6101-02196

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KIMBERLEY ANNE LINDSAY

Petitioner

- and -

CALVIN GEORGE LINDSAY

Respondent

Trial of claims for child custody, support, and division of matrimonial property.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on November 2 & 3, 1995

Reasons filed: January 2, 1996

Counsel for the Petitioner: Adrian C. Wright

Counsel for the Respondent: Sheila M. MacPherson

6101-02196

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KIMBERLEY ANNE LINDSAY

Petitioner

- and -

CALVIN GEORGE LINDSAY

Respondent

REASONS FOR JUDGMENT

1 The parties were husband and wife. They brought these proceedings seeking a divorce judgment plus orders relating to child custody, child support, and a division of matrimonial property. There is no claim for spousal support. At the conclusion of the trial, a divorce judgment was granted. Judgment on the other issues was reserved. These are my reasons for judgment on those issues.

Facts:

2 The parties were married in 1973. They have three children, Tonya (born in 1976), Tara (born in 1979), and Talaya (born in 1981). They separated in September of 1991.

3 The family had been living in Iqaluit since 1988. Prior to that they lived for the most part in Kelowna, British Columbia, although at times they resided in various northern communities to coincide with work contracts obtained by the respondent. In Iqaluit both parties worked and they maintained joint finances.

4 In 1989 the parties obtained a house lot in Iqaluit and started building a residence on it. This was a family effort with the respondent assuming the role of general contractor. They obtained a mortgage to help finance the construction. The house was substantially completed by the spring of 1991 and, although there was still finishing work to do, the family moved in and took up residence.

5 In September, 1991, the respondent moved out of the family home. He continued to work in Iqaluit and his pay continued to be deposited in the parties' joint bank account until November or December of 1991. He then moved back to British Columbia. He entered into a new relationship there. In January and February, 1992, he sent a total of $3,000 to the petitioner who remained in the family home with the three children. In August of 1992 the respondent sent $700 to the petitioner as required by a court order. A further order was made in September of 1992 requiring the respondent to pay interim child support.

6 The petitioner has continued to live in the former matrimonial home since the separation. She has made mortgage payments and paid for repairs and ongoing maintenance. The house is in need of further work. It has also depreciated in value over the past few years. A 1993 appraisal valued it at $225,000 while a more recent one has put the value at $219,000. Estimates also vary from $15,000 to $45,000 for the cost of completing the house. The mortgage balance is approximately $124,000. The property is now listed for sale.

7 The petitioner's current employment income is approximately $48,000 per year. Of the three children only Tonya, now 19 years old, still lives with her. She has always lived with the petitioner. The other two children have gone back and forth between their parents. The respondent has, since September, 1992, had at least one of the two children with him and since July, 1995, both children have been with him. The respondent lives with another woman and her two children. He is now self-employed but had a lengthy period of unemployment. As a point of comparison, his taxable income for 1991 (the last year he worked in Iqaluit) was $84,000 while for 1994 it was $14,000.

8 These are the basic background facts. Additional details will be reviewed when discussing the specific issues.

Child Custody & Support:

9 The parties are agreed that an order providing for joint custody may issue. Considering the ages of the children, and particularly recent history, the parties feel that they can agree between themselves as to the day-to-day care of the children. I agree that this is the most sensible solution.

10 One of the outstanding issues is the status of the eldest child, Tonya. As noted previously, she is now 19 years old. The *Divorce Act*, 1985, provides that the court may order a spouse to support any or all "children of the marriage". A "child of the marriage" is defined in s.2(1) of the Act:

> "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...

11 Tonya is currently a student in a post-secondary educational institution in Iqaluit. She works part-time during the school year and is unable to provide financially for herself to any great extent. She depends on her mother's support for the time-being.

12 In my opinion, ongoing education is sufficient "cause" for Tonya to be still considered a "child of the marriage" for support purposes. As a general rule, if a child is over 16 but is a bona fide student, then the parents remain responsible for that child's support: Martell v. Martell (1994), 3 R.F.L. (4th) 104 (N.S.C.A.); McGregor v. McGregor (1994), 3 R.F.L. (4th) 343 (N.B.C.A.).

13 Considering the facts that as of now two of the children reside with the respondent while one resides with the petitioner; the higher cost of living in Iqaluit as opposed to Kelowna; and, the disparity in incomes; the parties are in agreement that there should be no child support paid by either one to the other so long as the current arrangements continue. I agree. If and when there is a material change in the future, either party may bring a variation application.

Matrimonial Property Claim:

14 The only significant matrimonial asset is of course the former matrimonial home in Iqaluit. There was no claim advanced by either party to a division of any other asset so I will assume that all other property has been divided to their satisfaction.

15 Essentially the parties are agreed that the home should be divided equally. The dispute comes over whether there should be an additional payment by one to the other. The petitioner had initially advanced the proposition that there should be an unequal division but only so as to account for the fact that she made the mortgage payments on the property for the past 3 years and also so as to make up for what she claims were insufficient child support payments. She argues that if one goes through a calculation such as this then the respondent will owe her a significant payment that could be offset by an unequal division of the equity in the home. In her view the value of the home should be determined either by a valuation as of now or by a sale. The respondent submits that a value should be assigned to the home as of the date of separation and then divided with the petitioner then receiving the benefit of any increase in value by the time it is sold. The mortgage payments made by the petitioner, according to this argument, are offset by her use of the home since the separation.

16 The *Matrimonial Property Act*, R.S.N.W.T. 1988 c.M-6, provides that a judge may make any order that he or she considers fair and equitable with respect to property that is in dispute. The judge must take into account the respective contributions of the spouses whether in the form of money, services, prudent management, caring for the home and family, or in any other form. But, as noted by our Court of Appeal in Chapman v. Chapman, [1993] N.W.T.R. 355, the emphasis is on what the judge considers fair and equitable.

17 In this case, it is clear to me that the construction and financing of the home was a joint effort for the benefit of the whole family. Both spouses contributed in money,

effort, upkeep, family care, and all the other intangible things that family members would normally expect to contribute to the well-being of the whole. The *Matrimonial Property Act* does not expressly set out a presumption of equal distribution of matrimonial property, but case law has held that, absent exceptional circumstances, the court should be loath to depart from the principle of parity between spouses: Bartolozzi v. Bartolozzi, [1992] N.W.T.R. 347 (S.C.); Kucey v. Kucey, [1990] N.W.T.R. 234. In this case I am satisfied that what is fair and equitable is an equal division of the former matrimonial home.

18 The next step is to determine an appropriate valuation date. The evidence shows that the property has decreased in value. There are also significant expenditures that will be incurred by any future buyer to bring all deficiencies up to standard. This will no doubt adversely affect the sale price. And, it should be emphasized, the parties agree that the property be sold.

19 In my opinion the only fair course to take, in a falling market, would be to let the market determine the equity. Neither party has the funds on hand to buy out the other's equity. We are not dealing with a liquid asset whose value at any particular time can be fixed. If I were to set a value at the date of separation or at the date of trial the result could be an artificial enrichment or loss to one or other party depending on the eventual sale price.

20 The reasoning behind this approach was expressed by the Alberta Court of Appeal in Kremp v. Kremp (1989), 23 R.F.L. (3d) 164, at pages 167 - 168:

> The second ground of appeal is the date of distribution. The trial judge ordered a distribution of assets as of the date of the trial, whereas the appellant argues that the date of de facto separation of the parties would be more just.
>
> We can see many legal difficulties with that argument. Aside from them, it is not well founded factually. The various investments of the parties grew during the period of separation because of the income which they earned. As the overall split was equal, it seems fair to let the income be split the same way as the principal which generated the income.

21 The Kremp case dealt with investments in a rising market. But the same principle applies to a deflationary market. I have already concluded that the property should be divided equally. It seems to me that the parties should therefore share equally in any increase or decrease in value caused by market forces. It is acknowledged that nothing has been done to improve the property since the separation. I see no reason why market forces should not therefore set the value of this asset.

22 This now brings me to what additional amount should be paid by way of compensation by one spouse to the other. Unlike many provincial family property statutes, there are no categories of property designations or exemptions in the *Matrimonial Property Act*. Therefore it is not a simple matter of tabulating assets and liabilities at the beginning of the marriage and comparing with those at the end. Again, it is a question of what is fair and equitable.

23 At the date of trial the mortgage payments on the property were current. For the first 5 months after separation the respondent contributed to those payments. His pay kept going into the joint account for 3 of those months and then he sent some money to the petitioner. It seems to me that the mortgage payments for this period can be still

considered as having been jointly made by the parties. They mingled their funds; the payments came out of their joint account; accordingly, I do not credit those payments to either one separately.

24 From March until September, 1992, the mortgage went into arrears. The respondent made no support payments to the petitioner during that time until he was ordered to make interim child support payments. In September, 1992, the parties sold a house they jointly owned in Kelowna. Part of the sale proceeds went to pay the mortgage arrears on the Iqaluit property and the balance was divided between the parties. Therefore I consider those mortgage payments to have been jointly made.

25 Since September, 1992, until the trial, the petitioner has made the mortgage payments. I was provided, as an exhibit, with a list of the monthly mortgage payment amounts inclusive of municipal taxes. For the 37 months from October, 1992, to and including October, 1995, the payments totalled $49,487.90. In my opinion, these payments were necessary to preserve the equity in the home. Both parties will benefit as a result from the increased equity. Therefore, these payments should be allocated equally to both parties with the petitioner receiving credit for having in fact made all of them.

26 The respondent claims occupation rent from the petitioner. He submits that an adjustment should be made to off-set the fact that the petitioner has had the use of the home and the benefit of the respondent's capital investment in the home.

27 In general, a court has jurisdiction to grant occupation rent to a spouse where it would be equitable and reasonable to do so: Irrsack v. Irrsack (1978), 22 O.R. (2d) 245 (H.C.), aff'd (1979) 27 O.R. (2d) 478 (C.A.), leave to appeal to S.C.C. refused [1980] 1 S.C.R. viii. The court must exercise a certain discretion in balancing all relevant factors to determine whether occupation rent is sensible in the totality of the circumstances.

28 In this case there are a number of factors that convince me that occupation rent is not warranted. First, I heard evidence about certain expenses incurred by the petitioner as basic up-keep of the home. The respondent will benefit from this in the long run so I think they can be set off as against any notional rent. Second, one of the reasons for this type of an award is to compensate the non-occupying spouse for the inability to access capital by selling the home. In this case, however, the respondent chose to leave not only the home but Iqaluit and there was no evidence of an active desire on his part to sell. Finally, another reason for an award of rent is to off-set expenses incurred by the non-occupying spouse for his separate accommodations. The evidence, however, shows that the respondent has shared many expenses with his new partner including living in a house owned by her. He now pays rent for his two daughters but that is an aspect of his support obligations. In any event, there is no evidence that he would have continued to live in the Iqaluit house if given the chance to do so. Therefore, I make no award for occupation rent.

29 The respondent is, however, entitled to be credited with rental income received by the petitioner. The evidence was that the petitioner had a boarder for a period of 12 months in 1992 who paid rent of $500 per month ($6,000 for the year). In addition, she

had a boarder at the date of trial, since August, 1995, paying rent of $600 per month. For the 4 months of August through November, 1995, rent totals $2,400. The total rental income of $8,400 should therefore be divided equally between the parties.

30 There are two smaller items that should be included in any calculation.

31 The respondent claims for expenses he incurred in managing the Kelowna property prior to its sale. In my opinion such efforts benefitted both parties in the eventual sale value. He calculated his expenses at $5,180; petitioner's counsel argues that they should only be $3,644. I prefer the petitioner's argument on this point and I will assign $3,700 to this item. This expense should also be allocated equally.

32 There is also an outstanding debt on a bank overdraft of approximately $2,000. The parties are being sued for this debt. It too should be equally shared but I make the assumption that, since the suit is in British Columbia, the respondent will pay it in full. I will therefore credit him with that payment in the calculations below.

33 Finally, there is the petitioner's claim for compensation for the respondent's past failure to pay "adequate" support. The petitioner submits, and I do not disagree, that property division payments can be used as an alternative to retroactive lump sum support payments. I also agree with the general proposition that one's ability to pay support depends on not just what the person is actually making at the moment but what one should or could reasonably be earning. In this case, however, there is insufficient evidence to adequately assess this claim. First, there was an interim child support order

in place since September, 1992. If the amount was inadequate as the petitioner claims she could have applied for an increase. I recognize that the existence of an interim order does not limit my responsibility to vary it retroactively if necessary, but, in this case there is no basis for assessing the level of "inadequacy". Second, over the period from mid-1992 to present, the respondent has had at least one child with him and most recently two. He also contributed money voluntarily at least for the first five to six months of the separation. Finally, the respondent had limited income for several years. Any realistic, non-arbitrary, attempt to quantify this claim would require a periodic analysis of the parties' relative means and needs at every stage since the separation. The evidence to do that is lacking in this case. I therefore reject this aspect of the claim.

34 My calculation of the amount required to fairly compensate the petitioner for her over-all matrimonial property claim is as follows:

	PETITIONER		**RESPONDENT**	
	Paid (Received)	**Allocation**	**Paid (Received)**	**Allocation**
Mortgage:	$49,487.90	$24,743.95		$24,743.95
Kelowna Expenses:		1,850.00	$3,700.00	1,850.00
Overdraft Claim:		1,000.00	2,000.00	1,000.00
Rental Income:	(8,400.00)	(4,200.00)		(4,200.00)
	$41,087.90	$23,393.95	$5,700.00	$23,393.95
	(17,693.95)		17,693.95	
	$23,393.95	$23,393.95	$23,393.95	$23,393.95

35 The amount therefore to be paid by the respondent to the petitioner is $17,693.95. This is, however, subject to a number of qualifications and potential adjustments:

A. The sum of $17,693.95 (which I will, for want of a better term, refer to as the "equalization payment") is over and above the equal division of the Iqaluit property value. In other words, the Iqaluit property is to be sold and the proceeds divided equally. After that, the respondent is to make the equalization payment. To secure that payment, I direct that the amount of the equalization payment be a first charge in favour of the petitioner on the respondent's share of the sale proceeds. Alternatively, the respondent could make a lump sum payment forthwith to satisfy this aspect of his indebtedness.

B. I had considered whether the equalization payment should carry prejudgment interest even though this was not argued before me. In principle there is no reason why a property award could not attract pre-judgment interest. I am nevertheless satisfied that prejudgment interest is not appropriate in this case for the reason that the respondent cannot realize on the asset that gives rise to the bulk of the equalization payment until after the trial. The general principles in this regard are reviewed in Burgess v. Burgess (1995), 24 O.R. (3d) 547 (C.A.).

C. The equalization payment will carry post-judgment interest in the normal course. This will have to be part of the adjustments done once the property is sold unless payment is made before then.

D. There should be some adjustments to the above-noted calculation assuming that the equalization payment will come out of the sale proceeds. The calculations are as of the trial date. If by the time of the sale, the petitioner makes further mortgage payments or receives additional rental income, then those line items will have to be adjusted up to the date of the sale. Similarly, I am assuming and I direct that the respondent make the payment on the overdraft claim. Again, the exact amount of the payment will have to be inserted into the calculations. These adjustments are required to maintain the consistency of the approach adopted in this analysis.

36 If, of course, this process seems too complicated and the parties wish to make some alternative arrangement so as to satisfy all claims as between them, they are free to do so.

Conclusions:

37 I hereby order as follows:

1. A declaration will issue to the effect that the child Tonya is deemed to be a "child of the marriage" for purposes of the *Divorce Act*.

2. The parties will have joint custody of the children of the marriage with the day-to-day care of each child to be as agreed upon by the parties from time to time.

3. The parties shall enjoy liberal and generous access to all the children of the marriage upon such terms as may be agreed upon by the parties from time to time.

4. There will be no order as to child support.

5. The former matrimonial home in Iqaluit will be sold and the net proceeds divided equally between the parties. If the parties cannot agree on the terms or timing of the sale, either one may apply to me for further directions.

6. The respondent shall be liable to make an equalization payment of $17,693.95 (subject to adjustment as discussed above). The obligation to make such payment will be a first charge on the respondent's proceeds from the sale of the property and the petitioner will have judgment in that amount.

38 No submissions were made as to costs. Most of the facts in this case were not disputed; some issues were resolved without conflict; and on the contentious issues there was to some extent divided success. For these reasons my inclination would be to direct that each party bear their own costs. If the parties are unable to agree, however, further submissions may be made to me in chambers on notice.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 2nd day of January, 1996.

Counsel for the Petitioner: Adrian C. Wright

Counsel for the Respondent: Sheila M. MacPherson

6101-02196

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KIMBERLEY ANNE LINDSAY

Petitioner

- and -

CALVIN GEORGE LINDSAY

Respondent

Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes

---