

5 Nfld. & P.E.I.R. 337

O'Brien v. O'Brien

Newfoundland Supreme Court, Trial Division

Higgins, J.

Judgment: September 20, 1973

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Counsel: A. F. Miller, for petitioner.

David C. Day, for respondent.

Higgins, J.:

1 This matter came before me during the sittings of the Supreme Court on Circuit at Wabush, on July 18th, of this year. The petitioner's claim for relief was based on Section 4(1)(e)(i) of the *Divorce Act*, that is on separation of the spouses, not arising out of desertion on the part of the petitioner, for a period in excess of three years. The petition was contested only in respect of the question of access by the respondent husband to the children of the marriage. At the close of the evidence I intimated to counsel that I was convinced that the petitioner was entitled to a Decree Nisi of divorce from the respondent but that I desired to hear argument on the questions of maintenance for the children and access to them by the respondent. At the request of counsel I agreed to allow time for the filing of briefs. Originally the date for the filing of briefs was set at July 31st. Subsequent to my return to St. John's I received a request from counsel for the petitioner for an extension of this time limit. Inasmuch as he practices in a remote area of the Province and has not easy access to a law library I extended the date for the filing of briefs to August 31st. The brief of counsel for the respondent was filed on July 27th and that of counsel for the petitioner on August 31st.

2 The parties were married early in 1964. The first child, a boy who was christened Todd, was born September 29th, 1964, the second child, a girl named Nicole, was born on August 13th, 1967. At the time of the birth of both children the parents were living in St. John's.

3 Unfortunately the marriage was not happy. The petitioner suggested that the main source of trouble was her husband's drinking habits which, she claimed, interfered with his work. In any event they separated on October 14th, 1969. The wife, with the two children, moved to Labrador City where she took up residence with her sister. Some time early in 1970 the husband also went to Labrador City where he worked for some months. There is evidence that between February and May of that year he visited the children at their place of residence some five or six times. The wife was agreeable to his visiting the children but complained that on several occasions he turned up under the influence of drink. During this time the wife had secured part time

employment as a teacher but she felt that her husband should contribute to the support of his dependents. She applied to the Magistrate at Labrador City and on June 15th an order was made by F.M. Rowe, S.M., under the provisions of the *Maintenance Act*, requiring the husband to pay to his wife for the maintenance of herself and the two children the sum of \$40.00 weekly. This order was obeyed for about six weeks but then the husband lost his employment and left Labrador City. Since that time he has not made any contribution to the maintenance of his wife and children.

4 Although the petitioner, in her petition, had asked for maintenance for herself and the two children of the marriage, at the trial she abandoned her application for maintenance for herself and asked only for maintenance for the two children. She is now employed full time as a teacher at Labrador City and has made a home for herself and her children. The husband, as I have said, did not oppose the request for a decree of divorce. He also offered to pay to the petitioner the amount of \$50.00 monthly for the maintenance of both children. I shall deal with this matter presently. The question which presented the greatest difficulty in this case is that of the respondent's access to the children. He urges with apparent sincerity that he is anxious to have the custody of his children for certain periods during the year, principally during the Christmas season and the summer vacation period. He has stated that he is willing to pay the expenses involved in having the children travel from their home in Labrador City to his home at Cape Broyle. I am not to be understood to disparage his protestations of love for his children but I am compelled to note that, according to himself, his occupation as a painter affords him employment for only six months of each year and his net income is about \$3600. annually. After paying for the maintenance of his children and himself I feel that his ability to pay the travelling expenses of the children to and from Labrador City twice a year is doubtful. On the other hand I am not disposed to deny him the opportunity to have access to his children if he is able to meet the conditions which I have in mind. The custody of the children is awarded to the mother but the respondent is entitled to their custody for two weeks during the months of July and August on the condition that he advise the petitioner, at least a month in advance, of the period during which he desires to have the children. He will also have the right, at reasonable times, to visit the children at the petitioner's home during such times as the children are living with her. If the parties are unable to agree on these times of access leave is given to apply to the Court in this respect. The respondent will pay to the petitioner monthly the amount of \$40.00 for the maintenance of each child. A decree Nisi will issue to the petitioner. The respondent will pay the amount which I have set for the maintenance of the two children to the petitioner. In respect of the visits by the respondent to the children at the mother's residence it is specifically provided that he must be sober on the occasion of any such visit. In the circumstances there will be no order as to costs.

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