

45 Nfld. & P.E.I.R. 164

Hudson v. Hudson

Newfoundland Supreme Court, Trial Division

Mahoney, J. (ex officio)

Judgment: December 20, 1983

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Betty Hudson, Petitioner v. Ralph Newton Hudson, Respondent

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Judgment: December 20, 1983

Docket: Doc. 04058

Counsel: Mr. Alan Carter, for the Petitioner.

Mr. **David Day**, Q.C., for the Respondent.

Mahoney, J. (ex officio):

1 This divorce petition came on for hearing before me on January 8, 1979, at which time the petitioner was granted a divorce decree nisi on the grounds of physical cruelty by the respondent. At the same time some evidence was led regarding corollary relief sought by the petitioner. The trial was not concluded on that date; the hearing was adjourned with counsel to seek another date on which to complete the hearing. For reasons hereinafter set forth, the petitioner did not seek to have the hearing completed until application was made to me in late November, 1983, for a date to have it completed.

2 The petitioner was 46 years old on August 29, 1983; the respondent was 47 years old on August 26, 1983. The parties were married on February 21, 1959 at St. John's and lived there afterwards until they separated in September, 1978.

3 Four children were born of that marriage, namely:

Dean, born in 1959

Gail, born August 19, 1966

Donna, born December 18, 1963; and

Glen, born January 3, 1968

4 Since the separation in 1978 the four children continued to live with their father, the respondent, in the matrimonial home at No. 63 Power Street, St. John's, until Gail married. The other three children still live with their father there; Dean and Donna are both employed, but their father supports them with board and lodging. They do not contribute anything to household expenses.

5 There appeared to be ill feeling between the parties on the day this matter first came on for hearing, but in this I was obviously mistaken, for that very night the parties returned to the matrimonial home and lived together there for about a year and a half. The petitioner then left her husband's home once again and returned to Bell Island to her mother's home, where she lived for a period of months, after which she once again returned to live with her husband. She left again for Bell Island after another period with her husband, after which she returned to live with him again. Thus one can understand why the matter of maintenance was not completed, because the parties cohabited together for the greater part of the intervening period of almost five years.

6 It must be noted that the decree absolute was not taken out by the petitioner until June 2, 1982, even though she was entitled thereto in April, 1979. The parties lived together for a considerable period of time after the decree absolute was issued. During all the time they lived together over this period of about five years they lived together as husband and wife, and he supported her with her performing wifely duties about the house.

7 The petitioner stated that she last slept in the Power Street house with her former husband in October, 1983. The parties still see each other on occasion, and they and their children go bowling on Sundays and then go out to supper afterwards. When questioned about living with her former husband for such a long period of time after the divorce decree nisi was granted and about her future intentions, the petitioner stated that it is possible she may go back to live with him again when this matter is concluded. On the same subject matter the respondent stated that he is still very fond of his former wife and, once the money matters are settled up between them, they may go back to live together again.

8 The petitioner did not take an application under The Matrimonial Property Act of this Province to have their matrimonial property divided. She had an opportunity to do this prior to her taking out the decree absolute of divorce in June, 1982. One can only suspect that her reason for not so doing was that she was living with the respondent close up to the time she obtained that final decree. In any event she has lost her right to take an action under that Act, and I must not render a judgment under The Divorce Act in this application by taking into account The Matrimonial Property Act. This is nothing more than an application for lump sum and periodic maintenance under The Divorce Act, and whatever rights the petitioner has must be found in that Act.

9 The factual situation created here is, to say the least, rather unusual, for I feel that the parties will, very likely, go back to live together again, and will live together, from time to time in future, subject to periods of separation during which the petitioner leaves for a short while.

10 I must, nevertheless, deal with the petitioner's application for maintenance. She lives in a bed-sitting room for which she pays rent of \$175.00 per month. She says she requires \$125.00 per month for food and other necessities, for a total of \$300.00 per month periodic maintenance. She is not working now, having last been employed a couple of months ago as a babysitter at fifty dollars per week. She

resigned from that position because of ill health, stating she could not lift things, or the baby she was caring for. I find this somewhat difficult to believe in light of her evidence that she bowls well during the family bowling outings. I cannot believe in light of that that her back is as bad as she says it is. She is not seeking employment now, but states she would like to attend trade school to upgrade her skills and allow her to get a job as a secretary or something like that; she stated that this idea crossed her mind the day before this adjourned hearing took place. I am not at all satisfied that she cannot work, and no medical evidence was led to support her statement that she cannot. She worked as a cleaner with a school board during 1981 and 1982, and earned about \$6,500.00 in one of those years, during a period or periods when she had gone back to live with the respondent, and she did work for a while in a local hotel after separating from her husband.

11 Because of the peculiar circumstances attendant upon this whole situation, I am reluctantly going to allow periodic maintenance to the petitioner in the sum of three hundred dollars a month for twelve consecutive months, commencing the 31st of December, 1983. The respondent can afford that amount. He is employed full time as a motor mechanic at a gross salary of \$1,989.64 per month. He has deducted from that amount the usual deductions for Income Tax, Union Dues, Unemployment Insurance and group insurance, Canada Pension Plan and a deduction of \$200.00 per month towards the purchase of Canada Savings Bonds; this commenced in November, 1983.

12 He supports the two older offspring who live with him and who are now working. He has an obligation to the petitioner, who has no assets, greater than his responsibility to them. They will have to contribute towards their own support. He does, however, have the full responsibility of support of their 15 year old son. He is well in control of his finances and the Power Street home is mortgage free and he keeps his bills paid on a current basis; he only owes \$365.00 odd municipal taxes now, and has a savings of \$3,300.00 in Canada Savings Bonds, in addition to the \$400.00 saved by monthly deductions. He also had \$2,000.00 in Canada Savings Bonds which he gave to his brother as security for a \$2,000.00 loan to buy a 1983 model Ford motor car. However, the Canada Savings Bonds savings have all been made since the date of separation in September, 1978.

13 If the petitioner returns to live with the respondent during any portion or portions of the twelve month period during which he is obligated to pay her periodic maintenance, then his obligation to pay her such maintenance ceases during the period while she is living with him provided he supports and maintains her while she is living with him.

14 The parties lived together during the marriage for about twenty years up to the date of separation in September, 1978. They acquired the Power Street house, in his name, and, in his words she was a good wife and looked after the children well. He was the earner and she the home-maker. Indeed, she contributed to household repairs by giving him \$500.00 from her bank account to assist in repairs to the basement of the house during one period during which she resided with him after the decree nisi was granted.

15 Lump sum maintenance may properly be used to recognize the contribution of a spouse to the accumulation of family assets during marriage. In exercising my jurisdiction under The Divorce Act to award lump sum maintenance I must be careful to ensure that I am not enabling the petitioner to obtain a distribution of matrimonial property thereby in substitution for distribution which could be made under

The Matrimonial Property Act.

16 At the date of separation the respondent had assets which he values at \$15,732.73, consisting of:

House, Power Street	\$14,000.00
Car	\$ 200.00
Furniture	\$ 1,500.00
Bank deposit	\$ 32.73
	\$15,732.73

17 I accept his valuation of these assets at that date. I may say in passing that the house is valued by the municipal Council in 1983, for tax purposes at \$35,100.00 and he has a new car now valued at \$6,500.00 and Canada Savings Bonds worth \$3,300.00. The date on which I must value his assets for the purpose of making a lump sum award is the date of separation, September, 1978.

18 In all the circumstances of this case I feel the petitioner is entitled to a lump sum maintenance award in the amount of five thousand dollars. This will not be a great inconvenience for the respondent as he has now \$3,300 in Canada Savings Bonds which may be cashed in to contribute towards the lump sum. In addition, the respondent stated in evidence that he could borrow the amount of five thousand dollars to provide a lump sum to the petitioner. The lump sum will be paid by the respondent to the petitioner by February 1, 1984.

19 The Order is then as follows:

1. The respondent will pay to the Petitioner lump sum maintenance in the amount of five thousand dollars on or before February 1, 1984.
2. The respondent will pay to the Petitioner periodic maintenance in the sum of three hundred dollars per month, commencing December 31, 1983, for a period of twelve consecutive months. If the Petitioner returns to live with the Respondent during any portion or portions of that twelve month period then his obligation to pay her such maintenance ceases during the period while she is living with him provided he supports and maintains her while she is living with him.

20 In the unusual circumstances of this case I exercise the discretion vested in me by ordering each party to bear his own costs.

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