Date: 2006 10 10
Docket: S-0001-CV2003000364

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARJORIE BLACK

Applicant

- and -

PAUL WETADE aka MICHAEL PAUL WETRADE

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant and Respondent are former common law spouses. In this action, the Applicant seeks orders dealing with custody and access, child support, division of property, and restraining the Respondent from doing certain things.

[2] The Respondent has never filed any materials in these proceedings. He was served with materials throughout, including a notice of the trial date. At the start of the trial on September 26th, 2006, his name was paged by the deputy sheriff and there was no answer. The Applicant's case was presented that day; the matter was adjourned to the next day for submissions. When the Court reconvened, the Applicant's counsel advised that when she returned from Court the previous day, she learned that the Respondent had phoned the Legal Aid office at some point in the morning to ask that someone appear for him on the matter and seek an adjournment of the trial. The Respondent was told that as he was not a client of that office, no one from there could appear for him.

[3] The Respondent had notice of the trial date well ahead of it. He did not appear on September 26th, nor did anyone appear on his behalf to seek an adjournment. Under

the circumstances there was no basis not to continue with the proceedings on September 27th.

[4] At the conclusion of the Applicant's submissions I issued an Interim Order dealing with issues of custody, child support, possession of the matrimonial home and its contents, as well as a restraining order. I reserved my decision on the final orders sought by the Applicant.

Summary of trial evidence

[5] The only witness called at this trial was the Applicant. She and the Respondent were in a common law relationship for over twenty years. They have three biological children and one adopted child. The two oldest children, Angus and Natasha, are now adults. The custody and child support orders sought in this trial are for the two youngest children, Michaela Black, born on September 22, 1989, and Felix Wetrade, born on January 22, 1999.

[6] The relationship began in 1981 or 1982. The Applicant described it as "unhappy" and "rough". The Respondent was verbally abusive towards her. He was charged and convicted on a number of occasions for assaulting her. He served time in jail for some of those offenses. The three older children were witnessesto some of this violence. The Respondent was, at times, verbally abusive to them.

[7] The evidence revealed that neither the Applicant nor the Respondent had any assets or liabilities to speak of when their relationship began. They acquired some assets during their relationship. Their most significant asset is the matrimonial home, House #83 in Behchoko. The house is on leased land. Both their names appear on the title of the property, filed as Exhibit 2.

[8] In addition to various household items, a number of vehicles were purchased during the time of the relationship, including 2 Camaros, 1 Pontiac Tempest, a Mustang, a van, a half ton truck, and a snowmobile. The Applicantworked outsidethe home for periods of time and contributed funds to the purchaseof some of those assets. She was also, for most of the relationship, the primary caregiver to the children. The Respondent worked periodically as well and contributedto the purchaseof some of the assets. At one point he got life insurance, and opened an RRSP account.

[9] The couple also accumulatedvarious debts. At the time of their separation,there were credit card debts, as well as a substantial loan, in the amount of $55,000.00, that was taken out in January of 2003 by the Respondent and co-signed by the Applicant. The loan was originally for work that was planned on the house. The parties separated a few months later and the Respondent spent the money travelling with his new girlfriend.

[10] The Applicant testified that after separation, the Respondent cashed in his life insurance, of a value of approximately $10,000.00. He sold the Tempest for approximately $3,000.00. The truck was repossessed and after that happened, the Respondent took the van that had until then been used by the family.

[11] The Respondent had a car accident with the Mustang in 2003. The Applicant testified that she thought he may have received insurance moniesfor it, but she was not sure. She did not know how much money he might have received.

[12] After the parties separated on March 25, 2003, the Applicant and the children continued to live at House #83. The Applicant testified that shortly after the separation, the Respondent gave her a total of approximately $285.00 to assist with the care of the children. He never gave her any other money. After the separation, the Applicant was on income support for a period of time. Later on, she began a relationship with Narcisse Naedzo. They now live together at House #83. Mr. Naedzo has for some time contributed to family expenses.

[13] The Applicant recently started working for Tli Cho Domco. She works on a "2 weeks in, 2 weeks out" rotation, and Mr. Naedzo looks after the children when she is away. He is particularly close to the youngest child, Felix. He helps him with his homework, plays sports with him, picks him up from school. The Applicant testified that Felix has asked her if he could call Mr. Naedzo "dad".

[14] The Applicant testified that since the separation the Respondent has, from time to time, caused some difficulties for her. He has made threats about burning the house down and cutting the phone lines. He has on occasionmade commentsabout the house not being the Applicant's house. He sometimes comes to the house uninvited, walks in, and comes and goes as he pleases. The Applicant and Mr. Naedzo were sufficiently concerned about this that a decision was made that Mr. Naedzo, who was employed at

a mine and spent periods of time away from Behchoko, would take a year off work so he could remain in the community and keep an eye on things.

[15] The Applicant testified that the ongoing proceedings and the time it has taken to resolve matters between her and the Respondent have been difficult for her. She says the Respondent's family members have sided with him and there have been occasions where some of them have harassed her and criticized her in public. She becamevisibly upset during her testimony when she was talking about this. She testified that she very much wants to have matters between her and the Respondent finalized and settled.

[16] Since the Respondent did not appear and was not represented by counsel, the Applicant's testimony was not testedon cross-examination, nor was there any evidence brought forward to contradict her version of events. I observedthe Applicantcarefully during her testimony and I am satisfied that she did her best, throughout her evidence, to be accurate in her description of events relevant to the issues before the Court, and fair in her portrayal of things. Although she expressed concerns about some of the Respondent's behaviours, she did not show any particular animosity towards him. I have no hesitation in accepting her testimony.

[17] The fact that I accept the Applicant's testimony, of course, does not mean that she should necessarily be successful in obtaining the reliefs she seeks. Whether the Respondent contests the application or not, this Court has a responsibility to ensure that the reliefs that are sought are supported by the evidence and justified in law. In a case where one party to the litigation is not represented or present, the Court must be particularly careful in that regard.

[18] I now turn to the specific issues that are the subject of the Applicant's requests.

Custody and access

[19] The Applicant seeks sole permanent custody of Michaela Black, born on September 22, 1989, and of Felix Wetade, born on January 22, 1999. Michaela is seventeen years old and Felix is seven years old.

[20] The Applicant does not have any particular concerns with respect to the Respondent's access to Michaela, given her age. She submits that Michaela is in a

position to decide whether to have contact with her father, and on what terms. With respect to Felix, however, the Applicant asks that access be supervised.

[21] Any decision regarding custody of a child must be based on the best interests of the child. *Children's Law Act*, S.N.W.T., 1997, c. 14, as amended, s.17. The evidence revealed that for most of the relationship, the Applicant was the children's primary caregiver. Since the separation, the children have been living with her. Michaela and Felix are both attending school. Through challenging times, the Applicant has looked after their needs and provided them with a safe environment. Her currentcommon law spouse is assisting her with the care of the children, particularly when she is away for work. The evidence suggests that the Respondent has had limited contact with the children. I note from the record that this Court issued an Interim Order on August 20th, 2004, granting sole interim custody of the children to the Applicant, and granting the Respondent liberal and generous access to them. The evidence before me is that he has done very little to exercise access.

[22] On the whole, I am satisfied that maintaining the status quo and granting the Applicant sole permanent custody of the children is in their best interest.

[23] On the issue of access, I agree with the Applicant's submission that no restrictions are needed with respect to the older child, but I am satisfied that it is appropriate for the Respondent's access to Felix to be supervised. I base this assessment on the fact that Felix was very young when his parents separated, that the Applicant has been his primary caregiver, and that his main father figure at this time appears to be the Applicant's current common law spouse. I am also concerned about the evidence of the Respondent's past violent conduct towards the Applicant, and his verbal abuse of the other children.

[24] However, I don't propose to make the access provision as specific as what the Applicant seeks. In my view it is preferable to make a general provision that the access will be supervised and on terms agreed to by the parties. This will provide for some flexibility and give both parties an opportunity to agree on appropriate "ground rules" for the exercise of the access. Should this prove to be unworkable,steps can be taken to get this term of the Order varied.

[25] I am also of the view that it is in Felix's best interests to require the Applicant's written consent before the Respondent is able to take him outside of the Northwest Territories.

Child support

[26] The Applicant's request for child support is governed by Part IV of the *Children's Law Act, supra*.

[27] The Interim Order dated August 20th, 2004 imputedincome to the Respondentin the amount of $41,237.00 and ordered that child support be made accordingly for Natasha, Michaela and Felix. At that point, Natasha was still attending school and had not withdrawn from the Applicant's charge. Natasha is no longer in school and at the time of the trial, was working full time. She no longer falls within the definition of "child" in section 57 of the *Children's Law Act*. The Applicant acknowledges this and only seeks support for the two youngest children.

[28] The Respondenthas never made voluntarychild support paymentsin accordance with the Interim Order made in 2004. The Applicant has received some money through the Maintenance Enforcement Program. The Maintenance Enforcement Program Creditor Report for the period between September 2004 and August 2006, filed as Exhibit 1, shows arrears in the amount of $5,642.63.

[29] Adjustments are required to the computation of the arrears because Natasha withdrew from the Applicant's charge at the end of October of 2005. The Applicant concedes that it is appropriate to adjust the child support arrears to account for this change in circumstances. Under the Child Support Guidelines in force in October of 2005, the amount for monthly child support applicable at the income level imputed to the Respondent was $786.00 for three children and $599.00 for two children. The difference between the two amounts is $187.00.

[30] It has been submitted that a further adjustment is required to reflect an increase in the rates set out in the Child Support Guidelines that became effective in May of 2006. The amount applicable for the support of two children, at the income level imputed to the Respondent, was increased from $599.00 to $626.00 per month. The difference between that amount and the amount of $786.00 that was used by the Maintenance Enforcement Program in their calculations is $160.00. Under the

circumstances, I am satisfied that the adjustments to the arrears balance should take this into account as well.

[31] This means that two amounts must be deductedfrom the arrearsbalance showed on Exhibit 1. The first, for the period between November 2005 and April 2006 inclusive, is required to reflect that the support should have been calculated for two children instead of three. The second, for the period between May 2006 and August 2006 inclusive, is required to reflect that change in circumstances but also take into account the increase in the amounts prescribed in the Child Support Guidelines.

[32] The result is the following:

$5,642.63 (arrears balance showing on Exhibit 1)
- $1,122.00 ($187.00 x 6 months)
- $640.00 ($160.00 x 4 months)

= $3,880.63 (revised arrears balance)

[33] Having no evidence about the Respondent's current financial circumstances, I see no reason not to continue to impute income to him in the same amount as that of the Interim Order made in August of 2004, and to order continued child support payments accordingly.

Division of property

[34] The division of property betweenformer spousesis governedby the *Family Law Act*, RSNWT 1997, c. 18 ("*FLA*"). Under the regime created by the *FLA*, spousesare presumed to be entitled to an equal share of any increase in the total value of their property during the relationship, irrespective of contribution. *Fair v. Jones* [1999] N.W.T.J. No.17; *Anderson v. Antoine* [2006] N.W.T.J. No. 51.

[35] The determination of whether one spouse owes an equalization payment to the other is done by calculating each of the spouses' "net family property". A spouse's "net family property" is, put simply, the difference in his or her net worth at the beginning of the relationship (the commencement date) and the end of the relationship (the valuation date). *FLA*, *supra*, ss. 33, 35 and 36.

[36] Equal division is presumed, but that presumption is not absolute. A spouse can make a claim for unequal division of property. The threshold to be met is a high one: the party claiming unequal division must satisfy the Court that it would be unconscionable not to order unequal division. *FLA*, *supra*, Subs. 36(6).

[37] In this case, the evidence of the Applicant was that neither party came into the relationship with any assets or liabilities to speak of. Therefore, each spouses' "net family property" amounts to the value of assets that were acquired during the relationship, minus the liabilities that were incurred in the same time frame. The "valuation date", in this case, is March 25th, 2003, the date of the separation.

[38] During her submissions, the Applicant's counsel provided the Court with a list of assets and liabilities which she argued had been proven to exist at the valuationdate. I put certain questions to counsel about some of the values and some of the assets and asked for some clarifications. Counsel undertook to file a revised chart clarifying her submissions as to what assets and liabilities should be taken into account for the purposes of the calculations. On October 4th, 2006, counsel filed a chart showing her submission as to assets and liabilities as of the date of separation, and a second chart showing her submissions as to assets and liabilities as of the date of trial.

[39] I have reviewed these charts. I agree that most of the items listed were established through the Applicant's testimony. However, in my view, with respect to some items, the evidence was not sufficiently precise for me to make findings. It does not ultimately make any significant difference in my disposition of this matter, but for the sake of clarity and completeness, the following are the assets and liabilities I find have been established.

a) Assets

[40] Based on the evidence of the Applicant, which is the only evidence I have on this issue, I find the following assets and values have been established to exist as of March 25th, 2003:

Asset	Value
1) matrimonial home	$100,000.00

2) household contents	$10,000.00
3) Pontiac Tempest	$3,000.00
4) 2 Camaros	$300.00
5) van	$4,000.00
6) snowmobile	$3,000.00
7) Respondent's life insurance	$10,000.00
8) satellite dishes	$3,000.00
9) funds from CIBC loan	55,000.00
Total:	$188,300.00

[41] There was reference in the Applicant's evidence to two other vehicles, a Ford truck and a Mustang car, that were acquired during the relationship. I have referred to those in my summary of the evidence. I have not included either of those items in the list of assets for the following reasons. With respect to the truck, my understanding of the evidence was that it was repossessed at some point after the separation. There was no evidence about its value, about how much money what put down to finance it, or about how much was left owing on it at the time of separation. Assigning any value to this item for the purposes of these calculations would be completely speculative. As for the Mustang, there was evidence of an accident, as well as evidence about a fire, and the possibility that the Respondent may have received insurance monies for it. Again, the evidence was not sufficiently clear to enable me to make any findings in that regard.

[42] With respect to the value of the Respondent's RRSP, althoughthe Applicantdid at one point refer to the possible value of $10,000.00, my recollection is that later in her evidence she candidly acknowledged that she really was not certain what the value of it was. In my view, the evidence is too vague with respect to this item to draw any conclusions from it, so I have not included this asset in the calculations. I do not fault the Applicant for not having known in details the value of some of these assets, particularly having regard to assets not within her control. Nevertheless, I cannot speculate or guess to make findings about the existence, or value, of assets.

b) Liabilities

[43] The evidence revealed that a number of significant liabilities were incurred during the relationship. The Applicant listed some of those debts in a Financial

Statement and in a Statement of Property, sworn in July of 2006. These documents were not made exhibits on this trial, but they were shown to the Applicant during her testimony and she adopted most of their content, subject to a few clarifications she provided.

[44] I am satisfied that there were credit card debts outstanding at the valuation date. At the time of trial, there was also an outstanding debt to the Northern Store, but the evidence was not entirely clear on whether this debt pre-dated the separation or was incurred subsequently. Based on the evidence, in my view, the following debts have been established as family debts that arose during the relationship and existed at the valuation date. Again, I find these liabilities can be treated as having been incurred jointly.

	Liability	Amount
1)	CIBC loan	$55,000.00
2)	credit card debts:	
	- Petro Canada:	$800.00
	- Mastercard:	$2,000.00
	- JC Penny:	$350.00
	- Sears:	$1,900.00
	- CIBC Visa:	$2,000.00
	Total:	$62,050.00

[45] Counsel for the Applicant submitted that the calculation of the liabilities should include the amount owing for property taxes and lease. There was no clear evidence about the status of lease or property tax arrears at the time of separation. Therefore I have not included those amounts.

[46] The difference between the assets and liabilities of the parties at the valuation date is $126,250.00. That amount corresponds to the global increase in the parties' net worth during the course of the relationship. I have treated the assets and liabilities globally on the basis that the parties seemed to deal with property matters jointly throughout their relationship. To arrive at a specific amount corresponding to each of their "net family property" within the meaning of s.35 of the *FLA*, and determine if

either of them is entitled to an equalization payment, adjustments would be required, along the lines suggested by the Applicant's counsel in the charts she submitted, to take into account assets that are in the possession of one or the other of the parties, particularly if that asset has been disposed of and the proceeds are no longer available. For reasons that follow, in the circumstances of this case, I am satisfied that it is not necessary to break things down to that level of detail.

[47] The Applicant seeks unequaldivision of the property,and more specifically, that the Respondent's interest in the matrimonial home be transferredto her. The Applicant argues that in this case, there are several reasons why unequal division should be ordered.

[48] There is no question that the threshold of unconscionability is a high one. This has been recognized in several cases in this Court. It has been associated with such terms as "shockingly unfair", "repugnant to anyone's sense of justice", and "outrageous". It is a standard that goes beyond a mere finding that equal division would be unfair. *Fair v. Jones, supra*, at par 44; *Lay* v. *Lay* [2003] N.W.T.J. No.13, at par 42; *Anderson* v. *Antoine, supra*, at par. 25.

[49] In addition to providing for this high threshold,Subsection 36(6) of the *FLA* sets out the factors that the court must consider in assessing whether unequal division should be ordered. The Applicant relies on specific grounds, which she says fall within the purview of factors listed in Subsection 36(6), to argue than an order for unequal division should be made:

> - the Respondent has failed to disclose his financial situation (Par.36(6)(a));
>
> - the Respondent has depleted his net family property (Par.36(6)(c));
>
> - the Applicant has incurred a disproportionate amount of debts (Par 36(6)(e));
>
> - the needs of the children and the financial responsibility related to their care and upbringing (Par.36(6)(g)); and

- the Applicant has maintained the family home, has not disposed of any assets and has done her best to pay the debts accumulated by the family (Par.36(6)(j)).

[50] I am not convinced that all these grounds fall within the factors listed in Subsection 36(6) of the *FLA*, but some clearly do. In my view, Paragraphs 36(6)(c) and 36(6)(j) are particularly relevant to the circumstances of this case. Paragraph 36(6)(c) deals with a spouse's intentional or reckless depletion of his net family property. Paragraph 36(6)(j) deals with general circumstances relating to the spouses' conduct towards property and liabilities.

[51] The Respondent has unilaterally disposed of some assets that were acquired during the relationship and has not shared any of the proceeds with the Applicant. He sold the Tempest for approximately $3,000.00. He cashed in his life insurance, which had a value of $10,000.00. He also took the van, valued at $4,000.00, after the truck was repossessed. By contrast, with the exception of a small sum of money he gave to the Applicant after their separation, there is no evidence that he has made any effort to contribute to the maintenance of any of the family assets or put any money towards reducing any of the family's debts. He has benefited in a direct way for some of the assets that were acquired during the relationship, but has shown no corresponding willingness to share in the responsibility for the debts that accumulated during this time.

[52] The most egregious conduct disclosed by the evidence is the manner in which the Respondent dilapidated monies from the $55,000.00 loan that had been obtainedto pay for family related expenditures. The Respondent's conduct left the Applicant, as a co-signor of the loan, responsible for a significant liability and none of the funds available for family use. The evidence does not give rise to any real prospect that he will assume any responsibility for the payment of this debt or any of the other debts that arose from the relationship. By contrast, the Applicant has paid off some of the debts, and intends on continuing to do so. She has not disposed of any family assets and appears to have done everything she could to maintain them.

[53] The conduct of a spouse is not a relevant consideration on the issue of property equalization unless it has economic consequences for the spouse or the family. *Anderson* v. *Antoine, supra*, at Par. 25. The Respondent's irresponsible use of the

funds from the loan had, and continues to have, a very real financial impact on the Applicant, and inevitably, on the children.

[54] In my view, the manner in which the Respondent has disposed of some of the assets, his use of the loan funds, as well as the fact that he has not provided any assistance to the Applicant in carrying the burdens of family debts, would make it unconscionable not to make an order for unequal division of property in this case.

[55] I am also satisfied that an appropriate way of effecting this division of property is to order that the Respondent's interest in the matrimonial home be transferred to the Applicant, pursuant to s. 40(1)(a)(iv)(A) of the *FLA*. The Applicant will be responsible for any outstanding property taxes or lease payments as of the date of this decision, and will be solely responsible for such payments in the future. Obligations that the parties have to creditors for other outstanding debts remain unaffected by this decision.

Restraining Order

[56] The Applicant seeks a Restraining Order to prevent the Respondent from approaching the house, and from annoying, molesting or harassing her or the children. This was not something that was listed as a relief sought in the OriginatingNotice filed on October 21st, 2003, nor was it requested in the Application that led to the issuance of the Interim Order of August 20th, 2004.

[57] S. 59 of the *FLA* gives this Court the power to make restraining orders. Restraining orders are often sought on an interim basis. They are less frequently sought as part of final orders.

[58] As mentioned at Paragraph 6 of this Memorandum, the trial evidence revealed that the Respondent has in the past verbally and physically abused the Applicant. The evidence further revealed that since these proceedings were commenced, there have been instances where the Respondent has made some threats to the Applicant and her common law spouse about damaging the house and other property. Based on this evidence, I am satisfied that issuing a Restraining Order is appropriate, but I am of the view that there should be a time limit on it. It is this Court's hope that having a Restraining Order in place for a relatively short period of time will provide some

safeguards immediately following the release of this decision, and that the need for those safeguards will dissipate. In the event that problems surface or persist, it would of course be open to the Applicant or any other affected person to apply to this Court, or another Court, for an appropriate remedy.

[59] Counsel for the Applicant asked that the restraining order also extend to prevent the Respondent from harassing the children. In my view, there is not a sufficient evidentiary basis to make such an order. There is no evidence of any recent problems arising between the Respondent and the children. The two older children are adults and can take steps on their own if difficulties do arise. Michaela, on the Applicant's own submission, is able to make her own decisions about under what terms she will have contact with her father. As for the youngest child, Felix, the Respondent's access will be supervised and on terms agreed upon by the parties. This should provide the required safeguards to avoid any difficulties. Obviously, if the situation changes and there is a basis to put restrictions on the Respondent's ability to have contact with his children, steps can be taken to seek appropriate remedies at that point.

Costs

[60] The Applicant seeks costs of these proceedings. I see no reason not to grant this request, and the Applicant will be entitled to costs on a party-party basis, in accordance with the Tariff.

CONCLUSION

[61] Accordingly, an Order will issue with the following terms:

1. The Interim Order issued on September 27th, 2006, is vacated.

2. The Applicant is granted sole permanent custody of Michaela Black, born September 22, 1989 and Felix Wetade, born January 22, 1999.

3. The Respondent shall have liberal and generous access to the child Michaela Black, as can be arranged between the two of them.

4. The Respondent shall have supervised access to the child Felix Wetade, as can be arranged between the Applicant and the Respondent.

5. The Respondent shall not remove the child Felix Wetade from the Northwest Territories without the written consent of the Applicant.

6. Income shall be imputed to the Respondent in the amount of $41,237.00 per year.

7. As of August 31, 2006, the arrears of child support payments due to be paid are set at $3,880.63.

8. The Respondent shall pay child support to the Applicant for the support of Michaela Black and Felix Wetade in the amount of $626.00 per month, payable on the last date of each month, commencing on September 30th, 2006, until further order of the Court.

9. Each party shall have ownership of assets currently in his or her possession.

10. Neither party will make an equalization payment to the other.

11. The Applicant shall be granted sole ownership of House #83 in Behchoko, legally known as Lot 31, Block 3, Plan 3901 Rae Edzo, as well as sole ownership of its contents.

12. The Registrar of Land Titles is directed to cancel the existing certificate of title to Lot 31, Block 3, Plan 3901 Rae Edzo, and issue a new certificate of title in sole name of the Applicant, pursuantto s. 175 of the *Land Titles Act*, R.S.N.W.T. 1988 c.8.

13. The Applicant shall have sole responsibility for lease and property tax arrears for House #83 in Behchoko, as well as sole responsibility for future payments for lease and property taxes on that property.

14. Until such time as a certificate of title for House #83 issues to the sole name of the Applicant, the Applicantshall have exclusivepossession of house #83 in Behchoko.

15. The Respondent is hereby restrained from going within 50 metres of House #83 in Behchoko; the Respondent is further restrained from molesting, annoying or harassing the Respondent. These restrictions on the Respondent will be in place for a period commencingon today'sdate, and will continue until January 31st, 2007, inclusive.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
10th day of October 2006

Counsel for the Applicant: BettyLou McIlmoyle
The Respondent was not represented

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MEMORANDUM OF JUDGMENT OF THE
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