

6101-02096

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN :**

**RONALD NOEL THERIAULT**



- and -

**MARY CHRISTINE THERIAULT**

**Respondent**

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Joint proceedings under the Divorce Act, R.S.C. 1985, ch. 3 (2nd Supp) and Matrimonial Property Act, R.S.N.W.T. 1988 c.M-6. An application for child maintenance pursuant to the Divorce Act denied on the basis that the children are not "children of the marriage". An order granted pursuant to the Matrimonial Property Act transferring the equity in the matrimonial home to the wife.

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**REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD**

Trial held: April 6-7, 1994

Reasons filed: April 26, 1994

Counsel for Petitioner: J. Brydon

Counsel for Applicant: H. Latimer

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**REASONS FOR JUDGMENT**

1           At the conclusion of the divorce trial I granted a judgment of divorce on the ground that there had been a breakdown of the marriage by reason of the spouses having lived separate and apart for at least one year. I reserved decision on the remaining issues, in particular, child maintenance and division of matrimonial property. What follows herein are my decisions on those remaining matters, and the reasons therefor.

2           The parties were married on August 20, 1974. Their son Steven was born June 16, 1975 (two months shy of his 19th birthday at the time of trial). Their daughter Valerie was born April 4, 1977 (just turned 17 at time of trial).

3 At the time of the parties' separation in 1991 the family lived in Edzo. The husband was employed with the Hamlet of Rae-Edzo. The wife earned income from various part-time jobs. In addition, the parties served as foster parents from time to time for the Department of Social Services and derived further income therefrom.

4 Prior to 1989 the family lived in a rental unit, House #250 in Edzo. In 1989 they purchased House #122 in Edzo, and a leasehold interest in the lot on which House 122 was situate, from the Northwest Territories Housing Corporation (NWTHC), for \$6,000. Title was taken in the name of the husband only. No explanation has been given why title was placed in his name only. The husband in fact borrowed the \$6,000 from NWTHC and granted to NWTHC, as security for that loan, a mortgage of the leasehold interest. This mortgage loan was to be paid in monthly instalments of \$143 from April 1989 to April 1994. The last instalment has recently been paid (by the wife).

5 Also in 1989 the parties made application to NWTHC for financial assistance, pursuant to the NWTHC's Home Improvement Program, to upgrade House #122 to acceptable standards. NWTHC provided assistance in the form of a \$34,000 forgivable loan. The husband, as registered owner, executed a written agreement (Exhibit #30) with NWTHC with respect to this forgivable loan. Pertinent terms of that agreement are as follows:

- a) the \$34,000 would be used for materials, freight and labour in carrying out the repairs.
- b) the loan was forgivable on the condition that the owner continued to own and occupy the home for a period of 5 years following completion of the repairs.
- c) the loan would become due and payable if the owner leased, sold or otherwise disposed of the home during the 5-year period.

Evidence at trial indicates that, according to NWTHC records, the 5 year period commenced on January 1, 1991. Further, according to the testimony of a NWTHC official, it was NWTHC's policy to "forgive" 1/60 of the loan, i.e., \$566.67, each month that the owner continued to own and occupy the home.

7 The parties owned a 1986 Ford F250 Supercab truck that they purchased for \$20,000. It was fully paid for. In 1990 the parties borrowed approximately \$12,000 from the Bank of Montreal to use in connection with the home improvements (although the evidence is far from clear that all of these borrowed funds were indeed used for that purpose). Both parties signed the promissory note and granted a chattel mortgage over the Ford truck to the Bank of Montreal to secure the sum of \$16,255 (being the amount borrowed plus interest).

8 In late 1990 the parties purchased a 1990 Dodge Sprint car for \$20,000. The wife paid the down payment of \$1,000 from funds received for services performed as foster parents. The balance was financed with ScotiaBank with monthly payments of \$428.

9 In 1991 problems surfaced in the marriage. There were a few periods of separation in the early part of that year. The husband moved out of the matrimonial home at one point and later moved back. At another point in time, the wife lived at her cousin's residence in Edzo for approximately 1 month. In the summer of 1991 the husband lost his employment with the Hamlet of Rae Edzo. He found work in High Level, Alberta. On September 5, 1991 the husband filed a Petition for Divorce in this Court and in the Petition stated that the spouses had ceased co-habiting on May 14, 1991.

10 In late October 1991 the two children, living at the time with their mother in the family home in Edzo, telephoned their father in High Level and asked him to come and get them and to take them to live with him in High Level. Their father did so on November 1, 1991. When he left Edzo with the children on November 2, 1991 he also took a number of the matrimonial assets, in particular, the children's bedroom furniture, the washer and dryer, a microwave oven, some dishes, a dresser from the master bedroom, a lazy-boy chair from the living room, a used television set, a skidoo, and both family vehicles. In his testimony at trial the husband put the skidoo's value at the time at \$1,500 (yet I note that on a 1990 loan application (Exhibit #33) he indicated to the bank

that it had a value of \$3,000). On the evidence presented at trial I find that the value of the moveable matrimonial assets taken by the husband in November 1991 was in excess of one-half of the total value of moveable matrimonial assets (i.e., excluding the matrimonial home).

11 Between November 1991 and March 1992 the son Steven was back and forth between his parents' homes in High Level and Edzo. In March 1992 he was convicted for committing a break and enter and sentenced to 9 months custody. After his release he lived with his mother for two weeks, then one month with his father in High Level, and then he moved to Lac La Ronge, Saskatchewan where he has relatives. In Lac La Ronge he attended school for one semester, he also worked in the carpentry trade, and for a time lived on his own with a girlfriend. Since January 1994 he has been living in Edzo, either in his mother's home, or on his own. At the time of trial he was living with his mother and paying her \$50/month room and board. He is attending school (Grade 11) and is in receipt of \$190/month student assistance from the Department of Social Services.

12 The daughter Valerie returned to her mother's home in mid-1992 without completing the school year in High Level. She has been living in Edzo since that time. Very recently she went to another Dogrib community, Snare Lake, to visit her boyfriend and decided to stay in that community for the time being. She says she has arranged to continue her schooling at the Chief Jimmy Bruneau School in Edzo by correspondence

courses while in Snare Lake. She has obtained a babysitting job for which she receives \$200 every two weeks, plus room and board. She says she intends to return to school in Edzo in the fall.

13 Since the separation of the spouses in 1991 the wife has continued to live in House #122 in Edzo, and has paid the monthly mortgage instalments, utilities, etc. At present she is enrolled in an educational program called Early Child Development Program and receives \$600/month from Arctic College while attending this program. She expects to complete the program in June. She also works part-time as a homemaker at the Senior Citizens home in Rae, on an as-required basis, usually three shifts a month. For this she receives \$8/hour. She has, in addition, worked on an on-call basis as a guard at the R.C.M.P. detachment in Rae. She estimates she earned \$300 in total from the R.C.M.P. during 1993. At the moment Mrs. Theriault has a student boarder in her home who pays her \$350/month room and board. She does not know how long the boarder will be there.

14 Mrs. Theriault has been supporting her daughter Valerie during the past year, with the assistance of \$200/month interim child maintenance which the court ordered the father to pay to her in January 1993 for so long as Valerie was residing with her.

15 The husband has been working as a truck driver for a firm in High Level for the past year. He earns \$10/hour for a 44-hour week, and \$15/hour for any hours worked in excess of 44 hours a week. In 1992 the Bank of Montreal apparently repossessed the

1986 Ford truck because of his default in meeting the payments under the promissory note. The Bank of Montreal also sued him in the Alberta Courts for the balance owing on the promissory note, plus an additional sum owing on a MasterCard account. The Bank obtained judgement against him sometime in 1993 for \$12,669.26. In late 1993 Mr. Theriault made an assignment in bankruptcy pursuant to the federal Bankruptcy and Insolvency Act. His bankruptcy trustee was given formal notice of these divorce and matrimonial property proceedings but did not appear at trial.

16 As at the date of trial Mr. Theriault is an undischarged bankrupt. He continues to pay \$200 interim child maintenance, (the Court's order of January 18, 1993 being unaffected by the bankruptcy proceedings - see s.178 of the Bankruptcy and Insolvency Act, R.S.C. 1985 c.B-3, as amended). He has retained possession of the 1990 Dodge Sprint, with the permission of his bankruptcy trustee, and continues to make the car payments of \$428/month. He pays \$150/month to his trustee for the benefit of his unsecured creditors.

17 In 1992 the Bank of Montreal sued Mrs. Theriault in the Supreme Court of the Northwest Territories for the sum of \$7,200, the balance owing under the promissory note. She is defending that lawsuit on the basis that any obligation to the bank was satisfied by the bank's repossession of the truck. That court action is pending.

**CHILDREN OF THE MARRIAGE?**

18 In this divorce proceeding pursuant to the Divorce Act, one spouse (the wife) makes application for corollary relief under s.15 of the Act, i.e., for an order requiring the other spouse (the husband) to pay to her periodic sums for the support of a child of the marriage (Valerie). The father submits that neither Steven or Valerie is any longer a "child of the marriage" for purposes of the Divorce Act and corollary relief thereunder.

19 Parliament has defined "child of the marriage" for purposes of s.15 of the Divorce Act:

s.2(1) ...

"child of the marriage" means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of sixteen years, or
- (b) is sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

20 The phrase "at the material time" in this definition may have a different meaning according to the particular circumstances of the case. Kukolj v. Kukolj (1986) 3 R.F.L. (3d) 359 (Ont.U.F.Ct.), Tucker v. Tucker (1984) 43 R.F.L. (2d) 199 (Ont.S.C.). For the purposes of the wife's application pursuant to s.15 of the Act, I take the view that the material time is the time of the hearing of that application, i.e., the date of trial.

21

For a child over the age of 16 years, the onus of proof is on the spouse seeking the corollary relief to establish that the child is under the charge of the parents and is unable to withdraw from that charge or to obtain the necessaries of life. Law v. Law (1986) 2 R.F.L. (3d) 458 (Ont.S.C.), Duncan v. Duncan (1989) 18 R.F.L. (3d) 46 (Sask.Q.B.).

22

In the present case that onus has not been discharged.

23

There is no real issue as to the independence of Steven. In the past two years he has been making independent decisions - choices - as to where he will live (with one or other parent or on his own), in the N.W.T., Alberta or Saskatchewan; whether he will attend school and/or trades training, and where; whether he will seek employment and where, etc. He states that the reason he is living at his mother's home at the present time is simply because it is "cheaper" to live there. He has demonstrated an ability to withdraw from his parents' charge.

24

Valerie's situation is not quite so straightforward, because of the very recent changes in her lifestyle. Although a mere 17, at the moment she is asserting her independence. She says she is now making her own decisions about her life, and this is confirmed (with some unhappiness) in her mother's testimony. Valerie states under oath that she is self-supporting and content in her present circumstances in Snare Lake. She feels that her relationship with each parent is such that she can ask for assistance at any

time.

25 The evidence indicates that Valerie, at the present time, has made a conscious choice to adopt an independent lifestyle, to reject parental control, and to take herself out of her parents' charge. The evidence demonstrates, further, that she has the ability to do this at the present time. I find, therefore, that she is not a "child of the marriage at the material time" within s.15 of the Divorce Act.

26 In doing so I fully recognize the very recent nature of Valerie's circumstances and that this is a period of hiatus for this teenager. She says she has decided to return to school in the fall but experience shows that such a decision is not irrevocable.

27 Although I am compelled by the evidence to find that Valerie is not a "child of the marriage" at this time, it may be that she will one day re-qualify as such. The law provides that a young person can lose but later regain the status of a "child of the marriage" under the Divorce Act: Swidzinsky v. Swidzinsky (1984) 43 R.F.L. (2d) 456 (Man.Q.B.), Keen v. Keen (1990) 30 R.F.L. (3d) 172 (Sask.Q.B.).

28 Any court order that might have issued pursuant to s.15 of the Divorce Act deals with a parent's financial support of his/her child as a legal obligation. In the absence of any such order, a parent's financial support of his/her child remains a matter of moral conscience.

29 For the foregoing reasons the application for corollary relief is denied, and the interim order of January 18, 1993 is vacated effective March 31, 1994.

MATRIMONIAL PROPERTY

30 The parties apply for the Court's decision on a fair and equitable division of matrimonial property, pursuant to s.27 of the Matrimonial Property Act, R.S.N.W.T. 1988, ch.M-6.

31 The legislation provides as follows:

27. (1) In any question between a husband and wife as to the title to or possession, ownership or disposition of all property real and personal, the husband or wife or any person on whom conflicting claims are made by the husband and wife may apply in a summary way to a judge.

(2) Subject to any written agreement to the contrary, in an application under subsection (1) the judge is empowered to make any order with respect to the property in dispute that the judge considers fair and equitable including an order for one or more of the following, namely

- (a) the sale of the property or any part of it and the division or settlement of the proceeds.
- (b) the partition or division of the property.
- (c) the vesting of property owned by one spouse in both spouses in common in the shares that the judge thinks fit.
- (d) the conversion of joint ownership into ownership in common in the shares that the judge thinks fit, and
- (e) the transfer from one party to the other party or to a child of either or both parties of the property that the judge may specify.

and may direct any inquiry or issue touching the matters in question to be made in the manner that the judge thinks fit and may make an order as to the costs of and consequent on the application that the judge thinks fit.

(3) Subject to subsection (4), the judge may make any order under this section, whether affecting the title to property or otherwise, that the judge considers fair and equitable, notwithstanding that the legal or equitable interest of the husband and the wife in the property is in any other way defined.

(4) In considering an application under this section, the judge shall take into account the respective contributions of the husband and wife whether in the form of money, services, prudent management, caring for the home and family or in any other form.

(5) A judge making an order under this section may direct the Registrar of Land Titles to cancel, correct, substitute or issue any certificate of title or make any memorandum or entry on it and otherwise to do every act necessary to give effect to the order.

(6) An order made under this section is subject to appeal in the same way as an order made by a judge in an action.

32 All matrimonial assets other than the matrimonial home, H122 in Edzo, have already been divided, as indicated earlier in these reasons. It remains to determine what is fair and equitable with respect to the disposition of the equity (of unknown or uncertain value) in the matrimonial home.

33 Any such disposition in favour of the husband will, of course, vest in his bankruptcy trustee. Burson v. Burson (1990) 4 C.B.R. (3d) 1 (Ont.Gen.Div.), Re Fraese (1991) 4 C.B.R. (3d) 87 (B.C.C.A.).

34 There was insufficient evidence adduced at trial for the court to make a finding as to the fair market value of the home at the present time. The parties paid \$6,000 for the house, and a 30-year leasehold interest in the lot, in 1989. It appears \$44,000 - \$46,000 was expended on improvements in 1989-1990.

35

The \$6,000 mortgage loan has now been paid. The status of the \$34,000 NWT HC forgivable loan (in the name of the husband only and apparently not secured against the home) is unclear. At best, the loan remains in good standing, and the principal amount continues to decrease monthly by virtue of the wife's (and children's) continuous occupancy of the premises. At worst, the acceleration clause in the loan agreement was triggered in September 1991 by the action of the husband (the named "owner") in ceasing his "occupancy", and most of the loan, approximately \$30,000, remains due and owing to NWT HC.

36

After consideration of all of the circumstances I have determined that justice and fairness requires that the equity (whatever its value) in the matrimonial home should be transferred into the name of the wife only. In reaching this determination, I have considered the following factors:

- a) during the currency of the marriage the parties contributed equally to the acquisition of matrimonial assets in general.
- b) as determined earlier in these reasons, the value of the moveable matrimonial assets taken by the husband at the time of the separation of the parties is in excess of one-half of the total value of all moveable matrimonial assets (i.e. excluding the matrimonial home).



- c) from the date of occupancy in 1989 to the date of the separation in 1991 the parties contributed equally to the acquisition of an equity interest in the matrimonial home.
- d) since the date of separation almost 3 years ago, the wife alone has made the monthly mortgage payment.
- e) since the date of separation the wife alone has paid all utility and maintenance costs.
- f) of the 39 months of occupancy in fulfilment of the conditions of the NWTHC's Home Improvement Program, the wife alone has fulfilled this condition for at least 31 of those months.

37 In my view it is fair and equitable that the wife have the equity in the matrimonial home and at the same time formally assume (as between the husband and the wife) the ongoing obligations of the "owner" under the NWTHC loan agreement.

38 An order will therefore issue pursuant to s.27 of the Matrimonial Property Act which order will, inter alia, direct the appropriate officials in the Lands Division, Department of Municipal and Community Affairs, Government of the Northwest Territories, and in the offices of NWTHC to make the necessary entries in their records

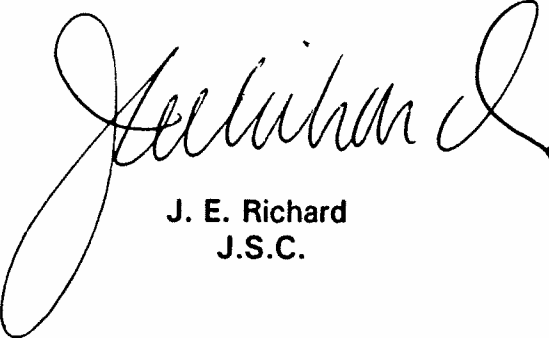
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to give effect to the court's order.

I would request the husband's counsel Mr. Brydon to forward a copy of these reasons and the formal order to the husband's trustee in bankruptcy.

Each of the parties shall be responsible for his/her own costs of these proceedings.



J. E. Richard  
J.S.C.

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