

Butler v. Butler

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Newfoundland Unified Family Court

Fagan, J.

Judgment: April 18, 1980

Docket: 1002

Counsel: J. Vernon French, for the petitioner

David Day, Q.C., for the respondent

Fagan, J.:

- 1 In this case, at the conclusion of the evidence, I was satisfied on the grounds and granted a decree nisi, reserving my decision on the matter of corollary relief.
- 2 The parties to this action were married on the 19th day of September, 1970. They ceased to live together as man and wife on or about the 27th day of August, 1975. There are no children of this marriage.
- 3 The respondent is seeking maintenance by way of a lump sum payment.
- 4 The first question to be decided is whether or not, in the circumstances, the respondent is entitled to maintenance, and if so, should such maintenance be paid by way of periodic payments or a lump sum payment.
- 5 Counsel for the respondent takes the position on behalf of his client that she is entitled to maintenance and that this maintenance should be paid by way of a lump sum payment. His client is employed as a full time social worker with a large hospital in the Province of Ontario, earning approximately Nineteen (\$19,000) Thousand Dollars per year.
- 6 This marriage lasted for approximately five years. During this time the respondent worked outside the home approximately three and one-half years of their living as man and wife, and on occasion helped the petitioner with his medical practice by acting as receptionist during periods when the regular receptionist was on vacation or sick leave. The petitioner's medical practice was carried on from his place of residence which kept him 'at home' so to speak, except when attending patients at the hospital or making house-calls.

7 The petitioner has three children by a previous marriage, and from the evidence I would conclude that the respondent and the children did not get along well together at all. On occasions, when not working, the respondent would spend her time reading, attending at the 'YWCA' or going out to coffee parties. My conclusion from the evidence is that she did not like doing housework and cooking, except on occasion, and a major portion of looking after the home was done by the petitioner's receptionist, who made the beds, cleaned the house and cooked.

8 The evidence of the parties clearly indicated to me that this marriage was destined to fail. This was apparent early in the relationship. The evidence of the petitioner and his witnesses and the evidence of the respondent, generally confirm this situation except that the respondent says that she helped her husband in his practice of medicine by talking with patients on the phone, arranging appointments and other related matters connected with his clientele. When she worked she says she paid the doctor's secretary/receptionist Seven Dollars & Fifty (\$7.50) Cents weekly for doing housework and cooking the mid-day meal for the doctor, and when she worked full time at the Janeway Hospital, she paid her One Hundred (\$100) Dollars monthly. She also paid a cleaning lady and babysitter for the son, Steven, until he was fourteen years of age. She also purchased some clothing for the petitioner's children and some household items.

9 The petitioner paid the respondent Sixty (\$60) Dollars monthly which the respondent says she received for her personal needs while working for the petitioner on occasions when the secretary/receptionist was sick or on holiday.

10 When the parties separated in August of 1975, she left the petitioner with a savings of approximately Sixteen (\$1600) Hundred Dollars after working for about three and a half of the five years previous, as a social worker.

11 The petitioner has assets valued at approximately Sixty (\$60,000) Thousand Dollars, and has an annual income of between Twenty (\$20,000) Thousand and Twenty-Four (\$24,000) Thousand Dollars. He is relatively debt free, with no mortgage debt, but has outstanding bank loans on which he is presently paying the interest only.

12 In determining whether or not maintenance should be paid one must consider the circumstances of the parties in the light of the provisions of Section 11 of the *Divorce Act* - these are:

a) *Conduct of the parties* - in many cases conduct in the sense of fault of one or other of the parties is not given significant weight, although a factor to some degree. It should be more broadly viewed as the action of a party to the divorce which has affected or is likely to affect, the financial status of the parties or their standard of living.

b) The condition, means and other circumstances of each party:

Condition - here one must not only consider the physical and moral condition of each party, but also the social standing or position of each party in the community.

Means - this includes all the pecuniary resources, capital assets, income from employment or earning capacity and any other resources from which the person receives, gains or benefits, and not merely money.

Other Circumstances - likelihood of remarriage, cessation of employment, possibility of inheritance and many other unforeseen events.

13 I am satisfied on the evidence that the respondent is entitled to an award of maintenance and that in the circumstances this award should be by way of a lump sum payment.

14 There is nothing in the evidence to indicate that the petitioner accumulated any assets over and above those existing at the time of the marriage of the parties. In fact the medical practice of the petitioner has declined, reducing his income considerably, because of the fact that he has this marital problem and perhaps mainly because of the location of his office, lacking parking facilities, and his present inability to relocate.

15 I feel, however, that the respondent should receive a lump sum to provide her with capital to establish herself elsewhere with proper and reasonable furnishings in her new living accommodations.

16 I would regard lump sum award as short-term maintenance and consist of a sum which is fit and just having regard to the conduct of the parties and the conditions, means and other circumstances of each of them as contemplated by Section 11 of the *Divorce Act*.

17 The respondent is now employed at a salary of Nineteen (\$19,000) Thousand Dollars; she has established her own living accommodations and life style independently of any help from the petitioner, but that is not to indicate that she is not now entitled to maintenance from the petitioner.

18 The principles to be applied in determining the question of maintenance are set out in the case of *Attwood v. Attwood*, [\[1968\] 3 All E.R. 385](#). The following principles stated in that case at page 388:

(viii) Where the wife is earning an income the whole of this need not, and should not ordinarily, be brought into account so as to enure to the husband's benefit...

(x) The court must ensure that the result of its order is not to depress the husband below subsistence level...

should be considered in this case. True the respondent is in receipt of a good income. This should not entirely relieve the petitioner of his obligations to support and maintain his wife. The petitioner has assets valued at Sixty (\$60,000) Thousand Dollars and an income of approximately Twenty-Two (\$22,000) Thousand Dollars. Having decided that in my view the respondent should be paid a lump sum payment, I make the following order:

(1) That the petitioner pay to the respondent Five (\$5,000) Thousand Dollars lump sum maintenance for herself, to be paid on or before the 1st day of October, A.D., 1980.

(2) As a condition pursuant to Section 12(b) of the Divorce Act, the petitioner may discharge his obligation to the respondent under paragraph (1) hereof by executing and delivering to her a first mortgage charge on his land and premises known as No. 145 LeMarchant Road, St. John's, Newfoundland, for Five Thousand (\$5,000) Dollars, maturing upon a breach of any of the covenants generally therein contained and containing such covenants as may be agreed upon between the parties, and in particular, the following:

(a) to insure and to keep insured, the mortgaged premises to the value of Five (\$5,000) Thousand Dollars with loss payable to the respondent;

(b) to pay all municipal taxes and assessments against the property;

(c) to maintain and keep the property in good repair and condition;

(d) to pay the sum of Five (\$5,000) Thousand Dollars on the earliest of:

i) October 1, A.D., 1980;

ii) the death of the petitioner;

iii) the destruction of the mortgaged premises;

iv) the sale of the mortgaged premises;

v) the breach of any of the covenant;

vi) to pay interest on the said sum after maturity to the date of payment at the rate of fourteen (14) per cent.

(3) As a further condition pursuant to Section 12(b) of the *Divorce Act*, if it shall hereafter be determined that the respondent now has an interest in the land and premises situate and known as No. 145 LeMarchant Road, St. John's, or elsewhere in the Province of Newfoundland, by way of implied, constructive or resulting trust, or under the provisions of the *Matrimonial Property Act*, Chapter 32, 1979, of the Statutes of Newfoundland, or otherwise, the lump sum paid pursuant to paragraph (1) hereof shall be repaid to the petitioner by the respondent except to the extent that it exceeds the value of such interest.

(4) There will be no order as to cost.

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