Lawson v. Lawson

81 O.R. (3d) 321

Court of Appeal for Ontario,

Gillese, Armstrong and MacFarland JJ.A.

August 4, 2006

Family law -- Custody -- Trial judge not erring in granting sole custody of children to wife -- Trial judge taking relevant factors into consideration and being in best position to determine best interests of children.

Family law -- Property -- Equalization of net family property -- Trial judge not providing adequate reasons with respect to equalization of property -- Trial judge's ruling on equalization not being entitled to deference -- Issue of equalization remitted to be decided by new trial.

Family law -- Support -- Child support -- Father not looking for similar employment after being laid off and instead deciding to become full-time farmer on family farm despite unprofitability of farm throughout marriage -- Trial judge not erring in finding that father was intentionally underemployed within meaning of s. 19(1) of Federal Child Support Guidelines -- Federal Child Support Guidelines, SOR/97-175, s. 19(1).

Family law -- Support -- Spousal support -- Trial judge making non-time-limited spousal support order in favour of wife -- Trial judge not giving reasons for quantum or duration of spousal support -- Order not being entitled to appellate deference -- Issue of spousal support being remitted to be decided by new trial.

The trial judge awarded sole custody of the parties' three children to the wife; determined that the husband was "intentionally underemployed" within the meaning of s. 19(1) of the Federal Child Support Guidelines and imputed income to him based on the average of his income in the three years prior to trial; awarded open-ended spousal support; and held that the entire farm on which the matrimonial home was located, a gift to the husband from his father during the marriage, was necessary for the use and enjoyment of the matrimonial home. The husband appealed.

Held, the appeal should be allowed in part.

The trial judge did not err in awarding sole custody to the wife. He was in the best position to evaluate the wife and her behaviour. He was fully alive to the question of whether the parties were genuinely unable to effectively co-operate and communicate, so as to make an award of joint custody unworkable. The key consideration in custody cases is always the best interests of the children, and the trial judge was in the best position to make that determination.

The trial judge did not err in finding that the husband was intentionally underemployed. The husband had worked full-time from 1994 until he was laid off in September 2004. He made no

efforts to find similar work, and instead decided that he wanted to be a full-time farmer, despite the fact that the farm had never made a profit during the marriage. Intentional underemployment occurs when a payor chooses to earn less than he or she is capable of earning. There is no need to find a specific intent to evade child support obligations before income can be imputed on the basis of intentional underemployment. The record amply supported the trial judge's finding. The trial judge did not err in imputing income to the husband on the basis of his average income for the three years prior to separation, but he made an error in calculating the average. An adjustment was necessary.

In ordering the husband to pay spousal support of $465 per month with no time limit or provision for review, the trial judge gave no reasons for the amount or duration of the support. Where an order is made without adequate reasons, unless the reasons are implicit or patent on the record, an appellate court has no access to the underlying reasons for the order and cannot accord it deference. The matter of the amount and duration of spousal support was remitted to be decided by a new trial.

The issues raised in respect of the net family property were: whether the entire property was properly classified as a matrimonial home or whether only the home and one acre of property was properly included in the calculation of the husband's net family property; what value should be attributed to the matrimonial home; whether the wife and children should be allowed to remain in the matrimonial home pending the equalization of property between the parties; whether the wife was entitled to an interest in the property based on express, resulting or constructive trust principles; and whether farm equipment was a gift to the husband. The trial judge's reasons were inadequate on those issues. They did not address the husband's primary argument at trial that the farm had been in his family for over a 100 years and four generations and was not a hobby farm. Nor was anything said in relation to his argument that the property was a gift to him from his father and this fact should be considered when deciding whether the entire property ought to be considered necessary to the use and enjoyment of the matrimonial home. The reasons did not mention the fact that title to the property was in the husband's name and failed to address issues that arose from that fact. The matter of equalization of property was remitted to be decided by a new trial.

APPEAL from an order of Dandie J. of the Superior Court of Justice, dated June 7, 2005, in a matrimonial action.

Cases referred to Drygala v. Pauli (2002), 2002 CanLII 41868 (ON CA), 61 O.R. (3d) 711, [2002] O.J. No. 3731, 219 D.L.R. (4th) 319, 29 R.F.L. (5th) 293 (C.A.); Hickey v. Hickey, 1999 CanLII 691 (SCC), [1999] 2 S.C.R. 518, [1999] S.C.J. No. 9, 138 Man. R. (2d) 40, 172 D.L.R. (4th) 577, 240 N.R. 312, 202 W.A.C. 40, [1999] 8 W.W.R. 485, 46 R.F.L. (4th) 1; Housen v. Nikolaisen, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 219 Sask. R. 1, 211 D.L.R. (4th) 577, 286 N.R. 1, 272 W.A.C. 1, [2002] 7 W.W.R. 1, 30 M.P.L.R. (3d) 1, 2002 SCC 33, 10 C.C.L.T. (3d) 157; Kaplanis v. Kaplanis, 2005 CanLII 1625 (ON CA), [2005] O.J. No. 275, 249 D.L.R. (4th) 620, 194 O.A.C. 106, 10 R.F.L. (6th) 373, 136 A.C.W.S. (3d) 860 (C.A.); R. v. Sheppard, [2002] 1 S.C.R. 869, [2002] S.C.J. No. 30, 211 Nfld. & P.E.I.R. 50, 210 D.L.R. (4th) 608, 284 N.R. 342, 633 A.P.R. 50, 162 C.C.C. (3d) 298, 50 C.R. (5th) 68, 2002 SCC 26; R. v. Tzarfin, 2005 CanLII 30045 (ON CA), [2005] O.J. No. 3531, 201 O.A.C. 183, 67 W.C.B. (2d) 695 (C.A.)

Stautes referred to Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 24 [as am.] Divorce Act, R.S.C. 1985, c.3, ss. 15.2, 16 Rules and regulations referred to Federal Child Support Guidelines, SOR/97-175, s. 19(1) [as am.]

Harold Niman and John P. Schuman, for respondent.

Carole Curtis and Valda Blenman, for appellant.

The judgment of the court was delivered by

[1] GILLESE J.A.: -- Scott Lawson, the appellant, and Beverley Lawson, the respondent, were married on February 3, 1990. They separated in April 2002 after 12 years of marriage. At the time of separation, they had three young children.

[2] Shortly after they married, the parties moved into a house on a property on the Niagara escarpment just outside of Grimsby, Ontario. The house had been previously occupied by the appellant's parents. The appellant's father had divided his farm into two parcels, one for each of his sons. He gave a 36- acre parcel to his son, Jay Lawson. He gave the appellant a 20-acre parcel that included the house. The parties lived on the 20-acre property for the duration of their marriage. The respondent and children continue to live in the house. The respondent wants to move from the property, with the children, but needs support and an equalization payment to do that.

[3] Throughout the marriage, the appellant worked full-time off the property. After coming home from his regular job, the appellant would spend many hours each week working on the property.

[4] The respondent also worked very hard on the property throughout the marriage, in addition to maintaining the home and caring for the three children.

[5] After nine days of trial, in which 20 witnesses testified, Dandie J. issued the order under appeal dated June 7, 2005 (the "Order"). His reasons for decision cover the issues of custody, access, child support, spousal support, arrears of support, what part of the property is the matrimonial home, the value to be ascribed to the property, equalization of net family property and whether income is to be imputed to the appellant. The reasons are three and a half typewritten pages in length.

The Issues

[6] The appellant takes issue with the entire Order. He says the trial judge erred in:

(a) awarding sole custody to the wife;

(b) determining that he was "intentionally underemployed" within the meaning of s. 19(1) of the Federal Child Support Guidelines, SOR/97-175;

(c) awarding open-ended spousal support;

(d) not imputing income to the wife;

(e) imputing income to him based on the average of his income in the three years prior to trial;

(f) holding that the entire property, a gift to him from his father during the marriage, is necessary for the use and enjoyment of the matrimonial home;

(g) deciding the value of the property based on the evidence of a real estate agent proffered by the respondent over the evidence given by a qualified appraiser on his behalf at trial; and

(h) holding that the farm equipment given to him by his father was not a gift.

[7] In para. 131 of the appellant's factum, he asks for the following relief:

(a) joint custody of the children of the marriage, or in the alternative, sole custody;

(b) the access provisions specified by Justice Dandie be varied as follow:

> (i) the husband's mid-week access occurs each Tuesday and Thursday from 4:30 p.m.;
>
> (ii) the husband be entitled to a minimum of two phone calls with the children each week, free of distractions;
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> (iii) the week about time-sharing during the summer months;
>
> (iv) the parties continue to maintain a Communication Book which shall travel with the children and be used to exchange information concerning the children; and
>
> (v) that Beverley Lawson share the driving for access.

(c) that only the value of matrimonial home and one acre of the property located at 29 Ridge Road West, Grimsby, Ontario be included in the calculation of the husband's net family property;

(d) that the value of the farm and the matrimonial home located at 29 Ridge Road West, Grimsby, Ontario be fixed at $345,000 as of the date of separation and that the value of the excluded portion of the property (the farm, gifted to the husband by his father) be fixed at $180,000 at separation;

(e) that the value of the husband's farm equipment be fixed at $91,150 and that the value of the excluded portion of the equipment gifted to the husband by his father be fixed at $40,825;

(f) an order accepting the values in the husband's net family property statement and fixing the equalization payment owing by the appellant to the respondent in the amount of $65,088.19;

(g) an order dismissing Beverley Lawson's constructive trust claim;

(h) an order dismissing Beverley Lawson's spousal support claim;

(i) in the alternative, an order that the husband has satisfied in full any entitlement to spousal support that Beverley Lawson may have had by the payment of periodic spousal support after separation and by the continued possession by her of the matrimonial home for many years after separation without rent or charge;

(j) an order that the husband pay child support to Beverley Lawson fixed in the table amount of $521 per month commencing on 1 June 2005 pursuant to the Federal Child Support Guidelines based upon the appellant's income of $29,170 per year and that they share special and extraordinary expenses proportionate to income;

(k) an order for costs to Scott Lawson of the appeal and the trial, on a substantial indemnity; or

(l) in the alternative, Scott Lawson asks that the order of Justice Dandie be set aside and that a new trial be ordered.

The Overarching Principles Involved in Deciding this Appeal

[8] Before dealing with the many issues raised on appeal, some general comments are in order. The first is our observation that this appeal arises, in part, because of the paucity of reasons given for decision at the trial level.

[9] It is the duty of a judge to give reasons for decision; it is an inherent aspect of the discharge of a judge's responsibilities. See R. v. Sheppard, 2002 SCC 26 (CanLII), [2002] 1 S.C.R. 869, [2002] S.C.J. No. 30, 162 C.C.C. (3d) 298. The appellant is entitled to reasons that are sufficient to enable him to know why issues were decided against him. The reasons need to be adequate also so that he can bring a meaningful appeal and this court is able to properly review the Order. The reasons do not need to be perfect. Nor do they necessarily need to be lengthy. But, they must be sufficient to enable the parties, the general public and this court, sitting in review, to know whether the applicable legal principles and evidence were properly considered.

[10] Having said that, we recognize that appellate courts are not to place an impossible burden on busy trial courts, in terms of the writing of reasons, and that a party's right is to adequate reasons, not perfect ones. See R. v. Tzarfin, 2005 CanLII 30045 (ON CA), [2005] O.J. No. 3531, 201 O.A.C. 183 (C.A.), at para. 9.

[11] While recognizing the trial judge's obligation to give adequate reasons, however, it is important to note that the appellant is effectively asking this court to re-try the case. That is not the function of an appellate court. An appellate court is to be deferential. It may interfere with a trial judge's findings of fact only if there is a palpable and overriding error. See Housen v. Nickolaisen, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31. The propriety of deference is manifest in this case, given the conflicting evidence on virtually every aspect of every issue.

[12] The Supreme Court of Canada wrote of the need for appellate deference in family law cases in Hickey v. Hickey, 1999 CanLII 691 (SCC), [1999] 2 S.C.R. 518, [1999] S.C.J. No. 9. At paras. 10 and 12, the court said:

> When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the Divorce Act or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[13] A tension exists between the right to adequate reasons and the need for appellate deference. In the end, however, where an order is made without adequate reasons, unless the reasons are implicit or patent on the record, an appellate court has no access to the underlying reasons for the order and cannot afford it deference.

Custody

[14] Custody is to be decided in the best interests of the children. See Divorce Act, R.S.C. 1985, c. 3 at s. 16 and Children's Law Reform Act, R.S.O. 1990, c. C.12 as amended, at s. 24.

[15] Joint custody is not appropriate where parents are unable to co-operate or communicate effectively. See Kaplanis v. Kaplanis, 2005 CanLII 1625 (ON CA), [2005] O.J. No. 275, 249 D.L.R. (4th) 620 (C.A.). However, one parent cannot create problems with the other parent and then claim custody on the basis of a lack of co- operation.

[16] The appellant maintains that is what has occurred in the present case. He says that rather than this being a high conflict situation, it is an "angry mother situation" and that the respondent's behaviour and general hostility towards him is not a reason to deny him joint custody of the children. He says that he is more than willing to co-operate with the respondent and that the respondent has denied him access to the children as a way to punish him. He points to occasions on which he called the police as a result of the respondent's behaviour, noting that the incidents occurred in front of the children. He testified that the respondent has sworn at him in front of the children, and called his new wife disparaging names.

[17] The respondent admits that she was emotional after the separation and, from time to time, behaved in ways that were inappropriate.

[18] As the result of an interim court order, the Office of the Children's Lawyer ("OCL") was asked to investigate and report on all matters of custody and access. A social worker conducted the investigation and prepared a thorough report. She clearly and frankly states the appellant's concerns about access and his view that the respondent is not well mentally, angers easily and does not keep the children clean. He also told the investigator that the two older children were "doing worse at school and have missed many days this year".

[19] The investigator looked into these concerns and did a significant amount of collateral information gathering. In addition to meeting with the children separately and at each parent's homes and at the school, she interviewed the two older children's teachers, the school counselor and the family physician. The family physician stated that he had known the family for a long time and had delivered all of the children.

[20] The investigator addressed the appellant's access concerns and concluded that part of the respondent's issues in that regard stemmed from the fact that the appellant brought his girlfriend to the property at a very early stage after the breakup. She also recommends that the appellant spend some time alone with the children. At pp. 12 to 13 of the report, she writes:

> There has been a significant degree of conflict between the parents concerning access and it seems the mother has withheld access of the children from the father. It appears that some of the conflict around access could have been avoided if more attention was paid to the response of the mother and the children to the early involvement of the father's girlfriend. . .
>
> The children are entitled to have a close relationship with their father. Frequent access would be ideal, but the children do not appear to be able to tolerate more access at this time. Due to the high degree of conflict between the parents during the exchange of the children, the children suffer from stress and tension. . . . The children seem to be tolerating the current schedule of access visits, and this should remain in place. It would be helpful to the children if they could have some quality time alone with their father . . .

[21] The social worker acknowledged that joint custody can be ideal for children but concluded that it was not appropriate in this situation. On p. 13, she wrote:

> In many cases joint custody is an ideal situation for the children. However, there needs to be a degree of co-operation and minimal conflict between the parents for that plan to be workable. In the situation that presently exists between the parents, joint custody would not be workable or in the children's best interests.

[22] The trial judge considered the report of the OCL and the wishes of the children that they reside with their mother and see their father regularly. He refers to the report cards of the two school-aged children, which show that they are progressing well, never late and seldom absent. He noted that the youngest child was meeting her developmental milestones. He concluded that

he found "nothing in the evidence or [arguments] of the respondent which leads me to conclude that the recommendations of the OCL are to be ignored".

[23] The trial was nine days long. Twenty witnesses testified. The appellant's arguments in relation to custody hinged, in large part, on credibility. One example is the police incidents. He says they show the respondent's true behaviour and attitudes but, as the respondent points out, no charges were laid and it was the appellant who chose to call the police, a very disturbing event for the children. Another example is the spring concert at the children's school where the appellant alleges that the respondent acted badly. But a third party testified about the same incident, saying that the appellant, his now-wife and their parents, were provoking the respondent in an attempt to cause an altercation. She said that "what transpired was nothing short of an ambush".

[24] The appellant also raised some concern about the value of the report of the OCL on the basis that it was not current at the time of trial. [See Note 1 below] However, the author of the report was called to give evidence at trial and was subject to cross-examination. Although many of the arguments made to this court were put to the investigator during cross-examination, she testified that the information did not lead her to believe the recommendations should be changed.

[25] The appellant's chief arguments are that the respondent is unwilling to co-operate or communicate effectively with him and that she denies him access. The trial judge was well aware of these arguments, as indeed, was the investigator for the Office of the Children's Lawyer. However, at trial, the appellant testified that the respondent had full responsibility or the major responsibility for the children during the marriage. The respondent called evidence in respect of her parenting skills. The evidence of those witnesses is that the respondent is an excellent mother. The appellant did not cross- examine the respondent on her parenting skills or call any evidence challenging her parenting skills. And, the respondent testified for over three days.

[26] The trial judge was in the best position to evaluate the respondent and her behaviour. He was fully alive to the question of whether the parties were genuinely unable to effectively co-operate and communicate. The respondent's behaviour was thoroughly explored in examination-in-chief and cross-examination.

[27] The key consideration in custody cases is always the best interests of the children; the trial judge was in the best position to make this determination. As explained above, this court owes considerable deference to the trial judge's findings of fact. In awarding sole custody to the respondent, it is clear that the trial judge preferred the respondent's testimony and accepted her explanation for her behaviour. There is nothing in the reasons to suggest that the trial judge acted on any basis other than the children's best interests. In light of the trial judge's findings and the record, in particular the OCL report and extensive testimony of the author of the OCL report and the appellant and respondent, we see no basis on which to interfere with the trial judge's determinations and would dismiss this ground of appeal. We wish to add that it would have been preferable had the trial judge dealt expressly with the appellant's arguments and explained why he rejected them.

Access

[28] In effect, the appellant seeks to vary access by means of this appeal.

[29] A motion to vary access should be brought to a first instance court, on a proper record, before being raised in an appellate court. On the record, there is no basis for giving effect to this ground of appeal and we decline to do so.

Child Support

[30] The appellant raises two issues in respect of child support. These are: whether the trial judge properly found him to be intentionally underemployed; and, if so, whether the trial judge erred in the amount he deemed the appellant's salary to be.

[31] The reasons given by the trial judge in relation to this matter read as follows:

> [P]rior to his employment with Mountain Cable [the appellant] was performing same type of work as he did for Mountain Cable namely the installation of underground cable lines. I find that there was similar type work available to him and that it was incumbent upon him to seek out such work rather than to take the employment as a volunteer fire fighter with the Town of Grimsby at a greatly reduced annual income. Accordingly, I impute a gross annual income of $66,000 per annum based on an average of his gross incomes for the 3 years prior to separation.

[32] While the trial judge says the appellant was working only as a volunteer fire fighter, as he notes, the appellant does earn a minimal income from that position. For example, in his factum, it shows that he earned $4,760.69 from such work in 2004.

[33] The appellant is a skilled tradesman. He worked full time for Mountain Cable from 1994 until he was laid off work in September 2004. His earnings from 1999 to 2002 were:

> 1999 -- employment income $64,846.80.
>
> 2000 -- employment income $61,103.22
>
> 2001 -- employment income $53,167.30 plus employment insurance income of $3,304 for a total income of $56,471.30.
>
> 2002 -- employment income of $64,962.40.

[34] According to the order of Quinn J. dated June 22, 2004 in this matter, the appellant earned $60,623 in 2003. According to the appellant's factum filed in this appeal, he earned approximately $60,000 in 2004, the year before the trial.

[35] The appellant was given notice in January 2004 that he would be laid off. At trial, he admitted that he had made no efforts to find work similar to that with Mountain Cable after being

given notice of the layoff or after the layoff itself. He decided that he wanted to be a full-time farmer and pursued that, in addition to working as a firefighter with the Grimsby Fire Department. Despite the fact that the farm never made a profit during the marriage and although he and the respondent had worked hard at producing income from it, the appellant and his new wife believed they could "make a financial go of the farm".

[36] Section 19(1)(a) of the Federal Child Support Guidelines permits a court to impute income to a spouse who is intentionally underemployed. Intentional underemployment occurs when a payor chooses to earn less than he or she is capable of earning. There is no need to find a specific intent to evade child support obligations before income can be imputed on the basis of intentional underemployment. When imputing income based on intentional underemployment, a court must consider what is reasonable in the circumstances. The factors to be considered are the age, education, experience, skills and health of the payor, as well as the payor's past earning history and the amount of income the payor could earn if he or she worked to capacity. See Drygala v. Pauli (2002), 2002 CanLII 41868 (ON CA), 61 O.R. (3d) 711, [2002] O.J. No. 3731 (C.A.).

[37] Although the trial judge did not articulate the legal principles for which he had regard when making his determination that the appellant was intentionally underemployed, it is clear from his reasons that his findings are based on the applicable legal principles. The appellant worked full-time throughout the marriage. It appears that the primary reason for his reduced income after he was laid off was his desire to pursue farming on a full-time basis. The information necessary to determine what was reasonable in the circumstances, including the appellant's earning history and the financial results of the farming operation during the marriage, were before the trial judge. The record amply supports the trial judge's determination that the appellant was intentionally underemployed. Accordingly, we would not interfere with that determination.

[38] In relation to the amount of income imputed to the appellant, we see no error in the trial judge basing the appellant's imputed income on his average income for the three years prior to separation. It was reasonable in the circumstances. However, the trial judge appears to have made an error in calculating the average. The parties separated in 2002. The three years prior to separation are 1999, 2000 and 2001. The average of those three years of earnings is $60,897.10, not $66,000 as was found by the trial judge.

[39] Hence, this ground of appeal is allowed to the extent that child support is to be paid based on the appellant's imputed income of $60,897.10. The appellant takes no issue with the quantum of arrears of child support in para. 7 of the Order, so that order stands.

Spousal Support

[40] Paragraph 8 of the Order requires the appellant to pay spousal support of $465 per month commencing September 1, 2004. The appellant takes issue with the quantum of spousal support on the basis that it does not reflect an imputed income to the respondent and that the amount is in error. He also argues that spousal support ought to have been time limited or reviewable.

[41] The reasons given by the trial judge, in respect to spousal support, are set out in full below:

> Scott J. in Dec 2003 ordered the [appellant] to pay $750.00 bi-weekly which I calculate to be $19,500.00 annually or $1,625.00 per month. The guidelines indicate a monthly payment of $1160.00 per month for 3 children.
>
> Order to issue that the [appellant] pays the applicant $1160.00 per month for child support and $465.00 for spousal support.
>
> I find that as of June 1, 2005 there are 10 months arrears outstanding namely $11,600 for child support and $4650.00 for spousal support.

[42] Nothing in the order of Scott J. dated December 2003 relates to spousal support.

[43] Entitlement to spousal support is not in issue. In his application before the court below, the appellant acknowledged that he would have to pay spousal support and sought only an order setting the quantum. In any event, even in the absence of reasons, a consideration of the parties' respective conditions, means, needs and other circumstances, including the length of cohabitation and the functions each performed during the marriage, makes it clear that the respondent is entitled to support. See s. 15.2 of the Divorce Act.

[44] However, as no reasons are given for the quantum or duration of spousal support, we are unable to defer to the trial judge's determination in this regard. While it would be preferable that this court decide those issues, the requisite findings to support such a determination have not been made. When such a determination is made, the appellant will be free to again raise, in the context of a consideration of the needs and means of both parties, whether the respondent is capable of earning income and, if so, what income ought to be imputed to her. Further, the appellant can raise again the question of whether he has, in effect, paid spousal support by permitting the respondent to stay in occupation of the matrimonial home since the time of separation and what arrears of spousal support ought to be.

[45] Accordingly, the matter of the amount and duration of spousal support is remitted for determination. It is appropriate that interim spousal support be paid pending that determination and further order of the court. In that regard, we would continue the order of Quinn J. dated June 22, 2004. Pursuant to para. 4(c) of that order, the appellant was ordered to pay spousal support of $540 per month. In making this order, Quinn J. acted on the assumption that the appellant would earn an income commensurate to that which he earned in 2003, namely $60,623, and he also considered the voluntary payments that the appellant had been making. The assumed income relied on by Quinn J. is very similar to the appellant's imputed income as found above. Consequently, we would order the appellant to continue to pay interim spousal support of $540 per month until further order of the court.

Equalization of Net Family Property

[46] The issues raised in respect of the net family property are: whether the entire property is properly classified as a matrimonial home or whether only the home and one acre of property is properly included in the calculation of the appellant's net family property; what value should be attributed to the matrimonial home; whether the respondent and children should be allowed to

remain in the matrimonial home pending the equalization of property between the parties; whether the respondent is entitled to an interest in the property based on express, resulting or constructive trust principles; and whether the farm equipment was a gift to the appellant.

[47] It will be apparent that these issues are interrelated. Each needed to be decided based on an articulation of the governing legal principles and factual findings. As we are of the view that the reasons are inadequate on these issues and that they must be remitted for a fresh determination, it is appropriate to say little more. It is sufficient to note that the trial judge fails to address foundational arguments of both parties. The reasons do not address the appellant's primary argument at trial that the farm had been in his family for over a hundred years and four generations and, for much of that time, had been farmed full-time and supported the Lawson family. Consequently, the appellant maintained, it is not a hobby farm. Nor is anything said in relation to his argument that the property was a gift to him from his father and that fact should be considered when deciding whether the entire property ought to be considered necessary to the use and enjoyment of the matrimonial home. In our view, the appellant is entitled to know why his arguments on these matters are rejected.

[48] Title to the property is in the appellant's name. The reasons do not mention that and fail to address issues that arise from that. For example, they do not speak to the respondent's argument that she is entitled, on trust principles, to an ownership interest in the property even if it is not all properly designated matrimonial property. Nor does the trial judge deal with the occupation of the property, apart from saying that he could be addressed as to whether there should be a court ordered sale. Thus, it is not known how long the respondent and children can live on the property and there is nothing in the Order to explain how to resolve the occupation issue. As a major issue at trial, ownership and occupation had to be dealt with. For example, para. 9 of the Order fixes arrears of spousal support at $4,650. While arrears of spousal support are not specifically raised in the Notice of Appeal or Supplementary Notice of Appeal, it is implicit that the appellant is challenging the arrears of spousal support on the basis that he has paid the respondent support by allowing her to occupy the property after marriage breakdown. However, that argument rests on the fact that title is in the appellant's name and that she has limited rights of occupation, none of which is addressed in the reasons.

[49] Moreover, the trial judge states as a conclusion, without reasons, that he rejects the appellant's claim that payment was made for a tractor but that the balance of the farm equipment was a gift to him. It is not obvious why he rejected the appellant's evidence on this point. A bald conclusion, without reasons, is inadequate.

Disposition

[50] Accordingly, the appeal is allowed in part. The Order shall be amended as follows:

(i) Paragraph 6 is varied to require the appellant to pay child support for three children based on the appellant's imputed income of $60,897.10;

(ii) Paragraph 8 is varied to require the appellant to pay spousal support of $540 per month until further order of the court;

(iii) Paragraphs 3, 4, 5 and 9 are set aside; and

(iv) the matters of spousal support and equalization of property, including the ownership, sale and possession of the property and farm equipment are remitted to be decided by a new trial in accordance with these reasons.

[51] As the respondent enjoyed greater success on the appeal than did the appellant, we order costs of the appeal in her favour fixed at $15,000, inclusive of disbursements and GST. The appellant seeks leave to appeal costs of the trial. In light of the outcome of the appeal, we would grant leave and order that costs of the first trial are reserved to the trial judge hearing the new trial.

Appeal allowed in part.

Notes

Note 1: The original report was dated July 7, 2003. It was amended after an objection from the appellant. The new version is dated November 18, 2003. The trial took place in March 2005.