

Date: 1999 08 26
Docket: CV 07899

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

EDITH WALLDEN

Petitioner

- and -

DEWAYNE WALLDEN

Respondent

MEMORANDUM OF JUDGMENT

[1] This matter came on before me for confirmation of a provisional order made in the Court of Queen's Bench of Alberta pursuant to the procedure in sections 18 and 19 of the *Divorce Act*.

[2] The parties, who were married in 1975, were divorced by a judgment of this Court in September of 1997. A corollary relief order was issued which provides that the Respondent, Mr. Wallden, who was noted in default in the divorce proceedings, pay spousal support in the amount of \$2000.00 monthly commencing September 1, 1997.

[3] In February of 1998, the Respondent obtained the provisional order, which provides for cancellation of all arrears, a stay of all attachment or other similar court processes, and variation of the spousal support payments so that they are fixed at \$1.00 per year, subject to further review by a court of competent jurisdiction. The order was obtained on an ex parte basis.

[4] The evidence on the confirmation hearing before me consisted of the affidavit of the Petitioner along with her sworn Property and Financial Statement. A Statement of Facts was filed which simply outlines the procedural background to this matter. I also heard submissions from the Petitioner's counsel.

[5] Since the confirmation hearing is the second stage of the bifurcated hearing process, and since s. 19(2) of the *Divorce Act* directs me to take into consideration the certified or sworn document setting out or summarizing the evidence given to the court that made the provisional order, I will begin by referring to the evidence that was before the Court of Queen's Bench of Alberta. A transcript of those proceedings was provided to this Court, indicating that the only evidence submitted was a sworn affidavit of the Respondent. In that affidavit, the Respondent states that from 1974 to 1996, he was employed by the federal government in the Northwest Territories and that he was laid off in a government restructuring. At the time he was laid off his salary was approximately \$40,000.00. He states that he was unable to find work in the Northwest Territories and moved to Edmonton. It appears that this occurred shortly after the parties separated. The Respondent further states that he was unsuccessful in finding work and has been relying on employment insurance benefits. At the time of swearing his affidavit, he had started receiving the amount of \$484.00 per month in social assistance.

[6] In his affidavit, the Respondent also states that more than fifty percent of his employment insurance benefits were being garnisheed for the benefit of the Petitioner. Although there is no specific reference in his affidavit to property or assets, his counsel on the application for the provisional order made the submission to the Court of Queen's Bench that the Respondent has no other money, furniture or assets of any type.

[7] Attached as exhibits to the Respondent's affidavit that was before the Court of Queen's Bench are the Petition for divorce, divorce judgment, corollary relief order and other documents from the divorce proceeding in this Court, including the affidavit sworn by the Petitioner in April of 1997 in support of her application for spousal support. In that affidavit she says that the Respondent received a severance package from the federal government in the amount of approximately \$62,000.00 and a pension. The Petitioner also states in the affidavit that the Respondent told her he had found a job when he moved to Edmonton but that he quit because he was not enjoying the work.

[8] Curiously, although this information is in the Petitioner's affidavit and attached as an exhibit to the Respondent's affidavit, the Respondent says nothing about it in his affidavit. He simply acknowledges that he was served with the documents and did not respond to any of them. His own affidavit does not refer at all to the severance package or the pension or the job. Significantly, he does not, in his affidavit, deny what the Petitioner said about those matters.

[9] It appears that the Petitioner's allegations about the Respondent's financial resources and the absence of any denial by him of those allegations were not brought to the attention of the Justice of the Court of Queen's Bench when the application for the provisional order was heard. Instead, counsel for the Respondent simply summarized the substance of the Respondent's affidavit. That affidavit, in my respectful view, fails to address whether there had been a change in the Respondent's circumstances since the time the corollary relief order was made. Since the information provided by the Petitioner was before the Court when the corollary relief order was made, the Respondent was obliged to address that information on the issue of a change in his circumstances. Clearly if he had received or was receiving the monies alleged by the Petitioner, he was obliged to disclose that. Unfortunately, this was not addressed before the Justice of the Court of Queen's Bench.

[10] In response to the application for confirmation of the provisional order, the Petitioner filed a current affidavit in which she essentially repeats what she said in her 1997 affidavit about the Respondent having told her that he did find employment when he moved to Edmonton and about his having accepted a severance package. She says that he is receiving a substantial pension as a result of his years of employment with the federal government. She also says that he has other financial assets, including Canada Pension Plan Benefits and a registered retirement savings plan.

[11] According to what is set out in her affidavit, the Petitioner has medical problems and suffers from a degenerative neurological disorder. She is dependent on social assistance and Canada Pension for support. After her rent is paid, she is left with \$327.00 per month for all other expenses. Apart from the fact that her medical condition has worsened considerably, her situation is much the same as described in her 1997 affidavit.

[12] The Respondent's argument in support of his application for the provisional order was that his circumstances had changed since the corollary relief order was made. There was no suggestion that the Petitioner's circumstances had changed.

[13] I am not satisfied that the Respondent fully disclosed his financial circumstances to the Alberta court in that, while not denying what the Petitioner had said in her 1997 affidavit about his financial resources, he failed to provide any information about those resources.

[14] In the circumstances, I am not going to confirm the provisional order. The only question is whether I should simply refuse confirmation or whether, pursuant to s. 19(6) of the *Divorce Act*, I should remit this matter back to the Alberta court for further evidence. Section 19(6) provides as follows:

(6) Where, in a proceeding under this section, the respondent satisfies the court that for the purpose of taking further evidence or for any other purpose it is necessary to remit the matter back to the court that made the provisional order, the court may so remit the matter and adjourn the proceeding for that purpose.

[15] If the matter is remitted back to the court that made the provisional order, that court is to give notice to the applicant, in this case, Mr. Wallden, and then receive further evidence [s. 18(5)]. If further evidence is received, the Alberta court would remit the matter back here with the evidence that was taken and "such recommendations as the court that received the evidence considers appropriate" [s. 18(6)].

[16] I note that s. 19(6) says that it is the respondent (on the application for confirmation of the provisional order) who must satisfy the court that the matter should be remitted to the court that made the provisional order. In this case, counsel for the Petitioner (who is the respondent on the application) submitted that I ought not to remit the matter to the Alberta court because the issue in this case is one of non-disclosure and because it will simply delay matters. There is a concern that, because of the Petitioner's medical problems, it may become more and more difficult to get instructions from her.

[17] In my view, the Petitioner's position has merit. This is not a case where there is contradictory evidence before the court which is asked to confirm the provisional order. If it were such a case, then the appropriate route might be to remit the matter back to the court that made the provisional order for further evidence; see, for example, *Blanchette v. Blanchette*, [1994] O.J. No. 1913 (Ont. Gen. Div.).

[18] In this case, I am not satisfied that the Respondent made full disclosure of his financial circumstances to the Court of Queen's Bench of Alberta. Accordingly, pursuant to s. 19(7)(c) of the *Divorce Act*, I refuse to confirm the provisional order. Counsel for the Petitioner is to prepare a formal order reflecting this judgment and certified copies of that order will be distributed by the clerk of the court as required by s. 19(12). Pursuant to s. 19(12)(c), a copy of this memorandum is also to be forwarded to the Court of Queen's Bench of Alberta.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT
this 26th day of August 1999

Counsel for the Petitioner: Glen Boyd

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