Green v. Green, 2000 NWTSC 20

Date: 2000 03 07
Docket: 6101-03115

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DEBORAH LEE GREEN

PETITIONER

-and-

RONALD PATRICK GREEN

RESPONDENT

MEMORANDUM OF JUDGMENT

[1] The Petitioner in these proceedings has applied ex parte for a "desk divorce" and corollary relief, the Respondent having been noted in default.

[2] The evidence establishes that the parties have lived separate and apart for in excess of one year immediately preceding the determination of these proceedings. Accordingly, a divorce judgment will issue.

[3] There are, however, a number of problems with the proposed corollary relief order.

[4] The proposed order provides for joint custody of the parties' two children, Jason, born October 23, 1980 and Tanya, born November 9, 1982, and child support payable by the Respondent directly to each of them.

[5] The difficulty is that the evidence is unclear as to whether Jason and Tanya fall within the definition of "child of the marriage" in s.2(1) of the *Divorce 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 (a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority 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;

[6] Tanya, at the age of 17, is under the age of majority but what little information has been provided about her circumstances raises the question whether she has withdrawn from the charge of her parents.

[7] In the Petitioner's affidavit, she states that when this action was started in July of 1999, Tanya was living with the Respondent in Grande Prairie, Alberta. She states that Tanya has since moved out of the Respondent's residence and resides with her boyfriend's mother in Grande Prairie. The Petitioner, who now lives in Lethbridge, Alberta, pays $100.00 per month to Tanya, as she does to Jason. In her financial statement sworn December 1, 1999, she describes these as support payments.

[8] Otherwise, the Petitioner does not say what Tanya's circumstances are, whether she is working or attending school or anything else. There is no evidence as to what her expenses are and how she meets them. On the face of it, since it is not suggested that Tanya cannot live with either of her parents, it would appear that she may have withdrawn from their charge. Indeed, in the Memorandum submitted by counsel with this application, she states that each child has gone to live independently.

[9] Jason has attained the age of majority and so the question in his case is whether he remains under the charge of his parents and is unable to withdraw from their charge or to obtain the necessaries of life.

[10] The Petitioner submits that Jason is unable to withdraw from parental charge or obtain the necessaries of life because he is currently attending high school full time in Fort Smith. He chose to stay there when the Petitioner moved to Lethbridge, although she expects that he will resume living with her in Lethbridge when he completes high school in two years. He now resides with family friends in Fort Smith. The Petitioner provides him with $100.00 per month.

[11] There is no evidence as to what Jason's expenses are and how he meets them apart from the $100.00 provided by the Petitioner. There is no evidence as to whether he works in addition to attending school.

[12] Although the Respondent was noted in default, there is a letter from him on the court file. This letter was referred to by counsel for the Petitioner in the Memorandum. In the letter, the Respondent states that he has tried to get the children to move to his home, that Jason is working and going to school and that Tanya was to come and live with him soon after the date of the letter. The only part of this addressed by the Petitioner in her affidavit is the question of where Tanya lives; the Petitioner says that Tanya is living with her boyfriend's mother.

[13] Although the Respondent has not filed an affidavit as required by the Rules of Court so as to put this information before the Court, his letter simply confirms what I consider to be the uncertainty, on the evidence presented thus far, of the situation.

[14] The evidence being insufficient to enable me to determine whether Jason and Tanya are "children of the marriage" as defined in the *Divorce Act*, I adjourn the claim for custody and child support *sine die*, to be dealt with as referred to at the end of this Memorandum.

[15] The draft corollary relief order also includes a clause providing that the matrimonial home in Fort Smith be transferred into the name of the Petitioner as sole tenant and that the Petitioner shall assume sole responsibility for the mortgage "into her sole name".

[16] It has been pointed out in a number of cases in this Court that a matrimonial property claim is not "corollary relief" as that term is used in the *Divorce Act*. Although a claim for matrimonial property can be joined in a divorce action under the Rules of Court, it is a separate claim and must be proven as would any other unliquidated claim: *Currie v. Currie* (S.N.W.T. No. 6101-02281; January 3, 1995); *Chinna v. Chinna* (S.C.N.W.T. No. 6101-02411; February 20, 1995).

[17] Therefore, in a case where counsel seeks an order dealing with matrimonial property, an order separate from any corollary relief order must be submitted.

[18] The applicable legislation is the *Family Law Act*, S.N.W.T. 1997, c.18. Part III of the Act provides for an equal division of assets after determining the "net family property" of each spouse. Where an application is made for a declaration as to entitlement to family property under s.38 of the Act, each spouse must file and serve the statement of property required by s.39.

[19] No. s.39 statement has been filed in this case. And the Petitioner's affidavit does not provide any evidence whatsoever as to the matrimonial property claim, the assets and valuations involved.

[20] In the Memorandum filed, counsel submitted that the order requested should issue as a matter of default judgment. However, as noted above, a claim for matrimonial property is an unliquidated claim. Notwithstanding the Respondent's default, the Petitioner must still prove her claim and comply with the requirements of the *Family Law Act.*

[21] In the absence of any evidence, I do not know whether what the Petitioner is seeking amounts to an equal division of property or a variation of that entitlement. If it is the latter, evidence must be provided to address the factors in s.36(6). In either case, there must be evidence to satisfy the Court that the order sought should be made.

[22] A further problem is the lack of affidavit evidence regarding the current state of the title to the matrimonial home and any encumbrances on that title. And a certified copy of the title should be attached to the affidavit providing that information.

[23] Quite apart from the lack of evidence, the order as drafted is not clear. It provides that the property be transferred into the name of the Petitioner as "sole tenant", when presumably it means as sole owner. It also refers to the Petitioner assuming sole responsibility for the mortgage "into her sole name". The intent is unclear but if it is meant to be an order that the mortgage be transferred into the sole name of the Petitioner, it cannot be granted absent the consent of the mortgagee in any event.

[24] Accordingly, the claim for an order under the *Family Law Act* is adjourned *sine die*. Both it and the claims for custody and child support may be brought on in chambers on affidavit evidence or on a hearing date obtained from the clerk for *viva voce* evidence. Counsel may decide which of those two ways to proceed. In either case, ten days' notice is to be given to the Respondent, who is also to be served with copies of all affidavits. The application may be heard by any judge of this Court.

V.A. Schuler J.S.C.

Dated at Yellowknife, Northwest Territories this 7th day of March, 2000.

Counsel for the Petitioner: Michelle Staszuk