

Case Name:

Name Removed v. Name Removed

**Between**

Wife, Applicant and Father, Respondent

[2009] O.J. No. 1160

Court File No. 30485/08

Ontario Superior Court of Justice

**D.K. Gray J.**

Heard: March 16, 2009.

Judgment: March 20, 2009.

(45 paras.)

*Family law -- Custody and access -- Access -- Denial of or interference with -- Motion by father for order restraining mother from interfering with his relationship with children dismissed -- No evidence of any difficulty with access other than reluctance of 13-year-old daughter to visit father when his new girlfriend and her son are with him -- Reluctance expected for daughter that age and father had not recognized this -- Mother had expressed belief in importance of children maintaining relationship with father and no evidence of anything coming close to parental alienation.*

*Family law -- Marital property -- Matrimonial home -- Possession and occupancy -- Interim -- Practice and procedure -- Orders -- Enforcement of orders -- Motion by mother for half the carrying costs of matrimonial home and payment of debts dismissed -- Motion by father for enforcement of order to divide contents of home allowed -- Mother was paying bills from joint line of credit and home was listed for sale -- No reason use of joint line of credit could not continue, then trial judge could divide debt after hearing all evidence -- Mother ordered to produce list of contents as ordered within 10 days or father could bring motion to strike her pleadings.*

*Family law -- Maintenance and support -- Child support -- Quantum -- Special or extraordinary expenses -- Spousal support -- Quantum -- Interim order -- Motion by mother for interim spousal support and s. 7 expenses allowed -- Mother received \$2,676 monthly child support for two children as per consent order and her claimed \$7,000 monthly deficit did not account for this -- Mother earned \$104,000 annually and had been left with all expenses for was entitled to relatively modest spousal support from father who earned \$212,000 annually -- Father to pay interim spousal support of \$1,200 per month -- Parties had not been properly accounting for and dividing s. 7 expenses so order these would be done through counsel.*

Motion by the mother for interim spousal support, half the carrying costs of the matrimonial home and proportionate share of s. 7 expenses. Cross-motion by the father for an order restraining the mother from interfering with his relationship with the parties' two daughter, ages 13 and 7, and enforcement of the order to divide the contents of the matrimonial home. The two children lived with the mother in the matrimonial home. The mother earned \$104,000 per year and the father earned \$212,000 per year. The parties had listed the home for sale but were having difficulty selling it. The father had been paying \$2,676 per month in child support as per a consent order. The mother had been paying all matrimonial home and child care expenses, mainly from the parties' joint line of credit. The father had access to the children but the 13-year-old daughter had been

reluctant to visit the father when he was with his new girlfriend and her son. The father blamed this on the mother, who had once told the daughter she did not have to go visit the father if she did not want to.

HELD: The motion was allowed in part. The cross-motion was allowed in part. There was no reason the household and child care expenses could not continue to be paid through the parties' joint line of credit. Eventually, the trial judge could divide the balance of the line of credit after hearing all the evidence. The mother claimed a monthly deficit of \$7,000, but her accounting did not include the child support she received. However, the mother had been left with all the expenses, whereas the father's monthly expenses had clearly decreased, and the mother earned significantly less than the father. The mother was entitled to the relatively modest interim spousal support of \$1,200 per month. The mother gave no satisfactory explanation for not having complied with the order to divide the contents of the home. The order had directed the mother to make two lists of contents, then the father would be able to choose one. The mother was ordered to present her lists within 10 days or the father would be entitled to bring a motion to strike her pleadings, on which she was warned she would not be very successful. The parties' treatment of s. 7 expenses had not been satisfactory as there was evidence of receipts not being presented to the father and other receipts not being accepted by him. The parties were ordered to deal with s. 7 expenses through their respective counsel. Finally, the father had failed to appreciate that his 13-year-old daughter was having difficulty accepting his new relationship. This was to be expected and the one comment from the mother was a long way from parental alienation, particularly when there was other evidence that the mother had stressed the importance of the girls maintaining a relationship with their father.

**Statutes, Regulations and Rules Cited:**

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 15.2(2), s. 15.2(4), s. 15.2(6)

**Counsel:**

Kevin Peires, for the Applicant.

Jaret Moldaver, for the Respondent.

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**REASONS FOR JUDGMENT**

1 **D.K. GRAY J.:**-- There are two motions before me. The first motion, by the applicant, is for interim spousal support; for payment of one-half of the carrying costs of the matrimonial home; for the payment of the balance of certain monies alleged to be owing by the respondent; and for an order for payment of the respondent's proportional share of the s. 7 expenses. The second motion, by the respondent, is for an order restraining the applicant from negatively interfering with the respondent's relationship with the children; and for an order requiring the applicant to comply with a consent order regarding division of the contents of the matrimonial home, failing which the applicant's pleadings should be struck.

**Background**

2 The parties married in 1994, and separated in 2008. They have two children, both daughters: Marie, who is 13-years old, and Alicia, who is 7-years old. They live with the applicant.

3 Both parties have been, and currently are, employed full-time. The respondent is an executive with Air Canada, and according to his latest financial statement, his gross income, inclusive of benefits, is approximately \$212,000 per annum. He deposes that he was awarded a bonus in 2007 in the amount of \$62,000, which was paid early in 2008. He says no bonus was declared in 2008.

4 The applicant's annual income is approximately \$96,000. Her most recent financial statement, which was sworn on March 15, 2009, discloses that she received a bonus in 2008 of \$7,731. Since she says nothing about the bonus in her affidavit, I will assume that she is entitled to an annual bonus in her employment with Scotia Bank.

5 In June, 2007, the parties sold their home in Oakville and moved to Montreal. They returned to Oakville in December, 2007, and purchased a new home, which closed in March, 2008. It was purchased for approximately \$1.3 million dollars. There is approximately \$600,000 in equity.

6 Sometime during the period when the parties were living in Montreal, the respondent spent considerable time in Toronto, and commenced having an affair with a woman, identified in the applicant's affidavit only as "Jane Doe". Jane Doe has a son. Currently, the respondent lives with Jane Doe in Georgetown.

7 The applicant deposes that the parties separated on the day after the closing of the house purchase, March 29, 2008. The respondent says they separated in June 2008. It is not disputed that the respondent made efforts to get the applicant to agree to sell the home, but it was not until November 2008 that she agreed to do so. The parties have been unsuccessful in selling the home to date.

8 On November 3, 2008, the parties entered into a consent order. The respondent agreed to continue making monthly child support payments of \$2,676 per month, based on an annual income of \$209,000. The order also provides that the matrimonial home will be sold; the applicant's interest in the parties' cottage will be purchased by the respondent at fair market value; the parties will divide the contents of the matrimonial home, by agreement, and failing agreement, the applicant is to prepare two lists and the respondent is to choose one of them; and special and extraordinary expenses are to be divided in proportion to the parties' respective incomes.

9 It should be noted that an earlier consent order, dated September 15, 2008, dealt with custody of, and access to, the children. In essence, it provided for the respondent to have access on alternate weekends. One of its terms required that the applicant "use her best efforts to facilitate and encourage the children" to attend visits with the respondent.

10 The parties have a joint line of credit, out of which the applicant has paid a number of expenses. According to the respondent, it has a current balance of \$150,281.27 outstanding, and still has \$211,618 of available credit.

11 The applicant says she has been paying all of the mortgage payments and other expenses on the matrimonial home. She also says that until February 2009, she has paid the mortgage payments on the cottage. She says the respondent has been paying one-half of those payments since then. Some of the expenses claimed by the applicant in her financial statement are, in my view, properly considered to be s. 7 expenses. These would include school fees and tuition, summer camp, and daycare.

12 The applicant says that the respondent has been inconsistent in paying for his share of the s. 7 expenses. She says she has provided receipts, some of which the respondent claims he has not received, and in at least one case, he threw the receipts on the ground when the applicant gave them to him. The respondent has not actually given the applicant funds earmarked for specific expenses. Rather, he has, from time to time, simply deposited money in the parties' joint bank account, and now takes the position that this was sufficient to defray his obligation for amounts he is required to pay.

13 As noted, the consent order of November 3, 2008 provided for the division of the contents of the matrimonial home. The parties could not agree on the division, and notwithstanding a number of requests by respondent's counsel, the applicant has not prepared the two lists as contemplated in the consent order.

14 The applicant claims that the respondent has been somewhat inconsistent in his exercise of access to the children. Of more importance, it would appear that the oldest child, Marie, has difficulty accepting the role of the respondent's new companion. She has resisted visiting the respondent while his new companion and her son are present.

15 The respondent blames the applicant for his difficulties with Marie. He notes that prior to the consent order of September 15, 2008, there were difficulties obtaining regular access. On more than one occasion, the police were called. Since the making of the order of September 15th, the respondent says that the applicant has told Marie in his presence that she does not have to go with him. He says that he and his daughter have participated in counselling, but that the process is being impeded by the applicant's interference.

16 For her part, the applicant deposes that she has always attempted to foster a positive relationship between the respondent and his daughters. With respect to the difficulties with Marie, she has encouraged counselling through Marie's therapist, but notes that the respondent has only attended counselling sessions twice in the last five months. In a letter from the therapist, which was copied to counsel for the respondent, the therapist notes that the applicant had stated that she believes it is very important for both the girls to visit with their father and to have a relationship. She also stated that she believes this relationship to be a very important one for both their daughters. The therapist notes that Marie has been feeling angry and anxious, and she recommended that it would be helpful for the respondent to participate in some of the counselling sessions to improve communication with Marie and work through some of her anger with him.

#### Analysis

(a) Spousal Support

17 A motion for interim spousal support is brought pursuant to s. 15.2(2) of the *Divorce Act*, which authorizes the Court to make an "interim order" to require a spouse to secure or pay such lump sum or periodic sums, "as the court thinks reasonable for the support of the other spouse". Under s. 15.2(4), the Court must take into consideration "the condition, means, needs and other circumstances of each spouse". Other criteria are specified under s. 15.2(6).

18 While the same criteria are to be considered, under s. 15.2 of the *Act*, with respect to both final and interim orders for spousal support, it is clear, as I have noted previously, that a motion for interim support is to be assessed differently from an application for a final order; see *Weber v. Weber* (2007), 42 R.F.L. (6th) 263 (Ont. S.C.J.); and *Lewis v. Lewis* (2008), 55 R.F.L. (6th) 454 (Ont. S.C.J.). A trial judge, with the benefit of a full record, will be in a much better position to assess the factors set out in s. 15.2 of the *Act*, and the evidence relevant to those factors. The trial judge will be in a position to make retroactive adjustments, if necessary, in order to accommodate and, where required, vary the somewhat "rough justice" that may be reflected in an interim order. A motions judge, who determines the matter based on affidavits, usually without the benefit of cross-examination, and without all of the documentary material that may be relevant, is only in a position to impose an imperfect solution pending trial. As I noted in *Lewis, supra*, at para. 17, a motions judge should approach the issue with some caution.

19 In this case, the applicant claims entitlement to spousal support based on an annual income of the respondent in the amount of \$266,000, and an annual income for her of \$95,000. In her most recent financial statement, she claims a monthly deficit of approximately \$7,000.

20 Based on the best evidence I have, I do not accept that the respondent's annual income is \$266,000. He has sworn that his bonus of \$62,000, received in early 2008, was earned in 2007. He swears that there was no bonus for 2008. At this point, I accept that the respondent's income is about \$212,000 per year. It is always open to the trial judge to come to another conclusion, based on better evidence.

21 The applicant did not disclose her bonus until her most recent financial statement was sworn the day before argument of the motion. She says nothing about the bonus in her affidavit. In the absence of some explanation by the applicant, I will assume that her bonus is something paid annually, and accordingly, I will assume that her annual income is approximately \$104,000.

22 The applicant is currently paying the expenses on the matrimonial home, including mortgage expenses. The respondent, for his part, asserts that he will be making a claim for occupation rent to be paid by the applicant. There is no reason, in my view, why the expenses of the matrimonial home, including mortgage payments, cannot continue to be paid from the joint line of credit. Any balancing can be done by the trial judge, after hearing all of the evidence and the competing claims.

23 As noted earlier, some of the expenses claimed by the applicant are really s. 7 expenses, which should be divided between the parties. I will be dealing with those later.

24 I note that in claiming her deficit of \$7,000 per month, the applicant has not included the child support that is being paid by the respondent.

25 I am not persuaded that the applicant has a real deficit of \$7,000 per month, as she claims.

26 As required by the Court of Appeal in *Fisher v. Fisher* (2008), 88 O.R. (3d) 241 (C.A.), I must consider the *Spousal Support Advisory Guidelines*. Based on the respondent's assumed annual income of \$212,000, and the applicant's assumed annual income of \$104,000, the *Guidelines* suggest a range of spousal support, for a couple with two children, of between about \$700 and \$2,150 per month, with a mid range being about \$1,450 per month.

27 The respondent submits that the *Guidelines* are advisory only, and are not binding, as distinct from the *Federal Child Support Guidelines*, which are binding. The respondent submits that the Court should take into account all of the surrounding circumstances, and that I should conclude that the applicant is not in need of spousal support pending trial. It is submitted that the applicant is perfectly capable of meeting her needs between now and the date of trial, and that the trial judge can remedy the situation retroactively, if need be.

28 As a general proposition, I accept the respondent's submissions. Clearly, all of the surrounding circumstances are to be

assessed in determining whether or not an interim order for spousal support should be made, and if so, in what amount. However, one of the circumstances to be considered is the range determined by the *Guidelines*. The *Guidelines* themselves contemplate that they will be applicable in the case of both interim and final orders. In *Fisher, supra*, the Court of Appeal recognized that the *Guidelines* are not binding. At para. 103, Lang J.A. noted that when counsel fully address the *Guidelines* in argument, and a trial judge decides to award a quantum of support outside the suggested range, "appellate review will be assisted by the inclusion of reasons explaining why the *Guidelines* do not provide an appropriate result."

29 In this case, independently of the *Guidelines*, I conclude that the applicant is entitled to a relatively modest amount of spousal support pending trial. Her income is considerably less than that of the respondent, and she has been left with the obligation of paying many of the expenses for which both parties had been responsible while they were still living together. It is likely that the respondent's expenses have decreased, even taking into account the child support he is paying. The respondent has said relatively little about his lifestyle since the separation, but I note that he is taking a vacation in Costa Rica in the near future. It is doubtful that the applicant could do the same.

30 On balance, I think an interim order for spousal support in the amount of \$1,200 per month would be appropriate, and that is slightly less than the mid range as suggested by the *Guidelines*.

(b) Matrimonial Home and Cottage

31 I will deal first with the contents. On November 3, 2008, the parties agreed on a mechanism for dividing the contents. The tie breaker was that the applicant was to prepare two lists, and the respondent would choose one. More than four months have passed since the consent order was agreed to, and the applicant has not prepared the lists, notwithstanding requests that she do so. In my view, the excuses offered by the applicant and her counsel are not satisfactory. While I am not prepared to strike the applicant's pleadings in default of her providing the lists, as requested by the respondent, I order that the applicant comply with the order within ten days. If she fails to do so, there is no doubt that she will not fare well on a motion to strike her pleadings.

32 The matrimonial home is listed for sale, and it is obviously in the parties' mutual interest that it be sold as soon as possible. There is considerable equity in the property, which can go a long way towards allowing the parties to go their separate ways financially, once the proceeds are divided. I am satisfied that, in the meantime, the applicant can defray the expenses of the matrimonial home, including the mortgage payments, out of the joint line of credit. If the sale is delayed, such that the joint line of credit is impaired, a further motion can be brought.

33 The respondent will be purchasing the applicant's interest in the cottage, and he is currently making the mortgage payments.

34 In the result, no further order is required at this time regarding the matrimonial home or the cottage. Any retroactive adjustment can be made by the trial judge.

(c) S. 7 Expenses

35 The treatment of s. 7 expenses has been unsatisfactory, and has produced some confusion. The respondent claims he has paid all s. 7 expenses for which he has received invoices. The applicant says that the respondent claims not to have received some invoices that she has, in fact, provided. Payments have been made by the respondent sporadically through the parties' joint bank account, which may or may not add up to the right amounts.

36 In my view, the treatment of s. 7 expenses must be more businesslike. Henceforth, I direct that claims for s. 7 expenses be done through counsel. Once each month, counsel for the applicant shall forward to counsel for the respondent an itemized list of s. 7 expenses, supported by receipts where applicable. Any disputes about those expenses can hopefully be sorted out between counsel. Payment shall be made by the respondent within five days of receipt by his counsel.

37 Section 7 expenses shall be shared by the parties proportionally to their respective incomes, based on an annual income of the respondent of \$212,000 and an annual income of the applicant of \$104,000.

38 One of the s. 7 expenses is the fees for the private school. I see no reason why that should not continue. For the sake of clarity, I order that the respondent contribute to the private school fees until further order of the Court.

(d) Parental Alienation

39 In my view, this case is a long way from parental alienation.

40 The respondent alleges, in broad, general terms, that the applicant has interfered with his relationship with his children, and his daughter, Marie, in particular. I am not satisfied, based on the material before me, that that is so.

41 The respondent acknowledges that since the consent access order was made, there have been relatively few difficulties with respect to access, save for the reluctance of Marie to visit while his new companion and her son are present. In terms of any specific allegation that the applicant has encouraged Marie to engage in this behaviour, the respondent has referred only to an occasion on which the applicant is alleged to have said that Marie is free to not go on a visit with her father. In my view, while a statement of this nature by the applicant is unfortunate, it does not come close to showing parental alienation. Balanced against this single statement is the undisputed evidence that the respondent has only attended counselling with Marie twice in the last five months. In the letter from Marie's therapist, to which I referred earlier, the therapist has encouraged joint sessions involving Marie and her father. The therapist also noted that the applicant has taken the position, in the company of Marie, that it is important for the girls to have a positive relationship with their father. The applicant herself swears that she has remained fully supportive of a positive and strong relationship between the respondent and his children.

42 In my view, it is not overly surprising that a 13-year old girl will have difficulty accepting that her father has a new relationship, and she needs time, patience, and assistance in coming to grips with that new relationship. Based on the material before me, I am not convinced that the respondent has fully recognized this. Instead of blaming the applicant for the difficulty, the respondent should, in my view, make greater efforts to assist his daughter in grappling with her emotional turmoil. I would urge the respondent to start by spending more time in the counselling process, as recommended by the therapist.

43 Needless to say, I am not prepared to make the order requested by the respondent, based on alleged parental alienation.

#### Disposition

44 In the result, I order as follows:

- (a) The respondent shall pay to the applicant interim spousal support in the amount of \$1,200 monthly, commencing April 1, 2009;
- (b) Section 7 expenses shall be divided proportionately according to the parties' respective incomes, based on an annual income of the applicant of \$104,000, and an annual income of the respondent of \$212,000;
- (c) The respondent shall continue to contribute towards the private school fees until further order of the Court;
- (d) Claims for s. 7 expenses shall be forwarded to counsel for the respondent, by counsel for the applicant, monthly, supported by receipts, where applicable, and shall be paid by the respondent within five days of receipt by counsel for the respondent;
- (e) The applicant shall comply with para. 3 of the consent order of November 3, 2008, within 10 days;
- (f) In all other respects, the motions of both parties are dismissed.

#### Costs

45 I will entertain written submissions with respect to costs, not to exceed three pages. A party claiming costs shall include a costs outline with the written submissions. Counsel for the applicant shall have ten days to file his submissions, and counsel for the respondent shall have ten days to respond. Counsel for the applicant shall have five days to reply.

D.K. GRAY J.

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