

SUPREME COURT OF YUKON

Citation: *MacNeil v. Hedmann*, 2009 YKSC 63

Date: 20091015
S.C. No. 09-D4165
Registry: Whitehorse

Between:

CYNTHIA LYNN MACNEIL

Plaintiff

And

DAVID GEORGE CLINTON HEDMANN

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Debbie Hoffman
David Hedmann

Counsel for the plaintiff
Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by Ms. MacNeil for exclusive possession, among other things, of a residence at 91 Wilson Drive and for Mr. Hedmann to have exclusive possession of a residence at 88 Wilson Drive. Mr. Hedmann presently resides at 91 Wilson Drive and Ms. MacNeil presently resides at 88 Wilson Drive. On September 22, 2009, I made an order granting Ms. MacNeil exclusive possession of 91 Wilson Drive, and granting Mr. Hedmann exclusive possession of 88 Wilson Drive. On September 24, 2009, Mr. Hedmann dismissed his lawyer and filed a Notice of Self-Representation. Counsel for Ms. MacNeil applied on September 29, 2009, for a date to commence

possession of 91 Wilson Drive, among other things. Mr. Hedmann applied for an adjournment to retain legal counsel. The application was adjourned to October 2, 2009, at which time Mr. Hedmann appeared on his own behalf by telephone from Kelowna, British Columbia. I ordered that exclusive possession for both parties commence on October 8, 2009. The applications were made by way of affidavits.

THE EVIDENCE

[2] Ms. MacNeil purchased the residence at 91 Wilson Drive in November 2004. Ms. MacNeil and Mr. Hedmann started to cohabit in or about February 2004 and married on July 8, 2006. On July 7, 2006, the parties signed a prenuptial agreement, which was apparently misplaced, causing the parties to re-sign a marriage agreement dated October 4, 2007, but effective July 7, 2006. The marriage agreement clearly states that Ms. MacNeil owned 91 Wilson Drive as her separate property and Mr. Hedmann could not acquire any interest in the property through financial contribution or upkeep. Mr. Hedmann's status was as a tenant and a renter. Mr. Hedmann signed a waiver of independent legal advice, which informed him he should seek independent legal advice.

[3] Mr. Hedmann states that it was his idea to enter into a marriage agreement as he was in bankruptcy at the time and wanted to protect Ms. MacNeil's interests against his creditors. However, he claims that the agreement went well beyond what he intended. He understood that the marriage agreement was to be temporary and would cease to be of effect when he was discharged from bankruptcy. He also claimed that he was under the influence of Oxycontin and other medication for arthritis in his knee. He claims that Ms. MacNeil exercised undue influence over him at a time when he was under the influence

of a powerful narcotic. He further claims that he was coerced by Ms. MacNeil with the promise of marriage.

[4] Each of the parties operates a separate business under contract with the Government of Yukon to provide 24-hour care services for adult clients. Each party has an adult in their care. Both 91 and 88 Wilson Drive are approved residences for the care of adult clients.

[5] On April 15, 2009 in Kelowna, British Columbia, Ms. MacNeil and Mr. Hedmann signed a "To Whom It May Concern" document stating that the properties at 91 and 88 Wilson Drive are in the name of Ms. MacNeil for reasons relating to the bankruptcy of Mr. Hedmann. The document states that 91 Wilson Drive is the matrimonial home and Mr. Hedmann and Ms. MacNeil are joint tenants except for Ms. MacNeil's pre-marriage interest of \$90,000, which Mr. Hedmann does not share. The document states that the Bank of Montreal requested that the title of 88 Wilson Drive, which was purchased by the parties in April 2009, be in the name of Ms. MacNeil because of the bankruptcy of Mr. Hedmann. However, the document makes it clear that the parties are joint tenants in 88 Wilson Drive. Ms. MacNeil acknowledges that she signed the April 15, 2009 document but stated that it was under pressure from Mr. Hedmann and she did not have legal advice. After receiving legal advice, she decided she did not wish to void the marriage agreement. Ms. MacNeil continues to pay for the mortgages on both 88 Wilson Drive and 91 Wilson Drive.

[6] The parties separated on June 25, 2009. Their relationship was very strained at that point. Ms. MacNeil's son, who was employed by Mr. Hedmann, got into a physical

confrontation with Mr. Hedmann at 91 Wilson Drive. Ms MacNeil states that there are mutual peace bonds currently in place between Mr. Hedmann and her son.

[7] Ms. MacNeil states that she moved into 88 Wilson Drive when they separated because Mr. Hedmann refused to move out of 91 Wilson Drive and they needed to be physically separated. Ms. MacNeil left personal property and business records at 91 Wilson Drive. She states that Mr. Hedmann had told her since April 2009 that he was going to leave the Yukon in September 2009 to visit his family in Kelowna for six to eight weeks. She said that he always told her that he would be taking his adult client with him to Kelowna.

[8] Their relationship has not improved since separation. Ms. MacNeil has been charged with assault as a result of slapping or punching Mr. Hedmann when she discovered his girlfriend at 91 Wilson. She is now in the Domestic Violence Treatment Option program as she has admitted the assault.

[9] By affidavit sworn September 21, 2009, Mr. Hedmann confirmed that he was leaving the Yukon on September 29 to travel to Kelowna with the expectation that he would return on December 20, 2009. Although he has family in Kelowna, he described the trip as primarily a business trip to explore the logistics of relocating his businesses. He stated that he would be bringing the adult under his care to Kelowna as it offers activities and other services for him that Whitehorse does not. He made arrangements for two friends to house sit at 91 Wilson during his absence. He claims that he would suffer significant hardship if he is required to leave 91 Wilson and that 88 Wilson is suitable as a residence for Ms. MacNeil and for the operation of her business.

[10] Ms. MacNeil, who is paying for both mortgages on 91 and 88 Wilson Drive, has applied for an increase to a personal line of credit to deal with her financial and legal issues. Mr. Hedmann is opposed to Ms. MacNeil encumbering 91 Wilson Drive or 88 Wilson Drive with any form of security for an additional loan.

[11] There is a significant amount of conflicting evidence about events before and after separation.

Court Order on September 22, 2009.

[12] On September 22, 2009, I ordered that Ms. MacNeil shall have interim exclusive possession of 91 Wilson Drive and Mr. Hedmann shall have interim exclusive possession of 88 Wilson Drive. I did so for two reasons. Firstly, Ms. MacNeil purchased 91 Wilson Drive and currently pays for the mortgage. Although the precise interest of the parties in 91 Wilson remains to be determined, presumably at a future trial date, Ms. MacNeil has a significant financial investment in 91 Wilson and needs additional financing. Secondly, as a matter of fairness, Mr. Hedmann did not intend to use 91 Wilson for three months and could possibly relocate to Kelowna. There were no encumbrances on 91 Wilson except for the mortgage that was being paid by Ms. MacNeil. At the September 22, 2009 hearing, I offered to set a date for the change of residences but counsel advised that they could work things out.

[13] On September 24, 2009, Mr. Hedmann dismissed his lawyer and filed a Notice of Self-Representation. On September 28, 2009, Mr. Hedmann filed a further affidavit stating that Ms. MacNeil purchased 88 Wilson Drive as her primary residence attaching an e-mail that Ms. MacNeil sent to the Bank of Montreal. He also stated the following:

17. I have cancelled my planned trip to Kelowna so that I can attend to these court matters and will likely have to pay for

cancelling the lease and will seek damages from the Plaintiff for this cost.

18. I rented the main house (ground and upper floor) at 91 Wilson Drive September 19, 2009 to Bud Reynolds and his wife Laurie Lemieux who are in the process of building a home in Mount Sima subdivision and this lease is for the period September 29, 2009 to January 8, 2010, the time which I planned to be away in Kelowna BC as in appendix G. I have known Bud Reynolds for about ten years and Laurie for about four years and they are a responsible professional couple whom I trust and they have agreed to share 91 Wilson with me as I have cancelled my Kelowna trip and I have agreed to share the house with them.

19. The suite at 91 Wilson Drive (sometimes referred to as 91A) is rented on a month to month lease to Titus Charlie who has lived in the suite since September 2008. His rent is paid directly to David Hedmann by INAC and Titus Charlie has paid a last month rent/damage deposit. I have given no notice to vacate to Titus Charlie who has certain legal rights as a tenant under the Landlord Tenant Act.

[14] Mr. Hedmann now swears that his adult client has a lease that cannot be broken. Ms. MacNeil advises that they each have an adult client at 88 and 91 Wilson Drive, respectively, and that the clients go with their caretakers. This is consistent with Mr. Hedmann's view of this matter in his first affidavit which did not raise any issue about landlord/tenant contracts with his adult client or a formal lease of the main house at 91 Wilson Drive.

[15] Mr. Hedmann states that the September 22, 2009 order should be varied to grant him the exclusive possession of 91 Wilson Drive. I refused to do so as the new evidence presented by Mr. Hedmann is contradictory to the evidence that he presented in his first affidavit sworn on September 21, 2009. It does not constitute a change in the facts since the September 22, 2009 order so much as a convenient change in Mr. Hedmann's prior evidence to attempt to vary that order.

[16] The primary reason for changing his plan to go to Kelowna relates more to his objection to the September 22, 2009 court order than any other factor. Further, the house sit for his friends described in his first affidavit became a signed lease in his next affidavit. This lease, dated September 12, 2009, and signed September 19, 2009, should have been presented on the first application rather than proceeding on the basis of a house sit.

[17] Mr. Hedmann also filed a Notice of Appeal on October 1, 2009 appealing the September 22, 2009 order.

[18] I conclude that there is no basis to vary the order of September 22, 2009. I ordered on October 2, 2009 that the parties change residences on October 8, 2009.

[19] I permitted Mr. Hedmann to make a further application to vary the September 22, 2009 order on October 8, 2009. Mr. Hedmann presented no additional evidence and wished to vary the court orders of September 22, 2009 and October 2, 2009. I refused to do so. I conclude that Mr. Hedmann should proceed to the Court of Appeal.

VEALE J.