Twigge v. Twigge, 2001 YKSC 526

Date: 20010605
Docket: S.C. No. 97-D2937
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

DOUGLAS BLAIR TWIGGE

PETITIONER

AND:

MARIE ANNA TWIGGE

RESPONDENT

**REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE P. C. POWER**

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[1] The parties were married on January 17, 1987. They separated on May 21, 1997 and they have two children, Blake Edward Twigge, born on February 22, 1986 and Lee Auston Twigge, born on May 12, 1988.

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

[3] The parents have not displayed an ability to co-operate and communicate about child-rearing decisions as a result of personal differences between the litigants.

[4] The evidence, in this case, does not support joint custody. The ongoing disagreements and arguments between two parents have not benefitted the children.

[5] The leading case on the subject is *Young v. Young*, decided by the Supreme Court of Canada, 1993, 8 W.W.R. at page 513, where McLachlin J., of the Supreme Court 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. First, the best interest of the child test is the only test. The express wording, 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.
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> Under s. 16(10) of the Divorce Act, provides that in making an order the Court shall give affect to the principle that a child in the marriage should have as much contact with each spouse as is consistent with the best interests of the child.

[6] Mr. Justice Wood of the Court of Appeal of British Columbia in 1990, 50 B.C.L.R. (2d), 1, and at page 96 stated:

> I believe the whole of s. 16 of the Divorce Act of 1985 when properly construed reflects the modern view that the best interests of a child are more amply served by a law which recognizes that the right of that child to a meaningful post-divorce relationship with both parents.
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> Access confers no right in the parent to influence the upbringing of the child, that is, for the parent with custody or guardianship. However, under the Divorce Act. 16(5), a parent granted access has a right to make inquiries and be given information as to the health, education and welfare of the child. The welfare of the child must be decided on a consideration of all relevant factors, including the general,

> psychological, spiritual and emotional welfare of the child. ... The adversarial process by its nature requires each spouse to attack the other in order to protect his or her economic interests. This has caused an undue emphasis to be placed at trial on the deterioration of the husband and wife relationship and not enough of the parent and child relationship.

[7] I bring these comments to the attention of the parents because it is a very real situation in the circumstances that involve these two children. Children have a right to meaningful relationships with both parents, regardless of whether these parents no long love or live with one another.

[8] The evidence presented to the Court clearly substantiates that there is hostility between both parents in this case. They cannot sit down and discuss the mutual concerns and interests of their two children in a civil manner. The children are directly affected by the disagreements that they have seen take place between their two parents. The custody of the two children, namely Blake and Lee Twigge, shall continue to be with the father, with liberal and generous access to the mother.

[9] The Respondent, in her financial statement filed May 18, 2001, stated that her monthly income is $557.45. However, on the sale of her 33 Class shares in Spirit Lake Enterprises Ltd., she received the following:

$ 150,000.00	Sale of Class A shares in Spirit Lake Enterprises Ltd.
$ 11,104.00	Repayment of shareholder loan from Spirit Lake Enterprises.
$ 20,000.00	Dividend declared by Spirit Lake Enterprises Ltd.
$ 181,104.00	TOTAL

[10] The Respondent testifies that she received the balance of the proceeds from the sale of her Class A shares on June 19, 1998 in the amount of $156,603.33.

[11] The Respondent has used the proceeds from the sale of her 33 Class A shares to pay debts, credit cards, legal fees and living expenses estimated to be $10,000.00 per year. She has invested $20,000.00 with Wood Gundy and receives a monthly income of $141.45. In addition, she receives a monthly employment income of $416.00 as a bookkeeper for Tagish Estates.

[12] The Court is aware that the Respondent has had serious health problems since the separation but has now recovered, subject to medical check-ups every three months. Notwithstanding her health problems, she has faithfully made all her child support payments and has testified that she intends to return to the work force on a full time basis in the near future.

[13] The Court may impute income to a parent in cases of intentional unemployment or under employment income when the needs of the children are obvious or because of reasonable educational or health needs. The standard of living of the Respondent is higher than that of the Petitioner. Accordingly, the Petitioner's application for child support is granted.

[14] The Respondent shall pay by way of child support the sum of $468.00 per month commencing June 1, 2001, which amount shall continue until the children reach the age of 19 years or have completed their education and are able to earn their own livelihood.

[15] The Respondent shall pay one half of the dental expenses incurred by her two children, which according to the evidence was in the amount of $8,460.00. The share of

the Respondent shall be the sum of $4,230.00, which is payable to the Petitioner within 30 days of this judgment. In addition, the Respondent shall be responsible for paying any additional dental expenses incurred by the two children while in the care and custody of the father or until they reach the age of 19 years.

[16] The Respondent's counsel and the Petitioner have provided many calculations with respect to the value of the personal property, including furniture, appliances, art, china, recreation equipment, Franklin collection and motor vehicle. In addition, the Petitioner estimated that his credit card indebtedness at the time of separation was $33,000.00. The dispute between the litigants has been continuous for the past four years and the Petitioner failed to produce at trial any statement from Visa or MasterCard to substantiate his claim of $33,000.00. The evidence as to the value of the joint personal property is weak, along with the credit card debt. The Court has had difficulty in arriving at a fair valuation because the evidence is incomplete and is based on memory of what occurred four years ago.

[17] The Court values the personal property assets of the Respondent and Petitioner at: Personal property of $44,925.00, less credit card debt of $16,500.00 for a Net Value of Personal Property of $28,425.00. Each litigant is entitled to one-half of the value of these assets in the amount of $14,212.50.

[18] The major area of dispute centers around the claim of the Respondent to one-half the value of the Class B shares in Spirit Lake Enterprises Ltd.

[19] In the case of *Pettkus v. Becker* [Can.], 14 R.F.L. (2d) at page 175, Dickson J quoted:

... adopted the "common intention" concept of Lord Diplock in Gissing [at p. 438]:

"... where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other."

...

The sought-for "common intention" is rarely, if ever, express; the courts must glean "phantom intent" from the conduct of the parties. The most relevant conduct is that pertaining to the financial arrangements in the acquisition of property. ... Professor Donovan Waters in a comment in (1975) 53 Can. Bar Rev. 366 stated [at p. 368]:

"... this 'discovery' of an implied common intention prior to the acquisition is in many cases a mere vehicle or formula for giving the wife a just and equitable share in the disputed asset."

...

... there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.

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...the circumstances disclosed the existence of a constructive trust arising out of and dependent upon the applicability of the doctrine of "unjust enrichment".

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...in my opinion contributions made by one spouse and freely accepted by the other for use in the acquisition and operation of a [corporation] give rise to a rebuttable presumption that, at the time when the contributions were made and accepted, the parties both intended that there would be a resulting trust in the favour of the donor to be measured in terms of the value of the contributions so made.

[20] The Respondent did make contributions of substantial amount towards the growth of the corporation known as Spirit Lake Enterprises Ltd. and there is a prima facie resulting trust in her favour.

[21] In *Peter v. Beblow* 44 R.F.L. (3d) at page 331, Cory J. states:

> In a family relationship the contribution need not be directly linked to a specific asset to justify imposing a constructive trust. The use of the constructive trust remedy does not have to be as limited in family law cases as it is in commercial cases. It should be imposed when a partner expects to receive a fair share of the assets that he or she helped to acquire, rather than a fee for services performed.
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> The parties entering a marriage ... will rarely have considered the question of compensation for benefits. ...they might say that because they loved their partner, each worked to achieve the common goal of creating a home and establishing a good life for themselves. ...in the absence of evidence establishing a contrary intention, the parties expected to share in the assets created in a matrimonial ... relationship, should it end.
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> ....it is unlikely that couples will ever turn their minds to the issue of their expectations about their legal entitlements at the outset of their marriage.... If they were ... asked about their expectations, ...most couples would probably state that they did not expect to be compensated for their contribution. ...they would say, if the relationship were ever to be dissolved, then they would expect that both parties would share in the assets or wealth that they had helped to create. ...rather than expecting to receive a fee for their services based on their market value, they would expect to receive, on a dissolution of their relationship, a fair share of the property ... which their contributions had helped the parties to acquire, improve, or to maintain.
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> ...equity and fairness should guide the court in determining the value and contributions made by the parties.
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> It would not be just to allow both parties to benefit from each other's services but allow only one to keep all the economic resources. ...the court has moved away from family law that is property- and support-driven towards family law that encourages the sharing of resources. A fair system of family law would identify the family resources regardless of their value or income-producing capabilities, and ensure that they are shared.
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> Judges must, ...do the best they can on the basis of the evidence but before them, taking judicial notice of those things which are common knowledge with respect to the realities of spousal relationships and the property and financial markets. It is with this broad view that we must approach the task of quantifying what I have called the "net appreciation in value".

[22] I am of the view that the "net appreciation in value" resulted from the efforts of both parties in contributing and increasing the value of the shares of Spirit Lake Enterprises Ltd. during their cohabitation. A constructive trust ought therefore to be declared in favour of the Respondent to secure one-half of that amount, that is to say the sum of $5,460.00.

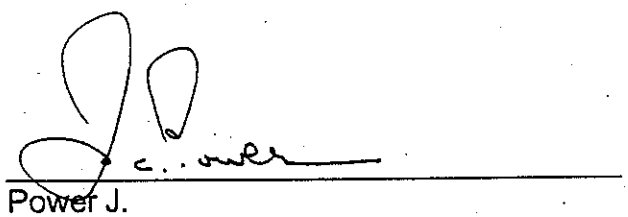
[23] The Petitioner sold their 21,840 Class B shares for the sum of $10,920.00 on the 27th day of August 1999. In the opinion of the Court, the Respondent is entitled to one half the value of the Class B shares in the amount of $5,460.00 which amount shall be paid by the Petitioner to the Respondent within 30 days of this judgment.

[24] The Respondent has established that she contributed money in the amount of $4,000.00 and a bunk house valued at $7,000.00 and that she worked full time in the company known as Spirit Lake Enterprises Ltd. for 12 years. The company was considered a joint venture which was two-thirds owned by the Petitioner and Respondent.

[25] On balance, the Respondent has been successful in this litigation and the Court awards costs in the amount of $1,500.00 to the Respondent.

DATED at Calgary, Alberta

This 5th day of June 2001



Power J.

Douglas Blair Twigge	Unrepresented
Edward Horembala, Q.C.	For the Respondent