SUPREME COURT OF NOVA SCOTIA
Citation: *Jessome v. Jessome*, 2014 NSSC 285

Date: 20140722
Docket: SFSND 071741 (1206-006092)
Registry: Sydney

Between:

Jane Jessome

Petitioner

v.

Joseph Jessome

Respondent

Judge:	The Honourable Justice A. David MacAdam
Heard:	May 12 and 21, 2014, in Sydney, Nova Scotia
Written Decision:	July 22, 2014

Counsel:	William Meehan, for the Petitioner Joseph Jessome, self-represented Respondent

By the Court:

[1] This is a proceeding for divorce and corollary relief. The parties were married on August 10, 2001, and separated on September 30, 2007. There are two daughters who are children of the marriage: P.J., born August 5, 2004, and J.P., born January 16, 2006.

[2] The children have both lived at the matrimonial home on Meadows Road in Sydney Forks, NS, since birth. Since separation they have remained with their mother at that address. J.P. was diagnosed with autism at 23 months of age and is therefore a child with special needs. Both girls are in primary school.

[3] Since the separation, Mr. Jessome has resided at various addresses in Nova Scotia and outside of Canada as well.

The previous order

[4] In August 2009 the petitioner, Ms. Jessome, brought an application for custody, with provisions for access and child support. Following a nine-day hearing, Bourgeois J. (as she then was) rendered a decision, with an accompanying Order dated February 16, 2010.

[5] Justice Bourgeois ordered sole custody of the children to Ms. Jessome, with Mr. Jessome having telephone access at least twice per week and physical access, initially two hours weekly, then increasing in frequency and duration. The visits during the first five months were to be supervised, with Mr. Jessome entitled to select the supervisor. The Order provided that beginning in May 2010 Mr. Jessome's parenting time with the children should become unsupervised. However, as a condition, Mr. Jessome was required to provide written confirmation from a doctor or psychologist that he had no current mental or physical health issues which would prevent him from parenting the children. This medical confirmation was required to be provided every three months. The Order further provided that overnight visits were not permitted, notwithstanding the gradual expansion of parenting time. Ms. Jessome had the right to make all decisions pertaining to the children, including those relating to J.P.'s care and educational programs. The order also provided that Mr. Jessome was to be apprised by Ms. Jessome of all health, social, educational and general welfare matters pertaining to the children.

[6] Justice Bourgeois ordered child support of $917.00 per month. Mr. Jessome was further ordered to pay retroactive child support, commencing January 1, 2009,

in the total amount of $11,004.00, at a rate of at least $250.00 per month, in addition to the ongoing child support.

[7] Ms. Jessome maintains that Mr. Jessome has not complied with the 2010 order. In particular, it appears that he has not exercised access or otherwise maintained contact (such as by communication at holidays or birthdays) as contemplated by the order.

Issues

[8] Ms. Jessome seeks the following relief from the court:

1. Custody of the children and any provisions for access by the respondent.
2. Child support, including section 7 expenses.
3. Spousal support.
4. Sale of the matrimonial home and four building lots owned by the parties, and the division of the proceeds between them.
5. Attachment of Mr. Jessome's portion of the proceeds of sale as security for (a) payment of support arrears, (b) payment of future support, and (c) costs.

[9] For his part, Mr. Jessome seeks custody of the children, with provisions for access by the petitioner, and exclusive possession of the matrimonial home.

[10] As a preliminary, I am satisfied that the parties have been living apart for more than one year, and that the prerequisites for divorce are established.

Custody

[11] The *Divorce Act* permits the court to "make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage": s.16(1). Section 16 goes on to set out the statutory considerations relevant to access orders:

> Access
>
> (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.
>
> Terms and conditions
>
> (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just
>
> Order respecting change of residence
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> (7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of

> the change, the time at which the change will be made and the new place of residence of the child.
>
> Factors
>
> (8) In making an order under this section, the court shall 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.
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> Past conduct
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> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
>
> Maximum contact
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> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[12] The general considerations in relation to a custody order were outlined in *Foley v. Foley* (1993), 124 N.S.R. (2d) 198, [1993] N.S.J. No. 347 (S.C.). Goodfellow J. stated, at paras. 15-18:

> ... In determining the best interests and welfare of a child the court must consider all the relevant factors. The diversity that flows from human nature is such that any attempt to compile an exhaustive list of factors that could be relevant is virtually impossible.
>
> Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:

1. Statutory direction Divorce Act 16(8) and 16(9), 17(5) and 17(6);

2. Physical environment;

3. Discipline;

4. Role model;

5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would be the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or expression of the child of a preference;

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists, psychiatrists, etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child;

10. The physical and character development of the child by such things as participation in sports;

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child;

> 13. The support of an extended family, uncles, aunts, grandparents, etcetera;
>
> 14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The *Divorce Act* s.16(10) and s.17(9);
>
> 15. The interim and long range plan for the welfare of the children;
>
> 16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and,
>
> 17. Any other relevant factors.

[13] Justice Goodfellow noted that the court's duty on a custody application is to consider all relevant factors in order to determine with whom the best interests and welfare of the child would most likely be achieved. He added that the "weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case". (paras. 17-18)

[14] The principle of maximum contact with both parents is singled out in s.16(10) of the Act. McLachlin, J. (as she then was) made the following remarks about this provision in *Young v. Young*, [1993] 4 S.C.R. 3, at 117-118:

> ... s.16(10) provides that in making an order, the court shall give effect "to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child." This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent. Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature, which suggests that children benefit from continued access: Michael Rutter, Maternal Deprivation Reassessed (1981), Robin Benians, "Preserving Parental Contact: a Factor in Promoting Healthy Growth and Development in Children", in Jo Tunnard, ed., Fostering Parental Contact: Arguments in Favour of Preserving Contact Between Children in Care and Their Families (1982).

[15] Since separation in 2007, Mr. Jessome has had minimal contact with the children. Their care, support, nurturing, and upbringing has all been provided by Ms. Jessome. Notwithstanding the many authorities directing that orders for custody should provide for maximum contact with both parents, there is a precondition in the present circumstance, namely that Mr. Jessome re-establish a relationship with these two children. P.J. was three years old, and J.P. less than two years old, when the parties separated. On the evidence the last occasion when Mr. Jessome saw his daughters was in 2008. Indeed, it is generous to use the word

“re-establish”; given their young ages at separation, there would appear to have been little in the way of an established relationship between Mr. Jessome and either of the two children. Ms. Jessome testified that J.P. had no memory of Mr. Jessome, while P.J. had some little recall.

[16] Mr. Jessome testified that he did not exercise access because he did not want to go to jail again. Apparently, prior to this hearing there had been an altercation between Mr. Jessome and counsel for Ms. Jessome that resulted in Mr. Jessome spending some time in jail. However, such an explanation is simply an excuse and not an acceptable justification for effectively abandoning his children. Justice Bourgeois’s order provided him with specific rights of access. He chose not to exercise his rights.

[17] I am mindful and, in general terms, agree with the direction that an order for custody and access should encourage maximum contact with both parents. Consequently in granting sole custody to Ms. Jessome, I would have provided access to Mr. Jessome on conditions similar to those under the Order of Justice Bourgeois. Although Mr. Jessome would have been entitled to select the supervisor, Ms. Jessome would have the right to object, providing she could

establish reasonable grounds for such an objection. If the parties were unable to agree, then the issue of the supervisor could be referred to this court.

[18] In the first full month following the decision, Mr. Jessome would have weekly access, with such visits not exceeding two hours. In the second and third full months, he would be entitled to visits twice a week but also not exceeding two hours each time. In the fifth full month, Mr. Jessome would continue to be entitled to two visits per week, with one of the weekly visits being expanded to six hours, provided it was on a weekend. There was to be no unsupervised or overnight access unless agreed to by Ms. Jessome, in writing, or authorized by a further court order amending the provisions for access that would have been contained herein.

[19] All that being said, however, Mr. Jessome has stated to the court that he does not want access, only custody. He made it clear that if he is not granted custody, he does not want access. Consequently, having granted custody to Ms. Jessome, I will accede to his wishes and not grant him access. In my view, it would not be in the best interests of the children to award access to a parent who does not want it. If, in time, he changes his position, then access can be considered, whether along the lines outlined herein, or other terms, depending on the circumstances at that time.

Child support

[20] Ms. Jessome seeks an order for child support. Mr. Jessome's income and employment situation was a source of some controversy. He maintains that he has no monetary income. In an affidavit filed April 11, 2013, he declared that "[a]s I have repeatedly informed the courts, in one way or another: I have the capacity to make a lot of 'taxable' income, but I have the desire and want to earn none." In an affidavit filed April 18, 2013, he deposed:

> ...I have no intention of filing "income tax returns" with corrupt, incompetent and tyrannical corporate legal entities, unless they cease with their actions against my children, people of my community, people across this nation, and myself, and becoming NOT corrupt, incompetent and tyrannical.

[21] Attached to the affidavit filed by Mr. Jessome is his response to a memorandum issued by Associate Chief Justice Lawrence O'Neil outlining information he was to provide in advance of this hearing. The responses by Mr. Jessome illustrate his position:

> Items requested by Lawrence I. O'Neil:
>
> a) the only property which I thought I 'owned' was my body — however, employees and supernumeraries of the corporate legal entity of Nova Scotia seem to think otherwise — from 'their' perspective, there are three deeds in the CBRM which have my name on them:
>
> - Residence located at 396 Meadows Rd., Sydney Forks, N.S. (Value $280,000.00 CDN)

- Lot of land located in Sydney Mines (value: ???)

- Lot of land located in Sydney Mines (value: ???)

- Some modest clothing, sporting goods, sailing gear, laptops, etc. (value: $1000. Appx.)

- ALL known video footage of [P.J. and J.P.], prior to spring 2007. (Value: PRICELESS)

b) I have the potential to earn a lot of money, and the desire and want to make no money. I want to be in compliance with the most 'laws'; just and otherwise. Falsely obtained court orders, and errors and incompetence stemming from abuse of judicial privilege mean less to me than valid and semi-valid 'laws'. In short, I have no income, and I require no income at this time. However, I eat and get along just fine, stemming from what I have and what I do.

c) As for my 'expenses', I would consider them private, confidential and meager. Perhaps to be considered 'trifle' and 'di minimus' (sp).

d) There has been NO income for these periods. I lived meagrely from savings and loans, but mostly through personal ingenuity, labour and toil — not to be confused with being associated with any governmental, monetary, taxation or banking systems. I have no collected EI, social assistance or other money from any governments.

e) I trust I have written enough

I trust I have not written too much.

(Lux et Veritas)

[22] Consequently Mr. Jessome has not filed any statements of property, income or expenses, nor has he provided tax returns or income information, whether current or for any other period post-separation. He has frankly admitted that he has

the potential to earn a lot of money but chooses not to do so, and claims his expenses are "meager". His evidence was to the effect that he has lived off of savings, loans, and gifts; he suggested that he has wealthy patrons who allow him to maintain his lifestyle without the need to earn an income. He says he has refused payment for work since 2009. As such, this court has no option but to impute income on the basis that Mr. Jessome has chosen not to earn income, or if he does, not to disclose it as required by law.

[23] The authority to impute income is found in s.19(1) of the *Federal Child Support Guidelines*, SOR 97-175, which provides, in part:

> 19.(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> > (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
> >
> > …
> >
> > (d) it appears that income has been diverted which would affect the level of child support to be determined under the Guidelines;
> >
> > (e) the spouse's property is not reasonably utilized to generate income;
> >
> > (f) the spouse has failed to provide income information when under a legal obligation to do so;
> >
> > (g) the spouse unreasonably deducts expenses from income…

[24] In *Smith v. Helppi*, 2011 NSCA 65, the Nova Scotia Court of Appeal discussed the considerations relevant to imputing income, endorsing the considerations set out by Wilson J. in *Gould v. Julian*, 2010 NSSC 123:

> 16 Mr. Smith argues that the judge erred in imputing income as he did. What a judge is to consider in doing so was summarized in *Gould v. Julian*, 2010 NSCC 123 (N.S.S.C.), where Justice Darryl W. Wilson stated:
>
> > [27] Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in *Hanson v. Hanson*, [1999] B.C.J. No. 2532, 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." ...
> >
> > > 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.
>
> …
>
> [33] In Nova Scotia, the test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.

[25] There is not the slightest doubt that Mr. Jessome is intentionally under-employed. Amidst his rhetoric about his resentment of the prevailing system of government and finance, and alongside his assertion that he does not accept money for working, is his claim to have submitted "over $3 million in H.S.T., income tax and other taxes, to the corporate legal entities of Nova Scotia and Canada, and a conservative estimate would suggest that both entities lost out on approximately $9 million during the last 6 years" (Affidavit filed April 11, 2013).

[26] Ms. Jessome seeks incorporation of the child support terms from the Order of Justice Bourgeois. I am satisfied that this is the appropriate order, and I adopt the reasoning of Justice Bourgeois on this point. Nothing in the evidence before me suggests any other approach. As noted earlier, Justice Bourgeois imputed income

of $65,000.00. Adjusting for inflation since 2009, for purposes of child support I impute income to Mr. Jessome of $71,000.00 *per annum*. By the current table under the *Federal Child Support Guidelines*, this results in child support of $982.00 to be paid to Ms. Jessome, commencing August 1, 2014.

Property division

[27] There appears to be no issue respecting the division of matrimonial property, save and excepting the matrimonial home and four vacant building lots located in Sydney Mines, Cape Breton, N.S.

[28] As indicated by s. 12(1) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, the presumption is that matrimonial assets will be divided equally between the parties; a party seeking an unequal division pursuant to s. 13 of the Act has a heavy burden of proof to establish that an equal division would be unfair or unconscionable; see also *O'Regan v. O'Regan*, 2009 NSSC 181, [2009] N.S.J. No. 254, at paras. 32-35. On the evidence at this hearing, there is nothing to support an unequal division in respect of these assets. The cost of maintaining the matrimonial home has been borne by Ms. Jessome. She has indicated that she can no longer

afford to continue with this expense. She said her intention is to move into less costly accommodations.

[29] Ms. Jessome sought a sale of the matrimonial home, as well as the vacant lots. She has carried the expenses related to maintaining the home without any contribution from Mr. Jessome. Following close of court on September 23, 2013, the hearing was adjourned, resuming in May 2014. In view of this situation, and notwithstanding that the trial was not completed, I signed an Order providing for the sale of the matrimonial home. This Order also provided an opportunity for Mr. Jessome to purchase the home.

[30] Although initially maintaining that counsel for the petitioner had disregarded a condition in the Order providing him the right to purchase the matrimonial home on the same terms as any offer Ms. Jessome was prepared to accept, Mr. Jessome later acknowledged he had been given the option as called for in the Order. The Order further required the proceeds were to be held in trust pending determination of each party's entitlement, subject only to the payment of expenses, including the mortgage, legal and real estate fees on the sale, and 20 percent of the balance to be paid to Ms. Jessome as an advance on her share in the equity. Mr. Jessome estimated that Ms. Jessome had paid 20 percent of the cost of the home, with him

having paid 80 percent. He was therefore of the view that she should receive 20 percent of the proceeds and he should receive 80 percent.

[31] I am advised that there is an outstanding judgment against Mr. Jessome. The settlement of this judgment shall be a charge on his share of the proceeds from the sale of the properties. The balance is to be held pending final determination of property division and of the petitioner's claim for an attachment order on Mr. Jessome's share as security for arrears of support and payment of future support.

[32] The court was advised by counsel for the petitioner that the sale of the matrimonial home was being completed. The hearing was adjourned to receive financial particulars of the sale.

[33] Although Ms. Jessome has incurred the expenses of maintaining the home in the amount of approximately $60,000.00 since separation, she has also had exclusive possession, with the children. In the circumstances I will divide the net proceeds equally, with an attachment order on Mr. Jessome's share as requested by Ms. Jessome. The order shall provide that all arrears of child support are to be paid from Mr. Jessome's share, with the resulting balance then held as security for future child support. Mr. Jessome's repeated statements that he has the capability

to earn substantial income but chooses not to do so is more than adequate justification, in my view, for the attachment order.

[34] To date, Mr. Jessome has not paid the child support ordered by Justice Bourgeois. His filings on this proceeding indicate that he has no intention to do so in the future. As such the share of the proceeds from the sale of the matrimonial home and four vacant lots shall be held in trust by counsel for Ms. Jessome and may be dispersed to her in payment of the arrears of support, as well as any ongoing support that is not paid by Mr. Jessome.

Conclusion

[35] Accordingly, the divorce is granted and custody, child support and division of the matrimonial home and building lots are determined as set out in these reasons.

[36] The petitioner shall have her costs to be taxed or agreed upon.

MacAdam, J.