

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Howell v. Howell*, 2017 NSSC 128

Date: 20170331
Docket: 1206-6450
Registry: Sydney, NS

Between:

GORDON HOWELL

Applicant

v.

CYNTHIA HOWELL

Respondent

Judge: The Honourable Justice Robert M. Gregan
Heard: May 24 and November 24, 2016 and January 13, 2017
Oral Decision: March 31, 2017
Released: May 17, 2017
Counsel: William Burchell – Counsel for Gordon Howell
Alan Stanwick – Counsel for Cynthia Howell

INTRODUCTION / ISSUES

[1] Someone famously once said:

Obviously because of my disability I need assistance, but I have always tried to overcome the limitations of my condition and lead as full a life as possible. I have travelled the world from the Antarctic to Zero-Gravity (Professor Stephen Hawking).

[2] What does a quote from Professor Hawking have to do with this proceeding?

[3] One of the issues I must decide in this case is whether or not the parties' son, Kyle, who suffers from Cerebral Palsy, is still a child of the marriage. To state it in another way, in the context of Professor Hawking's quote, to what extent should Kyle's parents assist him on his journey? Kyle may or may not get to Antarctic or achieve Zero-Gravity, but he should be given the opportunity to reach his fullest potential. The question is whether his parents' are legally required to do so or will he be required to make the journey on his own?

[4] For this reason I will deal with this issue as the first issue in these proceedings.

BACKGROUND

[5] The parties were married October 14, 2000 and separated July 21, 2012.

They have two children of the marriage; Kyle, who as I have just mentioned, will be 23 in May and S.H., who will be 18 in December.

[6] The issues the court must determine are (1) custody and access; (2) is Kyle a dependent child of the marriage; (3) quantum of child support, retro-active and prospective; and (4) division of matrimonial property.

[7] The Petition was filed in this matter as Exhibit 3 in the proceedings. There was an answer that was filed which was not marked as an Exhibit; it was filed on October 31, 2012. The Petition cited the marriage breakdown and living separate and apart for one year. The Answer that was filed cited separation and inability to reconcile, but also alleged and sought as grounds, physical and mental cruelty by Gordon Howell upon Cynthia Howell. I have heard no evidence with respect to mental or physical cruelty.

CHANGE OF NAME

[8] I note as well that Cynthia Howell requests a change of name to “Chisholm” and that will be granted as part of the divorce.

DIVORCE

[9] I will grant the divorce on the basis of the parties living separate and apart since July 21, 2012, and I find that all of the jurisdictional requirements of the divorce have been met.

EVIDENCE

[10] I have reviewed the exhibits tendered as well as the witnesses' testimony in this proceeding. I will not review all of the evidence in today's decision but will highlight the evidence required to give effect to my decision.

IS KYLE A DEPENDENT CHILD OF THE MARRIAGE?

[11] I begin the analysis by reviewing section 2.1 of the **Divorce Act**:

child of the marriage means a child of two spouses or former spouses who, at the material time,

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

[12] Guidance is also provided in section 3.2 of the Federal Child Support Guidelines which states that the court has discretion to order child support:

Child the age of majority or over

(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

(a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

(b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

EVIDENCE OF DR. WAIVER

[13] The court heard from Kyle's physician, Dr. Andrew Waiver. Marked as Exhibits 1 and 2 were a letter from Dr. Waiver and a neurological assessment from the IWK.

[14] Dr. Waiver also testified.

[15] In his evidence, Dr. Waiver described Kyle as a pleasant and intelligent young man. Medically he said Kyle suffers from Cerebral Palsy as a result of a hypo-glycemic condition at birth. This resulted in spastic quadriplegia predominately to his left side. This left Kyle with limited mobility and diminished motor skills. Kyle requires a wheel chair and assistance to stand or walk. In Dr. Waiver's opinion, it would be difficult for Kyle to do manual labor but may,

despite his lack of dexterity, be able to do some limited tasks with retraining. Dr. Waiver confirmed that Kyle attended CBU from September 2012 to February 2013, and then withdrew. In Exhibit 1 Dr. Waiver confirmed that:

Kyle Howell was enrolled in University but was unable to finish his first year due to his inability to deal with the work load, the pace of the information being presented to him and the stress and anxiety that it caused him.

[16] Reference in Exhibit 1 was also made to a neurological assessment. It was marked as Exhibit 2. I will not read all of that report but at page 1 it was noted that:

His [Kyle Howell] verbal intelligence was within normal limits. He obtained low average to average scores on measures of verbal memory... The findings clearly indicated that he had a nonverbal learning disability.

[17] At the conclusion of that report, Dr. Waiver stated that:

In summary, Kyle Howell has a nonverbal learning disability. His verbal abilities, verbal memory, and language arts abilities were all intact. There was a 34-point discrepancy between his Verbal Comprehension Index and his Perceptual Reasoning Index. He had difficulty on all of the measures of nonverbal abilities that were administered including measures of visual or nonverbal memory as well as academic achievement in arithmetic. He does not exhibit the social problems which some individuals with nonverbal learning disabilities can exhibit. I have enclosed a handout for individuals with nonverbal learning disabilities which Kyle Howell should review and determine whether he wants to take to the AccessAbility Centre along with a copy of this report.

...

Kyle Howell has well developed verbal abilities. He expressed an interest in becoming a counselor for disabled people. We wish him all the best in his future endeavors. He should feel free to contact me

[18] Dr. Waiver in cross-examination, was asked if Kyle could achieve his goal of being a counselor. Dr. Waiver added that he “certainly hoped so”. Dr. Waiver also confirmed that he had not discussed any other training with Kyle. He indicated that Kyle was concerned about his ability to complete additional training because he had previously been unable to complete the assignments at CBU.

[19] Finally, Dr. Waiver agreed that with proper supports and accommodations, Kyle could be retrained and do some type of work.

EVIDENCE OF THE PARTIES REGARDING KYLE’S DISABILITY

[20] Kyle’s father, Gordon Howell, also testified with respect to Kyle’s disabilities. Gordon Howell says that he helps Kyle with almost all of his daily routines. He assists Kyle in getting out of bed, with personal grooming and hygiene, including bathing and bodily functions, meal preparation and transportation. Kyle can eat limited meals on his own. He described Kyle as a smart young man with an interest in computers. Gordon Howell agreed with Dr. Waiver that Kyle withdrew from CBU because he found the pace too difficult. Gordon Howell also said however, that Kyle also withdrew because of anxiety,

including anxiety caused by the separation of his parents and the uncertainty of the court proceedings.

[21] I accept Gordon Howell's evidence on this point.

[22] Gordon Howell said going forward, he would like to see Kyle involved in a daytime program, where he would go and participate and contribute during the day, but not to live.

[23] In cross-examination Gordon Howell agreed Kyle was a smart young man that he had not discussed re-training with Kyle to date because Kyle is anxious about these proceedings and wanted it over. Gordon Howell also agreed Kyle has not applied for jobs since leaving CBU nor completed a resume, as Kyle presently has no employment skills.

[24] Cynthia Howell, Kyle's mother, also testified regarding Kyle's disabilities. She said as well that Kyle was a smart young man, and that he could do anything with a computer. With a push in the right direction, he could go into the work place. Cynthia Howell testified that Kyle should and could be retrained. In cross-examination Cynthia Howell said that she was tired of people telling Kyle that he was not intelligent. Cynthia Howell agreed that computers were Kyle's future.

When asked who should pay for the retraining she said “there is help out there”.

Cynthia Howell was clear that she was not going to pay for retraining.

EVIDENCE OF KYLE

[25] Kyle himself gave evidence in these proceedings. I noted that when he took the witness stand he was in a wheelchair and needed assistance in being taken into the court room and into the witness area. His speech was slow and somewhat distorted, but intelligible and articulate.

[26] Kyle said he lives with his father and things were good. Kyle testified that he talks on the telephone with his mother once or twice a week, that he goes to his mother’s home the odd time, but lately not in the last couple of months.

[27] When asked about his plans, Kyle agreed that in the past he has thought about being a counsellor and that it was his and his dad’s idea. He also agreed that he had not worked since leaving CBU. Kyle said he would like to go back to school for history/historian. He agreed in cross-examination that he had discussed an HR Management course with his mother. He said his response to his mother had been “sometime yes”.

[28] Kyle agreed he liked computers and could use a computer on his own. He also agreed he had done some research and answered questions for a professor who had written a book. He confirmed he received social assistance that goes into a bank account of approximately \$400 month. I note that Exhibit # 13 confirmed the amount to be \$476 per month. Kyle in his evidence said the amount was approximately \$400 month and that his father looks after the money and buys what he needs, including clothing. He confirmed there was a student loan but he did not know what the balance was or what the monthly payments were as his father looks after that.

[29] With respect to my impressions of Kyle, I would agree that he is pleasant and intelligent. He is articulate and has potential and wants to do something with that potential.

[30] Although not asked, my impression is consistent with others who testified that Kyle is anxious to have these proceedings concluded and move forward. For example, when asked questions, his speech would change and he would speak more quickly or mumble more when asked about his plans. Kyle, in my view, appeared anxious to please both parents when he told his father that he would like to take a course in counselling and his mother HR and then expressed being either involved in history/historian.

[31] I find based on the above, that Kyle is a dependent child of the marriage within the meaning of section 2.1 of the **Divorce Act**. My reasons are:

- Although everyone agrees that Kyle has potential to become self-sufficient, he is not yet been able to do so.

- I find this is so for a number of reasons:
 - i. He has not completed CBU and due to his anxiety over the martial discourse of his parents.
 - ii. The different approaches of both parents regarding Kyle's disability and abilities has also hindered his progress.
 - iii. As well, there has been a lack of financial support from Cynthia Howell post separation while Kyle was attending university and there is a student loan obligation which remains outstanding.

[32] All of these factors, in my view, have led to a stagnation of Kyle's ability to withdraw from the charge of his parents.

[33] Having found Kyle is still a dependent child, I must now determine whether that should be for an indefinite period of time or for a set amount of time.

[34] For reasons I will explain in my view Kyle should cease to be a dependent as of May 27, 2019, when he turns 25 years of age.

CHILD SUPPORT

[35] Having determined Kyle is still a child of the marriage the court must consider the issue of the obligation of Cynthia Howell to pay child support. Cynthia Howell through her counsel, argues that Kyle receives social assistance and that should be considered.

[36] As referenced, s. 3.2 of the Federal Child Support Guidelines gives discretion to the court to award the continuation of child support, taking into account consideration of a number of factors. These include the conditions, means, needs and other circumstances of the child. I have already set out the circumstances that led to the inability of Kyle to become independent or to withdraw from the charge. I must again consider the factors as set out in s. 3.2 of the Guidelines as they relate to Kyle's circumstances and Kyle's parents' circumstances and ability or requirement to pay.

[37] I have already discussed the conditions, means, needs and other circumstances of Kyle.

[38] At present, I find that Kyle's needs are being met through the \$486 a month social assistance that he receives, as well at the \$400 caregiver allowance that Gordon Howell receives. That has been the case since Kyle withdrew from CBU.

There were student loans that were acquired during the split custody arrangement when Kyle was living with one parent and S.H. with the other. There was however, no claim for section 7 expenses or particulars of the student loan advanced at this hearing, or claimed in the Petition for Divorce.

[39] There is also no evidence that Kyle had expenses or needs that are not covered by the social assistance that he receives.

[40] Kyle is at a cross roads. He can remain living as he is with no prospect for advancement, and remain living with Gordon Howell and Gordon Howell can continue to voluntarily support him as he has been without support of Cynthia Howell or Kyle can agree to re-training or additional education, in which case as determined, he is still a dependent child. Also, in which case, if there are needs and expenses above and beyond what is covered by social assistance and caregivers allowance, Gordon Howell can apply to vary child support.

[41] I repeat there is nothing before me in evidence to suggest that Kyle's needs are not being met at the present time by his present income.

[42] I will recognize the obligation of Cynthia Howell to pay child support for Kyle, but set child support at \$0 for Kyle from October 2013 onwards. This is in keeping with the approach set out in various authorities. I will refer first to the

Child Support Guidelines in Canada 2015. Julian Payne and Marilyn Payne and

there the authors say as follows:

Where an adult child is returned to the care of the parent because of illness or disability states subsidies received for that child under provincial statutes have been regarded as a relevant consideration in determining what amount if any the other parent should be required to contribute to that child's support. In the absence of general parental obligation to support adult children, the obligation of the state to support the adult child may be placed ahead of that of the parents having regard to their financial circumstances. But the fact that the state has agreed to subsidize a special needs child necessities of life does not automatically relieve parents of their support obligation under the Divorce Act. If they can reasonably supplement the bare necessities provided for by the state. While an order for table amount of child support under s. 3.1(a) and 3.2(a) of the Federal Child Support Guidelines may be an appropriate by reason of the disabled child's receipt of government assistance, an order for child support may be appropriate under section 3.2(b) of the Guidelines having regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent to contribute to the support of the child [Payne, Julien D, and Payne, Marilyn A: Child Support Guidelines in Canada, 2015. Irwin Law Inc, August 2015. P. 222].

[43] Additional authority can be found in **Harrington v. Harrington**, 33 O.R. (2d) 150, a decision of the Ontario Court of Appeal. There the court found that a child who had received independent status following the separation was hospitalized and became mentally ill. The child was hospitalized for some 14 weeks in a psychiatric ward and was released; however, she continued to receive treatment. Comments of the Court of Appeal were as follows at page 8:

In my respectful view the trial Judge erred in holding that the daughter was not a "child ... of the marriage". In arriving at this conclusion, he imported a requirement that is not contained in the statutory definition -- the requirement that the child (I use this word in its relationship sense) not have previously left the matrimonial home as an adult. It may be thought that this requirement is implicit in the words "unable ... to withdraw himself from their charge" and that the definition is not applicable because the child had already, once, withdrawn from the parents' charge. However, this is not what the provision says. By its use of the words "at the material time" the definition is directed to the child's situation at the time of the hearing. If the child is at that time unable to withdraw from his or her parents' charge, and the other conditions of the provision are met, then he or she qualifies as a child of the marriage.

[44] I cite Harrington, *supra*, for two propositions.

[45] It is clear from Harrington, *supra*, that a child can become independent and then subsequently once again become dependent, requiring assistance. This is exactly in my decision in finding that Kyle is a child of the marriage what is trying to be avoided. In other words, Kyle's needs are presently being met but if however, he goes on to take other training and requires assistance, as indicated; Gordon Howell would be able to apply to vary in order to seek additional support.

[46] Harrington, *supra*, stands for the proposition as alluded to in the text [Child Support Guidelines in Canada, 2015] that social assistance should be taken into consideration in determining means, needs and abilities.

[47] Therefore, I find on the evidence before as follows:

- a) I will order joint custody of the two children with primary care to Gordon Howell. In my view it is not appropriate to order sole custody in this case for the following reasons:
 - i. The ages of the children [Kyle 22 and S.H. 17];
 - ii. I do not want to promote a win/lose mentality with respect to the children; and
 - iii. Although there has been nonexistent communication to date, I note in cross-examination that Gordon Howell indicated that he would text information to Cynthia Howell if required with respect to the things going on with the children, so in my view, and hopefully with these proceedings behind them, the parties will be able to have some level of communication. If not, the children are of an age where communication can be facilitated through them.
- b) The parenting time that the children will have with Cynthia Howell will be reasonable access at reasonable times on reasonable notice, taking into consideration the children's wishes.
- c) Cynthia Howell will have the right to third party information, particularly medical and educational information which will be important, not only with respect to S.H. since he is getting ready to graduate, but also particularly with respect to Kyle so that in the event Gordon Howell is going to be applying to vary amount of child support, which I am setting at \$0 at the present time, so that she will be privy to that information.

RETROACTIVE CHILD SUPPORT

[48] With respect to child support, for 2013 based on line 150 income of \$50,890 that translates into \$727 for two children for a period of 6 months, which is \$4,362. Having found that as of October 2013 Kyle was no longer a child of the marriage, for the periods 2014, 2015, 2016, for S.H. for 2014 based on line 150 income of \$41,504, based on table amount of \$48,500, \$361 a month x 12 which is \$4,332. For 2015, based on line 150 income of \$53,674, \$467 month x 12 for a total of \$5,604. In 2016 based on an income of \$51,528, \$448 x 12 equates \$5,376. That plus the \$4,362 that I mentioned based on the \$767 for two children, equates to \$19,674.

[49] The court did not deduct the union dues in making the calculations. The Court instead will exercise its discretion and base child support using the line 150 income of Cynthia Howell's income tax returns..

[50] Also, because we are not into April, including January, February, March, based on those three months, that would be an additional \$1,344 for a total of \$21,018.

[51] Mr. Stanwick on behalf of Cynthia Howell says that I should give credit of approximately \$10,000 to Cynthia Howell for the items provided to their son, S.H. These include payments for a cell phone plan, purchase of a car obtained for S.H.'s

use, as well as transporting Kyle back and forth for visits and also for S.H. to go to school, she also said that she obtained and provided proof of a loan that she took out as well as purchasing insurance for the vehicle. Cynthia Howell says that she provided credit for these items because they were necessary. She says they were necessary because the cell phone was purchased and paid for so she could stay in touch with the children and the car and insurance was purchased so that the youngest S.H. could use it and as I have indicated, not only to go back and forth to school, but to transport Kyle for access with both children and her. She said that it was necessary because of the acrimony and lack of communication with Gordon Howell

[52] I reject these arguments for the following reasons:

- While I accept communication was nonexistent between the parties there is no evidence of parental alienation or denial of access.
- There were other avenues to ensure securing parenting time such as use of third parties and/or application to the court to set schedules and conditions for parenting time. This was not done.
- I have been provided no case authority that a payor parent can unilaterally determine what child support obligations can be spent on.

- In the absence of case authority, such a practice would set in my view, a dangerous precedent.

[53] I will therefore set the arrears owing at \$21,018. I order child support on a go forward basis starting April 1, 2017, in the amount of \$448 per month for the one child, S.H.

[54] I will also order that an additional \$252 per month be paid toward arrears until paid in full, making a total obligation each month of \$700.

[55] I will not order arrears paid out of the division of the property, as child support is for the benefit of the children, but certainly Cynthia Howell is free to do so and pay a lump sum payment if she wishes.

[56] I also find as indicated, that the child, Kyle continues to be a child of the marriage until May 2019, but that no child support is payable at this time and in the event Kyle is enrolled in education or retraining as indicated, Gordon Howell may make application to vary up to May 27, 2019.

DIVISION OF MATRIMONIAL PROPERTY

[57] I turn now to the issue of division of matrimonial property and debt.

[58] Both parties agree that each party is still entitled to retain sole ownership of their pensions from Marine Atlantic and each release the other's interest in the pensions and so I so order.

[59] Similarly, each party has agreed to be responsible for their own lines-of-credit in each of their own names and release each other from the obligation to pay that line-of-credit and I will so order.

[60] The parties have also agreed that all personal furnishings and personal items have been divided equally and I order that as well.

[61] Both parties agree that the matrimonial home at Barrington Street, Sydney Mines is valued at \$131,000. They disagree as to what credit, if any, should be given to Gordon Howell, who has been paying the mortgage, taxes and upkeep on the property.

[62] Gordon Howell said he should receive a full credit for these items.

[63] Cynthia Howell says that he should only receive credit for one-half of the portion that he contributed while initially separated when he vacated the matrimonial home from August 2012 to April 2013, when he was paying on the mortgage and not residing in the home. That amount as set out in the Mr. Stanwick's brief was $\$697.76 \times 9$, which equates to $\$6,279.84 / 2$ which translates

to \$3,139.92. I agree with this approach which was set out in *Simmons and Simmons*, 196 NSR 2d, 140 and in *Weese v. Weese*, 2014, NSSC 435, both as referenced in Mr. Stanwick's brief. I agree because although Gordon Howell had the children in the matrimonial home, he also received a benefit from residing in the home whereas Cynthia Howell had to incur additional costs.

[64] The parties also owned an additional dwelling, a mini home that Gordon Howell would not agree to allow Cynthia Howell to access or reside in. This resulted in additional costs for Cynthia Howell.

[65] Although Gordon Howell received no assistance towards the home, he has received retroactive support as just ordered, and as well, monies were provided for a car and cell phone for the children by Cynthia Howell.

[66] I will therefore order as follows:

- a) Gordon Howell will have until June 30, 2017, to obtain financing and payout Cynthia Howell's interest in the home and the matrimonial home will be divided as follows:
- b) The agreed value is \$131,000 less 4% realty commission, which I find is a reasonable amount as set out in *Weese and Weese, supra*, and 4% of the real estate commission is \$5,240 plus 15% HST (\$786), for a total of \$6,026.
- c) Less also \$1,000 for legal fees and HST of \$150 for a total of \$1,150.

- d) The total of real estate commission, HST and legal fees is \$7,176. Subtracting that from the \$131,000 equates with \$123,824.
- e) Exhibit 6 shows the payout of the mortgage as of date of hearing (November 17, 2016) of \$68,783.14. The payments were made bi-weekly, which means that between the conclusion of the hearing and today's date, there would have been an additional 8 payments that would have come out which totals \$2,567.12, to reduce the balance owing to \$66,216.02.
- f) \$123,824 minus \$66,216.02 leaves \$57,607.98 and I also at this juncture will interject I have reviewed Exhibit 10, the rental income for the mini home, which showed \$15,600 in rent, minus disposition costs, which were deducted and counsel for Cynthia Howell took no issue with those deductions, so the net proceeds will also be added into the matrimonial property division, so \$57,607.98 plus \$9,341.58 for a total of \$66,949.56 of equity, divided by 2, which means each party's share would be \$33,474.78, and I have not done the math, but also Gordon Howell would be given credit for the \$3,139.92, which should be added to Gordon Howell's amount.
- g) So Gordon Howell's share would be \$33,474.78 plus \$3,139.92 (to be subtracted from Cynthia Howell's portion).
- h) In the event the refinancing is not completed and the amount paid out owing to Cynthia Howell by Gordon Howell by June 30, 2017, the matrimonial home is to be sold and divided as set out above.
- i) I will also order that the mini home at 80 Pitt Street be sold immediately for fair market value, to a party at arm's length from the third party. Proof of listing to be provided within 30 days to Cynthia Howell and the proceeds of which will be divided equally.

- j) I decline to order rents other than what was in Exhibit 10 because although it was not rented out by Gordon Howell, he clearly was not provided any benefit from the mini home either, given that it was just sitting there being unused.
- k) Similarly, I note that Gordon Howell indicated a wish to keep the mini home for the children, however, in my view it is not appropriate and it should be sold. If after appraisal as to fair market value, Gordon Howell wishes to purchase Cynthia Howell's interest, then he is free to do so, but otherwise it is to be sold and divided equally.
- l) The parcel of land at 16 Simpson Street, Florence, if not already sold at tax sale, shall be redeemed from the proceeds of the sale of the mini home and be used to pay outstanding taxes on the property. The property at 16 Simpson Street will then be listed immediately for sale at fair market value to an arm's length third party and the proceeds of the sale divided equally. Again I say non-party/arm's length, with the exception of the parties if they wish to buyout the other's interest.
- m) Proof of sale for taxes or redemption of the Simpson Street property by payment of arrears shall be provided by September 1, 2017. I have given a little longer as it may take a while for the mini home to sell and also for confirmation as to what the status is of the Simpson Street property. I know counsel, we discussed that at the end of the hearing and it was not clear so that should give enough time for counsel to explore that.
- n) As I say it may involve sale of the mini home, which will also take some time.
- o) The court will also retain jurisdiction in the event a review is required to give effect to any of those conditions, particularly, given that there is a contingencies on the sale of the mini home and the property at 16 Simpson Street, Florence.

- p) If seeking costs, counsel has 30 days to make submissions to the court.

J.Gregan