

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Brake v. Brake, 2011 NSSC 440

Date: 20111125

Docket: 1201-065174

Registry: Halifax

Between:

Jennifer Brake

Petitioner

v.

Anthony Brake

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

October 31, 2011 in Halifax, Nova Scotia

Counsel:

Maureen Ryan for the petitioner
Robert Sutherland for the respondent

By the Court:

[1] This is a decision on interim spousal support.

[2] A divorce application was filed on March 10, 2011.

[3] The parties, Jennifer Brake (hereinafter "petitioner") and Anthony Brake (hereinafter "respondent") cohabited in September 1995, married on August 15, 1998 and separated on December 3, 2010. This is a 16 year union.

[4] The petitioner is 35 years of age and the respondent is 36 years of age.

[5] The parties have three children: Coady, Noah and Abby. They are 15, 12 and 8 of age respectively.

[6] The children live with the petitioner in the matrimonial home.

[7] As a result of the circumstances of their marriage and the roles they assumed during the relationship, the petitioner did not return to school. She remained in the home and subsequently later in the marriage took in other children in order to earn income.

[8] This is a traditional marriage in which the petitioner has been the primary parent responsible for the day-to-day care of the children as well as the household responsibilities. For 15 years she has been and continues to be a stay-at-home mother.

[9] The respondent agrees he has historically assumed responsibility for all financial matters.

History

[10] The parties met in the summer of 1994 when the petitioner was 18 years old and in high school. They dated for a year during which time the petitioner became pregnant.

[11] Originally the parties lived with the paternal grandmother. They separated when the first child was nine months old. The respondent was then in college.

[12] After marriage, they had two more children, one in 1999 and another in 2003.

[13] The respondent acquired a Bachelor of Business Administration. For 10 years of the marriage he was the only income earner.

Work-Related Transfers

[14] The nature of the respondent's work required him to accept transfers in order to continue his career climb. He was first moved to Bathurst, New Brunswick, where he was an assistant manager at a large retail operation. The petitioner and children followed him. He was then offered a job in the United States. The family moved to Tennessee for a year. They then moved to Halifax on a promotion and then to Stephenville, Newfoundland and Labrador; Grand Falls, Newfoundland and Labrador and finally Halifax, Nova Scotia; all to accommodate the respondent's career moves.

[15] The respondent worked long hours and occasional shift work.

Separation

[16] On December 3, 2010, the respondent decided to separate from the petitioner and he moved out of the home. He was involved with someone with whom he worked and since early after the separation has cohabited with this person.

[17] The respondent did not pay child support or spousal support after separation, to the date of March 2011.

[18] He continued to pay the mortgage payments in the amount of \$635.47 biweekly; property taxes of \$133.16 biweekly and life insurance, as well as house insurance in the amount of \$169.25 per month (Total of \$1,875.76), car insurance of \$81.33 per month and the lease payments on the Honda Civic driven by the petitioner in the amount of \$418 per month.

[19] The respondent acknowledges he paid third-party payments of approximately \$2,400 a month.

[20] After separation, he contacted Eastlink and Nova Scotia Power and had his name removed from the accounts. He cancelled the automatic delivery with Irving Oil.

[21] With significantly reduced household income, the petitioner was then required to make arrangements to set up these utility accounts in her name.

The Petitioner's Income

[22] The petitioner currently provides child care in her home. Her income in 2007 was \$4,450; in 2008 \$7,869; in 2009 her net business income was \$11,076; and in 2010 her net income from child care was \$21,769.34.

[23] She projects from March 2011 an income of \$32,800; however, this is an unreliable figure.

[24] Upon separation in December 3, 2010, the respondent removed himself from the home and subsequently declared bankruptcy on November 1, 2011. On that date a trustee was appointed.

[25] The ability of the petitioner and the children to remain in the home is in jeopardy. Her ability to earn income will be directly impacted because ownership of the home is in jeopardy,

Respondent's Income

[26] The respondent's Statement of Income prepared on March 13, 2011 reflects an annual income for table amount of \$201,430.44. His 2010 income was \$202,935; his 2009 Assessment was \$177,107, and his 2008 Assessment was \$171,366.

[27] He is paid a base salary bi-weekly with a significant fluctuating non guaranteed bonus. He receives this once each year in April. The bonus in April 2010 was \$77,000. In April of 2011 his bonus was \$84,000.

Agreement

[28] Prior to the hearing, the parties reached an agreement on custody and access. They agreed that the petitioner will have sole custody and care of the three children and she will reside in the matrimonial home for the time-being.

[29] The respondent has access every second weekend and every Wednesday afternoon and evening.

Debts

[30] As of August 25, 2011, the respondent did not pay child or spousal support.

[31] The family was burdened with substantial credit card debt and loans that primarily are in the name of the respondent with some joint loans in the name of the petitioner.

[32] The petitioner was left paying the food, clothing and other child-related expenses and all other costs associated with the matrimonial home including power at \$175 per month, phone, cable and internet of \$135 per month; oil of \$276 per month; gas and maintenance expenses for her car.

[33] She also pays minimum monthly payments on three matrimonial credit card debts in her name only, including Capital One at \$175 per month; Sears at \$150 and Wal-Mart at \$50 per month.

[34] The respondent suggested the petitioner had and used a supplemental card on the BMO Mastercard Line of Credit, Capital One Mastercard and American Express. He acknowledges that the Brick card is his own debt.

[35] The petitioner does not recall using the American Express credit card since separation. The respondent is the primary user of this card.

[36] The petitioner testified she did not know of the supplemental Capital One Mastercard the respondent indicates she has access to, nor does she has access to his HSBC or MBNA credit cards.

[37] Not only has her income decreased due to the separation and a reduction in the numbers of children she babysits ; the bankruptcy will no doubt have an effect on her ability to sustain her income in this fashion. She believes her income, currently \$3,260 gross, will decrease to \$2,040 per month.

[38] Despite assuming full responsibility for financial matters, the respondent blames the petitioner for their current financial crises. A review of the evidence causes me to conclude that the respondent bears a significant responsibility for the financial difficulties in which both of these parties find themselves.

[39] The respondent cannot now absolve himself of this responsibility by pointing the finger at the petitioner for poor spending practices. Indeed, many of the loans and credit cards are in his name.

[40] The petitioner did not obtain credit cards until the last five years of marriage, after she started a child care business in the home. Prior to that time she had no income and, as the respondent advises, would not have been approved for credit in her own name.

[41] In the petitioner's Statement of Property prepared on March 11, 2011, she lists her own debts at approximately \$10,000 including a Capital One credit card in the estimated amount of \$6,000; a Sears card in the approximate amount of \$4,000; in addition to the mortgage and car loans.

[42] In the respondent's Statement of Income dated May 13, 2011 he has more detailed information about joint debt and his list of credit cards, boat and trailer loans, consolidated loans, pool loans, the Honda leases as well as another Capital One card.

[43] In his list, the amount owing as of May 6, 2011, not including the mortgage, is \$212,408.

[44] In his BMO summary statement as of May 9, 2011, the total bank account balance was \$13,160.85, with minimal RRSP investments; loans of \$80,168.12 and a mortgage of \$269,185.43. He also has a personal Mastercard.

[45] Subsequent to separation, to set himself up in an apartment, in spite of their financial circumstances, the respondent purchased \$5,000 worth of household furnishings and items from the Brick.

[46] According to the respondent, the total of both their secured and unsecured debt is \$467,243. Total monthly payments on this were \$5,663.

[47] I have made no determination as to which of these debts are matrimonial or otherwise. That is a matter for future deliberations.

Child Support

[48] The parties agree that the respondent's income will produce a child support payment of \$3,142.

Child Tax Benefit

[49] The respondent has been receiving the benefit of the \$970.15 monthly child tax benefit from April 2011 to September 2011. The petitioner was unaware that the respondent arranged to have the child tax benefit deposited to their joint account and that he then removed it to direct the payment elsewhere.

[50] When she became aware of this and confronted the respondent, he advised he had spent this money on oil bills.

Spousal Support

[51] The respondent concedes the petitioner's entitlement to spousal support. He does not deny the petitioner has suffered economic disadvantage as a result of the marriage breakdown.

[52] Further, he acknowledges that the petitioner has a strong compensatory and non-compensatory claim for spousal support.

[53] He argues he is unable to pay spousal support at this time.

[54] If the respondent's gross 2010 income is taken as the annual income at \$202,935, his child support payments result in a payment for three children of \$3,242.26.

[55] There was some evidence about the feasibility of using his base salary rather than the total earned. A review of the last three years income tax returns indicates a consistent pattern of pay . There was no suggestion this year is any different.

[56] In such a circumstance the respondent will have to plan ahead . He has control of the finances, implemented this separation plan and ought to be responsible for ensuring stability in the children's household.

[57] I have reviewed the Spousal Support Guideline calculation as submitted by both parties. I am not clear which program the respondent utilized. The petitioner used Divorcemate. Counsel arrived at two different results.

[58] The petitioner used an employment income of \$202,935 for the respondent and net business income of \$24,888 for herself as well as a second estimate using a guideline income of \$201,430 for him and \$26,000 for her.

[59] The respondent used a gross income of \$202,935 for himself and \$38,907.12 for her. The petitioner's potential for income is likely overestimated especially for this year.

[60] They arrive at approximately the same child support award for three children at \$3,242.26.

[61] The petitioner's calculation of spousal support resulted in the low range of \$2,615 (or \$2,745), mid-range of \$3,093 (or \$3,241) and high of \$3,581 (or \$3,743) whereas the respondent's calculations reflect a low range of \$1,434.56 and an upper range of \$21,712 for a low monthly support award of \$1,244.55 and a high-end award of \$1,809.35.

[62] While helpful the guidelines are not binding.

[63] There are a number of considerations specific to these parties including:

1. The separation has been abrupt.

2. The parties have significant individual and matrimonial debt.
3. The effect on the children has been significant.
4. The respondent has left the residence and re-established himself in another relationship. Conduct is not a factor in spousal support. The relevance given to this circumstance is that the respondent is in a household where there is another income and thus he can share his expenses as these parties move through a turbulent and financially devastating transition from married to separated.
5. The recent petition for bankruptcy filed by the respondent leaves the petitioner in a significantly elevated financially stressful circumstance, living in the matrimonial home with the parties' three children.
6. The children's interests must be the focus to create as much as possible an interim financial stability in the mother's household to move them through this troubling time.

[64] The petitioner's transitional needs and requirements are urgent. She requires financial advice. While she contemplates in her evidence attempting to service any debts that are threatening her, in reality the overwhelming debt may well push her into bankruptcy, resulting in the loss of the matrimonial home.

[65] The continuation of her income stream at \$24,000 is speculative due to the reduction in children attending the matrimonial home for child care.

[66] Her ability to sustain the matrimonial home and thus her work place is seriously jeopardized by the separation and divorce, the parties' financial circumstances and the impending bankruptcy.

[67] These will have inevitable consequences which will jeopardize the stability of her employment until the petitioner and three children are re-established in a place where she can continue with her current work with children or choose an alternate path to retrain herself to be marketable.

[68] The respondent has cited a number of reasons why he believes that payment of spousal support should be delayed, including his obligation to pay child support for three children, his financial circumstances and his debt obligations.

[69] The monthly debt payments were included in the respondent's Statements of Income and Expenses and in his submissions at page 16 onward. He may, at one point in time, have assumed a significant share of the family debts. The bankruptcy has changed the debt allocation. Thus, this does not eliminate the possibility of paying interim spousal support.

[70] The respondent further claims that the petitioner stands in line behind the children and the creditors of matrimonial debts.

[71] The child support comes first.

[72] However, the respondent has precipitated aggravated the current financial crisis for the petitioner by the separation and his petition into bankruptcy.

[73] This transitional period of time is a time of highest need for the petitioner to sustain the family.

[74] I have reviewed their financial statements of income and expenses.

[75] I recognize this is an interim spousal support award made at a time of highest need; made when the respondent has removed himself from a significant amount of matrimonial debt and at a time when he is living in a household where his own expenses are reduced by the contribution from another partner.

[76] In consideration of these factors and the evidence , the respondent shall pay \$3,000 per month in spousal support, commencing November 1, 2011 and continuing thereafter until further order of the court or agreement of the parties.

[77] This is tax deductible in his hands and taxable in the hands of the petitioner.

[78] I acknowledge that I do not know what his partner contributes to his current household expenses.

[79] The respondent will no longer be paying the petitioner's motor vehicle or other indebtedness listed in the statement of income and expenses. In addition, his rental payment should be significantly reduced.

[80] The respondent has discussed in his submissions the issue of duration. It is premature to discuss duration at an interim hearing.

[81] I have considered his obligations under the bankruptcy, calculated his net disposable income and recognize that this leaves him with more than the minimum personal allowance set out in the bankruptcy papers and his monthly payment obligations of \$250 commencing December 30, 2011. These payments are calculated on the 2011 monthly standard for a family of three/six.

[82] This amount is calculated with the assumption that the medical benefits for the wife and children remain in effect, pending final resolution.

[83] I reserve the right for both parties to seek a final hearing and to seek among other relief, retroactive child and spousal support, recognizing that the respondent has maintained some but not all matrimonial debts in place of paying spousal and child support since separation.

[84] The affidavits clearly illustrate that neither knew what the other was doing. There needs to be a more exact verification of the bill payments subsequent to separation and the child and spousal support obligatory. Then the parties would be in a better position to determine set off.

[85] Counsel for the petitioner shall prepare the order.

[86] Should the parties wish to be heard on costs, they shall put their request in writing; the petitioner within three weeks of this decision, the respondent two weeks later.

Legere Sers, J.