

SUPREME COURT OF NOVA SCOTIA

(Family Division)

Citation: Thompson v. Thompson, 2013 NSSC 58

Date: 20130218

Docket: 1201-065789

Registry: Halifax

Between:

Georgina Lynn Thompson

Petitioner

and

Paul Gregory Thompson

Respondent

Judge: Associate Chief Justice Lawrence I. O’Neil

Date of Hearing: January 28, 2013

Counsel: Sally B. Faught, counsel for Ms. Thompson
Gary Jewett, counsel for Mr. Thompson

By the Court:

Introduction

[1] This is a decision in the matter of Georgina Lynn Thompson and Paul Gregory Thompson. This is a divorce proceeding. Evidence was heard on Tuesday, January 29th, 2012. The only witnesses were the parties. For the most part, direct evidence was contained in the affidavits of the parties. In addition, they filed financial documents. Both parties were subject to cross examination by counsel for the other party.

[2] The parties began a common law relationship in 1988 and married in 1992. They separated in September 2011 but lived in the same household until March 2012. The Petition for Divorce was filed by Ms. Thompson on December 6, 2011.

[3] The parties have two children. The older child born in July 1993 is a student at Acadia University. The younger child, born in December 1994, did one semester at Mount St. Vincent University but did not return in January 2012. The Court was told that the younger child expects to return to university at Dalhousie in the nursing program. She was a nutrition student at Mount St. Vincent University and did not feel that was a program to suit her.

[4] Ms. Thompson has an administrative position with a body associated with the Government of Nova Scotia and earns approximately \$83,000 per year. Mr. Thompson is self employed as a carpenter and occasionally works through the union hall. He declares an income of \$13,500 per year. At the time of the hearing, Ms. Thompson was 51 years old and Mr. Thompson 52 years old.

Issues

[5] The issues for the Court's consideration include (1) division of assets and debts. On the asset side, the parties principal asset is the matrimonial home and the debts include a mortgage on the home and a list of consumer debts.

[6] The second issue is (2) a determination of the Respondent's income. The Petitioner says the Respondent has the capacity to earn more than \$36,000 a year. She says he has undeclared income and an additional amount should be attributed to him. As a consequence, she argues no spousal support should be payable to him and his child support contribution for the two girls should be based on this imputed income.

[7] The third issue is (3) whether a divorce order should issue.

[8] A request for a contribution to special expenses was abandoned, given that the younger daughter withdrew from university.

[9] The principal issue for the parties is spousal support. Ms. Thompson says that Mr. Thompson can support himself and should not receive spousal support.

Debts

[10] The parties agree that the debts outlined by Ms. Thompson in her filings (Exhibit #3) are to be jointly shared as of the date of separation. In addition, they agree that the balance on the Canadian Tire account and Capital One account in the name of Mr. Thompson at the time of separation are also divisible assets. The accounting of Ms. Thompson does not currently include the Canadian Tire and Capital One credit card accounts. The parties are directed to exchange the necessary information to calculate this debt. The Court reserves the right to inquire further into the balance of these debts at the time of the separation if called upon to do so.

Spousal Support

[11] The general principles governing spousal support were outlined in *Burchill v. Savoie*, 2008 NSSC 307 beginning at paragraph 31:

[31] Section 15.2 (4) (a)- (c), (5) & (6) (a)- (d) of the Divorce Act, supra, requires the court to consider the condition, means and circumstances of each spouse and provides that a spousal support order should address four statutory objectives:

15.2(1) Spousal support order - A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse

(4) Factors - In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse including:

- (a) the length of time the spouses cohabited
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse

.....

(6) Objectives of spousal support order - An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should:

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above an obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self sufficiency of each spouse within a reasonable period of time.

[12] The words of Justice McLaughlin in *Bracklow* [1999] S.C.J. No. 14 at paras. 30-31 are on point:

[30] The mutual obligation theory of marriage and divorce, by contrast, posits marriage as a union that creates interdependencies that cannot be easily unravelled. These interdependencies in turn create expectations and obligations that the law recognizes and enforces. While historically rooted in a concept of marriage that saw one spouse as powerful and the other as dependent, in its modern version the mutual obligation theory of marriage acknowledges the theoretical and legal independence of each spouse, but equally the interdependence of two co-equals. It postulates each of the parties to the marriage agreeing, as independent individuals, to marriage and all that it entails -- including the potential obligation of mutual support. The resultant loss of individual autonomy does not violate the premise of equality, because the autonomy is voluntarily ceded. At the same time, the mutual obligation model recognizes that actual independence may be a different thing from theoretical independence, and that a mutual obligation of support may arise and continue absent contractual or compensatory indicators.

[31] The mutual obligation view of marriage also serves certain policy ends and social values. First, it recognizes the reality that when people cohabit over a period of time in a family relationship, their affairs may become intermingled and impossible to disentangle neatly. When this happens, it is not unfair to ask the partners to continue to support each other (although perhaps not indefinitely). Second, it recognizes the artificiality of assuming that all separating couples can move cleanly from the mutual support status of marriage to the absolute independence status of single life, indicating the potential necessity to continue support, even after the marital "break". Finally, it places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls.

[13] Justice L'Heureux Dube in *Moge v. Moge* 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, [1992] S.C.J. No. 107 directed that spousal support must strive to achieve some equitable sharing upon the dissolution of the marriage. At paragraph 73, she stated:

[73] The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse.

[14] Nevertheless, in the words of Justice MacLachlin in *Bracklow supra*, 1999 CarswellBC 532 :

21. When a marriage breaks down, however, the situation changes. The presumption of mutual support that existed during the marriage no longer applies . Such a presumption would be incompatible with the diverse post-marital scenarios that may arise in modern society and the liberty many claim to start their lives anew after marriage breakdown. This is reflected in the Divorce Act and the provincial support statutes, which require the court to determine issues of support by reference to a variety of objectives and factors.

.....

[15] In *Bracklow, supra*, MacLachlin J. defined the concept of quantum in reference to spousal support to include both the amount and duration of the support. She stated further that the factors relevant to entitlement also have an impact on quantum. At para. 53, when addressing the significance of any agreement the parties had, she states:

“ . . . Finally, subject to judicial discretion, the parties by contract or conduct may enhance, diminish or negate the obligation of mutual support . . . “

[16] I am satisfied that these parties developed a relationship of interdependency throughout their 24 year relationship. Each demonstrated that to the other. In August 2005 Mr. Thompson left Nova Scotia and worked in Ontario as a carpenter and returned every four to six weeks. Ms. Thompson testified that this was a decision supported by her. His income was deposited into the joint family account. His decision to take work in Ontario was at the end of almost one year of unemployment experienced by Ms. Thompson. The parties were under significant financial stress at the time.

[17] I am satisfied that this significant decision is evidence of the extent to which this couple accepted responsibility for each other in the household.

[18] I am satisfied that an entitlement to spousal support by Mr. Thompson is made out on a non compensatory basis.

[19] In the course of the marriage, Mr. Thompson spent one year building a home for the parties. During that year, he was not in the work force. This was obviously a decision this couple took in the interest of their family.

[20] Both parties agree that Mr. Thompson was an involved parent. He helped prepare meals; he helped transport the children to and from activities and he attended the activities for these two very active and competitive athletes as they grew. Ms. Thompson testified that as parents they over spent in terms of the children's activities. She testified that their support of the competitive pursuits of the children was an expense that they could not really afford, but they nevertheless incurred.

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[21] The parties have testified to their respective incomes. Ms. Thompson clearly has a much higher income, approximately \$83,000 per year and Mr. Thompson declares an income of \$13,500. Ms. Thompson argues that Mr. Thompson is capable of earning more money annually than he declares and the Court should impute income to him.

- Imputing Income

[22] The Court's authority to impute income is codified in the 'CSG'. Similar considerations govern when the Court is asked to impute income for purposes of determining spousal support and contributions to special expenses for children.

[23] The Court is mindful of the distinction that can be made when the Court is determining income for purposes of child as contrasted with spousal support (see *Richards v. Richards*, 2012 NSCA 7).

[24] Justice Forgeron in *Marshall v. Marshall*, 2008 NSSC 11 (CanLII), 2008 NSSC 11 provides a helpful summary of the state of the law on this issue. At paragraph 17-18, she wrote:

17 The discretionary authority found in section 19 of the Guidelines must be exercised judicially in accordance with the rules of reason and justice - not arbitrarily. There must be a rational and solid evidentiary foundation in order to impute income in keeping with the case law which has developed. The burden of proof is upon Ms. Marshall and it is proof on the balance of probabilities: *Coadic v. Coadic* 2005 NSSC 291 (CanLII), (2005), 237 N.S.R. (2d) 362 (SC).

18 In reviewing the factors to be considered when a party has requested imputation, the court stated at paras. 14 to 16 of *Coadic*:

[14] In making my determination as to the amount of income to be attributed to Mr. Coadic, I am not restricted to the actual income which he earned or earns, rather I am permitted to review Mr. Coadic's income earning capacity having regard to his age, health, education, skills and employment history.

[15] In *Saunders-Robert v. Robert*, [2002] N.W.T.J. No. 9, 2002 CarswellNWT 10 (S.C.), Richard, J., stated at para. 25:

[25] When imputing income, it is an individual's earning capacity which must be considered, taking into account the individual's age, state of health, education, skills and employment history. In the circumstances of the respondent, in my view it would not be unreasonable to impute, at a minimum, one-half of the income that the respondent earned in 1995 and 1996, say \$50,000. I note that the respondent's present income, according to his own evidence, is approximately \$42,500.00."

[16] In *R.C. v. A.I.*, [2001] O.J. No. 1053, 2001 CarswellOnt 1143 (Sup. Ct.), Blishen, J., reviewed the principle that income is based upon the amount of income which a parent could earn if working to his/her capacity and further adopted the factors to be applied when imputing income as proposed by Martinson, J., in *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.). Blishen, J., stated at paras. 79 to 80:

[79] By imputing income, the court is able to give effect to the legal obligation on all parents to earn what they have the capacity to earn in order to meet their ongoing legal obligation to support their children. Therefore, it is important to consider not only the actual amount of income earned by a parent, but the amount of income they could earn if working to capacity (*Van Gool v. Van Gool* 1998 CanLII 5650 (BC CA), (1998), 166 D.L.R. (4th) 528).

[80] In *Hanson v. Hanson*, [1999] B.C.J. No. 2532, Madam Justice Martinson of the British Columbia Supreme Court, outlined the principles which should be considered when determining capacity to earn an income as follows:

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (Van Gool at para. 30).

2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.

3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.

4. Persistence in unremunerative employment may entitle the court to impute income.

5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.

6. As a general rule, a parent cannot avoid child support obligations by a self- induced reduction of income."

[25] I am satisfied that Mr. Thompson is capable of earning more than the \$13,500 he claims as his income. I am satisfied, first of all, that these earnings are not claimed in his hands so at a minimum, I would gross this amount up. Secondly, I am satisfied that he is capable of working more than he declared. Mr. Thompson identified a very limited number of jobs that he did in 2012 that resulted in these earnings.

[26] It is difficult to determine how much more work is available to Mr. Thompson, but I am satisfied there is more than he has declared. In assessing the availability of work, one must remember that in 2005 through to 2008, Mr. Thompson left Nova Scotia for work. Clearly, if he had work in the Halifax area, he would have remained. I conclude from the decision to go to Ontario that no work was available in Nova Scotia at that time. I conclude that Mr. Thompson is

prepared to work. The foregoing does support his claim that there is not a lot of work available currently.

[27] Nevertheless, Exhibit 16 and 17 do show money going in and out of the joint account in the period immediately before the parties' physical separation in March 2012. I am satisfied some of these entries reflect earnings by Mr. Thompson. However, I cannot conclude that all of the deposits were earnings. Mr. Thompson did not identify all of the deposits and withdrawals as his, nor was he asked whether he purchased materials for the jobs he did. No business records were filed, nor is the Court aware that they were requested. They were not placed before the Court. Nevertheless, I am satisfied that Mr. Thompson has the capacity to earn more than \$13,500. A full time minimum wage job would generate more income for Mr. Thompson over the year than he currently declares.

[28] Mr. Thompson testified that he gave up his membership in the carpenters union because it was not resulting in much additional work for him.

[29] Mr. Thompson testified his not having a driver's license is a barrier to his gaining certain employment. This is because he does need to arrange transportation of his tools and other equipment when he accepts a job and this is problematic. In 2006, Mr. Thompson lost his license as a result of a conviction for dangerous driving. The driving suspension was for three years, ending in 2009. Beginning in late 2011 and in November 2012, Mr. Thompson took steps, including courses, to regain eligibility to gain a driver's license. He testified that provided he owns a car; has insurance and has a lock system on that car he is eligible to get his license. He currently does not own a car; he is without resources to buy one and going to the next step is a financial obstacle for him.

[30] Exhibit #4 being the affidavit in reply of Ms. Thompson contains at Exhibit 3, a number of job postings. Included are postings requiring that the applicant have a drivers license and/or a certificate of qualification as a carpenter. Mr. Thompson does not have either. His expertise is gained through experience. These postings do confirm some of the difficulty that Mr. Thompson currently faces gaining employment. However, there are also postings for carpentry work for which he would appear to be qualified.

[31] I am satisfied that an income of \$35,000 should be imputed to Mr. Thompson. I come to this conclusion after considering that his income, if he were working at a minimum wage, would be approximately \$20,000 based on 40 hours of employment per week. I am also satisfied that he has the capacity to earn more than that. For many weeks he works as a self employed carpenter for which he charges \$25 per hour. This is more than twice the minimum hourly wage. By combining the income earning opportunity that is presented by working at a minimum wage job and doing carpentry work when available, I have concluded that \$35,000 in gross income is realistic.

[32] Finally, I conclude that although Mr. Thompson may have some physical discomforts associated with working, I am not satisfied that arthritis or other ailments are an obstacle to his being gainfully employed. The scenario that Mr. Thompson places before the Court is that he earns \$13,500 per year. Given an hourly rate of \$25 per hour which he testified to this represents 540 hours per year or less than fourteen forty hour weeks per year. Clearly he has the opportunity and capacity to be employed more than that.

[33] In coming to this conclusion I have considered the directions of the *Divorce Act*; the guidance of the Supreme Court of Canada as enunciated in *Moge supra* and *Bracklow supra*. I have considered the parties' roles and responsibilities through the marriage.

[34] The Spousal Support Advisory Guidelines 'SSAG' calculate the spousal support payable to Mr. Thompson to have a low range of \$1,062 and a high range up to \$1,429. I am satisfied that an amount near the lower income range should be used. I come to this conclusion because of the high level of indebtedness that faces the parties; and the need for there to be a strong incentive for Mr. Thompson to do what he needs to do to gain employment. I am satisfied that Mr. Thompson's abuse of alcohol has been an obstacle to his employability. I set spousal support at \$800 per month.

[35] **Child Support**

[36] Mr. Thompson has an obligation to pay child support for the younger child who is 18 ½ years of age and still living at home and who plans to return to school in September. This obligation is premised on the fact that she is currently

unemployed but seeking work. The older child is living at university and the Court orders child support for her as well, but no contribution to the university expenses. No application for special or extraordinary expenses was placed before the Court.

[37] The child support obligation will be based on Mr. Thompson's imputed income of \$35,000. The table amount is \$505.

Disposition of the Home

[38] The Court has been asked by Mr. Thompson to sell the home and to have the equity applied to the parties' debts. Mr. Thompson wishes to be relieved of any responsibilities for these debts. In response, Ms. Thompson says that she would like to purchase the home at the assessed value as per Exhibit #7. The assessor places the value of the home at \$250,000. I accept this as the value of the home. If the home is sold, after disposition costs and after payment of the mortgage, the equity would be less than the parties' debts.

[39] Ms. Faught, on behalf of Ms. Thompson, argues that if there is a forced sale of the home, there will be no opportunity to pay 100 percent of the debts, whereas if Ms. Thompson is permitted to keep the home and re-mortgage it, she will have enough money to pay these debts. Ms. Faught did not indicate if the proposal is to then seek reimbursement from Mr. Thompson for a portion of the debts that were paid from the increased mortgage. Ms. Thompson's affidavit evidence suggests that Mr. Thompson would be relieved of any obligation to pay the matrimonial debts if she is permitted to buy the home.

[40] The Court wishes to hear further from the parties on this point.

Division of Personal Property

[41] The Court does not have reliable information on the value of the personal property of the parties. The Court is told by Ms. Thompson that the value is \$4,000 (Exhibit #7). Mr. Thompson disagrees. Ms. Thompson describes the furniture and appliances as 20 years old with the newest item about 12 years old. Included in the household effects are crystal, which she values at \$100 under the heading miscellaneous. The item 'Miscellaneous' also includes kitchenware and the like. Clearly, the value of these items is understated.

[42] The Court can not ignore that although resale value of many of these items is very low, the replacement value is significant. Given the limited resources and ability of each of these parties to purchase replacement items, the Court is directing that they propose a system by which the items be distributed. That may include each assigning a value to the major items with the parties agreeing on the overall value and dividing the value of the items equally by choosing items on an alternating basis. The Court is open to hearing from the parties should they believe they have a better idea.

RRSPs

[43] The Court orders that the RRSPs be divided equally by way of a roll over unless the parties agree otherwise.

Pensions

[44] The parties agree that the pensions of the parties will be divided equally at source to avoid any tax consequences.

Divorce

[45] The parties have lived separate and apart for more than one year. The jurisdiction of the Court has been established. The grounds for a divorce on the basis of a permanent breakdown of the marriage exist. There are no bars to the issuance of a divorce. An order will be issued when presented.

[46] There shall be an order reflecting all of the foregoing with the standard clause requiring ongoing financial disclosure by both parties.

[47] The Court will schedule an opportunity for the parties to make submissions on (1) sale of the matrimonial home/payment of debts; (2) distribution of household effects; and (3) commencement date for spousal and child support payments.