

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Delaney v. Delaney, 2009 NSSC 315

Date: 20091027
Docket: 57267
Registry: Sydney

Between:

Debbie Delaney

Applicant

v.

Douglas Delaney

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: Sept. 9 and Oct. 27, 2009 in Sydney, Nova Scotia

Oral Decision: October 27, 2009

Written Decision: October 29, 2009

Counsel: Elaine Gibney , for the Petitioner, Debbie Delaney
Douglas Delaney

By the Court:

[1] **Introduction**

[2] After a marriage of approximately 21 years, Debbie and Douglas Delaney separated in January 2008. At the time of separation, the parties faced financial ruin for two reasons. First, Mr. Delaney dissipated the matrimonial assets and accumulated debt because of his gambling addiction. Second, Mr. Delaney was fired from his job with the school board because of his relationship with a teenage girl - a girl with whom he now resides.

[3] Mr. Delaney was successful with the grievance he filed against the school board. The arbitration award provided for Mr. Delaney's reinstatement retroactive to February, 2008. The school board appealed. The appellate decision was outstanding at the time of trial.

[4] Ms. Delaney and the children bore the brunt of the financial crisis facing the family. The matrimonial home was lost due to foreclosure proceedings. Ms. Delaney and the children were forced to move to inferior, rental accommodations.

They own no vehicle. Ms. Delaney struggles to make ends meet. Mr. Delaney provided no child support and has little contact with the children.

[5] The trial was held on September 9, 2009. Issues were framed under the *Matrimonial Property Act* and the *Maintenance and Custody Act*. Mr. Delaney did not appear despite having been served with notice of the trial date on March 25, 2009, and despite having been served with a notice to bring, which referenced the trial date. At the trial, the court heard testimony from Wendy King of the Cape Breton Victoria Regional School Board and Ms. Delaney. The decision was reserved until today's date.

[6] **Issues**

[7] The following five issues will be determined by this court:

- a) What is the appropriate division of the assets and debts?
- b) What is the appropriate parenting order?
- c) What child support order should be granted?
- d) Should the maintenance order be subject to an execution order in the nature of a garnishee and security?

e) Should costs be awarded?

[8] **Analysis**

[9] **What is the appropriate division of the assets and debts?**

[10] There are few matrimonial assets, and some outstanding debts. The assets consist of Mr. Delaney's pension, household chattels, a vehicle, and vacation pay due to Mr. Delaney. The debts concern two loans advanced by Ms. Delaney's siblings. These loans were advanced to cover family debt which had not been paid because of Mr. Delaney's gambling.

[11] **Position of Ms. Delaney:** Ms. Delaney is seeking an equal division of Mr. Delaney's pension and vacation pay. She is proposing to retain the household chattels in her possession; Mr. Delaney is to retain his vehicle. She asks that Mr. Delaney reimburse her for the family loans.

[12] **Decision**

[13] **Pension:** There will be a source division of the pension from the date of plan entry until the date of separation, which is January 8, 2008, together with any increase in value on Ms. Delaney's half share since that time.

[14] **Vacation Pay:** Mr. Delaney is owed vacation pay for a period of time prior to January 8, 2008. Ms. Delaney is entitled to one-half or \$1,305.24: **Yazchuck v. Logan** [1992] 110 N.S.R. (2d) 278 (C.A.). Judgement will issue against Mr. Delaney for \$1,305.24.

[15] **Personal Property:** Each party will retain the household chattels in his/her possession. Mr. Delaney will retain his vehicle. There will be no equalization payment due in respect of these assets.

[16] **Family Loans:** Ms. Delaney has proven on a balance of probabilities that one of the family loans is capable of legal enforcement. I accept that Ms. Delaney's sister, Theresa MacQueen, loaned the parties \$3,000 with the expectation of repayment. The money was not a gift. The money was borrowed

because Mr. Delaney dissipated family income by gambling. Household bills, including the mortgage, therefore fell into arrears. The money which was advanced was used to help pay the accumulated debt. I further accept that the sum of \$400 was repaid by Ms. Delaney in September 2008.

[17] I also find that Ms. Delaney has proven that it would be unfair or unconscionable to equally divide this debt because the debt was incurred solely as a result of Mr. Delaney's impoverishment of the assets to feed his gambling addiction: s. 13 (1) (a) of the *Matrimonial Property Act*; **Harwood v. Thomas** (1981), 45 N.S.R. (2d) 414 (C.A.); **Keeler v. Keeler** (2000), 185 N.S.R. (2d) 389 (S.C.); **O'Quinn v. O'Quinn** (1997), 165 N.S.R. (2d) 330 (S.C.); **Ferris v. Ferris** (2004), 225 N.S.R. (2d) 278 (S.C.); and **Crane v. Crane** 2008 NSSC 33 (S.C.).

[18] Ms. Delaney will have judgment against Mr. Delaney in the amount of \$3,000. Ms. Delaney will be responsible for the repayment of the outstanding balance to her sister.

[19] **What is the appropriate parenting order?**

[20] Ms. Delaney seeks an order for sole custody and access according to the wishes of the children. I grant this request in the best interests of the children, given their ages, and given the conflict which exists, including Mr. Delaney's attempt to run down one of the children and to physically destroy the former matrimonial home. Joint communication is not possible.

[21] **What child support order should be granted?**

[22] **Position of Ms. Delaney:** Ms. Delaney is seeking the table amount of support, inclusive of a retroactive order based upon Mr. Delaney's salary with the school board. She also seeks s.7 add-ons in respect of graduation expenses and the cost of driver's education courses for both children.

[23] **Decision**

[24] **Table Amount:** Mr. Delaney is a 20 year employee with the Cape Breton Victoria Regional School Board. The school board is subject to an arbitration

award requiring them to reinstate Mr. Delaney effective February 8, 2008. I base the maintenance decision on the facts before me at the time of trial. If, however, the school board's appeal is successful, then I retain jurisdiction to determine the maintenance issue in light of the evidence already adduced, and any new developments.

[25] Mr. Delaney is paid \$1,460 every two weeks, which equates to an annual income of \$37,960. The table amount of child support is therefore payable at a rate of \$554 per month commencing November 1, 2009 and continuing on the 1st day of every month thereafter.

[26] **Retroactive Maintenance:** Ms. Delaney has met the burden upon her in relation to the retroactive maintenance request. I grant retroactive maintenance for the 21 month period commencing February 2008 to October 2009 based upon the factors outlined in the Supreme Court of Canada in **S.(D.B.) v. G. (S.R.)**, 2006 SCC 37 (S.C.C.) as per Bastarache J. and for the following four reasons:

a) **Reasonableness of Excuse in Bringing Application Forward:** Ms. Delaney acted reasonably in her claim for child support. She made application for support in February 2008, one month after separation. She is not responsible for the administrative delay in having the matter brought to trial.

b) **Conduct of Non-Custodial Parent:** Mr. Delaney engaged in blame- worthy conduct. He did not produce the financial information required of him by the court. He did not participate at trial. He was not cooperative with the process. He did not provide support to the children. He left the sole financial responsibility for the care of the children to Ms. Delaney.

c) **Circumstances, Past and Present, of the Children:** The children have suffered a significant loss in their standard of living. Their current residence is drafty and in need of repair. There is no family car. One child must walk home from work at dangerous hours as a result. The present and past needs of the children cannot be successfully met without the payment of retroactive support.

d) **Hardship which may Accrue to the Non-Custodial Parent:** There is no evidence of any hardship before me. To the contrary, the school board owes Mr. Delaney the gross amount of \$57,979.52 as of September 24, 2009. He has the ability to pay a retroactive order.

[27] Child support shall be payable retroactive to February 2008 based upon an income of \$37,960.00, and payable at a rate \$554 per month. This equates to a lump sum payment of \$11,634.

[28] **Section 7 Add-Ons:** Ms. Delaney has met the burden upon her in relation to the s. 7 add-ons' request. She has proven on a balance of probabilities that Mr. Delaney should contribute to the costs of the extraordinary expenses associated with drivers education classes for both children and graduation expenses for

Aaron. I grant this request pursuant to ss. 7(1)(f) and 7 (1A) and of the *Provincial Child Support Guidelines*, and for the following reasons:

a) Driver education courses will meet the reasonable needs of the children. Ms. Delaney plans to purchase a car for family transportation. The children will drive the car and will benefit from the professional training. Driver education courses help produce prudent drivers. An ability to drive is important in the CBRM because public transit is frequently not a viable option because of limited routes and hours of service.

b) The graduation expenses meet Aaron's needs. Graduation costs are estimated to be \$1,200. I accept this figure as reasonable. Aaron is doing well in school and is a good person. He should not have to miss out on graduation activities because his mother is unable to pay for them.

c) Ms. Delaney's income is not substantial. She works in a medical office and earns approximately \$26,000 per annum. This past summer, Ms. Delaney could not take a vacation because she needed additional money. She worked through her vacation and received vacation pay in lieu of time off. She continues to experience significant budgetary restrictions.

d) Ms. Delaney's budget, for the most part, is reasonable. She lives frugally and is attempting to meet the needs of her children. Even with the addition of the table amount to her budget, Ms. Delaney will continue to operate in a deficit position. Therefore the costs of the requested section 7 add-ons is extraordinary to Ms. Delaney.

e) Mr. Delaney has the ability to pay. If the parties were together, Mr. Delaney would be contributing to these expenses. I have no evidence of any hardship to Mr. Delaney.

f) The extraordinary activities do not produce on-going expenses. Thus Mr. Delaney's budget will not be taxed on a regular basis.

g) Mr. Delaney does not exercise access. Therefore, Ms. Delaney receives no financial reprieve from an access parent. Access parents ordinarily pay for food and recreational activities during the course of access.

h) There is no subsidy or taxable benefit to be considered. I have determined that the children's contribution to drivers education should be \$75 each from their part-time earnings. There should be no contribution from Aaron towards the graduation expenses.

[29] Given the incomes of the parties, Mr. Delaney is responsible for 59% of the drivers education courses which equates to \$560 after deducting the contribution of the children. Mr. Delaney is responsible for 59% of the graduation expenses which equates to \$708. Mr. Delaney's total responsibility is \$1,268. This sum is due November 1, 2009.

[30] **Should the maintenance order be subject to an execution order in the nature of a garnishee and security?**

[31] **Position of Ms. Delaney:** Ms. Delaney is seeking a garnish and security for the maintenance payments. She is concerned that Mr. Delaney will negotiate a severance with the school board to thwart the payment of future maintenance. Ms. Delaney states that Mr. Delaney does not want to return to work at the school board, and that he has other options available to him.

[32] **Decision:** Sections 35 and 36 of the *Maintenance and Custody Act* and s. 12 of the *Provincial Child Maintenance Guidelines* provide this court with the jurisdiction to grant the relief sought. Ms. Delaney bears the burden in respect of her request. It is the civil burden of proof on a balance of probabilities.

[33] Ms. Delaney has proven that an execution order in the nature of a garnishee should issue in respect of past and future maintenance obligations. Ms. Delaney has also proven that Mr. Delaney's outstanding retroactive (reinstatement) pay held at the school board pursuant to an interim preservation order, should be used as security towards the retroactive maintenance award and the lump sum s.7 add-on award. I am satisfied that Mr. Delaney would not pay the maintenance order otherwise. Mr. Delaney has not been cooperative and has engaged in blame-worthy conduct as it relates to his child support obligations. Ms. Delaney and the children require the maintenance now, not in the future.

[34] Ms. Delaney has not, however, proven on a balance of probabilities that a further preservation order should issue in respect of a potential, future settlement which Mr. Delaney may seek through negotiations with the school board. The court cannot grant an order based upon speculation and possibilities. I have no

evidence that Mr. Delaney is negotiating a final settlement with the school board at this time.

[35] Counsel for Ms. Delaney relies upon the unreported decision of **Dakai v. Dakai** 1206-001985, dated January 6, 1994. This case is distinguishable in that the future settlement was not speculative in the **Dakai** case. In **Dakai**, an action had already been commenced by the injured father and negotiations were in progress. As much as I have sympathy for the plight of Ms. Delaney and the children, I am nonetheless unable to place an order securing a future, speculative settlement award. Nor can I order the school board to notify Ms. Delaney if negotiations commence because the school board is not a party to the action. I will, however, grant an order requiring Mr. Delaney to contact Ms. Delaney in writing forthwith should severance negotiations commence.

[36] **Should costs be awarded?**

[37] Ms. Delaney is seeking costs. Costs in proceedings in the Family Division continue to operate under the old rules. I have considered rules 70.03(4), and 63. The tariff contemplated in rule 63 is problematic in many family law cases as the

amount involved is not easily determined. I have considered the comments of Goodfellow, J., in **Urquhart v. Urquhart** (1998), 169 N.S.R. (2d) 134 (T.D.) and B. MacDonald J. in **Arab v. Izsak** 2009 NSSC 275 (S.C.) .

[38] In exercising my discretion, and considering all relevant factors including Ms. Delaney's success on most issues and the uncooperative attitude of Mr. Delaney, I award costs in the amount of \$3,500 together with 95% of the costs of all disbursements incurred as confirmed by Affidavit.

[39] **Conclusion**

[40] The following relief is hereby ordered:

- a) An equal division of the pension and vacation pay;
- b) A judgement in the amount of \$3,000 for the family loan;
- c) An order confirming the present division of the household chattels and vehicle;
- d) A order for sole custody with access according to the wishes of the children;
- e) An order requiring Mr. Delaney to pay \$554 per month in periodic child support, \$11,634 in retroactive child support, and \$1,268 for section 7 add-ons;

f) An execution order in the nature of a garnishee and security for the maintenance; and

g) Costs in the amount of \$3,500, together with 95% of the disbursement costs.

[41] Ms. Gibney is to prepare the order and forward to the court for issuance.

Dated at Sydney, Nova Scotia, this 27th day of October, 2009.

Forgeron, J.