Date: 2012 04 25
Docket: S-1-CV-2012 000001

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ROBERT PARSONS ENGLE

Applicant

- and -

MARGARET LUCILLE CARSWELL

Respondent

SUPPLEMENTARY MEMORANDUM #3

[1] This is an application by Margaret Lucille Carswell ("Carswell") requesting that I:

a) Reconsider the Memorandum of Judgment issued on February 29, 2012, based on new evidence;
b) Allow her to enter the residence at 5 Albatross Court, Yellowknife (the "Principal Residence") to retrieve personal belongings; and
c) To adjourn Robert Parsons Engle's ("Engle") application to discharge the caveat on the Principal Residence *sine die*.

[2] I have considered the arguments made by Carswell as well as the materials that she has filed. For the reasons that follow, I have come to the conclusion that I must dismiss her application.

[3] Since the Memorandum of Judgment and Supplementary Memorandums were issued, the Applicant has not yet filed the formal Order. I was provided a draft Order by counsel for Engle at the hearing on April 18, 2012 but it has not been formally entered.

[4] As stated by Vertes J. in *Fullowka et al.* v. *Royal Oak Ventures Inc. et al,* [2002] N.W.T.J. No. 13 at para. 4; affirmed on appeal [2002] N.W.T.J. No 86:

> Generally speaking, a judge has the power to reconsider a judgment before it has been formally entered. This includes the power to admit new evidence. The power should be exercised cautiously. There is nevertheless an unfettered discretion to ensure that a miscarriage of justice does not occur.

[5] There are limited circumstances where a judge should entertain a second hearing on a matter: where there is new evidence; where the judge is satisfied that the original judgment was in error because of material evidence being misconstrued or overlooked; where the law was misapplied; or circumstances relating to the order have materially changed. *Fullowka et al.* v. *Royal Oak Ventures Inc. et al, supra* at para 9; *Alberta Turkey Producers* v. *Leth*, 2006 ABQB 283 at paras. 24-25.

[6] In this case, Carswell has premised her request on the basis of new evidence which is contained in her Affidavit filed April 12, 2012. The new evidence is information which is related to the sale of the Principal Residence. Essentially, that the purchase price is too low and concern that the purchasers are related to a close personal friend of Engle's current wife. The Affidavit also contains Carswell's comments with respect to the procedural history of this matter, responses to my decision of February 29, 2012 and a list of personal belongings which she claims may still be in the Principal Residence.

[7] The test for the admission of new evidence is well known and is a two-part test: 1) The evidence could not have been obtained by the exercise of reasonable diligence at the first hearing; and 2) The evidence would probably have changed the result of the first hearing. *Fullowka et al.* v. *Royal Oak Ventures Inc. et al, supra* at para. 6.

[8] Carswell appeared by telephone from California at the prior hearings. On April 18, 2012, she appeared in person as she was in Yellowknife for a visit. Arguably, there is an issue that, because of logistics, she could not have obtained this information by the exercise of reasonable diligence. However, I do not decide the admission of new evidence on this basis. I am satisfied that the new evidence would not change the result of the first hearing. My original decision was based upon the validity and interpretation of the prenuptial agreement. The new information that Carswell has put forward relates to the circumstances surrounding

the sale of the Principal Residence and is not sufficiently probative to alter my decision of February 29, 2012. Therefore, I decline to grant a re-hearing on the basis of new evidence.

[9] Overarching all of this, a court is also required to consider whether a miscarriage of justice will occur if the judgement is not re-considered. Many of Carswell's arguments center around this aspect. This argument was considered tangentially at paragraph 29 of my Memorandum of Judgment dated February 29, 2012. Nothing that Carswell has subsequently presented convinces me that a miscarriage of justice will result from my decision of February 29, 2012.

[10] With respect to the second aspect of Carswell's application, this action was commenced by Engle to remove the caveat placed by Carswell on the Principal Residence. At the initial hearing, Carswell claimed the presence of personal belongings in the Principal Residence as an argument to prevent removing the caveat and to prevent the sale of the Principal Residence. This issue was dealt with at paragraph 27 of my decision of February 29, 2012. Carswell has now provided a list of personal items and claims that to prevent her from retrieving them allows Engle to steal her personal property. I have considered Carswell's request and see no reason to alter my decision. The issue of the return of personal property is, in my view, one that is outside the scope of the Originating Notice before me and should be the subject of separate legal proceedings.

[11] Given my decision on the first part of Carswell's application, it is not necessary for me to address the third part of her application.

[12] In the circumstances, I dismiss Carswell's application. The formal Order reflecting the decisions of February 29, 2012, March 28, 2012 and today's date can be formally entered, subject to my approval once submitted to the Court. The requirement to obtain the Respondent's approval as to form and content is dispensed with.

[13] With respect to costs, Engle submitted that costs should follow the event and $1000 (to cover airfare and a hotel for counsel to attend the hearing) should be deducted from the amount payable into court. Carswell submitted that she is impecunious and it is impossible for her to pay costs. She also claims that Engle has significant resources and this should be taken into account.

[14] Counsel for Engle has attended in person two hearings in this matter. This has involved airfare, hotels, meals and other costs. After the first application, no costs were sought by Engle. I am of the view that some costs should be paid in this instance. I recognize that Carswell claims limited financial resources and for that reason, I agree that costs should be deducted from the amount payable into court. Costs will be ordered in the amount of $500.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
25th day of April 2012

Counsel for the Applicant: James Thorlakson
The Respondent represented herself

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MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE S.H. SMALLWOOD
