SUPREME COURT OF NOVA SCOTIA
Citation: J.G.W. v. T.L. W., 2010 NSSC 58

Date: 20100111
Docket: 1202-001632 (049993)
Registry: Truro

Between:

J. G. W.

Petitioner

v.

T. L. W.

Respondent/ Counter Petitioner

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	December 16, 2009, in Truro, Nova Scotia
Written Decision:	January 11, 2010
Counsel:	J. G. W., self represented Petitioner
	Katherine Briand, for the Respondent/Counter Petitioner

By the Court:

INTRODUCTION

[1] J. G. W. petitions and T. L. W. cross petitions for divorce pursuant to the **Divorce Act** S.C. 1985, c. 3. There are contested applications for corollary relief in relation to the custody and access of the children of their marriage, as well as for child support. In addition, Mrs. W. makes an application pursuant to Section 13 of the **Matrimonial Property Act** R.S.N.S. 1989, c. 235, as amended, for an unequal division of matrimonial assets.

BACKGROUND

[2] The parties were married February 4, 1995. They have three children being:

H. D. W., born *August, 1996;

K. L. W., born * January 2002; and

N. A. W., born *June 2003.

[3] Mr. and Mrs. W. lived in *County initially, as did their families. In late 1996 they moved to A. to accommodate the petitioner's employment. The petitioner's parents eventually moved to the A. area as well but the respondent's family continued to reside in *County.

[4] Throughout the marriage, the petitioner was the sole wage earner, while the respondent maintained the home and cared for the children.

[5] The couple separated on or about October 22, 2006. Mrs. W. left the family home then in *, Nova Scotia, having packed up many of the family's belongings and taking the children with her to live in * county.

[6] On November 2, 2006, Mr. W. was made the subject of a court order that restricted his access to the matrimonial home and the children. On November 17, 2006 the parties were before the Family Court and on November 28, 2006 Mr. W. filed this Petition for Divorce.

[7] On December 7, 2006, they appeared before Justice Davison of this court and an interim order was issued which directed that the parties would have joint

custody of the children who would be in the primary care of their mother. Mr. W. was granted access every second weekend under the supervision of his aunt.

[8] The matter quickly returned to court for a further hearing for an interim disposition and on January 4, 2007, Justice Scanlan made an order which continues in effect to this time. The key provisions are that:

1. The parties have joint custody of the children;

2. T. W. has primary care and control of the children;

3. Mr. W. has unsupervised access on a fixed schedule that includes:

    (a) Saturday from 10 am to Sunday at 5 pm on 5 weekends in each two month period;

    (b) an extension of access weekends by a day that falls on a holiday;

    (c) provisions for specific holiday access on Labour Day weekend, Father's Day, Mother's Day, Easter and Christmas;

    (d) provision for 2 weeks of block access each summer.

4. Mr. W. pays child support in the amount of $325 on the first of each month, which started on January 1, 2007. Having regard to his then income of $28,600, this was less than the table amount and was justified under section 10 of the **Federal Child Support Guidelines**. The evidence suggests that this was because of Mr. W.'s assumption of matrimonial debt and the requirement for him to absorb all costs of access, being the expenses associated with traveling between * and *.

5. Mr. W. is also directed to pay allowances to each of the three children, that totals $26 per month.

6. Mr. W. was given exclusive possession of the matrimonial home, in the expectation of effecting necessary repairs and renovations to enhance prospects for sale.

[9] Subsequently, Mrs. W. executed a Quit Claim deed releasing her interest in the matrimonial home in favor of Mr. W.. She was not compensated for this. He continues to reside there with S. B. who has been his common law partner since July 2009.

[10] There is evidence that there have been periodic disputes between the parties, mostly in relation to the respective parties' ability to communicate with the children while they are in the care of the other parent. There are allegations that

Mrs. W. has not consistently honored the access provisions. Mr. W. now questions Mrs. W.'s fitness to continue as the primary care giver to the children and seeks that he be provided the primary care and control of the children.

Divorce Judgment

[11] I am satisfied that the evidence before the court fulfills the statutory requirements for a divorce and the petition is granted. I will sign a Divorce Judgment.

Change of Name

[12] Upon application of the respondent/counter-petitioner, I order that the name of T. L. W., whose surname before marriage was T. L. S. and whose name at her birth on January *, 1973 was T. L. S., be changed to T. L. S..

Custody and Access

[13] The provisions of the **Divorce Act** that are relevant to the questions of custody and access are set out in section 16 which reads, in part:

> Order for custody
>
> 16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
>
> Interim order for custody
>
> (2) ...
>
> Application by other person
>
> (3) ....
>
> Joint custody or access
>
> (4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.
>
> Access
>
> (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

Terms and conditions

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

Order respecting change of residence

(7) ....

Factors

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

Past conduct

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

Maximum contact

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[14] McLachlin J. (as she then was), writing in the case of *Gordon v Goertz* [1996] 2 SCR 27, set out the factors that a court must consider in assessing what is in the best interests of the children as contemplated by section 16(8) set out above. While that decision focused on the test for a variation of a custody order under section 17, the principles for assessing best interests of the children of the marriage are in common with those that a court must consider at first instance under section 16.

[15] At paragraph 49 the Court summarized the applicable law as:

> 49 ...
>
> 1. ...
>
> 2. ...the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
>
> 3. ....
>
> 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, *inter alia*:

(a) the existing custody arrangement and relationship between the child and the custodial parent;

(b) the existing access arrangement and the relationship between the child and the access parent;

(c) the desirability of maximizing contact between the child and both parents;

(d) the views of the child;

(e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;

(f) disruption to the child of a change in custody;

(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

50 ... The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[16] Goodfellow J. in his decision in the case of *Foley v Foley* 124 NSR (2d) 198 set out a list of non exclusive factors that a court may consider in determining what is in the best interests of the children. He said:

> 15 ...In determining the best interests and welfare of a child the court must consider all the relevant factors. The diversity that flows from human nature is such that any attempt to compile an exhaustive list of factors that could be relevant is virtually impossible.
>
> 16 Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:
>
> 1. Statutory direction **Divorce Act** 16(8) and 16(9), 17(5) and 17(6);
>
> 2. Physical environment:
>
> 3. Discipline;
>
> 4. Role model;
>
> 5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists-psychiatrists- etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child;

10. The physical and character development of the child by such things as participation in sports;

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child;

13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The **Divorce Act** s. 16(10) and s. 17(9);

15. The interim and long range plan for the welfare of the children.

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and

17. Any other relevant factors.

> 17 The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question. With whom would the best interest and welfare of the child be most likely achieved?
>
> 18 The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

[17] The children have lived in the primary care and control of their mother since separation, a period in excess of three years. They rely on the child tax credit, social assistance and child support payments. At times, Mrs. W. has obtained assistance through the local food bank.

[18] Mrs. W. has presented certificates demonstrating that she has completed a seven session parenting program for the parents of preteens offered by the Kids First Family Resource Centre, and a “Parent-Child Interaction Program” offered by the same Centre. She has also completed a nine session, 27 hour pre-service training course for foster and adoptive parents sponsored by the provincial Department of Community Services.

[19] The respondent is scheduled to attend “Starting Point” commencing in early 2010, a program offered under the sponsorship of Social Assistance. It is a 12 week course, and is preparatory to entering the workforce. Mrs. W. testified that she has been a stay at home mother, but now that all of her children are in school she is hoping to obtain employment. Her evidence is that she has after school care in place should that become necessary.

[20] H. is 13 and a Grade 8 student at * Middle School. Her report cards for the years since moving to * County show steady improvement in her Social Development/ Work habits, and average academic grades. Teacher comments give no reason to be concerned over behavior or performance. There is no significant absenteeism noted. She has completed the D.A.R.E. program and swimming lessons at the YMCA/YWCA.

[21] K. turned 8 in January, 2010, and is a student in Grade 2 at * School in *. Her Social Developments/ Work Habits assessments are all positive, and her grades are average with no concerns expressed in the teacher comments. There are no absenteeism concerns.

[22] Her primary teacher complimented her as being a “kind and gentle girl” and K. participated in the “Ready, Set Go” program at the Kids First Family Resource Centre.

[23] N. is 6 and in Grade 1 at *. As with his sisters, his report card gives no reason to believe there are concerns with his social development, his work habits or his academic performance.

[24] Mr. W. describes the children as “good, polite, well behaved and doing well in school”. He also described them as “bright” and “happy”. He then added that, in his opinion, this was “despite” the care provided by Mrs. W., and “not because of her” care.

[25] The petitioner’s principle complaints are that he has observed the children to be dressed poorly, have poor hygiene, and that K. had flea bites, which he believed were caused by a cat or cats at the respondent’s home. He says that H. has provided information that she has been left to babysit on at least one occasion, and that there has been inadequate milk and food at the respondent’s home.

[26] Mr. W. does not approve of the neighborhood in which the respondent and the children live, believing it to be a “party” place. He has no first hand observations to support this assertion.

[27] He testified that Mrs. W. exhibited an extreme emotional reaction in front of the children when he was late in returning the children on one occasion in 2007. This, he says, “traumatized” the children and left them fearful of a repetition of the scene at that time. As a result he says that he is very conscious of the need to pick up and drop off the children on time. He feels that Mrs. W. has not exercised good judgment in this and upsets the children needlessly.

[28] Mr. W. accuses the respondent of making it difficult to speak with his children and so he has stopped calling them between access visits. In particular, he says that she monitors his calls by putting the children on speaker phone which he doesn’t agree with.

[29] He described his access visits with the children in positive terms, in particular noting that H. and Ms. B. get along well and engage in activities such as cooking, and crafts. They visit with his parents and the children go to a

playground. The petitioner says that Ms. B. assists him in caring for the children and would continue to do so, if the children were to be in his primary care and control. He acknowledged that N. and K. have not formed friendships in *, although H. has.

[30] The petitioner complains that Mrs. W. unreasonably interrupts his time with the children by calling them repeatedly and, when on the phone, upsetting them by requiring them to say that they miss her. On one occasion when she was unable to reach her children for a few days during a summer vacation, Mrs. W. called the police to check on the well being of the children. Mr. W. felt this too was an overreaction.

[31] The only negative incident he spoke of as taking place at his home was when N. slapped Ms. B. and did not apologize until spoken to about it.

[32] S. B. has been dating Mr. W. since 2007 and began living in a common law relationship with him as of July 2009. She testified that until July she was generally not present during access visits. Since July she has had more contact with the children and offered her observations from that experience. Her

relationship with the children is described positively, in particular that H. trusts her and shares with her.

[33] She corroborates Mr. W.'s allegation that the children fear Mrs. W.'s reaction if their father is late in returning them from an access visit and confirmed Mrs. W.'s strong emotional reactions when she feels that she is not getting telephone access to her children. Ms. B. has noted instances where she felt the children's clothes were dirty and hair was not brushed. These observations have not caused her, or Mr. W., to complain to Children's Services or any other social welfare agency.

[34] Access visits are spent at the home, playing on the computer and watching movies.

[35] Mr. W. takes the position that Mrs. W. was a "good mother" until 2007, but no longer should be trusted with the primary care of the children, for the reasons set out above. As his testimony progressed the petitioner revealed a palpable dislike for Mrs. W., that seriously brought into question the degree to which he would encourage his children to have contact with their mother. When asked how

she was to exercise access to the children, his response was that “She’ll have to find a way to get there like I did .... How she gets to see the kids is her problem.” His tone, and his description of his wife, show that he does not respect her. He feels she should have gone into the workforce before this and should be living in a better neighbourhood. His disapproval of her lifestyle underpins his assessment of her parenting abilities.

[36] If the children were to live with their father, then Ms. B.’s participation in their care is pivotal. Mr. W. is a * who works long night shifts. His schedule is:

Sunday: 9:30 pm to Monday at 5:00 a.m.

Monday night through Thursday night: 6:30 p.m to 5:00 a.m

Friday: 6:30 p.m. to 11:00 p.m.

[37] As a result of these hours, he sleeps to midday.

[38] Ms. B. currently works from 6:30 p.m. to 5:30 a.m. daily, but is prepared to switch to day hours to assist in caring for the children.

[39] I have considered the evidence carefully and have concluded that Mr. W.'s application to assume primary care and control of the children must be refused.

[40] The evidence is that these children are happy, well adjusted, and succeeding in their schools. They have participated in worthwhile programming and have a good relationship with both of their parents. They have lived in their * county community for 3 years, which for K. and N. is a significant part of their young lives. It would require compelling evidence to disrupt their lives by moving them from their schools, their community and their friends to take up residence in a town where they have no real friendships beyond family, and to live under the substantial supervision of Ms. B., who they have only begun to get to know in the last 6 months, during access visits.

[41] I am not suggesting that Ms. B. is incapable of fulfilling this role. In fact, she impresses me as an intelligent and caring person who would make her best efforts to assist these children. However, it is not reasonable in my view to remove

them from the care of their mother, whom they spend substantial hours with, to that of their father who will only be available to them for a brief time between their arrival home from school and when he leaves for work. He will not be there in the night time should they need him.

[42] Likewise, I do not doubt Mr. W.'s desire to be a good father, and to ensure their welfare while in his care, but the fact that he wants to care for them, and can provide an appropriate physical environment for them does not, in and of itself, make it in the best interest of the children to change residences.

[43] Under the existing arrangements the children get to spend time with their extended families in each community. Access provisions for Mr. W. are reasonable to achieve the goal of maximizing his contact with the children. The fact that they do not live in the same town, which was not Mr. W.'s choice, and his employment hours are an impediment to any increase in access time.

[44] There is no basis on which I could ascertain the wishes of the children but having regard to their tender years, any expression of their wishes would not necessarily assist in the decision.

[45] Neither do I have any expert evidence which could influence the decision in favor of one parent's plan as opposed to the other. I acknowledge the concerns expressed by Mr. W. and Ms. B. with respect to the clothing, diet and hygiene of the children, but note that they did not feel it necessary to complain to Mrs. W., nor to social service agencies, teachers or to any other third party.

[46] Mr. W. speaks derisively of Mrs. W. not having milk for the children and her need to go to food banks, but he did not offer her any extra financial assistance. I am struck by the fact that he did not offer to assist by sending back better quality clothing with the children at the end of the access visit. If he was as concerned about his children's health, diet and clothing as he suggests, I question these failures to come forward with some greater assistance, either personally or by seeking the intervention of third parties.

[47] For her part, Mrs. W. has taken appropriate courses to improve her parenting skills. She ensures the children attend school and that they meet the course objectives. The children have been enrolled in helpful programming and there is no suggestion of malnutrition or medical issues of real concern. I do not accept the

suggestion that her meager financial resources are a basis on which to change the care arrangements unless it was shown that the children were being put at risk by this. There is no evidence which persuades me that is the case.

[48] I conclude that Mr. W. cannot be relied upon to facilitate contact between the children and their mother, as section 16(10) of the **Divorce Act** requires. I do not have the same concern about Mrs. W. as she has overseen the participation of her children in access visits with their father for over 3 years.

[49] The evidence suggests to me that the circumstances of the separation and the subsequent disputes over access visits have significantly and negatively influenced Mr. W.'s perception of his wife and of her parenting ability. While the petitioner may have seen some instances of poor quality clothing or hygiene, and may have reservations about the mother's neighborhood, I have concluded that the significance of these things has been exaggerated in his mind by his dislike for the respondent. If he saw serious health and hygiene concerns I am confident he would have brought in outside authorities to assist him in addressing those concerns, or would have returned to court to vary the interim order. He did neither.

[50] I am also satisfied that Mrs. W. does not trust Mr. W.'s influence over her children and at times allows these concerns to cause her to act out in ways that are disruptive to Mr. W.'s time with his children and with his ability to speak with the children when they are at her home. While the reasons for Mrs. W.'s conduct are not clear, she appears to be insecure in her relationship with the children, perhaps fearing that their father will turn them against her, or even fail to return them from an access visit. This conduct does not render her a less fit mother, though she does need to moderate her attempts to intrude into the lives of the children while they interact with their father. I will expand on this when dealing with access.

[51] Having considered the facts, and the law, I have concluded that it is in the best interests of H., K. and N., that J. G. W. and T. L. W. will continue to have joint custody of the children of their marriage and that T. L. W. will have the primary care and control of the children.

Access

[52] The current schedule provides a reasonably generous access schedule by Mr. W. with his children. There have been some isolated problems, but overall it

appears to have worked for the children in ensuring positive and significant contact with both parents.

[53] I accept that Mrs. W. can be obsessive about contacting her children when they are in their father's care. There is no evidence to suggest that he behaves inappropriately with his children. He is entitled to enjoy his time with them and not to be sitting by a phone waiting for their mother's phone calls. Neither should he expect the police to arrive at his door looking for the children because he did not return calls in as prompt a manner as Mrs. W. would wish.

[54] Similarly, Mr. W. should feel free to call his children and not have their mother either listening or controlling the call. Rather, her role should be to encourage the children to speak with their father, to facilitate the call, and then refrain from entering into the call.

[55] Counsel for the respondent has submitted that the existing schedule of access be continued and that some conditions be added as part of the overall parenting arrangements that could serve to minimize the difficulties that have existed. I agree with this submission and direct that paragraphs 4, 5, 6 and 7 of Justice

Scanlan's interim order be incorporated into the corollary relief judgment emanating from this hearing.

[56] In addition I order the following:

1. A notebook will be obtained by the respondent and in it she will record any information about the children, including but not limited to their health, education, extracurricular activities or access issues that needs be shared with the petitioner. The journal will be kept up to date and be delivered to the petitioner with each access visit. The petitioner will also record any similar important information and return it to the respondent at the end of the access visit. It should include the date of the next access visit so that there is no confusion as to when that will be.

2. Mr. W. shall prepare an access schedule for the entire calendar year and provide it to Mrs. W. in January of each year. She will advise him within 10 days of receipt of it of any disagreements she has with it. The parties will consult to ensure that there is no confusion. Each shall maintain a copy of it.

Changes to the access schedule that both parties agree to are to be committed to writing.

3. If both parents agree, then they are to exchange email addresses that may be used for the purpose of communicating any important information about the children.

4. Neither parent is to discuss custody or access arrangements with or in front of the children, except to confirm pick up and drop off arrangements.

5. Each parent has the right to speak to each of the children during the time that the children are in the care and control of the other parent. The parents are directed to encourage the children to speak with the other parent, and if such a call is connected then to allow the child(ren) to speak privately and without interruption.

6. Each parent will maintain a working answering machine. Except in emergencies, only one call may be made to the children per day. The

parents must make best efforts not to say things that may upset the children or cause them to not want to be with the care giving parent at that time.

If the call is not connected, then one message may be left, and the receiving party is to make best efforts to have the child(ren) return the call the same day. If the children are going to be unavailable to make or receive a phone call for more than 24 hours then the parent who has the children in their care is to inform the other parent on reasonable notice of that fact in advance. (For example, if the children are going to be camping for a few days, then the parent with whom they are camping is to advise the non custodial parent of that fact and that communication will not be possible.)

Child Support

[57] Mr. W. earns $1150 gross every 2 weeks or $29,900 per year. He submits that any legally mandated support amount should be reduced to reflect his increased access costs generated by traveling from * to * to pick up the children. Those expenses are estimated at $240 per month. Such a consideration is included in section10(b) of the **Federal Child Support Guidelines.**

[58] The interim order of Justice Scanlan did reflect such a reduction, but was also intended to address the petitioner's assumption of matrimonial debt which has now been eliminated by his discharge in bankruptcy in December 2009.

[59] There has been no formal application filed claiming hardship by Mr. W., although Mr. W. effectively advances such an argument through his evidence and submissions. In order to assess whether his financial circumstances would warrant such a continued reduction I would need more information than was put before me. The most recent Statement of Financial Information for Mr. W. is from 2006 and although it showed him to be in a deficit position, I cannot rely on it as reflecting his current circumstances.

[60] I do not have evidence of Ms. B.'s financial circumstances and have not seen documentation to support Mr. W.'s estimations of his income.

[61] The petitioner's debts have been eliminated by his very recent discharge in bankruptcy. He owns his home and uses his partner's vehicle for transportation.

He has the benefit of Ms. B.'s income to share some of the expenses of maintaining the home.

[62] I do not have sufficient information upon which I can do a proper analysis of the comparable standards of living of the parties. On the face of it, the respondent has very limited resources to provide for her children. There have been times that Mrs. W. has felt the need to obtain items from the Food Bank.

[63] I accept that there is an increased cost for Mr. W. to exercise access, and that it was generated by Mrs. W.'s decision to move the children from * to * after the separation. His estimate of $240 per month does not seem unreasonable. But there is a clear need established for the children to have all the financial support they can get, and it has not been established that Mr. W., even with increased access costs, cannot pay the amount required by law.

[64] Therefore, in accordance with the Nova Scotia table of the Federal Child Support Guidelines Mr. W. will pay to T. W. the sum of $596 per month for the support of the three children of the marriage, based on his income of $29,900. Payments will commence on the 1st day of February, 2010 and continue monthly

thereafter. Payments will be made through the Maintenance Enforcement Program.

[65] Mr. W. will provide a copy to the respondent of his income tax return together with attached schedules and any assessments each year on or before the 1st day of June.

Matrimonial Property

[66] The respondent makes application pursuant to Section 13 of the **Matrimonial Property Act** R.S.N.S. 1989, c. 235, as amended, for an unequal division of matrimonial assets.

[67] The burden of proof is on the party claiming an unequal division. "It is a heavy burden which requires proof of unfairness or unconscionability." *see*, *Crane v Crane*, 2008 NSSC 33.

[68] Mr. W. seeks an equal division of the matrimonial property which he values at $8,000. I do not have independent evidence of value. The property in question

are personal and household effects. He acknowledges that Mrs. W. does not have $4,000 to pay him and so he says that he would be satisfied if he received five items being:

1. A quilt made by Marjorie Rolfe;

2. A video of “The Quiet Man”;

3. A reciprocating saw;

4. Special Christmas decorations given by his family each year;

5. A dehumidifier.

[69] These are not unreasonable requests but Mrs. W. says that she cannot satisfy them. Some items, such as the saw and the dehumidifier, she believes were left at the matrimonial home and she does not have them or know where they are. The other items she claims to have lost in subsequent moves or to have thrown out. I found her answers to be vague and unconvincing, especially when questioned as to the whereabouts of the quilt. Having said that I can do no more than direct her to use her best efforts to locate and to return these items to Mr. W.. If she knows

where they are, even though they may not be under control at this time, she is to make best efforts to retrieve them and return them to Mr. W..

[70] Mrs. W. acknowledges that when she left the matrimonial home that she took more than half of the matrimonial assets, but that it was because she needed more furniture and household items to establish a new home for her and her three children. The respondent says that she left her husband with sufficient household furniture and other items necessary for one person living on their own at the house.

[71] Mrs. W. executed a quit claim deed of the matrimonial home to Mr. W. without compensation for doing so. It is agreed by both parties that the house was in need of significant repair and renovation. Again, I have no evidence on which to assess the value of this property.

[72] I have been referred to and considered the principles set out in *Clancey v Clancey* 1991 N.S.R. (2d) 147, *Dicks v Dicks* 2001 NSSC 111 and *Marshall v. Marshall* 2008 NSSC 11. Having regard to the facts as I have found them, I am satisfied that the respondent has met the burden, and that an unequal division of the

matrimonial property is appropriate. In reaching this conclusion, I have considered the factors set out in Section 13 of the **Matrimonial Property Act** and in particular 13(h) - the needs of a child that has not yet reached the age of majority.

[73] In conclusion I grant the application to allow an unequal division with the parties each maintaining possession and ownership of the property already distributed with the exception that the respondent will make her best efforts to locate and return the five items listed herein, to the respondent .

COSTS

[74] Each party will bear their own costs. I direct counsel for the respondent to prepare an order for my signature.

[75] Dated at Halifax, Nova Scotia this 11th day of January, 2010.

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Duncan J.