

Court of Queen's Bench of Alberta

Citation: Goodwin v Goodwin, 2022 ABQB 520



Date:
Docket: 4812010057
Registry: Wetaskiwin

Between:

Richard Goodwin

Plaintiff

- and -

Diane Goodwin

Defendant

**Reasons for Decision
of the
Honourable Mr. Justice M. Kraus**

Introduction

[1] An application was made in regular family law chambers on behalf of the Plaintiff, Richard Goodwin, to validate service of the Statement of Claim for Divorce and Division of Matrimonial Property (Statement of Claim) upon the Defendant, Diane Goodwin, or, in the alternative, to grant an extension of time for service of the Statement of Claim upon Ms. Goodwin.

[2] Mr. Goodwin passed away on January 22, 2020, and therefore an application was also made for an Order to allow the action to continue against Ms. Goodwin by the litigation representative of the Estate of Richard Goodwin, Larry Goodwin, and that the style of cause be

amended with the Plaintiff being named “Larry Goodwin, as the Litigation Representative for the Estate of Richard Goodwin”.

[3] The applications were fiercely opposed by Ms. Goodwin in regular family law chambers. Both counsel were invited to submit written briefs and they have done so.

[4] For the reasons that follow, the applications to validate service and to allow for the division of matrimonial property action to continue against Ms. Goodwin by a litigation representative are granted.

Background

[5] Andrea Signore, counsel for Richard Goodwin in this matter at the material time, filed the Statement of Claim on January 9, 2020. In the Statement of Claim, Mr. Goodwin sought a Divorce Judgment, equal division of matrimonial property, exemption for pre-marital farm property, exclusive possession of the matrimonial home, and costs. He did not seek corollary relief in the divorce action.

[6] At the material time, Ms. Signore also represented Mr. Goodwin in a related proceeding about the family farm property (Farm action). Ms. Signore swore an Affidavit in this application detailing her interactions with Ms. Weir Andreassen, counsel acting for Ms. Goodwin in the Farm action. Most of the following background facts are drawn from that Affidavit; other evidence is drawn from Ms. Goodwin’s February 2, 2022 Affidavit.

[7] On January 9, 2020, Ms. Signore requested a four-way settlement meeting in Mr. Goodwin’s hospital room to discuss the issues in both the divorce and division of matrimonial property action and the related Farm action. No such four-way settlement meeting occurred.

[8] After a discussion between Ms. Signore and Ms. Weir Andreassen, Ms. Signore followed up with a letter dated January 10, 2020 advising Ms. Weir Andreassen that Mr. Goodwin’s doctor advised him he may have less than two weeks to live and that her instructions were to bring an application in regular family law chambers on January 14, 2020 to sever the joint tenancy of the farm property.

[9] In a Codicil dated January 10, 2020, Richard Goodwin confirmed he made his last Will and Testament dated February 13, 2019 in contemplation of his divorce from Diane Goodwin and that he wanted his last Will and Testament to continue notwithstanding his impending divorce.¹

[10] Ms. Signore further swears that she discussed the severance of the joint tenancy with Ms. Weir Andreassen in the context of the divorce between Mr. Goodwin and Ms. Goodwin and that the application was brought under the *Divorce Act*, RSC 1985, c 3 (2nd Supp), *Law of Property Act*, RSA 2000, c L-7, *Family Property Act*, RSA 2000, c F-4.7, and *Dower Act*, RSA 2000, c D-15.

[11] Ms. Weir Andreassen sought an adjournment from the regular family law chambers application for severance of the joint tenancy and the application was adjourned from January 14, 2020 to January 21, 2020.

¹ Mr. Goodwin’s Last Will and Testament, including the Codicil, was attached to the Written Argument of Ms. Goodwin.

[12] Ms. Signore sent a filed copy of the Statement of Claim to Ms. Weir Andreassen on January 14, 2020 and advised that she would also be attending to the personal service of the Statement of Claim upon Ms. Goodwin. Ms. Signore swears that she instructed her paralegal to serve the Statement of Claim and that a draft Affidavit of Service was prepared in anticipation of service being effected. Ms. Signore then instructed her paralegal to wait until 30 days after Mr. Goodwin's funeral. However, personal service never occurred.

[13] Ms. Goodwin filed an Affidavit on January 20, 2020 in response to Mr. Goodwin's application for the following day, indicating that Ms. Weir Andreassen was counsel of record for Ms. Goodwin.

[14] On January 21, 2020, Ms. Signore and Ms. Weir Andreassen appeared in regular family law chambers. The Court did not hear the application at that time and the application was adjourned to Family Law Special Chambers on April 9, 2020.

[15] A Certificate of *Lis Pendens* was filed against the Farm property on January 21, 2020.

[16] Richard Goodwin passed away the next day on January 22, 2020.

[17] Ms. Signore and Ms. Weir Andreassen communicated about the divorce and division of family property proceedings in the Statement of Claim between February 14, 2020 and December, 2020. The communications are outlined in Ms. Signore's Affidavit, and include the following:

- On February 14, 2020, Ms. Weir Andreassen advised Ms. Signore that as part of any resolution with the Estate and Mr. Godwin's children, a release was required from the Estate and children, along with a discontinuance of the divorce action.
- On February 24, 2020, Ms. Signore advised Ms. Weir Andreassen that adjustments had to be made for exemptions related to the matrimonial property.
- Ms. Weir Andreassen advised Ms. Signore that the Statement of Claim prevented Ms. Goodwin from accessing some government benefits.
- On March 25, 2020, Ms. Weir Andreassen advised Ms. Signore that Ms. Signore had to withdraw as counsel of record in the divorce and division of matrimonial proceedings because of a conflict of interest and that Ms. Weir Andreassen was not consulted as a divorce lawyer but was aware that Ms. Signore was acting in the divorce and division of matrimonial proceedings.
- Ms. Signore advised Ms. Weir Andreassen she had filed a Certificate of *Lis Pendens*. Ms. Signore notes that Ms. Weir Andreassen filed materials and appeared in Court on behalf of Ms. Goodwin to respond to court applications brought by Ms. Signore on behalf of Mr. Goodwin under the *Divorce Act*, RSC 1985, c 3 (2nd Supp) and *Matrimonial Property Act*, RSA 2000, c M-8 in this action.
- The April 9, 2020 Family Law Special Chambers application was adjourned sine die as a result of the pandemic.
- On April 15, 2020, Ms. Weir Andreassen asked Ms. Signore for an alternate settlement offer.
- On May 14, 2020, Ms. Signore and Ms. Weir Andreassen agreed to arrange for a mediation to be conducted remotely.

- On October 19, 2020, Ms. Weir-Andreassen advised that the action needed to move forward, perhaps by case management. Ms. Signore advised that her file was going to be transferred to another lawyer, Ms. Helen Banks.

[18] Ms. Goodwin swore an Affidavit on February 2, 2022. She did not directly respond to all matters raised in Ms. Signore's Affidavit. She indicated the following:

- She was not provided a copy of the Statement of Claim, but that Ms. Weir Andreassen advised her that she could expect to be served.
- She instructed Ms. Weir Andreassen to make a settlement offer to resolve the farm property ownership issue, but those efforts were unsuccessful.
- Questioning and mediation were scheduled and cancelled in the Farm action.

[19] Mr. Goodwin's son, Larry Goodwin, was formally appointed as the personal representative of the Estate of Richard Goodwin in a Grant of Probate dated February 22, 2022. Larry Goodwin is one of Mr. Goodwin's children from his previous marriage. Mr. Goodwin and Ms. Goodwin have no children together.

[20] Larry Goodwin is willing and able to continue the litigation on behalf of the Estate of Richard Goodwin against Ms. Goodwin.

Issues

[21] There are two main issues that need to be decided:

1. Should service of the Statement of Claim be validated or time for service be extended?
2. Should an Order be granted to allow for this action to be continued by the Estate of the Plaintiff?

Analysis

Service of a Statement of Claim for Divorce and Division of Matrimonial Property

[22] The service of a Statement of Claim for Divorce and Division of Matrimonial Property is governed by Rule 12.55, which states as follows:

12.55 Despite Part 11, Division 2, unless the Court otherwise orders, the following documents must be served by leaving a copy with the individual being served and not on the individual's lawyer of record, if any

...

- (a.1) a statement of claim for divorce and division of family property; (Emphasis added)

[23] The Rule also states that service must be made by a person other than the Plaintiff (Rule 12.55(2)) and proof of service must include a picture of the individual served, unless the Court otherwise orders (Rule 12.57).

[24] Rules 12.55 and 12.57 expressly state "unless the Court otherwise orders" meaning that the Court has discretion to deviate from the requirements of these Rules.

[25] There is no dispute in this matter that the Statement of Claim was not served personally and that there is no picture of Mr. Goodwin in an Affidavit of Service in accordance with the requirements of Rules 12.55 and 1257. The question arises whether the Court should exercise its discretion to make an Order to validate service.

Validating Service

Jurisprudence

[26] W.A. Stevenson & J.E. Côté, in *Alberta Civil Procedure Handbook 2022*, (Edmonton: Juriliber, 2022) at p 11-51 note:

Service is a practical question, not a theoretical or ritualistic one, and unconventional forms of service which actually produce notice will suffice...It does not matter whether service is direct or indirect.

[27] The point of service is that the Defendant has knowledge of the claim and can choose to defend. The Court in *Al-Ghamdi v. Alberta*, 2017 ABQB 684, aff'd 2020 ABCA 81, leave to appeal refused [2020] SCCA No. 363, conducted an extensive review of the rules of service for originating documents (at paras 316-328). The following general principles can be drawn from this decision:

- The Alberta Rules of Court provide for two methods for service of commencement documents: personal service or service by recorded mail signed for by the addressee (para 314);
- The Rules of Court provide a variety of remedies when the defendant is difficult to serve, like substitutional service and, as here, validating service (para 315);
- Service is a question of fact that does not require “a magical or formalistic ritual,” but **it does require that the recipient be aware their rights have been engaged** (para 317);
- The Court of Appeal in *Sandhu v MEG Place LP Investment Corp*, 2012 ABCA 266 held that unconventional service may be good service (although *Sandhu* was not a case dealing with commencement documents) (para 317);
- In a Defendant’s application to set aside service, the onus is on the Defendant to lead evidence they did not receive notice (at para 318); this is not such an application;
- The regime for service under the Rules of Court is a complete code. If commencement documents could be served by means other than personal service, there would be no need for substitutional service or an order to validate service (at para 320).

[28] In *Al Ghamdi*, the Plaintiff was attempting to enforce noting a number of Defendants in default for having failed to file a Statements of Defence. The Court held that the fact that the Defendants admitted knowledge of the claims would have been relevant if Dr. Al Ghamdi was applying to validate service. However, his application was to enforce noting them in default despite the improper service.

The relevant rules

[29] Rule 11. 27 reads as follows:

(1) Except in respect of a document that must be served in accordance with Division 8, **the Court may, on application, make an order validating the service** of a document served inside or outside Alberta in a manner that is not specified by these rules if the **Court is satisfied that the method of service used brought or was likely to have brought the document to the attention of the person to be served.**

...

(3) If service is validated by the Court under this rule, service is **effected on the date specified** in the order. (Emphasis added)

[30] Division 8, dealing with the Hague Convention, is not relevant here.

[31] Rule 12.3 in Part 12 – *Family Law Rules* provides that other parts of the Rules apply to family law proceedings **unless** they are expressly excluded by a rule in Part 12. The only exclusionary rule in Part 12 is Rule 12.58. These Rules are reproduced below:

Application of other Parts

12.3 Subject to this Part and any enactment, other Parts of these rules apply to proceedings and appeals under this Part.

Rules that do not apply

12.58 Rule 11.25(1) does not apply to service of

- (a) a statement of claim for divorce,
- (b) a statement of claim for divorce and division of family property, or
- (c) a statement of claim for divorce and division of matrimonial property, in a case to which rule 12.121 applies.

[32] Rule 11.25 is not relevant here as it relates to service of a commencement document outside Alberta.

[33] The Court of Appeal in *LKD v JB*, 2012 ABCA 72 noted that the purpose of Rule 12.3 at para 5:

The intention of R. 12.3 is that the general rules will apply to family law proceedings with the necessary modifications.

[34] Based upon Rules 12.3 and 12.58, I conclude that Rule 11.27 may be invoked to validate service in circumstances where the Plaintiff has not complied with Rule 12.55 and 12.57.

Should service of the Statement of Claim be validated?

[35] As previously mentioned, on March 25, 2020 Ms. Weir Andreassen advised Ms. Signore that she had not been consulted as a divorce lawyer. However, the uncontradicted evidence before me was that Ms. Weir Andreassen appeared in regular family chambers on behalf of Ms. Goodwin on January 21, 2020 in this action, Ms. Weir Andreassen was acting for Ms. Goodwin in the related Farm action, and Ms. Weir Andreassen had multiple communications with Ms. Signore about the divorce and division of matrimonial property proceedings.

[36] I am satisfied on a balance of probabilities that the Statement of Claim was brought to Ms. Goodwin's attention based on the following:

- Ms. Weir Andreassen received the Statement of Claim from Ms. Signore on January 14, 2020.
- Ms. Signore advised Ms. Weir Andreassen on January 14, 2020 that she would effect the personal service of the Statement of Claim upon Ms. Goodwin, but personal service never occurred.
- Ms. Goodwin was advised by Ms. Weir Andreassen that a Statement of Claim for Divorce and Division of Matrimonial proceedings was filed, and that Ms. Goodwin could expect to be served.
- On January 14, 2020, Ms. Signore served a filed application and Mr. Goodwin's Affidavit for the severance of joint tenancy returnable in family law chambers on January 21, 2020. Ms. Weir Andreassen filed and served a responding Affidavit on behalf of Ms. Goodwin on January 20, 2020.
- Ms. Weir Andreassen appeared on behalf of Ms. Goodwin in family law chambers in this action on January 21, 2020 at which appearance the application was adjourned to family law special chambers on April 9, 2020.
- Ms. Weir Andreassen advised Ms. Signore that any settlement with the Estate and Mr. Goodwin's children required a discontinuance of the divorce action.
- Ms. Weir Andreassen advised Ms. Signore that the Statement of Claim prevented Ms. Goodwin from accessing some government benefits.
- Ms. Weir Andreassen advised Ms. Signore that Ms. Signore should withdraw as counsel in the divorce and division of matrimonial proceedings because Ms. Signore had a conflict of interest.
- Ms. Weir Andreassen appeared as counsel for Ms. Goodwin in applications in the Farm action which, by their very nature, are related to the divorce and division of matrimonial matters in these proceedings.
- Ms. Weir Andreassen and Ms. Signore had settlement communications issues relating to the Farm action, including an exemption claim for the farm property in the matrimonial property proceeding, and they attempted to schedule a mediation to resolve the dispute.

[37] In *Hannan v Hyland* (2003), 352 AR 206, [2003] AJ No 1723, affirmed 2004 ABCA 268, plaintiff's counsel provided a copy of the Statement of Claim to a claims adjuster with advice that personal service would be effected within the next few days. No such personal service occurred. However, the Court was satisfied that the Statement of Claim was brought to the defendants' attention while the Statement of Claim was current, and Read J therefore denied the defendants' application to set aside the Statement of Claim.

[38] In part, Read J relied on a quote from the transcript of an unreported decision by McIntyre J in *Clarke v. Treadwell* (action #9301 18257) dated September 7, 1995, aff'd [1997] AJ No 683 (CA) (at paragraph 16 of *Hannan*):

I appreciate the argument made by the defendants that there must be an attempted form of service, but I must say I do not know why that is necessary. If there is a proper form of service, then there would be good service, and there would be no argument. If there is a defective form of service, by definition it is defective. The

issue, in my view, is whether there is actual knowledge, and I say there is actual knowledge, and there was actual knowledge when the statement of claim was current.

In my view, it would **be a triumph of the technical** to hold that the plaintiff's rights have been extinguished by failure to serve the statement of claim, **in light of the knowledge of the defendants and those who were, by law, required to defend the statement of claim.** So, I say, in my view, that the failure to serve the statement of claim is an irregularity, and the statement of claim is not a nullity. (Emphasis added)

[39] The Court of Appeal noted in *Clarke* (at para 3) that the record demonstrated the Defendants had “actual and substantial, though perhaps imperfect knowledge of the contents of the statement of claim” and that they relied on the insurer to conduct the defence. As a result, the Court denied the appeal, finding that the chambers judge made no error in exercising his discretion to cure the failure to personally serve the Statement of Claim.

[40] Ms. Goodwin relies on *1226911 Alberta Ltd. v. Redecopp*, 2012 ABQB 776 to argue that service of the Statement of Claim cannot be validated. However, in that case, when the Statement of Claim was provided to the Defendant, Plaintiff's counsel expressly confirmed that the Statement of Claim was provided on an information basis only and that it “did not in any way constitute service of the claim” (para 37). Counsel for the Plaintiff confirmed that he had not intended to affect the Defendant's legal rights by forwarding the Statement of Claim (para 37).

[41] Although in this matter Plaintiff counsel indicated that formal service would follow, Ms. Signore did not indicate to Ms. Weir Andreassen that the Statement of Claim was provided to her for information purposes only and Ms. Signore made no representations that its provision did not constitute service or engage legal rights. Indeed, in this matter, counsel for the parties communicated about divorce and division of matrimonial property issues and engaged in court applications which fully engaged the legal rights of the parties.

[42] In my view, it would be a triumph of the technical in the circumstances of this case to not validate service of the Statement of Claim upon Ms. Goodwin. In all the circumstances, service of the Statement of Claim is validated upon Ms. Goodwin as at January 14, 2020 under Rule 11.27.

[43] Ms. Goodwin also relies on *McGowan v Lang*, 2015 ABCA 217 in which the Court of Appeal upheld a chambers judge's (2014 ABQB 403) decision to overrule a Master's decision (2013 ABQB 699) to extend the time to serve a statement of claim under Rule 3.27. However, in this matter, I have validated service of the Statement of Claim for Divorce and Division of Matrimonial Property within the one-year currency period (as at January 14, 2020) after the Statement of Claim was filed on January 9, 2020. Therefore, there is no need to extend the time for service under Rules 3.26 – 3.28 or to deal with the other caselaw interpreting Rule 11, the precursor Rule in the former Rules of Court to Rules 3.26 – 3.28 in the current Rules of Court relied upon by Ms. Goodwin.

Order to Continue the Action

[44] Under the Grant of Probate dated February 22, 2022, Larry Goodwin is the personal representative of the Estate of Richard Goodwin.

[45] Rule 4.34 stays an action until an Order is granted to continue an action when the action has been transferred or transmitted to another person by the death of a party. This action, therefore, was stayed on Mr. Goodwin's death on January 22, 2020.

[46] In the circumstances, an Order under Rule 4.34 is granted to continue this action in the name of Larry Goodwin as the litigation representative of the Estate of Richard Goodwin, deceased, and the Plaintiff in the style of cause is amended from "Richard Goodwin" to "Larry Goodwin, as the Litigation Representative for the Estate of Richard Goodwin, Deceased".

[47] To be clear, however, the divorce proceedings cannot continue because of Mr. Goodwin's death. As noted by Read J in *Stalzer Estate v. Stalzer*, 2018 ABQB 191 at para 25:

A person is only a spouse while married. After the marriage ends, a former marriage partner becomes a former spouse. But when a person dies, all that is left is a body, an estate, and a personal representative. The dead body is not a spouse or former spouse. Neither is the estate which is only a legal concept and may even be a corporation. The personal representative is the representative of the estate but is not a spouse as that term is defined in the *Divorce Act*.

See also *White v White*, 2015 ONCA 647 at para 14.

[48] Mr. Goodwin did not seek any corollary relief in the Statement of Claim. There is no agreement or prior Order in these proceedings allowing the divorce action to continue. Therefore, the Order granted in this matter under Rule 4.34 does not apply to the divorce proceedings.

[49] However, the division of matrimonial property proceedings may be continued by the Estate of Richard Goodwin and the rights conferred upon Richard Goodwin under Part 1 of the *Matrimonial Property Act* before Richard Goodwin's death survive for the benefit of the Estate of Richard Goodwin under s. 16 of the *Matrimonial Property Act*.

Conclusion

[50] The Plaintiff's applications are granted.

[51] If the parties cannot agree upon costs, either party may contact me within 60 days.

Heard on the 8th day of March, 2022.

Written submissions received on the 6th day of April and 22nd day of April, 2022.

Dated at the City of Wetaskiwin, Alberta this 29th day of July, 2022.



M. Kraus
J.C.Q.B.A.

Appearances:

Lisa Handfield
Lisa Handfield Professional Corporation
for the Plaintiff

Andreassen Borth
Margaret Weir Andreassen
for the Defendant