2010 ONSC 4845
Ontario Superior Court of Justice

Harper v. Harper

2010 CarswellOnt 6928, 2010 ONSC 4845, [2010] O.J. No. 3899, [2011] W.D.F.L. 876, [2011] W.D.F.L. 888, [2011] W.D.F.L. 889, [2011] W.D.F.L. 926, 192 A.C.W.S. (3d) 549

Barbara Harper (Applicant) and William John Harper (Respondent)

Spies J.

Heard: August 31, 2010
Judgment: September 17, 2010
Docket: FS-10-358404

Counsel: Irving Aiken for Applicant
James S. Marks for Respondent

Subject: Civil Practice and Procedure; Family; Property; Contracts

Headnote

Civil practice and procedure --- Pre-trial procedures — Severance — Of issues

Parties began to live together in 2005, married in 2008 and separated in 2009 — Parties resided in home that husband acquired in 2003 — Parties each had children from prior relationships but no children together — Parties signed pre-nuptial agreement on eve of marriage — Husband sought exclusive possession of matrimonial home and order that wife vacate matrimonial home — Wife sought interim spousal support and other relief — Husband brought motion to sever claim for divorce from other corollary relief, and other relief — Motion granted in part, on these grounds — Husband authorised to proceed with uncontested divorce — Parties both agreed they had been living separate for over one year — There was no reason to not sever claim for divorce from other corollary relief pursuant to R. 12(6) of Family Law Rules — Wife had seven days to vacate matrimonial home after being served divorce order — Trial would address other claims.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Interim support — Entitlement

Parties began to live together in 2005, married in 2008 and separated in 2009 when husband assaulted wife — Parties resided in home that husband acquired in 2003 — Parties did not have children together — Parties waived right to spousal support in pre-nuptial agreement — Wife remained in matrimonial home after separation — Husband supported wife after separation and assumed all home related expenses — Wife argued that pre-nuptial agreement was null and void — Wife alleged being unable to work — Wife brought cross-motion for interim spousal support and other relief — Cross-motion dismissed — There was no evidence that wife contributed financially to relationship — Wife continued living in home entirely at husband's expense — Wife did not provide financial disclosure — Allegations of wife's health issues were not supported by medical evidence — Wife did not suffer economic disadvantage from relationship — Wife should be bound to terms of prenuptial agreement pending determination of claim at trial.

Family law --- Division of family property — Matrimonial home — Order for possession — Interim possession — Factors to be considered by court

Parties began to live together in 2005, married in 2008 and separated in 2009 when husband assaulted wife — Parties resided

in home that husband acquired in 2003 — Wife remained in matrimonial home after separation — Husband was sole owner of home — Parties did not have children together — Husband supported wife after separation and assumed all home related expenses — Parties' pre-nuptial agreement stipulated that wife would vacate matrimonial home within reasonable time after separation recognizing that wife could not be compelled to do so pursuant to Family Law Act — Wife argued that pre-nuptial agreement was null and void — Husband was charged with assault and recognizance required that husband remain away from home — Husband moved in with 80-year-old father — Wife had de facto possession of matrimonial home after separation — Husband brought motion for exclusive possession of matrimonial home and issue arose as to who should have exclusive possession of matrimonial home pending trial — Parties had been separated for over one year — Divorce was severed from other claims — Husband had acquired home prior to marriage and paid expenses while wife remained there after separation — Alternate accommodations existed for wife — It would not be just for wife to continue to have de facto exclusive possession of matrimonial home pending trial — Wife was ordered to vacate matrimonial home once order for divorce was made.

Family law --- Restraining orders

Parties began to live together in 2005, married in 2008 and separated in 2009 when husband assaulted wife — Parties resided in home that husband acquired in 2003 — Wife remained in matrimonial home after separation — Husband was sole owner of home — Parties did not have children together — Husband was charged with one incident of assault and recognizance required that husband stay away from matrimonial home — Husband admitted to being in home on occasions in attempt to reconcile with wife — Husband brought motion for various relief — Wife brought cross-motion for order prohibiting husband from entering matrimonial home unless accompanied by real estate agent, and other relief — Cross-motion dismissed — Husband was still subject to terms of probation order which required him to stay away from home — Husband would soon be in possession of matrimonial home — Further restraining order was not necessary at this time.

Family law --- Domestic contracts and settlements — Validity — Essential validity and capacity — Void for uncertainty

Table of Authorities

Cases considered by *Spies J.*:

Bailey v. Plaxton (2000), [2000] O.T.C. 243, 2000 CarswellOnt 1194, 47 O.R. (3d) 593, 6 R.F.L. (5th) 29 (Ont. S.C.J.) — distinguished

Barton v. Sauvé (2010), 100 O.R. (3d) 763, 2010 ONSC 1072, 2010 CarswellOnt 1509 (Ont. S.C.J.) — considered

Butty v. Butty (2009), 256 O.A.C. 258, 2009 CarswellOnt 7612, 2009 ONCA 852, 99 O.R. (3d) 228, 314 D.L.R. (4th) 692, 75 R.F.L. (6th) 16 (Ont. C.A.) — followed

Hartshorne v. Hartshorne (2004), 236 D.L.R. (4th) 193, 47 R.F.L. (5th) 5, 25 B.C.L.R. (4th) 1, 318 N.R. 1, 2004 SCC 22, 2004 CarswellBC 603, 2004 CarswellBC 604, [2004] 6 W.W.R. 1, 194 B.C.A.C. 161, 317 W.A.C. 161, [2004] 1 S.C.R. 550 (S.C.C.) — considered

Mantella v. Mantella (2006), 27 R.F.L. (6th) 57, 267 D.L.R. (4th) 532, 80 O.R. (3d) 270, 2006 CarswellOnt 2204 (Ont.

S.C.J.) — referred to

Perrier v. Perrier (1989), 20 R.F.L. (3d) 388, 1989 CarswellOnt 248 (Ont. H.C.) — considered

Scheel v. Henkelman (1999), 1999 CarswellOnt 1156, 45 R.F.L. (4th) 419 (Ont. Gen. Div.) — referred to

Scheel v. Henkelman (2001), 195 D.L.R. (4th) 531, 142 O.A.C. 374, 2001 CarswellOnt 28, 11 R.F.L. (5th) 376, 52 O.R. (3d) 1 (Ont. C.A.) — considered

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46
s. 265(1) "assault" — referred to

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — referred to

Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

s. 19 — considered

s. 19(1) — referred to

s. 19(2)(b) — considered

s. 24 — pursuant to

s. 24(3) — considered

s. 24(3)(f) — referred to

s. 33(4)(a) — considered

s. 33(8) — referred to

s. 34 — referred to

s. 52(2) — considered

s. 56(4) — considered

Rules considered:

Family Law Rules, O. Reg. 114/99

R. 12(6) — referred to

DETERMINATION of issues of corollary relief arising out of husband's motion and wife's cross-motion.

***Spies J.*:**

Introduction

1 The Respondent brings this motion for exclusive possession of the matrimonial home, an order that the Applicant immediately vacate the matrimonial home and an order splitting the claim for a divorce from the other corollary issues in this proceeding. The original date for this motion, August 10, 2010, was set at a case conference on June 30, 2010. On August 10th, the Applicant requested an adjournment which was strongly opposed by the Respondent. The adjournment was granted to August 31, 2010, peremptory to the Applicant and costs were reserved to the hearing of the motion.

2 The Applicant served a cross motion on August 3, 2010, for a declaration that a prenuptial agreement entered into between the parties is null and void, an order for interim spousal support in the sum of $7,500 per month, an order for the sale of the matrimonial home and an order prohibiting the Respondent from entering the matrimonial home, unless accompanied by a real estate agent.

Background Facts

3 The Respondent bought a condominium in March 2003 and remains the sole owner on title. The parties began to cohabit in the Respondent's condominium in September 2005. They married on May 31, 2008 after entering into a prenuptial agreement on May 29, 2008. They continued to live together in the condominium and there is no dispute that the condominium is the matrimonial home. The prenuptial agreement was important to the Respondent as he has two daughters from a previous marriage. The parties have no children from their relationship.

4 The parties separated on August 28, 2009, when the Respondent was charged with assaulting the Applicant. The recognizance required the Respondent to remain away from the condominium unit. As a result, the Respondent has been forced to live with his 80 year old father and the Applicant has had *de facto* exclusive possession of the matrimonial home since separation. There is no dispute that she has not contributed anything towards the condominium fees, property taxes or utilities since separation. The Respondent's counsel wrote to the Applicant by letters dated March 16, 2010 and April 5, 2010, asking that she move out of the condominium, but she has refused.

5 The prenuptial agreement provides that neither party will make any claims for spousal support regardless of any change in future circumstances. The agreement also provides that the Applicant is entitled to receive half the increase in the value of the condominium from the date of marriage to the date of separation and that the Applicant will vacate the matrimonial home within a reasonable period of time after separation, although both parties acknowledged that she could not be compelled to do so pursuant to the *Family Law Act* ("*FLA*").

The Enforceability of the Prenuptial Agreement

6 Mr. Aiken, the solicitor for the Applicant, made a number of arguments as to why I should declare the prenuptial agreement to be void. He did not bring a motion for summary judgment on this issue. For reasons that follow, given the issues raised by the Applicant, a final decision on the enforceability of the prenuptial agreement cannot be made without a trial. In fact during his submissions, Mr. Aiken submitted that a trial is necessary. Accordingly, the Applicant's request for a declaration that the prenuptial agreement is unenforceable is dismissed without prejudice to her ability to seek this relief at trial.

7 However, since the Respondent seeks an order for exclusive possession of the matrimonial home and the Applicant seeks an interim order for spousal support, the enforceability of the prenuptial agreement, to the extent I can determine that issue at this stage, must be considered, as set out below.

Is the Respondent Entitled to Exclusive Possession of the Matrimonial Home?

8 Section 19 of the *FLA* states that both spouses have an equal right to possession of the matrimonial home. Pursuant to section 52(2), the provisions in the prenuptial agreement that limit the Applicant's possession rights in the matrimonial home are unenforceable. Section 24 (3) sets out the factors for the court to consider in granting an order for exclusive possession. These factors include the financial position of both spouses, any written agreement between the parties, the availability of other suitable and affordable accommodation, and any violence committed by a spouse against the other spouse. Section 19 (2) (b) of the *FLA* states that when only one of the spouses has an interest in the matrimonial home, the other spouse's right of possession ends when they cease to be spouses, unless a separation agreement or court order provides otherwise.

9 Mr. Aiken made essentially two arguments in defence of the Respondent's application for exclusive possession. He argued that the prenuptial agreement is unenforceable as a matter of contract law and that the Respondent has committed violence against the Applicant and that this disentitles him to such an order pursuant to section 24(3)(f) of the *FLA*. In essence he submitted that because of this violence, the Applicant should remain in exclusive possession of the matrimonial home.

10 According to s. 56(4) of the *FLA*, a court may, on application, set aside a domestic contract or a provision in it, if a party failed to disclose to the other significant assets existing when the contract was made, or a party did not understand the nature or consequences of the contract, or otherwise in accordance with the law of contract. Unfortunately, neither counsel provided any relevant case law as to how this provision should be interpreted.

11 The most recent decision from the Supreme Court of Canada dealing with domestic contracts is *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550 (S.C.C.), where the court overturned a decision setting aside a marriage contract as being "unfair". In *Barton v. Sauvé*, 2010 ONSC 1072 (Ont. S.C.J.) at para. 41, Blishen J. summarized the *Hartshorne* decision as follows:

> 1. Parties are permitted and encouraged to take personal responsibility for their own financial well-being on the dissolution of marriage and courts should be reluctant to second-guess the arrangement, particularly where independent legal advice has been obtained. Spouses may choose to structure their financial affairs in a number of ways and it is their prerogative to do so, provided that the legal boundaries of fairness are observed.
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> 2. Once an agreement has been reached, the parties are expected to fulfill the obligations under that agreement. A party cannot simply later state that he or she did not intend to live up to his or her end of the bargain.
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> 3. In addressing the issue of judicial deference to spousal agreements in the context of property division on marriage breakdown, the court may apply *Miglinv. Miglin*, [2003] 1 S.C.R. 303, [2003] S.C.J. No. 21, to support the general legal proposition that some weight should be given to marriage agreements. The *Miglin* case is also helpful given its general propositions that "a court should be loathe to interfere with a pre-existing agreement unless it is convinced that the agreement does not comply substantially with the overall objectives" of the governing legislation and in addition that the court "must look at the agreement or arrangements in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves". In *Hartshorne*, however, the court notes that the *Miglin* judgment deals with the effect of a separation agreement on an application for support under the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) and therefore cannot directly apply to regulate property distribution on the dissolution of marriage because this would distort the analytical structure provided by the *Family Relations Act*, R.S.B.C. 1996, c.128 (B.C.).

12 As Blishen J. noted, the Ontario Court of Appeal in *Butty v. Butty* (2009), 99 O.R. (3d) 228 (Ont. C.A.), cited the *Hartshorne* decision, noting, at para. 50, that "... it is important to keep in mind that courts should respect private arrangements that spouses make for the division of their property on the breakdown of their relationship, particularly where the agreement in question was negotiated with independent legal advice." The facts in *Butty* appear similar to the case at bar. The court found that Mr. Butty disclosed his assets and liabilities and did not misrepresent the nature and terms of the contract to Ms. Butty. There was a mistaken understanding in respect of farm property, but the Court of Appeal affirmed the trial judge's finding that it was an innocent mistake and did not result in a misstatement of the size of the property in question or Mr. Butty's interest in it.

13 The burden is on the party seeking to set aside the agreement, in this case the Applicant. In this case, I have already found that there should be a trial to determine the enforceability of the prenuptial agreement. However, in my view, that does not necessarily preclude my consideration of the agreement and in particular, a consideration of whether or not the Applicant has raised a triable issue in support of her position that the agreement is not enforceable insofar as it deals with the matrimonial home. I have, therefore, considered the evidence and the submissions with this in mind.

14 Mr. Aiken submits that the Applicant did not have a proper and complete explanation of the details of the prenuptial agreement. The prenuptial agreement was witnessed by the lawyers for each of the parties. The Applicant received independent legal advice from Kirk Cooper, a lawyer practicing in Toronto. At the time the agreement was signed, Mr. Cooper swore an affidavit (as opposed to signing a certificate) that stated, in part, that he advised the Applicant with respect to the agreement and "I believe she is fully aware of the nature and effect of the Agreement in light of her present circumstances and is signing voluntarily." The Applicant admits that Mr. Cooper told her that she was giving up some of her rights and that the agreement was not to her benefit. It is her evidence that she did not understand that she was giving up all property and support rights. The Applicant has not provided any evidence from Mr. Cooper in support of her position either by way of affidavit or questioning.

15 In *Barton*, Blishen J. went on to find that "where a lawyer certifies that he or she has provided independent legal advice, so far as the opposite party is concerned, that should end the matter: *non est factum* will not be available unless the opposite party knew or was willingly blind to the fact that the other party did not understand the agreement. A solicitor certification is dispositive evidence of comprehension: see *Mantella v. Mantella*, 80 O.R. (3d) 270, [2006] O.J. No. 1337 (Ont. S.C.J.)." In my view the Applicant has not raised a triable issue in support of her position that she did not receive proper independent legal advice before signing the agreement.

16 Mr. Aiken submits that the prenuptial agreement is void as a result of a "major discrepancy", referring to the two different values for the condominium set out in the agreement. He relies on the fact that in paragraph 5(a) of the agreement it states that the condominium had a value of $495,000 at the time of execution of the agreement and that in the Net Worth statement of the Respondent, set out at the end of the agreement, the value of the condominium is listed as $425,000. This is the amount shown for both the "Total Value" of the condominium and the "Equity" in the condominium. There is no reference to this financial statement in the agreement; save for reference to the fact the Respondent had made financial disclosure to the Applicant. In my view it is not obvious on the face of the agreement that there is an inconsistency. That would depend on the evidence of any encumbrances on the condominium at the time the prenuptial agreement was executed.

17 The legal text relied upon by Mr. Aiken in support of his position that extrinsic evidence would not be admissible to explain this discrepancy is from 1959. A lot has changed since then. In my view, if there is indeed a discrepancy, the Respondent could make a claim for rectification. Whether or not a trial judge will accept extrinsic evidence in this case is not a matter that I can decide now but in my view this discrepancy would not be likely to vitiate the entire agreement.

18 Mr. Aiken also submits that because the Respondent did not and does not have appraisals of the condominium that "this would indicate that on the date of marriage the values were excessive and date of separation values insufficient." The Applicant has not provided any appraisal evidence as to the value of the condominium either. The interpretation of the prenuptial agreement and a determination of the value of the condominium are issues that must be dealt with at trial.

19 There is no evidence that the Applicant was in any way taken advantage of or subject to undue influence or duress such that the prenuptial agreement should not be enforced.

20 In my view the Applicant has not raised a triable issue with respect to the enforceability of the provisions in the prenuptial agreement dealing with the matrimonial home. Nevertheless, I am not able to make a conclusive finding that the agreement is binding at this time. In any event, as the agreement cannot limit the Applicant's possessory rights, I have considered the Respondent's claim for exclusive possession as a claim for exclusive possession pursuant to section 24 of the *FLA*.

21 In oral submissions, Mr. Aiken focused on the issue of domestic violence and the Applicant's current medical condition in support of his position that it would be unconscionable to hold her to the prenuptial agreement. Mr. Aiken suggested that he had not been able to "get at the truth" despite three occasions when he has questioned the Respondent (July 21, 2010, August 11, 2010 and August 17, 2010). I have reviewed the three transcripts filed and cannot make a finding that the Respondent has not been responsive to questions. It appears that the Respondent simply has not admitted the Applicant's version of the events concerning an incident at the cottage that led to his arrest.

22 In a case file synopsis by the OPP, it is stated that the Respondent "shoved her [the Applicant] knocking her to the ground" and elsewhere that he "reached out and pushed the victim in the area of her hips which caused her pain". This information would have come from the Applicant as the complainant.

23 On March 9, 2010, the Respondent received a conditional discharge for the assault charge. The agreed facts read out by the Crown in support of his guilty plea state that after an argument started he reached and pushed the Applicant in the area of her hips which caused her pain due to medical problems she was suffering from. The Respondent was found guilty of assault. Mr. Aiken argued that, therefore, he must have done much more than "touch" the Applicant, which is the word the Respondent used during questioning. However, the definition of assault in the *Criminal Code* has been interpreted to include any unwanted and intentional touching of a complainant, and the strength of the force used is immaterial. In my view, for the purpose of deciding this motion, the agreed facts at the time of the Respondent's guilty plea are the best evidence of what occurred during the incident.

24 Based on the evidence before me, it appears that the Applicant has exaggerated the incident that led to the arrest of the Respondent. On September 9, 2009, she wrote to the Crown Attorney advising that the Respondent "poses no threat to me and/or my safety" and that in the almost seven years she had been with him, "never once, prior to the start of this summer, has William even so much as raised his voice to me in anger". She admits that she was not the one that called police and that it was the Respondent. I note that she also stated in that letter that she was leaving the condominium as it no longer felt like home. She gave the Crown notice of a change of address to an address in Ajax.

25 The Applicant has sworn that she sent a further letter to the Crown dated October 25, 2009, disavowing the September 9th letter and stating that the Respondent had assaulted her several times over the duration of their marriage. The position of the Applicant now is that she was afraid that her charging the Respondent with assault would enrage him and cause him to come after her as he still had his keys to the condominium. However, on December 18, 2009, she sent an email to counsel for the Respondent in the criminal proceedings and attached the September 9th letter to her email. In a covering email, she advised the Respondent's criminal counsel that she had never been a willing participant in the Crown's case against the Respondent. It is submitted that she would only have known the name of the Respondent's criminal counsel if the Respondent had given the name to her. Although I cannot make a finding of fact on this disputed evidence, the current position of the Applicant appears to be at odds with the fact there was only ever one incident of alleged violence where the police were called and even in that case, it was the Respondent who called them. Furthermore, the letters referred to go much further than resiling from any allegation of assault.

26 It is now the position of the Applicant that as a result of the "assaults" by the Respondent, she is seriously ill and unable to work. In her Application and affidavit in support of her motion, the Applicant states that the Respondent frequently punched her and knocked her down and caused her permanent injury to her back and spine, which has also made her seriously depressed, preventing her from working. No particulars are provided apart from this bald allegation. The Respondent denies the allegations of physical abuse and deposes that he has never raised his hand and struck the Applicant during their relationship. Mr. Aiken submits this is a lie as this evidence is at odds with the admitted facts when the Respondent pleaded guilty to assault.

27 On this motion it is not possible to determine if the Applicant's assertions of other assaults is true. At this stage, the only uncontested evidence is what the Respondent admitted to when he pleaded guilty to the assault charge. If that is in fact the only incident, and the Respondent's evidence is accepted, the issue of alleged violence in my view would clearly not be material. In *Perrier v. Perrier*, [1989] O.J. No. 826 (Ont. H.C.), Kozak J. found that confrontations between a husband and wife which involved some pushing and shoving by both parties could hardly be classified as acts of violence, in the context of section 19(1) of the *FLA*.

28 In any event, in my view the issue of the extent of any violence is only relevant where that is the reason the spouse who alleges the violence seeks an order for exclusive possession of the matrimonial home and there is some other basis for the court to order that one of the spouses should remain in exclusive possession of the matrimonial home, rather than have it sold and the proceeds split between the parties. For the reasons that follow, that is not the case here.

29 Mr. Aiken also submitted in his factum that a number of other alleged actions of the Respondent such as refusing to give the Applicant a mailbox key and locking her out of her residence, justifies an order for exclusive possession. In my view, those allegations are not relevant to this issue.

30 The real issue before me is whether or not at trial the court would likely order the sale of the matrimonial home and who should have exclusive possession of the matrimonial home pending trial. The Applicant commenced this proceeding, but apart from her motion for interim spousal support, she has no interest in bringing this matter to trial quickly. In fact, as set out below, her refusal to submit to being questioned and her failure to make disclosure is consistent with her interest to delay this proceeding. She has already been able to delay the hearing of this motion. This case strikes me as one where the Applicant is trying to use her *de facto* possession of the matrimonial home for leverage against the Respondent. In my view, provided the court ensures that the Respondent does not delay in bringing this matter to trial, she should not be permitted to do so.

31 The Respondent does not want to sell the condominium as he owned it prior to the parties meeting. Although the condominium is a matrimonial home and the Applicant has an interest in it, based on the undisputed facts, even if the prenuptial agreement is found to be unenforceable with respect to the matrimonial home, in my view the Respondent would have a very strong claim to unequal division of the matrimonial home given the short duration of the marriage, the fact that he owned the matrimonial home before marriage and the lack of financial contribution to the purchase and carrying costs of the condominium by the Applicant. At trial, the Applicant is not likely to recover more than one half of any increase in value of the condominium from the time of marriage to the time of separation. She would not likely obtain an order for the sale of the condominium. The Respondent has ample other assets to satisfy any judgment in this regard. If the Applicant is bound to the prenuptial agreement, it is the Respondent's position that the condominium did not increase in value between the date of marriage and the date of separation and so the Applicant is not entitled to any money from the condominium. Either way, the Applicant's claim is a financial one. In my view there would be absolutely no basis to award the Applicant exclusive possession of the matrimonial home at trial or order the sale of the matrimonial home.

32 Both parties agree that the separation date was August 28, 2009 and that they have, therefore, been separated for more than one year. The Respondent submits that as a result, the Applicant no longer has a right to exclusive possession of the matrimonial home as she is no longer a spouse. Although no divorce has yet been granted, in my view the fact the Applicant has enjoyed exclusive possession to the matrimonial home for over one year and the Respondent is now entitled to a divorce are factors to consider.

33 The Respondent's evidence is that the Applicant has several places where she could live. One of those places is her mother's residence in Ajax. She could also live with a sister who lives in Ajax. A third possibility is her daughter who lives in Oshawa. According to the Respondent, when the parties met several years ago, the Applicant was living with her sister. At the time they began to cohabit, the Applicant was living with her mother. This evidence was not disputed by the Applicant. In fact, she stated in her first letter to the Crown that she intended to leave the condominium and she gave an Ajax address as her new address. The undisputed evidence, therefore, is that the Applicant would not be prejudiced by an order for exclusive possession in favour of the Respondent.

34 In my view given the Respondent is the sole owner of the condominium, the fact the Applicant is not contributing to the ongoing costs of the condominium and there is no dispute the Applicant has other suitable and affordable accommodation available to her, pending the trial, it would not be just for the Applicant to continue to have the right to *de facto* exclusive

possession of the matrimonial home pending trial, notwithstanding the financial position of the Respondent and the single incident of domestic violence she relies on.

35 Unfortunately I do not see my discretion under section 24 of the *FLA* as justifying an order for exclusive possession of the condominium in favour of the Respondent on the basis of what would be a just result. However, as there is no dispute that the parties have been living separate and apart for more than one year, I see no reason why I should not sever the Respondent's claim for a divorce from the other corollary relief claimed by both parties pursuant to Rule 12 (6) of the *Rules* and permit the Respondent to proceed forthwith with an uncontested divorce. The undisputed evidence of the Respondent is that because all of the furniture in the condominium is his, that the Applicant can move out very quickly as she would be moving in with relatives in the Ajax/Oshawa area. As the Applicant has notice now that she will have to leave the condominium, once the Respondent has obtained his order of divorce, the Applicant shall vacate the condominium immediately. The Respondent may request the assistance of the Sheriff to evict the Applicant, should that be necessary.

36 As an added precaution, to protect any financial claim the Applicant may have to any increase in value of the condominium, I shall also order that the Respondent not sell or encumber the condominium and direct the parties to schedule a settlement conference before the end of November 2010 so that a trial date can be set. The enforceability of the prenuptial agreement and what rights the Applicant has to a financial interest in the matrimonial home, should be determined as soon as possible.

Is the Applicant Entitled to Interim Spousal Support?

37 The Applicant claims interim spousal support under the provisions of both the *FLA* and the *Divorce Act*. Mr. Aiken relies on section 33(4) (a) of the *FLA* and argues that the provisions of the prenuptial agreement waiving the right to spousal support should be set aside as they are unconscionable.

38 Pursuant to section 34 of the *FLA*, the court may make an interim order for spousal support. Under section 33(4)(a) the court may set aside a waiver of the right to support in a domestic contract and may determine and make an order for support in an application if the provision for support or the waiver of the right to support results in unconscionable circumstances.

39 Mr. Aiken relied on the decision of *Bailey v. Plaxton* (2000), 47 O.R. (3d) 593 (Ont. S.C.J.). That case is now out of date. However, I accept that on an interim motion where there is a triable issue as to the enforceability of a domestic contract, where each party agreed to waive spousal support rights, the courts have found the agreement not to be an impediment to awarding interim spousal support; see *Scheel v. Henkelman* (1999), 45 R.F.L. (4th) 419 (Ont. Gen. Div.).

40 An agreement which was fair and reasonable when it was signed, may, through circumstances that occur in the future, result in unconscionable circumstances at the time of the support application, see: *Scheel v. Henkelman* (2001), 52 O.R. (3d) 1 (Ont. C.A.) at at para. 15.

41 At paragraph 19 of the appeal decision in *Scheel*, the court discussed the definition of the word "unconscionable" and after referring to dictionary definitions concluded that it can best be described as "something which is shocking, oppressive, not in keeping with a caring society". In making this determination, the purposes of a spousal support order under section 33(8) of the *FLA* should be considered.

42 The Applicant is 49 years old. In this case there is no evidence that the Applicant financially contributed to the relationship. Nor is there any evidence that she suffered an economic disadvantage as a result of the relationship.

43 There is some evidence of a change in circumstances from the time the prenuptial agreement was signed. In 2008, the Applicant earned $35,341 from working at the Ontario Orthopaedic Association as an Executive Coordinator and $5,353 from a Widow's Pension. However, in 2009, she only earned $10,560 from the Association and $5,485 from her Widow's Pension. According to a Record of Employment, her employment was terminated on April 13, 2009, because her position was eliminated. She has not given any evidence about whether or not she received Employment Insurance. The Applicant alleges that the Respondent demanded that she not get a new job and stated that he would look after her. This is not denied by the Respondent in his supplementary affidavit. Her position now is that she is not able to work because of physical and mental problems.

44 The Applicant has filed some medical evidence which I have considered. There is what is purported to be a "report" from Dr. Kussin, a psychiatrist, but what has been provided are his notes of a single visit with the Applicant on April 29, 2010. His notes conclude with his "impression" that the Applicant is suffering from a major depression, that she should take antidepressants and obtain an ODSP drug card. There is no evidence that the Applicant is under regular psychiatric care for her alleged depression. There is also no evidence filed from Dr. MacDonald, who is the doctor to whom the report was addressed to.

45 The Applicant has also provided a report from a radiologist, who at the request of Dr. MacDonald did a soft tissue ultrasound on her lower back. The report suggests there is a solid lesion in her back and recommends a MRI. It is not clear but the report appears to be based on imaging done in November and December 2009. In her affidavit the Applicant states that she has had the MRI but does not have the results.

46 The Applicant has also provided a report from Dr. Ta dated May 1, 2010, who saw the Applicant in his Chronic Pain Clinic. According to this report, the Applicant advised Dr. Ta that she had had chronic back pain for a number of years and that she had been able to manage the "baseline pain" until she was involved with domestic assault in December of 2009 over a period of two months. Dr. Ta states that the Applicant has disc disease and he recommends treatment by medication.

47 In her financial statement sworn April 9, 2010, the Applicant listed no income and calculated her monthly deficit as $1,459. She admits, however, to have a total income of $457.10 per month from a Canada Pension Plan/Widow's Supplement which she declared in her financial statement sworn on June 17, 2010. Furthermore, the expenses she claimed in both statements included condominium fees, property taxes and insurance totaling $849 for the condominium which she is clearly not, in fact, paying. Accordingly, even accepting all of the other expenses, the Applicant's monthly deficit is only $153. That is after including an expense for her phone of $190 per month.

48 In her affidavit sworn on July 30, 2010, the Applicant alleges for the first time that she requires the services of a nurse or caregiver at a cost of $2,500 per month (no evidence is provided in support of this amount), that walking is very painful for her and that she does not have sufficient money to buy necessary food and fill her medication prescriptions. However, the Applicant also deposes that her revised financial statement is accurate to the best of her knowledge. Her affidavit does not specify and so I assume this is a reference to her financial statement sworn June 17, 2010, already referred to, as that is the most current one in the Continuing Record. Notwithstanding this, she goes on to depose that the minimum amount she needs for interim support is $7,500 per month, a number clearly picked from thin air. There is no evidence as to how the Applicant is currently coping without a caregiver, while living on her own. The Applicant attended court without a caregiver and I observed no difficulties for her in that regard. According to the court record, she also attended court on August 10, 2010.

49 The Respondent earned a gross income last year of $122,383. There is no doubt that he has the financial ability to pay spousal support. It is admitted that the Respondent's financial position is much stronger than that of the Applicant, but as the Respondent submits, that is why the parties entered into a prenuptial agreement.

50 No evidence has been provided by the Applicant from any doctor or specialist, supporting her position that she is mentally and physically unable to work. There is absolutely no medical evidence to suggest that she needs a caregiver as she now alleges. Furthermore, she has not been forthright in her financial statements. Based on her most recent financial statement, presuming that the Applicant will move in with a family member, she will not have a shortfall based on her expenses, presuming she will no longer need to pay for a phone.

51 The Applicant has refused to be questioned by Mr. Marks on the basis that she is not physically or mentally able and could not stand the stress of an oral examination. She deposes that she "will consider" an examination by video or telephone. This is despite the fact that at the case conference held on June 30, 2010, E. Macdonald J. ordered that questioning, limited to two hours, was to take place on or before July 21, 2010. On August 10, 2010, a further order for questioning for August 11, 2010, was made. Based on the medical evidence filed, there is no legitimate basis for this position of the Applicant. It is either a further tactic to delay or one intended to avoid making proper financial disclosure, In that regard, the Applicant has not provided an Affidavit of Documents or any of the disclosure that the Respondent has requested.

52 The Respondent has supported the Applicant since separation in that she has been able to continue to live in the

condominium without making any financial contribution to the cost of carrying the property. On the evidence at this stage, I do not find it shocking to the conscience that the Applicant be held bound to the terms of the prenuptial agreement. Accordingly, the Applicant's motion for interim spousal support is dismissed without prejudice to the Applicant pursuing a claim for spousal support at trial.

Is the Applicant Entitled to a Restraining Order?

53 It is submitted that the Respondent entered the condominium unit after separation, with and without a uniformed officer and that a restraining order prohibiting the Respondent from entering the condominium and any common areas of the condominium building should be made. The only evidence from the Applicant, however, is that the Respondent attended twice with an officer and that he telephoned her necessitating a change in her phone number. However, the Respondent has admitted to being in the condominium unit to see the Applicant face to face on several occasions between November 25, 2009 and December 31, 2009, in an attempt at reconciliation.

54 The Respondent is still subject to terms of his probation order which require him to stay away from the Applicant's residence. I am not satisfied that any further order is necessary at this time. In any event, the Respondent will soon be back in possession of the condominium.

Costs

55 With respect to the costs of theses motions and the attendance on August 10th, the Respondent shall serve and file a Costs Outline, limited to 5 pages, by October 1, 2010 and the Applicant shall serve and file a written response, limited to 5 pages, by October 15, 2010. Any reply, limited to 2 pages, may be served and filed by October 25, 2010.

Disposition

56 For these reasons, an order will go as follows:

(a) The Respondent's claim for divorce is hereby severed from all corollary relief claimed by the parties.

(b) The Respondent may proceed forthwith with an uncontested divorce application based on an agreed separation of more than one year.

(c) Once the Respondent has obtained a divorce order, and served the order on the Applicant, the Applicant shall have 7 days to vacate the matrimonial home, namely the condominium at Suite 506, 1733 Queen Street East, Toronto, Ontario. The Respondent may request the assistance of the Sheriff in evicting the Applicant, if that is necessary.

(d) Pending the final disposition of the Applicant's property claims, the Respondent shall not sell or encumber the condominium.

(e) The Applicant shall provide her Affidavit of Documents and full disclosure of both her financial and medical condition before September 30, 2010.

(f) The Applicant shall submit to questioning by counsel for the Respondent, limited to two hours, as previously ordered, before October 15, 2010.

(g) The parties shall schedule a settlement conference before November 15, 2010, or as soon after that date as the court schedule allows, so that a trial date can be set.

(h) The Applicant's motions for a declaration that the prenuptial agreement entered into on May 29, 2008, is unenforceable, for sale of the matrimonial home and for interim spousal support are dismissed without prejudice to the Applicant pursuing these remedies at the trial.

(i) The Applicant's motion for a restraining order is dismissed.

Order accordingly.

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