Date: 20010524
Docket No.: S.C. 97-D2937
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

DOUGLAS BLAIR TWIGGE

Plaintiff

AND:

MARIE ANNA TWIGGE

Respondent

EDWARD HOREMBALA — For the respondent

DOUGLAS TWIGGE — Appearing on his own behalf

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

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[1] POWER J. (Oral): Tragically, this dispute has gone on far too long. Blame is not placed on either party. It is just one of those circumstances where a breakdown has occurred, the communication level was not maintained, and the dispute escalated.

[2] The parties were married on January the 17th, 1987. They separated on May the 21st, 1997. There were two children of their union: Blake Edward Twigge, born February 22, 1986; Lee Austin Twigge, May 12, 1988.

[3] From the evidence that the Court has heard, I am satisfied there has been a separation of the parties in excess of one year and a divorce judgment is granted with respect to the marriage of Mr. and Mrs. Twigge.

[4] The parties have not displayed an ability to cooperate and communicate about child rearing decisions caused by personal differences, and I am addressing this issue knowing that it really is not one that is of very real concern to the parties, but I want you to know the views of the Court on the basis that this case does not support joint custody. The reason for that is because of the ongoing disagreements and misunderstanding between the two parents that certainly have not benefitted the children.

[5] The leading case in this subject is *Young v. Young*, [1993] 4 S.C.R. 3, decided by the Supreme Court of Canada, where the current Chief Justice of Canada stated:

> Parliament has adopted the "best interests of the child" test as the basis upon which custody and access disputes are to be resolved. Three aspects of the way Parliament has done this merit comment.
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> First, the "best interest of the child" test is the only test. The express wording of s. 16(8) of the *Divorce Act* requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.

Under s. 16(10) of the *Divorce Act*,

> ..."provides that in making an order the Court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child."

And that statement the Court fully supports, that the child should have an ongoing and continuing relationship with both parents.

[6] The evidence presented by the Court substantiates that there was, at the time of separation, hostility between both parties - hopefully that has now subsided - and that it is obvious from the evidence that the mother has shown a very real interest and concern for the children, and has exercised her right of access and of guiding and directing the children. So that the record is clear, the custody of the children remains with the father with generous and liberal access, and from the brief reference, the testimony the Court has heard, that seems to be working; the children are reasonably happy with the visitations and that the parents have agreed to liberal access and that is ongoing.

[7] The respondent, in her financial statement filed May the 18th, 2001, stated that her monthly income is $557.45. However, on the sale of her Class A 33 shares in Spirit Lake Enterprises Ltd. she received the following: $150,000 for the sale of the shares, $11,104 by way of repayment of a shareholder's loan, $20,000 by way of a dividend, for a total of $181,104.

[8] The respondent, in her evidence, testified she received the balance of the proceeds from the sale of her Class A shares of Spirit Lake Enterprises Ltd. on June the 19th, 1998, in the amount of $156,603.33. The respondent has used the proceeds from the sale of her 33 Class A shares to pay down debt, to pay off credit card indebtedness, to pay legal fees and living expenses, and has indicated to the Court that from this fund, that she received from the sale of her shares, that she withdraws, on an annual basis, $10,000 per year. She has invested $20,000 with Wood Gundy, and receives a monthly income from that source of $141.45. In addition, she received a monthly employment income of $416 as a bookkeeper for Tagish Estates.

[9] The Court recognizes, from the testimony of Mrs. Twigge, that she has had serious health problems since the separation, but she indicates to the Court she has now recovered subject to medical check-ups every three months. Not withstanding her health problems, she has faithfully made all her child support payments since the order of Mr. Justice Maddison, made on December the 17th, 1997, in the amount of $468 per month, which commenced January the 1st, 1998. She is to be commended for having fulfilled that obligation.

[10] The Court has a serious dilemma. When one looks at the child support guidelines it is clear that based on the income that Mrs. Twigge currently has that she does not have an obligation to continue with any further child support payments. However, the two children who will suffer should those child support payments be withdrawn are her own two children, because from the information

that is before the Court they do need this financial help. She has indicated that she intends to return to the work force in the very near future, and based on that information provided by Mrs. Twigge she has displayed the talent, the ability, to maintain a number of different responsibilities and jobs. Certainly when she was involved with Spirit Lake Enterprises Ltd. as an extremely hard-working person who contributed many hours, on a daily basis, to the success of that particular venture - she is to be commended for that - and as a result she may have affected her health. Fortunately, from what she has told the Court, she thinks she has recovered and is able to go back into the work force, and based on that information the Court is going to impute to her an income, and I say that in this case it has not been an intentional unemployment on her part. Because of her health problems she was unable to continue working, and certainly could not continue at the level she had been working up to 1997; but she does have the ability to obtain employment, and the needs of the children are obvious from a point of view that they are currently both teenagers who have educational and health needs, and if those payments are not continued certainly their standard of living is going to be at a much lower level.

[11] Based on how faithful and supportive Mrs. Twigge has been, and concerned, as a mother, for her two children there will be a direction of the Court that she continue making the payments of $468 a month. The children are in a critical stage of their development and need all the assistance that she can provide.

[12] With respect to the dental expenses - and the Court acknowledges that the parents did not consult, did not communicate, did not exchange views before this major expense was incurred - but it is the view of the Court, based on the evidence that has been presented, that the dental expenses with respect to the two children were set at $8,460 and that the respondent should share that expense on the basis that she is responsible for $4,230.

[13] The major area of dispute centres around the claim of the respondent to one half of the value of the Class B shares in Spirit Lake Enterprises Ltd. and certainly I agree with Mr. Horembala that when we look at Tab 18 and the share purchase agreement, and we look at page 14, specifically, and the word "option" appears, it is clearly a misworded agreement from the point of view that this is not an option. It does not say that the purchaser "may" acquire these shares. It says "the company agrees to buy," and both Bob Twigge and Doug Twigge agree to sell, and it sets out the value and it sets out when this is going to take place so that it is clearly an agreement between the parties. It is not as if the purchasing company could have said, "Well, sorry, we're not interested in acquiring those shares." It was an obligation. Whether it was an obligation that had high risks attached to it, that is something there is absolutely no evidence before the Court. One looks at the agreement, what the terms are set out in there that the parties agreed to, and it is clearly an obligation that the purchasing company was obliged to fulfil.

[14] The one matter that clouds that agreement is the fact that Robert Twigge was involved as a consultant working for the purchaser, overseeing or assisting in the operation of the restaurant, the service station, and the other facilities on the property, and ensuring that the purchaser was successful so that they could meet their obligations. The evidence of Mr. Twigge indicates that his brother, Robert, wished to withdraw from being a consultant to the purchaser, and that the parties then negotiated a discount for the Class B shares.

[15] It was clearly, in the opinion of the Court, a family asset, that Mrs. Twigge had made an equal or major contribution towards the success of the business ventures and should have been consulted but was not. However, the Court takes into consideration that there was a need for a decision to be made in order to finalize the transaction, specifically the Class B shares, and they agreed to a discount - that is Robert and Doug Twigge - so that the shares were reduced in value by one half, and I am of the view that certainly there was a constructive trust, that Mrs. Twigge had a very vital interest in this family asset, was entitled to be consulted but was not, and a decision was made by the two other shareholders. In any event, the Court declares that a constructive trust should be made in favour of the respondent to secure one half of the amount received for those shares, and the Court recognizes that the sum of $21,840 was not received. One half of that amount was received, and the share that is payable by the petitioner to the respondent should be the sum of $5,460.

[16] The most difficult part of this dispute deals with the personal assets that were in the family at the time of separation and the lack of clear, precise evidence to establish values, to establish the credit card debts that existed at that time. There have been proposed explanations made. They are totally unacceptable to the Court from the point of view that that information is available. That information was important for the Court to be able to resolve this dispute, but, unfortunately, it is not before the Court, other than a number is submitted that the credit card debts at the time of separation were somewhere in the range of $33,000, but there is nothing to substantiate that, when the Court is fully aware that those kind of statements are available from the credit card companies. Mr. Twigge has indicated that that was obtained, that was given to one of his former lawyers. Again, Mr. Horembala indicates that he requested, on many occasions, this information. It was never provided. A lot of information was provided. The two statements involving Visa and MasterCard were never produced. That certainly creates difficulties for the Court in trying to arrive at a fair resolution from the perspective of both Mr. Twigge and Mrs. Twigge. The Court recognizes also that she had her own credit card and that she undertook the responsibility of paying that off from the proceeds of the sale of the Class A shares.

[17] Looking at the various statements that have been put before the Court: Number one, the jewellery and fur coat are specifically excluded, and there is ample authority to justify the exclusion of those items. The property in Colorado; the only evidence I have heard is that it was acquired when Mr. Twigge was 18 years of age, prior to any marriage or relationship with Mrs. Twigge, that it was

swamp land, that he has never seen the property, and in the opinion of the Court that is not a family asset and should be excluded.

[18] With respect to the other assets, and looking from a global perspective, the majority of these personal assets are depreciating assets whose value is going down rapidly, and by that I mean the appliances, the recreational equipment, the furniture, the motor vehicle. Whether these values are realistic, and certainly both litigants have different opinions as to what the values realistically are, the evidence discloses that some of these items are in storage, some of them remained at Carcross for whatever reason - that has not been explained - that they just walked away from those items and left them with the business, and in all probability it would be very difficult to recover any of those items at this stage.

[19] I have the calculations of both parties, and I certainly have taken into consideration figures that Mrs. Twigge has placed on these assets, subject to an adjustment for the children's items and the items that she took with her. It is my view that the total balance of $44,925 should be adjusted downward by giving Mr. Twigge credit for one half of the proposed credit card debt, that would be some of $16,500, because there is absolutely not a shred of evidence to establish anything more, other than he has continued through most of his adult life in the course of running Spirit Lake Enterprises Ltd., and his current business here in Whitehorse, by using excessive credit card debt to operate with. So that the $16,500 deducted from the $44,925 would result in a total of $28,425 as family

assets, divided in two would result in a declaration that Mrs. Twigge is entitled to the sum of $14,212.

[20] There is no doubt in the Court's mind that Mr. Twigge's former lawyer was fully aware of the amended answer and counter petition filed, pursuant to the Rules, on the 12th of March, 1998 and was served with a copy of that document. Whether Mr. Twigge ever was given notice of the fact that that claim had been advanced, he has taken a position that he never knew that that amended answer and counter petition had been brought to his attention. He knew what this dispute was about. Sadly, it was prolonged and unresolved. Hopefully, now it is.

[21] Now, the one issue that remains outstanding is the question of costs, and I will ask for any brief, concise submissions Mr. Horembala may wish to make or Mr. Twigge may make.

(Submissions)

[22] THE COURT: The Court always has a discretion when dealing with the question of costs, but weighing the success of one party over the other - and the success has been mixed - it is the view of the Court that Mrs. Twigge has been successful on one of the main issues that was hotly contested and that is the question of the constructive trust involving the Class B shares, and probably one of the reasons why this dispute was dragged out as long as it was. So that there will not be the necessity of preparing a bill of costs which involves

taxations and other procedural stops, and I am trying to minimize any further legal entanglements to both parties, I award costs to Mrs. Twigge in the amount of $1,500. Anything further?

[23] MR. HOREMBALA: No, My Lord.

[24] THE COURT: Thank you.

POWER J.