IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Spencer v. Burris, 2004 NSSC 6

Date: 20040109
Docket: 1207-001553 - STD - 024409
Registry: Truro

Between:

Randall Olie Spencer

Petitioner

v.

Donna Rae (Spencer) Burris

Respondent

D E C I S I O N

Judge: The Honourable Justice Douglas L. MacLellan

Heard: October 27 to October 29, 2003, in Truro, Nova Scotia

Counsel: David J. Mahoney, for the petitioner
Donna Rae (Spencer) Burris, present, unrepresented

[1] The petitioner Randall Olie Spencer petitions for divorce and requests that the Court grant retroactive child support for the children of the marriage and a division of assets under the ***Matrimonial Property Act***.

FACTS

[2] The parties here were married in 1981 and separated on December 25th, 1996. There are four children of the marriage; namely, Cory David Spencer, born, December 31, 1980; Allan Matthew Spencer, born February 21, 1983; Dusty Lynn Spencer, born October 10, 1984, and Angelica Marie Spencer, born October 23, 1986.

[3] When the parties separated in 1996 the children stayed with the petitioner father and one of the children is still dependent and continues to reside with him. Mr. Spencer is claiming retroactive child support back to the date of separation. The respondent agrees that she has not paid child support since the separation and also acknowledges that during some of that time she had income which would require her to pay child support under the child support guidelines.

[4] The central issue on the question of retroactive child support is a determination of what the respondent's income was during the years in question and at what time each child should be removed from the child support order.

[5] When the respondent left the matrimonial home in late 1996 she was unemployed and eventually went on social assistance. She then started a common-law relationship with Bernard Amon. She assisted him in his logging business to cover her room and board costs. In the Fall of 1997 she started work as a waitress at Damascus Pizza in Truro. She says her income for 1997 from that source was $1,700.00.

[6] The respondent asks that I impute income to her of $9,300.00 based on what she made for the three months she worked at the Pizza restaurant and the fact that she had tips which she did not disclose on her income tax return.

[7] I am not satisfied that I should impute any income over what she has declared, therefore, I find that she did not have enough income to require the payment of child support during the year 1997.

[8] In 1998, the respondent declared income of $11,300.00. The petitioner, through counsel, suggests that this should be increased to $13,800.00 to account for tips not reported. I conclude that the amounts provided by the respondent is the proper one and would therefore use that figure for the purposes of determining child support payable for her during that year.

[9] In 1999, the respondent admits income of $13,200.00. The petitioner suggests that her income was $18,200.00 and once again argues that her declared income does not factor in monies she received from tips. I am not satisfied that I should increase the amount declared by the respondent and would accept her figures for that year.

[10] In the year 2000, both the respondent and the petitioner agree that her income was $18,500.00.

[11] For 2001, the parties have agreed that her income for child support purposes should be $20,000.00.

[12] For 2002, the respondent submitted that her income was $12,700.00 while the petitioner suggests it should be $23,300.00 based on the fact that during that year she ran a private investigators business which grossed $28,300.00 but had net profit of only $5,000.00.

[13] I would impute income to the respondent for the year 2002 at $17,000.00 for child support guideline purposes.

[14] For the year 2003, the respondent suggests that her income will be $14,000.00 while the petitioner suggests that $23,300.00 is a more realistic figure.

[15] Based on the information I have before me, I would impute income for the year 2003 for the respondent at $17,000.00 for child support purposes.

[16] Following the separation all four children stayed with the petitioner. During 1997, the respondent had income below the minimum amount required to pay child support. In 1998 and 1999 the four children continued to be children of the marriage and therefore for these years the respondent should have paid child support as follows:

[17] 1. For 1998 based on income of $11,300.00 she should have paid $191.00 per month, or $2,291.00 for the year.

2. For 1999, her income was $13,200.00 and therefore she should have paid monthly income of $260.00 or $3,120.00 for the year.

[18] On December 31st, 1999, Cory turned 19 years old. There is a dispute between the parties as to when he stopped going to school. The respondent said that he stopped in December 1999 and therefore would not be considered a child of the marriage during the year 2000.

[19] Cory was called as a witness in rebuttal and testified that he dropped out of school in January 2001.

[20] I accept his evidence and would therefore order that the respondent pay child support for all four children during 2000. That will be based on the agreed income of $18,500.00 and results in monthly income of $437.00 or $5,244.00 for the year.

[21] In September 2001, the child Matthew dropped out of school, therefore, the parties have agreed that the respondent should pay for three children to September and two children thereafter. Based on an agreed income of $20,000.00 the calculations would be as follows:

$382.00 x 8 months =	$3,056.00
$283.00 x 4 months =	$1,132.00
Total child support	$4,188.00

[22] During 2002, the two youngest children remained with the petitioner and based on income of $17,000.00 the respondent should have paid $249.00 per month or $2,988.00 for the year.

[23] For 2003, the child Angelica left home in early February therefore the respondent should have paid for two children until February and one child thereafter. Based on imputed income of $17,000.00 she should pay:

$249.00 x 1	=	$ 249.00
$135.00 x 9 months (date of trial)	=	$1,215.00
Total		$1,464.00

[24] In summary, therefore, the child support ordered payable by the respondent on a retroactive basis will be as follows:

1. 1997	-	Nil
2. 1998	-	$2,292.00
3. 1999	-	$3,120.00
4. 2000	-	$5,244.00
5. 2001	-	$4,188.00
6. 2002	-	$2,988.00
7. 2003	-	$1,464.00
Total		$19,296.00

[25] Based on post-trial submissions from the parties, I am not able to determine if Dusty Spencer continues to reside with the petitioner. The respondent in her submission indicates that Dusty came to live with her in late October following the trial while counsel for the petitioner indicates in his post-trial brief that Dusty continues to live with her father.

[26] I would order that if Dusty is in fact living with her father the respondent should pay support in the amount of $135.00 per month. If, however, Dusty Spencer is living with the petitioner that would result in the petitioner paying child support. I do not have before me up-to-date information in regard to the petitioner's income therefore I cannot determine what he should be paying under the child support guidelines. It might be necessary for the respondent to make an application to vary unless the parties can agree on the amount of child support payable by the petitioner.

PROPERTY DIVISION

[27] When the parties here were first married they arranged with the petitioner's mother to purchase a home which was located on her property. It had belonged to the petitioner's grandparents and the parties paid only $500.00 for it. During the

marriage they improved the house by doing additions and repairs to it. They also built a garage on the same property which was used to do autobody work. They worked together doing that.

[28] In 1988 the petitioner's mother, who at that time operated a large blueberry operation, decided to divide up her land among her children. There were eight children and each one was to be given a lot of land and in addition all eight were to become the joint owners of a woodlot containing 150 acres.

[29] According to the petitioner when it was determined that he was to get a blueberry lot from his mother he decided that because he felt that his wife might leave him and that she was involved in an affair with another man, he decided to have his lot deeded directly to his brother Elmer Spencer. That lot was for 24 acres. He said that he felt that in this way he could protect the land from his wife and ensure that it went to his children. Apparently in 1988 he had been doing a lot of work on the blueberry lands for his mother. After 1988 the profits from his 24 acre lot was streamed into the family by way of having the income declared by the children. This was to avoid the payment of income taxes.

[30] The Court heard from Elmer Spencer about this arrangement and he acknowledged that the land really belonged to the petitioner, but the deed was in his name.

[31] In 1991, the parties decided that they would build a new home. The petitioner felt that since he had a one-eighth interest in the woodlot that he could build on that land. He started construction but it was slow and by 1996 when the parties separated the house was still not finished. There was a problem getting electricity to it and the land had to be subdivided. In 1997, he sold the still unfinished house for $14,000.00. To effect the sale, he had to have a subdivision of the property done. He realized $8,993.00 profit from the sale of that house.

[32] The respondent suggests that the whole $14,000.00 should be considered matrimonial property because the family should have paid for the subdivision. I conclude that in the circumstances that only the profit realized by the petitioner is matrimonial property.

[33] The woodlot of which the petitioner had a one-eighth interest was also sold and the petitioner realized $9,558.00 as his share of that sale. The petitioner suggests that

the woodlot was never a matrimonial asset because it was received as a gift from his mother and never used by the family except for the cutting of firewood.

[34] The respondent argues that it is a matrimonial property because the family took firewood from the property and shared in the proceeds when part of the property was expropriated for the building of a new highway.

[35] In ***Fisher v. Fisher*** [2001], NSJ. No. 32 our Court of Appeal dealt with this kind of situation and set out the basis upon which a property which is gifted to one party can be considered a matrimonial asset under the ***Matrimonial Property Act.***

[36] Counsel for the petitioner suggests here that the respondent's interest, if any, should be about 10 percent of the monies received by the petitioner for his share of the woodlot. Based on the ***Fisher*** case, I agree with counsel for the petitioner and I would award the respondent $500.00 as her share of the monies received by the petitioner.

THE BLUEBERRY LOT

[37] The respondent claims that it is a matrimonial asset and in addition claims that she should be entitled to half of all profits realized from the blueberry lot since the separation. The petitioner submits that it is a business asset.

[38] I find no basis here for the respondent's claim to either the profits or the blueberry lot itself. The profits were generated by the petitioner and his children and the respondent has no claim to them.

[39] I accept the position of the petitioner that the blueberry lot is in fact a business asset and in fact not subject to a division under the ***Matrimonial Property Act***. I reject any suggestion that the respondent here is entitled to any portion of the land based on work she did on the property

VALUATION OF OTHER ASSETS

[40] This case is an example of cases where the Court does not have clear information about the value of assets. Because of that, I am forced to attempt to determine value based on conflicting evidence from the parties.

[41] The matrimonial home is located on lands belonging to the petitioner's mother. Since the separation he has purchased the property from his mother. The Court must attempt to value the property as it was at the time of separation.

[42] The respondent suggests that it was worth $8,000.00 in 1996 based on the assessed value of $12,300.00. The petitioner says that the house was in bad shape and its only value would be for materials if it was torn down.

[43] I conclude that the house does have a value and would set its value at $5,000.00 at the time of separation.

[44] The respondent claims for occupational rent from the period between the separation in 1996 and the trial date. I have considered that request and I would in the circumstances not order that occupational rent be paid by the petitioner to the respondent. I do so in light of the fact that during that period of time the petitioner had the responsibility of the children of the marriage and the matrimonial home had very little value. (See ***MacLennan v. MacLennan***, 2003 N.S.J. No. 15)

[45] The garage is in the same circumstance. The respondent suggests a value of $3,000.00 and the petitioner suggests it has no value. I would conclude that the garage has a value of $1,500.00.

[46] There were a number of other assets which the petitioner retained. There is agreement in regard to the value of some of these.

[47] The parties agree that they had an ATV valued at $800.00 and a router tiller valued at $100.00 and that the furniture in the matrimonial home would be worth $2,500.00.

[48] At separation there were three family vehicles. The respondent took with her a 1981 Ford half-ton 4 x 4 and a 1985 Oldsmobile Cutlass. The petitioner says the Ford was worth $2000.00 at that time. The respondent says that they purchased it for $1,500.00 two months prior to the separation. I conclude that it should be valued at $1,500.00.

[49] The petitioner suggests that the 1985 Cutlass should be valued at $1,500.00 while the respondent suggests its value is $500.00. I would conclude that its value should be $1,000.00.

[50] The petitioner kept one vehicle, a 1980 Chev half-ton which he used for parts to fix up another vehicle. He acknowledged that it would be worth $1,000.00 for parts. I accept that value as being reasonable.

[51] The final items of property are tools used by the parties in the operation of the autobody business out of the garage. They both agree these tools are worth $4,000.00. The petitioner says that his wife did very little work in that business. She on the other hand says that she helped and that it was a joint venture to provide income to the family.

[52] I conclude that the autobody business was as described by the respondent and that the tools were purchased with funds that would normally have been used by the family. I conclude that the tools should be classed as matrimonial assets.

[53] I would summarize the assets and their values as follows:

[54] **RANDALL OLIE SPENCER'S ASSETS**

1. Proceeds from the house	$8,993.00
2. Matrimonial home	$5,000.00
3. Garage	$1,500.00
4. ATV	$ 800.00
5. Furniture in home	$2,500.00
6. Trailer	$ 100.00
7. Tools	$4,000.00
8. 1980 Chev	$1,000.00
TOTAL	**$23,893.00**

DONNA RAE (SPENCER) BURRIS' ASSETS

1. Ford Pickup	$1,500.00

2. 1985 Cutlass	$1,500.00
TOTAL	**$3,000.00**

[53] Needed to equalize property $10,446.50 + $500.00 (respondent's share of woodlot proceeds) equals $10,946.50.

[54] In light of the fact that I have already determined that the respondent owes the petitioner the sum of $19,296.00 for retroactive child support, I would therefore order that the amount owing by the petitioner to the respondent to equalize the property division should be subtracted from the amount owing by her to him for child support which will result in outstanding child support of ($19,296.00 - $10,946.50) $8,346.50 owed by the respondent to the petitioner.

[55] I would order that each party bear their own costs.

J.