

ONTARIO

SUPERIOR COURT OF JUSTICE
(Central East Region)

B E T W E E N:

KENNY WILLIAM BOWMAN

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) Gary Gottlieb, for the applicant
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) Applicant)
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- and -

NADIA CHELUK-
BOWMAN

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) Respondent)
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) Ingrid Van Weert, for the respondent
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) **HEARD:** Jan. 7-10, 13-17, 20-23, Feb. 14
& Mar. 7, 2003

REASONS FOR JUDGMENT

LOUKIDELIS J.

[1] While I commended counsel for their thorough work and conduct throughout the trial, I must add my disappointment in the inability of the parties to settle matters in a reasonable way. The lengthy trial has only deepened the bitterness and left the parties near bankruptcy.

[2] The parties married November 18, 1995 following an eight month courtship including a brief period of cohabitation. While each spent overnight visits at the

other's residence from May 1995, an intent to cohabit was not formed until Kenny relinquished his apartment. While Nadia had moved some furniture into Kenny's residence she never gave up her residence, owned by her late grandmother.

[3] Nadia's residence became their matrimonial home until they purchased their own. I find that cohabitation commenced on or about October 1st, 1995.

[4] One child was born of this union, Jessica on, May 15, 1997.

[5] While the parties separated on May 11, 2001 they continued to live in the same house until September 2002 when Kenny moved out. It was clear that the marriage had been in difficulty long before the separation date indeed from shortly after Jessica's birth. It went from failure to communicate to silence to bitterness then all out war.

[6] Even their interim agreement of June 5, 2002 created more problems than it solved.

[7] Turning now to the numerous unresolved issues.

Divorce

[8] The necessary separation period has been established. There is no possibility of reconciliation. A decree nisi shall issue.

Custody of Jessica

[9] Kenny seeks permanent joint custody. Nadia requests sole custody. Kenny has conceded that the child's principal residence remain with Nadia.

[10] While I did comment during the trial that lack of co-operation between parties does not necessarily obviate joint custody such is not the case here. There is not a modicum of respect or fairness between the parties sensible communication does not exist. Should joint custody continue I have no doubt Kenny would continue to use it to annoy Nadia such as unnecessarily involving the police over some minor pretext.

[11] At the present time, there is little or no commitment to make joint custody work. They are unable to set aside their animosity; particularly Kenny who describes Nadia as "a bad mother" notwithstanding that all the evidence points to

the contrary. To her credit Nadia does not retaliate in kind. Notwithstanding Kenny's assertion to the contrary Kenny was not an equal caregiver.

[12] Hopefully with the end of these proceedings the bitterness will abate at least to a degree that allows some mutual respect and co-operation.

[13] I am satisfied that Jessica's best interests require that she be in Nadia's sole custody.

[14] That being said, the parties have agreed that Jessica's last name shall not be changed and Kenny will be consulted with respect to non-emergency surgery and Jessica's enrolment in extra curricular activities. In addition, Nadia agrees not to move more than 50 kilometers from her present home. Kenny is also to have access to and consulted with respect to Jessica's school records and education. These agreed terms shall be so ordered.

Access

[15] Kenny should have daily telephone access at reasonable times. He shall also have overnight access every second weekend from Friday at 7 p.m. to Sunday at 4 p.m. There is presently some reluctance on Jessica's part to stay overnight. Kenny blames Nadia. Nadia indicates that Kenny's new home is shared with an older couple-strangers to Jessica-that causes the child's anxiety. I am inclined to agree with Nadia's position that Jessica should be encouraged to remain overnight-but this may take some time.

[16] Kenny has asked for 3 weekends a month rather than 2. As Nadia works, weekend time with Jessica is also precious to her. Two weekends a month each is fair.

[17] Kenny shall also have access alternate Christmas Eves, Christmas Days, Easters, Halloween evenings, Thanksgivings, Jessica's birthdays. He should have every father's day, and one half of the Christmas Holidays and March Break Holidays.

[18] Kenny should also have access 4 weeks per summer.

[19] The suggestion that the parties engage in parenting mediation is a sound one but at the present time is not in my view workable.

[20] Kenny's request for mid week overnight access is at the present time excessive. It perhaps can be revisited if Jessica overcomes her anxiety.

Spousal Support

[21] When interim support was agreed to be paid by Nadia in the Minutes of June 5, 2002, it was on a “without prejudice basis”. It was expected that the trial would take place within 4 months. As mentioned this agreement exacerbated an already tense situation. Nadia was left with less income for herself and Jessica than Kenny had available to himself. Kenny refused to pay agreed child support or his share of household expenses on the grounds that Nadia had overstated the expenses. In retaliation Nadia withheld drug reimbursement cheques to which Kenny was entitled.

[22] Kenny claims entitlement to support on the basis that he is totally and permanently disabled. This is the main issue as it also effects his obligation to pay child support.

[23] Kenny presents as one having a somewhat complex character. He is now 42. He was previously married for a short duration. He is an experienced tool and die maker who had no difficulty finding work. He is also a licenced auto mechanic. Evidence indicates he is somewhat of a loner with few if any ties to his family. Indeed he claims to have been abused as a child.

[24] At the time of marriage he was in relatively good health. He did have some back pain, possibly resulting from 2 motor vehicle accidents in the late 1970's and 1980 and/or a work related accident in 1990. He was visiting a chiropractor regularly for “adjustments or tune-ups”. He was not however in fragile physical condition. Even if he were at the time of marriage, it is not relevant in determining any spouse's subsequent obligation to pay spousal support.

[25] In April 1998 Kenny changed his family physician to Dr. Liefer who showed more interest in Kenny's neck and back pain. Dr. Liefer referred him to numerous specialists and prescribed other drugs.

[26] Dr. Liefer suspected some nerve injury which was not supported by any neurological finding. An MRI indicated some pressure on his nerve probably from 2 lesions at C5-C6 and T7-T8 but surgery was not recommended.

[27] Dr. Liefer prescribed percocet and amnitrptylene.

[28] On November 21, 2000 Kenny injured or re-injured his back at work. Dr. Liefer then found Kenny's injuries to be permanent, and that Kenny had reached his maximum medical recovery with no possibility of a normal life.

[29] By May 2001 further drugs were prescribed for pain, as well as anti-inflammatory and anti-depressant drugs including Oxycontin, Elavil, Neurontin and Celebrex.

[30] On the WSIB questionnaire of November 24, 2000 Dr. Liefer indicated Kenny to be incapable of any physical activity. Dr. Liefer admitted on cross-examination that the form had not been completed with the attention it ought to have been given. One could even say it was somewhat misleading.

[31] Pursuant to Dr. Liefer's recommendation Kenny was examined by Dr. Morin a psychiatrist who diagnosed him as having mild depression and a mood disorder. This was the only evidence from a qualified psychiatrist. Dr. Morin's diagnosis is preferable to that of other medical practitioners with respect to the severity of his depression. The worsening depression diagnosed by others I have no doubt related to this on going litigation.

[32] Kenny continued to withdraw into himself refusing recommended physiotherapy and exercises.

[33] Dr. Liefer has been very supportive of Kenny as a family physician should be. Kenny has relied on him and on Dr. Gardner-Nix, not only for physical problems but as counsellors or sounding boards for his marital problems. Some 18 visits in a year appears to corroborate his over reliance on his family doctor.

[34] Kenny was referred to Dr. Gardner-Nix, by Dr. Liefer. Dr. Gardner-Nix is a recognized expert in chronic pain. He first attended her office in June 2001 one month after his separation. Kenny presented to her, as a man overwhelmed by his physical and psychological problems- a man who was disabled. Dr. Gardner-Nix is a strong proponent of the holistic approach in treating chronic pain sufferers with, diet intervention, conditioning and psychological aspects as well as proper drug therapy.

[35] She was of the opinion that this litigation has been a barrier to his proper treatment. That once he is out of the "eye of the storm" he can concentrate on the psychosocial aspect including group classes on meditation and mindfulness. Until

then she considers him to be disabled, although in one report she indicated he could work at lesser paying jobs, but it might affect his WSIB claim.

[36] It was somewhat instructive that Kenny advised Dr. Gardner-Nix that his marriage was over as early as 1999 and he then spoke ill of his wife and family, yet when Nadia finally took the bull by the horns, so to speak, in the spring of 2001 and told Kenny the marriage was over Kenny became extremely angry and immediately took the offensive pushing ahead with this action without any prior settlement discussions, threatening to ruin Nadia.

[37] Kenny appears to be a proud man as Dr. Gardner-Nix indicated and also stubborn, quick to anger, resentful towards others be it Nadia, fellow employees or employers always perceiving himself to be the victim.

[38] I quite frankly found it difficult to accept Dr. Liefer and Dr. Gardner-Nix's opinions that a motorcycle purchase would be of great benefit to Kenny given his complete disability. It appears to me that the main reason for their support was to keep Kenny happy. Any physical benefit eludes me. Surely other physical activities that were more affordable and would be more beneficial.

[39] And for Kenny to purchase one of the most expensive machines ie: a Harley-Davidson for \$32,700 when his then finances were so precarious defies common sense. His explanation is almost child-like. I cannot help but infer that it was to hurt or annoy Nadia.

[40] Kenny's WSIB claim is encountering rough waters. WSIB questions the time of the injury and whether it was work related. Kenny appears to place a great deal of hope in its success. Other past claims by him met no success.

[41] Another previous injury-on December 7 1998 at Matsu Manufacturing which was accepted by his employer as being work related was by his conduct abandoned. He was given 2 alternate, less strenuous jobs. On one he refused to work with another employee. On the other he disobeyed instructions as to the weight size of objects he could lift. In addition, he failed to properly notify his employer as to time he wished to take off. Again, according to Kenny, it was someone else's' fault ie: he had not received proper orientation on the procedure-again the victim. The human resources manager, Mr. Bennino described Kenny as "a difficult man".

[42] The number of his moves from job to job is astounding-30 jobs in 12 years. Twelve of those during the marriage-a fact bound to cause any wife some concern. Many of his moves resulted from his inability to report to work on time contrary to what he told Dr. Lake. Only a few were due to job injuries. I specifically reject Kenny's assertion that many of the changes were caused by Nadia's insistence that he better himself. Again he seeks to blame others-again the victim.

[43] At the behest of the respondent Kenny was examined by Dr. Rae Lake a certified independent medical examiner. The functional capacity assessor indicated that Kenny did not put forth a reliable effort. The Kineaseiologist conducting the detailed physical tests was of the opinion that Kenny was capable of full time employment after proper rehabilitation. Dr. Lake was of the opinion that Kenny while unable to return to his former occupation as tool and die maker which required at times heavy lifting, he was capable however of lighter or sedentary work. Dr. Lake also indicated that while employable after a period of rehabilitation he was not at the present time emotionally capable of any employment. He was also of the opinion that Kenny lacked appropriate coping skills and he was trapped in a spiral of pain, hopelessness and despair.

While at the present time Kenny suffers from an impairment, which prevents him from working, he is not disabled as he claims ie: cannot do any type of work now or into the foreseeable future.

[44] I cannot help but note that his claim for a CPP disability pension was rejected and he did not appeal. Yet he now looks to Nadia for possible lifetime support. The CPP definition admittedly is quite onerous namely "incapable of regularly performing any substantially gainful employment".

ie: Not just his normal occupation or a similar occupation but any substantially gainful employment.

[45] The evidence I find clearly shows that Kenny with a period of rehabilitation can work at less physically demanding jobs even within his field of expertise. Mr. Kozma gave evidence of the need for maintenance engineers and quality engineers that require a tool and die background without the heavy lifting.

[46] Similarly, Mr. Reinhart's offer would be admirably suited to Kenny only requiring him to enter and exit his motor vehicle 5 to 6 times a day when he made calls. His excuse that their wives were friends is not a reason to not work. There was also good evidence of teaching possibilities at community colleges.

[47] If Kenny wishes to complete his newly chosen college course that is his choice, but he cannot claim disability and demand spousal support. If he wishes to continue he should have no difficulty finding part time and/or summer work to support himself and to contribute something to Jessica.

[48] There is also evidence that indicates that Kenny can be physically active when he so desires. He is in my view too absorbed with this action consumed with a desire to make matters as difficult as he can for Nadia.

Kenny must apply his efforts to rehabilitate himself, follow his doctor's advice, exercise, consult a rehabilitation psychiatrist engage in Dr. Gardner-Nix's recommended wellness programs. In brief, he must get on with his life now that the stress of his broken marriage and this action are behind him.

[49] If he is successful with his WSIB claim, it will be a bonus to him both in money and rehabilitation assistance.

Four questions must be answered:

1. What then should be a reasonable period of rehabilitation?
2. From what date should that period commence?
3. Should any income be imputed to Kenny?
4. If so, from what date should it be calculated?

[50] A reasonable period of rehabilitation ought not to be more than one year-and that is being somewhat generous.

A reasonable date for the commencement of his rehabilitation in my view is June 2, 2002 when Kenny undertook "to take all steps necessary to reintegrate into the work force subject to doctor's opinions".

While the stress of this action prevented him and Dr. Gardner-Nix from moving forward with her program, the burden of that omission should not be placed on Nadia's shoulders. Kenny had an obligation to mitigate his claim for spousal support and to contribute to Jessica's support.

[51] As he was able to undertake his new course, I can infer that some progress in his rehabilitation did occur. While his college course leads to employment paying

almost half other available jobs within his post-rehabilitation limitations, again, I would give him the benefit of the doubt and impute an income of only \$35,000 from June 1, 2003.

[52] This was a relatively short marriage. Spousal support should continue until May 31 next when it should cease. The amount of interim support was excessive leaving Nadia and Jessica in a worse position than Kenny. I would reduce the amount of spousal support to \$2,500 per month as of October 1, 2002.

[53] Kenny's stated expenses are unreasonable. If Kenny requires additional means, he can sell his valuable motorcycle.

[54] During that same period Oct 1/02 to May 31/03, Kenny's annualized income based on the spousal support of \$2,500 per month would be \$30,000 which would require him to pay child support of \$266.00 per month. From June 1/03 based on an imputed annual income of \$35,000 his child support payments will be \$305. In addition he is to pay reasonable extra expenses.

[55] Counsel advise that there are outstanding arrears of spousal and child support and house expenses. As well, there are the outstanding drug plan refunds owing to Kenny. All these items are to be added to or subtracted from any net equalization payment owing.

[56] I would not order that continuing drug coverage be provided by Nadia unless her plan allowed it. The evidence in this regard is unclear. If it continues to be available following divorce, why not provide it for an additional 2 years or until someone else qualifies as Nadia's spouse, whichever event first occurs.

[57] As to the disputed household expenses it did appear to me that some of the listed expenses were excessive. Nadia did not distinguish between some actual household expenses and child support. If counsel cannot agree, I could later rule on individual items if counsel wish.

Turning now to the Property Issues

Matrimonial home

[58] Nadia is buying out Kenny's share. The parties are at odds as to the value as of last October. I accept Mr. Parkinson's appraisal of \$325,000.

[59] To try and differentiate the various comparables because of missing items is beyond my ability.

[60] An opinion obtained by Nadia of a value of \$307,000 some 10 months earlier is really not that different accepting Mr. Parkinson's evidence that house prices in that area increased during 2002 at the rate of .5% per month.

[61] Nadia should be entitled to deduct a notional real estate commission of 5% and legal fees of \$1,000 as there is a strong likelihood that the property will be sold.

[62] Dealing with the other listed assets I compared Kenny's Property Statement contained in the Final Submission brief with Nadia's Trial Record Tab 7.

Furniture

[63] I understand that the division and or valuation of furniture is no longer an issue. If not, I will hear further submissions and make rulings.

Vehicles

[64] I find the separation date value of the vehicles as follows:

Nadia's Buick	\$4,812.00
Kenny's Baretta	\$1,600.00
Kenny's Van	\$ 500.00

I cannot leave the subject of vehicle values without noting Kenny's attempt to included an overvalued 1970 Cadillac.

Jewellery

[65] Nadia's engagement ring was purchased in St. Marten for \$3,426 Canadian. I am urged by applicant's counsel to place a value of \$9,100 being the appraisal given for insurance purposes. I am not prepared to do so without hearing the evidence of the appraiser. I will, however, make some allowance for increased value to valuation day. I would fix a value of \$6,500.

[66] I also accept the value of the balance of Nadia's jewellery and bike as claimed. Kenny took issue with the ownership of Nadia's necklace prior to

marriage because he claims not to have seen it until after the marriage. I find that she owned it prior to marriage as she claimed.

[67] I also accept Kenny's assertion that the grandfather clock delivered by his father after marriage had been gifted to him prior to marriage.

[68] I accept the applicant's valuation of his trade and household tools.

[69] Dealing with the bank accounts, the joint accounts I understand are agreed as well as Kenny's mutual funds RRSP and he CIBC account of \$80.57.

[70] I understand that there is no dispute as to Nadia's Ukrainian Credit Union Account of \$776.43 and her RRSP in the same credit union of \$4,134.26.

[71] There appears to be 2 items in dispute. Firstly the balance of Nadia's CIBC RRSP. Nadia alleges a balance of \$10,463.73. Kenny claims the balance to be \$11,305.46. The difference appears to be accumulated interest to valuation day. It would appear therefore that Kenny's figure is correct.

[72] As to Nadia's pension valuation the issue is her probable date of retirement. Given her age, the age of young Jessica and, the horrendous cost of this litigation I have no doubt that Nadia will work to age 65. The value of her pension on valuation day, I find therefore to be \$37.259.

[73] Kenny has listed 8 GIC certificates not shown by Nadia in section 11(c) as belonging to her.

[74] I am satisfied 6 of these were prior certificates rolled over and included in the total of Ex 10 \$11,309.46.

[75] I have some difficulty with certificate no. 24356775 in Ex 10 and Certificate No. 11590110 in Ex 12. If counsel are unable to resolve this. I will hear further submissions.

[76] The parties agree on the life insurance values and money owing to each.

[77] The GST refund is Kenny's asset. I would attribute no value to Kenny's Tool company.

[78] Debts and Liabilities owing at valuation day are agreed upon.

[79] Turning to Property and Debts on date of marriage (Part 13). Kenny accepts Nadia's real estate assets although there is a slight difference in their figures of \$450.00.

[80] Kenny's furniture valuation of \$4,000 is accepted by Nadia. Nadia values his work tools at \$5,000. The value of his household tools should be added. I would accept Kenny's figure of \$6,370.00.

[81] The Cadillac value was withdrawn.

[82] Nadia's Buick value at marriage is accepted at \$20,000.00. I also accept her figures for furniture \$2,000.00, bicycle \$300, jewellery \$3,555.

[83] Kenny's Beretta was clearly overpriced at \$14,628 being his purchase price in 1994. Factoring in about 2 years depreciation I find the value at date of marriage to be \$9,000.

[84] Nadia claims RRSP's and bank accounts totalling \$14,132.59. Kenny says the total is \$8,633.29 a difference of \$6,385.89. The question is whether 3 RRSP accounts and a savings account 1963510 all in her name were in fact joint accounts.

[85] Any accounts that carried his name as well as of the date of marriage should be equally divided between the 2 as of that date otherwise they were her sole property.

[86] As to debts owing as of the date of marriage, her mortgage loan and his loan from his father are agreed. He also owed some \$12,300 on his Beretta which should be deducted from Kenny's date of marriage assets.

[87] The grandfather clock I have already ruled on.

[88] Having ruled on the property values, I would suggest that counsel meet to recalculate the property statement in light of my ruling. If agreed they can file a written consent.

[89] If there remains any items in dispute, I could hear further submissions in court, by phone or in writing.

[90] The net equalization payment can then be determined and judgment will issue accordingly.

In Summary

[91] Decree Nisi to issue.

[92] Sole custody of Jessica to the respondent mother.

[93] Jessica's last name shall not be changed without the applicant's consent.

[94] The applicant shall be consulted with respect to non-emergency surgery and her enrolment in extra curricular activities and shall have access to school records.

[95] Should the respondent move from her present residence it will not be to a place more than 50 kilometers from the present residence.

[96] The applicant shall have regular and reasonable telephone access to the child.

[97] The applicant shall have overnight access every second weekend from Friday at 7:00 p.m. to Sunday at 4:00 p.m. or Monday at 4:00p.m. if his access weekend falls on a long weekend during the school year.

[98] The applicant shall also have access alternate Christmas days, Christmas Eve, Thanksgiving, Jessica's birthday, Easter Day and Halloween as well as Fathers Day.

[99] The applicant shall also have access one half Christmas and March break holidays and 4 weeks during the summer school holidays.

[100] The respondent shall pay to the applicant spousal support of \$2,500 per month from October 1, 2002 to and including May 1, 2003.

[101] The applicant shall pay to the respondent child support in the amount of \$266.00 from and including October 1, 2002 to and including May 1, 2003. Thereafter, commencing June 1, 2003 the child support shall be increased to \$305.00 per month.

[102] After the net equalization payment has been determined counsel may arrange to make submissions on costs.

JUSTICE E. LOUKIDELIS

Released: April 23, 2003