Citation: MacNeil v Hedmann, 2014 YKSC 16

DATE: 2014-03-18
S.C. NO.: 09-D4165
REGISTRY: Whitehorse

SUPREME COURT OF YUKON

B E T W E E N:	)	
	)	
Cynthia Lynn MacNeil	)	Debbie P. Hoffman, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
David George Clinton Hedmann	)	Self-represented
	)	
Defendant	)	
	)	
	)	**HEARD: August 12, 2013 – August 28, 2013. Written submissions received thereafter**

Justice E. W. Stach

Reasons at Trial

the issues

[1] This is the retrial of a matrimonial action first heard in 2010.[1] The primary issue in these proceedings concerns the division of property on the breakdown of a marriage. Much of the focus here is on a series of marriage contracts, their respective validity, and the scheme of the governing legislation in the Yukon.

[1] Reasons for Judgment in the 2010 trial, including the granting of an order for divorce, may be found under the citation *MacNeil v. Hedmann*, 2011 YKSC 45; oral reasons of the Court of Appeal for Yukon are recorded at *Hedmann v. MacNeil* 2012 YKCA 11.

[2] The parties entered into three agreements, all of them in writing. All focused on the division or ownership of property acquired before and during their marriage. The first of these, a marriage contract, was entered into on the day prior to their marriage. It was superceded by a 'replacement' agreement in nearly identical terms about one year later - after the first agreement went missing. On its face, a third agreement, made approximately three months prior to the separation of the parties, constitutes a revocation or partial variation of the earlier agreements or an attempt to do so. Also at issue is whether the last agreement was secured through undue influence.

[3] The parties raise issues respecting each of the three agreements which require the court to examine, in addition to their content, the circumstances of their making, the intention of the parties, the circumstances at the time of their execution and the attendant formalities.

[4] Neither spousal support nor child support is an issue in these proceedings. The sole issues relate to the division of property. The major assets in dispute here consist of two residential premises both situate in Whitehorse, one at 91 Wilson Drive and one at 88 Wilson Drive. Some chattels and other claims of lesser value also figure into the mix of property issues to be determined. Finally, the duration of the parties' relationship as common law spouses remains in dispute. All of these issues require consideration of their relationship both as common law and married spouses.

background

[5] Cynthia MacNeil And David Hedmann were married in the Yukon on July 8, 2006. Prior to their marriage they had lived together as common law spouses for a period of years. They separated after three years of marriage on June 29, 2009. Their entire relationship, no matter how calculated, was of relatively short duration.

[6] When Cynthia MacNeil and David Hedmann first met in 1999 Cynthia MacNeil was 41 and David Hedmann was 48 years old. Both had had previous relationships with other persons.

Indeed, when they first met Cynthia MacNeil was still married. She had two teenaged sons from an earlier marriage.

[7] Cynthia MacNeil's husband was killed in an automobile accident in April 2000. An incipient relationship between Cynthia MacNeil and David Hedmann developed shortly thereafter, financed significantly by Cynthia MacNeil.

[8] When they met, David Hedmann's financial circumstances were meagre. He was without work. He was seriously delinquent in paying the mortgage on his home at Almond Place; and he was heavily indebted to the Canada Revenue Agency and other individuals. He was then – and continued for some years after to be – on the cusp of bankruptcy.

[9] Cynthia MacNeil and her now deceased husband had not been affluent but both of them had been employed and they were getting by. With her husband's death, the mortgage on their jointly owned home was paid off through life insurance proceeds and Cynthia MacNeil received further insurance proceeds and various other payments through her husband's estate, including a widow's pension. In short, her financial situation improved greatly.

[10] The trial testimony of Cynthia MacNeil and David Hedmann differs on a broad spectrum of factual issues. It differs also on the nature and duration of their relationship, while unmarried, until the date of their actual marriage on July 8, 2006. Cynthia MacNeil says that their co-habitation as common law spouses was for 2 ½ years. She acknowledges, however, that in 2000 she and her sons moved from their home on Seine Square into David Hedmann's home on Almond Place for a period of 11 months, until April 2001. At Easter of 2001 David Hedmann told her that their relationship was not going to work and he asked them to leave. There is no dispute that in April 2001 she and her sons left the Hedmann residence and returned to her home on Seine Square. Cynthia MacNeil says that, thereafter, she and David Hedmann had only an intermittently romantic relationship - between April 2001 and February 2004 - but did not cohabit again until February 2004.

[11] David Hedmann says that Cynthia MacNeil's return to Seine Square was prompted by the behaviour of her sons who had in the interim been using the Seine Square residence as a party house. He denies any 'hiccup' in their relationship as de facto common law spouses despite not living together. He says their pre-marriage cohabitation was for a period of 5 years.

[12] I accept Cynthia MacNeil's testimony that David Hedmann terminated their relationship in April 2001, at Easter, and although they saw one another episodically – occasionally romantically - during the ensuing two years, they did not resume a common law relationship until David Hedmann moved into her home in Seine Square in February 2004. There is no dispute that David Hedmann actually lived in Cynthia MacNeil's homes at Seine Square and 91 Wilson Drive respectively from February 2004 until their separation in June 2009.[2] I find that their relationship as common law spouses was 3 ½ years, their marriage 3 years and their combined relationship as common law and married spouses 6 ½ years.

[13] David Hedmann maintained a bank account throughout the entire period of his pre-marriage relationship with Cynthia MacNeil but, owing to his ongoing financial predicament, it was not an active account. Early on in the relationship Cynthia MacNeil gave him access to her CIBC savings account. Indeed, he was in possession of the sole debit card in respect of that account and he appears to have used it often. Also from a very early stage Cynthia MacNeil paid many of David Hedmann's personal expenses including gym membership, vehicle insurance and groceries. She consistently paid his vehicle insurance between 2001 and 2009. From February 2004 (when he moved into her home on Seine Square) she gave David Hedmann access to all her bank accounts and empowered him to transfer funds from one account to another.

[14] To be sure, David Hedmann earned some income in the 2001 – 2006 taxation years and I have no reason to doubt that he made occasional deposits into Cynthia MacNeil's CIBC savings account. I infer, however, that most of the deposits he made were modest in amount and

[2] Recital A of Exhibit 8 states that: "Cynthia and David have cohabited since in or about February 2004 and married on July 8, 2006." In the agreement each of the parties warrants the truth of the recitals.

infrequent; his net income was modest throughout that period.[3] The mortgage on his home at Almond Place remained delinquent and, even at the time of its sale (for the purpose of getting out of the mortgage) in March 2004 was at risk of foreclosure. His debts to Canada Revenue Agency and others remained outstanding and undiminished. Despite repayment by David Hedmann of $30,000.00 to Cynthia MacNeil from the sale of Almond Square in March 2004, I conclude that, from a financial perspective, David Hedmann constituted a drain on the financial resources of Cynthia MacNeil throughout their pre-marriage relationship.

Renovations at Seine Square and 91 Wilson

[15] In October 2004 Cynthia MacNeil sold her home on Seine Square for $150,000.00 and purchased another, larger home at 91 Wilson Drive. Renovations were performed at both residences: at Seine Square in order to enhance the selling price, and at 91 Wilson in order to complete a basement rental suite and some landscaping. In both cases Cynthia MacNeil took out a loan in her name to have the work completed. David Hedmann contributed work and organizational skills to both renovations. He submitted detailed invoices for his work including, in each case, a project management fee. I find that he was paid both for the work and his management fees.

[16] At the time of its sale, the title to Seine Square was in Cynthia MacNeil's name alone. She applied $90,000.00 of her net proceeds from the sale of Seine Square towards the purchase of 91 Wilson. She is the sole owner on the certificate of title to 91 Wilson. David Hedmann did not supply any of the down payment towards its acquisition. Although they were then living together, there was never any discussion about putting David Hedmann on the title of 91 Wilson. The purchase price of 91 Wilson was $240,000.00. Cynthia MacNeil took out a mortgage on it for $150,000.00 in her name only. She and David hedmann moved into that home together in November 2004 and resided there together until their separation in June 2009. During this entire span Cynthia MacNeil made the mortgage payments of $1135.66 per month and paid all utilities including oil, propane, electricity and water.

[3] From the income tax returns filed at trial by David Hedmann, his net annual income for each of the taxation years in question is: 2001 - $14,700, 2002 - $25,600, 2003 - $20, 600, 2004 - $33,200, 2005 - $($1,720) net loss, 2006 - $37,500.

CMAC

[17] During their cohabitation at 91 Wilson, Cynthia MacNeil was employed at the Whitehorse General Hospital as a licensed practical nurse. David Hedmann was engaged in his consulting business as a sole proprietor under the trade name David Hedmann & Associates. In late 2005, Cynthia MacNeil's manager at the hospital approached her about the possibility of taking on the full time residential care of a cognitive/physically impaired patient in her basement suite at 91 Wilson. Cynthia MacNeil had a definite interest in getting back into the 'helping field' and responded very positively to the suggestion. This led to further meetings and ultimately to a serious exploration into making the idea work. Cynthia MacNeil ran the idea past David Hedmann and, because they were living together and soon to be married, it was inevitable that he would become part of the mix.[4] Indeed, he provided some very valuable input into the shaping of and negotiation for the residential care contract that ensued.

[18] A contract for a 'specialized approved home' was signed between Cynthia MacNeil (CMAC) and the Yukon Government. C.M.A.C. is an unincorporated sole proprietorship created by Cynthia MacNeil as a business vehicle for this undertaking. CMAC's first residential care patient came to live at 91 Wilson in December 2006. It is a contract that Cynthia MacNeil retains to this day.

[19] CMAC turned out to be a reasonably profitable venture for Cynthia MacNeil. David Hedmann contributed to that success directly and indirectly by measures both large and small. Cynthia MacNeil and CMAC benefited from David Hedmann's business acumen, his organizational skills, and his energy. During Cynthia MacNeil's medical treatment for breast cancer and her temporary absences from Whitehorse, David Hedmann was especially instrumental in providing stability to CMAC and support for her. Indeed, his contributions in that regard are generally acknowledged by Cynthia MacNeil. David Hedmann's attempts at trial, however, to portray himself as the lead figure, primarily responsible both for CMAC's creation

[4] As a matter of Yukon Government policy *all* residents of a residential care home have to be screened for safety, security and suitability purposes.

and its success, overreach the trial evidence as I see it, often significantly.[5] Although his role does not attain the near-heroic proportions that he, by times, ascribed to it, I am nevertheless persuaded that his personal belief in the importance of his role fed, and continues to feed David Hedmann's sense of entitlement.

[20] The 'specialized approved home' model that the Government of Yukon and CMAC developed together met a particular need of the government. In 2008 the Yukon government reapproached Cynthia MacNeil to conduct a needs assessment for a challenged individual who was for the time being housed in a correctional facility. This led ultimately to a second individual being housed at 91 Wilson commencing around July or August 2008 and it culminated in the creation of a separate business entity (Serenity).

the bankruptcy of David Hedmann

[21] The precise month that David Hedmann declared bankruptcy in 2007 is unclear from the evidence. From the picture that emerges, however, it may be said that, during the timeframe that CMAC came into existence in 2006 and for approximately the first 20 months of its operation, David Hedmann was either an undeclared or declared bankrupt. Bankruptcy documentation indicates that he owed $172,425.00 to unsecured creditors on the date of filing. He was discharged from bankruptcy on July 24, 2008. The parties separated in June 2009.

[22] The desire of an individual, upon emerging from bankruptcy, to re-establish financially is understandable, indeed, laudable. David Hedmann acknowledged at trial that this was also his goal and that a means of doing so was to show income and to regain creditworthiness. David Hedmann's discharge from bankruptcy coincided with the incipient development of a second placement at 91 Wilson.

Serenity

[5] See, as but one example, the testimony of Shirley Watts-Haase, the co-ordinator of Residential Services for the Yukon's Department of Health.

[23] The placement of a second individual at 91 Wilson was ostensibly a good fit. CMAC had established a track record with the government and, although CMAC's staffing would need to be supplemented, it already had most of the staffing in place. The second placement went forward, at 91 Wilson, initially on a trial basis, but soon established permanence there. During the trial period, payment for the second placement was directed by the government to CMAC.

[24] David Hedmann testified that he and Cynthia MacNeil had agreed that, if there was to be a second placement after his bankruptcy, it would be with a second company and in his name only. Cynthia MacNeil testified that she was very content to continue with the second placement under CMAC's aegis and expected that would happen. She says, however, that David Hedmann *told* her it was not fair that she had a business and he did not, and that she was *not* taking this second placement under CMAC's care. She attributes David Hedmann's dogged position on the issue to his penchant for "shouldering his way in" and says she relented because she did not have the energy to fight back. I believe there is truth in the testimony of each of them. On December 1, 2008 the Yukon government agreed that, although it was an anomaly from the perspective of government operations, David Hedmann would be permitted to run his own business out of the same household under a separate contract. Serenity, an unincorporated sole proprietorship in the name of David Hedmann, was brought into existence. On December 1, 2008 the second placement came under the care of Serenity.

[25] Although the second placement at 91 Wilson became Serenity's responsibility on December 1, 2008, CMAC employees continued to be involved in the care of that placement and, as indicated, additional staff needed to be hired. A formal contract between David Hedmann (Serenity) and the government could not be signed until 2009, and it was not until March 2009 that Serenity received any payment whatsoever under its contract with the Yukon government.[6] During this lengthy intervening period, *both* CMAC and Serenity's operations were funded by CMAC. Indeed, I find that, despite David Hedmann's protestations to the

[6] In March 2009 David Hedmann (Serenity) received a cheque for $58,000.00 from the Yukon Government respecting care for this second placement, for a three month period.

contrary, a substantial percentage of Serenity's operational expenses to the end of March 2009 - and thereafter as well - continued to be paid by CMAC, until the parties separated in June 2009.

[26] It must be said that the mostly conjoint operations of CMAC and Serenity, the multiplicity of accounts in existence, their frequently indiscriminate intermingling, the contradictory evidence of the parties, and the access by each of them to these accounts, makes it quite impossible for me to assign precise numbers to any overpayments by CMAC to Serenity. Yet, I am persuaded that Cynthia MacNeil almost inevitably wound up 'on the short end', and that, by April 2009, Serenity 'owed' CMAC a substantial sum of money.

[27] There is more to be said of the relational background of these parties and of the substantial sum of CMAC money which funded Serenity's first several months of operations. I will return to that context and chronology later in these reasons. I noted at the outset, however, that much of the focus of these proceedings concerned three marriage contracts. It is useful to consider each of them in context. The first was signed the day before their marriage.

Marriage contract (July 7, 2006); the first agreement

[28] When the parties entered into a prenuptial agreement on July 7th, 2006 Cynthia MacNeil was 47 years of age and David Hedmann 54. As indicated, both of them had previous relationships and, also as indicated, they had themselves been through an unsuccessful common law union of approximately 11 months before they resumed cohabitation and eventually married.

[29] I provided a generic outline of the financial circumstances and activities of these individuals at a somewhat earlier point in time, but, as at the date of the signing of the first prenuptial agreement their respective assets were specifically listed, for Cynthia MacNeil in Schedule "A" of the agreement and, for David Hedmann in Schedule "B".

[30] Among the listed assets of Cynthia MacNeil in 2006 there is real property known as 91 Wilson Drive, a retirement savings plan in the amount of approximately $38,000.00, a fully paid 1995 Ford Mustang motor vehicle, and various bank accounts held by her of which the balances are unstated. Her liabilities consisted of approximately $7,000.00 of credit card debt and a personal line of credit of about $40,000.00.

[31] For David Hedmann, Schedule "B" shows his sole asset as a sole proprietorship under his name. No value is ascribed for the sole proprietorship. His liabilities consisted of a debt with the Canada Customs and Revenue Agency of about $80,000.00 and about $80,000.00 in debt owing to other persons.

[32] The recitals in the prenuptial agreement show Cynthia MacNeil's income in 2006 as $45,000.00; she was then employed full-time as a licensed practical nurse. David Hedmann's 2006 income as a self-employed consultant is shown as $12,000.00. In fact, Mr. Hedmann's income tax return for 2006 was entered at trial and in that calendar year his net income was actually $22,400.00. In the 2005 calendar year, however, he had sustained a net loss of $1,720.00.

[33] The prenuptial agreement was prepared by Cynthia MacNeil's lawyer.

[34] Cynthia MacNeil testified that both she and David Hedmann wanted to have a prenuptial agreement in view of the relatively dire financial circumstances that David Hedmann was in at the time, and the desire common to them both to insulate Cynthia MacNeil from these liabilities. Additionally, Cynthia MacNeil had interest in a prenuptial agreement because, relative to David Hedmann, she did own a number of assets. She had two sons who were young adults for whom she wished to provide some inheritance. She wished to secure her own property, particularly in view of having been told by David Hedmann to move out of his residence on Almond Place at an earlier stage in their relationship. She wished, in short, to protect her assets as her own.

[35] In her testimony Cynthia MacNeil says that David Hedmann accompanied her to the first appointment she had with her lawyer in relation to the prenuptial agreement. She says he had his own reasons for being there and simply demanded to be present. He was present when their respective assets and liabilities were reviewed. Cynthia MacNeil stated that her lawyer made it clear to Mr. Hedmann that she was acting exclusively for Cynthia MacNeil and suggested to Mr. Hedmann that he retain his own legal counsel. There was some discussion during the initial appointment about some of the terms that were likely to be included in an eventual agreement, but at no point did anyone look at a draft of any document or any draft language or specific terms. The three of them never met again after the initial meeting. I have no reason to doubt Cynthia MacNeil's testimony about her lawyer having made it plain that she was acting solely for Cynthia MacNeil and that he was urged to retain his own counsel. As I see it, there is no credible basis in the trial evidence for David Hedmann's insinuation/assertion of a conflict of interest.

[36] The trial testimony of the parties differs as to the intended duration of the prenuptial agreement. David Hedmann says there was an understanding between them that the prenuptial agreement would be voided after his financial difficulties were sorted out or - if he declared bankruptcy, after his discharge from bankruptcy. Cynthia MacNeil indicated that it was always her intention that the prenuptial agreement be enduring. David Hedmann's view of the intended duration of the agreement is reflected in the repeated requests he made, after their marriage, that she void the agreement. Cynthia MacNeil's view that the agreement's duration was to be longstanding is reflected in her repeated attempts to deflect attention from his frequent requests to void it. I conclude that there was no common understanding as alleged by David Hedmann. David Hedmann may well have believed that, once married, he would be able to persuade her to void the agreement. Cynthia MacNeil's intention as to the agreement's duration is reflected in the resistance she routinely offered to the repeated attempts made by Mr. Hedmann to persuade her to do away with the prenuptial agreement.

[37] David Hedmann acknowledged at trial that he signed what he knew to be *a* prenuptial agreement on July 7, 2006, the day prior to their wedding. He protested, however, that he did

not have the time to review the document prior to signing it, that he had been taking oxycontin, a pain killer at or about that time, and finally, that he was met with pressure in the form of an ultimatum by Cynthia MacNeil: "Sign it or there will be no wedding". To the extent this triad of assertions are offered by Mr. Hedmann as an attack on the status of the prenuptial agreement, they have no purchase in my opinion. They are, however, consistent with the tack taken by him at trial to use any pretence available to devalue the agreement. I accept the testimony of Cynthia MacNeil that David Hedmann had a copy of the agreement beforehand and the opportunity to read it prior to the wedding. I accept her testimony that there was no ultimatum. I do not accept the notion that David Hedmann lacked either the capacity to sign or an understanding of the terms and consequences of the agreement.

[38] Some months after the wedding, the prenuptial agreement went missing from Cynthia MacNeil's office. She says that a tearful argument ensued after it became apparent that the prenuptial agreement was gone, and that, eventually, David Hedmann admitted to her that he had destroyed it. I accept the testimony of Cynthia MacNeil on this point. Her testimony is consistent with Mr. Hedmann's acknowledgement at trial that he made repeated requests for the agreement to be voided and it is consistent with Mr. Hedmann's subsequent acquiescence in agreeing to execute a "replacement" agreement despite his earlier requests for voiding it.

[39] Exhibit 7 at trial is said to be an unsigned copy of the first prenuptial agreement actually signed by the parties on July 7, 2006. Ms. MacNeil went through the document at some length. She testified that Exhibit 7, an unsigned prenuptial agreement, is an accurate version of the prenuptial agreement they actually signed on July 7, 2006. She says she recalls it clearly; and she remembers signing it with her lawyer. She says that she also saw David Hedmann sign the original. Thereafter, she placed the executed document in her office. She recalled that David Hedmann had initially overlooked initialling Schedule "B" of the agreement (which set out his assets and liabilities) and that he subsequently initialled it. She testified that she saw the fully executed document including David Hedmann's initials to Schedule "B". She testified that the certificate of independent legal advice that forms part of Exhibit 7 was in fact completed and that the witness to David Hedmann's signature had also signed; she saw that both the certificate and

waiver of independent legal advice respectively, had been signed by her lawyer and by David Hedmann respectively.

[40] Cynthia MacNeil testified that David Hedmann had disclosed the fate of the original (signed) prenuptial agreement to her around September 2007. She testified that once David Hedmann made the disclosure she knew immediately that she had to get another one and that it was important for her to seize the moment. She immediately contacted her lawyer with instructions to "re-create" the original document. I accept her testimony on these points.

[41] I find on a balance of probabilities that the text of Exhibit 7 conforms accurately to the original prenuptial agreement actually signed by each of the parties in July 2006 and that all segments of the original document were fully and properly executed in accordance with the statutory requirements. I find nothing in the circumstances leading up to its signing that casts any doubt respecting the prima facie validity of that prenuptial agreement. I turn now to the "replacement" agreement.

marriage agreement (October 4, 2007): the "replacement" agreement

[42] In her testimony before me, Cynthia MacNeil said that a signed original of the "replacement" agreement had been made available at the previous trial between these parties in 2010. She says that the original document was not thereafter returned to her and cannot now be found. Accordingly, the photocopy, now filed as Exhibit 8, is all that remains. I do not doubt her testimony on these points.

[43] But for a single explanatory note and one small update, the "replacement" agreement is said to be identical to the original prenuptial agreement signed by the parties on July 7, 2006. On its face, the replacement agreement is also dated July 7, 2006. However, paragraph B of the recitals was amended to explain that:

> "This agreement is a marriage agreement and was originally signed by the Parties on July 7, 2006, however, the original signed copy has been misplaced. Therefore the parties are re-signing this Agreement and the effective date shall be July 7, 2006."

[44] The replacement agreement also differs from the "original" in that Schedule "B" now shows the personal debt liability of David Hedmann to have increased to $80,000.00 from the $70,000.00 shown on the "original" agreement; his debt liability to the Canada Customs and Revenue Agency remained unchanged at $80,000.00.

[45] Cynthia MacNeil identified her signature and that of David Hedmann on the signing page of the "replacement" document. She identified the initials on Schedule "A" as hers and the initials on Schedule "B" as those of David Hedmann. She testified that both documents, the prenuptial agreement originally signed on July 7, 2006 and this "replacement" agreement signed on October 4, 2007 were prepared by her lawyer. In her testimony she went through several portions of the document and reiterated her understanding of its provisions and her reasons for wishing the prenuptial agreement to be re-signed.

[46] She noted, for example, that paragraph 4 of the 'replacement agreement' simply carried over from the original the provision that there was to be *joint* responsibility for payment of her personal Visa card and personal line of credit debt. She explained that David Hedmann had - starting from the time that they had become common law partners - used her Visa card, and that the debt reflected on the card related to them both. Similarly she explained that a significant portion of the debt on the line of credit (shown as totaling $40,000.00) was in fact attributable in large part to purchases that David Hedmann made in respect of a business venture in which he was involved. Paragraph 4 of the 'replacement' agreement is the same in all respects as paragraph 4 of the "original" prenuptial agreement.

[47] When the 'replacement' agreement was put to David Hedmann on cross-examination, he agreed that the document bore a photocopy of his signature. But while he agreed that he signed *a document* on October 4, 2007, he maintains that he cannot say that the photocopy now presented to him was a true copy of the document he actually signed. David Hedmann did

confirm that he was *not* on oxycontin when he signed the second *document* in October 2007. Nor is there any repetition of his assertion that he had no time to read this document. Mr. Hedmann was also specifically directed to the 'waiver of independent legal advice' attached to Exhibit 8. He recognized the photocopied signature on the waiver as his; he agreed that he *chose* not to get independent legal advice respecting this "replacement" document. Asked whether Ms. MacNeil's lawyer had suggested to him that he get independent legal advice, he said he was unable to remember

[48] On the evidence before me I find Exhibit 8 is a true copy of the prenuptial agreement actually signed by each of the parties on October 4, 2007 and that the photocopied signatures and initials are true copies of the signatures and initials originally endorsed on the agreement by them. Execution of this agreement also conforms with the statutory requirements. I find further that, but for the slight alterations already referred to, Exhibit 8 is identical in its terms to the prenuptial agreement originally signed by the parties on July 7, 2006. Nothing in the circumstances leading to the execution of the replacement agreement casts doubt on its prima facie validity. In the segment that follows I will provide an outline of some of that agreement's principal features.[7]

The terms of the prenuptial agreement

[49] The parties married on July 8, 2006. The prenuptial agreement was made in contemplation of their marriage. In terms both broad and specific the agreement provides that the parties are to be separate as to property. Indeed, early on the parties declare their purpose in entering the agreement is to determine the ownership, management and division of all property either or both of them own or may acquire during the time they live together and, the division of property if their marriage ends.

[7] The full text of the 'replacement agreement' is attached to these reasons as Appendix "A".

[50] A section in the agreement on bank accounts posits that each of them will maintain separate bank accounts. In fact, during the earlier stages of their brief marriage, most, if not all of the bank accounts were held by Cynthia MacNeil owing to the dire financial circumstances in which Mr. Hedmann found himself. Accordingly, the agreement provides for individual responsibility for personal debt with one exception - joint responsibility for debts incurred on Cynthia MacNeil's personal line of credit and her Visa credit card respecting debts incurred before marriage for the benefit of them both. In Schedules A and B of the agreement, the separate property of each of the parties is set out.

[51] The agreement specifically acknowledges David Hedmann's contributions to renovations and upkeep at Cynthia MacNeil's home at 91 Wilson and confirms that he will make no claim, nor acquire any interest in her home in consequence of any contribution made. The agreement explicitly provides that any property acquired during the course of their relationship be the separate property of the person who acquired it, unless registered in the names of both of the parties, or, the parties record in writing that such property is co-owned.

[52] With one exception, the agreement provides that neither Cynthia MacNeil nor David Hedmann will claim spousal support from the other if their relationship should end. The single exception preserves for Cynthia MacNeil a possible claim for spousal support if she should suffer an inability to work full time as a result of her having had hepatitis C. Cynthia MacNeil completed her treatment for hepatitis C in 2005. It is undisputed that David Hedmann was aware of her condition and her successful treatment. She has not experienced any recurrence in the period since then.

[53] Paragraph 12 of the agreement is effectively a 'release' clause. It provides that neither party will claim an interest in or a right to compensation respecting the separate property of the other. Paragraph 21 of the agreement is explicitly identified as a Release. It is set out below:

RELEASE

> 21. Except as otherwise provided in this Agreement, each party gives up all claims at law, in equity, or by statute against the other relating to a division of property, including, without restricting the generality of the foregoing, all claims under the *Family Property and Support Act*, the, *Estate Administration Act* and the *Dependent's Relief Act,* with respect to
>
> a) support for David,
> b) property,
> c) succession rights, and
> d) any other matter arising from their relationship or marriage.

[54] Paragraph 18 permits variation of the prenuptial agreement, but "only by a written agreement executed in the same manner as this agreement".

[55] It can be seen from this brief overview that the agreement focuses on property; it preserves 91 Wilson for Cynthia MacNeil and otherwise maintains the autonomy of the parties as to property. Other principal features of the agreement relate to the elimination or significant limitation of claims for spousal support and, the isolation of debt.

The effect of Yukon's Family Property Statute on the division of property in a marriage contract

[56] The law governing the division of marital property in the Yukon is set out in the Family Property and Support Act, R. S. Y. 2002, c. 83 (the Yukon Act). In Section 1 of the Yukon Act "marriage contract" is defined as an agreement between a man and a woman entered into before their marriage, or during their marriage while cohabiting, in which they agree on their respective rights and obligations under the marriage, or on the breakdown of the marriage including:

> a) ownership in or division of property,
> b) support obligations, and
> c) any other matter in the settlement of their affairs

[57] A domestic contract is defined in the Act to mean a marriage contract and includes an agreement to amend a marriage contract.

[58] The primacy of a marriage contract is set out in section 2(1) of the Yukon Act in the following language:

> 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.

[59] The complete text of section 2 is set out below:

> 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.

[60] Section 6 of the Yukon Act sets out a presumptive equal division of *family assets* owned by one or both spouses at the time of the breakdown of their relationship.[8] Section 7 of the Yukon Act deals with contributions by one spouse towards the acquisition, maintenance, operation or improvement of *non-family assets* in which the other spouse has an interest.[9] Section 13 of the Yukon Act (also in Part 1 of the Act) gives the court a power to order an unequal division of property in certain circumstances.

[8] The counterpart of Yukon's section 6 is found in section 4 of Ontario's Family Law Reform Act, 1978, S.O. c.2.
[9] The counterpart of Yukon's section 7 may be found in Ontario's Family Law Reform Act, 1978 S.O. c. 2 at section 8.

[61] For purposes of the division of property between spouses, section 4 provides the following definition of "**family assets**":

> 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.**
>
> (bolding added is mine)

[62] Notable in Section 4 is its provision that, for purposes of the division of property, the otherwise broad definition given to "family assets" 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.

[63] All of the foregoing statutory provisions are contained in Part 1 of the Yukon Act. Because section 2(3) declares void any provision in a marriage contract that purports to limit the

rights of a spouse under Part 2 of the Act, I must also consider the effect, if any, of Part 2 of the Yukon Act on the marriage contract in issue here. Similarly, I will consider whether any other provisions of the Act permit the court, at the instance of one of the parties, to override the terms of a marriage contract insofar as they deal with the division of property under Part 1.

[64] Part 2 of the Yukon Act deals extensively with family homes situate in the Yukon. On careful examination, however, Part 2 contains no provisions which deal with the division of the family home or the division of other family assets on the breakdown of marriage. Part 2 deals only with the possessory right of a spouse to remain in the family home, and the right of a spouse to concur in any encumbrance or disposition of that home. I conclude that nothing in Part 2 of the Yukon Act limits or prohibits the division of property in an otherwise valid marriage contract that deals with the division of property.

[65] Inasmuch as correct interpretation of the statutory provisions and their effect, if any, are of great importance here, it is prudent to seek additional confirmation. Neither of the parties was able to provide me with any Yukon authority on these points but, because the Yukon Act is said to have its roots in Ontario's Family Law Reform Act S.O. 1978 c. 2, (the Ontario Act) I was referred both to that Statute and to case law emanating from it. Indeed, when one compares the text of the present Yukon Act with the former Ontario Statute (the Ontario Act) there is a remarkable symmetry. The following examples are illustrative:

Section 2(1) of the Yukon Act: 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.	Section 2(9) of the Ontario Act: Where a domestic contract makes provision in respect of a matter that is provided for in this Act, the contract prevails except as otherwise provided in this Act.
Section 2(3) of the Yukon Act: 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.	Section 51(2) of the Ontario Act: Any provision in a marriage contract purporting to limit the rights of a spouse under Part III in respect of a matrimonial home is void.

Section 6 of the Yukon Act provides for the presumptive division of family assets in equal shares. Section 4(1) of the Ontario Act is essentially the same.

The Yukon Act Section 6(1):	The Ontario Act Section 4(1):
If a marriage breakdown occurs each spouse is entitled to have the family assets owned at the time of the breakdown by one spouse or both spouses divided in equal shares despite the ownership of the assets by the spouses as determinable for other purposes.	Subject to subsection 4, where a decree nisi of divorce is pronounced or a marriage is declared a nullity, or where the spouses are separated and there is no reasonable prospect of the resumption of cohabitation, each spouse is entitled to have the family assets divided in equal shares notwithstanding the ownership of the assets by the spouses as determinable for other purposes and notwithstanding any order under Section 7.

[66] In *Nikolic v Nikolic*[10] the Ontario High Court dealt with the interplay between section 2(9) of the Ontario Act (dealing with the primacy of domestic contracts) and section 51(2) (the prohibition against limiting the rights of a spouse under Part III of the Ontario Act) (Part 2 of the Yukon Act) in reference to what had been the matrimonial home of the parties:

> "It is necessary to consider the effect of ex.3 [a marriage contract] in the light of s. 51(2). Part III of the Act deals only with possessory right of a spouse to remain in the matrimonial home and also the right of a spouse to concur in any encumbrance or disposition of that home. Part III, in my view, does not deal with proprietary or ownership rights in the matrimonial home and, accordingly, executed contracts which do not purport to limit the possessory rights or right of consent of the partner are not within the sanction of s. 51(2). In my view, ex. 3 was a valid transfer of the plaintiff's proprietary right in the premises which satisfies the requirement of s. 2(9), and accordingly prevails over any rights she may have under s. 4(1) [presumptive equal division] in so far as the matrimonial home is concerned..."[11]

[10] Nikolic v Nikolic (1980) 29 O.R. (2d) 661 (1980) 20 R.F.L. (2d) 264.
[11] Ibid, per Callaghan J. (as he then was) at pp. 665 and 666 (O.R. (2d)).

[67] It is of interest to note that the division of property set out in an otherwise valid marriage contract prevails over the statute's presumptive equal division provision. Similarly, in *Lotton*[12], the Court of Appeal for Ontario confirmed that the presumptive right of equal division (in Ontario's Section 4) must yield to a provision set out in a domestic contract.[13]

[68] I conclude this segment of my analysis with the following excerpt from Engel v Engel:[14]

> The only sections of the Act giving a Court jurisdiction to override the terms of a separation agreement are s. 18(4) contained in Part II relating only to support, and s. 55(1) contained in Part IV relating only to children. There are no provisions in the Act which either explicitly or implicitly give a Court jurisdiction to override the terms of a separation agreement so far as they relate to Part I of the Acts, "Family Property".
> It therefore must follow that the terms of the contract here prevail, namely, the wife's release of "any claim of any nature or kind arising out of the marriage of the husband and wife" which "she has or hereafter can, shall or may have against the husband" preclude her from asserting any claim against his non-family assets under s. 4(6) or s.8 of the Act.[15]

[69] In very much the same manner, it may be said that the only provisions of the Yukon Act that give a court jurisdiction to override the terms of a marriage contract are s. 34(3), 35(1) and s. 36 – provisions respecting spousal support and child support. A close examination of s. 34(3) moreover, indicates that even this jurisdiction is very narrowly circumscribed. I add, parenthetically, that the Supreme Court of Canada has stated on several occasions that deference must be shown to the scheme and structure of relevant legislative provisions in a province or territory.[16] Where, as here, the legislature of the Yukon has established a very high threshold and a very narrow portal for courts to intervene in the division of property determined by spouses in a validly made domestic contract, there remains no alternative but to defer. Absent issues of

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[12] Lotton v Lotton (1979) 25 O.R. (2d) 1 (Ont. C.A.) per Morden J.A. at pp. 6 and 7 *(leave to appeal to the Supreme Court of Canada refused(Maitland, Dickson and Estey JJ.))

[13] I draw additional comfort from the fact that Groves, J. came to the same conclusion as to the scheme of the Yukon Act at the trial of this matter.

[14] Engel v Engel (1980) 30 O.R. (2d) 152 (High Court of Justice).

[15] Ibid per Walsh J. at p. 154 of O.R. citation. The corresponding sections of the Yukon Act to those cited by Walsh J. in the Ontario Act are: Ontario s. 18(4) – Yukon s. 34(3); Ontario s.55(a) – Yukon s. 35 which assigns priority to children; Ontario s. 4(6) – Yukon s. 5 and s. 6; Ontario s. 8 – Yukon s. 7

[16] See *Hartshorne v Hartshorne* [2004] 1 S.C.R. p 573 at paras.14 and 42 per Bastarache J. for the majority; and at paras. 74 – 76 per Deschamps J. for the minority. And see Rick v Brandsema [2009] 1 S.C.R. 295 at p. 312 para. 50 per Abella J. for the court.

spousal support or child support the primary policy objective guiding the court's role in a division of property on marital breakdown in the Yukon is a decided preference for a consensual regime over a statutory regime.

[70] Neither spousal support nor child support is a factor in this action. The marriage contract made on October 4, 2007 and its predecessor of July 2006 were appropriately formalized. They provide for the division of assets. There are no circumstances here that bring their prima facie validity into question. Accordingly, there is no place for judicial intervention.

[71] It remains for me to consider the circumstances leading up to the third 'agreement' and to weigh its impact, if any, on the division of property established in the earlier agreements.

Prologue to the third agreement

[72] In his testimony David Hedmann noted that time he dedicated to the operations of CMAC detracted from his ability to spend time on his own consulting business. While I take that to be true, my sense is that CMAC as a going concern proved clearly to be the more lucrative enterprise and, having had the opportunity over time to witness its financial success, David Hedmann began to recognize both his own affinity for the work and the financial potential for himself in this field. After his discharge from bankruptcy David Hedmann turned with renewed vigor to showing income and establishing creditworthiness. When the notion of a second placement at 91 Wilson came into the conversation, I infer that David Hedmann's resolve to carve a place for himself had become set.

[73] In his testimony at trial David Hedmann readily acknowledged that he made repeated requests of Cynthia MacNeil to revoke their prenuptial agreement. Similarly, he acknowledged that "she kept putting (him) off". He does not know how many such requests he made but insisted he did not badger her. I take a somewhat different view. From my assessment of the evidence I think it more likely that, following his discharge from bankruptcy, David Hedmann became ever more strident that Cynthia MacNeil void their previous agreement, and that he

raised the issue with increasing frequency. I find that it was the source of many arguments between them and that cracks that had been developing in their relationship now came fully to the surface. His view of her sons and their troublesome relationship with him had become another big wedge issue between David Hedmann and Cynthia MacNeil.

88 Wilson Drive

[74] Cynthia MacNeil purchased 88 Wilson Drive in her own name in April 2009. She testified that she had looked at this property when it was up for sale two years earlier, in 2007, and had liked the house a lot. She thought then that it would be a good rental property. When the house came up for sale again in 2009 her interest in it was renewed albeit, she says, for a different reason. She explained that David Hedmann's anger over her repeated refusals to void their prenuptial agreement had been building. He was raging - angry all the time - and focusing his anger on her and against her son. She fretted over the stress it caused. She became worried about getting sick again and realized that she needed a space of her own, a nearby "sanctuary" that she could resort to. She believed 88 Wilson would offer that respite space and that, without it, nothing was likely to change. She knew she could afford it and that she could rent out its lower suite. That she intended this to be *her* purchase emerges clearly from her evidence.

[75] Cynthia MacNeil says that when she told David Hedmann about her interest in 88 Wilson, he attempted immediately to take charge. She became angry, for example, when she got home one day and found out that David Hedmann had made an offer on it. She told him: "You can't put an offer on something you can't buy. Why do you have to put your fingers in everything I do?"

[76] The parties differ on whether the final offer accepted by the vendors of 88 Wilson was the joint offer of them both or the offer of Cynthia MacNeil alone. Although it is unnecessary for me to decide that issue, I tend to the latter as the more plausible. What is absolutely clear is

that the $2000.00 down payment for 88 Wilson was made by Cynthia MacNeil. She paid the sum of $41,258.63 required on closing. Closing of the transaction was slated for April 16, 2009.

[77] Cynthia MacNeil was aware in March 2009 that David Hedmann had received his first payment of $58,000.00 from the Yukon government for the individual under Serenity's care. When Cynthia MacNeil's real estate solicitor advised her that $41,258.63 was required for the closing of the transaction, she asked David Hedmann for payment of the monies CMAC had fronted to Serenity on startup and during its first several months of operations.[17] Her request for payment touched off another series of demands by David Hedmann for termination of their prenuptial agreement, and another series of arguments, albeit with a new ingredient. Now David Hedmann fulminated: "terminate the pre-nup or you get nothing". I accept Cynthia MacNeil's testimony on these points.

[78] David Hedmann's testimony on the acquisition of 88 Wilson is much less complex and also much different. He testified that the purchase decision was *jointly* taken and that it sprang from a common desire to expand '*their'* business into 88 Wilson because the property was a good fit for their future plans. David Hedmann also saw the joint acquisition of 88 Wilson as an important step in establishing his creditworthiness. It was important to him. He says he was blind-sided when told, prior to the closing of 88 Wilson, that the financing bank did not want him on the mortgage. He felt he had been betrayed.

[79] I find that whatever explanation Cynthia MacNeil gave David Hedmann for fact that the acquisition of 88 Wilson would not involve him, she clearly instructed her banker that it was solely *her* transaction and that David Hedmann was not to be involved in any way.

[17] Although David Hedmann had access to all of Cynthia MacNeil's bank accounts, including her business account for CMAC, Cynthia MacNeil did not, at that point, have access to David Hedmann's business account for Serenity.

[80] My sole observation as to the purchase decision for 88 Wilson is that, although not impossible, it seems incongruous to me that, in a context where Cynthia MacNeil and David Hedmann had been engaging in emotionally-charged exchanges between themselves over whether or not to leave their existing prenuptial agreement in place, Cynthia MacNeil would voluntarily agree to a partial 'about-face' through the joint acquisition of additional property.

The third agreement (April 15, 2009)

[81] Upon learning that he was not included as a party in the purchase of 88 Wilson, David Hedmann concluded that another means for him to establish an interest in the property was through a 'side agreement'. I referred to this 'agreement' earlier in these reasons as the third agreement. Throughout trial, however, counsel for the plaintiff repeatedly referred to this April 15, 2009 document as the "letter" and David Hedmann referred to it throughout as the "agreement". Their use of those epithets reflects their respective desire either to reduce or to maximize the significance of the document. I have elected for purposes of convenience only, to continue to describe it in the heading as the 'third agreement' and in the text below as the "April 15 document" or "the document".

[82] It will be apparent that the core issue in these proceedings, is the legal effect, if any, that is to be given to the earlier agreement and the legal effect, if any, of the April 15, 2009 document. It is undisputed that the document (Exhibit 9) was prepared in its entirety by David Hedmann. It is not lengthy and is easily reproduced here**:**

> To Whom It May Concern:
>
> For reasons relating to his 2007 bankruptcy alone, the titles at 91 Wilson Drive and at 88 Wilson Drive are in the name of Cynthia (Cindy) MacNeil.
> The property at 91 Wilson is the matrimonial home in which David Hedmann and Cindy MacNeil (the Parties) are joint tenants. Cindy MacNeil has a pre-marriage interest in 91 Wilson which is $90,000 in which David Hedmann does not share. In addition, the Parties have an equal interest in a CIBC line of credit in the name of Cindy MacNeil currently at -$50,000 (approximate).

> BMO requested that David Hedmann's name not appear on the title at 88 Wilson Drive which the Parties purchased in April 2009, again for reasons relating to his 2007 bankruptcy alone. Though David Hedmann's name does not appear on the title, the Parties are in fact joint tenants in the property at 88 Wilson and have an equal share and interest in the property.
> The statements in this document are facts and so cannot be altered.
>
> Signed this fifteenth day of April 2009 in Kelowna BC.

[83] Although there is no dispute that David Hedmann prepared the April 15, 2009 document, how and when the document came into existence are live issues. David Hedmann testified that in the lead-up to April 15, 2009, he and Cynthia MacNeil had several conversations in which they had essentially came to a consensus both on the subject-matter that ultimately found its way into the document and the rationale for doing so. He did not indicate when he actually prepared the document; nor did he indicate when he first presented it to her. His position is that the contents of the document would not have come as a surprise to her.

[84] In her testimony Cynthia MacNeil was adamant that, save for the arguments they had had over voiding the prenuptial agreement, there was no prior 'discussion', no consensus, and no input from her, indeed, no expectation that a document was being produced. She says the April 15 document was produced by David Hedmann for the first time on April 15 during the course of their argument over releasing $41,258.63 of Serenity funds to her. It was ultimately thrust in her direction with a no sign – no pay ultimatum.

[85] As to how and when the April 15 document came to the fore, I prefer the testimony of Cynthia MacNeil as the more plausible and more credible evidence.

The text of the April 15, 2009 document

[86] Both by its appearance and by its content the April 15 document poses some difficulties in categorization. It does not, on its face, appear to be a contract, nor is there any apparent

consideration. The document makes no specific reference to the earlier prenuptial agreements and deals only partially with their subject matter.[18] In my opinion, the document cannot be regarded as a *revocation* of the earlier agreements.

[87] Explicitly, the document refers to the nature of the parties' ownership in 91 Wilson, their joint obligation for payment of the CIBC line of credit in the name of Cynthia MacNeil and their ownership of 88 Wilson – a property yet to be fully acquired. Arguably, the document may, to that extent, be seen as a *variation* of the earlier agreement respecting the ownership of 91 Wilson and a declaration of their intention respecting 88 Wilson.[19]

[88] Alternatively, the document may be taken as an agreed statement of fact and an act of compliance with paragraph 8(1)(b) of the prenuptial agreement constituting a record of the parties, *in writing*, that property otherwise regarded as separate property is now, or will be, co-owned. Even on this interpretation the document must be seen as a declaration of the parties' intention that is intended to have legal effect and, as to the circumstances of its formation, cannot oust the jurisdiction of the courts. Indeed, it is David Hedmann's position that the April 15 document replaces the prenuptial agreement in its entirety.

[89] Cynthia MacNeil says that the preparation of this document by David Hedmann – without any input from her, its "eleventh hour" presentation, in combination with their relational history and other circumstances surrounding execution of the document constitute undue influence and, on that ground, the document ought not to be given any legal effect. Counsel for the plaintiff also raises other issues respecting the execution of the document, but ultimately, in my opinion, the issue stands to be determined primarily on whether Cynthia MacNeil's assertion of undue influence is established.

[18] The document, for example, leaves totally untouched the subjects of spousal support, gifts, wills etc.
[19] In that event, the document must conform to the requirements of s. 61(1) and comply with s. 2(4) of the Yukon Act.

Undue influence

[90] In law, to dominate the will of another simply means to exercise a persuasive influence over him or her. It may come about through manipulation, coercion or the outright but subtle abuse of power.[20]

[91] In her direct evidence at trial Cynthia MacNeil made extensive reference to instances during their relationship where, owing to a mix of forcefulness, charm and a strong personality, David Hedmann was able to exert his influence over her and, more often than not, have his way. She described him as having a way of "shouldering his way into things" in a fashion that would redound to his benefit. Her health history and her emotional condition at the time of signing introduce a measure of vulnerability. Various examples of David Hedmann's controlling influence over her is borne out by other witnesses, including in part, Victoria Coates, and Jared and Cole MacNeil.

[92] From a contextual standpoint it is appropriate to consider the relationship of the parties throughout their union. However, the period leading up to the presentation of the document and its execution will also take on considerable importance. I have already found that, by April 15, 2009, there was an abiding and building stress in their relationship. I found on a balance of probabilities that the April 15 document prepared by David Hedmann, was presented to Cynthia MacNeil for the first time on April 15, 2009. I have previously found that, by April 2009, Serenity owed CMAC a considerable sum of money and that the closing date for the 88 Wilson transaction was April 16, 2009. It is appropriate also to consider more closely the circumstances surrounding the execution of the April 15 document by the parties.

the signing

[93] The April 15 document was signed by the parties in Kelowna[21] on April 15, 2009. It was 'witnessed' by Jared and Cole MacNeil.

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[20] See Geffen v Goodman Estate [1991] 2 S.C.R 353. per Wilson J. at p. 377.
[21] A short while after the offer to purchase 88 Wilson had been made David Hedmann, Jared MacNeil and Cole MacNeil travelled to Kelowna with the two individuals in the care of CMAC and Serenity. This trip to Kelowna had

[94] In her testimony at trial Cynthia MacNeil described the lead up to the production of the April 15 document as a highly emotional scene during which she was almost begging David Hedmann for the release of the funding. By her description, Cynthia MacNeil was tearful, emotional, desperate, and "spent" during the signing process. Ultimately she felt she had no alternative but to sign in order to gain access to "her" money for the next day's closing; that if she did not acquire the separate space and some freedom from stress that 88 Wilson would afford, nothing in their relationship would change. In the moments before signing on April 15, 2009, she says that David Hedmann thrust the document in front of her and, angrily said: "Sign it or you don't get your fuckin money." She says her sons were not yet present at that point; nor were they present when she finally signed the document.

[95] In his account of the signing of the April 15, 2009 document, David Hedmann describes the signing as "straightforward": "there were no tears, no crying, no yelling. It was a business agreement." In his testimony David Hedmann did acknowledge saying to her that, if she signed the document, he would free up the funding needed for the closing. He says "she signed it and that was that".

[96] After the signing the parties went immediately to a BMO bank in Kelowna where David Hedmann completed documentation which gave Cynthia MacNeil access to his Serenity account at BMO in Whitehorse and, to the $41,258.63 required for the transaction's closing.

[97] Jared MacNeil, now 30, and Cole MacNeil, now 28, sons of Cynthia MacNeil, signed the April 15 document as 'witnesses'. Both testified at trial. Jared MacNeil and Cole MacNeil had worked at CMAC from the time of its start-up in 2006. They were trained for the job by their mother. Both still continue in the employ of CMAC, Jared now only ½ time and Cole full time. They had also been employed by Serenity when it began operating and thereafter worked for both employers under the supervision of David Hedmann and their mother. At the time of the signing in April 2009, they had been working in Kelowna under David Hedmann's supervision.

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been previously planned and lasted for some weeks. Cynthia MacNeil joined the group in Kelowna towards the end of that stay.

[98] On April 15, 2009 both of these young men had been upstairs when they were asked to come down to witness a document. While I propose, in the segment that follows, to set out their material observations as to the "signing" , there are reasons for approaching the testimony of Cole MacNeil and Jared MacNeil with considerable caution. Both had been regular users of marijuana for some time. Indeed, each of them was admittedly high on marijuana when they were summoned downstairs that day, and each acknowledged that their marijuana use was likely to have some impact on memory. Both young men are also very close to their mother. Each of them has had multiple disagreements or differences with David Hedmann. And both continue to be in the employ of their mother, via CMAC.

Jared MacNeil

[99] Jared MacNeil recalls signing a document in Kelowna after having been asked to do so either by his mother or by David Hedmann. He identified his signature on the document as a 'witness'. He has no recollection, however, of seeing his mother sign the document, and he was not present when David Hedmann signed it. Jared MacNeil does have a specific recollection of the stress that lay heavy in the room in the lead-up to his 'witnessing' the document. He described his mother as distraught and crying. He said that he had not before seen her in such a 'pummelled' state. He did not observe David Hedmann's demeanor at the time because he wasn't really focused on him. However, he did feel the pressure in the room and sensed that, if he refused to sign the document, there would have been another spat. Given the atmosphere that pervaded the room, he just did what was asked of him and made his exit. He was not asked to read the document and he did not do so.

Cole MacNeil

[100] Cole MacNeil had been on his computer upstairs. He had heard arguing and yelling downstairs before his mother summoned him to come down. Once downstairs he saw that his mother was teary-eyed, that she appeared very pale, and her voice was choking up. He could tell she was quite upset. The document he was asked to sign already bore the signatures of David Hedmann and his mother. He had not seen either of them actually sign it. He was not asked to read it and did not do so. Cole MacNeil signed the document because he was asked to do so. He thought his signing might alleviate the pressure in the room. Asked why he remembered these

things about his mother's condition at the time, he said that 'some things in life just have a bigger impact'.

discussion

[101] Irrespective of the fact that the closing for 88 Wilson did not occur until April 16, 2009, (the day following the signing) the text of the April 15 document recites David Hedmann's 2007 bankruptcy as being the sole basis for the titles to both 88 Wilson and 91 Wilson being in the name of Cynthia MacNeil alone. David Hedmann had, in fact, been discharged from bankruptcy in August 2008, approximately 8 months earlier, and, while the proximity in time between the date of his discharge from bankruptcy and the date of this closing may well account for the reticence of some financial institutions to have him involved in their financial instruments, it would certainly account for David Hedmann's heightened eagerness to do whatever he could to establish his creditworthiness. The document recites further that, despite title to both parcels of real property being solely in the name of Cynthia MacNeil, the parties are, in fact, joint tenants of those properties. If true, that 'fact' would undoubtedly constitute a very large step indeed in re-establishing creditworthiness for David Hedmann.

[102] The text of the document gives precedence to the $90,00.00 down payment that Cynthia MacNeil made towards the acquisition of 91 Wilson from the sale of her former home at Seine Square. It also confirms Mr. Hedmann's equal responsibility for the CIBC line of credit debt (standing at approximately $50,000.00). David Hedmann argues that these dual "acknowledgements" have the effect of conferring some benefit on Cynthia MacNeil. In fact, these dual acknowledgements do nothing to alter the existing status quo for Cynthia MacNeil whereas the new "statements of fact" in the document would confer a very substantial benefit upon David Hedmann.

[103] Given the personal importance that Cynthia MacNeil attached to the acquisition of 88 Wilson as a refuge for her, and given the distinct perspective of David Hedmann in seeing the *joint* acquisition of 88 Wilson as an important step in establishing his creditworthiness, it seems

implausible to me that the signing of the April 15th, 2009 document was as calm and businesslike as David Hedmann described it, particularly in circumstances where he had harboured a sense of betrayal about being excluded from the transaction. Indeed, as at the date of the signing on April 15th, 2009 there already existed between the spouses an abiding and ever-building stress over David Hedmann's repeated insistence that Cynthia MacNeil void the prenuptial agreement and her constant resistance to doing so.

[104] I remain mindful of the fact that Jared MacNeil and Cole MacNeil were high on marijuana when they were summoned to come downstairs to "witness" the document and that they are close to their mother. While I think it probable that their marijuana use had an impact on their ability to recall precisely what was said or to give detail about some particulars, I do not doubt that when they came downstairs their primary focus was on their mother. I have a greater sense of confidence in their ability to pick up on her condition and the sense of stress that each of them felt in the room, and particularly in her. I accept their observations of her. They reinforce what I conclude is a truthful account of the situation by Cynthia MacNeil.

[105] Defence Exhibits 7 & 8 are correspondence and an email, respectively, written by Cynthia MacNeil during the post-separation period of the parties. On their face they lend support to David Hedmann's position that Cynthia MacNeil intended to void the 'replacement' prenuptial agreement when she signed the April 15, 2009 document.

[106] It is significant, I think, that Exhibits 7 & 8 came into being after the parties separated and during what continued to be a highly charged and volatile time. I accept Cynthia MacNeil's testimony that they were written by her in desperate attempts to salvage their relationship and to get her husband back. Significantly, they were never acted upon. When she had the chance, in a less emotionally-addled state, to think on her own, she reverted to the position she had taken so many times previously, that she wanted to keep the prenuptial agreement in place.

[107] In my opinion, defence Exhibits 7 & 8 constitute no more and no less than part of the 'forth and back' that some spouses engage in in the post-separation period. I attach no weight to

them. Nor do they affect the findings I made nor the view I take of the circumstances leading up to the signing of the April 15, 2009 document.

Conclusion

[108] I find on a balance of probabilities that the April 15 document prepared by David Hedmann, was presented to Cynthia MacNeil for the first time on April 15, 2009, in all probability in full anticipation of her request of him that he now make available the funds owed to CMAC by Serenity to permit her to close the transaction for 88 Wilson, Because the transaction's closing was to take place on the very next day, the pressure on Cynthia MacNeil to have funds in place would have been apparent, especially to David Hedmann. The cumulative pressures on her were multi-faceted, immense and, in the end sufficient, I think, to overcome the will of Cynthia MacNeil. Whereas she had to this point resisted all attempts by David Hedmann to void the prenuptial agreement, ultimately she felt she had no alternative but to sign the document in order to obtain access to "her" money.

[109] I find that, from the start-up of Serenity until the payment to it in April 2009, David Hedmann had used monies properly belonging to CMAC for payment of numerous expenses solely attributable to Serenity amounting to at least $41,000.00. I find further that David Hedmann, with full knowledge of Cynthia MacNeil's desperation respecting the closing of 88 Wilson Drive, deliberately and improperly withheld repayment of those monies as a means of pressure to get her to sign the document he prepared. He had effectively availed himself of the intermingling of funds between CMAC and Serenity for his personal advantage – initially as justification for the expenditure of monies by CMAC for Serenity – but then rapidly showed himself capable of withholding monies then in his control when he could press that to his personal advantage.

[110] I conclude that the April 15 document was signed, not as the product of a reasoned and fair negotiation, but in the context of a power-play planned and managed by David Hedmann in a way that permitted him to leverage to the maximum degree his temporal control over the funds

then in Serenity's hands. His 'eleventh hour' introduction of the April 15 document did not permit ample time for reflection by an emotionally distraught Cynthia MacNeil. It was, moreover, produced at a place and in circumstances that did not afford her a realistic opportunity to obtain independent legal advice. It occurs to me that where the court, after careful and unemotional reflection, struggles over the proper categorization of the document, its appearance and its intended effect, the difficulty for a lay person in ascribing meaning and consequence to it may be markedly greater. The importance of independent legal advice is heightened in that context.

[111] Upon closer examination, the April 15 document holds no benefit for Cynthia MacNeil whereas it would give rise to a very significant personal gain for David Hedmann.

[112] I find David Hedmann's conduct in this to be exploitative. If tolerated it would allow unfair advantage to be taken.[22] It is for all of these reasons, taken cumulatively, that I find the allegation of undue influence to have been established here. I hold that the April 15, 2009 document has no legal effect. I hold, further, that the marriage contract made October 4, 2007 is valid and binding and that it alone governs the division of property between Cynthia MacNeil and Daivd Hedmann on the breakdown of their marriage.

[113] Counsel for Cynthia MacNeil offered a variety of other reasons why the court should decline to give effect to the April 15, 2009 document. For the sake of completeness I will deal with each of these briefly.

[114] Paragraph 18 of the 'replacement agreement' contained a provision that the parties may vary the agreement only by "a written agreement executed in the same manner as this agreement". It was suggested that this should be interpreted to import a "formality" requirement, in addition to a requirement that, as with the original agreement, each of the signatories have the opportunity to seek and obtain independent legal advice. Although it may be open to argument

[22] See also Rick v Brandsema [2009] 1 S.C.R. 295 at para. 4 per Abella J. (for the court).

whether the opaque language of paragraph 18 is sufficient to import these requirements, nevertheless, it seems to me that, in the circumstances which presented themselves at the time of signing, Cynthia MacNeil certainly had no realistic opportunity to seek or to receive independent legal advice and her inability to do so, in my opinion, very much weakens the legitimacy of the April 15 document. In *French v. French*[23], Esson, C.J.B.C. (as he then was) considered whether an oral agreement to vary a written domestic contract could succeed in circumstances where the original written agreement contained much the same language as the present paragraph 18. Esson, C.J.B.C. opined by way of obiter that the parties, having initially entered into a formal agreement, he could see no reason that their contract should now be varied in a more casual manner, but ultimately he decided the case on other grounds.

[115] Section 61(1) of the Yukon Act states that a domestic contract does not affect the rights of a person unless it is in writing, signed by both parties, and *witnessed by an independent third person*. Given my finding that Jared MacNeil and Cole MacNeil were not actually present to see either of the parties sign the April 15 document, there may exist a technical argument whether the document was "witnessed" at all. More to the point, the fact that both were in the employ of the parties who signed the document and *asked* by those parties to sign the document, raises some question whether they were "independent" within the meaning of the Act. Indeed, Cole MacNeil testified that he did what was *asked* of him because he was afraid of repercussions. It is not uncommon for witnesses to the signing of a document to be summoned to court to testify as to the circumstances surrounding its signing and, on this account, there may be compelling legislative reasons for the requirement that the witnesses be truly independent.

[116] Of the additional grounds raised, I regard it as most significant that Cynthia MacNeil did not have the opportunity in the circumstances to obtain independent legal advice. That

[23] French v French [1995] CanLII 2612 (BCSC)

opportunity was clearly available to the parties when they signed *both* the original agreement and its replacement. Indeed, I regard the opportunity for independent legal advice as an important component of the undue influence analysis. Although the other grounds or collateral reasons offered by counsel for Cynthia MacNeil, taken cumulatively, may offer additional support to the notion that the April 15 document should have no legal effect, they are insufficient on their own for that purpose.

impressions of Cynthia MacNeil and David Hedmann

[117] My impressions of the parties will have emerged in part from the findings of fact that I made throughout these reasons. It may nevertheless, be helpful for me to outline more explicitly my impression of each of the parties based upon my observations of them during three weeks of trial and my consideration of the evidence and their submissions. It must be said that both Cynthia MacNeil and David Hedmann have outwardly winsome personalities. Both are smart and articulate albeit David Hedmann has by far the greater facility with language and expression. Both are ostensibly capable of hard work and appear equally to have a high sense of responsibility towards the 'care work' they undertook during their marriage through CMAC and Serenity enterprises.

[118] As between the two of them David Hedmann has the much larger personality. He demonstrated a commanding presence in the courtroom, well developed organizational skills, and a dogged determination which, I daresay, would propel him to the front of almost any line he happened to be standing in. He is entrepreneurial, resilient, assertive and crafty. In my overall assessment of David Hedmann, I tend to accept Cynthia MacNeil's description of him as a very capable man who will find a way to benefit from any situation he finds himself in.

[119] It was not difficult to discern in the trial evidence of each of the parties a tendency toward understating or undermining the positive traits or contributions that the other of them brought to

or made to the relationship. I found this tendency, however, to be markedly more pronounced in the testimony of David Hedmann. In like manner, each of the parties cast their own personal traits and contributions in a more generous light. Again, this tendency is significantly more pronounced in the trial testimony of David Hedmann. Mr. Hedmann has a very large personality and an ego to match. In my view, David Hedmann was exceedingly generous to himself respecting the extent and importance of his alleged contributions to the relationship. He developed an extraordinary sense of entitlement as a consequence.

[120] David Hedmann is, in my opinion, a man of considerable intelligence. He had the facility and strength of personality to steer things in a direction that would be of advantage to him – and he often did.[24]

Disposition

[121] The marriage contract signed by the parties on October 4, 2007 (the 'replacement agreement'), alone, governs the disposition of property between Cynthia MacNeil and David Hedmann on the breakdown of their marriage. The application of that agreement here yields the following results:

Real property

[122] Title to the real property in Whitehorse, Yukon, municipally known as 91 Wilson Drive and 88 Wilson Drive respectively, is registered solely in the name of Cynthia MacNeil. Cynthia

[24] There is additional support for my impressions of David Hedmann in the testimony of Victoria Coates, a forthright witness who appeared to give her evidence in an even-handed way. She said of David Hedmann that "he's a very smart man and he's usually right but he should give others a chance to put their 5 cents in". She also thought him "capable of pushing until he got what he wanted".
Some additional comment respecting other witnesses may also be in order: I have relied, in part, on the testimony of Shirley Watts-Haase and Margaret Render. I have no reason to doubt the testimony of Barbara Frain Gower, Andria Pedlar, Dr. Herbert Cohen and Bruce Hedmann but, because their relations with the parties covered such a narrow window, I did not find their testimony particularly helpful in my decision making. As to Ashley Fraser, I found her to be vindictive and untrustworthy; I attach no weight to her testimony.

MacNeil will retain title to these properties in her sole name and to her sole benefit, without equalization to David Hedmann. Any caveat registered by or on behalf of David Hedmann against either or both of these properties shall be vacated forthwith.

Motor vehicles

[123] David Hedmann will retain the Subaru motor vehicle acquired by David Hedmann in January 2009 and registered solely in his name. Any motor vehicles solely owned by Cynthia MacNeil in 2009 will be retained by her.

Business enterprises: CMAC, Serentiy, David Hedmann & Associates

[124] CMAC is a sole proprietorship solely owned by Cynthia MacNeil. David Hedmann advances no claim for an ownership interest in CMAC and, in any event, by the terms of the marriage contract, Cynthia MacNeil retains the sole ownership interest in CMAC.

[125] As to Serenity and David Hedmann & Associates, Cynthia MacNeil claims no ownership interest and, in any event, by the terms of the marriage contract, David Hedmann retains the sole ownership interest in both.

Joint debt

a) CIBC Visa
b) CIBC Line of Credit

[126] Paragraph 4 of the marriage contract provides specifically for a joint repayment obligation respecting these accounts. In the period since their separation only Cynthia MacNeil has paid these debts down. As at the date of separation, the debt on the CIBC Visa account stood at $17,987. Cynthia MacNeil shall have judgment against David Hedmann for $8,993.83 (1/2 of

the balance then outstanding). Post judgment interest shall accrue at the rate charged on this account by CIBC.

[127] As at the date of separation, the outstanding balance on the CIBC line of credit stood at $41,153,38. Cynthia MacNeil shall have judgment against David Hedmann for $20,576.69 (1/2 of the balance then outstanding). Post judgment interest shall accrue at the rate charged on this account by CIBC.

Other claims

a) By Cynthia MacNeil
b) By David Hedmann

[128] The written submissions filed on behalf of Cynthia MacNeil set out additional claims against David Hedmann albeit in more modest amounts.[25] These additional claims are not pleaded in the amended Statement of Claim, and they go well beyond the stated relief she sought at the outset of this trial. I have decided, on those grounds, not to consider them. They are dismissed.

[129] Among the claims for relief requested in written submissions filed by David Hedmann are claims for declarations that the first two prenuptial agreements are invalid, and for an equal division of the real property assets. For reasons already set out these claims are dismissed. As with Cynthia MacNeil, the additional claims now being sought by David Hedmann were not claimed in his amended Counterclaim and cannot in any event, survive application of the marriage contract which I found to be valid and binding. They are dismissed.[26]

[25] See pages 17 – 18 of the written submissions of Cynthia MacNeil filed.
[26] See pages 40 – 41 of the written submissions of David Hedmann., filed. And see Engel v. Engel, op. cit. supra note 14 (Ontario High Court of Justice per Walsh J.)

The claims by each of the parties for defamation.

[130] Each of the parties has in their amended pleadings sought damages in defamation against the other. I think it fair to say that although there was some evidence on the issue led by each of them at trial, it was brief in the extreme and not seriously pursued. I am ill-disposed towards the claims for defamation of each of them. Neither claim merits an award of damages. Their respective claims for damages for defamation are dismissed.

Costs

[131] If the parties are unable to agree on costs, Cynthia MacNeil shall, on or before April 15, 2014, deliver written submissions not exceeding five pages, exclusive of her bill of costs and any pertinent offers to settle. David Hedmann shall, on or before May 15, 2014, deliver responding written submissions, not exceeding five pages, exclusive of any bill of costs he may wish to file for comparison purposes, and pertinent offers to settle,. If no submissions are received within the timetable, the issue of costs will be deemed by the court to have been settled as between the parties.

_____
Justice E. W. Stach

Released: March 18, 2014

MacNeil v Hedmann, 2014

S.C. No.: 09-D4165

DATE: 2014-03-181

SUPREME COURT OF YUKON

B E T W E E N:

Cynthia Lynn MacNeil

Plaintiff

- and –

David George Clinton Hedmann

Defendant

REASONS AT TRIAL

Stach, J.

Released: March 18, 2014

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