Date: 2013 05 16
Docket: S 1 CV 2013 000005

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BETTI MAI DELOREY

Applicant

-and-

THE ESTATE OF JAMES WAI HUNG WONG

Respondent

MEMORANDUM OF JUDGMENT

[1] Betti Mai Delorey seeks an order allowing her to bring an application for property division under the *Family Law Act*, S.N.W.T. 1997, c.18 outside of the prescribed time period for doing so. She also seeks an order for unequal division of family property through the transfer of all interest in the family home to her.

[2] The Public Trustee appeared at the application and does not oppose the relief Ms. Delorey requests.

FACTS

[3] The circumstances of this case are unique and they are tragic.

[4] Betti Mai Delorey and James Wong lived together in a common law relationship from 2003 until 2006. During that time they had two children and they built a house. The house became the primary asset of the relationship.

[5] The house stands on a lot that the parties purchased in late 2004 for $40,000.00. Mr. Wong provided these funds. When it was purchased, the lot was placed solely in Mr. Wong's name. According to Ms. Delorey, this was not

because the parties wished Mr. Wong to be the sole legal and beneficial owner, but rather, because of concerns about Ms. Delorey's credit rating at the time.

[6] The parties did not build the house immediately. This was due primarily to Mr. Wong's struggle with addiction.

[7] Shortly after they purchased the lot, Mr. Wong entered an addictions treatment program in British Columbia. Ms. Delorey moved into her parents' home in Hay River with the parties' first child while Mr. Wong completed treatment. Subsequently, he joined Ms. Delorey at her parents' home.

[8] In early 2005, Mr. Wong obtained a mortgage loan to finance construction of the house. Ms. Delorey's name was not on the mortgage due to the same credit issue referenced earlier. They started to build the house.

[9] There were a number of difficulties encountered during the building process. There were delays and irregularities in the construction. Some contractors left the job without completing work. Despite his treatment in British Columbia, Mr. Wong continued to struggle with addiction issues. This left Ms. Delorey to deal with the construction on her own.

[10] Eventually, the parties were able to move into the house.

[11] Mr. Wong's personal problems continued. He was unable to hold down a job, so it fell to Ms. Delorey alone maintain the home and support the family. Meanwhile, Mr. Wong incurred significant debts and depleted the parties' assets. He ran up a personal line of credit to support his addiction and he had to sell a car to service the debt. He incurred a towing bill as a result of an accident (which he concealed from Ms. Delorey). More than once, he emptied out Ms. Delorey's personal bank account so that she was unable to pay household bills or buy groceries and he secretly took money from her purse.

[12] Mr. Wong attended another residential addiction treatment program, this time in Grand Prairie, in early 2006. Ms. Delorey was then pregnant with their second child. Shortly after, the parties separated for good in April of 2006.

[13] By agreement, Mr. Wong left the house and Ms. Delorey remained there with the two children.

[14] Ms. Delorey was left with all of the household debts and obligations, including outstanding taxes, fuel, electricity and telephone bills, insurance premiums and, of course, the mortgage. Eventually, she was able to bring

everything into good standing. She received some assistance from her parents and she worked odd and part-time jobs, whilst attending training to become an addictions counselor.

[15] Mr. Wong did not provide any contributions towards household expenses, nor child support, in the year following the separation.

[16] Mr. Wong's life began to turn around and approximately one year later, he secured gainful employment with a mine. He was in need of a place to live, so Ms. Delorey agreed that he could move into the house on a temporary basis. This was not a reconciliation. During this time, Mr. Wong made three mortgage payments, amounting to just under $3,500.00 in total.

[17] At the same time, the parties managed to reach an agreement on property division and child support. Specifically, they agreed that child support would commence on August 30, 2007 and that Ms. Delorey owned the house and would continue to pay the mortgage. The parties also acknowledged that Mr. Wong had invested $40,000.00 in the house. They agreed that if Ms. Delorey sold the house, they would negotiate a settlement for Mr. Wong. The amount was not specified.

[18] Ms. Delorey and Mr. Wong wrote out the terms of the agreement by hand. They signed it, but it was not witnessed. Ms. Delorey's evidence is that they intended to obtain assistance through the Legal Services Board to effect a transfer of the property into her name from Mr. Wong. I pause to note that Ms. Delorey does not seek to enforce the written agreement.

[19] The agreement was never implemented. On August 28, 2007, Mr. Wong died unexpectedly. He left surviving him his mother and his brother, as well as his two infant children. The title to the house was still in his name alone. He had not had an opportunity to make even one of the agreed upon child support payments.

[20] Mr. Wong did not have a will. Ms. Delorey made contact with his mother and brother to see if they wished to administer Mr. Wong's estate. They were entitled to priority as potential administrators on an intestacy, pursuant to Rule 6 of the *Probate, Administration and Guardianship Rules of the Supreme Court of the Northwest Territories,* SOR/79-515 (Ms. Delorey no longer being Mr. Wong's spouse when he died). Neither expressed an interest in becoming Administrator.

[21] Subsequently, Ms. Delorey retained a law firm to assist in organizing the appointment of an administrator for the estate. Written inquiries were again sent to Mr. Wong's brother and mother, asking if each would consent to Ms. Delorey becoming the administrator. There was no response.

[22] Ms. Delorey applied to this Court for Letters of Administration in late 2010. These were granted on December 10, 2010, in Action Number S-1-ES-2010-000007. She brought the application on notice to the Public Trustee and to Mr. Wong's brother and mother. The Public Trustee did not appear and take a position when the application was heard, nor did Mr. Wong's brother or mother.

[23] The house is the estate's only significant asset. It was valued at $225,000.00 when Mr. Wong died. The outstanding mortgage, which totaled $155,141.07, was paid by the proceeds of a mortgage insurance policy on Mr. Wong's life. The beneficiary was the lender, which was paid directly. The funds did not pass through the estate. Mr. Wong also had a small amount of cash, which was less than $2,000.00.

[24] The estate debts amounted to $44,878.70. This was composed of a personal line of credit and credit cards. Ms. Delorey paid this amount shortly following her appointment as Administrator. She took out a line of credit, which is secured by the house, to do so. She has been servicing the line of credit with her own funds and she has continued to maintain the house, making repairs and improvements as required and ensuring the utilities and taxes are paid, since Mr. Wong's death.

ISSUES:

[25] The issues are whether the time for bringing the application should be extended and if so, whether the property should be divided unequally, in favour of Ms. Delorey.

Time Extension

[26] Section 38(3) of the *Family Law Act* limits the time period in which applications for property equalization may be commenced. In this case, the applicable limitation is the earliest of two years from the date that Ms. Delorey and Mr. Wong separated with no reasonable prospect that they would resume cohabitation, or six months from the date that Letters of Administration were granted.

[27] This application was filed on January 9, 2013, well outside of the prescribed period. Ms. Delorey and Mr. Wong separated permanently in 2006. Letters of Administration were granted for Mr. Wong's estate in December of 2010.

[28] Section 66 of the *Family Law Act* allows the Court to extend the time to bring an application where it is satisfied of three things: that there are apparent grounds for relief under the Act; that the delay in seeking relief was incurred in

good faith; and that no person will suffer substantial prejudice as a result of the delay.

Are there apparent grounds for relief?

[29] Ms. Delorey and Mr. Wong lived together as spouses. They had two children. They acquired land and they built a house.

[30] Ms. Delorey and Mr. Wong attempted to resolve the property through an agreement, but it was not implemented. The circumstances changed drastically with Mr. Wong's death. There was no opportunity to transfer title to Ms. Delorey. Further, there is a significant uncertainty in the agreement in that the parties agreed *to negotiate* a settlement as to what, if anything, Mr. Wong's entitlement would be. There was, of course, no negotiation.

[31] Ms. Delorey is not asking the Court to enforce the agreement. It should be noted, however, that the agreement is unenforceable in any event as it fails to meet the requirements for enforceability prescribed in s. 7(1) of the *Family Law Act.* That section provides that domestic contracts must, among other things, be witnessed.

[32] The family property remains undivided. The *Family Law Act* addresses property division. Thus, there are apparent grounds for relief.

Was the delay incurred in good faith?

[33] The term "good faith" as it is used in s. 66 of the *Family Law Act* has not been considered by this Court. However, an identical provision and has been considered by the courts in Ontario.

[34] In *Hart v. Hart,* 1990 CarswellOnt 276 (U.F.C.) Mendes da Costa, U.F.C. J. said the following about "good faith" in the relation to an application to extend time:

> [24] Section 2(8)(*b*) enshrines in legislative form the concept of "good faith". As is not infrequently the case, these words are not defined in the Act, and I do not believe that it would be either possible or useful to attempt to catalogue the possibilities that they embrace. However, I must attribute to these words their "plain meaning according to the understanding and practices of the times": *Cash v. George Dundas Realty Ltd.* (1973), 1 O.R. (2d) 241 at 248, 40 D.L.R. (3d) 31 (C.A.). I believe, to establish "good faith", it must be shown that the moving party acted honestly and with no ulterior motive. It does not seem to me that the legislature, anticipating the general newsworthy nature of the family property provisions of the Act, intended that a mere failure to make enquiries should

> necessarily negate "good faith", provided that the absence of enquiry does not constitute willful blindness or does not otherwise, in all the circumstances, fall below community expectations. . .

[35] I am satisfied that Ms. Delorey acted honestly and without ulterior motive, and that she incurred the delay in good faith.

[36] There is nothing to suggest that Ms. Delorey was willfully blind to the limitation period or that she even knew about it. Similarly, there is no suggestion that the delay was designed to defeat a claim by the estate or anyone else.

[37] After Mr. Wong's death, Ms. Delorey was left to deal with a large amount of debt, the parties' two young children and, not insignificantly, their grief. No one stepped up to deal with Mr. Wong's estate until Ms. Delorey took action in 2010. Given this, it is not at all surprising that she did not turn her attention towards the limitation period in the *Family Law Act.*

Will any party suffer substantial prejudice if an extension is granted?

[38] There is no evidence of substantial prejudice to any party.

[39] The requirement that prejudice be "substantial" means that it cannot be presumed solely from the lapse of time. *Taylor v. Taylor*, 2006 CarswellOnt 5768 (S.C.J.) at paragraph 41; *El Feky v. Tohamy*, 2010 CarswellOnt 7385, 2010 ONCA 647, at paragraph 37.

[40] Mr. Wong died before the limitation period expired. He did not arrange his affairs on the assumption that there would be no application for property division. There is no prejudice to Mr. Wong, nor his estate, occasioned by the delay. Indeed, the value of the estate's only substantial asset has been preserved.

[41] This leaves the two children. The Public Trustee appeared in these proceedings and made submissions. It is not asserted that the children will suffer substantial, or any, prejudice in the event that Ms. Delorey is permitted to proceed with this application. Indeed, the Public Trustee submits that the interests of Ms. Delorey and her children coincide to a large extent.

[42] The children would be entitled to share in the residue of the estate under the terms of the *Intestate Succession Act,* R.S.N.W.T. 1988 c. I-10, but any such claim would yield to Ms. Delorey's entitlement under the *Family Law Act*, pursuant to s. 37(9)(b). In any event, there has been no distribution of estate assets to the children under the *Intestate Succession Act* that would be affected adversely, nor

have the children's affairs been arranged in a manner that assumed there would be no application for division.

[43] In the circumstances, I am satisfied that Ms. Delorey has met all three of the requirements in s. 66 and therefore, an extension of time to bring an application for property equalization under the *Family Law Act* should be granted.

Manner of Division

[44] The next question is how that property is to be divided or, more particularly, whether the property should be divided unequally, in favour of Ms. Delorey.

[45] There is a presumption of equal division in the *Family Law Act;* however, s. 36(6) permits unequal division where the court finds that equal division would be unconscionable, having regard to a number of circumstances.

[46] Section 36(6) provides:

> 36 (6) The court may, on an application under section 38, vary the amount of a spouse's entitlement under this section or, in the circumstances described in subsections (1) and (3), award an amount as an entitlement to a spouse whose net family property is equal to or greater than the net family property of the other spouse, where the court is of the opinion that it would be unconscionable not to do so, having regard to
>
> (a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the commencement date;
>
> (b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
>
> (c) a spouse's intentional or reckless depletion of his or her net family property;
>
> (d) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to the duration of the spousal relationship;
>
> (e) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities for the support of the family than the other spouse;
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> (f) a written agreement between the spouses that is not a domestic contract;
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> (g) the needs of the children of a spouse and the financial responsibility related to the care and upbringing of the children;

> (h) a substantial change, occurring after the valuation date, in the net family property of either spouse and the circumstances of the change;
>
> (i) a substantial decrease, occurring after the commencement date, in the value of property claimed in reduction of a spouse's net family property under paragraph 35(1)(b) or a substantial loss on the disposition of such property after the commencement date, and the circumstances of the decrease or loss; or
>
> (j) any other circumstance relating to the
>
> (i) acquisition, disposition, preservation, maintenance, improvement or use of property,
>
> (ii) acquisition, maintenance or disposition of debts or other liabilities.

[47] In *Fair v. Jones*, 1999 CarswellNWT 26; (1999), 44 R.F.L. (4th) 399 (N.W.T.S.C.) the applicant sought an unequal division of family property. Vertes, J. considered the standard that must be met to justify a departure from equal division and, in particular, the meaning of the term "unconscionable" as opposed to "unfair" or "inequitable":

> [43] The "unconscionable" criterion sets a high standard. As noted by Jennings J. in *Merklinger v. Merklinger* (1992), 11 O.R. (3d) 233 (Ont. Gen. Div.), affirmed at (1996), 30 O.R. (3d) 575 (Ont. C.A.):
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> > Section 5(6) of the *Family Law Act, 1986* permits me to order an unequal allocation of value if to do otherwise would be unconscionable. The legislature deliberately chose to strictly define the severity of the result of the application of s.5(1) which must pertain before there can be any judicial intervention. The result must be more than hardship, more than unfair, more than inequitable. There are not too many words left in common parlance that can be used to describe a result more severe than unconscionable.
> >
> > Subsections 5(1) and (6) noted above are the Ontario equivalents to our subsections 36(1) and (6).
>
> [44] Jennings J. used the term "outrageous" to describe the unconscionability of an equalization order in the *Merklinger* case. Some other common terms that have been used in the case law are "shocking" (*Kelly v. Kelly* (1986), 50 R.F.L. (2d) 360 (Ont. H.C.)), and "shockingly unfair" (*Magee v. Magee* (1987), 6 R.F.L. (3d) 453 (Ont. U.F.C.)), and "repugnant to anyone's sense of justice" (*Wachtel v. Wachtel*, [1973] 1 All E.R. 829 (Eng. C.A.) per Lord Dunning). Whatever term is

> used as a substitute expression, it is clear that by stipulating "unconscionable" the legislature intended a much stricter test than merely "unfair" or "inequitable".
>
> [45] Since the rule is equalization, any claim to a departure from that rule would have to be an exceptional case. The onus is on the spouse claiming more than an equal share to prove his or her entitlement: *Reynolds v. Reynolds* (1995), 13 R.F.L. (4th) 179 (Ont. C.A.). That spouse must first bring his or her claim within one of the factors set out in subsection (6) and then must show that, as a result, it would be unconscionable not to order an unequal division.

[48] Several of the factors listed in section 36(6) are at play here. As noted earlier, Mr. Wong incurred debts and depleted the family's assets. He ran up his personal line of credit. He sold a car. He emptied Ms. Delorey's bank account and took money from her purse without her consent.

[49] At the same time, Mr. Wong did not have a steady or reliable source of income while the parties lived together or even after they separated. It was Ms. Delorey who paid all of the household bills, including the mortgage and taxes on the house. After the parties separated, Ms. Delorey continued to pay these debts and maintain the household bills in good standing.

[50] Further, it was Ms. Delorey who maintained the property, physically and financially, after Mr. Wong died, even before she assumed her role as Administrator. She ensured that the repairs and improvements were made to the house and she paid the estate's debts, ensuring protection of its most valuable asset from Mr. Wong's creditors.

[51] Finally, it was Ms. Delorey who attended to the financial and other needs of the parties' two children.

[52] Mr. Wong's contributions were the initial investment of $40,000.00 to purchase the land and three mortgage payments that he made in 2007. He paid no child support. He invested no "sweat equity" in the house. He paid none of the bills associated with the house. He participated minimally in child care duties.

[53] The equity in the house increased significantly upon Mr. Wong's death as a result of the proceeds of the mortgage life insurance policy being paid to the lender. In my view, however, this event, which is purely fortuitous, does not in and of itself undermine the case for unequal division in these circumstances. But for Ms. Delorey making the mortgage payments and seeing to the other household bills, foreclosure proceedings would undoubtedly been taken, resulting in the loss of the house long before Mr. Wong died.

[54] There are certain financial realities now facing Ms. Delorey in bringing up the children. The children are still very young and they will require financial support from their mother for many years to come. An order directing equal distribution of the property could force the sale or refinancing of the house to effect the equalization. This could, in turn, uproot the children from the only house they have known. At the very least, it would cause financial instability.

[55] Such an order would also be likely to lead to additional legal proceedings against the estate, such as an application under the *Dependents Relief Act*, R.S.N.W.T. 1988 c. D-4 to secure support for the children.

[56] The evidence in support of unequal division is substantial. Equalization in these circumstances would be clearly unconscionable, amounting to a complete failure to recognize Ms. Delorey's disproportionately high contribution to the acquisition, preservation and improvement of property, and to the care and support of the children. Further, it would ignore the current and future needs of Ms. Delorey and the children related to their care and upbringing.

[57] Transferring the interest in the house to Ms. Delorey is the only way to properly recognize her contribution and allow her to continue to provide the children with a stable home without unnecessary interruption or additional legal proceedings.

ORDER

[58] The application for an extension of time for bringing an application for property division under the *Family Law Act*, is granted. It is ordered that all interest in the house and land legally described as Lot 422, Plan 360, Hay River be transferred to Ms. Delorey forthwith and the Registrar of Land Titles shall issue title to this land in the name of Ms. Delorey.

K. Shaner
JSC

Dated at Yellowknife, NT
this 16th day of May, 2013.

Michael Hansen, Counsel for Betti Mai Delorey
Brian Asmundson, Public Trustee

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