

54 Nfld. & P.E.I.R. 81

Winsor v. Winsor

Newfoundland Supreme Court (Trial Division)

Steele, J.

Judgment: June 13, 1985

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Austin F. Winsor, Petitioner and Avis Hyacinth Winsor, Respondent

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Docket: 1982 1001

Counsel: **David Day**, Esq., Q.C., for the petitioner

Mrs. Maureen Dicks, for the respondent

Judgment of Steele, J.:

1 The petitioner (the husband) alleges mental and physical cruelty and asked for a decree dissolving the marriage and custody of the children of the marriage. The respondent (the wife) in her Answer denies the allegations of cruelty but admits that she has a medically diagnosed mental condition; she says that her health problem has stabilized. The wife was heard with respect to custody and maintenance. This petition for divorce was heard with Action 1982 No. C.B. 404, an action under the Matrimonial Property Act, judgments in both actions to be filed simultaneously.

2 The husband is 52 years of age and the wife 50 and they were married July 2nd, 1960. They reside at Springdale, Newfoundland. The couple have three children:-

Janice Lee: born February 7th, 1961; Lisa Mona: born July 24th, 1965; and Rochelle Lola; born July 11th, 1972.

The issue of custody concerns only Rochelle.

Decree Nisi

3 The petition for divorce was filed April 12th, 1982, and at that date both parties still resided in the family dwelling at Springdale.

4 The husband alleges various acts of mental and physical cruelty of such a nature and kind as to render intolerable their continued cohabitation. In her Answer the wife denies the allegations of cruelty and gives her explanation of the events cited.

5 The wife has suffered from a mental illness of unknown origin. Doctor Maxwell Wheeler, a psychiatrist, stated that the illness and occurrences resulted from an imbalance in the chemical activity in the brain and was not behavioural; it is a physical disturbance. Dr. Wheeler first came in contact with the wife in 1976 and says that her condition is being controlled by medication but relapses have and can still occur. There are also side effects from the drugs such as motor restlessness, weight increase and drowsiness. During her periods of illness she hallucinates and has had exaggerated religious ideas. The wife has been admitted to hospital approximately 14 times.

6 The parties disagree over the seriousness and consequences of the respondent's illness during the past 7 to 10 years. However, the result is, rightly or wrongly, that the husband has not been able to live or cope with the difficulties and I am satisfied that the uncertainty, tension, and the stress and strain, became more than he could tolerate. The wife's conduct and behaviour was beyond her control and whatever acts of "cruelty" she may have committed were involuntary on her part. I doubt that she has always comprehended the full extent and range of her actions either from the mental illness or the side effects from the drugs.

7 Section 3(d) of the Divorce Act stipulates that the petition for divorce may be presented to the Court on the ground that the respondent has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses. Section 3(d) is silent as to whether the acts of physical or mental cruelty must be intentional on the part of the respondent. In my opinion it is not necessary to find an intention on the part of the respondent to commit acts of physical or mental cruelty in order to comply with ground 3(d) of the Divorce Act. The test is subjective and once it is established that the petitioner has been treated with physical or mental cruelty to the point he or she cannot tolerate continued cohabitation the requirement for a petition of divorce has been met. It is not a requirement of section 3(d) that the acts of cruelty by the offending spouse be deliberate or with evil intent.

8 I am satisfied that the petitioner has established the ground for divorce set out in Section 3(d) of the Divorce Act, namely, physical and mental cruelty of such a kind as to render intolerable the continued cohabitation of the parties. It is ordered that the decree nisi be issued.

Custody

9 As stated the question of custody only concerns the youngest child of the marriage, Rochelle.

10 At the end of the second day of the trial, March 29, 1983, when it was obvious that the trial would be delayed to my next circuit at Corner Brook, I awarded interim custody of Rochelle to her mother, the respondent. At that time the respondent was also granted interim exclusive possession of the matrimonial home in the action taken pursuant to the Matrimonial Property Act. The trial continued November 5, 1984 and at that time counsel for the husband made a vigorous plea for an order for "shared parenting" of Rochelle.

11 The parties agree that from March of 1983 to November of 1984, when the wife had interim custody of Rochelle, that all went well. A routine was developed for the child and she was happy in a

more or less stable situation. It is also conceded, however, that much of the credit is due to the major efforts of the father. Although the wife had exclusive possession of the matrimonial home he regularly visited the home, with the tacit consent of the wife, to prepare certain meals and otherwise ensure that all was going well. He did all or most of the driving of Rochelle to and from school; on occasions the child visited her father to do her homework. The father also spent time with her during the weekend. The respondent wife was always present in the home and had general supervision of Rochelle and her activities. While the husband and wife did not communicate they managed to develop a system that worked and the result is that Rochelle has remained a content and happy child enjoying a good relationship with her father and mother who remain separated.

12 My impression is that the father feels that the present arrangement is not just; that he ought in all fairness to have legal or Court sanction endorsing his contribution. He feels he has carried out his parental duties in a diligent and responsible manner yet the Court has failed to legally recognize his efforts; also, that his wife was awarded interim custody while much of the credit for its success can be attributed to him. In order to rectify this injustice the father asks for an order for shared parenting. I have no difficulty at all understanding the father's position and his plea has merit but I do not agree that it would necessarily be in the best interest of Rochelle to attempt to manufacture a workable order for shared responsibility of the child. In *Re: Brenton*, 41 Nfld. & P.E.I.R. 224 at page 227 I had occasion to stress that in custody cases Section 47 of the Child Welfare Act, stipulates that the paramount consideration is the best interest of the child:-

In a contest over custody of a child the law and the guiding principle are clear. In this province it is stated in the form of a statutory directive. Section 47 of the *Child Welfare Act*, S.N. 1972, c. 37, reads:

Where in any proceeding before any court, including the Supreme Court, the custody or upbringing of a child is in question, the court, in deciding that question shall regard the best interests of the child as the first and paramount consideration, notwithstanding whether, from any other point of view, the claim of the father, or any right at common law possessed by the father, or in respect of such custody or up-bringing is superior to that of the mother, or the claim of the mother is superior to that of the father.

Clearly, in Newfoundland, the general principle in deciding any issue of custody or upbringing of a child is the best interests of the child. While the court must consider all relevant factors the touchstone for any issue or question between the parties relating to custody is in the final analysis a determination of the best interests of the child.

13 Since March of 1983 Rochelle has been in the custody of her mother and there is no serious dispute but that that arrangement has been satisfactory albeit that considerable credit goes to the co-operation and help of the father. I see no compelling reason to alter the relationship or the circumstances now existing. I do not see any change that will likely improve the situation. The more likely probability is that a change in the existing custody order would cause disruption and problems.

14 *Power on Divorce and other Matrimonial Causes*, third edition, volume 1, page 263 to 268 discusses the various types of orders that can be made under Sections 10 and 11 of the Divorce Act. I

take the liberty of paraphrasing certain paragraph from those pages. The usual order for custody and access provides for custody to one parent with access to the other. In England they refer to a "divided order" which is an order that provides that custody be given to one party or both parents whilst care and control, sometimes described as physical custody, be given to the other. There are at least two other custody orders that are considered unusual. The first is the order for joint custody where the child spends part of the year with one parent and part with the other and decisions relating to the child's education and religion are to be taken jointly. The second type of unusual custody order is that of custody in one parent with unusually generous access provisions. *Power* points out at the top of page 266 that orders for divided custody, joint custody and unusually generous access have all been made in Canada but have not found much support from the courts generally.

15 Schedule A to the brief and argument filed by counsel for the petitioner is a draft of the proposed order for custody. Paragraph 1. commences by stating:

That the petitioner and respondent have custody, care and control of Rochelle Lola Winsor (born 11 July 1972), the child of the marriage ("Rochelle"), with the intent that they share responsibility for her parenting as follows:....

Then follows a division of the various responsibilities some assigned to the petitioner, some to the respondent and some jointly. It is not necessary that I try to categorize the draft order but a quick perusal suggests simply that custody is joint with responsibilities assigned or shared.

16 I have no doubt that there are cases where an order for joint custody would be appropriate and in the best interest of the child, but with respect, I fail to see that this is such a case. It is blatantly obvious that such an order for joint custody can only work successfully if the parents communicate constantly and can co-operate with one another without friction and always in the best interest of the child. That is frequently difficult ever for your average parent but certainly all the more difficult for parents who have divorced and gone their separate ways.

17 The joint custody order contemplated by the petitioner would require Rochelle to be moving from residence to residence within the same day and at different times during the same day under the supervision of either the father or the mother.

18 I realize that the residence of the parties are adjoining but with respect I conclude that the custody order anticipated by the petitioner is simply not workable. In my opinion it is not possible for the child to be answerable to two parents at the same time who do not live together and in circumstances that will lead to confusion. In reality she would not have a home. With respect I adopt the statement of Weatherston, J. in *McCahill v. Robertson* (1974) [17 R.F.L. 23 at 23-24](#):

My judgment is based on the very strong feeling that divided custody is an inherently bad thing. A child must know where its home is and to whom it must look for guidance and admonition and the person having custody and having that responsibility must have the opportunity to exercise it without any feeling by the infant that it can look elsewhere.

For these reasons I am obliged to reject the petitioner's plea for a joint custody order.

19 The present arrangement with custody granted to the wife has worked exceedingly well though admittedly with strong support and co-operation from the husband. I trust that that arrangement and understanding between the parents will continue for surely it is in the best interests of the child Rochelle. The parents have managed to bring about a workable arrangement without much or any communication. Both parents care very deeply for Rochelle and if the past two years is any indication, I am sure that they will co-operate, if but silently, to ensure that Rochelle will remain happy and content during the remainder of her adolescent years. It is mainly for these reasons that I do not deem it necessary at this time to specify precise access conditions.

20 The custody, care and control of Rochelle Lola Winsor is granted to the respondent, the mother, with reasonable and liberal access to the father, the petitioner.

Maintenance- Lump Sum

21 On the 29th day of March, 1983, an interim maintenance order was made for the support of both the wife and Rochelle in the amount of \$226.00 weekly. It was also ordered at that time that the petitioner pay all expenses necessary for the operation, repair and upkeep of the matrimonial home the exclusive possession of which was granted to the wife on an interim basis.

22 The wife seeks an order for the payment of a lump sum and in addition periodic sums for the maintenance of herself and the child Rochelle.

23 As I have already indicated, the judgment in the Matrimonial Property action is to be filed simultaneously. An award for maintenance and a division of matrimonial assets usually go hand in hand it being understood however, firstly, that maintenance by way of lump sum or periodic payments, or both, must not be schemed to effect a division of matrimonial assets, and secondly, the division of matrimonial assets under the Matrimonial Property Act must be in strict accordance with the Act and not used to rectify an otherwise unsatisfactory maintenance award. Nevertheless, the division of assets under the Matrimonial Property Act can affect the maintenance award under the Divorce Act.

24 I have come to the conclusion that it is appropriate in this case to grant both a lump sum payment and periodic payments: the husband has substantial assets; the wife has virtually no assets; the husband's assets are tied up in a business that is precarious and for any number of reasons could disappear overnight. The wife's only security is a lump sum award - a "nest egg" - that would provide a degree of protection for the future. Further, the husband's assets are in liquid form and can be paid without too much disruption or complications. I am satisfied that the wife can manage her own affairs and will not squander the money. The lump sum award is intended for the maintenance of the wife only. It is ordered, therefore, that the petitioner pay to the respondent a lump sum payment of \$50,000.00 for the maintenance of the respondent.

Maintenance - Periodic Payments

25 Periodic payments for maintenance are also required by the respondent for herself and Rochelle.

26 Exhibit A.W. No. 1 is the Financial Statement filed by the respondent setting forth particulars of her monthly expenses. This Statement includes expenses for the operation of the family dwelling at 6 Pine Street, Springdale. On the assumption that the family home on Pine Street will be awarded to her in the matrimonial property action the respondent asks for a monthly payment of \$1,708.75. This includes living expenses for mother and daughter, Rochelle, and for the operation of the home. That sum of \$1,708.75 is made up as follows:

Monthly Expenses	

Food - Groceries and Household Supplies	\$ 500.00
Meals outside the home	20.00
Clothing	200.00
Laundry and Dry cleaning	30.00
Housing - Taxes	6.25
Home Insurance	17.00
Water	7.50
Hydro	200.00
Phone	50.00
Repairs and Maintenance	100.00
Health & Medical - Drugs	30.00
Dental care	15.00
Transportation - Car operation	
Gas and oil	60.00
Insurance and Licence	48.00
Maintenance	25.00
Education & Recreation	
School fees, books, etc.	20.00
Newspapers, publications and stationery	15.00
Personal Care - Hairdresser, barber	50.00
Toilet articles, (hairspray, soap, etc.)	15.00
Children's allowances, gifts	200.00
Miscellaneous	100.00

	\$1,708.75

27 Upon reviewing all the evidence and taking into consideration all the circumstances, I am satisfied that the claim for periodic payments is excessive. Accordingly I award the respondent for her support and also for the support of Rochelle a periodic - monthly - payment in the amount of \$1,300.00 to be paid bi-monthly in instalments of \$650.00 each on the 1st and 15th days of each and every month commencing on the 15th day of June, 1985.

28 In the exercise of my discretion I award the respondent one-half of her taxed bill of costs.

29 In summary there shall be an order as follows:

1. A decree nisi;

2. Custody of Rochelle Lola Winsor to the respondent mother with reasonable and liberal access to the father, the petitioner;

3. Maintenance:

(a) Lump sum payment to the Respondent of \$50,000.00; and

(b) Periodic or monthly payments of \$1,300.00 to be paid bi-monthly in instalments of \$650.00 on the 1st and 15th days of each and every month commencing on the 15th of June, 1985; and

4. The respondent to recover one-half of her taxed bill of costs.

30 Judgment to be entered accordingly.

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