

CITATION: Natyshak v. Henriksen, 2012 ONSC 5709
COURT FILE NO.: 33233/11
DATE: 2012-10-09

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
DONNA NATYSHAK)
) Samuel Z. Stern, Counsel for the Applicant
Applicant)
)
– and –)
)
NEIL HENRIKSEN) Not Appearing
)
Respondent)
)
)
)
) **HEARD:** June 5, 2012

2012 ONSC 5709 (CanLII)

REASONS FOR JUDGMENT

MURRAY J.

[1] This application was commenced on January 6, 2011.

[2] Although properly served with the application, the respondent filed no answer and has been noted in default.

[3] On January 23, 2012, Justice Hourigan ordered this matter to proceed as an uncontested trial. It proceeded as an uncontested trial before this Court on June 5, 2012.

[4] The applicant seeks:

1. a divorce;
2. sole custody of the children of the marriage;
3. child support in accordance with the *Child Support Guidelines* based on an imputed income of \$150,000 to the respondent;

4. section 7 expenses to be split between the applicant and the respondent on a 12% / 88% basis;
5. retroactive child support;
6. retroactive section 7 expenses;
7. spousal support;
8. the vesting of certain monies in the name of the applicant in trust for the children;
9. permanent exclusive possession of the matrimonial home at 1054 Pearson Dr., Oakville, Ontario;
10. permanent exclusive ownership of the matrimonial home and an order permitting the registration of property in the applicant's name alone;
11. designation of the applicant and the children of the marriage as irrevocable beneficiaries of a life insurance policy in an amount of not less than \$350,000 as security for child support, said expenses and spousal support;
12. an order requiring the respondent to obtain and maintain medical, dental and extended health plan coverage for the applicant and the children for so long as any of them are entitled to support by the respondent;
13. costs

The Evidence

[5] The applicant was born on November 29, 1965 in Oakville, Ontario and has continuously resided there.

[6] The parties met in Canada in 1990 and were married on October 9, 1993 in Denmark. They separated on July 1, 2010. There has been no cohabitation since the date of separation. There is no prospect of reconciliation.

[7] The parties have four children: Taylor Henriksen, born March 20, 1994; Jacob Henriksen, born August 10, 1995; Juhl Henriksen, born October 1, 1998; and Paige Henriksen, born December 1, 2001. All four children currently reside with the applicant in Oakville, Ontario. Two of the children, Jacob and Paige, have been diagnosed with central auditory processing disorder which requires special accommodation at school for both of them and additional tutoring for Paige. At the time the application was commenced, Taylor was 17 years old and a senior high school student at Holy Trinity High School in Oakville. As of the date of

the uncontested trial, Taylor has been accepted at Queen's University and plans to attend that institution commencing in September, 2012. She will be in residence. At the time of commencement of the application Jacob was 16 years old and in grade 11 at Holy Trinity High School, Juhl was 13 years old and in grade 8 at St. Matthews Elementary School and Paige was 10 years old and in grade 5 at St. Matthews Elementary School.

[8] Prior to separation, the applicant had not been employed in the workplace since 1995. In 1995, she decided to remain at home to be the primary caregiver to her children. This decision to stay at home with her children was made with the full support of the respondent. The evidence establishes that during the marriage the burden of child-rearing was assumed primarily by the applicant.

[9] The respondent is described as a hard-working and entrepreneurial man who had a busy chiropractic clinic. The respondent was able to spend significant time on his business assisted in large measure by the parties' decision in 1995 that the applicant would remain at home to be the primary caregiver to the children.

[10] Beginning in 2004-2005, the respondent began to encounter financial difficulties in his business endeavours. The respondent closed two of his clinics, one in Toronto and one in Burlington. The parties struggled financially. In 2006, the matrimonial home, which was in the name of the applicant, was remortgaged by her at the request of the respondent in order to provide financial assistance to the family and to the respondent whose business was continuing to experience difficulty. In order to ease the financial pressure, the applicant also cashed in her RRSPs and sold a townhouse that she owned.

[11] Following an investigation by the College of Chiropractors of Ontario, by decision dated March 25, 2010, the Discipline Committee of the College suspended the respondent for a period of 12 months based on findings of disgraceful, dishonourable and unprofessional conduct. The respondent has ceased working as a chiropractor and has not complied with the terms set out by the Discipline Committee of the College of Chiropractors of Ontario arising from its decision of March 25, 2010.

[12] Until the date of separation, the parties lived together with their children at the matrimonial home located at 1054 Pearson Dr., Oakville, Ontario. Upon separation on July 1, 2010, the applicant left the matrimonial home. After leaving the matrimonial home, the applicant and her three daughters, Taylor, Juhl and Paige, went to live with the maternal grandmother and the respondent remained in the matrimonial home. Jacob was in Philadelphia at the time of separation, although he returned from time to time to live for very short periods with his father in the matrimonial home. However, for support purposes, Jacob has always been dependent on his mother.

[13] On or about September 3, 2011, the respondent, without notice to the applicant or to the children, left Canada and returned to his country of origin, Denmark. After the respondent returned to Denmark on September 3, 2011, he has seen the children only once, that being on March 20, 2011 at a mall. He has made no further efforts to see his children. There is email correspondence from time to time between him and the children.

[14] According to the applicant, the children are not favourably disposed to the respondent and the relationship between the children and the respondent is described by the applicant as strained. She has no objection to him having reasonable access to the children pursuant to an order of the Court which would, she believes, establish the parameters of access should he attempt to re-establish contact with the children. I accept that in the circumstances of this case and given the treatment of the applicant by the respondent, a Court order is preferable to leaving access to be agreed to by the parties.

[15] The respondent left Canada with his financial affairs in disarray, with significant debt, including tax arrears. The matrimonial home required significant repairs. The respondent's departure from Canada left the applicant and the children with very limited resources and without any means of support creating extreme financial hardship for them. The applicant has been required to expend capital to support her family and receive assistance by way of loans from family members.

[16] The applicant was not able to provide any accurate financial information with respect to the income of the respondent. He has refused to participate in these proceedings and has refused

to provide any financial disclosure. The applicant believes that the respondent has never filed personal income tax returns with Revenue Canada.

[17] Prior to and throughout the course of the marriage, the respondent worked as a chiropractor specializing in foot orthotics. He operated through his own business, the latest being 1638548 Ontario Inc. operating as “The Foot Clinic and Hands-on Chiropractic.” He operated his business from the matrimonial home. The applicant has not been able to locate any corporate financial records. Bank statements located by the applicant indicate deposits into the respondent's personal bank account which indicate receipts in excess of \$1,266,000, and net income after expenses of \$832,254.89 for 2007. Based on the information she has been able to locate, she has found evidence of income in 2008 of \$124,873 and in 2009 of \$92,019. The respondent made cheques payable to the applicant in the amounts of \$58,000, \$61,500, and \$56,000 in 2007, 2008 and 2009 respectively. In 2010, he paid the applicant \$16,500 prior to separation. In the facts found by the Discipline Committee of the College of Chiropractors of Ontario, in the period between January and June of 2007, the respondent issued invoices and prescriptions related to orthotics or orthopaedic shoes worth in excess of \$558,000 in claims.

[18] During the marriage, the respondent also had an interest in a business called Pine Tree Financial which loaned interest at high rates and from which he earned some income. The applicant is not aware of the magnitude of the income earned through this source.

[19] More recently, the respondent's Facebook account indicates that he was residing in Stubberup, Denmark, and working for a company called Selvstaendig and further that he may have been employed as a sales director for a company called Global Wallet Corporation in which he has exclusive sales jurisdiction over a number of European and Central American countries.

[20] Although the applicant initially thought that the respondent had no intention of returning to Canada on a permanent basis, in March of 2012 the applicant received information that the respondent had returned to Ontario and was acting as an independent contractor doing house renovations, working with another contractor by the name of Wayne Robertson and, in an email to the applicant from the respondent, she learned that he has registered his own company.

There is also some evidence that the respondent is making orthotics to generate additional income.

[21] At the day of the uncontested trial, the applicant believes that the respondent had returned from Denmark and that he is currently living and working in Ontario. The applicant is currently unaware of the respondent's employment situation but, based on his skill and training as a chiropractor who operated his own chiropractic clinic in Ontario for approximately a decade, she is of the view that he can find and secure, gainful employment as a chiropractor in Ontario and/or in Denmark.

[22] As noted above, the evidence clearly establishes that the applicant has been the homemaker and primary caregiver for the four children of the marriage for the duration of the relationship. Prior to her having children, the applicant worked as a real estate agent. The applicant has now returned to the real estate business. She hopes that a return to this occupation will allow her flexibility in the scheduling of work resulting in minimal interference with her parenting responsibilities. The applicant's mother, her sister and brother-in-law are available to assist the applicant with the children when necessary. The evidence is that the children are very close to their maternal grandmother and to their aunt and uncle, all of whom have helped look after the children in the past.

[23] The evidence establishes that the applicant has completed some of the required courses and that as of September 13, 2011 has been registered as a real estate broker with a well-known agency. She needs to complete three more courses to maintain the licence or it will expire. The evidence further establishes that she earned no income in 2011 as a real estate broker and has earned \$25,000 up to the date of the uncontested trial in 2012.

[24] The matrimonial home is currently owned 99% by her and 1% by her mother. According to the applicant, her mother's ownership was established in order to facilitate the securing of a mortgage. An accurate net family property calculation has not been possible in this case because of the failure of the respondent to make disclosure. A calculation of net family property using only the applicant's information shows a payment due by the applicant to the respondent of \$58,044.28.

Analysis

Divorce

[25] The parties separated on or about July 1, 2010. The respondent left the country without notice to the applicant or his children in September 2010. There has been no cohabitation since the date of separation. There is no hope of reconciliation. The applicant is entitled to a divorce.

Spousal support

[26] The respondent paid the applicant an average of \$58,500 per annum for household expenses in 2007, 2008, and 2009. During their marriage, the lifestyle provided by the respondent was consistent with a significant income. He owned two expensive automobiles and motorcycles. He was responsible for some of the household expenses notwithstanding the amounts paid to the applicant. He paid cash for his automobiles. After moving into the matrimonial home, the respondent paid for the installation of a swimming pool. He traded in stocks and bonds. There is every reason to believe that his business in orthotics generated a handsome profit. The respondent is still able to work as a chiropractor in Ontario but has elected not to do so. He may currently be employed but has provided no financial information on which the Court can make any assessment of his actual income. He has never filed income tax returns in Canada and has never provided any financial disclosure in these proceedings.

[27] I am in agreement with the applicant that it is not unreasonable to impute income to the respondent on a prospective and retrospective basis in the amount of \$150,000 annually for purposes of determining his spousal and child support obligations.

[28] The respondent has paid no child support and no spousal support since the date of separation. He has completely ignored his obligations and his responsibilities to his family. He departed from Canada leaving his family in a state of financial disarray. In sum, the respondent, Niels Henriksen, has behaved in a reprehensible manner with reckless disregard for the interests of his spouse and children.

Custody

[29] The evidence establishes that the applicant has been the principal custodian and primary caregiver to the four children of the marriage during the marriage. The applicant is entitled to an order granting her sole custody of Juhl Henriksen born October 1, 1998 and Paige Henriksen born December 1, 2001.

[30] The older two children, Taylor Henriksen born March 20, 1994 and Jacob Henriksen born August 10, 1995, are now both 18 years of age and a custody order is no longer appropriate for them. They are old enough to make decisions on their own.

Access

[31] The respondent shall have access to Juhl Henriksen and Paige Henriksen in Oakville, Ontario, Canada only upon further Court order.

Spousal Support

[32] This was a lengthy marriage of almost 17 years. The evidence is that in 1995 the applicant decided to remain at home to be the primary caregiver to her children and that this decision was made with the full support of the respondent. The applicant and the respondent specifically agreed that the applicant would stay at home to care for the children while he worked at his career. As a result of this decision, the respondent was able to pursue his business and other pursuits without having to assume more than minimal childcare responsibilities. This was a lengthy marriage during which the applicant set aside her career and her career opportunities in order to sustain the home. She returned to the workforce in 2011 after being abandoned by the respondent. As outlined above, the applicant has engaged in some retraining and is now licenced as a real estate broker. She earned no income in 2011. In 2012, up to the date of the uncontested trial, the applicant has earned \$25,000. The applicant is not in a position to determine how successful she will be as a real estate agent. There is no doubt she is entitled to compensatory spousal support for an indefinite duration. See: *Elliot v. Elliot*, 15 O.R. (3d) 265.

[33] The applicant claims retroactive spousal support based on the mid-point calculation pursuant to the *Spousal Support Advisory Guidelines (SSAG)* based on the respondent's imputed

income of \$150,000. I agree that this is a reasonable basis upon which to calculate spousal support in the circumstances.

[34] The Divorce Mate calculations provided by the applicant indicate that with the *Guidelines* income of \$149,340 (based on non-taxable income of \$100,000 per annum grossed up for income tax), the midpoint of the *SSAG* is \$1,459 per month for July and August of 2010 and \$1,480 per month for the balance of 2010 and for 2011. For 2012, and thereafter, the *SSAG* midpoint, based on \$150,000 of imputed income and \$25,000 income for the applicant, is \$1,460 per month.

[35] Therefore, arrears of spousal support calculated to the end of October, 2012 are fixed as follows:

1. \$2,918 for July and August, 2010;
2. \$5,920 for September to December, 2010;
3. \$17,760 for 2011;
4. \$14,600 for the months of January to October, 2012.

[36] Considering that the applicant will not pay tax on a lump-sum payment ordered for 2012 retroactive spousal support, and recognizing that the respondent will have no deductible payments, I have adjusted the lump-sum payment of \$14,600 by 20% resulting in arrears of spousal support owing by the respondent to the applicant in the lump-sum amount of \$11,680.

[37] With respect to ongoing child support, the respondent shall pay the sum of \$1,460 per month commencing the 1st day of November, 2012 and on the first of each and every month thereafter until further order of this Court.

[38] Spousal support at this level is to continue for an indefinite period subject to variation in case of a material change in circumstances.

[39] In addition, the parties should be required annually to exchange financial information and to disclose information related to income received from all sources. The parties should exchange updated financial and income information related to 2012 prior to June 1, 2013 and

thereafter, prior to June 1 in each year, the parties shall exchange updated financial and income information with respect to the prior calendar year.

Child Support

[40] Based on an annual income of \$150,000, the respondent's child support obligation child support for his four children in the years 2010 and 2011, pursuant to the *Child Support Guidelines*, is \$3,064 per month. Therefore, for the period following separation in 2010 and for 2011, the respondent's retroactive child support obligation amounts to \$49,024, being \$3,064 per month for 16 months.

[41] Commencing January 1, 2012, the respondent's child support obligation pursuant to the *Child Support Guidelines* is \$3,102 per month until September, 2012 when Taylor began university and will only be returning to live with the applicant during school vacation periods. As of September, 2012, the respondent's child support obligations are therefore reduced to \$2,275 per month. Therefore, for the period commencing January 1, 2012 and ending October 31, 2012, the respondent's retroactive child support obligation amounts to \$29,366 being \$3,102 per month for 8 months and \$2,275 for 2 months.

[42] In addition, commencing November 1, 2012, and on the first of each and every month thereafter, based on his imputed annual income of \$150,000, the respondent's child support obligation, pursuant to the *Child Support Guidelines*, is \$2,275 per month for Taylor Henriksen born March 20, 1994, Jacob Henriksen born August 10, 1995, Juhl Henriksen born October 1, 1998 and Paige Henriksen born December 1, 2001 .

[43] The applicant also in seeks an order to be reimbursed for 88% of s.7 expenses incurred by her and for which she has received no contribution from the respondent. In her affidavit for uncontested trial dated December 21, 2011, and in the exhibits filed at the uncontested trial, the applicant has established that she incurred s.7 expenses in the aggregate amount of \$14,789 since the date of separation. Having reviewed the evidence, I am satisfied that each of the individual expenses for which reimbursement is claimed is a *bona fide* s. 7 expense incurred for the four children, Taylor, Jacob, Juhl and Paige. I agree that the respondent is responsible for 88% of these expenses. I therefore fix s. 7 arrears for the period ending January 31, 2011 in the amount

of \$13,014.32. Therefore, this Court orders that the respondent reimburse the applicant in the sum of \$13,014.32 as his contribution of s. 7 expenses incurred up to December 31, 2011 for the four children.

[44] In addition, the respondent shall be responsible for 88% of all s. 7 expenses incurred by the applicant from December 31, 2011 up to October 31, 2012 upon proof of payment by the applicant.

Costs

[45] The applicant is entitled to her costs of this application which I fix in the amount of \$15,000.

The Matrimonial Home and Equalization

[46] As noted above, an accurate calculation of net family property has not been possible because of the failure of the respondent to make any financial disclosure. A calculation of net family property using only the applicant's information shows a payment due by the applicant to the respondent of \$58,044.28.

[47] The applicant has asked for a declaration that the respondent shall have no further property or matrimonial home rights or obligations with respect to the property municipally known as 1054 Pearson Dr. in Oakville, Ontario. She asks that the respondent be given credit for making payments owed by him and that such credits shall be in full satisfaction of any obligation of the applicant to make an equalization payment to the respondent. I agree that this is an appropriate remedy for the applicant.

[48] The retroactive spousal support obligation of the respondent fixed as of December 31, 2011 has been fixed in the amount of \$26,598. I have also found that the respondent is obligated to reimburse the applicant for s. 7 arrears fixed in the amount of \$13,014.32 for his contribution to s. 7 expenses incurred up to December 31, 2011 for the four children. As noted above, I have fixed the applicant's costs payable by the respondent to her in the amount of \$15,000. These three items add up to \$54,612.32. The applicant suggests that the respondent should be given

credit for these amounts thus negating any equalization payment that may be owed by her to him. I agree. This is more than fair to the respondent.

[49] Therefore, the respondent shall be credited for paying the aggregate amount of \$54,612.32 in order to offset any equalization payment which the applicant might be required to make to the respondent.

[50] Furthermore, the respondent's right or entitlement to any interest in the matrimonial home known as 1054 Pearson Dr., Oakville, Ontario is hereby extinguished. The property shall no longer be considered a matrimonial home and the applicant may encumber, transfer, sell or otherwise use the property free of any further claims by the respondent. The order of the Court may be registered on title to 1054 Pearson Dr., Oakville, Ontario to ensure the removal of any matrimonial home designations in favour of the respondent that may be or have been registered on title either before or after this order.

Insurance

[51] I agree in the circumstances that the applicant's request that the respondent obtain life insurance in the amount of \$350,000 designating the applicant as an irrevocable beneficiary is reasonable to secure child support, expenses and spousal support. Furthermore, I agree it is reasonable for the respondent to be required to obtain and maintain medical, dental and extended health plan coverage for the applicant and the children for so long as any of them are entitled to support.

Savings/RESP Accounts

[52] The evidence establishes that a number of bank accounts and RESPs have been established for the benefit of the children. They shall be vested in the name of the applicant in trust for the children.

Conclusion

[53] This Court orders as follows:

1. The applicant, Donna Natyshak, shall have sole custody of Juhl Henriksen born October 1, 1998 and Paige Henriksen born December 1, 2001;
2. The respondent, Neils Henriksen, shall have access to the children Juhl Henriksen born October 1, 1998 and Paige Henriksen born December 1, 2001, only upon further Court Order;
3. The respondent shall have access to Taylor Henriksen born March 20, 1994, and to Jacob Henriksen born August 10, 1995 in accordance with their wishes.
4. Commencing November 1, 2012, and on the first day of every month thereafter until further order of this Court, the respondent shall pay to the applicant child support in the amount of \$2,275 per month for the children Taylor Henriksen born March 20, 1994, Jacob Henriksen born August 10, 1995, Juhl Henriksen born October 1, 1998 and Paige Henriksen born December 1, 2001 based on the respondent's imputed income of \$150,000 per annum in accordance with the *Child Support Guidelines*;
5. Commencing January 1, 2012, the respondent shall pay to the applicant 88% of the expenses of Taylor, Jacob, Juhl and Paige pursuant to s. 7 of the *Child Support Guidelines* upon being provided receipts or other evidence of payment by the applicant. For purposes of clarification, these expenses shall include:
 - a) medical, health, eye and dental expenses not covered by insurance;
 - b) orthodontic treatment expenses not covered by insurance;
 - c) extraordinary expenses for primary and secondary school including expenses for extracurricular activities which shall include but not be limited to basketball, volleyball, soccer, field hockey, swimming, and lacrosse;
 - d) driving instruction;
 - e) tutoring expenses;
 - f) counselling expenses;

- g) expenses for post-secondary education;
6. The respondent shall pay to the applicant arrears of child support for the years 2010 and 2011 fixed in the amount of \$49,024;
 7. Commencing November 1, 2012, and on the first of each month thereafter until further Court order, the respondent shall pay to the applicant spousal support in the amount of \$1,460 per month;
 5. The respondent shall pay to the applicant arrears of spousal support a lump-sum payment fixed in the amount of \$11,680 for the months of January to October, 2012;
 8. The following accounts shall vest solely in the name of the applicant in trust for the children Taylor, Jacob, Juhl and Paige Henriksen:
 - a) Scotiabank savings account #94*1087;
 - b) Scotiabank savings account #94*0927;
 - c) Scotiabank savings account #94*1222;
 - d) Scotiabank savings account #94*1389;
 - e) USC RESP account #102628493;
 - f) USC RESP account #6609915;
 - g) USC RESP account #102634587;
 - h) USC RESP account #6609901; and
 - i) USC RESP account #102634565.
 9. The applicant, Donna Natyshak, is granted a divorce;
 10. The applicant, Donna Natyshak, is granted permanent exclusive possession and ownership of the matrimonial home municipally known as 1054 Pearson Dr., Oakville, Ontario. Any right, entitlement and interest of the respondent, Niels Henriksen, in the former matrimonial home municipally known as 1054 Pearson Dr., Oakville, Ontario, L6H 288 is hereby extinguished;

11. The applicant, Donna Natyshak, may encumber, transfer, sell or otherwise use the property municipally known as 1054 Pearson Dr., Oakville, Ontario, L6H 288 free of any further property claims of the respondent, Niels Henriksen, and the order of this Court may be registered on title to the property in order to effect the removal of any matrimonial home designations that may have been registered or may be registered on title either before or after the date of this order;
12. The respondent shall obtain and maintain a life insurance policy of not less than \$350,000 as security for child support, s. 7 expenses and spousal support obligations and shall designate irrevocably the applicant as the beneficiary of such policy;
13. The respondent shall obtain and maintain medical, dental and extended health plan coverage for the applicant and for the children, Taylor Henriksen born March 20, 1994, Jacob Henriksen born August 10, 1995, Juhl Henriksen born October 1, 1998 and Paige Henriksen born December 1, 2001, for so long as any of they are entitled to be supported by the respondent;
14. A Support Deduction Order shall issue in order that this judgment may be enforced by the Family Responsibility Office;
15. By November 1, 2012 and by November 1st of each year thereafter, until further order of this Court, the respondent and the applicant shall exchange income information for the previous calendar year in which they provide each other with copies of supporting documentation including copies of income tax returns, T4s and notices of assessment;
16. This order shall be served on the respondent within seven days of the applicant's receipt thereof to the following addresses:
 - a) by mail to: Niels Henriksen, 534 Valley Dr., Oakville, Ontario, L6L 4M2;
 - b) by mail to: Niels Henriksen, c/o Jorn Henriksen, Krogvej 28, Stubbenup 4140 Borup, Denmark;
 - c) by e-mail to: nhenriksen1961@Hotmail.com.

MURRAY J.

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DONNA NATYSHAK

Applicant

– and –

NEIL HENRIKSEN

Respondent

REASONS FOR JUDGMENT

MURRAY J.

Released: October 9, 2012