

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Hubley-Swider v. Swider, 2009 NSSC 106

Date: 20090402

Docket: 1201-062838

Registry: Halifax

Between:

Carolann Jean Hubley-Swider

Petitioner

v.

Mark Andrew Swider

Respondent

Judge:

The Honourable Justice Elizabeth Jollimore

Heard:

March 31, 2009, in Halifax, Nova Scotia

Decision:

April 2, 2009

Counsel:

Patrick J. Eagan, counsel for the Petitioner
Peter D. Crowther, counsel for the Respondent

By the Court:

[1] Mark Swider and Carolann Hubley-Swider separated in July, 2006. On February 26, 2009, an application for interim child and spousal support (including retroactive support) was decided. On the heels of that decision, Ms. Hubley-Swider relocated with the couple's son, Nathaniel, moving from the matrimonial home in Dartmouth to Wilmot, Annapolis County. In response, Mr. Swider filed this application on March 13, 2009 for interim exclusive possession of the home and a variation of the interim support decision.

[2] Mr. Swider seeks interim exclusive possession of the home so he may apply for a SISIP loan. If this loan is granted, according to paragraph 16 of his affidavit, Mr. Swider intends "to deal with the outstanding mortgage arrears and other arrears on personal debts in [sic] matrimonial property debts that have accumulated". After bringing the mortgage payments current, Mr. Swider plans to maintain the mortgage until the real estate market has recovered or the parties have otherwise resolved the issue of the home's disposition. The parties have been attempting to sell the home. Their real estate agent recently advised that an offer they received was likely the best offer they will get. This offer will not cover the outstanding mortgage, mortgage arrears and realty fees.

[3] Mr. Swider's application to vary child and spousal support seeks to revise the arrears that have accumulated pursuant to the interim support decision. Mr. Swider wants the child and spousal support payments for January, February and March 2009 to be forgiven in exchange for his assuming the mortgage arrears of approximately \$5,400.00 owing as of April 1, 2009. The child and spousal support payments for January, February and March 2009 total \$3,789.00.

[4] The application proceeded on March 31, 2009 on the basis of Mr. Swider's affidavit and direct testimony from John Hopkins, a social worker employed by the Metro Community Housing Association. Mr. Hopkins provides supportive counselling to Mr. Swider. Ms. Hubley-Swider elected not to provide an affidavit and offered no evidence in response to the application. She was not present. Her counsel attended and cross-examined both Mr. Swider and Mr. Hopkins.

Interim Exclusive Possession of the Matrimonial Home

[5] Mr. Swider's application for exclusive possession is governed by s. 11 of the Matrimonial Property Act, R.S.N.S. 1989, c. 275, which states in part:

11 (1) Notwithstanding the ownership of a matrimonial home and its contents, the court may by order, on the application of a spouse,

(a) direct that one spouse be given exclusive possession of a matrimonial home, or part thereof, for life or for such lesser period as the court directs and release any other property that is a matrimonial home from the application of this Act;

(b) direct the spouse to whom exclusive possession is given under clause (a) to pay such periodic or other payments to the other spouse as is prescribed in the order;

(c) direct that the contents of a matrimonial home that are matrimonial assets, or any part thereof, remain in the home for the use of the person given possession;

(d) determine the obligation to repair and maintain the matrimonial home and to pay for other liabilities arising in respect of the matrimonial home;

(e) authorize the disposition or encumbrance of the interest of a spouse in a matrimonial home who has not been granted exclusive possession;

[. . .]

Conditions for order for possession:

(4) The court may only make an order for possession of the matrimonial home under subsection (1) or (3) where, in the opinion of the court,

(a) other provision for shelter is not adequate in the circumstances; or

(b) it is in the best interests of a child to make such an order.

[6] My authority to make an order for exclusive possession of the matrimonial home is limited to those circumstances enumerated in s. 11(4). The Act

specifically states that I may only make an order in these circumstances. Mr. Swider bears the burden to prove his claim on the balance of probabilities.

Is Other Provision for Shelter Not Adequate in the Circumstances?

[7] Mr. Swider is currently a voluntary patient at the Nova Scotia Hospital. He is preparing himself for release from the Hospital. Through the Metro Community Housing Association, Mr. Swider has support to assist him in locating appropriate accommodations, moving into them, furnishing them, arranging for utilities to be connected, and meeting his needs once settled in a residence (buying groceries, cleaning, making meals and maintaining the residence). Mr. Hopkins testified that budgeting assistance is available to Mr. Swider, though Mr. Hopkins does not provide this assistance. It isn't Mr. Hopkins' job to help Mr. Swider pay his bills.

[8] Mr. Swider provided no evidence of other available shelter. He did not deny that other shelter might be available to him. He did not discharge the burden of showing other available shelter was not adequate in the circumstances. Mr. Swider testified that he is trying to save for an apartment. When he was ill during the summer and fall of 2008, Mr. Swider did not manage his money properly. It was suggested that, as a result of this, Mr. Swider might be required to provide deposits for rent and utilities. There was no evidence of what these costs might be. The evidence does not support an order for exclusive possession on the basis that other provision for shelter is not adequate in the circumstances.

Is it in Nathaniel's Best Interests to Award Interim Exclusive Possession to Mr. Swider?

[9] Mr. Swider's evidence was that it would be better for Nathaniel to live in the matrimonial home because this would put Nathaniel in proximity to hospitals and therapy. As well, Nathaniel's residence in Dartmouth would enable him to spend time with Mr. Swider in accord with the terms of the Order issued on February 2, 2009 governing access. Mr. Swider has not satisfied the burden of proving it is in Nathaniel's best interests that Mr. Swider have interim exclusive possession of the home.

[10] Mr. Swider argues that s. 11(4) should be interpreted to permit an exclusive possession order where the order would serve a family's long-term financial interests. He argues that this interpretation would enable me to grant an order for

his interim exclusive possession of the home. No authority was offered for this interpretation and I have been unable to locate any authority for it. I decline to read s. 11(4) to encompass the interpretation Mr. Swider urges on me.

[11] If s. 11(4) should be interpreted as Mr. Swider suggests, I find that he has not proven on a balance of probabilities that his plan will serve the family's long-term financial interests. Mr. Swider's plan is to obtain a SISIP loan to deal with outstanding debts. Once the debts are brought current with the proceeds from this loan, he would maintain the home "until such time as the real estate market has recovered and/or we otherwise resolve the issue of disposition of the matrimonial home either by settlement or court order", according to paragraph 11 of his affidavit.

[12] Mr. Swider's plan hinges on obtaining the SISIP loan. Mr. Swider testified that SISIP won't loan money if it doesn't see closure in the litigation. Mr. Hopkins similarly testified that SISIP will process the loan application when litigation has ended. This is an interim application. There is an "interim interim order" in place regarding parenting. No request has been made for a trial date to deal with the divorce petition and its ancillary claims. Based on the evidence from Mr. Swider and Mr. Hopkins, the SISIP loan is unlikely. For Mr. Swider's plan to succeed, he would maintain the home until the real estate market recovers. This element of the plan is not a course of action serving the family's long-term financial interests, but a hope. If s. 11(4) could be interpreted to include consideration of a family's long-term financial interests, Mr. Swider has not proven that his plan will serve those interests.

[13] I decline to award interim exclusive possession of the matrimonial home to Mr. Swider.

[14] Through submissions by her counsel, Ms. Hubley-Swider seeks interim exclusive possession of the home. In support of this claim, I have Mr. Swider's evidence that it would be best for Nathaniel to return to Dartmouth. In addition to placing Nathaniel in proximity to hospitals and therapy and enabling Nathaniel's access to Mr. Swider, it will also return Nathaniel to the locale in which the Department of Community Services is conducting an investigation of this family. On the basis of this evidence, I find that this is an appropriate case to award interim exclusive possession of the home to Ms. Hubley-Swider.

[15] Ancillary to awarding interim exclusive possession to Ms. Hubley-Swider and pursuant to s. 11(1)(d) of the Matrimonial Property Act, I direct that Ms. Hubley-Swider pay the mortgage payments and other liabilities arising from occupation of the home which fall due from the date of this decision.

[16] I make no direction with regard to responsibility for any cost that may be incurred by either party to ready the home for sale or for the mortgage arrears that have accumulated to date. Responsibility for these sums may be determined when there is an opportunity to review all the debts and costs and the circumstances in which they were incurred.

Variation of Child and Spousal Support Order

[17] The variation of child and spousal support orders is governed by ss. 17(4) and (4.1) of the Divorce Act, R.S.C. 1985, (2nd Supp.), c. 3, which provide:

Factors for child support order

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

Factors for spousal support order

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[18] Mr. Swider seeks to vary the February 2009 interim support decision. At the time of that decision, it was known that Ms. Hubley-Swider had not made payments on the mortgage since November, 2008. During the separation when Mr. Swider made voluntary support payments to her, she paid the mortgage. She stopped paying the mortgage after Mr. Swider's voluntary payments ended. At the time of the interim support decision, it was also known that Ms. Hubley-Swider had recently received more than \$5,900.00 from the Canada Pension Plan and that

Mr. Swider was required to repay this amount. These circumstances cannot be the basis on which support would now be varied.

[19] Mr. Swider argues that the change which has occurred since the interim support decision was made is Ms. Hubley-Swider's abandonment of the home.

Varying Child Support

[20] Ms. Hubley-Swider's relocation has no relevance to the factors upon which Mr. Swider's interim child support obligation was determined. There is no change in Mr. Swider's income, his province of residence, Ms. Hubley-Swider's income or Nathaniel's s. 7 expenses. There is no basis upon which to vary interim child support.

Varying Spousal Support

[21] Ms. Hubley-Swider's re-location may have some relevance to the factors upon which Mr. Swider's spousal support obligation was determined. When interim spousal support was awarded, it was done in circumstances where Ms. Hubley-Swider occupied the home and, when Mr. Swider paid her voluntarily, she paid its mortgage. Mr. Swider has not yet made any support payments pursuant to the February 26, 2009 decision so it is not known whether Ms. Hubley-Swider would devote any portion of the support to the mortgage, regardless of her current residence in Wilmot. The February decision would have considered Ms. Hubley-Swider's then-current expenses. There is no evidence whether Ms. Hubley-Swider's expenses have changed as a result of her move.

[22] The burden is on Mr. Swider to prove that there has been a change in the condition, means, needs or other circumstances of either spouse. He has not proven such a change.

[23] In essence, Mr. Swider's request to vary the interim support payments is an effort to have me allocate responsibility for a debt (the mortgage arrears) between the parties. This is more appropriately dealt with by the parties in their application under the Matrimonial Property Act where all the circumstances surrounding the accumulation of arrears can be considered.

Costs

[24] Ms. Hubley-Swider seeks costs on the basis that Mr. Swider has not come to the Court with "clean hands" because he has not paid the support ordered on February 26, 2009 and he has not provided the evidence necessary to support his claim. She seeks costs of \$1,000.00.

[25] Mr. Swider says his plan is reasonable and argues that Ms. Hubley-Swider cannot complain of his conduct where she moved with Nathaniel from Dartmouth without any notice.

[26] I order that costs be in the cause and encourage the parties to move toward resolution of the matters between them.

J.S.C.(F.D.)

Halifax, Nova Scotia