Date: 2010 07 21
Docket: S-1 -CV-1997006895

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THERESE ARROWMAKER

Applicant

- and -

PETER ARROWMAKER

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant and the Respondent are spouses who separated in 1996. It appears that neither has commenced proceedings under the *Divorce Act*. In 1997, the Applicant brought an application under the *Domestic Relations Act*, R.S.N.W.T. 1988, c. D - 8 ("DRA", since repealed) for custody of the parties' daughter, child support, spousal support and exclusive possession of the family home. An interim order was granted on February 21, 1997 which gave the Applicant custody, child support in the amount of $600.00 per month and exclusive possession of the home. The order states that the Applicant's right to bring an application for interim spousal support is reserved. The Respondent did not appear on the application that led to that order.

[2] Nothing further transpired in the proceedings until March of 2009, when the Applicant, in the same action, filed a Notice of Motion seeking interim and permanent spousal support under the *Family Law Act*, S.N.W.T. 1997, c. 18 ("FLA"). That application came before the Court on June 11, 2009, at which time the presiding Chambers Judge made certain procedural orders and directed that the parties provide further affidavit evidence. An appeal was taken from that order but

it was adjourned *sine die* after being spoken to on October 21, 2009 and appears to have been abandoned.

[3] The Applicant brought the FLA application for interim and permanent spousal support back on before the Court in June 2010; counsel argued the application for interim support on July 9. This is my decision on the application.

Is the Applicant's Claim Statute-barred?

[4] The Respondent raises a preliminary issue under s. 32(1) of the FLA. That section provides:

> 32. (1) No proceeding for an order for the support of a spouse may be brought under this Part more than two years after the day the spouses separate.

The "Part" referred to is Part II of the FLA, entitled "Support Obligations".

[5] The Respondent argues that s. 32(1) bars the Applicant's claim for spousal support. The FLA came into force on November 1, 1998. On the same date, the DRA, under which the Applicant first brought her claim in 1997, was repealed by s. 88 of the *Children's Law Act*, S.N.W.T. 1997, c. 14. The Respondent says that the Applicant's claim under the FLA is out of time because it was not brought until 2009, 13 years after the parties separated.

[6] The Applicant disagrees that her claim is out of time. She relies on s. 36(2)(b) of the *Interpretation Act*, R.S.N.W.T. 1988, c. I - 8, which provides:

> 36. (1) In this section,"former enactment" means an enactment that is repealed;"new enactment" means an enactment that is substituted for an enactment that is repealed.
>
> (2) Where an enactment is repealed in whole or in part and another enactment is substituted for the former enactment,
>
> (b) every proceeding commenced under the former enactment shall be continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment;

[7] The Applicant says that when the DRA was repealed and the FLA came into force, her claim under the DRA continued as a claim under the FLA.

[8] The Respondent says there is no legislative provision that substitutes a claim under the FLA for a claim under the DRA, nor does the FLA declare itself to be substituted for the DRA.

[9] Counsel did not submit any jurisprudence on the meaning of the term "substituted" or any authority that substitution must specifically be set out in the legislation. Based on the common meaning of the term "substitute" as a person or thing acting or serving in place of another, and the statutory definition of "enactment" as an Act or a regulation or any portion of an Act or a regulation (s. 28(1), *Interpretation Act*), I conclude that the FLA was substituted for the DRA in so far as it provides for spousal support in proceedings that are not taken under the *Divorce Act*. No territorial statute apart from the FLA now provides for spousal support in non-divorce proceedings.

[10] Therefore, the Applicant's claim for spousal support is, and was, continued under the FLA effective November 1, 1998. In my view, the fact that it is continued is not dependent on the Applicant filing a new application specifying that her claim is now under the FLA; s. 36(2)(b) of the *Interpretation Act* makes the continuation automatic and does not require that a new proceeding be brought.

[11] In this case, the Applicant's right to apply for spousal support was specifically reserved pursuant to the order of February 21, 1997; this is not a matter of a new claim being brought. Whereas her claim had originally been made under the DRA, by operation of s. 36(2)(b) of the *Interpretation Act*, it became a claim under the FLA when the latter statute came into effect; however, the claim was "brought", to use the words of s. 32(1) FLA, under the DRA, which did not contain a limitation period. The evidence is that the parties separated in 1996 and the claim under the DRA was brought in 1997 so even if the limitation period in the FLA can somehow be said to apply to claims that were already in the system before it came into effect, the claim was brought within 2 years. Accordingly, I conclude that the limitation period in s. 32(1) of the FLA does not bar the Applicant's claim.

Factual Background

[12] For the most part, the parties agree on the facts. They married in 1968 and separated in 1996. Three of their children were independent by the time these proceedings were initiated in 1997; one daughter, 9 years of age, remained in the care of the Applicant.

[13] The parties had a traditional relationship in that the Applicant looked after the household and cared for the children and only occasionally worked outside the home, for example part time at a seniors' residence when the children were young. She has a grade 1 education and speaks little English; her language is Dogrib. At the time of the 1997 court application, she was 52 years old, unemployed and on social assistance. Since then, she has been able to obtain sporadic housekeeping work. She is occasionally able to obtain employment preparing food for meetings and teaching aboriginal culture. She is now 66 years old and is beginning to have pain in her shoulders and arms.

[14] The Applicant's income tax information indicates that in 1996 she had income of $10,675.00 and in 1997, income of $12,206.00. Her income in 2008 was $9,494.00, including Canada Pension, and in 2009 it was $8,587.00. Her current financial statement shows monthly income of only $500.00 in the form of Old Age Security. The child support payments ended in 2006 when the parties' daughter turned 19.

[15] The Applicant has resided in the family home in a small community since the separation. Although the Respondent describes it as a good, solid house, and it has electricity, it lacks running water and indoor plumbing. The Applicant has to use an outhouse. The home is heated by a wood stove only.

[16] The Applicant has been living in a common law relationship since the spring of 2002. Her spouse has a grade 3 or 4 education and works as a labourer when there are construction projects available in the community. His 2009 income tax return shows income of $8,473.00, which the Applicant says is reflective of his income since they have resided together. She and her spouse split household, vehicle and food expenses. Her current financial statement shows that she is left with a monthly deficit of $708.00.

[17] The Applicant says that after the child support payments ended, she tried to apply to Legal Aid but for reasons unknown, nothing came of it. She applied again in 2008 which I take it resulted in the Notice of Motion filed in 2009.

[18] The Respondent, who is now 61 years of age, has a grade 11 education. While the parties were together, he was employed regularly with the Band and held positions of significance, such as Band Manager and Band Chief and Sub-Chief. In 1995, he began working for a mining company and continued working in that industry full time until 2006, when he was seriously injured in an accident. He was unable to work for over a year and then resigned from his job because he was no longer able to do it. He says that it is unlikely that he can obtain full-time work at his age and he cannot do physical labour. He does contract work for an aboriginal government from time to time and sits on the board of directors of its investment corporation which pays him an honorarium and expenses for meetings. He lives in Yellowknife and spends quite a bit of time hunting.

[19] The Respondent has lived in a common law relationship since 1996 and he and his spouse have an 11 year old daughter. His spouse works full time and pays the majority of their household expenses, including the mortgage on their home, which she owns. The Respondent says that he has not accumulated any significant assets. He has not filed a financial statement in these proceedings and there is no information before me about what expenses he pays.

[20] The Respondent's income tax information indicates that his income has fluctuated over the years since the separation. From 1999 to 2004, his income exceeded $60,000.00 per year; it then decreased to between $29,000.00 and $53,000.00 for the next three years. In 2008 his income was $76,559.00 and in 2009 it was $86,212.00 from work and a pension.

[21] The Respondent expects his income to be about $50,000.00 in 2010 as some of the work he did in the last two years is no longer available. He expects to retire in the next 3 or 4 years.

[22] The Respondent says that when the parties separated, he left all their property with the Applicant, including the family home and household furnishings. There is a dispute between the parties about what happened with a boat and snow machine

but that is not significant for purposes of this application. There is no evidence before me as to the value of any of these assets and the Applicant says that she has been told that the house cannot be appraised.

Positions of the Parties

[23] The Applicant says that due to her age, lack of education and skills, and limited ability to speak English, she is unable to support herself and requires spousal support. Her role in the 28 year marriage was to look after the children and the home. Such income as she has or is able to obtain is minimal. In the years following the separation she managed to get by on the child support paid by the Respondent and when that support ended, she took steps to revive her claim for spousal support. She seeks interim spousal support in the range of $1,000.00 to $2,426.00, based on calculations her counsel has provided under the *Spousal Support Advisory Guidelines*.

[24] The Respondent points out that for most of the years following separation he paid child support in an amount more than would have been required under the *Child Support Guidelines.* He emphasizes the Applicant's lengthy delay in pursuing her claim and says that interim orders are meant to deal with the period immediately after separation and before trial. He concedes that the Applicant has a triable claim, but says it is a weak one. He takes the position that her current disadvantaged position may have more to do with her current relationship than the breakdown of their marriage. He also expresses concern about the effect a spousal support order will have on his ability to support his daughter, particularly after he retires.

Analysis

[25] An order for spousal support is discretionary: s. 16(1) FLA. In determining whether to make an order, I must take into account the requirements of the FLA, in particular the following provisions:

> 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.
>
> 16. (4) An order for support on the breakdown of the spousal relationship should;
>
> (a) equitably share the economic advantages and disadvantages to the spouses arising from the spousal relationship;
>
> (b) recognize the spouses' contributions to the spousal relationship; and
>
> (c) recognize the effect that having custody of a child of the spouses has on a spouse's earning capacity and career development.

[26] The scope of the inquiry on an interim application for spousal support is limited and is meant as a temporary solution until trial when the evidence and issues can be explored more fully. The main focus on an interim application should be to alleviate economic disparities by addressing needs and means. The Court has to determine whether there is at least a triable issue on entitlement to support: *McLean* v. *McLean*, 2001 NWTSC 38; *Muchekeni* v. *Muchekeni*, 2008 NWTSC 23.

[27] The Applicant argues that she is entitled to support on the basis of the compensatory and non-compensatory models described in *Bracklow* v. *Bracklow*, [1999] 1 S.C.R. 420. These models are also reflected in s. 16 of the FLA, some of which is quoted above.

[28] As to the compensatory model, this was a long term marriage in which the Applicant stayed at home looking after the family and was economically dependent on the Respondent. She has little education and developed little or no marketable skills or earning potential. Thus it is arguable that she has been economically disadvantaged by the marriage breakdown.

[29] On the other hand, it is arguable that the Respondent was economically advantaged by being able to work outside the home and obtain positions with a reasonable level of income that has generally increased over the years.

[30] On a non-compensatory, or needs and means, analysis, it is clear that the Applicant is not able to support herself on what little income she has or can earn. This situation is likely to decline further as she gets older. The Respondent has the means to assist her.

[31] The Respondent does not argue that the Applicant does not have a triable claim, but says her case is so weak that interim support should not be ordered. He says the weakness in her case is due to two factors: delay and the unlikelihood of success.

[32] The length of the delay here is unusual. However, delay is just one factor to take into account among all the circumstances of the case. It may affect entitlement or, if entitlement is established, it may affect quantum: *Brown* v. *Brown*, [1996] A.J. No. 658 (C.A.); *Belcourt* v. *Chartrand*, [2006] O.J. No. 1500 (O.S.C.J.); *Way* v. *Hanes*, [2000] O.J. No. 3608 (O.S.C.J.); *Lakhani* v. *Lakhani* (2003), 43 R.F.L. (5^{th}) 175 (O.S.C.J.).

[33] The cases indicate that the important considerations in connection with delay are whether there is an explanation for the delay and whether the spouse from whom support is sought has been prejudiced.

[34] Delay is one of the issues that the parties may delve into more thoroughly at trial. Although there is no information before me as to why the Applicant did not pursue spousal support in 1997 when she obtained the order for child support, it is a reasonable inference that she was able to manage thereafter with the child support paid by the Respondent. It appears that she made efforts to revive her claim for spousal support when the child support ended. The fact that she lives in a small community where there are no lawyers, her lack of education and her limited English may account for at least some of the delay in bringing this matter back before the Court. The delay between June 2009 and July 2010, during which the appeal from a procedural order was brought, is troublesome, but I am reluctant to place responsibility for that on the Applicant considering her lack of education and her circumstances.

[35] In my view, the Applicant has provided an explanation for the delay that is *prima facie* reasonable. The question then is whether the Respondent has been prejudiced by that delay.

[36] It is reasonable to think that had the Applicant pursued her claim for spousal support in 1997, she would likely have been successful. That being the case, it is arguable that the Respondent has benefited in not having had to pay any spousal support over the years. Although during those years the $600.00 per month he paid in child support usually exceeded what he would have paid under the *Child Support Guidelines*, about half the time the excess was less than $100.00 per month.

[37] The Respondent has a good income and he has not presented any evidence of any significant expenses. There is no evidence that he has arranged his financial affairs or other circumstances in any particular way because he was free of support obligations. Although the fact that he has a child to support has to be taken into account, the only information before me is that his current spouse pays most of the household expenses, so it is difficult to assess the impact of a spousal support order on the Respondent's ability to support the child.

[38] On the material before me, I conclude that the Respondent has not demonstrated that he has been prejudiced by the delay.

[39] The Respondent also submits that interim support ought not be ordered because the Applicant's claim is unlikely to succeed at trial. He identifies delay as the primary reason why it is unlikely to succeed. I have already dealt with that issue and for the reasons given, I cannot say that the claim is unlikely to succeed due to delay, although in the end that will be up to the trial judge.

[40] Another factor identified by the Respondent is the Applicant's current common law relationship. The Respondent argues that the Applicant's disadvantaged situation may arise from that relationship rather than from their marriage. However on the evidence before me, that is speculation. The evidence simply indicates that the Applicant's current spouse has little education and earns little income. This is quite unlike the situation in *Belcourt* v. *Chartrand*, *supra*, where the spouse seeking support from her first husband had been through a second

marriage breakdown which resulted in financial issues that were found to be the likely cause of her unfortunate circumstances. Obviously this is an issue that may be addressed more fully at trial, but at this stage I find no evidentiary support for this aspect of the Respondent's argument.

[41] The Respondent also questions why the Applicant has not been able to obtain employment which would allow her to support herself. Again, that is an issue that will be dealt with at trial, but it is certainly not surprising that a woman of the Applicant's age with a grade 1 education and limited English has few options for employment.

[42] In summary, for the reasons set out above, I find that there is a triable issue as to whether the Applicant is entitled to support on a compensatory or a non-compensatory basis and that despite the delay she has a reasonable prospect of success.

Amount of Support

[43] In determining the amount of interim support the Respondent should pay, I take into account that if the Applicant is unsuccessful in her claim for permanent support, the Respondent will not be able to recover any amounts he pays in interim support. I also take into account that the Respondent's after-tax cost of spousal support payments will be less than the amount ordered.

[44] The expenses listed by the Applicant in her financial statement are modest, indicating a lifestyle that is far from lavish. There is no indication that she plans to move from the family home, despite its lack of running water and indoor plumbing. Based on her current financial statement, she has a deficit of $708.00 per month.

[45] There is no evidence upon which I can conclude that an amount that would cover or even exceed the Applicant's deficit will cause hardship to the Respondent.

[46] The calculations provided by the Applicant are based on the *Spousal Support Advisory Guidelines*, which are advisory only and not law. The calculations set out a range of amounts. At the low end, the range starts at $1,064.00 per month, based on the Respondent having yearly income of $43,518.00 and the Applicant having

income of $9,484.00. At the high end, the range goes to $3,065.00 per month, based on the Respondent having income of $86,214.00 and the Applicant having income of $8,587.00. The Applicant asks that support be ordered in the $1,000.00 to $2,426.00 range. Counsel for the Respondent objected to the use of these figures, pointing out that a number of factors go into the calculations.

[47] The *Spousal Support Advisory Guidelines* are not binding on this Court but they may be useful as a guide against which an order that is contemplated can be compared. In this case, however, there are some unusual factors, such as the delay and the fact that both parties are in their sixties and the Respondent is, not unreasonably, considering retirement in only a few years.

[48] For purposes of this interim order, I prefer to look at what the Applicant needs and what would provide her with a reasonable level of support to maintain or enhance somewhat her current circumstances. There is no suggestion in her affidavits that she needs or expects to incur any significant expenses in the near future.

[49] Taking into account all the circumstances, I order that the Respondent pay interim spousal support in the amount of $1,100.00 per month commencing June 1, 2010, the month he was served with the present application. Any claim for retroactive support before that date is adjourned to be dealt with at trial.

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

Dated at Yellowknife, NT, this
21st day of July, 2010.

Counsel for the Applicant: Charlene Doolittle
Counsel for the Respondent: Elaine Keenan Bengts

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