Date: 2000 01 05
Docket: CV 08521

Wilson v. Eronchi, 2000 NWTSC 5

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DAVID WILSON

Applicant

-and-

SHIRLEY ERONCHI

Respondent

MEMORANDUM OF JUDGMENT

[1] The parties in this case lived in a common law relationship for several years and have now separated. The Applicant claims sole interim custody of the three children of the relationship, ages 5, 8 and 11, who have been living with him since the separation in early August of this year. The Respondent did not oppose his claim for custody and so interim sole custody is granted to the Applicant.

[2] The issues that were argued on this application, which came before me in Chambers, concern money. They have arisen mainly because the Respondent won $195,000.00 in a lottery in October 1999. Of that amount, $70,000.00 is being held in the Respondent's lawyer's trust account pursuant to an order made by my colleague Justice Vertes.

[3] The Applicant requested an order that the Respondent use some of the money to pay a debt owing by the parties to Revenue Canada. However, counsel for the Respondent advised that he understood that she had paid an amount which Revenue Canada was willing to accept in settlement of its claim. I adjourned that issue sine die to be brought back on five days' notice so that counsel could be certain of Revenue Canada's position in light of the lottery winnings. As discussed in Chambers, the matter of the debt is an issue of property division and it may not

be appropriate to deal with it on an interim application.

[4] That left only the issue of interim child support payable by the Respondent to the Applicant. This is my ruling on that issue.

[5] In the past, the Respondent, who has a grade ten education, has worked mainly as a waitress or cook. Her last rate of pay was $11.00 per hour. In her affidavit she says that in 1999, up until November, she had earned approximately $3,700.00. She also received income support payments from the Department of Social Services in September 1999. She was upgrading at the Chief Jimmy Bruneau School in Edzo but it is not clear whether that is still the case.

[6] The Applicant's annual income is approximately $42,000.00.

[7] This is not the first time that the Respondent has won money. She previously won amounts of $4000.00 and $10,000.00 at bingo. Although the Applicant suggested in his initial affidavit that the Respondent spend her money on alcohol and items for herself, he acknowledged in his second affidavit that the earlier winnings were largely spent on items for the family.

[8] The question is how the lottery winnings should be applied to the Respondent's child support obligations. Counsel suggested very different ways of dealing with the money.

[9] Counsel for the Applicant suggested two ways of dealing with the winnings for child support purposes. The first is that the entire winnings of $195,000.00 be grossed up for income tax purposes to $334,000.00 and that amount be considered one year's income for the Respondent. Under the *Child Support Guidelines* pursuant to the *Children's Law Act*, S.N.W.T. 1997, c. 14, child support payments for three children would then be $5,362.50 per month. These payments over the course of one year would use up the majority of the $70,000.00 held in trust.

[10] Counsel for the Applicant argued, however, that a better option is to divide the grossed up sum by a number of years, say five, and consider the resulting approximately $65,000.00 to be the Respondent's income in each of the five years. It was acknowledged that five years is a figure bearing no relation to any circumstance in this case. Counsel suggested that the amount of $65,000.00 could be held in an interest-bearing account as security against child support payments.

Based on annual income of $65,000.00, those payments would be $1193.00 per month. If the Respondent does not make the payments as required, they could be enforced against the sum held as security. If she does make the payments, she will eventually receive the money held as security.

[11] Counsel for the Respondent argued that the lottery winnings represent capital and not income and as such should be treated as an asset which can be invested to generate income. He relied on the fact that lottery winnings are non-taxable and do not fall within the definition of income in the *Child Support Guidelines*. He pointed out that the options suggested above contemplate only limited periods of support payments and argued that they would impair the Respondent's ability to make long term use of the capital.

[12] There are two issues which arise from the positions taken by the parties. The first is how the lottery winnings should be treated so as to calculate child support. The second is whether the Respondent's child support obligation, whatever it may be, should be secured by holding monies in trust.

[13] Section 1 of the *Child Support Guidelines* sets out the objectives of the *Guidelines*:

> The objectives of these guidelines are
>
> (a) to establish a fair standard of support for children that ensures that they benefit from the financial means of each parent;
>
> (b) to reduce conflict and tension between parents by making the calculation of support for children more objective;
>
> (c) to improve the efficiency of the legal process by giving courts, parents and other parties to a support application guidance in setting the levels of support for children and encouraging settlement; and
>
> (d) to ensure consistent treatment of parents and children who are in similar circumstances.

[14] Counsel for the Applicant emphasized s. 1(a) in arguing that a parent's financial means are made up of more than just income from employment. I think that is

clear from the legislation, but the question is how a parent's means are to be used so that they become a resource available for the payment of child support.

[15] The main point of the *Guidelines* is that normally child support is to be tied to and paid out of income. Sections 4, 15 and 16 all set out that child support is to be calculated from the table which is based on the number of children and the payor's annual income, which income is in turn determined using the sources of income which are considered taxable income by Revenue Canada.

[16] The *Guidelines* also provide specifically in s. 19(1) that income may be imputed in certain circumstances, which include the following:

> (b) the parent is exempt from paying federal or provincial income tax;
> (e) the parent's property is not reasonably utilized to generate income;

[17] Section 19(1)(b) seems to contemplate those situations where a party receives a recurring amount which is not taxable and does not therefore fall within the sources of annual income that are used under s. 16 to calculate annual income for child support purposes. For example, in *Hoover v. Hoover*, [1998] N.W.T.R. 209 (S.C.), where the payor's only source of income was a workers' compensation benefit which was tax-exempt, Vertes J., relying on s. 19(1)(b), grossed up the amount of the benefit to come to an annual income for child support purposes. It appears that the Alberta Court of Appeal did the same thing with workers' compensation benefits in *Dahlgren v. Hodgson*, [1998] A.J. No. 1501.

[18] Section 19(1)(e) deals with property. The significance of property, or assets, for purposes of child support was referred to by the Alberta Court of Appeal in *Levesque v. Levesque*, [1994] 8 W.W.R. 589 in dealing with child support obligations under the *Divorce Act* prior to the enactment of the federal *Child Support Guidelines*. There the Court said:

> The *Divorce Act* (s.15(8)(b) provides that any award should apportion the child care cost "... between the spouses according to their relative abilities to contribute..." In our view, the Act, when it speaks of ability to contribute, uses the term in the broadest sense. Its compass includes not only income, but also assets, the ability to earn income, and future income and assets. Where we use the word "income" throughout these Reasons we mean this: the income the spouse can generate by personal effort and the prudent investment or sale of existing assets.

[19] The *Guidelines* under the *Children's Law Act* (which are virtually identical to those under the *Divorce Act)* use the same reasoning by including in income both the income a parent can generate from his or her own efforts and the income a parent can generate from prudent investment or sale of assets.

[20] Clearly the lottery winnings are not income earned by the Respondent by her own efforts. They represent a one time windfall, not a series of payments. In my view, they are properly characterized as capital or property. This one time windfall is also quite different from the "$1000.00 per month for life" winnings of the taxpayer in *Rumack v. Canada (M.N.R.)*, [1992] F.C.J. No. 48 (F.C.A.), where the investment of the capital of the prize was, by the terms of the lottery, compulsory and the resulting monthly payments were found to have the character of income.

[21] In some instances, an asset or sum of money may be treated as either income or as property. The Alberta Court of Appeal noted this in *MacDonald v. MacDonald*, [1997] A.J. No. 1262 (Alta. C.A.). There, on termination of his employment, the payor parent received a salary package and was obliged to exercise all his outstanding employee stock options. He had also received bonuses from his employment. He argued that all of these were property and did not affect his ability to pay child support. The Court of Appeal noted that the bonuses and stock options were historically part of his compensation from employment. The bonuses and the severance package monies, the latter being income replacement, were considered taxable income by Revenue Canada as were the taxable capital gains realized from the disposition of the employee stock options. Although the Court of Appeal found all of these items should be considered income, it also noted that depending on how they were dealt with by the taxpayer after receipt, they could be considered property for purposes of matrimonial property division.

[22] This case can be distinguished from *MacDonald* because here the lottery winnings clearly have no connection with employment. They are non-taxable and non-recurring. In my view, they are clearly a property item or asset. As such, they may be used to generate income. That is how Lee J. dealt with lottery winnings in the case of *D.L.A. v. J.T.A.*, [1999] A.J. No. 312 (Alta. Q.B.), where he imputed a six per cent annual return on cash remaining from the winnings to determine an annual income from investment which was then added to the income the payor could earn from employment to come to a total income for child support

purposes. To treat the winnings in this fashion is also consistent with the reasoning in *Rumack, supra,* although that case did not involve child support.

[23] In my view, therefore, it is appropriate to take into account the income potential from the Respondent's lottery winnings and to impute to her an annual income from that source. I was not provided with any evidence as to what a reasonable rate of return would be on that sum. Counsel for the Applicant suggested a rate of between fifteen and eighteen per cent per annum. That seems high. Counsel for the Respondent suggested eight per cent which seems more reasonable, considering in part that six per cent was the figure used by Lee J. in *D.L.A. v. J.T.A.* for a much larger sum of money in March 1999.

[24] As I understand the figures that were presented, after payment of debts there should be approximately $180,000.00 left available to the Respondent. Invested at a rate of eight per cent per annum, that sum would generate an annual income of $14,400.00. I therefore impute that annual income to the Respondent. Added to it will be $22,000.00 as the amount the Respondent can earn from employment, based on a wage of $11.00 per hour. The total annual income which I impute to her is therefore $36,400.00 and the interim monthly child support payable is $708.72. This amount will be payable on the first of each month commencing November 1, 1999.

[25] The next issue is whether there should be a lump sum payment or whether money should be held in trust or some form of account to secure payment by the Respondent of the child support ordered. In this regard, s. 60(1) of the *Children's Law Act* provides that a court considering an application for child support may order that a lump sum be paid or be held in trust [s. 60(1)(b)] and that payment be secured under a child support order by a charge on property or otherwise [s. 60(1)(j)].

[26] The Applicant takes the position that an order under s. 60 should be made because the Respondent has been irresponsible with money in the past and there is a risk that she will spend her winnings on entertainment, alcohol and gambling rather than for the benefit of the children.

[27] The Respondent admits to having a problem with alcohol but says that the Applicant is a controlling person who forced her to hand over her earnings and any past winnings to him. I have already referred above to the evidence about how her past winnings were spent and the fact that the Applicant acknowledges that the large amounts were used for family items.

[28] Ordering that child support be paid in a lump sum or that it be secured is an unusual step. It may be justified where the payor has a poor history with respect to child support [as in *Megeval v. Megeval*, [1997] B.C.J. No. 2454 (B.C.S.C.)] or a record of poor money management or has demonstrated a willingness to risk the family's security [as in *Lobo v. Lobo* [1999] A.J. No. 113 (Q.B.)]. It may be justified where there is a risk that no support will be paid, for example, as in *Villeneuve v. Lafferty*, 1999 N.W.T.S.C. 15 (S.C.), where the non-custodial parent had abandoned the family without trace and left behind only his interest in the family home.

[29] Counsel for the Applicant relied on the case of *M.-J.M. v. R.G.*, [1991] A.Q. No. 200 (Que. C.A.). In that case, the payor parent had been ordered to make weekly payments of child support and some months later won $100,000.00 on a television show. The Court was of the view that lump sum rather than periodic support should have been ordered when the payee parent applied for a variation after the win. The Court based its view on the fact that the payor had demonstrated a refusal to make any payments and that he preferred being on welfare rather than working for a living and had spent almost half his winnings without any thought of sharing them with his child.

[30] In this case, however, the Respondent has already, with her counsel, met with an investment counsellor for advice on how to manage her winnings. She has already indicated a wish to put some of the winnings into trust for her children when they get older. She has paid at least a portion, if not all, of the Revenue Canada debt. She does not have a history of child support payments, which may be explained by the fact that since the parties separated in August 1999 she has had little money except for the lottery winnings obtained in October. She has used large amounts from her past winnings to purchase items for family use.

[31] Considering that the evidence about the Respondent's past management of money is conflicting and that I cannot resolve the conflicts on affidavit evidence and considering that she has taken some steps for the prudent management of the money which is now available to her, I do not consider a lump sum payment to be warranted.

[32] In my view, however, there is reason to be cautious simply because the Respondent does not have experience in dealing with such a large sum of money as she has now won. And she has not put forward a definite plan for investment of the monies won or their use for the children other than her stated intention to set up a trust fund for each child.

[33] I therefore order that all but $25,000.00 of the $70,000.00 held in trust is to be released to the Respondent. The $25,000.00, which represents approximately three years of the child support payments I have ordered, is to be kept by the Respondent's counsel in an interest-bearing account until further order of this Court. My intention in ordering this is simply to preserve some of the capital on an interim basis. The Respondent may, however, apply for release of the $25,000.00 or any part of it. I have added the latter term so that the Respondent may seek to make the $25,000.00 part of her investment plan when she is in a position to present specific information about it.

[34] As requested by counsel for the Applicant, counsel may speak to the matter of costs of this application if they wish by arranging a date for that purpose through the Courtroom Services Supervisor.

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

Dated at Yellowknife, NT on the
5th day of January, 2000.

Counsel for the Applicant: Elaine Keenan Bengts
Counsel for the Respondent: James D. Brydon