Date: 2006 07 26
Docket: S-0001-CV2002000140

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WANDA LEE ANDERSON

Applicant

- and -

BLAINE CHESTER ANTOINE

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant and Respondentare former common-law spouses. The Applicant seeks an order for the following relief:

a) that the Applicant's entitlement pursuant to section 36(1) of the *Family Law Act* be varied pursuant to subsections36(6)(e), (d) and (j), specifically the Applicant claims that each party retain the assets and debts as set out in the Applicant's Statement of Family Property, filed November 2, 2005, and that neither party pay an equalization payment to the other;

b) that the Applicant have exclusive possession of the family home and its contents, pursuant to sections 55(1)(b) and 55(1)(d)(i) of the *Family Law Act*;

c) declaring that the Applicant has sole ownership and right to possession of the family home at 620 Anson Drive, Yellowknife, Northwest Territories, pursuant to section 41(1)(a) of the *Family Law Act*;

d) directing the Registrar to substitute the current Certificate of Title with respect to 620 Anson Drive, Yellowknife in the Northwest Territories, which indicates that the parties are joint tenants, with one indicating that the Applicant is the sole owner of 620 Anson Drive, Yellowknife, pursuant to section 175 of the *Land Titles Act*;

e) declaring that the Applicant has sole ownership and right of possession of the dog, Jake.

[2] The Respondent has not filed any material in these proceedings. He has been served with notice of these proceedings throughout, and appeared once when the Applicant had a motion returnable before the Court. He was served with a Notice of Hearing for July 18, 2006. Counsel for the Applicantadvised the Court that just before court commenced on July 18, the Respondent was present in the court house and spoke to him, leaving the impression that he was not going to remain for the hearing. The Respondent did not answer to his name when paged by the deputy sheriff and did not appear at any point during the hearing.

[3] The result of this is that there is no evidence before me that counters the Applicant's evidence. It can also be inferred that the Respondent is not opposing the application. This does not, however, mean that the Applicant is automatically entitled to the order she seeks. The presumption under the *Family Law Act*, S.N.W.T. 1997, c. 18, as amended, is that the value of family property will be divided equally. The *Act* requires it be so divided unless the party seekingan unequaldivision satisfiesthe Court that it would be unconscionable not to order an unequal division. So that determination must still be made, notwithstanding the Respondent's failure to take a position or present evidence in these proceedings.

[4] The evidence at the hearing consisted of testimony from the Applicant. During her testimony she was referred to some affidavits she had sworn and I will look to those affidavits as required in addition to her testimony.

[5] The parties commenced living together in May 1992. In February 2002 they separated after the Respondent assaulted the Applicant. In May 2002 they executed a separation agreement which provided for disposition of their family property. The joint title to the family home was not transferred to the Applicant as agreed, although other items were divided between the parties as stipulated in the separationagreement.

[6] The parties reconciled in September2002 but separatedagain in May 2005, after the Respondent assaulted the Applicant.

[7] The Applicant was employed throughout the relationship and for the last few years earned an annual salary of close to $80,000.00 working as the financial and administrative manager of a resource management board. The Respondent's annual salary from carpentry work ranged from approximately $13,000.00 to $23,000.00 in the last few years of the relationship.

[8] The *Family Law Act* creates a regime whereby assets are to be divided equally, regardless of the contribution made by the spouses: *Fair v. Jones,* [1999] N.W.T.J. No. 44 (S.C.). The *Act* does not create a share in ownership of property, but a share in property value through the payment of money so as to equalize the value of the assets for each spouse. It requires a determination of the "net family property" of each spouse. The net family property is the value of all the property(except that specifically excluded by the statute) that a spouse owns on the date of separation (the "valuation date"), after deducting the spouse's debts and liabilities and the net value of property that the spouse owned, in the case of common-law spouses, on the date the spouses commenced cohabitation outside marriage for a period or in a relationshipsufficient to establish their spousal relationship (the "commencement date"): section 33 and subsections 35(1) to (3). This means that a spouse's net family property is essentially the increase in his or her net worth during the years of the common law relationship.

[9] The Respondent did not file the property statement required by s. 39 of the *Act.* The Applicant did file a property statement. Although the way the jointly held family home and its mortgage have been attributed on that statement and the choice of September 2002, being the date the parties reconciled, as the commencement date give rise to some issues, I am satisfied that in the end they do not make any difference to the determination in this case. I also note that counsel for the Applicant did not seek to rely on the 2002 separation agreement, which contains a clause providing that should the parties resume cohabitation for any continuous period in excess of 90 days, the agreement becomes null and void. Since the partiesdid reconcilefor a period in excess of 90 days, the separation agreement did become null and void.

[10] The main issue in this case is simply whether it would be unconscionable not to divide the property value unequally as requested by the Applicant. Specifically, the

question is whether the Applicant should be relieved of having to make an equalization payment to the Respondent (which payment would otherwise be $11,844.25 by her calculations) and whether she should be granted sole ownership of the family home and contents along with sole responsibility for the mortgage.

[11] The net value of the Respondent's family property is less than that of the Applicant's. This is so whether one accepts the Applicant's calculations which attribute all the value of the home and the mortgage debt to her or calculates family property so as to reflect a half interest in the family home and the mortgage attributed to each spouse.

[12] To make the unequal division sought by the Applicant, under s. 36(6) of the *Act* the court must be of the opinion that it would be unconscionable not to make that division, having regard to a number of factors. Any one of the factors can be relied on; all of them need not be present.

[13] The Applicant relies on three of the factors contained in s. 36(6) as follows:

> (d) the fact that the amount the Respondent would otherwisereceive is disproportionately large in relation to the duration of the spousal relationship;
>
> (e) the fact that the Applicant has incurred a disproportionately larger amount of debts or other liabilities for the support of the family than the Respondent;
>
> (j) any other circumstance relating to the (i) acquisition, disposition, preservation, maintenance, improvement or use of property, or (ii) the acquisition, maintenance, or disposition of debts or other liabilities.

[14] I also bear in mind that subsection 36(7) of the *Act* states that the purpose of s. 36 and its presumption of equal division of value is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the spousal relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these

responsibilities, entitling each spouse to equalization of the net family properties, subject only to variation by the Court.

[15] Counsel for the Applicant argued that s. 55(3) of the *Act* should also be taken into account in determining whether it would be unconscionable not to order an unequal division. In my view, however, the factors in s. 55(3) are relevant only to a determination as to whether a spouse should have exclusive possession of a family home to which the other spouse would otherwise have possession rights as well. What the Applicant seeks in this case is sole title to and ownership of the family home, which, if granted, would necessarily give her the sole right to possession. It is s. 36, and not s. 55, that must be looked to on the issue of unequal division.

[16] The evidence before me is that during the relationship, the Applicant paid from her financial resources virtually all of the ongoing expenses of the household, including utilities, vehicle and home insurance, water, internet access, cable television and dog care. She paid the rent when the parties rented accommodation and the mortgage payments after they purchased the home. She paid for the parties' food and other household items and travel expenses. In the period 2002 to 2005, she paid for approximately nine vacation and recreational trips for the two of them.

[17] The only monetary contribution from the Respondent was approximately $3000.00 in the time period 2002 to 2005. According to the Applicant'stestimony, the Respondent was generally "broke" and frequently even relied on her to buy gas for his vehicle.

[18] Although the Respondent assisted his father and the Applicant with some renovations to the family home, he did not finish the work. The Applicant purchased the materials for the renovations. The Applicant also paid to replace the furnace and fuel tank in the family home. After the separation in 2005, she paid to repair the roof. The total of the expenditures for the furnace, fuel tank and roof was approximately $16,000.00.

[19] The Applicant also did the vast majority of household tasks such as cleaning, yard work, show shovelling and cooking. Her evidence is that no regular household tasks were recognized as the Respondent's responsibility. After several years, at her insistence, the Respondent began doing his own laundry and occasionally cooked a meal.

[20] The Applicant sometimes obtained loans to cover the expenditures she had put on her credit cards. It appears that the parties' financial circumstances were not good and the Applicant obtained secondary employmentin late 2004 to obtain more income. The Respondent, though he worked only seasonally, would not follow up on job opportunities in the off-season.

[21] The Applicant also testified that the Respondent used alcohol and drugs on a regular basis.

[22] Referring back to the factors in s. 36(6), the Applicant submits that the amount the Respondent would otherwise receive ($11,844.25) is disproportionately large in relation to the duration of the relationship. The Applicant submits that the duration of the relationship is the period 2002 to 2005, after the parties reconciled. I am not convinced that that is the only period to be taken into account. Although the parties did enter into the separation agreement which was aimed at resolving all property issues between them, that agreement also had a clauseanticipating that there might be a reconciliation and nullifying the agreement in that event. So I do not see the fact of the separation agreement as marking a break in the relationship. In my view the duration of the relationship must take into account the period from 1992 to 2002 as well. I do not consider the equalization payment that the Applicant would otherwise have to make as disproportionately large in relation to the total 13 year relationship. So the order sought would not be justified under s. 36(6)(d).

[23] However, it is clear that the Applicant has incurred a disproportionately larger amount of debts or other liabilities for the support of the family than the Respondent. The debt load she has taken on, including the mortgage on the family home, amounted as at the date of separation to $93,070.51, whereas the debt load left to the Respondent was only $5114.60. Therefore, s. 36(6)(e) militates in favour of the Applicant.

[24] Finally, s. 36(6)(j) permits consideration of other circumstances relating to the maintenance and preservation of property and the maintenance of debts. Looking at the history of the parties' financial arrangements, it appears that the Respondent's contribution to the household property was minimal at best. He did not take responsibility for any expenses or any tasks to maintain the home or other assets on a regular basis. There is no evidencethat other circumstances preventedhim from taking responsibility. The parties did not have children to look after, the Respondent did not

suffer from any illness, disability or disadvantage and save for very briefly in 2000, he did not pursue education. There is no evidence that he did anything that assisted the Applicant in pursuing her career. The picture painted by the Applicant'sevidence is of a spouse who spent his own income on his own pursuits while leaving it to the Applicant to look after the financial and other needs of the household. Similarly,there is no evidence that the Respondent has contributed to maintaining any of the assets or debts since the parties' separation.

[25] Unconscionability is a high threshold. It has been held to mean "outrageous", "shocking", "shockingly unfair" and "repugnant to anyone's sense of justice". It does not mean merely unfair or inequitable: *Fair v. Jones, supra*; *Lay v. Lay*, [2003] N.W.T.J. No. 13 (S.C.). The Applicant bears the burden of persuadingthe Court that it would be unconscionable not to order the unequal division she seeks. I must also keep in mind that conduct of a spouse is not a relevant consideration on the issue of property equalization unless it has economicconsequences for the spouse or family. This means that the Court must be wary of using property division to sanctiona spouse for conduct that is not relevant to and does not adversely affect the financial health of the family. There is no evidence that the Respondent's assaultson the Applicanthad such an effect and no evidence that his drinking did either except for an incident in 1992 when he lost a job because he brought alcohol onto the work site. So that conduct on the part of the Respondent is not reason to grant an unequal division.

[26] I do, however, think that the evidence that the Respondent chose to spend his income on items (such as alcohol and drugs) for his own use rather than contribute his income to the household is relevant to assessing his contributionto the householdand I take that into account.

[27] The *Act* recognizes that inherent in the spousal relationship is an equal contribution to the assumption of responsibilities. In this case, however, the evidence is that there was significantly unequal contribution. The Applicant assumed responsibility for virtually all the financialobligations and the householdmanagement. The evidence does not disclose any reason why the Respondent could not also have contributed in accordance with his abilities. In the circumstances, I am satisfied that it would be unconscionable not to grant the unequal division sought by the Applicant.

[28] The Respondent is not entitled to any equalization payment. The Applicantwill have sole ownership of the family home and the other assets in her possession. She

will also, as between her and the Respondent, have sole responsibility for the mortgage.

[29] The dog Jake was not included as property in the Applicant's statement of property and although in submissions her counsel characterized her claimto the dog as more of a custody claim than one of ownership, I think under the law the dog would be considered property, although there is no evidence that any monetary value should be attached to him. I order that the Applicant have sole ownership of the dog.

[30] Accordingly, the following orders will issue:

1. Each party will have sole ownership of the assets in his or her possession.

2. Neither party will pay an equalization payment to the other.

3. Sole ownership of the home at 620 Anson Drive, Yellowknife and its contents is granted to the Applicant.

4. The Registrar of Land Titles is directed to cancel the existing certificate of title to 620 Anson Drive, Yellowknife and issue a new certificate of title in the sole name of the Applicant, subject to the existing encumbrances on title.

5. Until such time as a certificate of title to 620 Anson Drive, Yellowknife issues in the sole name of the Applicant, the order made on January 20, 2006 grantingthe Applicantinterim exclusive possession will continue.

6. The Applicant will bear full responsibility for the CIBC mortgage registered against 620 Anson Drive and will indemnify the Respondent for any liability in relation to that mortgage.
7. The Applicant will have sole ownership of the dog, Jake.

[31] Because the Court heard from the Applicant only in this proceeding and the Respondent did not participate, there may be points or issues that were not canvassed.

It is not the Court's responsibility to raise arguments that the Respondent might have raised. It might also be inferred from the Respondent's failure to participate in these proceedings that he does not oppose the orders sought by the Applicant. For these reasons, this case should not be considered a precedent.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
26th day of July 2006

Counsel for the Applicant: Kenneth Allison
No one appearing for the Respondent

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