

24 Nfld. & P.E.I.R. 459

Morris v. Morris

Newfoundland Supreme Court (Trial Division)

Fagan, J.

Judgment: December 1, 1979

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Docket: 1978 1001

Counsel: Gary Row, for the petitioner

**David Day**, for the respondent

Fagan, J.:

1 This matter came on for hearing on June 27, 1979, and was adjourned following presentation of the evidence of the petitioner and respondent, to enable counsel to obtain appraisal reports on properties owned by the parties, and to submit written briefs. To date I have received the written briefs and now propose to deal with the matter.

2 In the Decree Nisi granting the divorce between the parties, it is decreed as follows:

1. THAT Charles Arthur Morris, the petitioner, is hereby divorced from the respondent, Sheila Mary Morris and the marriage which was solemnized between them on the 20th day of September A.D., 1948, at St. John's, Newfoundland is hereby dissolved, unless sufficient cause is shown to this Court within three months from the date hereof why this decree should not be made absolute.

2. THAT as to custody and maintenance either party may apply.

3. THAT the provisions of the separation agreement dated May 1, 1975 will be continued until further notice.

3 The petitioner in his application seeks to reduce the amount of the monthly payment to the respondent under the separation agreement referred to in the decree nisi, on the grounds that he is unable financially to meet his commitment to the respondent.

4 This application deals with the question of whether or not a separation agreement is a bar to the court's considering a claim for maintenance in divorce matters. From reading several of the cases dealing with that matter, it is well established that a wife cannot, by agreement, preclude herself or the court from considering the question of maintenance, because the power to grant

maintenance is not a power conferred exclusively in the interest of the wife but it is also to be exercised in the public interest. The jurisdiction for making an order of maintenance is to be found in the *Divorce Act*, R.S.C. 1970, c. D-8. Many of the provisions of separation agreements go beyond that jurisdiction. Maintenance orders should spell out within themselves the amount to be paid and the other terms and conditions imposed so that it can be enforced in this jurisdiction or elsewhere. Other terms of such agreements might be contractual and enforceable.

5 The separation agreement between the parties dated May 1, 1975, was placed in evidence as Consent 1. It is important for our purposes to recite the following clauses of that agreement:

4. *THAT* the Husband shall convey to the Wife a 1972 Datsun motor vehicle. The Wife shall pay all transfer fees and sales tax related to the said transfer.

5. *THAT* the Husband agrees to pay the Wife the sum of Nine hundred dollars (\$900.00) monthly for the maintenance and support of the wife and children of the marriage while they are in the custody of the wife and under the age of eighteen (18) years, payable on the 16th day of each and every month with the first payment to commence on the 15th day of April, A.D., 1975; *PROVIDED ALWAYS THAT* the Husband and the Wife hereby mutually agree that should the financial circumstances of either party materially alter from those existing at the date of the execution of this Agreement, then the Husband and the Wife will, upon reasonable notice, renegotiate the provisions of this clause of the Agreement, *PROVIDED FURTHER THAT* nothing in this clause shall be deemed to affect the validity or finality of any other clause of this Agreement.

8. *THAT* the Husband agrees that the Wife may continue to live at the lands and premises known as 6 Ordnance Street in the City of St. John's, in the Province of Newfoundland, as long as the Wife may wish to do so, and covenants and agrees to pay all taxes and to make all mortgage payments as and when the same fall due and shall pay the fire insurance premiums and other maintenance costs, it being understood that all other payments including all payments for heat, light and telephone services, in respect of the lands and premises are to be paid by the Wife so long as she continues to reside in the premises. It is further agreed that if the Husband fails to make any payments as required by this paragraph, the Wife shall be entitled to add the amounts thereof to the amount payable by the Husband to the Wife in the next month according to the terms of this Agreement.

9. *THAT* the Wife shall be absolutely entitled to all her personal clothing, jewellery and effects and all furniture, furnishings, fixtures, equipment, silverware and household effects now in or about the said premises, 6 Ordnance Street, in the City of St. John's, in the Province of Newfoundland, and the Husband releases and quit claims unto the Wife any right or title which he has or may have therein.

13. *THAT* if the parties hereto shall at any time come together and cohabit for a period of in excess of six months or if their marriage shall be dissolved, this Agreement shall

thereupon determine and all foregoing stipulations and provisions shall henceforth be absolutely null and void; *PROVIDED HOWEVER* that nothing contained in this Clause shall prevent the Wife from petitioning a competent court having jurisdiction in the matter for maintenance after the dissolution of the marriage.

15. *THAT* the parties agree that the terms of this Agreement shall have effect and be binding until the death of the Husband or the Wife which shall first occur, at which time this Agreement shall be terminated.

6 At the time of signing the separation agreement the following children were under the age of eighteen years, namely: Jane, Colin, Blair and Megan. At the date of the hearing of this matter Blair and Megan remain under eighteen years of age.

7 The *Divorce Act*, Section 2(b) reads as follows:

2(b) "children of the marriage" means each child of a husband and wife who at the material time is

(i) under the age of sixteen years, or

(ii) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with the necessaries of life:

8 Considering the definition of "child" it would seem that any child over sixteen years of age under the charge of a parent, must be unable, by reason of (i) illness, (ii) disability, or (iii) other causes, to withdraw himself from their charge, or to provide himself with necessaries of life, in order that the other spouse be required to support such child. Based on the evidence, Blair, born October 6, 1962, and Megan, born August 5th, 1965, are the only children for which the petitioner can be required, under the *Divorce Act*, to pay maintenance.

9 Since I am inclined to the view that the Separation Agreement is not binding on the court, it is not necessary for me to deal with its terms or their enforceability.

10 The evidence disclosed that upon separation of the parties in 1974, the petitioner moved out of the family or matrimonial home, (family home) leaving everything except his personal belongings, in the home to the respondent. The children remained with her. The petitioner paid to the respondent Nine Hundred (\$900) Dollars monthly for her support and that of the children. He also agreed to pay mortgage payments, municipal taxes and insurance with respect to the family home and to maintain same.

11 The petitioner takes the position that he is not financially able to maintain the family home, and this is confirmed by the respondent in that the family home, prior to separation and since, has continued to deteriorate.

12 The respondent is not employed and has not been employed since her marriage to the petitioner. She has no particular training and it is unlikely that she will find any satisfactory or reasonable employment.

13 The petitioner is a medical practitioner and his income is largely determined by the amount of effort put into carrying on his practice. He states his income is approximately Twenty-Five (\$25,000) Thousand Dollars per year, while the Provincial average for doctors is approximately Fifty (\$50,000) Thousand Dollars per year. No evidence was led with respect to his income at the time of granting of decree nisi or entering into the separation agreement.

14 In the present application I have no jurisdiction to determine what interest, if any, the respondent has in the family home, nor to order any disposition or otherwise of same.

15 The question before me is one of maintenance and I must assess the need on the one hand, and the ability to satisfy that need, on the other.

16 Section 11(1) of the *Divorce Act* reads as follows:

11(1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

(a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either

(i) the wife, and

(ii) the children of the marriage;

(b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either

(i) the husband, and

(ii) the children of the marriage; and

(c) an order providing for the custody, care and upbringing of the children of the marriage.

17 Upon granting a decree nisi of divorce, the Court is given the jurisdiction, in its sole discretion, having regard to the conduct of the parties and the condition, means and other circumstances of each of them, to make one or more of the type of order mentioned. Likewise any order made pursuant to Section 11(1) may be varied from time to time or rescinded, having regard to the conduct of the parties and the condition, means and other circumstances of each of them.

18 "Conduct of the parties" in many cases conduct in the sense 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.

19 The condition, means and other circumstances of each party:

*Condition* - here one must not only consider the physical, mental, 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.

20 The *Divorce Act* of Canada makes it possible for married people to divorce each other and to remarry without fear of prosecution under the law. Surely the intent and purpose of Sections 10 and 11 of the Act is to determine as quickly and as practicably as possible, the continuing obligations of one spouse to the other so that each may plan his or her future life and to find or start life anew without the fear of continued court actions or applications. Any order may be varied or rescinded under subsection (2) of Section 11 only after consideration of all the relevant factors.

21 After reviewing my notes and the briefs submitted by counsel in the matter, I would hope that I have given sufficient consideration to the various factors relating to this application.

22 The evidence of the petitioner discloses that he has an income of approximately Twenty-Five (\$25,000) Thousand Dollars. His outstanding loans, including the family home mortgage, amount to approximately Forty-Five (\$45,000) Thousand Dollars. He says that his monthly expenses exceed his income by approximately Eleven Hundred & Twenty-five (\$1125) Dollars and he depends on his present wife for financial contribution, which he says amounts to Three Hundred & Forty-Six Dollars & Eighty-Four Cents (\$346.84) monthly. There is still a short-fall and he is going further in debt. Obviously from his evidence his monthly deficit is quite significant.

23 The Petitioner indicated inability to work at full capacity because of an impediment with his throat which has been present since childhood. While this condition may have worsened with age, it is difficult to really appreciate how this would affect his income appreciably, particularly in his profession where income is increasing rather than decreasing, as appears to be the case with the petitioner.

24 The respondent, in her evidence, says that she really needs Eleven Hundred & Seventy-

Five Dollars (\$1175) monthly and not Nine Hundred (\$900) as is now paid. This payment would be in addition to the mortgage payment, municipal taxes and insurance on the family home.

25 In this case we are concerned only with the provision of Section 11 of the *Divorce Act* of Canada. In my view, a court, having granted a decree nisi, is then vested with the authority or jurisdiction to make one or more of the following orders:

- (a) an order requiring the husband to secure a lump sum; or
- (b) an order requiring the husband to pay a lump sum; or
- (c) an order requiring the husband to secure periodic sums; *or*
- (d) an order requiring the husband to pay periodic sums.
- (e) an order providing for the custody, care and upbringing of the children of the marriage.

26 At the outset and in cases where children are involved, surely the first order to be considered is one of custody, care and upbringing of the children. Having decided on this question, and assuming the order is that custody goes to the wife, then the court must consider the powers and authority set out in Section 11(1)(a)(ii). If there are no children then consideration must be given to Section 11(1)(a)(i), for the wife alone. In my view only *one* of the orders listed as (a), (b), (c) or (d) can be made for the *maintenance* of both or either. If no order is made as to custody in cases where children are involved, then no doubt an order as to maintenance can be made under Section 11(1)(a)(ii) in relation to the wife and children of the marriage because of Section 2(b) of the Act.

27 In the case at Bar, the respondent has de facto custody of two of the children of the marriage. I therefore regard her as entitled to maintenance for herself and the children.

28 The principles to be applied in determining the question of maintenance were set out in the case of *Attwood v. Attwood*, [1968] 3 All E.R. 38, at p. 388, as follows:

(i) In cohabitation a wife and the children share with the husband a standard of living appropriate to his income, or, if the wife is also working their joint incomes. (ii) Where cohabitation has been disrupted by a matrimonial offence on the part of the husband, the wife's and children's maintenance should be so assessed that their standard of living does not suffer more than is inherent in the circumstances of separation...

(iii) ...in general the wife and children should not be relegated to a significantly lower standard of living than that which the husband enjoys ... (iv) Subject to what follows neither should the standard of living of the wife be put significantly higher than that of the husband ... (v) the inescapable expenses of each party ... expenses of earning an income and of maintaining any relevant child. (vi) If the wife is earning an income, or if

she has what should in all the circumstances be considered as a potential earning capacity, that must be taken into account ... (vii) Where a wife is earning an income, that ought generally to be brought into account unless it would be reasonable to expect her to give up the source of income ... (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 ensure to the husband's benefit ... (ix) This consideration is particularly potent where the wife only takes up employment in consequence of the disruption of the marriage by the husband, or where she would not reasonably be expected to be working ... (x) The court must ensure that the result of its order is not to depress the husband below subsistence level...

29 I am not satisfied that a lump sum award is warranted in this case. The respondent is provided with a place to live and necessary furnishings, such as they are. There is no indication of any likelihood of disposition of assets by the petitioner to the detriment of the respondent, or need on the part of the respondent for setting up living accommodations. From the tenor of the evidence I rather suspect that some further action will be taken in future years because of what appears to be an impossible situation where funds are not available to maintain the present living arrangements for the parties.

30 However, based on the information before me, the fact that only two of the children are now dependent, and assuming living accommodations will still be provided to the respondent, I do order that the petitioner pay to the respondent for her maintenance, the sum of Seven Hundred (\$700) Dollars monthly on the 1st day of each and every month, beginning December 1, 1979, and that the petitioner pay to the respondent for the maintenance of the two children of the marriage, the sum of One Hundred & Fifty (\$150) Dollars monthly to be reduced by Fifty (\$50) Dollars monthly upon the older child attaining the age of sixteen years, or so long as the said child continues his education on a regular full time basis, and to be further reduced by One Hundred (\$100) Dollars monthly upon the younger child attaining the age of sixteen years, or so long as said child continues her education on a regular full time basis.

31 There will be no order as to costs.

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