

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Wells v. King*, 2015 NSSC 232

Date: 2015 - 08 - 04

Docket: 1201-065830; SFH-D 078781

Registry: Halifax

Between:

Terri-Lynne Wells

Petitioner

v.

Gerard Thomas King

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: July 16 and 17, 2015

Counsel: Damien J. Penny for Terri-Lynne Wells
Robyn L. Elliott, Q.C. for Jerry King

By the Court:

Introduction

[1] This decision involves the issues of divorce, property division, spousal support and child support. More precisely, it is decision about the date of separation because this date has significant consequences for the other relief claimed.

[2] In 2011, Ms. Wells petitioned for divorce. She also claimed a division of property, child support and spousal support. She claimed she and her husband separated in 2011. Mr. King has maintained throughout that the parties separated in 2005.

Credibility

[3] Ms. Wells offered her own testimony to support her claim that the couple separated in 2011. To support his claim, Mr. King offered his own testimony, the testimony of the couple's older daughter and various corroborating documents.

[4] In weighing the evidence, I must consider Ms. Wells' credibility.

[5] In *Baker-Warren v. Denault*, 2009 NSSC 59 at paragraph 19, Justice Forgeron identified factors to be balanced when assessing credibility. These factors include: the inconsistencies and weaknesses in the witness' evidence; whether the witness had an interest in the outcome or a motive to deceive; whether the witness had an ability to observe the factual matters that were the subject of her testimony; the witness' power of recollection; whether the witness' testimony was "in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions"; whether there was an internal consistency and logical flow to the witness' evidence, whether the evidence was provided in a candid and straightforward manner; and whether the witness was capable of making an admission against her interest.

[6] During her cross-examination, Ms. Wells was compelled to admit numerous shortcomings in her sworn evidence. A partial list follows.

a. Ms. Wells admitted that she did not disclose any of her property on her Statement of Property, though she swore the Statement contained details of all property she owned.

b. Ms. Wells claimed her marital status as "separated" when filing her tax returns for each of the years from 2005 until and including 2010, though she now says she and Mr. King only separated in 2011.

c. Ms. Wells admitted that she accepted child support payments for the couple's younger daughter for two years after the child had moved out. She did not return these funds to Mr. King nor did she forward them to the child. Initially, Ms. Wells explained this by saying she thought the child would return home yet elsewhere she swore that within six months of the child's departure she stopped believing the child would return home.

d. Ms. Wells admitted that in 2013 she claimed a tax deduction for the couple's younger child even though the child did not live with her.

e. Ms. Wells swore information relating to her husband's work schedule when she had no knowledge of it.

f. Ms. Wells swore that Mr. King travelled from Alberta to Nova Scotia monthly to visit, though the work schedule described on his paystubs did not allow for this.

g. In support of an earlier motion, Ms. Wells swore that Mr. King was in arrears of his support payments, though bank statements showed that the money was being directly deposited for her use.

h. Ms. Wells swore that an interim support order was not registered at the Maintenance Enforcement Program (MEP) when it was.

i. Ms. Wells swore that she told MEP every time Mr. King paid her money directly. However, the MEP ledger does not reflect all of the direct payments he made. Ms. Wells was unable to explain why three payments, totaling \$5,021.00, made directly to the bank account she used, were not credited on the MEP ledger.

j. Ms. Wells swore that Mr. King was not complying with an order that he pay costs. Again, bank records confirmed that he paid this award as ordered.

k. Ms. Wells filed six separate affidavits during this proceeding, however it wasn't until one month ago that she acknowledged there had been a separation 2005.

l. Ms. Wells admitted that it was "outright false" that she filed for divorce because Mr. King had cut her off financially. In cross-examination, she admitted Mr. King was probably providing her with \$4,000.00 each month at the time.

[7] Ms. Wells' evidence was self-serving. For example, problems were caused by others: she said that H&R Block was responsible for her filing tax returns as a separated spouse, yet only she would be able to provide the tax preparer with the information on which to base her marital status claim. Difficulties arose at MEP because Mr. King made the support payments directly to Ms. Wells while the support order was registered for enforcement. Mr. King paid support directly to Ms. Wells only at her request. In response to the suggestion that she caused these difficulties, she said "I didn't do anything wrong. It was wrong for him to give me the money."

[8] In many regards, Ms. Wells' evidence was undermined by documentary material. In addition to the bank records, tax returns and paystubs that I've mentioned, her pre-2011 medical records noted that Mr. King was no longer her "spouse" but her "ex-spouse". Similarly, 2008 notes in her doctor's file record that Ms. Wells had been separated for three years. Ms. Wells' medical file noted a consultation about birth control at a time when she has claimed she and her husband weren't separated, however Mr. King had a vasectomy. When having her taxes prepared or seeing her doctor in the past, Ms. Wells provided information that is consistent with

Mr. King's assertion that the couple separated in 2005 – and inconsistent with her assertion that they separated in 2011.

[9] Ms. Wells' testimony lacked consistency. At times, she said that she and her husband were not separated (citing the fact they shared a bed or had sexual intercourse) and at other times, she insisted that he demanded access to the home and to her body because he was paying the bills. Her characterization of these events varied, depending on the question she was asked and which answer better suited her purpose.

[10] This is not a complete review of the shortcomings in Ms. Wells' testimony. At various times, Ms. Wells admitted what she had said in a sworn document was false. At other times, she blamed others. Her testimony and sworn materials were presented to promote her self-interest.

[11] Ms. Wells lives in Nova Scotia. She divides her time between her aunt's home and her boyfriend's. Her parents were present throughout the hearing. At pre-hearing conferences, Ms. Wells suggested that there would be evidence from her doctor and therapists. Ultimately she offered no witnesses to support her position.

[12] Ms. Wells was not a believable witness. Where her evidence conflicts with Mr. King's, I accept Mr. King's evidence.

Date of separation

The law

[13] According to clause 8(3)(a) of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, "spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other". Sub-clause 8(3)(b)(ii) makes clear that the period of time when spouses have lived apart is not considered to have been interrupted or terminated "by reason only that the spouses have resumed cohabitation during a period of, or periods totaling, not more than ninety days with reconciliation as its primary purpose."

[14] The Nova Scotia Court of Appeal has most recently addressed the issue of separation date in its decision in *Volcko*, 2015 NSCA 11. In that case, the Court of Appeal upheld Justice Beaton's conclusion that parties separated in June 2009 where their children had been told their parents were separated, the spouses never engaged in sexual relations or shared sleeping quarters again, the spouses didn't spend time alone with each other except as required by their marriage counselling, Ms. Volcko no longer attended her husband's work-related social functions and didn't take part in his choosing his new home or visit it, they vacationed separately and didn't perform household tasks for one another.

The evidence

[15] As each marriage is different, so is each separation. The evidence which proved the Volkos had separated would not necessarily be the same for Ms. Wells and Mr. King.

[16] The couple's older daughter testified that in 2005, she was at her paternal grandparents' home and her parents told her they were separated. She was fifteen years old and she was given the choice of the parent with whom she would like to live. She planned to spend the summer in Newfoundland and Labrador with her friends. In June 2005 Ms. Wells and the couple's younger daughter moved to Alberta. The following November, Mr. King moved to northern Alberta.

[17] From 2005 to date, each spouse has claimed "separated" status when filing his or her income tax return. Mr. King paid his taxes in Alberta as a resident of that province, even after Ms. Wells and the children returned to Nova Scotia in 2007.

[18] Ms. Wells claims that the couple frequently discussed reconciling. Mr. King admits this. He says, however, that while they talked about reconciling, they never attempted to reconcile. He explained that when he came to Nova Scotia to visit the children, he stayed at Ms. Wells' home which enabled him to spend time with the children in comfortable surroundings and without additional expense. Ms. Wells would stay elsewhere – at her boyfriend's, for example. This arrangement meant Mr. King could be with the children at times such as Christmas, when their mother would also want to be present.

[19] On occasion the couple had sexual intercourse. Mr. King says this occurred approximately six times and each occasion involved alcohol and regrets. Ms. Wells claims there was greater sexual activity between them. Both parties admit that they dated other people and had serious relationships with other people. Ms. Wells has been in a steady relationship with the same gentleman since 2010 (one year before the separation date she stated in her divorce petition). Mr. King removed Ms. Wells from his health insurance coverage so he could provide health insurance to a new partner.

[20] Like the Volckos, Ms. Wells and Mr. King told their children they were separated. So, too, from 2005 until their younger daughter left her mother's home, Ms. Wells and Mr. King conducted themselves in a manner consistent with protecting their children from the negative consequences of a separation: Mr. King voluntarily provided money for Ms. Wells and the children; Mr. King visited the children in the comfort of their own home; and the parties were able to share special occasions with the children such as vacations and Christmas. The parties' ability to co-parent does not mean that they were not separated.

[21] To require a parent to withhold financial support or to isolate children from the other parent to prove a separation undermines the goal of the *Divorce Act* to promote children's best interests and the objective of the *Federal Child Support Guidelines*, SOR/97-175 to reduce conflict and tension between spouses, and is inconsistent with the policies of this Court in offering a Parent Information Program.

[22] Ms. Wells makes much of the parties' sexual relations.

[23] In *K.L.S. v. D.R.S.*, 2012 NBCA 16, the New Brunswick Court of Appeal addressed the question of when a separation exists. On behalf of the majority, Justice Green said, at paragraph 23, "surely we must also be open to the possibility that an estranged couple who no longer share a residence may at law be living separate and apart even though, for whatever reason, they

continue to engage in consensual sexual activity with one another.” I accept this possibility.

[24] There was evidence of a trip the couple took to Niagara Falls in 2010 for few days. There was, as well, evidence of the occasions when the parties had sexual intercourse. Even if I accepted that these were instances of cohabitation with reconciliation as their purpose, and I do not, these periods do not exceed ninety days individually or in aggregate.

[25] I find that the couple separated in 2005. At that point, they began to live separate lives. Independent of her husband, Ms. Wells moved to Alberta. She found work there. Eventually she chose to return to Nova Scotia with the children. She began to attend university. She began to date and entered into new intimate relationships with other men. Her health care providers document a separation in 2005.

[26] Mr. King conducted himself similarly. When his children moved to Alberta, he chose to pursue work there. This was profitable and he continued to work in Alberta even after his children moved to Nova Scotia. Mr. King maintained a home in Alberta which Ms. Wells never visited. He began to date and entered into new intimate relationships with other women. He removed his wife from his health insurance coverage so that he could provide coverage to a new partner.

[27] While the spouses discussed reconciliation, there was no evidence that they ever resumed cohabitation for that purpose. On most occasions when they were together, it was so Mr. King could spend time with the children, including during vacations or at Christmas when both parents would want to spend time with the children.

[28] I conclude that Ms. Wells and Mr. King separated in 2005.

Divorce

[29] Ms. Wells and Mr. King have been living separate and apart without any prospect of reconciliation for more than one year and they were separated when the petition was filed. I grant the divorce.

Property division

[30] The only property Ms. Wells sought to divide was the property related to Mr. King’s current employment at Ledcor.

[31] The *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, exempts certain property from a division when a marriage ends. According to clause 4(1)(g) of the *Act*, “real and personal property acquired after separation unless the spouses resume cohabitation” are not matrimonial assets and not divided pursuant to section 12. Exempt property might be divisible pursuant to section 13 of the *Act*, but Ms. Wells has not made such a claim.

[32] According to subsection 4(3) of the *Matrimonial Property Act*, “spouses are deemed not to have resumed cohabitation where there has been a resumption of cohabitation by the spouses

during a period or periods in aggregate not exceeding more than ninety days with reconciliation as its primary purpose.”

[33] Mr. King began his employment at Ledcor after the couple separated. I have determined that Ms. Wells and Mr. King did not resume cohabitation for a period or periods which aggregate in excess of ninety days with reconciliation as its primary purpose. Accordingly, Mr. King’s Ledcor pension is not a matrimonial asset. I dismiss Ms. Wells’ claim for division of Mr. King’s Ledcor pension.

Spousal support

[34] Ms. Wells seeks spousal support. Mr. King claims that he has been supporting Ms. Wells since 2005 and that she is not entitled to further spousal support.

Entitlement

The law

[35] In *Bracklow*, 1999 CanLII 715 at paragraph 21, then-Justice McLachlin made clear that the presumption of mutual support which exists during a marriage “no longer applies” once the marriage has ended. She identified three bases for spousal support: contractual or consensual; compensatory; and non-compensatory. Contractual support reflects an explicit or implicit agreement that one spouse supports the other, while compensatory support considers the roles of the spouses in the family and the advantages or disadvantages conferred by these. Non-compensatory support looks to a spouse’s “actual ability to fend for himself or herself and the effort that has been made to do so”, according to Justice McLachlin at paragraph 40 in *Bracklow*, 1999 CanLII 715.

[36] An entitlement to compensatory support may be established where a spouse’s ability to achieve self-sufficiency has been compromised by family commitments or where one spouse conferred a substantial career advantage on the other.

The evidence

[37] Ms. Wells is forty-five years old. When the parties separated she was thirty-five. The parties had been married for fifteen years and their children were aged nine and fifteen. Before the separation, Ms. Wells worked as a waitress, a building superintendent, a sales clerk and a hotel supervisor. Following the separation in 2005, Ms. Wells moved to Alberta where she found work. When she returned to Nova Scotia in 2007, she attended Dalhousie University for a period of time.

[38] Ms. Wells’ health permits her to go to the gym regularly. She says she lifts weights, uses the treadmill and does a cardio workout at the gym. She also uses the Stairmaster and rides an exercise bicycle. There is no evidence that she is physically incapable of working.

[39] While Ms. Wells mentioned counseling and provided a copy of prescription to see a

psychologist (written on the same day she swore an affidavit in response to her husband's motion to terminate her spousal support), she offered no more specific evidence about this after a disclosure order was granted for the files of her health care practitioners. She has not shown that she has any physical or emotional health problems which prevent her from working.

[40] I was provided with copies of written communications between the parties (text messages and emails) in which Mr. King beseeched Ms. Wells to find work. Ms. Wells admitted knowing that she must work. Ms. Wells offered no evidence of any effort whatsoever to find employment of any sort since returning to Nova Scotia in 2007.

[41] The couple's older child left Ms. Wells' home at age eighteen in 2008 and has only lived with Ms. Wells for "a number of months in 2010/2011". The couple's younger child left Ms. Wells home in 2012. Ms. Wells' employability has not been constrained by a need to care for the couple's children for the past few years. Ms. Wells provided no evidence of any applications for employment in the past decade. She has not shown that she is incapable of finding a job or supporting herself as a result of the marriage.

[42] Ms. Wells claims she is entitled to spousal support on both a compensatory and non-compensatory basis.

[43] Ms. Wells has not shown herself to be entitled to compensatory support. She remains capable of the employment she had during the marriage and in the early years following the separation. She cannot identify any disadvantage that she has experienced as a result of the roles adopted during the marriage. Immediately following the separation she was able to find work in Alberta.

[44] Both spouses were employed while they cohabited and their schedules meant that both parents were involved in child care. Mr. King worked during the day while Ms. Wells cared for the children and Ms. Wells worked at night when Mr. King cared for them. The household income was modest. The couple's older daughter confirmed that Ms. Wells worked at night while Mr. King worked during the day.

[45] The parties' roles during the marriage don't attest to Ms. Wells' dependency.

[46] Before separation, between Ms. Wells' earnings and Mr. King's, the family's annual income was in the range of \$35,000.00 to \$60,000.00. When Mr. King began to work in northern Alberta, his income skyrocketed. During his first year in Alberta he earned \$138,000.00. At their peak, his earnings exceeded \$220,000.00 in one year.

[47] Ms. Wells argues that her husband's vastly improved employment circumstances exist because her care for the children enabled him to work in northern Alberta, and says this is an example of how she has conferred an advantage on him.

[48] This argument is inconsistent with events as they occurred. After the couple told their children that they were separating, Ms. Wells moved to Alberta in June 2005. The couple's younger child was with her. The older child remained in Newfoundland and Labrador for the

summer. It was months later, in November 2005, that Mr. King moved to northern Alberta.

[49] Mr. King's earning capacity didn't increase because Ms. Wells enabled him to pursue work in northern Alberta. This was an opportunity he pursued on his own after the separation.

[50] Following the separation, Mr. King voluntarily provided money to Ms. Wells for herself and the children. These payments were commensurate with his income and in this way, Ms. Wells and the children benefit from his increased earning capacity. He continued to pay spousal support until it was suspended in June 2015 and continued to pay child support well past the point when either child lived with Ms. Wells.

[51] Ms. Wells received spousal support payments for ten years following the end of a fifteen year marriage.

[52] I conclude that Ms. Wells is not entitled to ongoing spousal support.

[53] In May, 2014, Mr. King filed a motion requesting that the spousal support payments required by Justice Campbell's interim order be terminated. Justice Beaton declined to vary the interim order and moved the matter forward to trial, then scheduled for September 2014. The trial was re-scheduled from September to a settlement conference in December 2014 as a result of the unavailability of Ms. Wells' counsel. In December, the trial was scheduled for June 29 and 30, 2015. As these trial dates approached, the case was monitored for anticipated disclosure and back up trial dates were fixed in July, in case delayed disclosure meant the parties were not ready for trial on the June dates. Ten days before the trial was to begin in June, it was adjourned to July and Ms. Wells' spousal support payments were suspended pending the outcome of the trial.

[54] Mr. King now asks for all spousal support paid after May 2014 to be repaid to him, with interest.

[55] Based on the evidence I heard, I am able to conclude that Ms. Wells is no longer entitled to receive spousal support. However, the evidence doesn't enable me to conclude that she was not entitled to spousal support at any earlier date, so I dismiss Mr. King's request for repayment.

Child support

[56] It's agreed that, at age sixteen, the couple's younger child left Ms. Wells' home in December 2012. Mr. King paid a further \$29,167.00 in child support before Ms. Wells agreed payments could stop.

[57] Ms. Wells asks that I reduce the amount of child support she must repay by the equivalent of three months child support payments - a "grace period" reflecting a period when Ms. Wells reasonably could have believed the child would return. Child support is intended to meet children's current needs. When the younger child left Ms. Wells' home, she became Mr. King's financial responsibility and he was required to provide for the child's direct support. He did this without any contribution from Ms. Wells.

[58] Mr. King is entitled to the repayment of all child support provided to Ms. Wells after the child left her home. Ms. Wells shall pay Mr. King \$29,167.00 immediately.

Maintenance Enforcement Program payment adjustments

[59] In 2012 the first interim support order was made. Throughout the year, Ms. Wells asked Mr. King to make support payments directly to her. He complied, asking that she notify MEP whenever he made one of these payments. Mr. King identified three payments, totaling \$5,021.00, he made to Ms. Wells in 2012 which were not credited to his MEP account.

[60] Ms. Wells was unable to explain why the payments were not shown on the MEP ledger. She had no evidence to corroborate her statement that she always let MEP know when she received a direct payment. She suggested that Mr. King sometimes gave her money to pay for specific expenses and that these might be the deposits Mr. King made which weren't credited by MEP. I do not accept Ms. Wells' suggestion that, after having made voluntary payments for seven years, once Mr. King became subject to an interim order, he would continue to make voluntary payments in addition to honouring the order. Ms. Wells owes Mr. King \$5,021.00 for the double-payment.

[61] Mr. King's income was the subject of a garnishment by MEP At June 29, 2015 when his child support payments ended and his spousal support payments were suspended he had overpaid by \$4,861.00, according to MEP records. He was refunded \$1,750.00 by cheque on July 6, 2015, reducing the overpayment to \$3,111.00. Ms. Wells owes Mr. King \$3,111.00 for the overpayment she received.

[62] Ms. Wells shall repay these amounts to Mr. King immediately.

Conclusion

[63] I dismiss Ms. Wells' claim for a division of Mr. King's pension and confirm that there is no further property division to be made. I dismiss Ms. Wells' claim for ongoing spousal support.

[64] Ms. Wells shall pay Mr. King \$29,167.00 immediately to reimburse him for child support payments he made while the couple's younger child was no longer living with Ms. Wells. She shall also repay him \$8,132.00 immediately to reimburse him for support payments he ought not to have made.

[65] Mr. Penny shall prepare the divorce and corollary relief orders. If either party wishes to be heard on costs, written submissions should be provided by September 4, 2015.

Elizabeth Jollimore, J.S.C. (F.D.)