

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Freeman v. McRae*, 2004 YKSC 12

Date: 20040130
Docket No.: S.C. No. 03-D3573
Registry: Whitehorse

Between:

MURRAY NELDON FREEMAN

Petitioner

And

MARILYN EVELYN MCRAE

Respondent

Appearances:

Ms. Debbie Hoffman

Ms. Marilyn Evelyn McRae

For the Petitioner

On her own behalf

Before:

Mr. Justice R.S. Veale

REASONS FOR JUDGMENT

INTRODUCTION

[1] These reasons are given in response to a practice in the Yukon Land Titles office with respect to family homes under the *Family Property and Support Act*, R.S.Y. 2002, c. 83, (the Act). I am advised by counsel that the practice in the Yukon Land Titles office is to transfer family homes without regard to the provisions of s. 23 of the Act which prohibit a spouse from disposing or encumbering a family home unless affidavit proof is filed by the transferring spouse that the property is not a family home. In this case, the Yukon Land Titles office permitted Ms. McRae to transfer a family home without providing the required proof by way of affidavit. I am advised by counsel that Ms. McRae

transferred the family home from her name to her son's, without complying with s. 23 of the Act. As a result, I set aside the transfer of Ms. McRae to her son and the case was ultimately concluded by an order consented to by Ms. McRae and Mr. Freeman.

THE FACTS

[2] Ms. McRae and Mr. Freeman were involved in a common-law relationship for 8 years before getting married on July 1, 2000. They lived in a home on Lot 194, Porter Creek, Plan 24795 (the Yukon property) from 1992 until July 2002 when Ms. McRae moved to a property in British Columbia (the B.C. property).

[3] The Yukon property was registered solely in the name of Ms. McRae. The B.C. property was registered in the joint names of Ms. McRae and Mr. Freeman.

[4] The parties were not formally separated until Easter 2003, when Ms. McRae advised Mr. Freeman that she wanted a divorce.

[5] Mr. Freeman registered a *caveat* against the Yukon property on June 2, 2003, forbidding the registration of any transfer of this property except as subject to the interest claimed by Mr. Freeman. A *caveat* does not prohibit the transfer of the subject property but rather gives notice of a claim against the property to the owner and any prospective purchaser.

[6] Ms. McRae transferred the Yukon property to her son on July 2, 2003. He began proceedings to evict Mr. Freeman and remove his *caveat*.

[7] On August 7, 2003, I issued an order without notice designating the Yukon property as a family home and granting exclusive possession to Mr. Freeman. On August 26, 2003, after hearing evidence and submissions from Ms. McRae, I ordered that the Yukon property was a family home and set aside the transfer of Ms. McRae to

her son. Thus, the title to the Yukon property was returned to the name of Ms. McRae with an order that no subsequent transfers were valid without the written consent of Mr. Freeman pursuant to s. 23 of the Act.

[8] The matter was adjourned for a settlement conference that ultimately concluded with a consent order agreed to by Ms. McRae and Mr. Freeman. The consent order, among other things, transferred the Yukon property to Mr. Freeman and the B.C. property to Ms. McRae.

DISCUSSION

[9] I do not understand how the Yukon Land Titles office could permit the registration of a transfer of the family home from Ms. McRae to her son without requiring compliance with s. 23 of the Act.

[10] The following provisions of the Act are relevant:

Family home

21(1) Property in which a person has an interest and that has been occupied by the person and their spouse as their family residence is their family home.

(2) Property formerly occupied by a person and their spouse as their family residence continues to be their family home as long as one of the spouses holds a real, personal, or equitable interest in the property entitling one of the spouses to reoccupy the property immediately or later.

(3) A spouse may have more than one family home at the same time.

(4) The ownership of a share or shares, or of an interest in a share or shares, of a corporation entitling the owner to the occupation of a housing unit owned by the corporation shall be deemed to be an interest in the unit for the purposes of subsection (1).

(5) If property that includes a family home is normally used for a purpose other than its use as a residence, the family home is only that portion of the property as reasonably may be regarded as necessary to the use and enjoyment of the residence.

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Disposing of home

23(1) No spouse shall dispose of or encumber any interest in a family home unless

- (a) the other spouse joins in the instrument or consents to the transaction;
- (b) the other spouse has released all rights under this Part by a separation agreement;
- (c) the transaction is authorized by an order of the Supreme Court or an order has been made releasing the property as a family home; or
- (d) the property is not designated as a family home under section 24 and the spouses have an uncanceled designation registered in respect of another property.

(2) On the disposition or encumbrance of an interest in a family home in accordance with subsection (1), the property ceases to be a family home to the extent necessary to give effect to the transaction as if the property were not a family home.

(3) If a spouse disposes of or encumbers an interest in a family home in contravention of subsection (1), the transaction may be set aside on application to the Supreme Court unless the person holding the interest or encumbrance at the time of the application acquired it for value, in good faith and without actual notice that the property was at the time of the disposition or encumbrance a family home.

(4) For the purposes of subsection (3), an affidavit of the person making the disposition or encumbrance

- (a) verifying that the person is not, or was not a spouse at the time of the disposition or encumbrance;

- (b) verifying that the property has never been occupied by the person and their spouse as their family home;
- (c) verifying that the property has not been occupied by the person and their spouse as their family home since the cancellation of its designation as their family home under section 24 or 25;
- (d) if the property is not designated as a family home under section 24, verifying that an instrument designating another property as a family home of the persons and their spouse is registered under section 24, and not cancelled; or
- (e) verifying that the other spouse has released all rights under this Part by a separation agreement

shall, unless the person holding the interest of encumbrance is the person to whom the disposition or encumbrance is made and they had actual notice to the contrary, be deemed to be sufficient proof that the property is not a family home.

(5) This section does not apply to the acquisition of an interest in property by operation of law.

Powers of the Supreme Court

27(1) The Supreme Court may, on the application of a spouse or person having an interest in property to which this Part applies,

...

(e) direct the setting aside of any transaction disposing of or encumbering an interest in a family home contrary to subsection 23(1) and the re-vesting of the interest or any part of the interest on any terms and subject to any conditions as the Supreme Court considers appropriate.

[11] I am informed that the practice among real estate solicitors is to attach an affidavit to each transfer sent to the Yukon Land Titles office to demonstrate compliance with s. 23 of the Act.

[12] It is not clear to the court how this particular transfer was registered without demonstrating compliance with s. 23.

[13] In my view, the people of the Yukon have a reasonable expectation that the Yukon Land Titles office will enforce the laws of the Yukon whether they are found in the *Land Titles Act*, R.S.Y. 2002, c. 130 or the *Family Property and Support Act*, *supra*.

VEALE J.