

SUPREME COURT OF NOVA SCOTIA

Citation: Tran v. Tran, 2013 NSSC 280

Date: (20130912)

Docket: 1204-005591 (SKD 079164)

Registry: Kentville

Between:

Lan Thi Tran

Petitioner

v.

Hung Tran

Respondent

Judge: The Honourable Justice Arthur LeBlanc

Heard: May 2, 2013, in Pictou, Nova Scotia

Oral Decision: July 5, 2013, in Pictou, Nova Scotia

Written Decision: September 12, 2013

Counsel: J. Dena Bryan , for the petitioner
Janet Stevenson, for the respondent (Hearing)
Mr. Hung Tran, Unrepresented (Oral Decision)

By the Court:

Introduction

[1] This is a decision on the application for Interim Relief under the provisions of the *Divorce Act*.

[2] The Petitioner (Applicant on this motion), Ms. Tran, commenced a Divorce proceeding in Kentville on 27 January 2012. Mr. Tran filed an Answer on 1 March 2012. The proceeding was transferred to Pictou in January 2013. This is an interim motion.

Background

[3] The parties began cohabiting in 2002 and were married in October 2007. They had been living together, originally with Mr. Tran's parents, since 2002. There was a temporary separation in 2005. The parties purchased the matrimonial home in November 2007. That home was sold in 2010. The parties separated for several months in mid-2010. They attempted reconciliation, then separated again in late 2010. There are two children of the marriage: a son, TT, born 6 May 2007,

and a daughter, JT, born 15 June 2008. The parties agreed to interim split custody in September 2011. TT lives with Mr. Tran, and JT with Ms. Tran.

[4] Mr. Tran opened a nail salon, Princess Nails, in Clayton Park in 2003 or 2004. The business was originally a sole proprietorship. He incorporated Princess Nails as 3220991 Nova Scotia Limited in November 2008.

[5] Ms. Tran says she worked in the salon from 2004 to 2010. Ms. Tran says that she was never paid a salary or commission during that time. She says that during an attempted reconciliation between August and December 2010 she was paid a 60 per cent commission, amounting to between \$1000 and \$1200 per week. She seeks payment in the form of salary or commissions for the work she did in the business between 2004 and April 2010. Alternatively she seeks an unequal division of matrimonial assets under s. 18 of the *Matrimonial Property Act* on the basis that she made contributions to the acquisition and maintenance of Princess Nails.

[6] At the time of the 2005 separation, Mr. Tran gave Ms. Tran \$60,000. Her evidence was that when she and Mr. Tran reconciled, this money was used to buy

a home and a car. Mr. Tran later sold that car. When the parties separated in December 2010, he gave her a lump sum of \$80,000. Ms. Tran went to live with her parents, who run a nail salon in New Minas, after the separation. She said she did some work for her parents, getting free room and board, with commissions going to pay household expenses. She moved out of her parents' home in July 2012. Since that time, she has done some work on commission for her brother.

[7] Mr. Tran said he received a demand for more than \$400,000, from Canada Revenue Agency, which he could not meet and which led to his bankruptcy. He said he did not agree with the reassessment, but did not appeal it on the advice of his accountant. Ms. Tran says that as a result of the CRA investigation of Mr. Tran, of which she had no knowledge, she was assessed income tax, penalties, and interest of \$84,000, based on income that she says she never actually received. Like Mr. Tran, she became bankrupt. Ms. Tran said she did not tell the trustee about the \$80,000 she received from Mr. Tran in 2010, saying it was not in her hands at the time.

Interim custody and access

[8] The *Divorce Act* permits the court to make an order pursuant to Section 16. This order provides for either custody and access including interim orders. Pursuant to Section 16(8) the court is required to “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.” As noted above, there are two children of the marriage: a son, TT, born 6 May 2007, and a daughter, JT, born 15 June 2008. After each birth, Ms. Tran experienced post-partum depression. The parties agreed to interim split custody in September 2011. As I indicated, TT lives with Mr. Tran, and JT with Ms. Tran. Mr. Tran submits that the *status quo* should not be disturbed on the interim application. There is authority for the view that the *status quo* should be maintained in the absence of evidence that this is not in the children’s best interests: *Roebuck v. Roebuck* (1983), 34 R.F.L. (2d) 277, [1983] A.J. No. 12 (Alta. C.A.), at paras. 19-22; *Prost v. Prost* (1990), 30 R.F.L. (3d) 80, 1990 CarswellBC 490 (B.C.C.A.), at paras. 8-10.

[9] I am satisfied that the *status quo* should be maintained with respect to custody of the children. I understand from the parties that they have come to terms with respect to access. However, in the event that this is not so, I will hear further from them.

Child support

[10] Child support in cases of split custody is governed by Section 8 of the *Federal Child Support Guidelines*, which provides that:

[w]here each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

[11] Ms. Tran asks the Court to impute income of \$100,000 to the Mr. Tran for support purposes. Mr. Tran says the interim hearing is not the best forum for determining whether, and in what quantity, income should be imputed. He says this determination should await fuller financial disclosure, including receipt of his 2012 CRA Notice of Assessment, which indicated an income of \$25,000. Alternatively, he says the Court could impute income in the amount of \$50,000, in accordance with his 2011 Notice of Assessment.

[12] Reviewing Mr. Tran's historic income level, by reference to his tax returns, notices of assessments, and documents related to the CRA investigation, I note that between 2005 and 2008 he was apparently reporting net income well in excess of \$100,000 *per annum*. This declined to reported taxable income of little more than \$30,000 beginning in 2009. Mr. Tran has pointed to no evidence, whether relating to the broader economic and financial climate, or to the specific conditions of Princess Nails, or to his own circumstances, that would explain the fairly drastic decline in reported income in the period leading up to the parties' separation in 2010. I also note that a February 2010 car loan application indicates an income of well over \$100,000 for Mr. Tran. While refraining from making findings of credibility at this interim stage, I am prepared to impute income to Mr. Tran in the amount of \$100,000.

[13] Ms. Tran is now working and living with a new partner. She works in her brother's nail salon. Her statements of income indicate earnings in the range of \$28,000 to \$30,000; her evidence indicates that there is some seasonal variation to her work. She testified that there was typically a decline in the level of activity during the winter months.

[14] Both parties claim certain child care expenses. Mr. Tran reports monthly expenses of \$160.00, mainly for sports activities. Ms. Tran reports monthly expenses of \$810.00, of which \$650.00 is for child care and remainder for other activities.

[15] Child support is ordered in accordance with Section 8 of the *Federal Child Support Guidelines* based on an income of \$100,000 for Mr. Tran and \$30,000 for Ms. Tran. Accordingly, Mr. Tran is to pay child support on a monthly basis of \$837.00 per month for one child, while Ms. Tran, is to pay child support in the amount of \$250.00 for one child. Therefore, the net difference between these two amounts is \$585 which is a payment Mr. Tran will have to make to Ms. Tran for child support. Any special or extraordinary expenses under Section 7 of the *Guidelines* shall be divided proportionately, with Mr. Tran paying 70% of the total of child care expenses for both children, and Ms. Tran paying 30% of that total. This amount shall be divided, as I said, proportionately, taking into account any subsidies, benefits or income tax deductions or credits relating to the expenses, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expenses, as per Section 7(3) of the *Guidelines*.

[16] At this time I am not prepared to Order retroactive child support. This will have to await the trial of the matter.

Spousal support

[17] Ms. Tran seeks spousal support. I am not convinced that it is appropriate to make such an order at this time in view of the uncertainty as to what really happened to the \$80,000 she received upon separation.

[18] Ms. Tran seeks retroactive spousal support. This too will have to await the trial.

Disclosure

[19] A spouse who applies for a child support order, or who has been served with an application for child support, and whose income information is necessary to determine the amount must provide the following information pursuant to subsections 21(1) and (2) of the *Federal Child Support Guidelines*:

- (a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;

(b) a copy of every notice of assessment and reassessment issued to the spouse for each of the three most recent taxation years;

(c) where the spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the spouse's employer setting out that information including the spouse's rate of annual salary or remuneration;

(d) where the spouse is self-employed, for the three most recent taxation years

(i) the financial statements of the spouse's business or professional practice, other than a partnership, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;

(e) where the spouse is a partner in a partnership, confirmation of the spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;

(f) where the spouse controls a corporation, for its three most recent taxation years

(i) the financial statements of the corporation and its subsidiaries, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;

(g) where the spouse is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements; and

(h) in addition to any income information that must be included under paragraphs (c) to (g), where the spouse receives income from employment insurance, social assistance, a pension, workers compensation, disability payments or any other source, the most recent statement of income indicating the total amount of income from the applicable source during the current year, or if such a statement is not provided, a letter from the appropriate authority stating the required information.

[20] The disclosure requirements of section 21 do not preclude the making of provincial rules “respecting the disclosure of income information that is considered necessary for the purposes of the determination of an amount of a child support order”. See s. 21(5).

[21] At an appearance before Justice Scaravelli on 21 March 2013, he ordered production of business records and income tax returns for the previous three years.

[22] Ms. Tran seeks the following disclosure (which I paraphrase from the list provided by Ms. Tran’s counsel):

- (1) Mr. Tran’s personal income tax returns and attachments, and Notices of Assessment, back to 2002 and documents respecting certain property transactions;
- (2) various financial statements, partnership documents (2000-2009), and corporate documents for Princess Nails and 3220991 Nova Scotia Limited;
- (3) documents respecting the CRA investigation of Mr. Tran and of Princess Nails;
- (4) documents relating to Mr. Tran’s bankruptcy;
- (5) documents respecting certain property transactions;
- (6) documents respecting certain chattels allegedly sold by Mr. Tran;
- (7) full disclosure of all income, assets, and liabilities of Mr. Tran, inside or outside Canada, from 2002 to the present;
- (8) full disclosure of businesses and corporations in which Mr. Tran has any interest (including an equitable interest) or for which he is an officer or director, inside or outside Canada.

[23] Mr. Tran submits that he has met all of his disclosure obligations. He says he has provided a Statement of Income, dated January 30, 2013, which includes his personal income tax returns and Notices of Assessment, as well as financial statements of Princess Nails between 2008 and 2011. He says Ms. Tran already has the full bankruptcy file, which includes details of the bankruptcy, the CRA reassessment, and the disposal of assets in order to pay debts. He says these records also include information respecting real property transactions during the marriage and after separation. He has also provided a T4 confirming his 2012 employment income, and says further tax returns and financial statements respecting Princess Nails will be provided.

[24] Ms. Tran says she requires this disclosure in order to identify the matrimonial assets acquired before and during the marriage. Mr Tran says that the requested material is not relevant to the issues in the proceeding. He calls it a “fishing expedition.” There must be a factual basis to support a claim for further disclosure: *S.S. v. B.S.*, 2006 NSFC 35, at paras. 19-20. Mr. Tran says this is an attempt by Ms. Tran to litigate financial decisions the parties made during the marriage, including disposal of property owned by one spouse or the other. A

right to division only arises upon separation: *Hurst v. Gill*, 2011 NSCA 100, at paras 50-58.

[25] Mr. Tran also submits there is no claim for property division or for compensation for contribution to a business asset (under ss 13 or 18 of the *Matrimonial Property Act*, respectively) which would justify the order sought. The divorce petition, however, seeks the appropriate corollary relief. Alternatively, he says Ms. Tran has not established a *prima facie* case for such claims. A party is not required to establish a *prima facie* case for the relevant claim in order to obtain disclosure.

[26] With respect to Ms. Tran's claim that she was not paid a salary for most of the time she worked at Princess Nails, for instance, Mr. Tran says there is no evidence that she contributed to day-to-day household expenses. The real issue, it is submitted, is whether Ms. Tran received compensation. For the purposes of s. 18, this can take other forms than direct payment of wages, such as payment of family expenses out of the business. In *Hurst v. Gill*, for instance, it was held that a contribution of funds out of one spouse's business to support another spouse's music career was adequate compensation for purposes of s. 18 claim. It should be

noted, however, that the majority of the Court of Appeal commented that “it may be that the business funding of family vacations and the like cannot properly be considered as Mr. Gill's ‘compensation’, (because it arises from his spousal status)...”: *Hurst* at paras. 27-28.

[27] Disclosure under the *Civil Procedure Rules* depends on relevance: see generally Rules 14, 15, and 18. On the scope of relevance, see, e.g., *Murphy v. Lawton's Drug Stores Ltd.*, 2010 NSSC 289, at paras. 3-20; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, at paras. 8-47. I note that the disclosure sought is framed largely in relation to the child support claim, but in fact it clearly relates both to support issues and to property division. As such, documents relevant to the *Matrimonial Property Act* claims – and specifically, claims for an unequal division or a division of non-matrimonial assets under s. 13, or for contribution to a business asset under s. 18 – will be subject to disclosure.

[28] The question is what claims are properly before this Court. This is a divorce proceeding involving corollary claims for maintenance and property division. I agree that documents relating to assets acquired before or during the marriage (and not disposed of before the marriage) are relevant and subject to

disclosure. I also agree that documents relating to any contribution by Ms. Tran of “work, money or moneys worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset” of Mr. Tran will be relevant to a claim under s. 18 of the *Matrimonial Property Act*. Section 18 refers to a contribution by a “spouse,” which, under the definition in s. 2(i), excludes parties who have not been married. This point was considered in *Walsh v. Bona*, 2002 SCC 83, where, as paraphrased by Lynch J. in *Fougere v. Jessome*, 2010 NSSC 469, the Supreme Court of Canada “found that the decision to live together is not indicative of an intention to share in each other's assets and liabilities” (*Fougere* at para. 16).

[29] Counsel has not, however, offered any authority that suggests that *pre-marriage* contributions to a business asset may be dealt with in a divorce proceeding. I do not make any definitive finding on this point, but on the basis of the submissions to the Court to date, I cannot conclude that pre-marriage contributions to an eventual spouse’s business asset is a matter that can be dealt with in a *Divorce Act* proceeding.

Suit money

[30] Ms. Tran requests an order for suit money of \$25,000, to be credited towards any eventual award of costs in her favour or, alternatively, to be credited to her in the final order for property division. The need for suit money rests on her assertion that the respondent has been “evasive, uncooperative and deceitful in relation to his obligation to pay support and discloses that she anticipates incurring further expenses for interrogatories, ... discovery examination of the Respondent and his accountants, and financial analysis of the disclosure obtained”: Notice of Motion at para. 11.

[31] In support of her request for suit costs, the applicant cites *Lindsay v. Lindsay* (1991), 106 N.S.R. (2d) 128, 1991 CarswellNS 171 (S.C.T.D.), where Saunders J (as he then was) declined to order suit money of \$5,000, but did make a lesser order for \$1,200, being satisfied that certain disbursements would be called for, and that the assets existed to cover the expense (paras. 37-38). He said it is “incumbent upon an applicant for suit money to identify the specific disbursements which are likely to be incurred verified by affidavit, before

burdening a spouse with having to fuel his spouse's litigation” (para. 37).

[32] In both *Luke v Luke*, 2003 NSSF 12 and *O'Brien v O'Brien* (1997), 28 R.F.L. (4th) 384, Dellapinna J and Goodfellow J, respectively dismissed a claim for suit money. In the words of Dellapinna J he made a finding “no evidence of any significant disbursements necessary for the furtherance of Ms. Luke's defence of this divorce proceeding for which she requires a contribution by Mr. Luke” (para. 34). And also a request for suit money was also dismissed by Scanlan J in *Grant v. Grant*, 2008 NSSC 147, at para. 27.

[33] Suit money was awarded, however by Levy Fam Ct J in *DMCT v LKS (No 1)*, 2006 NSFC 36. In that case he applied to two-fold tests saying “the usual test for determining whether or not to award interim costs is two-fold; is there a likelihood of success in the claim; and but for the award of interim costs whether the claimant would be able to prosecute her claim.”

[34] The two-step test set out by Orkin to which I just referred must be taken to be the necessary analysis, given its endorsement by our Court of Appeal. Mr. Tran relies on the Court of Appeal decision in support of the argument that an order for

“advanced costs,” while within the court’s discretion, is nevertheless exceptional. He submits that the applicant’s costs motion is related to her claims under the *Matrimonial Property Act*, but not to the issues of child and spousal support. He says there is no evidence that would allow the court to make an estimate of the likelihood of success of that claim. He adds that no *prima facie* case has been made out, but this is not the test, in my opinion.

[35] On the second branch of the test, Mr. Tran says the applicant is employed, debt-free, and that she received \$80,000 from him towards the division of property at the time of separation. He also alleges that she has not made full disclosure of her own income, specifically of tips received or her 2012 T4 Return.

[36] Given that Ms. Tran has not yet conducted examination for discovery of Mr. Tran, nor has she served interrogatories or demands for particulars, I am not therefore not satisfied either that she has established a likelihood of success of the claim such that suit money should be ordered. I am likewise not persuaded, on the record as it now stands, that she has established that she will be unable to pursue the claim without the benefit of suit money.

Costs

[37] Ms. Tran seeks costs on the motion of \$5000. The basis for an elevated award, it is submitted, is the delay allegedly caused by Mr. Tran. The delays in disclosure required extensive searches of the Registry of Joint Stock Companies and the Registry of Deeds. I have also taken into account the fact that the hearing took a full day to complete. I am satisfied that delays in hearing this motion and in making disclosure justify an elevated award of costs. I would allow Ms. Tran costs of \$3,000.00, inclusive of disbursements, payable not later than September 4, 2013.

LeBlanc, J.