

Droit de la famille — 083454

## SUPERIOR COURT

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF LONGUEUIL

N° : 505-04-016623-076

DATE : JUNE 18, 2008

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**PRESENT: THE HONOURABLE SOPHIE PICARD, J.S.C.**

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**Z. A.**  
Plaintiff

c.

**H. H.**  
Defendant

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### JUDGMENT

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[1] Plaintiff instituted proceedings for separation from bed and board on July 25, 2007<sup>1</sup>.

[2] The parties are asking the Court to rule on:

- custody of their son X;

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<sup>1</sup> In fact, Plaintiff first instituted divorce proceedings which were later amended into proceedings for separation from bed and board, following a judgment rendered by Mrs. Justice Claudine Roy, on December 17, 2007.

- support for the child;
- partition of the family patrimony; and
- partition of the partnership of acquests.

## CONTEXT

[3] The parties were both born in Town A, Afghanistan, in 1966 (Plaintiff) and 1953 (Defendant).

[4] Defendant arrived in Canada in 1983.

[5] In 1990, the parties obtained a marriage certificate from the authorities of Town A, Afghanistan. The marriage ceremony was held on April 9, 1990, in Town B, India. Defendant then returned to Canada and Plaintiff arrived in Canada shortly after.

[6] The parties' son, X, was born on [...], 1997 in Canada. He is now 10 years ([...] months) old.

[7] Plaintiff has completed studies in Town C and has been working as respiratory technician since 1998, after X's birth.

[8] Plaintiff has always been the main financial support of the family.

[9] Defendant completed studies in computer sciences but was not able to work in his field and has always worked in restaurants.

[10] Until X was about three years old, Defendant took care of the child at home while Plaintiff was working full time. Then, until 2006, Defendant has worked full time in a restaurant; his earnings were undeclared.

[11] In 2000, Plaintiff purchased a house in Town D. She made the down payment and has always made the mortgage payments and tax payments, as her salary was higher than Defendant's.

[12] Defendant purchased the groceries most of the time and paid the electricity, telephone and Internet expenses. He also purchased some furniture and paid for the car repairs.

[13] Defendant cooked the meals for the family, washed the laundry, drove X to school, and took him to most of his medical appointments and consultations with the language specialist.

[14] Defendant also made some house repairs.

[15] Both parties have always taken very good care of X. He has received a good education from both his parents.

[16] In October 2006, the parties moved to the United Arab Emirates (UAE), in the City of Town E, where Plaintiff had obtained a two-year contract to work in her field, at a higher salary than in Town C.

[17] Before leaving for Town E, the parties were married again, this time in the Province of Québec. This second marriage solemnized on May 29, 2006, was a pure formality as the parties could not find their Afghan marriage certificate and were required to provide a marriage certificate to the authorities of UAE.

[18] The parties figured that it was easier to remarry in Canada than to try obtaining from the Afghan authorities, an additional copy of their initial marriage certificate, especially with the war situation.

[19] The parties' relationship deteriorated while they were in Town E. Plaintiff felt that Defendant's efforts to find work and contribute to the family income were insufficient.

[20] The parties have been living apart since March 24, 2007. On that date, Defendant left Town E for Afghanistan where he sought advice from his brother. Then, after a short stop in Town E in June 2007 to see his son, Defendant returned to Canada on July 11, 2007.

[21] Plaintiff instituted these proceedings on July 25, 2007.

[22] Defendant had interim custody of X during four months, from September 2007 to December 2007<sup>2</sup>. They lived in the family residence during these four months, in Town D, with X's uncle and cousins who were renting the house. Plaintiff returned to Town E.

[23] In December 2007, Plaintiff obtained provisional custody of X<sup>3</sup> and the child therefore returned to live with his mother in Town E. Defendant was granted access rights of four weeks during the summer vacations.

## **ANALYSIS**

### **Custody of X**

[24] X enjoys himself in Canada as well as in UAE. He has adapted well to the school he has attended in both Town D and Town E. In Town E, he goes to a private international school. Plaintiff's employer pays for half of the school fees.

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<sup>2</sup> Further to an interim order by Mr. Justice Nadeau, on August 21, 2007.

<sup>3</sup> Further to a judgment by Mrs. Justice Claudine Roy dated December 21, 2007 and maintained by the Court of Appeal on January 30, 2008.

[25] X has cousins, uncles and aunts in Town D with whom he gets along very well. In Town E, Plaintiff lives most of the time with her father and brother.

[26] X has made two friends in Town E and does many activities (as he did in Town D).

[27] He has language problems which seem to be well controlled; he has been seeing a language specialist once a week in Town E.

[28] Plaintiff is a very responsible and resourceful mother. She is concerned about X's education and wellness. Being the main provider for the family, she sees her work in Town E as the best way to increase her standard of living as well as X's.

[29] Plaintiff has just renewed (for two years) her working contract in Town E which will end in September 2010<sup>4</sup>. She says that she will then come back to Canada in « X's natural environment » where his father and other family members live.

[30] Defendant also takes very good care of X and wishes the best for his child.

[31] Defendant's financial situation is not as stable as Plaintiff's as he has recently started a new job in a restaurant.

[32] The Court must determine what *living arrangement* is in the best interest of X during his mother's stay in Town E.

[33] The case of *Gordon v. Goertz*<sup>5</sup> sets out the factors to be considered when one parent wants to move the residence of the child to a location that is far from the other parent. It provides as follows:

[49]. ...

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, *inter alia*:

- (a) the existing custody arrangement and relationship between the child and the custodial parent;
- (b) the existing access arrangement and the relationship between the child and the access parent;

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<sup>4</sup> Plaintiff explains that as she has not been able to put aside enough money during the past two years (considering the costs of these proceedings). She has therefore decided to extend her stay in Town E for two additional years.

<sup>5</sup> [1996] 2 S.C.R. 27.

- (c) the desirability of maximizing contact between the child and both parents;
- (d) the views of the child;
- (e) the custodial parent's reason for moving, only on the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
- (f) disruption to the child of a change in custody;
- (g) disruption to the child consequent on removal from family, schools and the community he or she has come to know.

[34] The Court has to determine whether it is in the best interest of X to live in Town E during the school year with his mother and with his father during the summer vacations in Town D or to live during the school year with his father and during summer with his mother who would come back to Town D.

[35] X would prefer to continue living in Town E during the school year and in Town D with his father during the summer vacations.

[36] The opinion of a child of X's age (almost 11 years old) must be given an important weight as to the issue of his custody, although it is not an overriding factor<sup>6</sup>.

[37] The Court considers that it is in the best interest of X to stay with his mother during the school year and to spend two months during summer vacations with his father.

[38] This will ensure some stability in his life as he has expressed the view that he would feel more comfortable continuing to go to school in Town E where he has made new friends and is enjoying himself. It was difficult for him to attend two different schools in the last school year.

[39] He has a close relationship with his two parents and cherishes them equally but would prefer the above-mentioned arrangement during his mother's stay in Town E.

[40] Moreover, the temperature in Town E being excessively warm during the months of July and August, the parties acknowledge that it would be more appropriate for their child to spend these months in Town D.

[41] Besides, Defendant will be moving very shortly from the family residence to an apartment and has just started a new job. This element also brings the Court to conclude that the stability of X would be best preserved at this point, if he lives during the school year with his mother.

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<sup>6</sup> M.A. c. S.L., [2005] R.D.F. 450 (C.S.).

[42] This being said, had the parties both been living in Town D, the shared custody would clearly have been appropriate, considering the parents' common approach in the education of their child and the fact that they recognize the importance for their child to be as much as possible with both parents, which is also the child's desire.

[43] Plaintiff says that she will return one month during summer in Town D and agrees to pay the child's travel fees. However, as the child will stay for an additional month, he will have to be accompanied by an adult for his return to Town E and the travel expenses of said adult will be shared 50/50 by the parties. The same partition will apply should the parties decide that it is appropriate for X to also visit his father in Town D during the two week vacation at the end of December/beginning of January.

[44] Finally, it is important that while X speaks over the telephone to one of his parents, the other parent not be present to control or listen to the conversation<sup>7</sup>. It is also essential that each party continue showing great respect for the other parent in front of the child.

### **Support for the child**

[45] The gross annual salary of Plaintiff and Defendant is presently 69 300 \$ (15 400 \$ dirhams per month) and 15 080 \$, respectively. The child support payable by Defendant to Plaintiff therefore amounts to 132 \$ per month pursuant to the federal guidelines.

[46] As X requires special assistance from a language specialist, Plaintiff and Defendant will share the professional fees of such specialist in proportion to their respective salaries (20 % father; 80 % mother).

[47] However, the child's school fees in Town E will be paid by Plaintiff, considering that in Town D, X always attended a public school and Defendant's salary is insufficient for such expenses.

### **Family patrimony**

[48] The family patrimony at the date on which the parties ceased living together is composed of:

- The family residence in Town D;
- the parties' respective registered retirement-savings plans (R.R.S.P.'s);
- the movable property furnishing and decorating the family residence;

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<sup>7</sup> The same comment applies to the father of Plaintiff who has made comments when X was speaking to Defendant over the phone.

- the benefits accrued during the marriage under Plaintiff's retirement plan (R.R.E.G.O.P.) at A Centre (the amount of said pension has not been established as Plaintiff was unaware of its existence);
- each spouse's registered earnings during the marriage pursuant to the *Act respecting the Quebec Pension Plan* (R.S.Q., c. A-9).

[49] According to the parties, the family residence is likely to be sold for about 165 000 \$ (with a mortgage loan of 50 800 \$), an agent fee of approximately 10 000 \$ and notary fees of approximately 1 000 \$, for a net value of approximately 103 200 \$. There are also municipal tax payments that have to be made.

[50] The parties' R.R.S.P.'s have a value of 636 \$ (for Plaintiff) and 1052 \$ (for Defendant).

[51] The movable property furnishing and decorating the family residence is worth approximately 5000 \$ and is presently in the basement of the residence.

[52] Pursuant to article 416 C.c.Q., the family patrimony must be divided equally.

[53] Plaintiff requests that the family patrimony be divided unequally (25 % (Defendant) / 75 % (Plaintiff)), in accordance with the exception provided under article 422 C.c.Q.:

**422.** The court may, on an application, make an exception to the rule of partition into equal shares, and decide that there will be no partition of earnings registered pursuant to the Act respecting the Québec Pension Plan or to similar plans where it would result in an injustice considering, in particular, the brevity of the marriage, the waste of certain property by one of the spouses, or the bad faith of one of them.

[54] The Court of Appeal has recognized that these three criteria are not limitative and has applied the *ejusdem generic* rule to provide examples of other situations that might justify unequal partition, such as the exceptional contribution by one of the spouses to the family and the chronic laziness of one of the spouses<sup>8</sup>.

[55] Section 422 C.c.Q. does not however enable a spouse to recover losses resulting from the sole application of the law. Furthermore, the fact that one of the spouses has paid for and owns the property composing the family patrimony, is not *per se* a reason for unequal partition<sup>9</sup>.

<sup>8</sup> *Droit de la famille* – 1395, [1993] R.J.Q. 1659, 1663 (C.A.).

<sup>9</sup> Michel TÉTRAULT, *Droit de la famille*, 3<sup>e</sup> édition, Cowansville, Éditions Yvon Blais, 2005, p. 133-135.

[56] Plaintiff contends that Defendant has throughout the marriage contributed insufficiently to the expenses of the household and that equal partition of the family patrimony would therefore be unfair.

[57] It is true that Plaintiff has made the down payment and mortgage payments for the family residence and has worked very hard to support the family. However, this is not a case of laziness of the other spouse. It was established that Defendant's earnings were lower than Plaintiff's and that Defendant contributed to some expenses (groceries, telephone, electricity, Internet, car repairs, some house furniture). Moreover, Defendant took X to school, to his medical/dentist appointments, often cooked the meals for the family, helped with the child's homework, washed the laundry and took care of some renovation work with respect to the family residence.

[58] The criteria of bad faith is clearly not met in this case and the Court therefore dismisses Plaintiff's request for unequal partition of the family patrimony.

### **Partnership of acquests**

[59] Article 3123 C.c.Q. provides as follows:

**3123.** The matrimonial or civil union regime of spouses who have not entered into matrimonial or civil union agreements is governed by the law of their country of domicile at the time of their marriage or civil union.

If the spouses are at that time domiciled in different countries, the applicable law is the law of their first common residence or, failing that, the law of their common nationality or, failing that, the law of the place of solemnization of their marriage or civil union.

[60] The parties have not entered into any matrimonial agreement at the time of their marriage in 1990. Defendant's true domicile was in Canada whereas Plaintiff was domiciled in Afghanistan and was to join Plaintiff to Canada after the marriage. Therefore, pursuant to the second paragraph of article 3123 C.c.Q., as the first common residence of the parties where they wished to establish themselves was in Canada, their matrimonial regime is governed by the law of Québec.

[61] When the parties remarried in 2006, the applicable matrimonial regime was also the partnership of acquests.

[62] The relevant date for the determination of the effects of the dissolution of said regime shall be on March 24, 2007, when the parties ceased living together. The exception set out in article 466 C.c.Q. applies as the parties completely stopped sharing their expenses at that date and were living in different countries.

[63] The property (future construction) in Town E for which Plaintiff made a first payment of 5625 \$ in March 2007 will not be included in Plaintiff's acquests as this

property is meant for Plaintiff's father who made most of the down payment (18 000 \$). Moreover, in all likelihood, Plaintiff will lose her rights to said property as the installments of May 2007, August 2007 and February 2008 are outstanding. Furthermore, Plaintiff made the 5625 \$ payment for that property, the month the parties ceased living together.

[64] Plaintiff's car will also be excluded from her acquests as it was purchased after the date the parties ceased living together.

[65] Finally, Plaintiff and Defendant had 2900 \$ and 2 212 \$ in their respective bank account, at the time they ceased living together. They also had at that time, debts with respect to a student loan, in the amount of 15 000 \$, in the case of Defendant, and debts for the school, speech therapist and municipal taxes (regarding the house in Town D) in the case of Plaintiff, which in all likelihood, were close to the amount in her bank account.

[66] There is therefore no amount owed by either party as a result of the dissolution of the partnership of acquests.

#### **WHEREFORE, THE COURT :**

[67] **PRONOUNCES** the separation as to bed and board of the parties whose marriage was solemnized on April 9, 1990 in Town A, Afghanistan and on May 29, 2006 in Town C, Québec;

[68] **GRANTS** custody of the parties' minor child, X, to Plaintiff;

[69] **DECLARES** that both parents will exercise parental authority toward their child X and **ORDERS** that the parties consult each other before taking any important decision concerning their child, including with respect to his education and health;

[70] **ORDERS** that Plaintiff and Defendant not criticize the other party in front of the child and that they inform their respective families of the importance that they follow the same rule of conduct;

[71] **AUTHORIZES** Plaintiff to travel with the child outside Canada without the prior authorization of Defendant;

[72] **GRANTS** to Defendant access rights in accordance with the following terms:

- 8 weeks during the summer vacations at Defendant's residence in the Province of Québec (the travel expenses will be paid by Plaintiff but the expenses of the adult who will be travelling with the child back to UAE at the end of the summer, will be shared equally between the parties);

- 2 weeks at the end of December/beginning of January during the child's vacations, should the parties agree that it is in the interest of the child to travel overseas for such a short period (the travel fees would be shared equally between the parties);
- visits with the child if Defendant is temporarily in Town E;
- phone calls to the child by Defendant once a week at Defendant's expense, without the presence of Plaintiff;
- the child will have the right to telephone Defendant whenever he wishes to do so, at Plaintiff's expense;
- Plaintiff will provide email communication to the child, to enable him to communicate with his father;
- such other access as agreed by the parties.

[73] **ORDERS** Plaintiff to conform to these access rights;

[74] **GRANTS** to Plaintiff child support in the amount of 132 CAN\$ per month, payable by Defendant monthly, commencing on the date of this judgment;

[75] **ORDERS** that each party notify the other party in writing, within 30 days of any change in income or employment, together with proof of such change;

[76] **ORDERS** Defendant to pay 20 % of the fees of the language specialist who sees X; this payment will be made upon demand by Plaintiff with the relevant invoices;

[77] **DECLARES** the family patrimony between the parties to be dissolved as of March 24, 2007;

[78] **ORDERS** the equal partition of the family patrimony and **DECLARES** that:

- Plaintiff and Defendant will share equally the net earnings of the sale of the family residence located at [...], Town D, Québec (after deduction of the mortgage loan, agent fees, notary fees and municipal tax payments);
- Defendant owes to Plaintiff 2500 \$ in consideration of the partition of the movable property furnishing and decorating the family residence;

[79] **ORDERS** the transfer of 250 \$ from Defendant's R.R.S.P. to Plaintiff's R.R.S.P.;

[80] **ORDERS** Plaintiff to transfer to Defendant half of the amounts registered in Plaintiff's name in the *Régime de retraite des employés du gouvernement et organismes publics* (R.R.E.G.O.P.) between April 9, 1990 and March 24, 2007;

[81] **ORDERS** that the period of partition of benefits registered in virtue of *An Act respecting the Quebec Pension Plan* be established as of March 24, 2007, date at which the parties have ceased cohabitation;

[82] **DECLARES** each party to be the owner of the movable property presently in his/her possession;

[83] **DELARES** Plaintiff sole owner of the car which she presently owns;

[84] **DECLARES** that the matrimonial regime of partnership of acquests having existed between the parties is dissolved as of March 24, 2007;

[85] **WITHOUT COSTS.**

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**SOPHIE PICARD, J.S.C.**

Me Sébastien St-Clair  
ST-CLAIR & ASSOCIÉS  
Attorney for Plaintiff

Me Pamela O'Reilley  
Attorney for Defendant

Me Isabel Brault  
Attorney for X

Dates of hearing : June 10, 11 and 12, 2008