

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: MacNeil Estate v. Woodman, 2011 NSSC 288

Date: 20110712

Docket: SFSNOTH73217

Registry: Sydney, N.S.

Between:

The Estate of Kevin Anthony MacNeil

Applicant

v.

Milissa Woodman

Respondent

Judge: The Honourable Justice Darryl W. Wilson

Heard: July 6, 2011, Sydney, Nova Scotia

Counsel: Nash Brogan, Counsel for the Applicant
Andrea Rizzato, Counsel for the Respondent

By the Court:

[1] The issue in this proceeding is the interpretation to be given to the words “mortgage balance” found in paragraph 15 of a consent order which establishes a formula for the calculation of an equalization payment for property jointly owned by Kevin MacNeil and Milissa Woodman.

BACKGROUND

[2] Milissa Woodman and Kevin MacNeil were involved in a common-law relationship which ended in January, 2009. In December, 2009, Milissa Woodman initiated an action seeking the sale and division of proceeds of sale of four (4) properties jointly held by the parties, including:

- (a) 18 Murphy’s Lane, Glace Bay;
- (b) 5548 Union Highway 20, River Ryan;
- (c) 2455 Lingan Road, Lingan;
- (d) Vacant Land on Tower Road.

[3] The parties reached agreement and a consent order was issued.

[4] The parties agreed that properties located at 5548 Union Highway, 2455 Lingan Road and the vacant land on Tower Road would be listed for sale and the net proceeds of sale divided equally between them.

[5] Mr. MacNeil agreed to purchase Ms. Woodman’s interest in the property located at 18 Murphy’s Lane. The parties would continue as owners in joint tenancy of the property until such time as Ms. Woodman was removed from the mortgage or the property was sold. Mr. MacNeil was given nine (9) months from the date of the order to remove Ms. Woodman from the mortgage. If he was unable to remove her from the mortgage, the property was to be listed for sale. Mr. MacNeil would have exclusive possession of the property and he was to be solely responsible for all mortgage, insurance, tax and maintenance payments.

[6] Ms. Woodman was to receive an equalization payment for her interest in the Murphy Lane property. The amount of the equalization payment was not specified. The equalization amount was to be calculated according to a formula set out in paragraph 15 of the consent order.

15. The equalization payment regarding 18 Murphy's Lane, Glace Bay, Nova Scotia, shall be calculated as follows:

**Appraised Value (as determined in paragraphs 11 and 12) - Mortgage
Balance ÷ 2**

The equalization payment was to come from Mr. MacNeil's share of the sale proceeds of the other properties.

[7] The property located at 2455 Lingan Road was sold in May, 2010. Ms. Woodman received her one-half share of the net proceeds of sale. The balance which is being held in trust, was to be applied toward the equalization payment.

[8] Mr. MacNeil passed away on July 6, 2010 unexpectedly. His father, Daniel Anthony MacNeil, was appointed administrator of his estate on September 1, 2010.

[9] Following Mr. MacNeil's death, the property located on 5548 Union Highway was sold and the net proceeds from that sale are being held in trust pending resolution of this proceeding.

[10] The vacant land has not been sold.

[11] Mortgage life insurance had been purchased on the lives of Mr. MacNeil and Ms. Woodman. After Mr. MacNeil's death, the insurance proceeds paid the outstanding mortgage balance.

[12] The parties could not agree on the amount of the equalization payment payable to Ms. Woodman. The estate claims the mortgage balance should be the amount owing at the time the consent order was signed which was approximately \$49,000.00. Ms. Woodman claims the mortgage balance should be nil since life insurance paid out the mortgage balance.

[13] The estate filed an application for division of assets. Ms. Woodman filed a response seeking an interpretation of paragraph 15 of the consent order and an order for enforcement. The application by the estate for division of assets was dismissed since that issue had already been determined.

[14] Initially, Ms. Woodman raised three (3) issues for the court's consideration:

(1) Interpretation of the phrase "mortgage balance" in paragraph 15 of the consent order;

(2) Enforcement of the consent order provision regarding reimbursement of real property insurance payments by Ms. Woodman; and,

(3) Enforcement of the consent order provision regarding the all-terrain vehicle.

[15] The parties reached agreement on Ms. Woodman's claim for reimbursement of real property insurance payments and compensation for the all-terrain vehicle, leaving the interpretation of the equalization payment provision of the order as the only remaining issue for determination.

[16] For ease of reference, I recite paragraphs 6 to 17 of the consent order:

6. The jointly held property located at 18 Murphy's Lane, Glace Bay, Nova Scotia, PID No. 15414212 [hereinafter referred to as the "*Murphy's Lane property*"] shall continue to be jointly held by the Plaintiff and the Defendant and the Defendant shall have exclusive possession of the property, until such time as the Plaintiff is removed from the mortgage or the property is sold.

7. The Defendant shall be required to take all reasonable efforts to remove the Plaintiff from the mortgage presently encumbering the Murphy's Lane property and in any event nine (9) months from the date of this Order.

8. In the event that the Defendant is unable to remove the Plaintiff from the mortgage, the property shall be immediately listed for sale upon the expiration of the nine (9) month period.

9. The Defendant shall be exclusively responsible for all mortgage, insurance, tax and maintenance payments with regard to the Murphy's Lane property.

10. If the Defendant misses two (2) mortgage payments, the Plaintiff shall be entitled to list the property for sale forthwith and the Defendant will be required to execute any documentation necessary to effect that sale.

11. The Murphy's Lane property, including the garage located on that property, shall be made available by the Defendant forthwith for a re-assessment of the value of the property by Bruce Kennedy.

12. In the event that Mr. Kennedy determines that the appraised value of the Murphy's Lane property is greater than in his previous valuation, based on having access to the garage located on the property, then that figure shall form the basis of the equalization payment to be made by the Defendant to the Plaintiff. Otherwise, the appraised value as determined by Bruce Kennedy in an appraisal dated January 20, 2010 will form the basis of the equalization payment to be made by the Defendant to the Plaintiff.

13. Both parties shall be given credit for any real property tax payment that he or she has made since the date of separation with regard to any of the four real properties.

14. The Plaintiff shall be given credit for the real property insurance payment that she made regarding the Murphy's Lane property which remains in effect.

15. The equalization payment regarding 18 Murphy's Lane, Glace Bay, Nova Scotia, shall be calculated as follows:

**Appraised Value (as determined in paragraphs 11 and 12) - Mortgage
Balance ÷ 2**

16. The Defendant shall be required to pay to the Plaintiff one-half of the net value of the Murphy's Lane property from the proceeds of the sale of the properties listed in Paragraph 1, upon the sale of each property until the full balance of the equalization payment has been satisfied.

17. If there are inadequate funds to satisfy the equalization payment regarding the Murphy's Lane property from the sale of the properties listed in Paragraph 1, the Defendant shall make the payment forthwith.

[17] The parties agree that the appraised value of 18 Murphy's Lane as determined in accordance with paragraph 11 and 12 of the consent order is \$72,000.00. A re-assessment of the value of the property by Bruce Kennedy did not occur.

[18] The words "mortgage balance", unlike "appraised value", were not defined in the consent order.

SUBMISSIONS

[19] Counsel on behalf of the estate did not specify a dollar amount for the mortgage balance. Counsel submits the mortgage balance should be the amount owing as of the date of the order. Counsel submits the court, in giving meaning to the words “mortgage balance” should look at the plain, ordinary words of the order and what was done by the parties. According to counsel for the estate, the consent order is clear. The parties contracted for the purchase of Ms. Woodman’s interest in the Murphy’s Lane property. The terms of purchase were incorporated into the consent order. All that remained was the completion of the terms of the agreement. The parties agreed on a purchase price, subject to a re-appraisal, which did not occur. They agreed to the mortgage balance owing at that time since Mr. MacNeil was responsible for all future mortgage payments and costs associated with the property until Ms. Woodman was removed from the mortgage or the property was sold. They agreed the equalization payment would come from Mr. MacNeil’s share of the sale of proceeds of other properties. Mr. MacNeil’s share of the sale proceeds of the Lingan property in May, 2011, was sufficient to pay the equalization amount owed to Ms. Woodman for her interest in the Murphy Lane property at that time. Ms. Woodman’s name was removed from the mortgage within the nine (9) month period specified in the order when the life insurance paid out the mortgage balance.

[20] Counsel for the estate submits there was substantial compliance with the terms of the consent order by May, 2011 and Ms. Woodman is entitled to an equalization payment for her interest in the Murphy’s Lane property equal to one-half the difference between the appraised value of the property and the mortgage balance as of May, 2011.

[21] Counsel for Ms. Woodman submits that the issue is not whether there has been substantial compliance with the consent order, but the interpretation of the words “mortgage balance” contained in paragraph 15 of the consent order.

[22] Counsel for Ms. Woodman submits:

- (1) The mortgage balance should be zero since that is the current balance;
- (2) The mortgage balance amount was not specified, even though it was easily obtained. It is reasonable to expect the amount of the mortgage balance to

change because other events such as the removal of Ms. Woodman's name from the mortgage or the sale of the property had to occur before the equalization payment was fixed.

(3) The consent order did not contemplate what would happen on the death of either party;

(4) The life insurance payments removed both names from the mortgage and it is unreasonable to expect Ms. Woodman to pay one-half of a mortgage which does not exist;

(5) The overall intent of the order was to provide for an equal division of the parties' common property. There would be an unequal division of the parties' property if the mortgage balance was fixed at an amount other than zero.

(6) Calculating the equalization payment owed to Ms. Woodman based on an unspecified mortgage balance, when one had not been specified in the order, could give rise to an absurd result and defeat the intent of the parties to arrive at an equal division of the property.

(7) Ms. Woodman remained an owner in joint tenancy of the property with Mr. MacNeil and both should benefit from the insurance policy taken out in their names. Had Ms. Woodman predeceased Mr. MacNeil, the life insurance would also have paid the mortgage in full. The mortgage insurance on the lives of Mr. MacNeil and Ms. Woodman was not cancelled at the time of the order.

LEGAL PRINCIPLES

[23] A consent order sanctions an agreement entered into by the parties. The ordinary principles of interpretation and application apply whether a court is interpreting a provision in an agreement or a Consent Order. See **Claus v. Claus**, 2010 CarswellBC 343 (BCCA).

[24] In **Royal Bank v. 1542563 Ontario Inc.**, 2006 CarswellOnt 5761 (S.C.J.), at para 4, Mossip J. summarized the principles to apply when a court is asked to interpret the language of an Order. These principles are as follows:

(a) A broad and liberal interpretation is to be used to achieve the objective of the court in making the Order;

(b) The language must be construed according to its ordinary meaning and not in some unnatural or obscure sense;

(c) A certain flexibility must be available in recognition of the fact that life is not static; developments beyond the contemplation of the parties often arise;

(d) The court must examine the context in which the Order was issued, evaluate the Order in accordance with the circumstances of the case, and question whether the acts or omissions could reasonably have been contemplated to fall under the terms of the Order; and

(e) A party cannot hide behind a restrictive and literal interpretation to circumvent the Order and make a mockery out of the administration of justice.

[25] Similar principles of interpretation have been applied in family law cases: **Tetarenko v. Tetarenko**, 2005 CarswellAlta 588 (Q.B.) and **Randall v. Randall**, [2003] B.C.J. No. 1095 (C.A.) and **Power v. Jackman**, 2008 CarswellNS 730.

CONCLUSION

[26] The Consent Order is not clear that all values were fixed as of the date of the Order. The purchase was contingent on the removal of Ms. Woodman from the mortgage or the sale of the property. The words “mortgage balance” are capable of more than one interpretation.

[27] The terms of the Consent Order did not provide what would happen in the event of the death of either party and life insurance paid out the mortgage balance.

[28] It is clear from the terms of the Order that the parties’ intention was to divide their jointly owned property equally.

[29] The interpretation suggested by the estate of Mr. MacNeil is a restricted and literal interpretation which would circumvent the intent of the parties which was to equally divide the jointly held property. The court would be required to take into consideration that Ms. Woodman’s name was removed from the mortgage when life insurance paid the mortgage balance but ignore the reduction in the mortgage balance for purposes of calculating an equalization payment.

[30] A broad and liberal interpretation, along with a degree of flexibility in recognizing the unforeseen death of Mr. MacNeil supports the interpretation advanced by Ms. Woodman.

[31] Ms. Woodman and Mr. MacNeil were owners in joint tenancy of the property at the time of Mr. MacNeil's death. Ms. Woodman had not been removed from the mortgage at that time. Life insurance had not been cancelled. Both Mr. MacNeil's estate and Ms. Woodman were relieved from further obligations to pay the mortgage. It is unreasonable to expect Ms. Woodman to pay one-half of a mortgage which does not exist.

[32] The issue of ownership of the jointly held property on Mr. MacNeil's death was not addressed in this hearing because the parties did not want the court to determine that issue.

[33] I find the mortgage balance amount is nil for purposes of determining an equalization payment pursuant to paragraph 15 of the Consent Order.

[34] Ms. Woodman is entitled to her costs, which I fix in the amount of \$500.00.

J.