Date: 2008 09 29 08
Docket: S-0001-FM-2006000123

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

AND 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:

NANCY LAMB

Applicant

- and -

DAVID WALCER

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant, Nancy Lamb, seeks custody of the two children of the relationship - C.W., 11 years of age and K.W., 9 years of age - a determination of the Respondent's income for 2007 and 2008 and an appropriate level of child support to be set, arrears of child support, calculations and awards of child support and extraordinary expenses payable by the Respondent retroactively and at present, division of matrimonial property, directions for distribution of funds held in trust from the sale of the matrimonial home and costs .

[2] At the commencement of the trial of this matter on September 9, 2008, the Respondent, David Walcer, who represented himself, appeared briefly and advised the Court of his demands and what he was and was not prepared to accept from this process. In particular, he told the Court he would settle for nothing short of joint custody of his children, the money he spent to buy the lot upon which the family

home was built and his labour and other expenses incurred in doing repairs and renovations prior to the marital home being sold. After advising he had little faith in the justice system, he left the courtroom and did not return. The trial proceeded in his absence, the Applicant being the only witness.

Background

[3] The parties entered into a common law relationship in October or November of 1985. In approximately 1983, the Respondent had purchased a lot at 37 Johnson Crescent in Yellowknife for the sum of $24,500.00. Evidence given by the Applicant was that the Respondent had taken out a 3 year loan for the purchase and that only 2 years had elapsed on it when they began living together. She further said that the final payment on the loan was made just prior to Christmas of 1985, some two months after the parties began living together. By her reckoning, after two years, only 2/3rds of the loan would have been paid off and therefore as of October of 1984, there would have been approximately $8,500.00 owing to the bank. The parties saved for and constructed a house on the property and took possession in May of 1990. As indicated earlier, in his brief appearance before the Court and in affidavit material filed by the Respondent, he makes clear he is claiming the full amount of the purchase price as monies he should receive from the distribution of funds.

[4] The Applicant has been employed with the City of Yellowknife for 26 years. In 2005 she was promoted to the position of Supervisor of Financial Operations and at that time her hours of work changed such that she worked until 5 p.m. instead of 3:30 p.m. This meant she had to put the children in day care after school. The Respondent has been employed as a carpenter with the Yellowknife Housing Authority since approximately 1986.

[5] There were two children of the marriage, namely, C.W. 11 years old and K.W. 9 years old.

[6] Over time, the relationship deteriorated and the Applicant left the marital home in October of 2004. At separation, the Respondent remained in the matrimonial home and paid for the mortgage and utilities. The Applicant paid some expenses on the home. She and the children moved into an apartment and paid rent until August 2008 when she bought a new home.

[7] The matrimonial home was sold on June 20, 2007 for $475,000.00. A number of agreed upon debts have been paid from the proceeds but there remains the sum of $252,950.44 in a solicitor's trust account to be disbursed in accordance with directions from this Court.

[8] After separation, the parties had a shared parenting arrangement for a time but had to resort to counselling to settle differences regarding children and other matters. The counselling was ultimately unsuccessful and decisions have not been made jointly concerning the children since January of 2005 but rather by the Applicant alone. In February of 2007, the Applicant was forced to obtain an Emergency Protection Order against the Respondent as a result of telephone threats made by him. At the time of separation a highly dangerous situation developed in the Respondent's home when he threatened the Applicant with a butcher knife. She was visibly shaken and emotional in giving her testimony relating to this incident. There were other incidents involving threats with a baseball bat, and where the Respondent made violent gestures with a hockey stick towards a friend of the Applicant. In any event, since the Emergency Protection Order was granted, the Respondent has had very little, or at least sporadic, contact with the children. After the sale of the marital home, the Respondent moved into a "Bed and Breakfast" establishment where he has one room with only one bed. By house rules, guests are only permitted to stay one night and only one may "sleep over" at a time. So long as the Respondent remains in this accommodation, he will be unable to have both children stay overnight at the same time.

[9] By an Interim Order dated August 24, 2007 the Applicant was granted day to day care and control of the children with the Respondent having liberal as well as specified access. Further, the Respondent was ordered to pay $1,030.00 per month in child support payments based on 2006 reported income of $68,255.00. Also, he was ordered to provide financial information under the *NWT Child Support Guidelines*, information relating to his pension and registered retirement savings plan accounts and proof of his equity in the former marital home as at October 1984. By Order dated September 20, 2007, the Respondent was ordered to pay the Applicant $150.00 per month for his proportionate share of present and future child care and special expenses for the children.

[10] The Respondent provided no financial information (up to the date of trial) as ordered other than what was required to pay agreed upon debts from the proceeds of sale of the marital home. As well, the Respondent failed to make any child support

or extraordinary expense payments voluntarily. Child support has been obtained by garnishment proceedings through the office of Maintenance Enforcement but there remained outstanding as at the date of trial, arrears in the amount of $8,990.00.

Custody

[11] After the parties separated, they alternated having physical custody of the children each week but since February of 2007, the children have been in the day to day care and control of the Applicant and she has clearly been the primary care giver. The Respondent has had liberal access to them over the past 18 months but since September of 2007 has exercised that access with decreasing frequency. Usually, to arrange visits with the Respondent, the children initiate telephone calls and often are required to leave messages. On occasion the Respondent will phone at the "last minute" and wish to spend time with the children but they would have made other plans and commitments. The Respondent has sought a joint custody arrangement in these proceedings but given the history of the relationship after separation and the extreme difficulty in communicating or arriving at rational decisions in the best interests of the children, in my view joint custody is ill-advised in this case. The children's performance at school has improved over the past year while living full time with the Applicant who struck me as a caring and sensible parent. As well, she has enrolled C.W. in hockey, soccer and baseball in the summer and K.W. in soccer and gymnastics which are healthy and constructive activities. So, the Applicant shall have custody and day to day care and control of the children.

Access

[12] It is clear from the evidence of the Applicant and material on file that the Respondent is a caring parent who does wish to be a part of the children's lives. The Applicant testified at length about incidents where violence was threatened against her or a friend by the Respondent. The children were witness to at least one incident. It seems clear that the Respondent is a person who has been devastated by the break up of his common law marriage and has had difficulty in accepting that the union is over. Virtually all of his aggression has been directed at the Applicant or her friend. Of some concern to the Court is evidence of the Applicant that the Respondent has threatened to take his own life on occasion and the feeling that he is unstable and could "implode at any time." At the same time, she testified that she feels the Respondent has no reason to hurt the children and they themselves have

expressed no concerns. The Applicant indicated she wanted the Respondent to be part of the children's lives and would agree to him having access to the children every second weekend for one day and one night each week on condition that she be given 48 hours notice of his intention to exercise access. Her one caveat is that she does not feel it appropriate that K.W., who is now almost 9 years old, sleep in the same bed as her father and she asks that there be no overnight access with K.W. unless she is able to sleep in her own bed. In the circumstances, I think these proposals are reasonable.

Child Support

[13] In 2006, the Respondent's reported income from employment was $68,255.03 and he was, accordingly, ordered on August 24, 2007 to pay the sum of $1,030.00 each month commencing March 1, 2007. As of the date of trial, arrears of child support and extraordinary expenses based on the 2006 income figure were $8,990.00. He has not made payments voluntarily and all financial support has been obtained through garnishment proceedings by the office of Maintenance Enforcement. As a result of the Respondent's failure to provide financial information for 2007 and 2008, the Applicant has sought to have imputed income fixed for those years based on some historical wage increases prior to 2006. This would have increased the Respondent's income by almost 5% each year. As an employee with the Yellowknife Housing Authority, the Respondent is a member of the Public Service Alliance of Canada and for the years 2007 and 2008 would have received increases in accordance with those negotiated within the relevant collective agreement. Counsel for the Applicant agreed that this would be a more accurate method of calculating wage increases and subsequently provided evidence that pay increases for the Respondent's bargaining unit in 2007 and 2008 were 3% each year. Using that percentage, his income would have then increased to $70,303.00 in 2007 and $72,412.00 in 2008.

[14] Given the Respondent was ordered to pay child support commencing March 1, 2007, any retroactive support would be payable to that date. A 3% increase in child support would raise the monthly payments from $1,030.00 to $1,060.00. The difference of $30.00 per month for 9 months in 2007 would be $270.00 which I will order be paid retroactively to the Applicant. Another 3% increase for 2008 would raise the monthly payments to $1,092.00 - a difference of $32.00 a month for 9 months which equals $288.00. Accordingly, I find that the total amount owing in retroactive child support from March 1, 2007 to September 1, 2008 to be $558.00.

Extraordinary Expenses

[15] The Respondent was ordered to pay $150.00 for his proportionate share of s. 9 extraordinary expenses (based on his 2006 income) on September 21, 2007 to commence on October 1, 2007. Based on the imputed income figures for the Respondent for 2007 and 2008 and the actual expense incurred by the Applicant, she seeks to have the amount of these expenses for 2007 and 2008 increased retroactively. As well, the Applicant testified that over the past year she has paid for hockey, soccer, gymnastics, piano, summer camp, necessary equipment and child care-all of which qualify as legitimate s. 9 expenses under the *Child Support Guidelines* of the Northwest Territories, N.W.T. Reg. 138-98, and which exceed the amount of expenses placed before the Court on September 21 of last year. I should add that, virtually without exception, the Applicant provided receipts to prove she paid for these items. In any event, the Applicant seeks an order for retroactive s. 9 expenses in the sum of $639.00 which I find to be justified and I will make that order. As well, she seeks an increase of $9.00 per month to the amount payable for s. 9 expenses as of September 1, 2008 based on the Respondent's proportionate share which has actually decreased since the date of the last order. I will grant this relief.

Division of Matrimonial Property

[16] 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 ends, the basic principle being that the parties are presumed to be entitled to share equally in the value of property acquired during the relationship. Net family property of a spouse does not include, *inter alia*, property acquired prior to the commencement date of the relationship. [s.35. (1)]

[17] Accordingly, to calculate the Respondent's net family property, it is important to establish the date when the common law marriage commenced. While there was some confusion here, the Applicant testified at trial that the parties started living together some time in October of 1984 and I find that as fact. Whatever the Respondent paid for the lot on Johnson Crescent will then not be included in his net family property.

[18] The Applicant has rightly conceded that whatever the Respondent had paid down on the loan he had taken out for the purchase of the martial property at the time cohabitation commenced, should be paid to him from the proceeds of sale. She has testified that the Respondent had obtained a 3 year loan to purchase the land and that he had, "within a month or two", a year left on the loan when they started living together. She then made a mathematical calculation - two thirds of a 3 year loan for $24,500.00 equals roughly $16,500.00 which would leave $8,000.00 owing once the parties started living together. She further testified that the Respondent went in and paid off the loan just before Christmas of 1985; that he "found the balance and paid that off." She had no recollection if it was paid from a joint bank account or whether joint accounts had been set up at the time.

[19] Counsel for the Applicant argues that the Respondent did not produce financial information relating to this property as he was ordered to do nor appear at trial and, as such, the evidence of the Applicant is not controverted and should be accepted.

[20] While I found the Applicant to be a truthful and credible witness, these events took place over 24 years ago and her precise recollection of them is understandably hazy. In an Affidavit on file, she had said the parties commenced living together in early 1985 and in her Trial Brief, the date was asserted to be in the Fall of 1984. The solid facts I can glean from her testimony are that the loan was still outstanding and had less than a year to go on it when cohabitation started. Her evidence that there would have been almost one-third of the loan outstanding at the time was guesswork as it was about the kind of loan the Respondent had. Ms. Lamb speculated that there are penalties with most loans if you try to make early payments. The facility here could have been a short term loan where there are no such penalties and the Respondent could have made a number of unscheduled payments on principal to reduce it substantially. As well, the Respondent could have had saved a sum of money from prior to cohabitation earmarked to discharge the loan. While the Respondent produced no documentation concerning the loan, it may have been helpful if the Applicant could have produced copies of her bank statements, if available, or some other documentation to assist the Court in arriving at an appropriate estimate of what amount was outstanding at the time of cohabitation. While it is the evidence of the Applicant that I am to consider, I must also be satisfied on a balance of probabilities that a set of alleged facts has been proved. Given that the loan was paid by the Respondent within a few months of cohabitation, that he "just found the balance and paid that off", and that the

Applicant was forced to guess and make a mathematical calculation in order to arrive at a notional figure on the unpaid loan, I am not persuaded on a balance of probabilities that there was $8,000.00 outstanding. Given the evidence as a whole, I find that the sum of $2,500. 00 was outstanding and should be considered as matrimonial property.

[21] A Direction to Pay to Solicitors acting on the sale of the marital home, dated June 7, 2007, was filed as an exhibit. It discloses that from the proceeds of sale of the marital home, in addition to the mortgage, real estate commission and legal fees, the following debts were paid from trust on the signed agreement of the parties:

> Bank of Nova Scotia Line of Credit - $43,336.76
> All-West Glass - $328.09 (invoice for side light)
> Matonabee Petroleum - $856.90 (final fuel)
> Carl's Carpet - $333.90 (steam cleaning)
> Fitzgerald Carpeting - $664.39 (invoice for installing astro turf)
> David Walcer - $753.52 (reimbursement for lino invoice, paint invoice and burner pans)

[22] As well, disbursed from trust were payments to the parties of $25,000.00 each on June 20, 2007, $10,300.00 each on December 13, 2007. On March 10, 2008, the sum of $5,402.56 was paid to the Keenan Bengts law firm in trust for David Walcer, $3,250.00 was disbursed to Mr. Walcer and $8,652.56 was disbursed to Ms. Lamb. The Respondent made a statement at the beginning of the trial that he wanted all the money owed to him for fixing up the house for sale and for his labour. The Applicant gave evidence to suggest she would be entitled to some compensation for having split evenly the cost of retiring the Line of Credit since the Respondent was to have been responsible for maintaining those payments after separation. She said the balance on this loan was higher than at separation largely because the Respondent did not pay the taxes and they were simply charged to this loan. I should add that the Applicant did not specifically make this claim and assume that it was brought to the Court's attention so the Respondent's claim for additional consideration for his work on renovations could be evaluated in an equitable context.

[23] The parties agreed on June 7, 2007, that from the proceeds of sale of the marital home, they would discharge the indebtedness listed above. There were no caveats or without prejudice endorsements on the Direction to Pay or anything else

that is before the Court to otherwise indicate that the intention was there would be no further dispute in regard to these items. I find that in instructing solicitors to pay out debts on the house, including one to the Respondent, the parties intended to resolve these issues out of court and they did so and that no further monies are owed to either party relating to the marital home other than those remaining in trust.

[24] There remains the issue of equalization of matrimonial property in total. Evidence was adduced relating to assets and liabilities as at the date of separation and counsel provided the Court with a useful summary filed as an exhibit. When considering an equal share in the marital home (value as per sale price), vehicles, household items, and the cash value of life insurance policies the Applicant's share of matrimonial property was $268,953.00 and the Respondent's $282,655.00. The Respondent is then credited with $22,000.00 towards the purchase of the land and therefore his share of matrimonial assets comes to $260,655.00. The liabilities of the parties assumed by the Applicant at dissolution were $106,801.00 and those of the Respondent were $68,481.00. Deducting liabilities from assets leaves the parties with net assets of:

> Applicant - $268,953.00 less $106,801.00 = $162,152.00
> Respondent - $260,655.00 less $68,481.00 = $192,174.00

[25] To divide matrimonial property evenly, the Respondent shall be required to pay to the Applicant one half of the difference of the net assets or $15,011.00.

[26] The Applicant is making no claim against the Respondent on any retirement savings plans or his pension as their post-retirement financial positions are seen to be approximately equal.

Conclusion

[27] In the result, the Order of the Court is as follows:

> 1. The Applicant, Nancy Lamb, shall have sole custody and day to day care and control of the children C.W. and K.W.
>
> 2. The Respondent is granted reasonable access to the children as may be agreed upon and specific access on the following terms and conditions:

(a) one day every second weekend and one weeknight each week with the exception that K.W. shall not stay overnight with the Respondent until such time as he resides in accommodation where she can have her own room and bed;

(b) when seeking reasonable or specified access the Respondent shall provide the Applicant with a minimum of 48 hours notice;

3. The Respondent shall pay retroactive child support in the sum of $558.00.

4. The Respondent shall pay ongoing child support in the sum of $1,092.00 per month commencing September 1, 2008 and remaining payable on the 1st day of each and every month thereafter until further order of the Court;

5. The Respondent shall pay to the Applicant arrears in child support in the sum of $8,990.00;

6. The Respondent shall pay retroactive child care and special expenses in the sum of $639.00;

7. The Respondent shall pay to the Applicant $159.00 per month for his proportionate share of present and future child care and special expenses until further order of the Court;

8. The Respondent shall pay to the Applicant a matrimonial property equalization payment of $15,011.00;

9. The law firm of Denroche and Associates is hereby directed and ordered to disburse from its trust account where it held the sum of $253,489.13 as at September 4, 2008 the following sums:

(a) The sum of $8,990.00 shall be remitted forthwith to the Maintenance Enforcement Office of the Department of Justice, Government of the Northwest Territories in

satisfaction of outstanding arrears of $8990.00 for child support owed to the Applicant;

(b) The sum of $16,208.00 shall be paid forthwith to Nancy Lamb representing a matrimonial property equalization payment of $15,011.00 together with retroactive child support and special expenses of $558.00 and $639.00 respectively;

(c) The sum of $20,000.00 is to be retained in trust until further order of this Court;

(d) The balance of $208,291.13 and any interest accumulated to the date of disbursement, less any reasonable legal fees and disbursements, is to be divided equally between and paid to Nancy Lamb and David Walcer by separate cheques or deposits to their respective accounts;

(e) The issue of costs is reserved and may be spoken to on application to the Court;

(f) The Applicant shall take out the formal Judgment and may serve the Respondent by attempting personal service at his residence at 114 Knutsen Avenue in Yellowknife and if the Respondent is not present or, if present, he refuses to accept service, then service may be effected by depositing the documents to be served with any adult resident in the dwelling whose name shall be recorded and set out in the Affidavit of Service.

(g) The Applicant shall serve the formal Judgment, along with a copy of this Memorandum of Judgment, on the firm of Denroche and Associates.

D.M. Cooper

J.S.C.

Dated this 29th day of September, 2008.

Counsel for the Applicant: Margo Nightingale
The Respondent was self represented.

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REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE D.M. COOPER
