

**PERTH COURT FILE NO.:** 344/05  
**DATE:** 2007/02/06

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

CORINNE ERMA SOMERTON

Applicant

- and -

MICHAEL GILBERT WARD

Respondent

)  
 )  
 ) Graeme B. Fraser, for the Applicant  
 )  
 )  
 )  
 )  
 )  
 )  
 )  
 ) Michael Gilbert Ward (Respondent),  
 ) in person  
 )  
 )  
 )  
 )  
 )  
 ) **HEARD:** December 18, 2006 and  
 ) January 15, 2007 (Perth)

**HACKLAND J.**

**REASONS FOR JUDGMENT**

**Background**

[1] I will refer to the parties, Ms Somerton Ward and Mr. Ward, individually as 'the wife' and 'the husband' respectively. The parties lived together in a common-law relationship for 6 years beginning in 1981, married in November 1987 and separated in August of 2004. They have a 15-year-old son and a 13-year-old daughter. The children spend approximately equal time with each parent pursuant to an arrangement the parties term "joint shared custody".

[2] The husband, age 44, is a self-employed mechanic. He lives with his girlfriend with whom he has recently had a child. His girlfriend earns about \$45,000 annually. The husband's

- 2 -

income is difficult to ascertain, as discussed below. The wife, age 45, remains single. She earns \$34,000 annually as a customer services supervisor at a bank.

### **Issues**

- [3] The issues to be addressed are:
- (a) the parenting schedule for the children;
  - (b) the amount of child support and section 7 expenses to be paid by the husband (including retroactivity);
  - (c) the wife's claim for an unequal division of family property;
  - (d) the wife's claim for lump sum spousal support.

### **Parenting Schedule**

[4] At the time of separation in August of 2004, the parties agreed to a schedule (exhibit 2) wherein the children spend roughly equal time with each parent. In July of 2006, the husband unilaterally modified the schedule so that instead of returning the children Sunday evening, he would return them Monday evening. He explained in his evidence that Sunday afternoon family activities are disrupted by having to return the children by 6:00 p.m. and that his change to the schedule results in each parent having the children, 7 nights per cycle (rather than 6 and 8 in the wife's favour). Both parents agree that the children have no preference as between the two options.

[5] I think the current arrangement (i.e. from July 2006 to date) is in the children's best interests. It gives both parents alternating uninterrupted weekends with the children and equalizes the time with each. I arrive at this conclusion in spite of the husband's unfortunate lack of consultation. The parents have agreed that each will have an uninterrupted weeklong period with the children during summer vacation and a 6-hour period to the access parent on Christmas day. The access schedule is not to be altered in future, except with the written consent of the other parent, which consent is not to be unreasonably withheld.

- 3 -

**Child Support**

[6] When the parties first separated it was agreed informally through mediation that the husband would pay child support of \$75 a week. This figure would reflect an income of \$55,000 on the husband's part, income of \$34,000 earned by the wife and a set off of the *Child Support Guideline* amounts attributable to those incomes (for a net child support payment by the husband of \$325 per month for the 2 children). The evidence is that the husband paid a total of \$260 for child support in the September-October 2004 time period and has paid nothing since. His explanation for this was that he formed the opinion that since he has an equal sharing of residential time with the children and since he incurred the costs of acquiring two bedroom sets for them, he sees no obligation to pay child support.

[7] An important question for the determination of child support is whether the husband earns more than the wife and if so how much? The wife asks the Court to impute income of \$55,000 to the husband on the basis of the understanding reached in mediation and on the basis of this being a reasonable figure to deduce from the evidence as a whole. There is no dispute that the wife earns \$34,000 annually.

[8] The evidence of what the husband earns is very unsatisfactory, thanks to the husband's lack of cooperation, lack of necessary disclosure and his lack of record keeping. He works by himself as a mechanic in a garage which he rents in Almonte. He would have the Court believe that he has no bank account, always pays cash for parts and supplies and cashes cheques received from customers at Money Mart. He admits to accepting payment in cash "sometimes". It was the wife's understanding from the parties' years together, that he received "a lot of cash" in the business. The husband admits to working 5 or 5 ½ days a week, charges \$70 per hour for his labour and sometimes works on 2 cars simultaneously. Essentially, he claims that he keeps no business records.

[9] The husband filed with the Court (exhibit 12) balance sheets recently prepared by his bookkeeper showing that in the year 2000 his gross income from his business was \$54,582 and his net income was \$7175. For 2001 his gross income was \$54,582 and his net income was \$6461. For 2002 his gross income was \$54,582 and his net income was \$7993. For 2003 his gross income was \$54,582 and his net income was \$8126. For 2004 his gross income was

- 4 -

\$54,582 and his net income was \$9386. The husband admitted that his tax returns and the above-noted accounting records were all created in the spring of 2006 and his income over the total period was divided equally among the years in question, hence the identical gross income figure for each year. These balance sheets imply that he has records or at least relevant documentation, yet he denies this. I consider this evidence to be virtually worthless. Further, the husband has declined to produce any of the original source documentation to assist in any review of his earnings and expenses, notwithstanding earlier orders of this Court. In my opinion, the husband was attempting to mislead the Court as to his business income and the most charitable thing I can say is that he may not know what he earns.

[10] As part of his own evidence, the husband stated that mechanics with his training normally earn \$21 per hour and a typical mechanic at Canadian Tire would earn just under \$40,000 annually. As noted, the husband admitted charging \$70 per hour for his work and it was implicit in his evidence that he was kept busy for something in excess of the normal work week.

[11] In summary, I am of the opinion that the wife's submission that the husband should have net income attributed to him in the sum of \$55,000 per annum is reasonable, and indeed conservative, and I accept this figure as appropriate in all of the circumstances, for the purpose of fixing child support. The husband will pay child support of \$325 per month retroactive to September 2004 and the parties will share equally (as agreed) the children's extraordinary expenses.

#### **Division of Net Family Property**

[12] The wife related a remarkable story about the family finances while the parties cohabited, which was largely corroborated by the husband's own evidence. Essentially, she paid the mortgage, taxes, insurance, utilities, telephone and virtually all the household expenses. She paid for nearly all the groceries and for the children's daycare. She paid for nearly all the children's dance and hockey expenses. All the husband could say for himself in his evidence was that sometimes he did some grocery shopping on Sundays and contributed to some food costs on hockey excursions with his son. He would however repair and supply old used cars for family use.

- 5 -

[13] With respect to the matrimonial home it was purchased in 1988 for \$63,000, with the parties assuming a mortgage of \$58,000. The husband made the down payment. The wife eventually paid this off in June 2006, having paid interest totaling \$52,213 (exhibit 5) over the years.

[14] In 1985, the parties bought a lot in West Carleton for \$15,000 with a mortgage of \$11,500. The husband made the down payment. The wife paid 100% of the mortgage and carrying costs of this lot. The lot was refinanced in 1995 to raise \$15,000 substantially for the purpose of paying down the husband's business debts. The wife carried this additional debt until 1998 when she secured the husband's agreement to take over the payments. However, she subsequently learned that he had not made any payments and a default judgment had been filed against the property in the sum of \$16,054. This debt was garnished out of the wife's wages and was eventually paid off in 2005. Exhibit 7 establishes that the wife has, over the years, paid nearly \$56,000 of debt and costs secured on this lot.

[15] A recent title search discloses liens against the matrimonial home for the unpaid retail sales taxes from the husband's business and against the West Carleton lot. These liens total \$82,630 (\$14,874 on the lot and \$67,755 on the matrimonial home). The husband asserts that the amounts claimed in the liens greatly exceed his actual liability and he is attempting to resolve this with taxing authorities. I accept the appraisals obtained by the wife and filed in evidence which show that the value of the matrimonial home is \$122,000 and the value of the West Carleton lot is \$30,000.

[16] Based on the evidence that clearly establishes that the wife paid the husband's business debts during the marriage together with virtually all of the family expenses and the evidence that the wife's share of the joint family assets are now encumbered by liens for the husband's business debts in the sum of approximately \$80,000, the wife requests an unequal division of the net family property.

[17] The applicant relies on section 5 of the *Family Law Act* which states:

5. (1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the

- 6 -

spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them. R.S.O. 1990, c. F.3, s. 5 (1).

...

(6) The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,

...

(b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;

...

(f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;

...

(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

[18] I accept the wife's net family property statement (exhibit 17) which calculates an equalization payment owing by the husband to the wife of \$28,200. The combined estimated value of the two real properties is approximately \$152,000 and after allowing 15% for disposition costs, would reduce their value to approximately \$129,200. The wife's one half interest is approximately \$64,600. The husband's one half interest of \$64,600 would be reduced by \$28,200 to the sum of \$36,379 assuming an equalization.

[19] I am of the opinion that it would be unconscionable in all of the circumstances noted previously to equalize the net family properties. The wife has clearly incurred a disproportionately larger amount of the debts for the support of the family and has paid the husband's business debts during the marriage and will apparently be liable for further amounts as reflected in the retail sales tax liens. These debts were incurred by the husband recklessly and in bad faith in the sense that he had deliberately decided to run a 'cash' business and not file income tax returns or other tax information required by law. I accept the wife's argument that the only fair and equitable approach to dealing with the unconscionable circumstances that have resulted from the husband's conduct and that would be perpetuated by an equalization payment by the wife, is to order pursuant to section 5(1) of the *Family Law Act*, that the husband's one

- 7 -

half interest in the former matrimonial home and in the West Carleton lot be transferred to the wife.

[20] With respect to the parties' household contents and personal effects, the wife testified that there had previously been an equal division. The husband's evidence is that the wife retains all of these items. I propose to resolve this by ordering the wife to give the husband (as he requests) (1) an equitable share of the children's baby pictures and memorabilia, (2) his great grandmother's table, his father's 1973 Yamaha snowmobile and copies of the children's birth certificate. The balance of the furnishings and personal effects will be deemed to have been divided equally.

[21] The wife's counsel argued persuasively that the Court should also award the wife lump sum spousal support in an amount equal to the husband's business debts, particularly the retail sales tax liens on the property totalling approximately \$80,000. The wife relies on section 15.2 of the *Divorce Act* which identifies as a factor giving rise to an entitlement to support, "... any economic... disadvantages to the spouses arising from the marriage or its breakdown." However, in view of the husband's relatively modest means after paying the child support required by this judgment and the wife receiving the value of the matrimonial home and lot which will be transferred to her, I do not think a lump sum spousal support order is justified in all the circumstances.

### **Disposition**

[22] A final order will issue providing as follows:

- (1) the children will be in the "joint shared custody" of the parties on the schedule currently followed (see exhibit 2);
- (2) respondent to pay the applicant child support for 2 children in the sum of \$325 per month beginning September 1, 2004, based on an income to the applicant of \$34,000 per year and an imputed income to the respondent of \$55,000 per year;
- (3) the parties will share equally the children's extraordinary expenses;

- 8 -

(4) there will be an unequal division of the spouses' net family property such that the husband's interest and title in the matrimonial home and in the West Carleton lot will vest in the wife and an appropriate vesting order will issue to that effect.

[23] The applicant will provide her written submission on costs within 30 days of the release of these reasons and the respondent may respond within 30 days after receiving the applicant's submission.



Mr. Justice Charles T. Hackland

**Released:** February 6, 2007



**PERTH COURT FILE NO.: 344/05**  
**DATE: 2007/02/06**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**CORINNE ERMA SOMERTON**

Applicant

**- and -**

**MICHAEL GILBERT WARD**

Respondent

---

**REASONS FOR JUDGMENT**

---

Mr. Justice Charles T. Hackland

**Released: February 6, 2007**

**PERTH COURT FILE NO.:** 344/05  
**DATE:** By Written Submissions

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** CORINNE ERMA SOMERTON (Applicant) v. MICHAEL GILBERT  
WARD (Respondent)

**BEFORE:** Mr. Justice Charles T. Hackland

**COUNSEL:** Graeme B. Fraser, for the Applicant

Michael Gilbert Ward (Respondent), in person

**COSTS ENDORSEMENT**

[1] As reflected in my judgment in this action dated February 6, 2007, the wife, Ms Somerton, was substantially successful in all of her claims. Mr. Ward has been self-represented throughout and has not cooperated or met his disclosure responsibilities. I note and agree with paragraph 8 of Ms Somerton's submission on costs in which she states:

To obtain this successful result, the wife has necessarily incurred legal fees over approximately two years as set out in the Bill of Costs, and Accounting Ledger attached. In addition to the preparation and attendance at trial, serving and filing the Trial Record, Document Brief, and Factum, there were 2 case conferences, and a settlement conference, with Briefs served and filed for all by the applicant and none by the respondent, and substantial ongoing services throughout largely in fruitless pursuit of disclosure and cooperation by the respondent.

[2] Ms Somerton's counsel, Mr. Fraser, billed at a reasonable rate of \$260/hour for his services. His services for the period January 11, 2005 – March 5, 2007 together with counsel fee for 1.5 trial days result in total costs claimed at \$30,000 inclusive of disbursement and GST, on a substantial indemnity basis. I consider this *quantum* and scale of costs to be appropriate in all the circumstances.

- 2 -

[3] I decline to award costs in reference to Ms Somerton's participation in the collaborative family law process.

[4] The costs awarded herein will be added to the child support awarded under my judgment and enforced through the Office of the Family Responsibility.



Mr. Justice Charles T. Hackland

**DATE:** May 9, 2007

**COURT FILE NO.:** 344/05  
**DATE:** By Written Submissions

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** CORINNE ERMA SOMERTON  
(Applicant) v. MICHAEL GILBERT  
WARD (Respondent)

**BEFORE:** Mr. Justice Charles T. Hackland

**COUNSEL:** Graeme B. Fraser, for the Applicant

Michael Gilbert Ward (Respondent),  
in person

---

**COSTS ENDORSEMENT**

---

Mr. Justice Charles T. Hackland

**DATE:** May 9, 2007

COURT FILE NO.: 344/05  
DATE: 2011/11/24

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Corinne Erma Ward	)	Graeme B. Fraser, for the Applicant
	)	
	)	
	)	Applicant
	)	
- and -	)	
	)	
Michael Gilbert Ward	)	In person
	)	
	)	
	)	Respondent
	)	
	)	
	)	HEARD: November 22, 2011

RULING ON MOTION

Quigley, J.

[1] There are two issues before the court on this file.

[2] Firstly, a motion by the Respondent for a variation of an order by Hackland, J., dated February 6<sup>th</sup>, 2007.

[3] Secondly, a motion by the Applicant for clarification of a vesting order made by Justice Charles T. Hackland, dated February 6<sup>th</sup>, 2007, namely, to make such vesting order effective as of the date of the parties' separation, namely August 9<sup>th</sup>, 2004.

Background

[4] In Hackland, J's comprehensive decision of February 6<sup>th</sup>, 2007, he outlined the circumstances of a lengthy combination common-law and marriage that dated from 1981 until

- 2 -

August of 2004. The relationship produced two children, a boy and girl. At the time of the trial, the boy was 15 and the girl was 13.

[5] The learned judge found the evidence of the husband's income capacity to be unsatisfactory including his "lack of cooperation, lack of necessary disclosure and his lack of record-keeping." As a result, the court imputed income to the husband in the amount of \$55,000 per year.

[6] The court further ordered an unequal division of spouses' net family assets and transferred the husband's interest in the matrimonial home and West Carleton lot be vested to the wife and ordered "an appropriate vesting order to issue to that effect."

[7] The court further went on to dismiss the applicant wife's request for a lump sum spousal support award.

[8] The Applicant has been unable to register the vesting order in view of the outstanding Ontario Provincial Ministry of Revenue (Retail Sales Tax) liens which were filed subsequent to the separation, even though some of them may well have been incurred prior to the separation. In any event, the liens relate entirely to the operation of the Respondent's business in which the Applicant had no interest. The liens have a current outstanding value in excess of \$100,000, with interest and penalties.

[9] Counsel for the Applicant submits that the court has jurisdiction to make such an order pursuant to Section 9(1)(d) of the *Family Law Act* and Section 100 of the *Courts of Justice Act*.

[10] In support of this motion, counsel for the Applicant brought to the attention of the court specifically two decisions of the Ontario Court of Appeal, namely, *Regal Constellation Hotel Ltd., Re* [2004], 188 O.A.C. 97 (OCA), located at Tab 1 of the Applicant's Case Law and Legislation Brief; and *Stevens v. Stevens* [2006] 214 O.A.C. 201 (OCA), located at Tab 2 of the said Brief.

[11] I am satisfied that Hackland, J's order on the unequal division of family assets and the vesting of the matrimonial home and lot in the Applicant's name can only be construed as a vesting order to be dated August 9<sup>th</sup>, 2004, which was the date of separation.

[12] Net family property by statute is calculated as of the date of separation.

[13] At the conclusion of the Applicant's motion, the parties settled the variation application of the Respondent on consent, on the following terms and conditions:

The Respondent's outstanding arrears on child support and costs shall be fixed at \$40,000;

The Respondent shall pay, commencing December 1<sup>st</sup>, 2011, shall commence payments of \$400 per month, comprising \$300 child support and Section 7 expenses for his daughter and \$100 on the arrears.

- 3 -

The parties further agreed, and it shall become an order of this court, that any default in his payments by the Respondent, the arrears shall revert to the original \$65,000.

[14] Therefore, an order to go as follows:

1. Vesting order shall issue, vesting the aforementioned properties in the name of the Applicant, Corinne Erma Ward, free and clear of all encumbrances as of August 9, 2004.
2. Arrears of child support and costs owing by the Respondent to the Applicant shall be fixed at \$40,000 as of November 22, 2011.
3. The Respondent shall pay ongoing child support to the Applicant in the amount of \$300 per month as of December 1, 2011. He shall pay an additional \$100 per month on arrears, also commencing December 1, 2011.

[15] If the Respondent defaults on these payments, the arrears shall revert to the amount owing as of November 22, 2011.

[16] I shall remain seized of this issue pending the registration of the vesting order.

  
MR. JUSTICE MICHAEL J. QUIGLEY

Released: November 24, 2011

**COURT FILE NO.:** 344/05  
**DATE:** 2011/11/24

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Corinne Erma Ward

- and -

Michael Gilbert Ward

---

**RULING ON MOTION**

---

Quigley, J.

**Released:** November 24, 2011