

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

In the matter of the *Children's Law Act*
of the Northwest Territories

And in the matter of the *Family Law Act*
of the Northwest Territories

BETWEEN:

HARRIET KOYINA

Applicant

- and -

GEORGE ALLAN KOYINA

Respondent

Application for the division of family property and spousal support.

Heard at Yellowknife, NT on June 13 and 14, 2007.

Reasons filed: July 25, 2007

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Applicant: Terri Nguyen
Respondent appeared on his own behalf

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REASONS FOR JUDGMENT

[1] Harriet and George Koyina were in a spousal relationship for a number of years. They separated in September 2002. Ms. Koyina now seeks an order for the division of the family property. Specifically, she seeks an order declaring that all remaining assets of the marriage are her sole property. She is prepared to take sole responsibility for any remaining liabilities of the marriage. She also seeks an order for spousal support.

[2] Mr. Koyina does not contest Ms. Koyina's request relating to the disposition of the family property. He does oppose her claim for spousal support. He says he cannot afford to pay spousal support because he is supporting his new spouse and their adoptive child. He considers that the transfer of all the assets of the marriage to Ms. Koyina would achieve a fair resolution of matters.

[3] To dispose of this case, I must decide whether the property of the marriage can be divided in the manner that Ms. Koyina suggests, and I must determine whether an order for spousal support is appropriate. The evidence about the circumstances of the parties' relationship is relevant to both of these issues.

A) BACKGROUND OF MARRIAGE

[4] The only two witnesses who testified at this trial were the two parties. In many respects their testimony is consistent. Their relationship began in the late seventies. They have two adult children, both boys, who were born in 1980 and 1982. After their first son was born they began living together. They got married in 1985, and that same year, moved into a house that they built in Behchoko.

[5] Mr. Koyina was able to pursue educational opportunities during the relationship. He obtained his licence as a heavy equipment operator in 1983 after taking training for a number of months in Fort Smith. He also took advantage of some training in carpentry during the course of the relationship.

[6] Mr. Koyina was employed during most of the relationship, working at different jobs. He worked for the hamlet of Behchoko, for various companies, and in 1999 he started to work for a mine on a 2 weeks in 2 weeks out rotation. Occasionally he stayed at the mine for longer shifts.

[7] Ms. Koyina also worked during the relationship. Before the children were born she did some sewing and handicraft work. She also worked as a cashier. After the children were born she stayed home to look after them. She later took on various jobs, some of which were part time. My understanding of the evidence is her income was far less than Mr. Koyina's .

[8] The parties separated in September of 2002. Mr. Koyina left Behchoko and went to live in Dettah. Ms. Koyina remained in the matrimonial home. Ms. Koyina testified that she struggled to support herself and continue paying family debts after Mr. Koyina left. The most significant liability was an outstanding property tax bill in the amount of \$15,465.41. There were also outstanding debts on some family vehicles. There were ongoing utility bills for fuel and power. Ms. Koyina was unable to meet these financial obligations so she borrowed money from the bank in an effort to pay off the family debts and support herself.

[9] Ms. Koyina incurred further debts to assist her sons's educational pursuits. The youngest son went to school in Lethbridge in 2001 or 2002, and his brother attended the same school in 2004. She bought a computer for them, paid their rent, sent them money for food, books, and other expenses.

[10] Mr. Koyina testified that when he left Behchoko, he took his clothes and personal belongings, and a Ford truck. He acknowledges that he did not provide financial assistance to Ms. Koyina after he left. The only family debt he says he paid was the loan on the truck. He also testified that from time to time he sent his sons money.

[11] It is against this general background that the issues of division of property and spousal support must be examined.

B) DIVISION OF FAMILY PROPERTY

1. Legal framework

[12] The *Family Law Act* S.N.W.T. 1997, c.18 (the *Act*) sets out a framework for the division of property when a relationship breaks down. The basic principle is that both spouses are presumed to be entitled to share equally in the value of property acquired during the relationship. This framework is based on the premise that both spouses contribute equally, albeit sometimes in different ways, to the relationship, and they should ordinarily share equally in the value of property acquired during that relationship.

[13] In certain circumstances, the Court can make an order for unequal division of the property. This can only be done where the Court finds it would be unconscionable not to do so. The factors that can justify an order for unequal division are set out at Paragraph 36(6) of the *Act*. Ms. Koyina argues that unequal division is justified in this case on the basis of the disproportionate amount of debts she acquired for the support of the family, the financial responsibility related to the care of the children and the circumstances related to the maintenance of the family home and to the payment of family debts after the separation.

2. Assets and Liabilities

[14] Neither party had any assets at the start of the relationship. What is to be divided, therefore, is the difference between the value of the family property and the value of family debts at the time of separation. The evidence on these topics is not entirely clear.

[15] The main asset is the family home. Ms. Koyina believes that it was worth \$90,000.00 at the time of separation. That opinion is entirely based on what another

person told her. The property was not appraised so there is no independent or reliable evidence about of its value. The other assets are household items, a truck, a car, a snowmobile, and a life insurance policy.

[16] The liabilities at the time of separation included property taxes and money owed on vehicles. As I have already mentioned, Ms. Koyina incurred additional debts after the separation. Some were incurred to assist her sons who were attending school in Lethbridge. Others were incurred because she did not have enough money to pay her regular bills and meet the obligations arising from the family debts.

[17] I have no difficulty finding that Ms. Koyina struggled financially after the separation. The evidence showed that she was often in arrears with many of her bills. At times, this led to very negative consequences that had a further financial impact on her. For example, because she was in arrears of her fuel bill, the fuel company stopped delivering fuel to her unless she paid up front. At one point she did not have any money to pay for fuel and the house froze, which resulted in damages and costly repairs.

[18] Mr. Koyina acknowledges that after separation, he did not contribute to the payment of any family debts, except for payments on the truck that he was using. He did not support Ms. Koyina financially in any way. He only remembers one of his sons going to school in Lethbridge and says that he sent him money from time to time.

3. Specific issues relevant to property division

[19] In deciding how the property should be divided certain specific issues that emerge from the evidence must be addressed.

i) educational expenses for children

[20] The parties' sons were eighteen and twenty at the time of separation. I am satisfied that while they pursued their education in Lethbridge, they were not able to withdraw from their parents' charge. To the extent that their parents were capable of supporting them, they both had the legal obligation to do so. *Children's Law Act*, S.N.W.T. 1997, c. 14, ss. 57 and 58.

[21] Ms. Koyina had very modest means after separation, but she shouldered a large portion of this obligation. I accept that Mr. Koyina sent some money periodically to one of his sons to assist him, but I find that this fell far short of his obligation to

support his children, given his income. This is one of the circumstances that must be taken into account in dividing the family property, particularly considering the debts that Ms. Koyina contracted in an effort to support her children.

ii) Property taxes

[22] Mr. Koyina was aware that taxes were being assessed on the property where the matrimonial home was built, but he never paid them. His position, if I understand it correctly, is that the property is exempt from taxes because it was used by his father several years ago. Mr. Koyina is of the view that Ms. Koyina should have adopted the same approach and not paid the tax bill. I cannot agree with that position. If a person feels they are unjustly taxed, or that taxes have been assessed by mistake, there are processes to get assessments reviewed. Simply ignoring a liability does not leave a party in a very good legal position. Ms. Koyina obviously believed that this tax bill had to be paid and she took steps to pay it. It was a responsible thing for her to do and not something for which she ought to be punished.

iii) truck payments

[23] There was considerable evidence about the debt associated with the Ford truck so I will address it briefly. The parties co-signed the loan for the truck. This loan was still outstanding at the time of separation. Mr. Koyina said he took the truck when he left. He said he made full payments on the loan for that vehicle for a number of months. He stopped making the payments when Ms. Koyina took the truck back. During Cross-Examination he was confronted with various documents showing that the loan payments for the truck were in arrears at various points while he had the vehicle in his possession. He could not explain the discrepancy between his testimony and the documents.

[24] Ms. Koyina's version was that she started getting calls from the Ford dealership about the fact that the payments were not being made. She became concerned because she had co-signed the loan. She knew she could not afford to make the loan payments on the truck. Eventually she sent one of her sons to get the truck from Mr. Koyina so that it could be taken back to the Ford dealership.

[25] In my view nothing turns on the evidence about this truck. If Mr. Koyina made some or all the payments on the truck loan while he was using the vehicle, that does not have significant impact on how the remaining family property should be divided. In addition, the asset is no longer in either party's possession. I do not find it necessary to

make specific findings as to how much money Mr. Koyina paid on the truck or the precise circumstances of its return to the dealership.

4. Division of Property

[26] Ms. Koyina has had sole use of most of the family assets since separation. She has also carried, alone, the burden of paying off significant liabilities arising from the marriage. She received no support at all from Mr. Koyina. She incurred additional debts to provide for her two sons while they attended school, a financial burden that Mr. Koyina had a responsibility to share with her but did not.

[27] Even without knowing the exact value of the matrimonial home, it is safe to assume that the assets of the marriage were worth more than the total liabilities at the time of separation. An order for unequal division of property is required if Ms. Koyina is to retain all the assets. Under the circumstances of this case, I am satisfied that it would be unconscionable not to make such an order.

[28] I have reached that conclusion because Ms. Koyina incurred a disproportionate amount of debts to deal with liabilities arising from the marriage, including the large outstanding tax bill. She was also the one who took primary responsibility for supporting the children of the marriage while they pursued their education. She covered all the expenses to maintain and preserve the family home. Given this, I find that unequal division is justified on the basis of Paragraphs 36(6)(e), (g) and (j) of the *Act*. To a lesser degree, I have taken into account that Mr. Koyina does not strongly oppose this aspect of Ms. Koyina's application.

[29] Therefore, there will be a declaration that Ms. Koyina is the sole owner of all the family assets that are currently in her possession. Since no certificate of title was entered as evidence in these proceedings, I cannot issue a specific direction to the Registrar of Land Titles with respect to title of the matrimonial home. Counsel for Ms. Koyina advised during submissions that she understood that a declaration of ownership by this Court would be sufficient to enable Ms. Koyina to obtain a new title to the property.

[30] Ms. Koyina's position is that she is also prepared to be solely responsible for any liabilities remaining from the relationship. In that regard, of course, I can only make an order that binds the parties to these proceedings.

C) SPOUSAL SUPPORT

[31] Ms. Koyina seeks spousal support for five to six years, retroactive to when her application was filed in February 2005. She asks that the amount of support be \$1,000.00 per month. This is the amount that she was awarded on an interim basis in April 2006.

1. entitlement to support

[32] While decisions on spousal support involve the exercise of considerable discretion, that discretion is guided by the objectives and factors set out in the applicable legislation. Ms. Koyina bases her claim for spousal support on sections 15 and 16 of the *Family Law Act, supra*. These principles and criteria are very similar to those set out in the *Divorce Act* R.S.C.1985, c. 3 (2nd Supp.). The principles developed in the context of divorce proceedings are therefore relevant to applications like this one. *Gabel v. Gabel* [2000] N.W.T.J. No.54 at para.6.

[33] The law recognizes three basis for entitlement to spousal support: a contractual basis, a compensatory basis, and a non-compensatory or needs basis. Ms. Koyina does not advance a contractual basis in support of her claim. Although certain aspects of her submissions could be characterized as a non-compensatory claim based on need, the core of her submissions is a claim for support on a compensatory basis.

[34] Paragraph 16(4) of the *Act* provides that the objectives of a spousal support order after a relationship has broken down include the equitable sharing of economic advantages or disadvantages to the spouses that arise from the relationship and the recognition of the spouses' contribution to the relationship.

[35] Ms. Koyina argues that she was economically disadvantaged during this relationship. As her primary role was to care for the children, Mr. Koyina was able to work full time, upgrade his education, and pursue various employment opportunities. All this contributed to him now having well paid employment. Ms. Koyina, by contrast, was employed sporadically. Her ability to be involved in the work force was interrupted after the birth of each of her two children because she stayed home to care for them. Even when she was able to resume working, she continued to be their main caregiver, so she did not have the same opportunities to upgrade her education, in Behchoko or elsewhere. Her employment opportunities remained somewhat limited.

[36] Ms. Koyina's claim largely rests on her account of the roles that the parties had in caring for the children. I have reviewed the evidence on this topic carefully because

there were glaring inconsistencies in how the parties described their role and involvement in caring for the children.

[37] Ms. Koyina said she was the children's primary caregiver, and almost their sole caregiver. She testified that Mr. Koyina rarely contributed to the children's care, because he was either at work or out drinking. She also said he provided money to her for groceries only once in a while.

[38] Mr. Koyina's version was quite different: he testified that he was very involved with the children's care because Ms. Koyina was a gambler who often stayed out very late at night and was also often gone during the day. He said that he often had to look after the children at night and was the one who got them up in the morning, fed them breakfast and got them off to school.

[39] These, obviously, are diametrically opposed versions of what transpired. My assessment of the evidence is that both versions are somewhat problematic. Ms. Koyina's description of Mr. Koyina was that of an entirely absent father who only occasionally financially contributed to the family expenses because he was always drinking. I have some difficulty accepting this, because the evidence about Ms. Koyina's employment and her income makes it unlikely she could have supported herself and the children without receiving considerable assistance from him. The dire financial situation she found herself in after Mr. Koyina left tends to confirm that before then, he was supporting the family.

[40] Another reason I find Ms. Koyina's version difficult to accept in its entirety is that she testified she was very ill for a significant period of time during the relationship. She said she got sick in 1993 or 1994, and this lasted for 10 years. The evidence about the exact nature of this illness was somewhat unclear. Ms. Koyina said it was asthma. But she also said she was barely able to get out of bed and needed help to walk and carry groceries. She seemed to describe an illness that was something more than asthma, but I cannot speculate about what it might have been. Whatever the exact nature of this illness was, it interfered considerably with Ms. Koyina's daily life during extensive periods of time. If she was incapacitated to that degree, I do not accept that Mr. Koyina's contribution to taking care of the children was as limited as she claimed.

[41] For those reasons I find that Ms. Koyina minimized the extent of Mr. Koyina's financial contributions to the family, as well as his involvement with his children.

[42] On the other hand, I also have great difficulty accepting Mr. Koyina's version of events. He testified that for a considerable period of time during the marriage Ms. Koyina was out every night gambling and that he was the children's main caregiver. If that is an accurate description of what transpired during many years of the marriage, it is difficult to imagine how he could have gone to Fort Smith for an extended period of time to take the training he did. In addition, it is not disputed that from 1990 to 1994, Ms. Koyina was employed as a "house parent" by the high school in Edzo. This job entailed her being responsible for the care and welfare of a number of students who attended the high school and were boarders. It is difficult to imagine how Ms. Koyina could have maintained this employment if her lifestyle was what Mr. Koyina described. I find, therefore, that Mr. Koyina exaggerated the extent to which Ms. Koyina's activities outside the home interfered with her ability to care for the children.

[43] The *Act* sets the parameters for spouses' obligations to support each other. Subsection 15(2) reads as follows:

15. (...)

(2) On the breakdown of a spousal relationship, the economic advantages and disadvantages arising from the spousal relationship should be equitably shared between the spouses and a spouse has an obligation to provide support for himself or herself and for the other spouse in accordance with this principle, to the extent that he or she is capable of doing so.

[44] I am satisfied that Ms. Koyina was the main caregiver for the children for most of the relationship. I accept that because of this role, she was economically disadvantaged, while Mr. Koyina was economically advantaged because he was able to pursue various training and employment opportunities. When the relationship broke down, Mr. Koyina continued to benefit from these advantages while Ms. Koyina was left to fend for herself. Under the circumstances, I find that an order for spousal support is necessary to ensure that the economic advantages and disadvantages arising from the relationship are equitably shared between the parties.

[45] Before turning to the issue of how much support should be ordered, I want to deal briefly with the evidence that each party adduced about the other party engaging in conduct that was detrimental to the relationship. Ms. Koyina testified about Mr. Koyina's drinking. Mr. Koyina testified about Ms. Koyina's gambling. This is conduct that likely contributed to the breakdown of the relationship, and it was obvious at trial that the parties were still upset about it. But that conduct is not relevant to the issue of whether spousal support should be ordered. Subsection 16(10) of the *Act* states that

the parties' conduct is irrelevant to the determination of support, unless there is evidence that shows that a party engaged in conduct so unconscionable that it amounted to an obvious and gross repudiation of the relationship. That is a very high threshold, and I have not heard any evidence of conduct that could reasonably be characterized that way.

2. Amount of support

[46] Paragraph 16(5) of the *Act* sets out a number of factors that must be considered in determining the amount and duration of an order for spousal support. All factors must be considered, as opposed to focusing on one at the exclusion of the others. *Bracklow v. Bracklow* [1992] 1 S.C.R. 420 at paras 50-53.

[47] A number of the factors are particularly relevant in this case. Ms. Koyina's role in caring for the children is relevant in a number of ways. It not only had an impact on her capacity to earn income but it also enabled Mr. Koyina to enhance his earning capacity by taking training and pursuing various types of employment.

[48] I have also taken into account the current assets and means of the parties. Ms. Koyina faced certain financial hardships after Mr. Koyina left. She was able to secure employment after the separation and has also upgraded her education to grade 10, but her means at the time of trial continued to be limited. Her income has been in the range of \$35,000.00 to \$40,000.00 since separation.

[49] Mr. Koyina continues to be employed. His income tax returns show that his income was \$85,456.27 in 2003, \$76,834.00 in 2005, \$77,407.44 in 2006 and that his gross income for 2007 as of February 3, 2007 was \$9,750.24. He reported much lower income in 2004 (\$23,182.80), but some of the evidence about where he worked that year suggests he may have earned more than that. In any event, on average, his income over the last few years has been much higher than Ms. Koyina's. Mr. Koyina testified that he thought there might be errors in some of the documents dealing with his current income, but I have no reason to doubt that the documents issued by his employer are accurate.

[50] Mr. Koyina testified about his expenses and some of the financial pressures that he faces. He asks that I take into account that he is supporting his new spouse and a child that they have adopted. He says that the child has health problems and had to be taken to the hospital on a few occasions. He believes that there might be additional

costs to raising her because of those health problems. Ms. Koyina argues that any costs incurred by Mr. Koyina to support his new family are irrelevant.

[51] The starting point is that the means of the payor spouse are relevant to the assessment of the amount of spousal support to be ordered. *Family Law Act, supra*, at Paragraph 16(5)(d); *Pittman v. Pittman* [1998] N.W.T.J. No.118. Paragraph 16(6) of the *Act* qualifies this by limiting the Court's ability to consider the economic consequences of a new spousal relationship. That provision does not exclude consideration of a person's legal obligation to support a child, nor does it completely exclude consideration for the means of the payor spouse. I have therefore taken into consideration that Mr. Koyina is supporting a child. As for the child's health problems, there is no evidence before me about specific costs that arise from those problems. However, I do understand Mr. Koyina's concerns. Should the child's health problems develop in a way that has a financial impact on Mr. Koyina, it would be open to him to make application to this Court to vary the Order based on a change in his circumstances.

[52] Another factor that is relevant to the amount of support to be ordered is how division of family property was effected and the financial impact it has on the spouses. *Moge v. Moge* [1992] 3 S.C.R. 813 at para.45; *McPike v. Wiebe* (1980), 16 R.F.L. (2d) 102, at para.13. I have taken into account that Ms. Koyina will benefit from the unequal division of the family property, and will be the sole owner or all remaining assets of the marriage, including the matrimonial home. While this is not, in the circumstances of this case, sufficient to fully compensate Ms. Koyina for the economic disadvantages arising from the relationship, it is a factor that mitigates the amount of support that I might have otherwise ordered.

[53] Finally, I have taken into account the fiscal implications of a spousal support order. Spousal support is deductible from the income of the payor. Given Mr. Koyina's income, which places him in one of the higher taxation brackets, that factor is not insignificant.

[54] Mr. Koyina argues that he should not have to pay spousal support to Ms. Koyina because she works, has a salary, and her son helps her out financially. The ability of a spouse to return to self-sufficiency is a relevant factor, but the fact that Ms. Koyina is able to work and earn some money is not determinative on the question of whether she should receive support. Similarly, assistance she receives from her children or from her family cannot in and of itself relieve Mr. Koyina from his legal obligations towards her.

[55] Based on the various factors I have referred to and on my assessment of the evidence, I have concluded that Ms. Koyina is entitled to receive spousal support from Mr. Koyina in an amount of eight hundred dollars per month for a period of five years from today's date.

[56] I realize that an order for spousal support will place a financial burden on Mr. Koyina, and will likely force him to make adjustments to his budget and lifestyle for a period of time. However, Mr. Koyina was in a relationship with Ms. Koyina for some twenty years. During that relationship, because Ms. Koyina took care of the children, he had the opportunity to work, to upgrade his education, to improve on the skills he had and to acquire others. It is evident that all this has served him very well in the work force. He will continue to benefit from these advantages for many years to come. In caring for the children, Ms. Koyina carried out an important role in the family and that role resulted in some economic disadvantages to her. Compensatory support is meant to reflect that marriage is a joint endeavour, and that the benefits and costs of it are to be shared. It is to ensure that the costs and benefits are equally shared between these parties that I have decided to make an order for spousal support.

3. Retroactive support

[57] The power to order retroactive spousal support is provided for at Paragraph 21(1)(e) of the *Act*, which states that a Court can require that support be paid in respect of any period before the date of the order.

[58] Ms. Koyina's request for retroactive support really has to do with the period between February 2005, when the Originating Notice claiming spousal support was filed, and April 2006, the date when the Interim Order for spousal support was issued.

[59] As I mentioned earlier in these Reasons, Mr. Koyina did not provide any support to Ms. Koyina after the separation. As a result, she found herself in a very precarious financial position after he left. However, I have already taken these facts into account in deciding that there should be an order for unequal division of property. In my view, making an order for retroactive support would amount to compensating Ms. Koyina twice for the financial hardships that she suffered after the separation. Therefore, I decline to make an order for retroactive spousal support.

4. Life insurance

[60] During the time of the marriage, Mr. Koyina had a life insurance policy which named Ms. Koyina as a beneficiary. He cancelled that policy after the separation. Ms. Koyina asks that Mr. Koyina be ordered to maintain life insurance designating her irrevocably as the beneficiary, in an amount sufficient to cover the spousal support obligations arising from my decision.

[61] The power to direct a spouse to maintain life insurance policy for the benefit of the other spouse, in this context, is set out at Paragraph 21(1)(g) of the *Act*:

21(1) In an application [for spousal support] the court may make an order

(...)

(g) requiring that a spouse who has a policy of life insurance as defined in the *Insurance Act* designate the other spouse as the beneficiary irrevocably.

[62] I interpret this provision as giving this Court the power to order a spouse to change the beneficiary of an existing life insurance policy. In this case, it would entail ordering Mr. Koyina to name Ms. Koyina, instead of his current spouse and child, as the beneficiary of the life insurance policy that he holds. I am not satisfied that such an order would be appropriate in the circumstances of this case. Mr. Koyina does have certain obligations towards his new family, and although they are of limited relevance to these proceedings, they should not be completely disregarded.

CONCLUSION

[63] An Order will issue with the following terms.

1. Pursuant to Sub-Paragraph 40(1)(a)(iv)(A) of the *Family Law Act*, all assets of the marriage currently in the possession of Harriet Koyina are hereby declared to be her sole property. This includes house # 85 formerly known as house # 185, in Behchoko, Northwest Territories.
2. Harriet Koyina is hereby declared to be solely responsible for paying any remaining debts or liabilities that arose during the relationship, as between herself and George Koyina. Harriet Koyina will indemnify George Koyina for any claim made against him in relation to any such liabilities.

3. Pursuant to Paragraph 21 (1)(a) of the *Family Law Act*, George Koyina shall pay spousal support to Harriet Koyina in the amount of eight hundred dollars (\$800.00) per month on the first day of each month commencing on August 1, 2007, and each month thereafter until July 1, 2012 inclusive.

[64] If the parties wish to make submissions as to costs, they can arrange for a convenient date with the Clerk of the Court to appear before me in Chambers for those submissions.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
25th day of July 2007

Counsel for the Applicant: Terri Nguyen
Respondent appeared on his own behalf

S-0001-CV-2005000043

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