize the moment. She immediately contacted her lawyer with instructions to "re-create" the original document. I accept her testimony on these points.
>
> [41] I find on a balance of probabilities that the text of Exhibit 7 conforms accurately to the original prenuptial agreement actually signed by each of the parties in July 2006 and that all segments of the original document were fully and properly executed in accordance with the statutory requirements. I find nothing in the circumstances leading up to its signing that casts any doubt respecting the prima facie validity of that prenuptial agreement. I turn now to the "replacement" agreement.

[29] The judge addressed the October 2007 replacement agreement:

> [42] In her testimony before me, [the respondent] said that a signed original of the "replacement" agreement had been made available at the previous trial between these parties in 2010. She says that the original document was not thereafter returned to her and cannot now be found. Accordingly, the photocopy, now filed as Exhibit 8, is all that remains. I do not doubt her testimony on these points.

He concluded:

> [48] On the evidence before me I find Exhibit 8 is a true copy of the prenuptial agreement actually signed by each of the parties on October 4, 2007 and that the photocopied signatures and initials are true copies of the signatures and initials originally endorsed on the agreement by them. Execution of this agreement also conforms with the statutory requirements. I find further that, but for the slight alterations already referred to, Exhibit 8 is identical in its terms to the prenuptial agreement originally signed by the parties on July 7, 2006. Nothing in the circumstances leading to the execution of the replacement agreement casts doubt on its prima facie validity.

The judge then discussed the salient provisions of the agreement.

[30] This was followed by an extensive review of the law governing the division of matrimonial property in Yukon. He stated "that nothing in Part 2 of the [*Family Property and Support Act*, R.S.Y. 2002, c. 83 ("the *Yukon Act*")] limits or prohibits the division of property in an otherwise valid marriage contract that deals with the division of property" and concluded:

> [69] … [T]he only provisions of the Yukon Act that give a court jurisdiction to override the terms of a marriage contract are s. 34(3), 35(1) and s. 36 – provisions respecting spousal support and child support. A close examination of s. 34(3) moreover, indicates that even this jurisdiction is very narrowly circumscribed. I add, parenthetically, that the Supreme Court of Canada has stated on several occasions that deference must be shown to the scheme and structure of relevant legislative provisions in a province or territory. Where, as here, the legislature of the Yukon has established a very high threshold and a very narrow portal for courts to intervene in the division of property determined by spouses in a validly made domestic contract, there remains no alternative but to defer. Absent issues of spousal support or child support the primary policy objective guiding the court's role in a division of property on marital breakdown in the Yukon is a decided preference for a consensual regime over a statutory regime.
>
> [70] Neither spousal support nor child support is a factor in this action. The marriage contract made on October 4, 2007 and its predecessor of July 2006 were appropriately formalized. They provide for the division of assets. There are no circumstances here that bring their prima facie validity into question. Accordingly, there is no place for judicial intervention.

[31] The judge then turned to the April 2009 agreement. He began his discussion with comments about the "Prologue to the third agreement" stating:

> [73] … From my assessment of the evidence I think it more likely that, following his discharge from bankruptcy, [the appellant] became ever more strident that [the respondent] void their previous agreement, and that he raised the issue with increasing frequency. I find that it was the source of many arguments between them…

[32] The judge observed that the respondent wanted to purchase 88 Wilson Drive because she "needed a space of her own, a nearby 'sanctuary'". He added, "[t]hat she intended this to be *her* purchase emerges clearly from her evidence". The judge stated:

> [76] The parties differ on whether the final offer accepted by the vendors of 88 Wilson was the joint offer of them both or the offer of [the respondent] alone. Although it is unnecessary for me to decide that issue, I tend to the latter as the more plausible. What is absolutely clear is that the $2000.00

> down payment for 88 Wilson was made by [the respondent]. She paid the sum of $41,258.63 required on closing.

[33] Returning to the issue of whether the 2006 agreement was terminated, the judge commented:

> [77] [The respondent] was aware in March 2009 that [the appellant] had received his first payment of $58,000.00 from the Yukon government for the individual under Serenity's care. When [the respondent's] real estate solicitor advised her that $41,258.63 was required for the closing of the transaction, she asked [the appellant] for payment of the monies CMAC had fronted to Serenity on startup and during its first several months of operations. Her request for payment touched off another series of demands by [the appellant] for termination of their prenuptial agreement, and another series of arguments, albeit with a new ingredient. Now [the appellant] fulminated: "terminate the pre-nup or you get nothing". I accept [the respondent's] testimony on these points.
>
> …
>
> [80] My sole observation as to the purchase decision for 88 Wilson is that, although not impossible, it seems incongruous to me that, in a context where [the respondent] and [the appellant] had been engaging in emotionally-charged exchanges between themselves over whether or not to leave their existing prenuptial agreement in place, [the respondent] would voluntarily agree to a partial 'about-face' through the joint acquisition of additional property.

[34] The judge observed:

> [82] … the core issue in these proceedings, is the legal effect, if any, that is to be given to the earlier agreement and the legal effect, if any, of the April 15, 2009 document.

[35] The appellant testified that he and the respondent discussed the proposed content of the 2009 agreement in advance of him presenting it to her. She stated that it was produced by the respondent for the first time on April 15 during their argument over the release of $41,258.63 of Serenity funds to allow her to make the down payment on 88 Wilson Drive. The judge stated:

> [85] As to how and when the April 15 document came to the fore, I prefer the testimony of [the respondent] as the more plausible and more credible evidence.

[36] The judge concluded that the 2009 agreement was not a revocation of the 2006 agreement, although it could be seen as a variation of that document. It was the appellant's position that the 2009 agreement replaced the 2006 agreement. The judge concluded that "the issue stands to be determined primarily on whether [the respondent's] assertion of undue influence is established". He stated:

> [90] In law, to dominate the will of another simply means to exercise a persuasive influence over him or her. It may come about through manipulation, coercion or the outright but subtle abuse of power.

[37] The judge reviewed the evidence of the parties concerning the circumstances of the signing of the 2009 agreement. He noted the appellant's position:

> [95] In his account of the signing of the April 15, 2009 document, [the appellant] describes the signing as "straightforward": "there were no tears, no crying, no yelling. It was a business agreement." In his testimony [the appellant] did acknowledge saying to her that, if she signed the document, he would free up the funding needed for the closing. He says "she signed it and that was that".

[38] The judge cautioned himself in his approach to the evidence of the respondent's sons who witnessed the signatures of the parties. He gave credence to their observation that the respondent appeared to be upset. He stated:

> [104] I remain mindful of the fact that Jared MacNeil and Cole MacNeil were high on marijuana when they were summoned to come downstairs to "witness" the document and that they are close to their mother. While I think it probable that their marijuana use had an impact on their ability to recall precisely what was said or to give detail about some particulars, I do not doubt that when they came downstairs their primary focus was on their mother. I have a greater sense of confidence in their ability to pick up on her condition and the sense of stress that each of them felt in the room, and particularly in her. I accept their observations of her. They reinforce what I conclude is a truthful account of the situation by [the respondent].

[39] In the judge's view the 2009 agreement gave little, if anything, additional to the respondent and conferred "a very substantial benefit upon [the appellant]". As to her evidence and the situation, the judge commented:

> [103] Given the personal importance that [the respondent] attached to the acquisition of 88 Wilson as a refuge for her, and given the distinct perspective of [the appellant] in seeing the *joint* acquisition of 88 Wilson as an important step in establishing his creditworthiness, it seems implausible to me that the signing of the April 15th, 2009 document was as calm and businesslike as

> [the appellant] described it, particularly in circumstances where he had harboured a sense of betrayal about being excluded from the transaction. Indeed, as at the date of the signing on April 15th, 2009 there already existed between the spouses an abiding and ever-building stress over [the appellant's] repeated insistence that [the respondent] void the prenuptial agreement and her constant resistance to doing so.

[40] The judge referred to documents that came into existence after the parties separated that tended to support the appellant's position, but concluded they were of little import, constituting "no more and no less than part of the 'forth and back' that some spouses engage in in the post-separation period".

[41] The judge's conclusions were as follows:

> [108] I find on a balance of probabilities that the April 15 document prepared by [the appellant], was presented to [the respondent] for the first time on April 15, 2009, in all probability in full anticipation of her request of him that he now make available the funds owed to CMAC by Serenity to permit her to close the transaction for 88 Wilson[.] Because the transaction's closing was to take place on the very next day, the pressure on [the respondent] to have funds in place would have been apparent, especially to [the appellant]. The cumulative pressures on her were multi-faceted, immense and, in the end sufficient, I think, to overcome the will of [the respondent]. Whereas she had to this point resisted all attempts by [the appellant] to void the prenuptial agreement, ultimately she felt she had no alternative but to sign the document in order to obtain access to "her" money.
>
> [109] I find that, from the start-up of Serenity until the payment to it in April 2009, [the appellant] had used monies properly belonging to CMAC for payment of numerous expenses solely attributable to Serenity amounting to at least $41,000.00. I find further that [the appellant], with full knowledge of [the respondent's] desperation respecting the closing of 88 Wilson Drive, deliberately and improperly withheld repayment of those monies as a means of pressure to get her to sign the document he prepared. He had effectively availed himself of the intermingling of funds between CMAC and Serenity for his personal advantage – initially as justification for the expenditure of monies by CMAC for Serenity – but then rapidly showed himself capable of withholding monies then in his control when he could press that to his personal advantage.
>
> [110] I conclude that the April 15 document was signed, not as the product of a reasoned and fair negotiation, but in the context of a power-play planned and managed by [the appellant] in a way that permitted him to leverage to the maximum degree his temporal control over the funds then in Serenity's hands. His 'eleventh hour' introduction of the April 15 document did not permit ample time for reflection by an emotionally distraught [respondent]. It was, moreover, produced at a place and in circumstances that did not afford her a realistic opportunity to obtain independent legal advice. It occurs to me that where the court, after careful and unemotional reflection, struggles over

> the proper categorization of the document, its appearance and its intended effect, the difficulty for a lay person in ascribing meaning and consequence to it may be markedly greater. The importance of independent legal advice is heightened in that context.
>
> [111] Upon closer examination, the April 15 document holds no benefit for [the respondent] whereas it would give rise to a very significant personal gain for [the appellant].
>
> [112] I find [the appellant's] conduct in this to be exploitative. If tolerated it would allow unfair advantage to be taken. It is for all of these reasons, taken cumulatively, that I find the allegation of undue influence to have been established here. I hold that the April 15, 2009 document has no legal effect. I hold, further, that the marriage contract made October 4, 2007 is valid and binding and that it alone governs the division of property between [the respondent] and [the appellant] on the breakdown of their marriage.
>
> ….
>
> [116] Of the additional grounds raised, I regard it as most significant that [the respondent] did not have the opportunity in the circumstances to obtain independent legal advice. That opportunity was clearly available to the parties when they signed *both* the original agreement and its replacement. Indeed, I regard the opportunity for independent legal advice as an important component of the undue influence analysis. Although the other grounds or collateral reasons offered by counsel for [the respondent], taken cumulatively, may offer additional support to the notion that the April 15 document should have no legal effect, they are insufficient on their own for that purpose.

[42] The judge held that the 2006 agreement, as replaced in October 2007, governs the disposition of the parties' property and that the respondent solely owned 91 Wilson Drive and 88 Wilson Drive. Other interests of the parties were disposed of in accordance with the provisions of the 2007 replacement agreement.

Positions of the parties

[43] The appellant advanced 35 paragraphs of alleged errors by the trial judge.

[44] The respondent states that most of these grounds concern findings of credibility and fact by the judge for which there was evidence. The judge made no palpable and overriding error in his findings of fact. She also contends that the judge made no error of law.

Discussion

[45] It is apparent from an examination of the judge's reasons that his decision largely is based on findings of fact for which there was evidence. The appellant disagrees with those findings, but there is no basis on which this Court can interfere with them.

[46] The appellant complains that the judge preferred the respondent's evidence to his evidence. The judge was entitled to do that. The judge also did not do so uncritically. He stated that there was truth in the testimony of both parties concerning Serenity. He accepted some of the evidence of the appellant and explained his rejection of other evidence and preference for the evidence of the respondent.

[47] Examples of findings of fact which are important to the judge's conclusions are:

- the respondent was the sole owner on the certificate of title to 91 Wilson Drive;
- she took out a $150,000 mortgage to purchase the property and paid the mortgage and utilities payments;
- the appellant contributed to the success of CMAC, but not to the extent he claimed;
- a substantial percentage of Serenity's operational expenses were paid by CMAC and by April 2009, Serenity owed CMAC a substantial sum of money;
- there was no common understanding that the 2006 agreement would be set aside once the appellant was discharged from bankruptcy;
- the respondent intended for the agreement to continue to apply;
- the respondent routinely resisted the appellant's attempts to set aside the agreement;
- the appellant had a copy of the agreement in advance of signing it; there was no ultimatum given to sign the agreement; the appellant had the capacity and understanding to sign the agreement;
- the appellant destroyed the 2006 agreement;

- the 2007 “replacement” agreement was substantially identical to the 2006 agreement;
- the replacement agreement was signed by the appellant;
- the respondent was not aware of the 2009 agreement until it was presented to her;
- at that time she was desperate to obtain funding to complete the purchase of 88 Wilson Drive which was to be a sanctuary;
- Serenity owed CMAC at least $41,000 at that time;
- the appellant required the respondent to sign the 2009 agreement as a condition of releasing funds to complete the purchase;
- the appellant overcame the will of the respondent in signing the 2009 agreement.

[48] As noted, the appellant disagrees with many of these findings of fact, but on the evidentiary record before him, the judge was entitled to make them. This Court is not entitled to interfere with these factual conclusions.

[49] Specifically, as to the 2009 agreement, the judge made no error in his assessment of the governing legal principles. He reviewed the evidence of the parties and cautioned himself with respect to the evidence of the respondent’s sons. He concluded that the respondent’s version of events was preferred to that of the appellant. The judge was entitled to do so. There is no basis on which this Court could interfere with the judge’s conclusion that the 2009 agreement was signed by the respondent under duress; her will was overcome.

[50] Although it was not pleaded, the appellant included in his final argument before the judge, and on appeal, a contention that the 2006 agreement was unfair and unconscionable and on the basis of *Hartshorne* should be varied. The judge did not address this contention specifically, but he clearly was aware of *Hartshorne* because he referred to the case in another context.

[51] The appellant conflates unconscionability with unfairness, but I shall address his position as I understand it. He asserts that it is unfair and unconscionable “for one party to be awarded all the assets after a relationship of almost a decade”. He

also submits that what the parties may have viewed as reasonable in 2006 changed over time, as the appellant took on more responsibility for the respondent, the companies and their household.

[52] The judge undertook a very full analysis of Yukon law. He concluded that the Court has very limited scope to interfere with marriage agreements. I agree with him. Although he did not state that *Hartshorne* is not applicable in Yukon that was the respondent's contention on appeal. I agree with her.

[53] The issue in *Hartshorne* was whether a marriage agreement entered into "without duress, coercion or undue influence" could be varied on the basis that it was unfair in accordance with the statutory regime in British Columbia (at paras. 1-2).

[54] Before undertaking an overview of the British Columbia *Family Relations Act*, R.S.B.C. 1996, c. 128, Mr. Justice Bastarache affirmed the general proposition that "courts should respect private arrangements that spouses make for the division of their property on the breakdown of their relationship" (at para. 9). Comparing the British Columbia legislation with that in other provinces, Bastarache J. stated:

> [14] … By contrast, in British Columbia … a court may reapportion assets upon finding that to divide the property as provided for in the agreement or the *FRA* would be 'unfair'. Clearly, the statutory scheme in British Columbia sets a lower threshold for judicial intervention than do the schemes in other provinces.

[55] It is my view that the judge's analysis of the Yukon legislation is consistent with the Court not having the authority to interfere with the expressed will of parties based solely on fairness. He clearly rejected the appellant's "attack on the status of the prenuptial agreement" finding that he had time to consider the agreement, no ultimatum was issued and he had the capacity to enter into the agreement.

[56] In the 2006 agreement, the parties specifically addressed any potential unfairness stating that the importance of "being able to rely on the Agreement far outweighs the risk that it may operate unfairly at some future date". In my view, an

examination of the terms of the agreement does not suggest that it is unfair or unconscionable.

[57] The relative financial position of the parties is stated. The distribution of assets accords with this. Although "windfalls, such as inheritances, gifts, or damages for personal injury" received by the respondent are her property, the appellant agreed that windfalls received by him would be shared by the parties. This was because he expressly recognized the support and benefits she had advanced to him. Because it was known that the respondent had hepatitis C and might not be able to work, her right to claim support on a marriage breakdown was preserved. While these provisions operate in favour of the respondent, based on the rationales expressed in the 2006 agreement, I do not think they could be considered to be unfair, if that were relevant, or unconscionable.

Conclusion

[58] In my view, the appellant's contentions are based primarily on his disagreement with the judge's findings of fact. Whether this Court would have reached the same findings is not relevant. The judge's conclusions were based on his appreciation of the evidence. There is no basis on which this Court is entitled to interfere.

[59] The judge rejected any notion that the appellant had entered into the 2006 agreement under duress. On the evidence, he was entitled to reach that conclusion.

[60] The judge held that the respondent did enter the 2009 agreement under duress. On the evidence, he was entitled to reach that conclusion.

[61] I conclude that the judge made no error of law. I am not satisfied that *Hartshorne* is the law in Yukon. I agree with the judge's conclusion that the window for interfering with consensual arrangements made by spouses is very narrow in Yukon.

[62] Even if fairness were a consideration, an examination of the terms of the 2006 agreement does not lead to any conclusion that it is unfair. It is not unconscionable. It addressed the reality of the circumstances of the parties.

[63] I would dismiss this appeal.

_____
The Honourable Mr. Justice Chiasson

I agree:

_____
The Honourable Madam Justice Schuler

I agree:

_____
The Honourable Mr. Justice Goepel