SUPREME COURT OF NOVA SCOTIA
Citation: Wilson v. Wilson, 2013 NSSC 427

Date: 20131219
Docket: S. T. No. 1207-003714(080651)
Registry: Truro

Between:

Marilyn Frances Wilson

Petitioner

v.

Richard James Wilson

Respondent

DECISION

Judge:	The Honourable Justice E. Van den Eynden
Heard:	December 9, 2013, in Truro, Nova Scotia
Written	December 19, 2013
Counsel:	Bradford Yuill, Solicitor for the Petitioner Dianne Paquet, Solicitor for the Respondent

By the Court:

Introduction

[1] This is a motion by the Respondent, Richard James Wilson, challenging the Court's jurisdiction. The Respondent argues the Province of Nova Scotia is not the convenient forum. The Respondent requests this Court decline its jurisdiction or, alternatively, transfer the proceedings to Ontario pursuant to the **Court Jurisdiction of Proceedings Transfer Act of** Nova Scotia. The Respondent asserts the more appropriate forum is Ontario. This is based on the assertion that the most real and substantial connection of the parties and their dependent child of the marriage is with Ontario.

[2] The Petitioner asserts there is no justiciable issue respecting the determination of custody, access, child support or Section 7 expenses. Respecting the division of property, the Petitioner asserts any outstanding issues can be appropriately determined by this Court. Respecting the issue of spousal support, the Petitioner asserts the most appropriate forum is the Petitioner's chosen forum, Nova Scotia. The Petitioner requests the application be dismissed. If the Petitioner is successful, the Petitioner seeks costs for the application and costs

associated with the alleged delay of the Respondent in bringing forward his motion to challenge the Court's jurisdiction.

Procedural Background

[3] Marilyn Frances Wilson, the Petitioner, filed her Petition for Divorce on April 27, 2012. The Respondent was served with the Petition on September 5, 2012. The Respondent has not filed an Answer to the Petition. Counsel for the Respondent on this motion advises she is retained as an agent for the Respondent's counsel in Ontario. Her retainer is limited to the jurisdictional motion before the Court.

[4] Negotiations were ongoing between the Petitioner's counsel in Nova Scotia and the Respondent's counsel in Ontario. Not all issues arising from the breakdown of the parties marriage were resolved and the Petitioner sought a date assignment conference in late May, 2013.

[5] Subsequent to the request for a date assignment conference, the Respondent retained counsel in Nova Scotia to challenge jurisdiction. In late July, 2013, the Respondent's counsel in Nova Scotia indicated she would be filing a motion to transfer and objected to the scheduling of the date assignment conference.

Notwithstanding Respondent's counsel indicated such motion would be filed, together with the supporting documentation by September 30, 2013, the motion was not filed with the Court until November 18, 2013. An amended motion was filed on November 20, 2013, moving up the hearing date.

[6] Both the Petitioner and the Respondent filed an affidavit. There was no cross examination. Both counsel filed briefs although the Respondent's brief was filed late. The Court heard submissions from the parties counsel on December 9, 2013.

Factual Background

[7] The parties were married in Ontario on November 30, 1991. They separated on October 1, 2009. During this period of marriage they resided in Ontario.

[8] Post separation, the Petitioner moved to Nova Scotia. She moved in June, 2010 and has continued to reside in Nova Scotia since that time.

[9] There remains a dependent child of the marriage, namely Sara Marilyn Wilson, born November 4, 1992. Sara is 21 years of age and resides with the Respondent in Ontario. She is enrolled in a veterinarian technician course at Sheridan College. She is expected to complete her studies in the late

spring/early summer of 2014 and will hopefully secure full-time employment at that time. If so, she will likely no longer be a dependent child of the marriage.

[10] Both parties acknowledge Sara is currently a dependent child of the marriage. Although the Respondent is seeking child support/Section 7 expenses; the Respondent acknowledges the Petitioner has no current ability to pay.

[11] The parties relationship was a traditional one. The Respondent was essentially the sole income earner. The Petitioner was a home maker and states she was primarily responsible for the children and running the home front.

[12] The Respondent acknowledges the Petitioner suffered a serious injury and there are some medical issues which continue to cause her problems. I quote from the Respondent's affidavit sworn to on November 28, 2013 wherein he states at paragraphs 25 and 26:

> 25 Ms. Wilson has a history of seizure activity plus she sustained a significant injury when our daughter, Sara, was about a year old. While shopping at a large store a shelf of microwave ovens fell on her head and neck. She sustained serious injuries and there are some medical issues which continue to cause her problems.
>
> 26 Despite her medical history I say Ms. Wilson has some ability to work and she claims there are factors prohibiting her ability to work.

[13] The Petitioner has a very limited work history. Apart from working as a data entry clerk from the period February, 2008 through to November, 2008, the Petitioner has not been employed since the parties date of marriage. Her underlying medical condition impacted her ability to continue with this employment. She took sick leave in November of 2008 and has not been employed since. It is acknowledged by the parties that her only source of income is the $200.00 per month she receives from the Respondent. The Respondent, through his counsel, acknowledges that the material issue outstanding between the parties is one of entitlement to and quantum of spousal support.

[14] The Petitioner has been residing with her parents in Truro, Nova Scotia since her return to the Province of Nova Scotia in June, 2010. Apart from the $200.00 per month she receives from the Respondent, her parents are financially supporting her.

[15] In her affidavit, the Petitioner states that in the three and one-half years since she has resided in Truro, Nova Scotia she has been unable to recover from her chronic depression, anxiety and migraines. She is under the care of her family doctor and a neurologist. She also attends the Colchester Regional

Hospital Mental Health unit for services and is awaiting an appointment with a psychiatrist. Further particulars respecting the Petitioner's medical status and ongoing treatment in Nova Scotia are set forward in her Affidavit.

[16] The Respondent's annual income is in the range of $63,000.00 plus. In his Affidavit, the Respondent states his line 150 income in 2011 was $63,186.31. Although he did not provide his line 150 income for 2012 or current year-to-date income for 2013, he states his 2012 and 2013 income is similar to that in 2011.

[17] In paragraphs 16 and 17 of his Affidavit the Respondent addressed the financial support he seeks from the Petitioner and the circumstances surrounding the current funding of Sara's educational program. He states at paragraph 16 and 17:

> 16. I receive no child support from Ms. Wilson to assist with Sara's living expenses. I am seeking for Ms. Wilson to contribute to Sara's living and education expenses in accordance with the Federal Child Support Guidelines, retroactively and prospectively.
>
> 17. Sara is funding her education as follows:
>
> a. a RESP, registered education savings plan, that helps pay for Sara's tuition, for her books and for her college fees.
>
> b. I have co-signed a line of credit for Sara.
>
> c. Sara has acquired a student loan.

> d. Sara works part-time at the Metro (a grocery store chain in Ontario) earning minimum wage.

[18] Respecting the current status of the division of property, the Petitioner states in her Affidavit that the Respondent has provided draft financial statements and full disclosure. With the exception of obtaining some miscellaneous values for vehicles and perhaps an estimate on household contents, the parties have reached an agreement on the valuation of the matrimonial home, the valuation of the parties debts, the Petitioner's pension, RRSP's and bank accounts. No evidence to the contrary was presented by the Respondent; although Counsel for the Respondent submitted she was not aware of any agreements respecting the division of property to have been committed to writing and exchanged between the parties.

[19] The Respondent concedes the Petitioner is ordinarily resident in the Province of Nova Scotia and this Court has territorial jurisdiction under Section 3 of the **Divorce Act**.

Issue

Should the Court decline jurisdiction or transfer the proceedings to Ontario?

Summary of Submissions

[20] Respecting the issue of custody/access/child support/section 7 expenses, the Respondent submits the connecting ties to Ontario or arguments in support of Ontario as the appropriate forum are as follows:

- The dependent child resides in Ontario;
- Sara does not have the time or financial resources to attend for a hearing in Nova Scotia to respond to any issues that may arise in the divorce proceeding respecting her status as a child of the marriage;
- Transferring these issues for determination in Ontario would be more efficient and reasonable because any witnesses who may need to be called to speak to these issues, with the exception of the Petitioner, reside in Ontario;
- In Ontario Sara may be eligible for her own legal counsel. In the event Nova Scotia retains jurisdiction Sara is not likely to be eligible for Legal Aid assistance as a non-resident of Nova Scotia.

[21] Respecting this issue, the Petitioner argues there is no live or justiciable issue of custody or access respecting the parties 21 year old daughter. The Petitioner concedes that currently Sara is a dependent child of the marriage; however, she has no ability to pay child support at this time. To the extent that support is a live issue, the matter can be appropriately decided in this jurisdiction. The Petitioner argues in these circumstances Ontario is not the jurisdiction with the most real and substantial connection.

[22] Respecting the issue of the division of matrimonial property, the Respondent simply submits that since the property is situate in the Province of Ontario (including the matrimonial home and the Respondent's pension which is subject to division in the Province of Ontario) the determination of property is most substantially connected to the Province of Ontario.

[23] In the Petitioner's Affidavit, she provides specifics respecting the valuation of matrimonial assets carried out to-date and the agreements reached on the valuation of key assets to be divided. Since there is an agreement on valuation there will be no disputed appraisals and no associated witnesses. The division of property does not appear to be complicated.

[24] Respecting the issue of spousal support, the Respondent asserts the matter should be heard in Ontario because the Respondent, Petitioner and the evidence related to the determination of the issue is more substantially connected to the Province of Ontario. In support the Respondent argues:

- The parties resided in Ontario during their marriage;
- The Petitioner's medical practitioners pre June, 2010 reside in Ontario;
- The Petitioner's doctors in Nova Scotia could not testify to the Petitioner's medical history because her medical file/records and physicians are in the Province of Ontario;

- It might be necessary to seek reports from these historic physicians, practitioners, counsellors and therapists who treated the Petitioner and the Petitioner may wish to cross-examine these professionals;
- The cost of having these witnesses testify in Nova Scotia may be prohibitive and eliminate the Respondent's ability to call material evidence to respond to the spousal support claim;
- These same witnesses would be necessary both for the determination of entitlement and quantum; (I note the Respondent puts forward these arguments without having even requested copies of the historical medical records of the Petitioner to determine whether they contained helpful or harmful facts from the Respondent's perspective, nor, whether the Petitioner's treating physicians in Nova Scotia have her prior medical history to draw upon);
- The Respondent expects to call the Petitioner's previous employer from her 2008 employment to speak to her job performance;
- Other witnesses respecting the determination of entitlement and/or quantum are also in Ontario.

[25] The Petitioner asserts she has been residing in Nova Scotia for the past three and one-half years. During this time she has been under the care of medical and related professionals and the most relevant and current medical information is found in Nova Scotia; not her historic medical records in Ontario.

[26] The Petitioner asserts these historic Ontario records are dated and have little or no probative value. Even if they did and the Respondent wished to produce them he could and the professionals could testify by way of

commission evidence or teleconference, as permitted under the **Nova Scotia Civil Procedure Rules.**

[27] The Petitioner argues:

- The **Divorce Act** provides the presumptive right to jurisdiction in Nova Scotia;
- The onus is upon the Respondent to discharge the presumption. It should not be discharged lightly;
- There is little, if any, evidentiary basis to do so and no compelling reason to decline jurisdiction or transfer the proceedings to Ontario; and
- The evidence presented to the Court establishes that Nova Scotia is the forum convenience.

Decision

[28] I have considered the relevant provisions of the **Divorce Act** and **Court Jurisdiction and Proceedings Transfer Act** and the case authorities submitted by counsel which include the following:

- **Detcheverry v. Herritt**, 2013 NSSC 315;
- **Bouch v. Penny**, 2009 NSCA 80;
- **Inglis v. Inglis**, 2012 NSSC 124;
- **Abbott v. Algarvio**, 2012 NSSC 312;

- **Yonis v. Garado**, 2011 NSSC 110;
- **Schulz v. Schulz**, 2007 NSSC 319.

[29] Under the doctrine of forum non conveniens the Court has the discretionary power to decline jurisdiction when satisfied justice would be better served if the matter before the Court were brought and heard in another forum.

[30] The Petitioner currently does not have an ability to pay child support. Her only source of income is $200.00 per month, which the Respondent provides to her. Based on the evidence before the Court at this time, it is probable that Sara may no longer be a dependent child of the marriage when she completes her course in the late spring/early summer of 2014. It is unlikely, based on the evidence before the Court at this time, that the Petitioner's circumstances will materially change during this time frame. Even if that were not the case, the issue of child support can be appropriately determined by this Court. I find there to be no justiciable issue related to custody and access. I find little to no merit in the Respondent's argument that for the purpose of determining child support the real and substantial connection lies with Ontario.

[31] Turning to the division of property, I reject the argument of the Respondent that Ontario is the appropriate forum in these circumstances. In the event the

property division is not resolved by agreement, this issue can be appropriately determined by this Court. Any evidentiary issues can be managed and extra provincial enforcement remedies would be available to the Petitioner if necessary.

[32] Although I find the Petitioner had a historic connection to the Province of Ontario during her 18 year period of marriage, she has been ordinarily resident in the Province of Nova Scotia for the past three and one-half years. Her current mental and medical health status is most relevant to the determination of the issue of spousal support. I find the contention that the Respondent intends to call a witness from the Petitioner's brief employment back in 2008 to be grasping for a connection. I find the most current and relevant information is most likely to be found in the Province of Nova Scotia.

[33] Historic medical information arising prior to June, 2010 and located in Ontario may also be relevant and either or both parties may wish to introduce such historic evidence. Historical medical records may be obtained in a variety of ways which would not deprive the Respondent of presenting evidence that he thought was probative and relevant. I find the most real and substantial

connection for the determination of the issue of spousal support is with the Province of Nova Scotia.

[34] Based on the specific facts of this case, I find the appropriate and convenient forum to be the Province of Nova Scotia. This Court retains jurisdiction to hear all contested issues in the Divorce proceeding filed in the Province of Nova Scotia. To decide otherwise would be unfair to the Petitioner. The Respondent's application is dismissed.

Costs

[35] The Petitioner seeks costs of the day payable forthwith. In addition, costs thrown away due to the unnecessary delays of the Respondent.

[36] Although the Respondent's application could have been brought in a more timely manner and marshalled more expeditiously, including ensuring the Respondent's brief was filed on time, the Court declines to award costs associated with any delay.

[37] In light of the application being dismissed and based on the Court finding that several arguments advanced by the Respondent were of little or no merit,

costs are awarded in favour of the Petitioner in the amount of $1,000.00. Costs shall be payable forthwith by the Respondent.

Van den Eynden, J.

12/19/2013