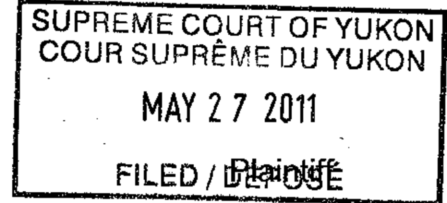
SUPREME COURT OF YUKON

Citation: *MacNeil v. Hedmann*, 2011 YKSC 45

Date: 20110527
Docket S.C. No.: 09-D4165
Registry: Whitehorse

BETWEEN:



CYNTHIA LYNN MACNEIL

Plaintiff

AND:

DAVID GEORGE CLINTON HEDMANN

Defendant

Before: Mr. Justice J. Groves

Appearances:

Cynthia MacNeil — Appearing on her own behalf
David Hedmann — Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] This litigation arises from a marriage and common-law relationship between the plaintiff Cynthia Lynn MacNeil (hereinafter referred to as the "plaintiff" or "MacNeil") and David George Clinton Hedmann (hereinafter referred to as the "defendant" or "Hedmann").

[2] The issues before the court relate primarily to division of property. On the last date of hearing, the 19th of November 2010, a divorce order was granted.

[3] The assets in dispute between the parties consist of two residential premises, one at 91 Wilson Drive and one at 88 Wilson Drive, both in Whitehorse, Yukon. The

first, 91 Wilson Drive, was purchased prior to the parties' marriage and is in the name of MacNeil. The second property at 88 Wilson Drive, across the street from 91 Wilson Drive, was purchased in the latter part of the marriage. It is also in MacNeil's name. Additionally to these two major assets, there are small items such as vehicles and chattels in the parties' respective name and possession. Also, there are claims advanced by MacNeil that she paid various joint debts post-separation, and she paid various expenses for residences occupied by Hedmann, for which she claims reimbursement.

[4] Additionally, each party has in their own name a company, each of which has a contract with a branch of the Yukon government to provide long term supportive care to a "disabled" individual. MacNeil owns her company referred to in these proceedings as "CMAC", and Hedmann owns his company referred to in these proceedings as "Serenity". No claim is made by each party against the other for an interest in these companies, though the financial intermingling of the two companies prior to separation is an issue, specifically as funds were advanced by CMAC (MacNeil) for the benefit of Serenity (Hedmann).

[5] Finally, very much at issue in this case is the existence and/or validity of a marriage or prenuptial agreement which the parties entered into on the 7th of July 2006, the date before their marriage.

FACTS:

[6] MacNeil and Hedmann met a few months before MacNeil's then husband, Glen MacNeil, was killed in automobile accident. The accident happened in April 2000. It is not disputed that at the time they met, Hedmann was in dire financial straits and difficult

personal circumstances. The parties began a dating relationship in late 2000 and they began to cohabit in 2003 or 2004 in a duplex property owned by MacNeil at 104 Seine Square in Whitehorse ("Seine Square").

[7] In terms of Hedmann's financial circumstances, shortly after the death of MacNeil's husband, when their relationship was getting started, Hedmann requested and MacNeil agreed to loan significant funds from her husband's estate to permit Hedmann to arrange for the mortgage on property he owned to be brought up to date. These funds were eventually paid back and no claim arises from that advance. As noted, in late 2003 or early 2004, Hedmann moved in with MacNeil at Seine Square and a common-law relationship began. While occupying the Seine Square residence, Hedmann assisted MacNeil in obtaining an advance to do renovations on Seine Square through the Yukon Housing Corporation. An administrator or salaried component was obtained for Hedmann and he was, as such, paid for his services.

[8] In November 2004, Seine Square was sold and the residence at 91 Wilson Drive was purchased in MacNeil's name alone. A $90,000 down payment was arranged from MacNeil's sources. She testified that approximately $35,000 came from her late husband's estate, $10,000 from life insurance for her late husband, as well as $18,000 she received from a medical disability insurance payment. The balance of the $90,000 she paid down came from the sale of Seine Square. Hedmann made no financial contribution to the purchase of this property in 2004. Hedmann at the time was earning some income but continued to be in difficult financial circumstances.

[9] The parties married on the 8th of July 2006. Prior to that date, on the 7th of July 2006, a marriage agreement (the "Agreement") was signed. A copy of the

Agreement is in evidence although there is apparently no original. Both Hedmann and MacNeil acknowledged that the copy presented as Exhibit 1 in this proceeding is a photocopy of the original Agreement. There is some dispute as to what happened to the original Agreement. Hedmann believes it to be lost. MacNeil believes that Hedmann destroyed it and she obtained the signed photocopy (Exhibit 1) from her lawyer's office, Debbie Hoffman. It is fair to conclude that neither party disputes the accuracy of Exhibit 1 as a copy of their actual Agreement. The parties very much dispute whether or not the Agreement is still binding.

[10] Both parties agreed that the initial discussions in regards to the Agreement arose from Hedmann. He states that his concern was that he was likely facing bankruptcy and wanted to protect MacNeil's property from any claim. MacNeil states that she was wanting to bring up the issue of a prenuptial agreement and it was convenient that Hedmann did. MacNeil testified that she wanted the Agreement because all the funds in the marriage were hers from pre-existing assets, insurance policies, and the like and that she had concerns about Hedmann's potential bankruptcy and his general dealings with finance. She also wanted to protect these assets for her children who were young adults.

[11] The issue of the Agreement and whether or not the Agreement was revoked either by the actions of the parties, or revoked by its destruction, or revoked by further oral agreement, was very much an issue.

[12] The parties married, as indicated, on the 8th of July 2006. The marriage ended less than three years later in June 2009.

[13] During the course of the relationship, MacNeil worked primarily as a licensed practical nurse and it was through her work at a local hospital that she formulated the idea to provide in home care to a long-term resident of the hospital. For that purpose, she incorporated the company referred to in the evidence as CMAC. CMAC contracted with the Yukon government to provide a home and care to this disabled individual. Over the years, the CMAC contract has been a supplementary source of income for the household and MacNeil. Both MacNeil and Hedmann appeared to have worked to provide care for the individual covered by the CMAC contract. Additionally, at various times, MacNeil's two sons have also worked for CMAC under this contract as have a number of other individuals. The contract required 24-hour care for the individual which the contract covered.

[14] Hedmann testified that it was his ability to deal with government and his ingenuity and negotiating skills which resulted in the success of CMAC. MacNeil disputes this to a limited degree, acknowledging Hedmann's role in negotiations, but noting her abilities and reputation as a care provider.

[15] In August of 2008, a similar business was developed by Hedmann called Serenity. Serenity also provided a similar type of service for a handicapped individual and also contracted with a branch of the Yukon government. MacNeil says that it was the success of CMAC and her relationship with government officials which assisted Serenity in developing its business plan and being successful in its negotiations of a contract.

[16] In regards to these businesses generally, neither party makes a claim against the other's business although each raises historical contributions to the businesses in

support of their claims generally. As noted, Hedmann said that it was his skill and ingenuity which ensured the success of CMAC as well as his work in the business. MacNeil claims that it was her long established reputation, her stability and her resources which made CMAC successful and essentially Serenity was built upon the reputation established by CMAC. She argues Hedmann was paid for his services.

[17] Throughout the vast majority the parties' relationship, Hedmann's past financial difficulties continued to plague both MacNeil and Hedmann. Eventually, this forced Hedmann in July 2007 to declare bankruptcy. It is one year later in August 2008 that Serenity was developed, after the bankruptcy had been resolved.

[18] Additionally, there seems to be a period of time that Serenity was operating and not receiving funds from any governmental authority and it is during this time that the entirety of both operations were funded through the bank account of CMAC. Much evidence was called in regards to the perplexing and, unfortunately, non-resolvable issues of the intermingling of the two businesses and how the joint financial obligation of the two entities were funded through the accounts of CMAC.

[19] As Serenity developed, the parties looked to purchase a second residence. A residence across the street from 91 Wilson Drive became available, 88 Wilson Drive. The purchased occurred in March/April 2009, just before the separation. Around the time of the purchase of 88 Wilson Drive, Serenity paid back some of the money owed to CMAC, being approximately $41,000. These funds were used as the down payment of 88 Wilson Drive. 88 Wilson Drive is in MacNeil's name alone. Although the source as funds for 88 Wilson Drive was from Serenity, these funds were clearly some of the monies owed by Serenity to CMAC.

[20] I can conclude however that Serenity did not reimburse CMAC for all costs funded by CMAC up to the date of separation. It seems clear that the vast majority, if not all of the expenses of Serenity, until close to the separation of the parties, were paid by CMAC. During the first year of operation, the calendar year of 2009 to the date of separation at the end of June 2009, based on Hedmann's evidence, he was to receive about $17,500 per month under his care contract with the Yukon government. As such Serenity would have received for this time about $105,000 (6 months x $17,500 = $105,000). The expenses were run through and paid by CMAC. Only $41,250 was paid to CMAC and the balance was retained by Serenity. Serenity, in fairness, paid for some of CMAC's employees during a six-week period of time when the employees were in Kelowna but on balance, the vast majority of the expenses for the combined operation were paid by CMAC.

[21] The parties' joint financial operations from the date of marriage to the date of separation are, again, a confusing financial quagmire. MacNeil had income and there was income from CMAC. There was some income from Serenity in the latter part of the relationship but other than the reimbursement of some expenses paid by CMAC, approximately $41,000, Serenity has retained the bulk of the funds. MacNeil had outside income which was used to support the family. Hedmann states that he also had outside income and this appears true, and he also did on occasion receive income from CMAC.

[22] MacNeil claims that her funds and the income generated by CMAC supported the relationship. Hedmann states that he contributed funds as well to the party's joint expenses.

[23] Usually this would not matter much in a long-term marriage however the parties made much of what they perceived to be their own contribution to the relationship and the lack of contribution of the other side. On balance, I find MacNeil has shown that she made the larger financial contribution to the parties' joint relationship. Clearly, through the common-law relationship and the early part of the marriage, Hedmann's financial problems were a drain on this relationship. As indicated, he eventually declared bankruptcy. MacNeil on the other hand, worked outside the home and worked the business of CMAC, granted with the assistance of Hedmann, and her funds were used to support the family.

ISSUES:

1. The Agreement (the marriage agreement dated the 7th of July 2006)

[24] The Agreement provides in Schedule A and Schedule B the assets and liabilities of each party. Schedule A, MacNeil's assets, includes the property at 91 Wilson Drive, her RRSPs, a 1995 Ford Mustang, and all bank accounts that she owns. Her liabilities are noted as a personal line of credit and a VISA debt.

[25] Hedmann's assets are listed as Schedule B as David Hedmann & Associates, a sole proprietorship. His liabilities are noted as debt to Revenue Canada as well as $80,000 in general debts not specified.

[26] Generally speaking the Agreement provides that the parties are to be separate as to property. The section on bank accounts indicates that the parties will maintain separate bank accounts and will remain owners of their accounts as separate property. The Agreement further provides for individual responsibilities for personal debt. The Agreement provides for separate property and further provides that property will remain

separate during the course of their relationship. After their relationship ends, the Agreement provides that neither party will make a claim against the other's separate property.

[27] The Agreement acknowledges Hedmann's contribution to MacNeil's home and notes that contribution as a gift from Hedmann to MacNeil and that Hedmann will have no recourse whatsoever to recover monies gifted and shall acquire no interest whatsoever in MacNeil's home as a result of any contribution he made. Additionally, the Agreement provides that any property acquired during the course of the relationship is the separate property of the person who acquires it unless it is registered in both parties' names or the parties record in writing that it is co-owned.

[28] Paragraph 12 of the Agreement deals with the consequences of property if their relationship ends. It reads as follows:

> 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.

[29] Additionally, para. 18 of the General Clauses is significant. It reads as follows:

> 18. The Parties may vary this Agreement only be [sic] a written agreement executed in the same manner as this Agreement.

[30] In their argument, neither MacNeil nor Hedmann made any suggestion, nor is there any evidence, that there are formal invalidities to this Agreement. Both parties acknowledge that this was an agreement that they entered into, knowing the consequences of it. Specifically, Hedmann did not suggest that he was coerced or intimidated into signing this Agreement which he now seeks to set aside. In fact, he was candid in his evidence that it was his idea that the Agreement being entered into.

[31] Clearly on the evidence, both parties desired an agreement for different reasons. Hedmann was aware that he was facing a potential bankruptcy; MacNeil indicated in her evidence, and I accept this evidence, that she was wanting to raise the issue of an agreement in order to protect her assets in the event that their relationship broke down. Specifically, as many of the assets had their origin in the estate of her former husband, the father of her two children, she wished to protect some assets for her two children.

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

[33] It seems clear on the evidence that on a number of occasions, particularly as their relationship was breaking down and as they were separating, MacNeil in an attempt to salvage the relationship with Hedmann, offered in discussions to set aside the Agreement. This however was never done. On every occasion that it appeared to

be discussed, MacNeil backed away from cancelling the Agreement once she had a chance to think on her own.

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

[35] The fact that the Original of the Agreement is "missing" is in my view not of consequence. Both parties admit Exhibit 1 is a true copy. It is signed.

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

2. The effect of the *Family Property and Support Act* on the Agreement:

[37] The *Family Property* and *Support Act*, R.S.Y. 2002, c. 83 [*FPSA*], is the governing law in the Yukon regarding division of property. Section 2 of the *FPSA* describes the extent to which a marriage contract applies with respect to matters provided for in the *FPSA*. It states:

> 2(1) Except as otherwise provided by this Act, if a marriage contract or separation agreement makes provision in respect of a matter that is provided for in this Act, the contract prevails.

> (2) Any provision in a domestic contract that purports to limit the jurisdiction of a court to determine the extent to which subsection (1) applies in respect of the contract is void.
>
> (3) Despite any other provision of this Act, any provision in a marriage contract that purports to limit the rights of a spouse under Part 2 is void.
>
> (4) Despite subsection (1), if a court is satisfied in any proceedings under this Act that a person has, through undue influence, secured the agreement of their spouse or a person with whom they are cohabiting to any provision in a domestic contract, a court may decline to give effect to the provision for the benefit of the person who secured the agreement.

[38] The *FPSA* appears in s. 2(4) to provide an “out” in regards to a marriage contract if the marriage contract was obtained through undue influence. From the facts noted above, that does not apply in this circumstance. Section 2(1) of *FPSA* states if a marriage contract deals with matters that is provided for under the *FPSA* then the contract prevails. This is subject to circumstances that suggest undue influence, not present here, and s. 61(1) of the *FPSA* which requires that the marriage contract be in writing signed by both parties and witnessed by an independent third party. Those circumstances are present on the facts here.

[39] Of note, s. 2(3) provides that a marriage contract cannot limit the rights of a spouse under Part 2 of the *FPSA*.

[40] Based on my review of the provisions of the sections under Part 2 and the legislation generally, none of the provisions of Part 2, which is entitled “Family Home” deal with the division of the family home on marriage breakdown. Rather, s. 6 of the *FPSA* governs this issue. Section 6 is found in Part 1. Section 6 begins with the proposition that family assets including the family home, owned by one or both spouses

are to be divided in equal shares between the spouses. Additionally, s. 13 of the *FPSA* grants the court power to order an unequal division in certain circumstances.

[41] Also of significant note is s. 4 of the *FPSA*. This is above in Part 1. That section defines what a family asset is for the division of property purposes. It states:

> 4 In this Part, "family assets" means a family home as determined under Part 2 and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation, or for household, educational, recreational, social, or aesthetic purposes, and includes
>
> (a) money in an account with a chartered bank, savings office, or trust company if the account is ordinarily used for shelter or transportation or for household, educational, recreational, social, or aesthetic purposes;
>
> (b) if property owned by a corporation, partnership, or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property;
>
> (c) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of themselves, if the property would be a family asset if it were owned by the spouse; and
>
> (d) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume, invoke or dispose of the property, if the property would be a family asset if it were owned by the spouse;
>
> (e) if the spouse's rights under a pension plan have vested, the spouse's interest in the plan, including contributions made to the plan by other persons;
>
> (f) the spouse's rights to contributions to a pension plan in which the spouse's rights have not vested, and the

> spouse's rights to money in a retirement, savings, or investment plan.
>
> but does not include property that the spouses have agreed by a marriage contract or separation agreement is not to be included in the family assets. [Emphasis Added]

[42] It was suggested before me that the provisions of Part 2 of the *FPSA* has the effect of prohibiting a marriage agreement, and specifically this Agreement, from governing the division of a family residence. I disagree with that proposition. Part 2 provides parties to a marriage certain rights in regards to a family home including a right of possession and the like. Part 2 does not however govern the division of family assets, that is covered in the various sections in Part 1. As I noted above, s. 4 provides a definition of family assets which are presumptively subject to equal division, but this expressly excludes assets that the parties have agreed by a marriage contract are not to be included as family assets. There is no restriction in s. 4 that relates to the family home. As such, I have concluded that the *FPSA* does not prohibit the parties from agreeing in a marriage contract to a division of a family home by way of contract rather than following the provisions of the Act.

[43] In this case, the parties, by way of the Agreement, decided how their property would be divided upon marriage breakdown and concluded that they would have separate property throughout the marriage and after the end of their marriage. They agreed that any property acquired by the party in their own name will be their separate property and not subject to division in the event of marriage breakdown. As noted, I am satisfied that there is nothing in the *FPSA* which has the effect of limiting the intentions of the party as noted in the Agreement.

[44] I have, as such, concluded that the Agreement between the parties dated the 7th of July 2006 governs this relationship and the division of property at the end of their relationship. Pursuant to the Agreement, MacNeil is entitled to sole ownership of 91 Wilson Drive, 88 Wilson Drive and her company, CMAC. Additionally, she is entitled to her Ford vehicle. Hedmann is entitled to his Subaru vehicle, his Toyota Forerunner, and his company Serenity.

[45] Additionally, each party is responsible solely for the debts in their own name. It does not appear that there are any joint debts.

[46] Based on this conclusion, I would not entertain any claim by MacNeil for bills, debts, or payments she has made post-separation that she believes, fairly, to be the responsibility of Hedmann. These are also governed by the Agreement. They are debts in her own name and as such her responsibility.

3. Division absent the Agreement:

[47] If I am wrong in my determination as to the validity of the Agreement and its effect on the *FPSA* on the Agreement, then a determination of property entitlement would be made considering s. 6 and 13 of the *FPSA*. I now turn to that alternative analyses.

[48] As indicated, the exact financial details and the financial inter-relation of CMAC and Serenity are impossible to determine on the evidence before me. CMAC is owned by MacNeil and Serenity is owned by Hedmann. Each party agrees that they will retain their respective company as their own asset free from a claim from the other. It is fair to conclude on the evidence however, that CMAC paid Serenity's bills for several months, and was not completely reimbursed when the approximately $41,000 was paid back.

[49] Noted below is a chart outlining the remaining assets owned by the parties and their values, followed by a discussion of other factors at play in regards to division of property.

Asset	Value at Trial	Indebtedness		Equity
91 Wilson Drive	$490,000	$112,000 $42,000	(First Mortgage) (Second Mortgage)	$336,000
88 Wilson Drive	$390,000	$304,000		$86,000
Hedmann Subaru	$24,000	0		$24,000
Hedmann Forerunner	$10,000	0		$10,000
MacNeil Ford	$14,500	0		$14,500

[50] In addition to these assets, there is also an issue of debt paid by MacNeil since the separation for which she claims reimbursement from Hedmann. These were for the most part not seriously disputed by Hedmann, but in any event I would find that fairness requires Hedmann to reimburse MacNeil for payments made by her. I will detail these below:

(i) Mortgage 91 Wilson Drive:
From July to October 2009, MacNeil paid four months mortgage payments of $1,221, or $4,884 on the 91 Wilson Drive property while Hedmann occupied it.

(ii) Mortgage 88 Wilson Drive:
For the month of November 2009, MacNeil paid the mortgage on 88 Wilson Drive while Hedmann occupied it. She paid $1,542.

(iii) Line of Credit:
For fifteen months to the date of trial, MacNeil paid the line of credit which is the second mortgage on 91 Wilson Drive, but which is in fact joint consumer debt of MacNeil and Hedmann. For fifteen months she paid $205 on average per month or $3,075. Additionally, from December 2010 to and including the month of June 2011, MacNeil will have to pay $205 per month or $1,435. The total she has or will pay is $4,510. She would claim from Hedmann one-half this amount of $2,255.

(iv) Insurance:
MacNeil paid the house insurance from October 2009 to October 2010 on 88 Wilson Drive. During that period of time, the property was occupied by Hedmann. This totalled $1,361.

(v) Power bill:
At separation, there was a joint indebtedness on a power bill in the amount of $730. MacNeil claims one-half or $365 from Hedmann.

(vi) MasterCard:
At separation, there was a balance owing of $5,400 on the MasterCard. This appears to be a joint debt, that was not really disputed; though it is in MacNeil's name alone. I am satisfied on the evidence that interest accrued from the date of separation to the date of trial in the amount of $1,435. I am further satisfied that additional interest will run on this credit card from the date of trial to the month of June 2011 in the amount approximately of $500. That creates a total indebtedness (principal and interest) for the MasterCard of $7,335. MacNeil claims one-half of that being $3,667.50.

(vii) VISA card:
At the time of separation, the balance owing on the VISA card was $17,504. Again, this appears to be a joint debt in MacNeil's name alone. I am satisfied on the evidence that interest to the date of trial accrued in the amount of $4,973. Further, interest to the month of June 2011 will be approximately $1,500. The total VISA indebtedness is $23,977. MacNeil claims one-half of that total VISA indebtedness or $11,988.50.

[51] It should be noted that MacNeil argues that Hedmann should pay all the interest on the VISA and MasterCard because of her efforts to extend the line of credit and have those two charge cards paid by way of advance on the line of credit. Although there is a superficial rationality to this, in the circumstances of the parties being involved in heated litigation, it was not completely unreasonable for Hedmann to take the position that he did not agree to extend the line of credit.

[52] In the absence of the Agreement, MacNeil argues for an unequal division of property as an appropriate result. The parties' relationship began in late 2003 or early

2004. The parties married in July 2006 and they separated in June 2009. This is less than a three-year marriage and slightly over a five-year total relationship. MacNeil notes that virtually all of the funds used to acquire assets came from her sources. Certainly, all of the funds to acquire 91 Wilson Drive came from her sources and the purchase of 88 Wilson Drive came from reimbursement to her company for monies essentially paid by CMAC for the benefit of Serenity.

[53] Hedmann argues that he made indirect contributions to the Seine Square property which increased its value, allowing additional funds to be available for the purchase of 91 Wilson Drive and argues that it was their joint enterprise which created the funds for the purchase of 88 Wilson Drive.

[54] I find that the argument of MacNeil more meritorious. There is scant evidence of any significant financial contribution by Hedmann to the parties' relationship. Absent the financial resources of MacNeil, there would have been little acquired by the parties during the course of their relationship.

[55] The *FPSA* provides presumptively for an equal division of property. Section 13 deals with an unequal division. It reads as follows:

> 13 The Supreme Court may make a division of family assets resulting in shares that are not equal if the Supreme Court is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to
>
> (a) any agreement other than a marriage contract or a separation agreement;
>
> (b) the duration of the period of cohabitation under the marriage;
>
> (c) the duration of the period during which the spouses have lived separate and apart;

(d) the date when property was acquired;

(e) the extent to which property was acquired by one spouse by inheritance or gift;

(f) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement, or use of property rendering it inequitable for the division of family assets to be in equal shares;

(g) the date of valuation of family assets.

[56] There are a number of notable factors at play in the determination of this matter, if it was to be made, strictly under the provisions of the *FPSA*. The first factor of note is that the vast majority of the financial resources used to acquire assets were the financial resources of MacNeil earned or obtained prior to the marriage, most notably from her former husband's estate and during her marriage to her former husband. Also of considerable note is the fact that this is a short marriage. The period of marriage cohabitation is around the three-year mark. These two factors together are strongly supportive of an unequal division between MacNeil and Hedmann. Also of note however, is the fact that since the separation, as noted above, the complete responsibility for maintaining the family assets has fallen on the shoulders of MacNeil. Hedmann has essentially contributed nothing to the substantial joint family debt and, as I have found, has not reimbursed MacNeil's company to a complete degree for the considerable expenses run through her company, CMAC, for the benefit of his company, Serenity, for which he received payment. In my view, s. 13(b), (c), and (f) are of consideration.

[57] Absent an agreement, I would award a 25% interest in 91 Wilson Drive and 88 Wilson Drive properties to Hedmann. The total equity of these two assets, as noted above, is $422,000. A 25% interest as such is $105,500.

[58] I would also allow Hedmann to retain his two vehicles and MacNeil her vehicle. This is a financial advantage to Hedmann. I would direct that Hedmann pay to MacNeil the sum, she claims as noted above, being $4,884 for mortgage payments made by MacNeil for Hedmann's benefits on 91 Wilson Drive, $1,542 for a mortgage payment made on 88 Wilson Drive for the benefit of Hedmann, $2,255 for the line of credit interest payments made by MacNeil to June 2011, $1361 for reimbursement of insurance premiums, $365 for reimbursement of the power bill, $3,667.50 for the MasterCard and $11,998.50 for the VISA card. As such, from the $105,500 owing to Hedmann for the equity in the two properties, I would deduct $26,063, requiring MacNeil to pay to Hedmann the sum of $79,437.

[59] Under this determination, again absent the Agreement, MacNeil would retain the properties at 91 Wilson Drive and 88 Wilson Drive, her Ford vehicle and her business CMAC. Hedmann would retain his business Serenity, his Subaru, his Toyota Forerunner and would receive $79,437 from MacNeil.

[60] I specifically am not making a determination that Hedmann should retain ownership or have the opportunity to retain ownership in either 91 Wilson Drive or 88 Wilson Drive. These parties clearly need to be physically separated from each other. Hedmann, during the course of this litigation, posted in the window of one of the residents that he occupied, a document making negative comments about MacNeil.

This was posted for all in the neighbourhood to see. Hedmann commented at trial about his "right" to post such sign.

[61] Without ruling on his right to defame, it is clearly in these parties' best interests to have physical distance from each other and I would not accede to his assertion that he should retain one of the Wilson Drive properties.

[62] As noted, this discussion of property division absent the Agreement is for discussion or alternative consideration only. I have ruled that the Agreement between the parties governs.

CONCLUSION:

[63] At the last day of trial, I order the parties to be divorced.

[64] I have concluded that the Agreement between the parties dated the 7th of July 2006 governs. MacNeil is entitled to full ownership of 91 Wilson Drive, 88 Wilson Drive, her vehicle, and full interest in her company CMAC. All the debts in her name are her debts alone and her responsibility to pay. I would not require Hedmann to reimburse her for expenses she paid.

[65] Hedmann is entitled to his business Serenity and his vehicles.

GROVES J.