SUPREME COURT OF YUKON

Citation: *Ngeruka v. Bruce*, 2010 YKSC 51

Date: 20100909
S.C. No. 10-B0008
Registry: Whitehorse

Between:

NAPOLEON NGERUKA

Plaintiff

And

LELAH GAYE BRUCE

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Carrie E. Burbidge — Counsel for the Plaintiff
H. Shayne Fairman — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Ngeruka applies for special leave under s. 15(2) of the *Family Property and Support Act* to bring an application for the division of family assets after the pronouncement of a *Decree Nisi* of divorce.

[2] The short version of the facts is as follows:

1. The wife purchased the family home in 1995.
2. The parties married on August 17, 1996.
3. They had three children.
4. They separated in August 2003.

5. In the fall of 2006, the family home was sold and the husband signed a Consent to Disposition of the family home and received $5,000.
6. A Separation Agreement was signed on March 31, 2006.
7. The wife commenced divorce proceedings on March 23, 2009, and the original copy of the Separation Agreement was filed in court.
8. Both the husband and wife were represented by lawyers and on July 2, 2009, a Consent Divorce Order, formerly known as the *Decree Nisi*, was filed granting the divorce.
9. The husband filed a Statement of Claim on April 20, 2010, seeking special leave to file an application for division of family assets.

BACKGROUND

[3] The husband and wife met in 1993 at the Whitehorse General Hospital when he was a janitor and she was a Registered Nurse.

[4] The first of their three children was born on June 5, 1996, and they married on August 17, 1996.

[5] They began to live together in 1996. The wife had purchased the family home, which was registered in her name, in 1995. The wife took out a mortgage in her name only.

[6] The husband and wife resided in the family home from 1996 to 2003 when they separated.

[7] Shortly before they separated in 2003, the wife took out a Yukon Housing Corporation mortgage which the husband signed as guarantor for the purpose of renovations to the family home. The mortgage was for $35,000 and obtained through

the husband's employment at Yukon College. Both the husband and wife contributed labour to complete the renovations.

[8] However, the wife states that during the time they lived at the residence, the husband refused to assist with repairs or improvements and referred to the family home as the wife's home.

[9] The wife alleges that the husband is an alcoholic and that he did not financially support the family, despite continuing to work at Yukon College.

[10] After separation in 2003, the wife and children were living on social assistance and the Director of Human Resources sued the husband for financial support. The right of the Director to sue a spouse is a condition upon which social assistance is granted. The court ordered the husband to pay child support in the amount of $700 per month commencing October 1, 2005, based on an income of $47,000.

[11] The wife says that between the separation of 2003 and the sale of the family home in 2006, the husband never made a claim with respect to the property.

[12] According to the husband, when the wife decided to sell the family home in March 2006, he signed the spousal Consent to Disposition but he was not advised by the wife or her lawyer that he could claim a one-half interest in the property.

[13] The husband was advised that the wife made a profit of $47,000 from the sale of the family home on March 31, 2006.

[14] The husband says that the wife, in the presence of her father, showed him a Separation Agreement that she had written up. He says that she told him to sign it and he did, after which she gave him a cheque for $5,000.

[15] The wife provides a different version of the sale of the family home and the signing of the Separation Agreement. She says the husband signed the Consent to Disposition freely without a promise of money. After signing, the wife says that the husband wanted to be paid $5,000 from the sale proceeds. She agreed to pay him $5,000 when the house sold and she did.

[16] The wife says that they met with the Law Line lawyer, who provides free legal information, to discuss the contents of separation agreements generally and he provided some draft separation agreements.

[17] She says that she drafted the Separation Agreement and discussed the terms with the husband, who wanted, among other terms, assurance that she would make no further claims.

[18] After reviewing drafts, they signed the Separation Agreement and witnessed each other's signatures in the presence of the wife's father.

[19] The specific term of the Separation Agreement referring to the Matrimonial Home is as follows:

> The parties agree to the following division of assets:
>
> > (a) Matrimonial Home – the home has been sold and the proceeds have been split to the mutual satisfaction of the parties. No further action will be undertaken by either party to make further claims on the proceeds of this property.

[20] Both the husband and wife have abided by the terms of the Separation Agreement which provides, among other things, that he would retain his Yukon College Pension Benefits, each would retain their own RRSPs and there would be no further claims by either of them with respect to the division of assets. The Separation

Agreement required the husband to pay child support in the amount of $400 per month, which was less than the previous court order of $700 per month.

[21] The wife commenced divorce proceedings on March 23, 2009 and the Statement of Claim made no reference to the property or division of assets. The Separation Agreement was filed in the proceeding. Each party was represented by a lawyer. The husband, who had a Legal Aid lawyer, confirms that the Legal Aid lawyer would not represent him on property issues which, he says, explains why the issue of his property claim was not raised.

[22] The Consent Divorce Order, in addition to granting the divorce, confirmed the child support at $400 per month and provided for retroactive child support fixed at $1,200.

[23] The question of the husband having an interest in the family home was never raised in the divorce proceedings. The wife says the husband first raised such an interest in this proceeding, which was filed April 20, 2010.

[24] The husband explains the delay by saying he only realized his potential interest after discussing his Divorce Certificate with the Human Resource Services Officer at his place of employment. Following this conversation, he spoke to a lawyer.

[25] The husband makes his claim against another property of the wife which was purchased with the sale proceeds she received from the Family Home.

ISSUES

[26] There are two issues arising from the facts:

1. Is the Separation Agreement valid?

2. Should the husband be granted special leave to bring his claim for division of assets after the Consent Divorce Order?

Separation Agreement

Issue 1: Is the Separation Agreement valid?

[27] Under the heading “Form of Domestic Contract”, s. 61(1) of the *Family Property and Support Act* states:

> A domestic contract does not affect the rights of a person under this Act unless it is in writing, signed by both parties and witnessed by an independent third person.

[28] A Separation Agreement is included in the *Act*’s definition of domestic contract.

[29] In this case, both the husband and the wife signed the Separation Agreement. However, it was signed in the presence of the wife’s father, who is not an independent third person. Thus, the husband submits the Separation Agreement is not valid and not legally binding on him. If this is the case, it would be a factor to consider in whether special leave should be granted to raise the issue of his claim for an interest in the family home after the Consent Divorce Order.

[30] Although it is a substantially different factual case, the decision in *Miglin v. Miglin*, 2003 SCC 24, offers some analysis of the approach to be taken in interpreting pre-existing separation agreements. In *Miglin*, a separation agreement contained a spousal support release claim. The wife sought a variation under s. 15(2) and s. 17 of the *Divorce Act.* The trial judge and the Court of Appeal granted the wife $4,400 per month for spousal support. The Supreme Court of Canada dismissed the application for spousal support.

[31] The Supreme Court of Canada generally set out some of the circumstance to be considered in reviewing a separation agreement:

1. Was there any circumstance of oppression, pressure or other vulnerability present in the negotiations and was there any professional assistance to overcome any systemic imbalances? (paras 80 – 83).
2. If the conditions of negotiation were satisfactory, was the agreement in "substantial compliance" with the Act? In *Miglin*, this question was directed to the merits more than procedural compliance. (paras. 84 – 86).

[32] In the case of *Benmergui v. Bitton*, (2008), 52 R.F.L. (6th) 69 (Ont. S.C.), Wildman J. considered the *Miglin* approach in determining which of three separation agreements was valid to establish the appropriate level of child support between two self-represented litigants involved in protracted litigation. The parties apparently agreed that a Memorandum of Agreement prepared by the parties and requiring child support of $350 was valid. The issue was whether a subsequent Rabbinical Council agreement increased the child support to $732 a month.

[33] The court concluded that the Rabbinical Council agreement was entered under objectionable circumstances.

[34] In recognizing the July 8, 2001 Memorandum of Agreement, Wildman J. stated at para. 71:

> ... While it may not have been the perfect deal, or even what the court would have ordered, they both knew what they were signing and chose this as a better final resolution than going to court. They negotiated their agreement over an extended period of time and each had the opportunity to obtain independent legal advice if he or she wished. The lack of a formal separation agreement is not fatal, as an "agreement to agree" can still represent a contract (See *Bogue v. Bogue* (1999), 46 O.R. (3d) 1 (C.A.). Where, as here, the agreement contains all the essential terms intended by the parties, the parties did not believe their obligations were deferred until a separation agreement was

> prepared and one party has received all the benefits contracted for in the agreement, I see no alternative but to uphold the contract, particularly when neither is really asking me to set it aside.

[35] In *Waters v. Conrod*, 2007 BCCA 230, the court determined that an agreement signed in California and witnessed the next day by a notary public was valid. The Court relied upon authority from the Ontario courts in *Geropoulos v. Geropoulos* (1982), 26 R.F.L. (2d) 225 (C.A.), *Campbell v. Campbell* (1985), 52 O.R. (2d) 206 (H.C.) and *Hyldtoft v. Hyldtoft* (1991), 33 R.F.L. (3d) 99 (Gen. Div.) and approved the statement of the trial judge in *Waters v. Conrod* as follows at para. 13:

> [33] It is evident from the Ontario jurisprudence that in the view of those courts, the purpose of the witness requirement is to ensure that the signatures on the agreement belong to the parties and that those signatures were not affixed under any duress or undue influence. In the present case, both parties acknowledge signing the Agreement, and acknowledged that fact in front of a notary public the next day. If there was an issue of alleged coercion or undue influence, or one of the parties denied signing the agreement, then no doubt additional considerations would come into play.

[36] In the case at bar, the only requirement lacking for a valid agreement is the witnessing of the Separation Agreement by an independent third person. However, the wife's father witnessed the signature, no party is denying that they signed it and the Separation Agreement has been acted upon for a period of approximately four years.

[37] In these circumstances, the Separation Agreement is valid, despite not meeting the exact procedural requirement in s. 61(1) of the *Act*.

Special Leave

Issue 2: Should the husband be granted special leave to bring his claim for division of assets after the Consent Divorce Order?

[38] Section 15(2) of the *Family Property and Support Act* states:

> Except by special leave of the Supreme Court, no application shall be brought under this Part, in relation to the division of family assets or other property under section 6, 13, or 14 by a person against their former spouse after the pronouncement of a decree nisi of divorce in respect of the marriage, or the pronouncement of a declaration that the marriage is a nullity, as the case may be.

[39] As counsel indicated there is very little case law to assist in the interpretation of the words “special leave”. However, there is no doubt that the legislature intended that claims for the division of family assets must be made before a Divorce Order is pronounced.

[40] One of few modern cases considering “special leave” is *Turbo Resources Ltd. v. Gibson*, 60 Sask. R. 221 (Sask. C.A.).

[41] In the Rules of the Saskatchewan Court of Appeal in 1987, further evidence could be received “on special grounds only, and not without special leave of the court.” The Court of Appeal said this:

> This Rule empowers the Court, in its discretion, to receive further evidence upon questions of fact. In all cases leave of the court is required before the evidence may be given. In some instances, special leave, meaning leave which will be granted on special grounds only, is required. In others, leave is required but upon the usual grounds only, meaning that the applicant need not meet the more stringent tests governing the grant of special leave. Generally speaking, evidence of matters occurring after the decision under appeal is made will be received more readily than will evidence of the matters occurring before.

[42] *Turbo Resources* is helpful in establishing the fact that special leave requires a more stringent test than mere leave and requires special grounds.

[43] Section 15(2) grants this court the discretion to grant special leave to a spouse to claim a division of family and non-family assets after the divorce has been concluded by

a *decree nisi*, which is now called a Divorce Order under the *Rules of the Supreme Court of Yukon* effective September 15, 2008.

[44] The onus for obtaining special leave must obviously be more onerous than for simple leave but the statute does not provide any factors to consider in the exercise of the discretion to grant special leave.

[45] Based upon the *Miglin* case, cited above, and without being exhaustive, the following factors may be considered in considering whether special leave should be granted under s. 15(2) of the *Family Property and Support Act*:

1. Did the parties have any opportunity to or did they obtain legal advice at any stage of the matter?
2. Is there credible evidence of any oppression, duress, undue influence, unconscionability or vulnerability in the negotiations or proceedings?
3. Is there credible evidence of unequal bargaining power that was not addressed with professional assistance?
4. Is there credible evidence that one spouse had no knowledge that a divorce judgment would be issued, thereby removing the right to claim a division of family or non-family assets?

[46] These factors are not exhaustive as there are many factual circumstances that may arise. However, they do suggest the type of circumstance or factual context that must exist before special leave may be granted.

[47] In the circumstances of this case, special leave is denied for the following reasons:

1. There is no credible evidence of oppression, duress, undue influence, unconscionability or vulnerability;
2. There is no evidence of unequal bargaining power;
3. There was ample opportunity for the husband to obtain legal advice between the separation in 2003 and the Divorce Order in 2009;
4. The husband had legal counsel during the divorce proceeding;
5. The husband had full knowledge of the assets at every stage of the separation negotiation and divorce proceeding;

[48] Changing one's mind or being advised that a separation agreement may not be the best deal that could be negotiated are not a basis for granting special leave.

[49] Costs may be spoken to, if necessary.

VEALE J.