SUPREME COURT OF YUKON

Citation: *S.L.H. v. A.W.H.,* 2019 YKSC 41

Date: 20190719
S.C. No.: 18-D5076
Registry: Whitehorse

BETWEEN:

S.L.H.

PLAINTIFF

AND

A.W.H.

DEFENDANT

Before Mr. Justice D.R. Aston

Appearances:
Shaunagh Stikeman — Counsel for the Plaintiff
A.W.H. — Appearing on his own behalf

REASONS FOR JUDGMENT

[1] ASTON J. (Oral): On May 10, 2019, I conducted a case conference in this case. The procedural order of May 17, 2019 arises from that conference. Pursuant to that order, the plaintiff's application for a summary disposition of the property issues was adjourned to the opening of trial, July 15th. Consequently, the process this week was bifurcated with the Rule 19 application heard first and the other claims following.

[2] The Rule 19 application proceeded on the basis of affidavit evidence and oral testimony. The evidence included three valuation reports admitted into evidence under Rule 19(4). None of the authors of those reports testified on the Rule 19 hearing itself. Marc Perreault did subsequently testify. I have taken his evidence into account even

though it was technically outside the scope of the Rule 19 hearing. I have also taken into account Mr. Meger's report even though A.W.H. chose not to disclose that report until after the filing deadline in the May 17 order.

[3] On Wednesday this week, I advised the parties of my conclusion that, with the exception of the clause relating to Canada Pension Plan credits, the prenuptial agreement signed on June 27, 2012 would be confirmed as a valid, subsisting, and enforceable domestic contract within the meaning of the Yukon *Family Property and Support Act*, R.S.Y. 2002, c.83. I indicated I would give reasons and a detailed judgment later in the week. That is what I am doing now.

[4] The prenuptial agreement was prepared on the initiative of A.W.H. with full disclosure and an opportunity for both sides to obtain independent legal advice. The evidence does not support any reason recognized in law upon which to set aside the contract. It is rather ironic that the defendant is the one seeking to vitiate a contract that is so one-sided in his favour on its face.

[5] S.L.H. gave up the right to claim spousal support and the right to share in any family property the parties might acquire.

[6] The contract, perhaps not unfairly, excluded all pre-existing assets from sharing, including 98% of A.W.H. future settlement of a motor vehicle accident claim.

[7] The agreement provides for "separate property" in para. 4 enabling A.W.H. to keep the entirety of his $2 million settlement for himself.

[8] Paragraph 2 of the contract takes away from S.L.H. any property claim by:

> … virtue of the marriage, any Act of the Yukon Territory, any constructive or resulting trust, any other operation of law, or the law of any other jurisdiction, …

[9] The only property claim reserved to her is a contractual claim under para. 6(b). Paragraph 6(b) provides that if the parties separate, unless otherwise agreed in writing:

> … all property in which the parties have a joint interest is to be divided equally between the parties notwithstanding any equitable principle to the contrary.

[10] In my opinion, it would be unconscionable not to afford S.L.H. the protection of the single provision that operates to her advantage.

[11] A.W.H. voluntarily put the title to [redacted] and [redacted] in joint names. He regrets it now but it is simply too late. He characterizes his voluntary choices regarding the title to those two properties as undermining the basic purpose of the contract by failing to give effect to the mutual intention of protecting all of his assets from any sharing.

[12] This submission glosses over the fact that it was his own choice (a) to take title in joint names; and (b) to involve S.L.H. in financing the two purchases. She was the only one with a pay cheque at the time of acquisition. She signed the mortgage on one property and a line of credit secured against the other. No one forced A.W.H. to buy these properties before he received his settlement money or to add his wife's name to the title.

[13] The pressure that A.W.H. may have felt before the wedding to get a prenup signed does not rise to the level of duress as the law defines it. Moreover, and perhaps more to the point, he was not under any pressure from S.L.H. to put either property in joint names when they were purchased in January of 2013 and July of 2015.

[14] The prenuptial agreement does not foreclose the possibility of gifts between the parties subsequent to its execution.

[15] Under s. 7(2)(a) of the *Family Property and Support Act*, the fact that property is taken in joint names is *prima face* proof that each spouse is intended to have a one-half beneficial interest in the property. Quite apart from that statutory presumption, the contract itself gives such an interest to S.L.H.

[16] The plaintiff's Rule 19 application asks the Court to value the two properties and then trade them off against one another with some cash adjustment. The evidence of values is not reliable enough to enable that approach. The only way of ascertaining the values and fairly dividing the equity in the two properties equally is by ordering a sale of both. This, in turn, requires the Court to address the terms and conditions for sale but, in my view, it also necessitates an order in this case for the possession and control of the properties. Rule 19(12)(b) authorizes an order for terms and conditions for the enforcement of any order under Rule 19. The Court also has a wide ranging inherent jurisdiction.

[17] S.L.H. wishes to realize on her share of the equity as quickly as reasonably possible. It is not clear to me but, alternatively, she may wish to reside at [redacted] once the current lease is up next September.

[18] I have no doubt, based on the history of this litigation, that A.W.H. will be difficult when it comes to the sale of [redacted], if not for both properties.

[19] The cottage property at [redacted] is in A.W.H.'s name and is not subject to any claim by the plaintiff under the prenuptial agreement. However, she has registered a certificate of pending litigation against title. Given my expectation that the enforcement

of this judgment is likely to be protracted and difficult, the cottage property ought to be used as security for the realization of the plaintiff's entitlement. The certificate of pending litigation will remain in place subject to any further order of the Court as security for the enforcement of this judgment.

[20] The Court also needs to address the rental income from [redacted] and the carrying costs on both properties pending their sale. A.W.H. has received all the rental income since the separation, but he has also paid the carrying costs on both properties. He has had exclusive possession of the family home since August 1, 2018, and wishes to continue to reside there. Absent any actual evidence of the fair market rental of [redacted] but mindful of the personal and subjective value of the property to A.W.H. and the carrying costs he has paid, practicality and equity lead me to conclude that he should be responsible for all carrying costs of the family home since the date of separation and continuing so long as he occupies it. It is a fair trade-off of the value of occupying the property against those costs and the best I can do on the evidence that I have got.

[21] Because of my concern that A.W.H. will obstruct a sale of that property, I want to specifically say that I have considered granting S.L.H. exclusive possession of the family home pending a sale. I have decided not to do so at this time, but the judgment today is specifically without prejudice to her right to seek that relief if, in fact, A.W.H. does interfere with efforts to sell the property or does not maintain it in a manner suitable for prospective purchasers.

[22] Under the *Family Property and Support Act*, a provision in a domestic contract that limits possessory rights in a family home under Part 2 of the *Act* is void. See s. 2(3)

of the *Family Property and Support Act*. There is therefore no legal impediment to an order granting either spouse exclusive possession of [redacted], should it become necessary.

[23] In addition to an accounting for the rental income, there is a post-separation adjustment for an amount that A.W.H. added to the line of credit after the date of separation. On the date of separation, the line of credit stood at $67,250, registered as security against the property at [redacted]. S.L.H.'s beneficial interest at that time cannot be eroded by A.W.H.'s unilateral action in running the line of credit back up to its maximum of $146,250, as he did, with a $79,000 advance to himself post-separation.

[24] Finally, the Rule 19 application seeks an order for the sharing of two vehicles and household contents. These items would clearly be family assets but the marriage contract ousts the provisions of the *Family Property and Support Act*, so entitlement must be grounded in the contract itself. There are two basic principles in play.

[25] The first is that the separate property provisions in paras. 4 and 6(a) of the contract mean that each spouse gets to retain — in first instance, at least — any property he or she purchased. In this case, there was never a joint bank account so it is at least theoretically possible to trace ownership of chattels and vehicles.

[26] The second principle in play is that the contract does not foreclose gifts as between the spouses. For example, no one would suggest that Christmas, birthday, or other gifts that were exchanged are reversible somehow based upon the domestic contract.

[27] With respect to the Ford F-150 truck, A.W.H. submits that he purchased this vehicle with his own separate funds and registered it in his own name. There is no

evidence to the contrary. He says he only intended for S.L.H. to have the use of the vehicle, not an ownership interest.

[28] I accept the evidence of S.L.H. on this particular issue found at paras. 115 to 123 of her Affidavit #6, sworn February 8, 2019, at least as to her understanding. From her perspective, she gave up her own vehicle in substitution for a new one. From her perspective, the new vehicle was a gift.

[29] However, as a question of law, gifts are determined by the intention of the donor. A.W.H. has satisfied me that he did have in mind the regime of separate property under the marriage contract and that he did not intend the actual ownership of the vehicle to vest in his wife. This finding is consistent with his attitude, however unreasonable it may seem, with other chattels. Take one extreme example, the set of ladies golf clubs which obviously are of no personal use to him but which still belongs to him.

[30] As a property claim, the Court cannot grant the plaintiff's claim regarding the vehicles or the contents. However, I will be seriously considering a lump-sum for spousal support when I get to the other claims in this case.

[31] With respect to the household contents, the time available to hear this matter did not permit an inquiry into the acquisition, use, or possible gifting of any particular items, with a few exceptions. It is obvious that A.W.H. retained much more but he also paid for much more. If the parties are unable to resolve S.L.H.'s claim for a greater share of the remaining household contents and chattels in A.W.H.'s possession, I will consider her need to replace items in the context of her spousal support claim.

[32] The parties were unable to agree on a listing price for [redacted] or [redacted]. The listing price for [redacted] will be fixed at $345,000. The listing price for [redacted]

is fixed at $629,000 or such greater amount as the plaintiff may choose in the initial listing.

[33] Based on these reasons and reserving the right to deliver supplementary reasons, if necessary, a judgment will be granted as follows on the Rule 19 application.

1. Paragraph 8 of the prenuptial agreement of the parties prohibiting either party from applying for a division of pensionable earning credits under the Canada Pension Plan is invalid and unenforceable.
2. Pursuant to para. 11 of that agreement, para. 8 is severed and the agreement is construed as if para. 8 was omitted.
3. The Court declares that the prenuptial agreement is otherwise a valid, subsisting, and enforceable domestic contract under the *Family Property and Support Act*.
4. The parties, having separated and not having entered into any other written agreement, all property in which they have a joint interest is to be divided equally between them, not withstanding any equitable principal to the contrary in accordance with para. 6(b) of that agreement.
5. The properties known as [redacted], Whitehorse (the family home) and [redacted], Whitehorse (the rental home) are jointly and equally owned by the parties according to the registered title. The ownership interests are to be equally divided, subject to any post-separation adjustments as between them.
6. Both properties are to be listed for sale forthwith, according to the terms of this judgment and any subsequent order the Court may make for

directions to accomplish the sale and equal division of the proceeds of sale.

7. Effective July 31, 2019, the plaintiff shall assume exclusive possession and control of the rental property at [redacted]. The defendant is restrained from renewing the lease for the property. Effective August 1, 2019, all rent shall be paid to the plaintiff. The plaintiff, in consultation with the defendant, shall decide whether the property will be rented after the expiry of the current tenancy in September; and if so, on what terms. If requested, the defendant will execute without delay any document necessary to effect the termination of the current tenancy and to secure vacant possession of the property.

8. Within 30 days, the defendant will provide a detailed accounting, including supporting documentation, as to the rental income collected by him and the expenses he has paid in relation to the rental property from April 1, 2018 to July 31, 2019. Effective August 1, 2019, all expenses for the property will be paid from the rent received, if any, and any expenses not covered shall be paid by the parties in equal shares pending the sale.

9. The Defendant will maintain all carrying costs on [redacted] in lieu of occupation rent and there should be no post-separation adjustment on account of that property.

10. The family home shall be listed for sale for $629,000 or such greater price as the plaintiff chooses for the initial listing. If the parties are unable to

agree on the listing agent, the plaintiff may choose the agent in the first instance.

11. The defendant shall maintain [redacted] in a state of repair, tidiness, and cleanliness conducive to its sale and shall cooperate reasonably with any real estate agent and any prospective purchaser. Beyond the required disclosure of deficiencies in the listing, he shall not discourage a sale by word or deed.

12. The rental property at [redacted] shall be listed for sale for $345,000 or such other price as the parties agree upon. If the parties are unable to agree on the listing agent, the defendant may choose the agent in the first instance.

13. In addition to any post-separation adjustment that may be payable as between the parties on account of net rental income or ongoing expenses for the rental property pending its sale, there shall be a post-separation adjustment in favour of the plaintiff for the $79,000 the defendant added to the line of credit loan secured against [redacted].

14. After payment of all costs of sale for the first property to sell, $79,000 shall be paid to the plaintiff before the remaining net proceeds of sale are equally divided. Any shortfall in the $79,000 shall be paid in like fashion from the proceeds of sale on the second property to sell, at which time the post-separation adjustments on account of the rental income and expenses for [redacted] shall be paid.

15. The certificate of pending litigation registered on the title to [redacted] shall remain in place until further order of the Court or the receipt in full of all amounts due to the plaintiff on account of property, child support, spousal support, or costs, as may be the case.

[34] I have heard submissions on costs with respect to the Rule 19 application. I think it is appropriate to deal with those costs discretely and separately from the costs on the other issues, so I will reflect on that some more before I make a decision on that aspect of the Rule 19 application.

[35] The last thing I will say for today, at least formally, is that I am going to reserve the decision on all of the other issues that have been identified as issues for trial.

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ASTON J.