

IN THE FAMILY COURT OF NOVA SCOTIA

Citation: Heisler v. Heisler, 2013 NSFC 3

Date: 20130115

Docket: FLBMCA-081260

Registry: Bridgewater

Between:

Karen Heisler

Applicant

v.

Richard Heisler

Respondent

Judge:

The Honourable Judge William J. Dyer

Heard:

December 12, 2012, at Bridgewater, Nova Scotia

Counsel:

Johnette Royer, for the Applicant
Michael Ellis, for the Respondent

By the Court:

[1] Karen Heisler (the wife) and Richard Heisler (the husband) are the parents of three children, a daughter and two sons. They were married in mid May, 1988; they separated in early April, 2012.

[2] The wife started proceedings under the **Maintenance and Custody Act (MCA)** in early June, 2012 shortly after the breakup of their relationship and marriage which spanned more than two decades. At this juncture, the parenting arrangements for the two youngest children (who are still dependants) are not in issue, but I was asked to deal with the issues of interim child and spousal support pending a final hearing.

[3] The parties' daughter is 21 years old. She graduated from high school over three years ago. She is employed seasonally in the local area. The wife does not claim money for her support.

[4] There are no prior written agreements or court orders. And, the parties have not settled the division of their matrimonial assets and debts by agreement or by court determination. Although the Family Court has no jurisdiction over property matters, both parties mustered evidence about who may (or may not) be responsible for certain debts, about who may (or may not) be responsible for delays in selling the matrimonial residence, and about related outstanding issues.

[5] Perhaps not surprisingly, the wife has turned to the Family Court for an interim determination of the maintenance. On a without prejudice basis, she agreed that any interim award(s) could impose a start date of December 1, 2012.

[6] The parties agreed that I would consider affidavit evidence and the submissions of counsel. There was no oral testimony, so I will refrain from making any findings about the credibility of the deponents. But, I will summarize the evidence I have relied upon in reaching my conclusions.

Wife's Circumstances

[7] The wife is 46 years old. She has a grade 11 education, but no additional formal education or special training. During the marriage, she was a full-time homemaker and caregiver for the children. At various times, she made and sold craft work, but this netted only about \$500 to \$1,000 annually.

[8] The wife said that the husband has been a foreman for a freight company based at Dartmouth, Nova Scotia for about five years. (It was eventually stipulated that his annual income has been about \$45,950.)

[9] She referred to the parties' jointly owned residence in the Hubbards area which has an estimated value of \$260,000 to \$270,000, against which there is a mortgage of about \$96,000. It attracts monthly payments of about \$648 (presumably including principal, interest and taxes). Efforts to ready the property for sale have been a source of conflict.

[10] According to the wife, the parties have a credit card debt of approximately \$3,100; and she owes her brother just over \$2,000 for purchases made on the brother's credit card for appliances and other small household items.

[11] The eldest son is a grade 12 high school student; his younger brother is in grade 7. Both are attending a private Christian School near Tantallon. The wife stated that private school enrolment was directly related to diagnoses of Attention Deficit Hyperactive Disorder. (ADHD). Because of the wife's limited financial means, the school now charges what I would call nominal tuition and registration fees. Her evidence was that the parties had discussed enrolment, in advance, and the husband supported the arrangements (at least until the separation).

[12] After the separation, the husband relocated to Dartmouth and he reportedly started to cohabit there with another woman. When the wife started legal proceedings, her expectation that the husband would be relocating back to the local area and living at his grandmother's home after the completion of some renovations. Her expectations were well-founded.

[13] The wife described the matrimonial home as unfinished and conceded the parties had agreed that it should be sold with any proceeds to be divided between them. Immediately after the separation, the husband continued the monthly mortgage payments by providing her with \$310 twice monthly which she

redirected to the lender. More recently, the wife asserted there have been frequent problems with the mortgage payments and, as a consequence, she has received numerous calls from the lender about missed payments and the implications. At one stage, payments were 75 days overdue.

[14] Additionally, the wife said her husband discontinued her motor vehicle insurance and also closed out their bank accounts, including one from which she was taking money to meet ordinary living expenses. Moreover, the wife said the matrimonial home was heated primarily by wood, but that she did not have enough money to purchase fuel for the winter season. She wrote that she also had to take the initiative and accept responsibility for the supply of, and payment for, basic utilities at the residence because her spouse flatly refused to continue with payments. (There was no countervailing evidence about these claims.)

[15] The wife's understanding is the husband has a health insurance plan through his employment but she has not been provided with full particulars. The sons take medication regularly with prescription costs totalling about \$189 monthly. She seeks coverage for her sons.

[16] The wife has high blood pressure which requires medication. About ten years ago, she was diagnosed with several mental health conditions which are also treated, in part, with prescription medications. The wife's medications attract a total cost of about \$90 monthly.

[17] The wife demonstrated a total monthly income of about \$729 made up of a National Child Tax Benefit plus child support from the husband. (Benefits are available only in relation to the youngest child.) Total monthly expenses for the wife and two sons are about \$2,300 leaving a substantial budget deficit of almost \$1,600 monthly. (Her budget does not include the mortgage payments.)

[18] As mentioned, the wife believes the husband is cohabiting with a woman who has two dependant children of her own, and that they and her children may all be living under the same roof. (The husband said nothing to clarify the prevailing arrangements.)

[19] The wife acknowledged the husband made some repairs and improvements to the matrimonial home in preparation for its sale. She exemplified this; but she

also gave examples of work that she has done. She discussed some issues surrounding legal and practical access to the matrimonial home which has further complicated, and perhaps delayed, its sale.

[20] The wife would prefer to remain in the matrimonial residence with the children until it is sold, but she needs financial help to do so. She expressed concern that if the husband defaults on the mortgage, she and the children will not have a home and will have nowhere to go.

[21] The wife believes that the husband received about \$20,000 from the sale of an inherited family property. She also mentioned that besides the mortgage she and the husband still owe about \$5,600 in unsecured debt to others.

The Husband's Evidence

[22] Attached to the husband's affidavit was an undated letter which purports to be from the Branch Manager of his current employer. It suggests that the employer has experienced a 30% reduction in the volume of freight being processed and a reduction in the number of shifts per week for the husband and all of the company's employees. The document also indicates the husband had over 30 weeks of work during the past year with less than five shifts per week and over ten weeks of work with three shifts or less. There is no formal letterhead and, of course, it is not under oath. The upshot is that the husband anticipates his income may be less than in the past. Assuming the husband would not deliberately mislead the court, for interim purposes, I nonetheless receive the document with caution.

[23] The husband acknowledged that the utility accounts for the matrimonial home were removed from his name "on the advice of a lawyer other than my current lawyer". No other explanation was offered for this arbitrary action. There was no expression of concern for the possible consequences to the wife and children or assurances that he would make amends.

[24] According to the husband, he has tried to prepare the residence for sale; and he exemplified work that has been done and expenses that have been incurred. He estimated total costs for repairs, etcetera at about \$3,000. He also claims to be sharing the costs of putting in a new driveway with his own mother and stated that he owes her \$2,000. He gave his version of the circumstances surrounding access

to the property and the difficulties in achieving an easement or other remedy. He stated that the wife has refused to complete certain legal documents in order that sale of the home may be facilitated. He claimed he has had difficulty paying the bills for the matrimonial home, but was not specific and provided no receipts, demand letters (if any), etcetera. That said, he gave assurances that he wants to expedite a sale, that the wife and children can stay there until that occurs, and that he will pay the mortgage.

[25] The husband confirmed he is now renting a property in the local area from his mother at a rate of \$600 monthly. He admitted he received \$20,000 from the sale of a parcel of land which he inherited from his uncle; and he said the funds have been used for repairs to the property he now occupies.

[26] The husband claimed no knowledge of monies spent by the wife on her brother's credit card (as previously discussed). He also disputes the \$5,600 credit card balance referred to by the wife - he said the card was used for her benefit and asserted that he is not responsible for that particular debt.

[27] The husband strongly asserted that since the separation the wife has done nothing "to mitigate my responsibility to support her". And, he submitted that she should be making efforts to find employment "as she has time available to her during the day in order to work". He mentioned that his sons are away at school each day during the school year - the implication being that she can work if she wants to.

[28] The husband acknowledged his responsibility to pay basic child support pursuant to the **Child Maintenance Guidelines (CMG)**, and his responsibility to contribute to some of the **CMG** section 7 expenses. However, he resists the request that he contribute to the costs of the children's schooling. He stated he does not have enough money to pay for them to attend private school and he would prefer that they attend public school. He mentioned that he has never paid more than \$200 annually towards his children's education, in any event.

[29] The husband agreed to maintain his children on any health plan through his employment, as long as it is available. However, he submitted that he is unable to keep the wife on his health plan given that the parties are now living separately.

[30] The husband conceded he is responsible for paying interim spousal support. But, he asked that it be set at the low end of the range under the **Spousal Support Advisory Guidelines (SSAG)**.

[31] Tax summaries from the Canada Revenue Agency indicate that the husband's 2011 line 150 income was \$45,946. In 2010 it was \$44,238 and in 2009 it was \$45,252.

[32] In his Statement of Financial Information (Budget), the husband posited a gross monthly income of about \$3,829. (This is equivalent to his 2011 gross income - notwithstanding the employer's document). Against income, he claimed total monthly expenses of almost \$6,500 which results in a deficit of about \$2,600. His budget does not reflect the current (lower) rent being paid by him, but it does include support currently being directed to the wife (\$610 monthly) and the mortgage (\$700 monthly).

[33] The husband did not volunteer his current partner's income or her contribution to household expenses. Nothing was disclosed about her children (if living with her), child or spousal support by others, etcetera.

Evidence of Celia Heisler

[34] Celia Heisler is the husband's mother. She deposed that her son and she sold five parcels of land in Lunenburg County for \$170,000 in late May, 2012. Her evidence was that her son received \$20,000 from the sale, and that he was not responsible for, and did not pay, any of the disbursements on the sale from which he derived benefit.

[35] There was also evidence from this deponent that her son and his girlfriend (Tanya Rogers) started renting a house from her and her husband on July 1st, 2012. She stated that the original rental rate was \$900 monthly. It is a month-to-month lease.

[36] Ms. Heisler's understanding is that Tanya Rogers was to contribute \$300 monthly toward the rent but has been unable to do so. Accordingly, she wrote that she and her husband have reduced the rent to \$600 monthly which is the same

amount that her son has been contributing towards rent since he first occupied the property. (Ms. Rogers did not submit an affidavit or make any financial or other disclosure, on her own initiative.)

Discussion/Decision

Child Support

[37] Regarding basic child support, and utilizing an estimated annual income of \$45,950, it was submitted on behalf of the wife that the husband should pay \$634 monthly, on the first day of each month, starting December 1st, 2012. It would be interim and “without prejudice”. As this was unopposed, it will be ordered. Any support payments made by the husband on or after that date shall be first credited against his child support obligations.

[38] With respect to the section 7 **CMG** claims, it was submitted that the wife will accept a modest \$100 monthly towards the children’s educational costs - this being 1/12 of the total estimated yearly expense. I am satisfied the threshold requirements of the section have been met for interim purposes, and that enrolment last Fall was consensual or, at least not strongly opposed. It would make no sense to force the boys out their current school setting in the middle of the academic year. The amount requested is ordered, starting effective December 1, 2012, coincidental with the basic support payment, unless the parties agree in writing to another date (such as mid-month).

[39] Additionally, the wife seeks confirmation and an order to the effect that both children will be maintained under the husband’s group health insurance plan at his place of employment. I will so order.

Spousal Support

[40] Regarding spousal support, the wife proposes that she make the mortgage payments from any award approved by the court. Given the wife’s precarious financial circumstances and the history of late or non-payment of the mortgage by the husband, it was submitted that so long as she and the children occupy the home she should control, and be responsible for, the mortgage. To that end, the court

was invited to consider an award near the upper end of the **SSAG** range and to impose a mortgage payment term or condition on her.

[41] I am mindful that child support payments are not deductible for personal income tax purposes. However, spousal support will be deductible by the husband so that his net (after tax) cost will be significantly less than the face value of any award. Spousal support received by the wife will have to be declared by her.

[42] Regarding the wife's health circumstances, it was stressed on her behalf that her monthly medication expenses result from prescribed treatment and should be considered when the spousal support quantum is set within the **SSAG** framework. As noted elsewhere, the husband previously had coverage for the wife's benefit. Assuming cessation of that coverage was connected solely to the reality of the parties' separation, the wife submits the (new to her) prescription costs are relevant when looking at possible **SSAG** outcomes.

[43] On behalf of the wife, the court was reminded the husband had not provided a "year-to-date" pay statement from his current employer; and that the husband diverted \$20,000 to his new residence (as opposed to the one which the wife now occupies with the children).

[44] Under the **SSAG**, on behalf of the wife, it was submitted that the appropriate range of awards is from \$718 to \$924 monthly. (This was not challenged.) Even at the high end of the scale, it was submitted that the husband's net cost would be around \$600 monthly. There was no evidence to offset this submission. And, countervailing calculations were not offered.

[45] It was submitted that if the husband has taken on financial responsibility for a new partner (and maybe her children), and not disclosed her financial circumstances, the court should give short shrift to any suggestion of mitigation in his favour. It was argued his primary obligations remain to his wife and children.

[46] The husband's position is that he cannot afford to pay the total awards proposed by the wife. The child maintenance awards are significant. And, he submitted that any interim award should be at the lower end of the **SSAG** range. (He undertook to provide proof of the wife's dis-entitlement to group coverages in due course.) He took a strong position that the wife's prescription medication costs

should be paid out of her spousal support award - not, in effect, added to it. Moreover, it was argued that the wife can mitigate her financial plight by being more proactive in securing and maintaining employment outside the home.

[47] The court's authority to make spousal support orders is found in section 3 of the **MCA**. A wide variety of interim and final orders may be made. I am mindful that the court must give priority to child maintenance when considering a spousal support award and I have done this.

[48] Also, although counsel have agreed that the **SSAG** can and should be considered at this interim stage, I have directed my attention to section 4 of the **MCA** which sets out a host of non-exhaustive factors to be considered when fixing the quantum.

[49] The commentary at Chapter 5 of the July, 2008 **SSAG** publication by the Department of Justice (Canada) confirms that the **Advisory Guidelines** are intended to apply to interim as well as final orders. Indeed, the interim support setting is characterized as "an ideal situation" for use of the **Guidelines**. The commentary suggests that in most cases there will be a need for quick and easy calculations, on the understanding that more precise calculations and adjustments may be made at the final hearing.

[50] Chapter 12 of the same publication canvasses circumstances in which there may be departures from the ranges of amounts and durations for spousal support under the formulas. A helpful consolidation of potential exceptions is presented.

[51] In the present case, given that entitlement is not in issue and that there is consensus that the court may refer to the **SSAG**, I find it unnecessary to embark on a detailed examination of the parties' finances. I will use the husband's income as determined for **CMG** purposes.

[52] Based on the available evidence, I find that the wife has made out a *prima facie* case that she has been the primary caregiver for the children during the course of the marriage, that she has had very limited income, that she has significant health issues which have affected and will continue to affect her ability to earn an income outside of the home, and that her income and capital positions are fragile, at best.

[53] For interim purposes I am not persuaded that the wife is a malingerer or otherwise deliberately avoiding accepting responsibility for her own support, inflating her own financial needs, or needlessly increasing the demands being made on the husband.

[54] Counsel for the wife utilized a computer software program to generate a range of potential interim awards. Counsel on behalf of the husband made no submissions in this regard. The calculations on behalf of the wife are consistent with my own.

[55] In looking at possible exceptions to what might otherwise be a routine exercise, it was submitted on behalf of the wife that at the interim phase spousal support should be increased to the upper end of the award range, assuming the wife makes the mortgage payments. (The converse, of course, is that if the husband is to make the mortgage payments, then spousal support may have to be reduced.) Indeed, this scenario is one of the “compelling financial circumstances” examples given in Chapter 12 of the Government publication.

[56] Another exceptional circumstance may be illness and disability. The wife’s current medical circumstances are such that she has uninsured personal expenses associated with prescription medications which were previously covered by the husband’s group insurance.

[57] I accept the husband’s submission that the (wife’s) medication costs ought not be automatically treated as “add ons” - akin to extraordinary expenses under section 7 of the **CMG**. That is, even at the interim stage, I find it inappropriate to simply fix an appropriate award and then add to it an amount equivalent to the net cost of the wife’s present uninsured expenses. On the other hand, I find the wife’s unmet medical expenses may arguably be a factor tending to push the potential interim award upward.

[58] One of the advantages of running various scenarios through computer programs is that a reasonably clear picture may emerge about the after tax implications to, and cash flows of, the spouses. Having a picture, or series of pictures, depicting how a range of awards will impact on the parties is very helpful when weighing submissions that the recipient may or may not be able to make

ends meet and, conversely, that the payor may or may not be able to afford that which is ordered.

[59] In the present case the husband's arbitrary and high-handed decisions to refuse to pay the utilities at the former matrimonial residence and to delay in making or to refuse to make mortgage payments when due, augers for vesting responsibility for those expenses in the wife.

[60] As mentioned, the wife has proposed, pending further court order, that she pay the mortgage (principal, interest, and taxes) and the utilities associated with her occupation of the residence. I find that that is a reasonable position to take and it is reflected in my application of the **SSAG**.

[61] Against the background of the child support award, and allowing there is an element of rough justice because of the limited evidence, I fix interim spousal support at \$875 monthly with payments to start effective as of December 1st, 2012. Payments of spousal and child support shall continue on the first day of each and every month thereafter, until otherwise ordered by a court of competent jurisdiction. Child support payments made by the husband which are established by way of receipts for the month of December and thereafter shall be credited to the husband. The award is predicated on payment of the mortgage by the wife. The husband shall receive credit for any mortgage payments made by him on or after December 1, 2012 pending release of this decision.

[62] Maintenance payments shall be made directly by the husband to the wife (who shall provide receipts) until and including March 1, 2013. Thereafter, payments shall be through the Maintenance Enforcement Program.

[63] Ms. Royer shall prepare an order capturing the outcome.

[64] A final hearing date shall be set by the Family Court Officer, upon request, in consultation with counsel for the respective parties.

Dyer, J.F.C.