

SUPREME COURT OF YUKON

Citation: *S.L.H. v. A.W.H.*, 2020 YKSC 12

Date: 20200519
S.C. No. 18-D5076
Registry: Whitehorse

BETWEEN

S.L.H.

PLAINTIFF

AND

A.W.H.

DEFENDANT

Before Chief Justice R.S. Veale

Appearances:
Shaunagh Stikeman
A.W.H.

Counsel for the Plaintiff
Appearing on his own behalf

REASONS FOR JUDGMENT (Sale of Family Home)

INTRODUCTION

[1] This is a high conflict case where every decision of the trial judge, following a five-day hearing on July 15, 2019, has required applications to ensure that the Rental Property and the Family Home are sold and the proceeds divided equally and fairly.

[2] There are seven issues to be addressed in this application:

1. the wife's claim to \$16,042.02 from the proceeds of the sale of the Rental Property as her share of the rental income;
2. the wife's application that the husband pay all the costs associated with his occupation of the Family Home until he vacated the home on March 9, 2020, including, but not limited to, the mortgage arrears in the amount of

- \$2,848.16, the furnace repair in the amount of \$659.25, and all utilities, taxes and insurance owing on that date;
3. the wife's application that she and the husband each pay half the costs of maintaining the Family Home pending its sale including, but not limited to, the mortgage, utilities, insurance, property tax and any further repairs undertaken to sell the Family Home;
 4. the wife's application that the husband pay a lump sum amount to the Maintenance Enforcement Program for future child support and day care costs from his share of the proceeds of sale of the Family Home;
 5. that the wife have the sole right to accept any offer for sale on the Family Home that is \$599,000 or greater (rather than the \$629,000 previously ordered on December 5, 2019);
 6. that the husband's overnight access to the children, M.H., B.H. and A.H. be suspended until he secures suitable housing for the children to sleep overnight;
 7. the wife claims solicitor and own client costs.

BACKGROUND

[3] There are several findings from the Reasons for Judgment of Justice Aston, cited as *S.L.H. v. A.W.H.*, 2019 YKSC 43, following the five-day trial on July 15 – 19, 2019, that I accept and consider to be binding upon me:

1. Justice Aston concluded that the husband's financial statement is completely unreliable as evidence of his true financial circumstances;

2. in 2016, the husband received a net amount of \$1.6 million from a settlement of a motor vehicle accident;
3. the husband also received \$275,000 in the 17 months between March 1, 2018 and the trial which he did not disclose in his financial statement;
4. Justice Aston rejected the husband's claim that the annual income attributable to his \$1.6 million in settlement funds should be \$1,000 per year;
5. Justice Aston concluded that the husband was "intentionally unemployed" but had potential employment income of \$35,000 - \$40,000 per annum, resulting in an imputed income of \$90,000;
6. Justice Aston ordered the husband to pay \$1,795 child support per month to the wife and ½ half of the after subsidy cost of daycare for the three children;
7. Justice Aston ordered the husband to pay the wife's court costs in the amount of \$50,000.

[4] There are three properties at issue and addressed by Justice Aston;

1. The Family Home, held in joint names, was of particular concern in *S.L.H. v. A.W.H.*, 2019 YKSC 41, at para. 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.

2. The Rental Property was addressed at para. 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.

The parties were unable to agree on a listing price for the Family Home and the Rental Home. The trial judge set the Rental Home listing price at \$345,000 and the Family Home at \$629,000.

3. The Cottage Property is in the husband's name and Justice Aston stated at para. 19 as follows:

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.

[5] Justice Aston made the following orders at para. 33 in *S.L.H. v. A.W.H.*, 2019 YKSC 41, dated July 19, 2019, among others:

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 [wife] shall assume exclusive possession and control of the rental property at [redacted]. The [husband] is restrained from renewing the lease for the property. Effective August 1, 2019, all rent shall be paid to the [wife]. The [wife], in consultation with the [husband], 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 [husband] 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 [husband] 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 [husband] 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 [wife] chooses for the initial listing. If the parties are unable to agree on the listing agent, the [wife] may choose the agent in the first instance.
11. The [husband] shall maintain [the Family Home] 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.

...

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 [husband] 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 [wife] 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 [the recreation property] shall remain in place until further order of the Court or the receipt in full of all amounts due to the [wife] on account of property, child support, spousal support, or costs, as may be the case.

[6] Counsel for the wife filed a comprehensive application on November 15, 2019, to address the post-separation adjustments arising out of the sale of the Rental Property on October 16, 2019, the failure to sell the Family Home based on the obstruction of the husband and the application to require the husband to pay a lump sum amount to the Maintenance Enforcement Program for future child support.

[7] At the hearing on December 5, 2019, I proceeded with the issues relating to the husband's interference with the sale of the Family Home which he resided in according to Justice Aston's Order, dated July 19, 2019.

[8] In my Reasons for Judgment in *S.L.H. v. A.W.H.*, 2019 YKSC 71, I concluded that the husband's interference with the sale of the Family Home was well-established

and granted the wife exclusive possession of the Family Home as of February 1, 2020, and the right to accept any offer for \$629,000 or greater, among other things.

[9] I adjourned the issue of finalizing the payout from the proceeds of the Rental Property and the application for a lump sum to be paid from the proceeds of a potential sale of the Family Home to secure the payment of child support and daycare expenses.

Proceeds of Sale of Rental Property

[10] Upon the completion of the sale of the Rental Property in October 2019, the sum of \$16,650 from the husband's equal share of the proceeds was held in trust representing:

1. The rental income adjustment in the amount of \$14,900 to the wife based upon the husband's refusal to account for the rent of \$29,800 he received from the Rental Property;
2. The \$1,500 from the tenant's damage deposit which the husband retained; and
3. The \$1,000 in costs with respect to the Rental Property.

[11] The wife applies for a payment of \$16,402.02 to her and the balance of \$607.98 to the husband.

[12] This application arises out of the Order of Justice Aston, dated July 19, 2019, and filed August 12, 2019. I have examined the accounting of the husband and I am satisfied that the husband did not comply with the requirement that he provide supporting documents for the claimed expenses of Adil Kahlik, whose affidavit filed by the husband did not attach any invoices. I therefore order that the sum of \$16,042.02 be

paid to the wife and \$607.98 paid to the husband from the trust monies held from the sale of the Rental Property.

The Wife's Application Related to the Family Home

[13] I find that the wife's applications 2 and 3 above relating to the division of costs for maintaining the Family Home are entirely reasonable and contemplated in the Reasons for Judgment of Justice Aston. I order that relief accordingly.

[14] The wife applies to amend my order, dated December 5, 2019, granting the wife the sole right to accept an offer on the Family Home for \$629,000 or greater. As a result of delays in listing the property which are attributable to the husband's interference, the COVID-19 crisis is now upon us. In light of that uncertainty, I order that the wife now has the sole right to accept an offer on the Family Home at \$599,000 or greater.

Lump Sum Payment for Future Child Support and Daycare Costs

[15] I note that the husband filed an affidavit of 222 paragraphs on April 14, 2020, the day before the hearing of the applications on April 15 and 16, 2020. As a general comment, the vast bulk of his affidavit is a review of the Reasons for Judgment of Justice Aston and rejecting all the findings of Justice Aston against the husband. To that extent, the husband's affidavit is not helpful. He continues to state that he has "zero income" and that he is "disabled from competitive employment in any capacity since April 8, 2013", all contrary to Justice Aston's decision. However, I have taken his paragraphs 165 to 222 into consideration regarding his current living arrangements and overnight access to the Children.

[16] The wife stated the following in her affidavit #12, filed November 26, 2019:

1. As of November 25, 2019, the husband had not paid the wife any child support since August 7, 2019.
2. He has not paid for any daycare since August 2019.
3. Once the Family Home is sold, the husband will not voluntarily pay child support or daycare costs.
4. She estimates child support of \$292,985 will be owing during the time the Children reach the age of majority.
5. At a minimum, the husband will owe daycare costs of \$14,000 until all the Children are in school.

[17] In her affidavit filed April 7, 2020, the wife stated:

1. As of April 3, 2020, the husband owed her \$28,851.88 for child support, daycare and legal costs.
2. The wife is advised by the Maintenance Enforcement Program that the husband's driver's licence has been suspended and that he obtained a further 30-day temporary licence each time he pays any child support. She is concerned that he will move back to Ontario.
3. She has lost her job as a dental hygienist as a result of COVID-19 and fears she will not be able to provide basic needs for her children.
4. The wife estimates that a sale of the Family Home, the husband will receive approximately \$96,000 after realtor's fees, legal fees and his Maintenance Enforcement lien.

[18] The husband continues to maintain that he is suffering from "permanently disabling medical conditions, including epidural fibrosis, arachnoiditis, complex regional

pain syndrome and complex sleep apnea” contrary to Justice Aston’s finding, after trial, that he is “intentionally unemployed” and has an imputed income of \$90,000 per annum.

[19] The *Family Property and Support Act*, R.S.Y. 2002, c. 83, states that in ordering child support, the court may order under s. 38 that:

...

(b) a lump sum be paid or held in trust;

...

(d) all or any of the money payable under the order be paid into court or to any other appropriate person or agency for the benefit of the dependant;

...

[20] In *Aubry v. Thurber*, 2008 BCSC 1060, at paras. 21 and 22, Joyce J. stated that lump sum support orders are exceptional and should only be paid when specific circumstances make it appropriate. The following are previous decisions where lump sum support orders were granted:

1. Where there is animosity between the parties;
2. Where the payor was not in a position to make any periodic payments;
3. Where the ability to provide support was through the payor’s interest in the family home;
4. Where it was neither practical nor feasible for the payor to pay periodic maintenance considering her earning capacity;
5. Where the father had disobeyed a previous maintenance order and had not demonstrated “prudent financial management”;

6. Where the payor had limited means to earn income by reason of his recent turbulent past and the only reliable, practical means of providing support for his child was from the only financial asset the payor had.

[21] In *V.M.R. v. S.G.*, 2015 YKSC 16, Gower J. granted an application for a lump sum where the defendant did not cooperate and forced the wife to obtain numerous court orders exhausting her emotionally and financially.

[22] In this case, there is a pattern of refusing to pay court-ordered child support, considerable animosity and the allegation that he has “zero income” which Justice Aston did not accept. The only realistic option to ensure the wife receives child support and daycare costs is to order lump sums from their joint assets as they are sold.

Overnight Access

[23] The wife has made an additional application that the husband’s overnight access to the Children be suspended until he secures suitable housing for the Children to sleep overnight.

[24] On December 5, 2019, I ordered the husband to give the wife exclusive possession of the Family Home as of February 1, 2020, because he did precisely what Justice Aston predicted, he obstructed a sale of the Family Home. He did not leave the Family Home until March 2, 2020, and left the premises in a mess and without removing his personal effects which further disrupted the potential sale of the Family Home. This delay may have further negative consequences because of the COVID-19 pandemic.

[25] The husband now resides in the basement of a house belonging to a friend and the Children sleep on mattresses on the floor when they visit their father.

[26] The husband candidly admits that this is a precarious situation dependent upon the goodwill of his friend but he swears that he cannot move to the Cottage Property he owns because of incomplete renovations.

[27] I do not find the prospect of sleeping on mattresses sufficient to deprive the husband of overnight access. I dismissed the wife's application but granted her the liberty to apply again should the access conditions of the Children seriously deteriorate.

[28] As the wife has achieved substantial success in her applications, I award her costs against the husband in the lump sum amount of \$2,500 to be paid from the husband's proceeds from the sale of the Family Home.

VEALE C.J.