IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Tomlik v. Tomlik, 2011 NSSC 415

Date: 20111109
Docket: 1201-064103
Registry: Halifax

Between:

Angela Tomlik

Applicant

and

Peter Tomlik

Respondent

Judge: The Honourable Associate Chief Justice Lawrence I. O'Neil

Heard: April 27, 2011
(post hearing submissions received May and October 2011)

Counsel: Brian Bailey, for the Applicant
Adrienne Bowers, for the Respondent

By the Court:

Introduction

[1] The parties were married September 25, 1999 and separated April 22, 2009. The petition for divorce was filed by Ms. Tomlik on November 27, 2009. The parties have two daughters born in 2002 and 2006. They are in a shared parenting arrangement. Mr. Tomlik is a member of the Canadian military and Ms. Tomlik is employed by a major Canadian Bank.

[2] They resolved a number of issues at a settlement conference on November 30, 2010. The terms of their agreement are contained in a document included in exhibit 3 at tab 1. The parties agreed to a new child support regime at that time. It came into effect December 1, 2010. As a result, only retroactive child support to December 1, 2010 and outstanding issues related to asset and debt division were scheduled to be litigated before me. Prior to hearing evidence the court initiated discussions with the parties that further streamlined the issues. The parties were able to agree on many matters identified as points of disagreement in the pre trial submissions. The Court heard evidence over two days and was presented with detailed documentary evidence; consisting primarily of the parties' financial records. Post hearing written submissions were received in May, 2011.

[3] Following the completion of evidence the parties provided the Court with a draft corollary relief order which reflected the points of agreement between the parties. The draft order also highlighted points of disagreement. Mr. Tomlik calculates his entitlement as $16,896.28 and Ms. Tomlik calculates her entitlement as $16,137.64.

Issues

[4] The court was asked to rule on the fourteen outstanding issues.

1. Should a divorce order issue?

[5] The jurisdiction of the court is established; the parties were married in 1999 and have lived in this province for at least the past 10 years. The ground for divorce has been established given the period of separation of the parties. There are no bars to the issuance of a divorce order. There is no prospect of reconciliation. A divorce order will therefore issue.

2. Child Support: January - February 2011 and Child Care: January - April 2011 and Clauses 1 & 4 of the Draft Corollary Relief Order

[6] The Court is asked to determine whether Mr. Tomlik met his child support obligation for the period January 2011 to April 2011. On November 30, 2010 the parties agreed that Mr. Tomlik's child support payment would be $120 per month when he actually participated in a shared parenting arrangement. Ms. Tomlik argues that between January and February 2011 a shared parenting arrangement

did not exist because Mr. Tomlik was mostly away on duty with the military. In her opinion, Mr. Tomlik should have paid child support based on the child support tables; not the reduced amount of $120 per month. She does acknowledge that she owes Mr. Tomlik a contribution to the childcare expense he paid solely for part of the period, January to April 2011. She argues that when the amount owed by Mr. Tomlik is set off against the amount that she owes him, the result is a liability of approximately $880.00 ($1,280.00 - $400.00) owed by Mr. Tomlik to her.

[7] I conclude that Mr. Tomlik was not in a shared parenting arrangement in January and February 2010. Consequently Mr. Tomlik must pay child support in the amount of $1,040.00 for each of these months as required by clause 11© of the parties' partial agreement (exhibit 3 at tab 1).

3. Adjustment of Prospective Child Support and Special Expenses - Clauses 1 - 4 of the Draft Corollary Relief Order

[8] The child support obligation of Mr. Tomlik will reflect his previous year's income and be adjusted on July 1 of each year in keeping with the parties' agreement reached at a settlement conference (see clause 11(e) of the agreement appearing at tab 1 of exhibit 3). Other than the childcare expense, the parties did not offer evidence of any other special expenses associated with the children. Clause 11(d) of the same agreement provides for proportionate sharing of the childcare expense. However, the court order will provide for the proportionate sharing of additional expenses the parties agree upon.

4. Retroactive Child Support : April 2009 - November 2010 : Clause 4 of the Draft Corollary Relief Order

[9] Clause 11 (I) of the parties' partial agreement (exhibit 3 at tab 1) deferred resolution of the claim of underpayment/overpayment of child support for the period April 30, 2009 to November 30, 2010 and whether the parties had contributed to the child care expense on a proportionate basis.

[10] The Application and Petition for Divorce herein were filed November 27, 2009 (tab 2 of exhibit 3 and tab 1 of exhibit 4). A claim for child support was made by Ms. Tomlik at that time. She now claims retroactive child support.

[11] For the period following the parties' separation in April 2009 the children were primarily living with Ms. Tomlik. Initially, Mr. Tomlik lived with his parents because he could not afford other accommodation. Mr. Tomlik made payments on the parties' joint accounts and argues that he financially supported the children both directly and indirectly. He also argues that when calculating his obligation to pay child support using the child support tables, his previous year's income should be used. He argues Ms. Tomlik erroneously bases her calculations on his current income in a given year and disregards many payments he made.

[12] Ms. Tomlik is claiming that Mr. Tomlik did not make the appropriate child support payments for the period beginning May 1, 2009 and ending November 30, 2010. She references the *Federal Child Support Guidelines* and calculates the total child support (and child care) obligation of Mr. Tomlik over this period of 19 months as $25,660.00. Ms. Tomlik uses Mr. Tomlik's 2009 income to calculate his 2009 obligation and his 2010 income to calculate the 2010 obligation.

[13] I am satisfied that for purposes of this calculation the previous year's income should have been used. This is consistent with the parties' agreement reached in November 2010 and with the approach generally followed when applying the *Federal Child Support Guidelines*. The result is that for purposes of calculating the 2009 child support and childcare obligation; Mr. Tomlik's 2008 income of $68,505.00 should have been used not $74, 632.00; and for 2010 his 2009 income of $74, 632.00 should have been used, not $85,720.00. In addition to affecting the table amount of child support payable during these periods, the apportionment of the child care expense is affected for the years 2009 and 2010.

[14] Mr. Tomlik points to payments to third parties as settlement of this obligation and as evidence of an arrangement he had with Ms. Tomlik to pay in this manner. In his post hearing submission Mr. Tomlik argues that he, in fact, overpaid his child support/child care obligation during this period by $9,774.78; consisting of an overpayment of $5,648.27 in 2009 and $4,126.51 in 2010.

[15] Ms. Tomlik argues that if these third party payments are treated as child support then Mr. Tomlik should not be credited with these payments when the division of debts and assets is done. She argues that to do so amounts to double counting.

[16] The index to exhibit 5 (volume 2 of documents filed by Mr. Tomlik), identifies financial statements following tab 30 as evidence of Mr. Tomlik's direct and indirect payments. These are bank statements from (1) the parties joint TD account and (2) Mr. Tomlik's Royal Bank account.

[17] Mr. Tomlik also submitted a spreadsheet which he says summarizes all of his payments to Ms. Tomlik directly and to their joint account. The spreadsheet appears at tab 29 of exhibit 5.

[18] Mr. Tomlik's deposits to the joint account are also shown as exhibit 7. They cover the period April 22, 2009 to April 8, 2011. Other payments from the Royal Bank account are further evidenced by cancelled cheques drawn on the Royal Bank account referenced above.

[19] I am satisfied that until the fall of 2010 the parties were in a period of transition. For the initial period following their separation they commingled funds in an effort to avoid financial catastrophe and to preserve a home for the children. They were forced into an arrangement to cover their joint financial obligations, including the expenses associated with raising their children.

[20] In his e-mail to Ms. Tomlik appearing at tab 30 of exhibit 5, pages 357-358 Mr. Tomlik correctly summarizes the family context on June 11, 2009.

[21] Justice Bastarache in *D.B.S.* 2006 S.C.C. 37 reviewed the principles the court must apply when an application is made for a retroactive child support order.

[22] Mr. Tomlik cannot be described as guilty of blameworthy conduct nor is Ms. Tomlik guilty of delay in claiming child support. She filed her application in November 2009. Until the matter was concluded in part, at a settlement conference almost one year later, Mr. Tomlik made substantial payments for the support of the children and on joint debts. Initially his entire employment income continued to be deposited into the parties' joint account for the benefit of the family.

[23] Mr. Tomlik's conduct militates against a retroactive award. At paragraph 109 in *D.B.S. supra* Justice Bastarache stated *inter alia*:

> "...But having regard to all the circumstances, where it appears to a court that the payor parent has contributed to his/her child's support in a way that satisfied his/her obligation, no retroactive support award should be ordered. "

-and at paragraph 128

> "That said, courts ordering a retroactive award pursuant to the Divorce Act must still ensure that the quantum of the award fits the circumstances. Blind adherence to the amounts set out in the applicable Tables is not required - nor is it recommended..."

[24] I am satisfied that neither party has a financial obligation to the other due to an overpayment of child support/child care or as a result of an under payment. The context in which these parties began addressing these financial obligations reflected their dire financial circumstances. They behaved responsibly in doing so. Mr. Tomlik met his financial obligations. If there was an overpayment it arose as a result of how these parties agreed to meet onerous financial obligations as they moved forward. Similarly, if an underpayment arose (based on the child support table) it reflected the reality these parties agreed to accept.

[25] It is clear that Mr. Tomlik met his obligation to the children during the period following separation. There is therefore no retroactive award. He may very well have overpaid based on the tables. I am not prepared to order any credit carried forward. The parties agreed on an ad hoc basis on how bills would be paid. A new agreement flowed from the settlement conference on November 30, 2010.

5. The property tax account - Clause 5 (a) (ii) of the Draft Corollary Relief Order

[26] Following separation on March 1, 2009 Ms. Tomlik continued to occupy the matrimonial home until early 2011. The house was sold and the sale closed February 24, 2011 (exhibit 3 at tab15). Each party had to contribute additional funds to close the transaction because there were insufficient proceeds from the sale, to meet all the financial obligations.

[27] When the former matrimonial home was sold a "surplus" of $1,508.77 in the so-called property tax account existed (exhibit 3 tab 15). Ms. Tomlik believes that this "surplus" belongs to her because she paid the mortgage and taxes during the period of her sole occupation. Mr. Tomlik takes the view that this "surplus" should be available to meet deficiencies associated with the sale of the home. He

argues that the mortgage and tax account were the same account and Ms. Tomlik's obligation when living there was to continue the payment into the mortgage/tax account and the benefit of this payment was to be applied to the liabilities associated with the house.

[28] I do not agree that the so called surplus in the tax account should be isolated from the account which also contains funds for the payment of the mortgage. When the matrimonial home was sold a deficiency existed and the parties were required to share that deficiency. The separation of funds into a tax account is simply an administrative function of the bank. The funds deposited in this account were to meet the liabilities associated with ownership of the matrimonial home. The tax account surplus is therefore available to meed the obligation associated with the former matrimonial home. The funds are not the funds for the benefit of Ms. Tomlik solely.

[29] On these facts I conclude that the parties agreed that Ms. Tomlik would make the regular payments to the bank to cover the mortgage and tax liability and the full value of these deposits would be applied against these liabilities. It is not necessary for the court to embark upon an analysis of whether the tax liability is an incident of ownership or occupation as discussed in *MacDonald v. MacDonald* 2010 NSSC 18 and *Jovic v. Jovic* 2005 NSSC 183.

6. Property Tax Deficiency discovered after closing - Clause 5(a) (ii) of the Draft Corollary Relief Order

[30] Similarly, a property tax deficiency; discovered after the closing of the sale of the property must be borne equally by the parties. This is a liability of $996.46 and has been paid by Ms. Tomlik. Ms. Tomlik seeks reimbursement of one half ($498.23) from Mr. Tomlik. I agree that Mr. Tomlik has this liability.

7. Reduction in mortgage principal during Ms. Tomlik's sole occupation Clause 5 (a) (iii) of the Draft Corollary Relief Order

[31] The parties also disagree on the point at which the equity in the former matrimonial home should be divided. Ms. Tomlik's argument that any post separation decrease in the mortgage principal should be solely for her benefit is not accepted. The court accepts the reasoning of Justice Campbell in *Simmons* 2001 CanLII 4617 (NSSC). Ms. Tomlik lived in the matrimonial home and had sole occupation. She does not get the additional benefit of unequal division of the equity in the home. The home and mortgage are to be valued at the time of sale.

8. Period of vacancy of the home prior to its sale on February 24, 2011

[32] The parties agree that financial responsibility for the home for the period of vacancy preceding its sale is to be equally shared by the parties.

[33] The parties had disagreed on the length of the period of vacancy of the matrimonial home prior to its sale. However, they appeared to resolve this disagreement after hearing evidence. By way of background, Ms. Tomlik had been living in the home and vacated it prior to its sale. Ms. Tomlik had responsibility for certain costs associated with the home while she solely occupied it. The parties are equally responsible for the costs associated with meeting the mortgage and tax obligation after Ms. Tomlik vacated the home.

9. Furnishings and personal property associated with the home - Clause 5 (b) of the Draft Corollary Relief Order

[34] Ms. Tomlik takes the view that the parties have equally divided the furnishings and associated personal property. Mr. Tomlik believes that Ms. Tomlik retained an additional $10,000.00 worth of furnishings and personal property associated with the home such as patio furniture.

[35] He argues that he is therefore entitled to $5,000.00 as compensation.

[36] I accept the general description of events surrounding the division of furniture and household goods put forward by Mr. Tomlik. Ms. Tomlik could not be as unaware of the value of items as she said she was. She is a bank employee

with an appreciation of matters financial. Her efforts to avoid answering questions surrounding the valuation of the personal property of the parties undermined the case she was making in response to Mr. Tomlik's claim. She was evasive and not forthcoming on this issue. Her list of items divided between the parties appears at tab 24 of exhibit 3 and his list is at tab 7 of exhibit 4.

[37] I conclude that Ms. Tomlik did retain more of the household furnishings then Mr. Tomlik. I accept his evidence that he was told to leave when he visited the home to remove certain items.

[38] The Court is left with the difficult task of valuing the personal property retained by Ms. Tomlik and for which Mr. Tomlik did not receive an offsetting benefit. I am satisfied that the value is at least $4,000.00. I am satisfied therefore that a $2,000.00 liability to Mr. Tomlik from Ms. Tomlik exists; given she retained more than one half of personal property.

10. Pensions - Clause 5(e) of the Draft Corollary Relief Order

[39] The parties agree their pensions are to be divided equally to the period ending with their separation. However, they disagree on how the equal division of their respective pensions should be effected.

[40] Ms. Tomlik has a pension benefit earned over a short period when she was an employee of Canada Trust. Canada Trust was purchased or merged with the Toronto Dominion Bank (TD Bank) but the pension benefit earned at Canada Trust remained a stand alone pension benefit. The value of this pension is shown at tab 18 of exhibit 4 and is in the form of a locked in investment as TD Bank Shares.

[41] Now as an employee of the Toronto Dominion Bank, Ms. Tomlik participates in another pension plan. The particulars of this plan are shown at tab 12 of exhibit 4.

[42] Mr. Tomlik's pension entitlement is through the Department of National Defence and its value is as shown at tab 11 of exhibit 4. He agrees to equally share the commuted value earned until the parties separated April 1, 2009 provided Ms. Tomlik agrees to have her pensions treated the same way.

[43] The principal issue of disagreement is how a pension entitlement earned by Ms. Tomlik as an employee of Canada Trust is to be valued. The parties disagree on whether the parties should be dividing the commuted value of the pensions or simply divide the contributions made to the respective pension vehicles. Mr. Tomlik argues that if division of Ms. Tomlik's Canada Trust pension is to be made on the basis of contributions only, then that is how his military pension should be divided. The commuted values of both pensions are much higher.

[44] I direct that the division of the pension and receipt of entitlement be deferred until retirement. Each party is entitled to one half the value of the pensions earned to their date of separation on April 1,1999. The parties may agree to resolve this issue differently.

11. Vehicles and Vehicle Insurance - Clause 5 © and (d) and Clauses 10 & 11 (insurance) of the Draft Corollary Relief Order

[45] Appraisals of the parties' vehicles appear at tab 9 and 10 of exhibit 4. The parties disagree on what value should be assigned to the motor vehicle each retained following separation. An appraisal prepared at the request of Mr. Tomlik appears at tab 10 of exhibit 4. Mr. Tomlik retained a 2007 Pontiac G6 and Ms. Tomlik kept a 2007 Pontiac Torrent. I observe that the "wholesale" not market retail value of the Torrent is reflected in exhibit 9 and further that the appraisal of the G6 is dated November 2008, 18 months after the parties' separation.

[46] The court does not have reliable evidence of the value of these vehicles. I therefore conclude that a fair resolution of this issue is to have each party assume the debts associated with the vehicle they retained. I am influenced by the value of the loan remaining on each vehicle as indicative of the value of each vehicle at the time of separation. Those loans had comparable balances at that time. These obligations and assets are offsetting in value as between the parties.

[47] The cost of insurance on each vehicle is not the same. Exhibit 10 at page 2 reveals the cost of insurance for the G6 to be $871.00 and for the Torrent to be $969.00. These are the numbers to be factored into the calculation of the parties' respective obligations.

12. Student loans of parties - Royal Bank line of credit (see Ms. Tomlik's statement of property tab 5 of exhibit 3) and Clause 5 (p) of the Draft Corollary Relief Order

[48] Mr. Tomlik argues that a Royal Bank line of credit (exhibit 3 tab 5 at p. 28 and exhibit 4 tab 23) in the name of Ms. Tomlik should be her sole liability. At the time of separation it had a balance of $18,884.88. Mr. Tomlik says he was not aware of the existence of the account until after the parties separated. In addition he says the account was used by Ms. Tomlik exclusively for her benefit.

[49] Ms. Tomlik says that the line of credit was established prior to her marriage to Mr. Tomlik. She says it had an initial balance of $10,000.00 to fund her education but was subsequently increased over the years for various purposes, including for the purpose of consolidating debt.

[50] I am familiar with the decision of Justice Dellapinna in *Bhatt-Standley v Bhatt- Standley* 2008 NSSC 288 and in particular his comments at paragraphs 22 & 23 on whether a student loan is matrimonial debt.

[51] Mr. Tomlik also borrowed to fund Ms. Tomlik’s education. The loan was through the Canadian Forces Personnel Assistance Fund. A statement of account for this loan is shown at tab 28 of exhibit 5.

[52] I am satisfied that $10,000.00 of the Royal Bank line of credit is matrimonial given it was targeted to education expenses of Ms. Tomlik and the expenditure was an indirect benefit to the family.

[53] The student loans of both parties should be treated the same. These debts did fund education that represented an asset for this family. Mr. Tomlik is a navigator employed on a military helicopter and his educational pursuit as a pilot is of indirect benefit to the family.

13. TD VISA card (exhibit 8)

[54] The TD VISA card (exhibit 8) had a balance of $6,494.44 on May 4, 2009. Ms. Tomlik agrees that $459.44 of this amount is not matrimonial but the balance of $6,034.61 is. Mr. Tomlik says that only $5,500.00 is matrimonial debt. I am satisfied that $6,034.61 is the shareable debt associated with this account at the time of separation.

14. TD Line of credit of Ms. Tomlik (exhibit 9) Clause 5 (p)

[55] Ms. Tomlik's line of credit at the TD Bank had a balance of $7,405.55 on April 20, 2009 (Exhibit 9). I am satisfied that Mr. Tomlik was unaware of the existence of this liability while the parties were together. Mr. Tomlik concedes that transfers from this account did pay down the TD VISA account. He does not agree that the account in its entirety should be treated as matrimonial debt.

[56] The fact he was unaware of the debt does not preclude it being classified a matrimonial debt (see *Selbstaedt v. Selbstaedt*, 2004 NSSF 110 and *Lockerby v. Lockerby* 2010 NSSC 282).

[57] I conclude that only those amounts transferred to pay down the TD VISA card are appropriately matrimonial debt. The parties are directed to do the arithmetic flowing from this conclusion.

Conclusion

[58] Reconstructing the financial history of these parties, given the evidence, has been very challenging.

[59] The court retains jurisdiction to hear the parties further should either party believe a ruling on debt division is unclear or has been overlooked. The court asks that it be notified within two weeks of release of this decision of such a request.

[60] If no request to be heard further is received, any submissions on costs the parties wish to make are to be made within four weeks of release of this decision.

[61] Given that Ms. Bowers prepared the draft CRO, she is directed to forward the completed CRO which should show Mr. Bailey's consent to form. This is to be done following a ruling on costs, if any.

ACJ