Wilkinson v. *Beaulieu*, 2008 NWTSC 82

Date: 2008 10 22
Docket: S-0001-CV 2005000001

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JENNIFER WILKINSON

Applicant

- and -

DONALD ALEXANDER BEAULIEU

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant in this action claims the following relief: (i) sole custody of the children of the relationship with the Respondent to have reasonable access; (ii) child support to be paid by the Respondent; (iii) that the Respondent pay a proportionate share of s. 9 expenses; (iv) an unequal division of family property with the Applicant to have sole ownership of the family home and its contents; (v) that family photographs retained by the Respondent be returned to the Applicant; and (vi) costs.

[2] The trial proceeded on September 23, 2008. Although the Respondent was served with notice of the trial date along with the Applicant's trial brief indicating the relief sought by her, he did not appear at trial.

[3] Since the Respondent did not appear at trial, the facts before me are as testified by the Applicant, who also adopted the contents of several affidavits she had sworn earlier in the proceedings. I will also refer to an affidavit filed by the Respondent insofar as it was addressed in the Applicant's testimony and because it contains an admission about his status with regard to one of the children.

Background

[4] The Applicant and the Respondent lived together in a common law relationship from August 1998 to September 2003. They had a child together, B., born in 1997. The Applicant's child from a previous relationship, J., born in 1995, also lived with them. Although two of the Respondent's children from a previous relationship also lived with the parties, both of them are now over the age of 19 and there is no evidence before me as to their current circumstances so I will not mention them further. When I refer to "the children", I am referring to B. and J.

[5] The parties are the joint owners of a home in Fort Smith, which is subject to two mortgages. At the time of their separation, they also owned a van that was subject to financing and had various other debts.

[6] A number of interim orders have been made in these proceedings. On March 18, 2005, an order was made imputing annual income of $18,000.00 to the Respondent and requiring him to pay child support of $280.00 per month until April. That order also required that he make financial disclosure by April 19, 2005. On April 29, 2005, the matter was adjourned until May 20 with the child support to continue until then and the Respondent's financial information to be filed by May 12. On the latter date, the Respondent filed his only affidavit in these proceedings; it includes information as to his income.

[7] On May 20, 2005, child support was continued in the amount of $280.00 per month and the matter was adjourned to June 3, 2005. The May 20 order also required that each of the parties exchange income tax returns and notices of assessment no later than July 1 each year for the previous taxation year. The Respondent was represented by counsel when the order was made.

[8] The next order as to the merits of the action was made November 3, 2006. That order granted interim sole custody of the children B. and J. to the Applicant with the Respondent to have liberal and generous access as arranged between the parties. The Respondent was also ordered to file his 2005 income information by November 30, 2006 or show cause why he should not be held in contempt. That order was served by substitutional service pursuant to an order made in 2005. At some point after this counsel for the Respondent filed a notice of ceasing to act, although the record indicates that he had not appeared for the Respondent since May 2005.

[9] The Applicant subsequently changed counsel and the next order on the merits was made May 8, 2008. That order gave leave to the Applicant to set this matter down for trial. It also ordered the Respondent to provide to the Applicant's counsel his income tax returns for 2005, 2006 and 2007, if available, and any recent pay stubs or 2007 T4 statements within 20 days of service of the order. There is no proof on the court file that the order was served on the Respondent.

[10] It appears from the court record that the Respondent has not appeared, either in person or by counsel, on any of the court applications since May 2005. The evidence before me is that he has not provided any financial disclosure since filing his affidavit of May 12, 2005.

Custody and Access

[11] Since the parties separated in September 2003, the children have remained in the care of the Applicant. On her evidence, the Respondent's contact with them has been somewhat sporadic and minimal. There is no application before me by the Respondent for custody. I am satisfied that it is in the children's best interests that they remain with the Applicant. The Applicant will therefore have permanent sole custody of the children and the Respondent will have reasonable access to them as may be agreed on by the parties.

Child Support

[12] The Applicant seeks an order imputing to the Respondent annual income of $66,867.00 and based on that income, that child support be payable in the amount of $1,010.00 per month on the first day of each month. She also asks that child support in that amount be payable retroactive to May 1, 2005, with the Respondent to be credited for any child support actually paid since then.

[13] The Applicant asks that income be imputed to the Respondent because of his failure to provide financial information. The March 18, 2005 order imputed income of $18,000.00 and the May 20, 2005 order appears to have used that figure for calculation of child support as well, although the Respondent's affidavit that was before the Court states that he was then employed with the Town of Fort Smith as a garbage truck driver earning $23.19 per hour working 16 hours per week. He also filed tax return summaries showing the following gross income: 2002: $18,825.79; 2003: $35,000.73; 2004: $30,639.32. There is no indication in the affidavit whether those amounts are from full or part time work.

[14] In her affidavit sworn April 10, 2008 and adopted in her testimony at trial, the Applicant says, based on information received from acquaintances and her own observations, that the Respondent is now employed full-time driving the water truck for the Town of Fort Smith. As at the date of trial he was current with child support payments under the orders made by this Court, from which I infer that he earned or had access to enough money to make those payments.

[15] The Applicant provided affidavit evidence that the most recent Statistics Canada figures available on the internet show that in 2005 the average yearly income for adult males employed in Fort Smith was $66,867.00. Although this is greatly in excess of the income declared by the Respondent in the income tax returns he provided for the years 2002, 2003 and 2004, since he has provided no further information as to his employment and income, pursuant to s. 19(1)(f) of the *Child Support Guidelines* made under the *Children's Law Act*, S.N.W.T. 1997, c. 14, and in light of the Applicant's evidence that he is working full time, I will impute income to him in the yearly amount of $66,867.00.

[16] The Applicant testified that the Respondent always treated J. as his child and treated him no differently than B., until the past year when the Respondent ceased any contact with J. I note that the Respondent's affidavit filed in May 2005 says with regard to J., "I have acted as a father to this child". I am satisfied that the Respondent did act *in loco parentis*, that is, as a parent to J., and accordingly child support will be payable for J. as well as B.

[17] Therefore, based on annual income imputed in the amount of $66,867.00, the Respondent is to pay child support to the Applicant for J. and B. in the amount of $1,010.00 per month, on the first day of each and every month.

[18] The next issue is the commencement date for child support in that amount. The Applicant asks that it be payable commencing May 2005, when the Respondent last provided any financial information or, alternatively January 2006, because of his failure to provide his 2005 income tax return.

[19] Based on the order made May 20, 2005, the Respondent should have provided his 2005 income tax return and notice of assessment by July 1, 2006. The order obviously contemplated that there might be an adjustment of child support based on his declared income for 2005. I also take into account that the Statistics Canada figure is substantially in excess of what the Respondent made from 2002 to

2004 according to his income tax returns. But by not making the financial disclosure he was ordered to, the Respondent has put himself in a situation where his true income is unknown and it is reasonable to infer that he does not want it to be known because it would lead to an increase in the child support he has to pay.

[20] Balancing all of this, in my view it is appropriate to use the imputed figure starting January 2006. Since the *Child Support Guidelines* were amended effective May 1, 2006, support of $927.00 per month is payable from January to April 2006 and $1,010.00 per month commencing May 1, 2006. All amounts actually paid by the Respondent are to be credited towards the arrears that will result from this order.

[21] The Applicant also seeks payment of a proportionate share of special (health) expenses under s. 9 of the *Child Support Guidelines.* Specifically, the Applicant seeks payment of $187.50 per year commencing January 1, 2006 until further order of the Court.

[22] The expenses are for epi-pens and eyeglasses for B. in the total amount of $375.00, of which the amount sought, $187.50 is half. Counsel for the Applicant suggests that the expense be apportioned half to each of the parties as the income imputed to the Respondent is close to the Applicant's income.

[23] The evidence about these expenses is sparse and was not addressed in the Applicant's testimony. In her affidavit sworn April 10, 2008, the Applicant says that she had great difficulty funding B.'s glasses when she first required them and that she now needs a new pair. In her affidavit sworn June 4, 2008, she says that B. requires glasses and she provides a quote from a store for $250.00, saying that last time she purchased glasses for B. they were more expensive. She also says that B. requires a new epi-pen at a cost of $127.11 each for two, one for school and one for home. The glasses and the two epi-pens would total $504.00.

[24] There is no evidence before me that the items in question have been a yearly expense in the past and no evidence about the last time or times they were purchased. There is also no evidence as to how often the Applicant expects to incur these expenses in the future. I will make an order that the Respondent pay the sum sought, $187.50, this year and that in future years he will pay a proportionate share, based on his income, of s. 9 expenses upon production to him by the Applicant of receipts for the expenses actually incurred.

Property Division

[25] The Applicant asks for an order that each party retain the assets and debts in their possession without any equalization payment and that she be granted sole ownership of the family home and its contents in Fort Smith.

[26] The family home is owned jointly by the parties and is encumbered by a first mortgage to CIBC Mortgages Inc. and a second mortgage to The Northwest Territories Housing Corporation ("NWT Housing").

[27] The Applicant testified that the home was purchased for $94,500.00 in 2002. The CIBC mortgage was approximately $87,000.00, and included funds for renovations to the home. The NWT Housing mortgage was in the amount of $27,899.00, of which $10,000.00 was a grant that is not repayable and $17,899.00 is repayable according to the terms of the mortgage.

[28] The Applicant tendered in evidence an appraisal dated August 22, 2002 estimating the value of the home to be $95,000.00 as is and $104,000.00 as improved with the renovations.

[29] The Applicant testified that she made most of the mortgage payments. The payments were automatically withdrawn from the parties' joint account, but she contributed more to the account. The Respondent worked part-time and although his income did go into the joint account, he would withdraw it and use it for other things, such as a trip he took to Edmonton.

[30] On separation in September 2003, there was approximately $85,000.00 owing on the CIBC mortgage and $17,000.00 owing on the NWT Housing mortgage. The Applicant continued to make the mortgage payments without any contribution from the Respondent. She changed the account to her name alone and from it also paid the power, water, fuel, home expenses, groceries and insurance.

[31] The Applicant's mother has been residing in the family home since the Applicant moved to Yellowknife in early 2006 and paying $650.00 per month in rent, which at one time covered the mortgage payments but does not now do so. The mother pays for utilities and the Applicant pays the remaining expenses. The house was appraised at $195,000.00 in June 2007.

[32] The parties also jointly owned a van that they purchased in October 2002 for $35,000.00. The Respondent took the van after the separation and the parties agreed that he would make the payments owing on it while the Applicant would make the payments owing on the home. However, the Respondent did not make any payments and the van was repossessed, leaving approximately $15,000.00 owing on it. The Applicant paid the debt off in early 2008 without any contribution from the Respondent.

[33] The Applicant also testified she paid approximately $2,500.00 in credit card debts which had been incurred during the relationship for everyday expenses although she was able to give details about only two such debts, for Mastercard and Sears, totalling just over $1,800.00.

[34] In his affidavit filed in May 2005, the Respondent refers to an unspecified debt of $9,000.00 incurred during the relationship and for which payments were garnisheed from his wages. The Applicant testified that she recalls no such debt. Without any further evidence from the Respondent on this point, I am unable to conclude that there was such a debt or take it into consideration.

[35] The issue of family property is governed by the *Family Law Act*, S.N.W.T. 1997, c. 18. The *Act* creates a regime whereby assets are to be divided equally, regardless of the contribution made by the spouses. It does this by creating a share in property value through the payment of money so as to equalize the value of the assets held by each spouse. To set the equalization payment, if any, the Court must determine the "net family property" of each spouse. The net family property is the value of all property (except that 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 on the date the spouses commenced cohabitation (for a common law relationship, known as 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.

[36] There is no evidence before me as to what the Applicant and the Respondent owned when they commenced cohabitation.

[37] The Applicant takes the position that on the valuation date, when the parties separated September 5, 2003, the assets were negated by the parties' liabilities. The family home would have been worth somewhere between $95,000.00 and

$104,000.00; I will use the figure $100,000.00. The two mortgage debts would have totalled approximately $102,000.00. Although there would have been some value in the van, it was lost on repossession shortly after the parties' separation, leaving the $15,000.00 debt. There were also credit card debts of at least $1,800.00. The value of the parties' assets was therefore "zero" at the time of separation.

[38] The Applicant submits that in these circumstances, the family property value should be considered equalized as at separation and the Respondent not be entitled to any of the present increase in the value of the home. She submits that she should be granted sole ownership of the home as she has been the one maintaining it and paying the expenses since the separation.

[39] Alternatively, the Applicant asks for an unequal division of family property pursuant to s. 36(6) of the *Family Law Act*, which provides that a Court may make an unequal division where it is of the opinion that it would be unconscionable not to do so, having regard to a number of factors. The Applicant relies on the following factors included in s. 36(6):

> (c) a spouse's intentional or reckless depletion of his or her net family property;
>
> (d) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to the duration of the spousal relationship;
>
> (e) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities for the support of the family than the other spouse;
>
> (g) the needs of the children of a spouse and the financial responsibility related to the care and upbringing of the children;
>
> (h) a substantial change, occurring after the valuation date, in the net family property of either spouse and the circumstances of the change;
>
> (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.

[40] The burden is on the Applicant to show that in the circumstances, it would be unconscionable not to order the unequal division requested, unconscionability being a very high threshold, amounting to "repugnant to anyone's sense of justice": *Fair v. Jones*, [1999] N.W.T.J. No. 44 (S.C.); *Anderson v. Antoine*, [2006] N.W.T.J. no. 51 (S.C.).

[41] In my view, an unequal division is justified in these circumstances under subsections (c), (e), (g) and (j). Under (c), the Respondent failed to make payments on the van, thus wasting its value and leaving a debt of $15,000.00 which he did not pay. Under (e), the Applicant has taken responsibility for all the debt incurred during the relationship with no assistance from the Respondent. Under (g), the Applicant has also taken on responsibility for addressing the needs of the children and has shouldered financial responsibility for their care and upbringing. The Respondent has provided a minimal level of financial support and then only when ordered to do so and has refused or failed to disclose particulars of his income for purposes of calculation of child support.

[42] Under (j), the Applicant has been the sole contributor to the upkeep and expenses of the family home since separation and its increase in value is likely due at least partially to her efforts in that regard. There is no evidence of any contribution by the Respondent to the increased value of the home.

[43] Based on the above factors, I am satisfied that it would be unconscionable not to grant the unequal division sought by the Applicant, with the result that she will have ownership of the family home and its contents. The value of the latter was not specified but appears from the Applicant's affidavit evidence to be minimal. As between the Applicant and the Respondent, the Applicant will bear responsibility for the mortgage debts and will indemnify the Respondent from any liability in that regard. This result should also follow in my view if one regards the asset value as zero on the date of separation, since all of the debt has been taken on by the Applicant.

Family photographs

[44] The Applicant also requests that the Respondent return to her the family photographs that he kept, or that he provide her with copies of same. This seems fair and an order will go to that effect.

Costs

[45] Counsel requested lump sum costs and suggested $2,500.00 for fees apart from disbursements. I order that the Applicant have her costs in the amount of $2,500.00 for fees plus disbursements to be taxed.

[46] Accordingly, the following orders will issue:

1. The Applicant will have permanent sole custody of the children J. and B. with the Respondent to have reasonable access to them as may be agreed on by the parties;

2. The Respondent will pay child support for J. and B. in the amount of $1,010.00 per month based on imputed annual income of $66,876.00; support in that amount is payable on the first day of each month commencing May 1, 2006 and in the amount of $927.00 per month for the months of January to April 2006. All amounts which have been paid by the Respondent for child support previous to this order are to be credited to the arrears resulting from this order;

3. The Respondent will pay $187.50 for s. 9 expenses this year by November 30, 2008. In future years he will pay a proportionate share of s. 9 expenses upon production to him by the Applicant of receipts for the expenses actually incurred;

4. Each party will provide to the other a copy of their income tax return and all notices of assessment by July 1 of each year for the previous taxation year;

5. The Applicant will have sole ownership of the family home, Lot 395, Plan 207, Fort Smith and its contents;

6. The Registrar of Land Titles is directed to cancel the existing certificate of title to Lot 395, Plan 207, Fort Smith and issue a new certificate of title in the sole name of the Applicant, subject to the existing encumbrances on title;

7. As between the Applicant and the Respondent, the Applicant will bear responsibility for the mortgage debts secured against Lot 395,

Plan 207, Fort Smith, and will indemnify the Respondent from any liability in relation to same;

8. The Respondent will return to the Applicant the family photographs in his possession or provide her with copies of same;

9. Except as set out above, each party will retain the assets in their possession and each will be responsible for the debts they owe;

10. Neither party will make an equalization payment to the other;

11. The Applicant will have her costs paid by the Respondent in the amount of $2,500.00 for fees plus disbursements to be taxed.

[47] Because the Respondent did not appear at the trial and the Court heard from the Applicant only, 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. Accordingly, this case should not be considered as a precedent.

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

Dated at Yellowknife, NT, this
22nd day of October, 2008

Counsel for the Applicant: Karina Winton
No one appeared for the Respondent.

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