Date: 20021001
Docket: CA 178479

NOVA SCOTIA COURT OF APPEAL
[Cite as: *McNeil v. McNeil*, 2002 NSCA 116]

Cromwell, Chipman, Hamilton, JJ.A.

BETWEEN:

PETER J. McNEIL
Appellant

- and -

KATHRYN ANN McNEIL

Respondent

REASONS FOR JUDGMENT

Counsel: Darlene MacRury for the appellant
Elaine Gibney and Christopher Conohan for the respondent

Appeal Heard: October 1, 2002

Judgment Delivered: October 1, 2002

THE COURT: Appeal dismissed per oral reasons for judgment of Hamilton, J.A.; Chipman and Cromwell, JJ.A. concurring.

HAMILTON, J.A.: (Orally)

[1] This is an appeal from the December 15, 2001 decision of Justice J. Vernon MacDonald of the Supreme Court in which he ordered an unequal division of the matrimonial assets of the parties on their divorce.

[2] The parties lived together for approximately twelve years. They have three children aged 14, 13 and 11 who have lived in the matrimonial home with the respondent since separation. The respondent has a fourth child who is 6 and also lives with her. By agreement this child was not included as a child of the marriage. The marriage was a traditional one in the sense that the appellant was the sole breadwinner and the respondent stayed home and looked after the children. The respondent had no source of income following separation and relied on social assistance for 1½ years until she could upgrade her education and get a job.

[3] The parties' matrimonial assets are modest. They consist of the matrimonial home, furniture, a car which was sold for $700 shortly after separation and the money given to the respondent, and an RRSP of $1,572 which the appellant cashed in and kept. At trial the appellant sought division only of the matrimonial home.

[4] The trial judge valued the matrimonial home at $15,000. Counsel for the appellant argued the trial judge erred in valuing the matrimonial home at $15,000 rather than $26,000. She pointed to the 2001 assessment of the home, the price the respondent's uncle indicated someone was interested in buying it for when the parties entered into the rent to own agreement with him in 1992 and the total amount the parties paid to the respondent's uncle under the rent to own agreement.

[5] This Court is not satisfied the trial judge erred in determining the value of the home. The suggestion that the total payments made under the rent to own arrangement reflects the better value does not take into account the interest component in the payments made over 6½ years or the change in the condition of the home over the time the parties lived there. The argument that the assessed value is the better value is not conclusive because the assessment in the record is for 2001, with a base date of January 1, 1999, and the trial judge determined the valuation date should be the date of separation, that is July, 1997, which was not unreasonable given the evidence of the substantial work done on the home by the respondent since separation. The respondent provided receipts totalling over $11,000 for materials alone used to repair and improve the home since separation.

On the record, this court is not satisfied the trial judge erred in determining the value of the home.

[6] The trial judge also determined that an equal division of the home would be unfair and unconscionable and that the appellant should not have any interest in the matrimonial home. In addition the trial judge ordered $2,000 costs payable by the appellant to the respondent.

[7] The grounds of appeal as stated by the appellant are:

> i) **THAT** the Learned Trial Judge erred in fact and in law in awarding an unequal division of matrimonial property in favour of the Respondent herein.
>
> ii) **THAT** the Learned Trial Judge erred in fact and in law in awarding costs to the Respondent.
>
> iii) **THAT** the Learned Trial Judge erred in fact and in law in awarding costs in the amount of $2,000 to the Respondent.

[8] With respect to the first ground of appeal the court is satisfied the trial judge did not err in determining that an equal division of the matrimonial home would be unfair and unconscionable.

[9] As set out in **Donald v. Donald** (1991), 103 N.S.R. (2d) 322 (N.S.S.C.A.D.) at para. 20, the court is limited by s.13 of the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 as amended, as to what it can consider when determining how matrimonial assets are to be divided:

> In **Archibald v. Archibald** (1981), 48 N.S.R. (2d) 361, 92 A.P.R. 361 (T.D.), Hallett, J., stated that the court is limited to considering the factors enumerated in s. 13 in determining in the first instance if it would be unfair or unconscionable to simply divide matrimonial assets equally, and then, applying the same factors determine what division thereof would be fair and conscionable. I agree. In examining the factors set out in s. 13 to see if one or more of them should displace the entitlement of equality declared in the preamble of the **Act**, a court requires strong evidence showing that in all the circumstances an equal division would clearly be unfair and unconscionable on a broad view of all the relevant factors: **Harwood v. Thomas** (1981), 45 N.S.R. (2d) 414; 86 A.P.R. 414 (C.A.), at 417 per MacKeigan, J.A., Thus the onus rested upon the respondent to produce this strong evidence.

[10] Section 13 provides as follows:

> [13] Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
>
> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
>
> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
>
> (c) a marriage contract or separation agreement between the spouses;
>
> (d) the length of time that the spouses have cohabited with each other during their marriage;
>
> (e) the date and manner of acquisition of the assets;
>
> (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
>
> (g) the contribution by one spouse to the education or career potential of the other spouse;
>
> (h) the needs of a child who has not attained the age of majority;
>
> (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
>
> (j) whether the value of the assets substantially appreciated during the marriage;

> (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
>
> (l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;
>
> (m) all taxation consequences of the division of matrimonial assets.

[11] While this court does not necessarily endorse all of the reasons given by the trial judge for ordering an unequal division, the findings of fact made by the trial judge in light of the provisions of s.13 overwhelmingly support his decision that an equal division would be unfair and unconscionable. This is one of the rare cases anticipated in **Bennett v. Bennett** (1992),112 N. S. R. (2d) 79 (N.S.S.C.A.D.).

[12] The trial judge found the respondent had paid, without any contribution from the appellant, matrimonial debts relating to the home in excess of $6,000, despite her minimal income compared to the appellant's $42,000 annual income. He also found that the respondent had paid the balance of the rent to own payments after separation, totaling $5,000, without contribution from the appellant. The evidence also indicated that while they were living together the respondent supported the appellant's decision to upgrade his education to get a better job and that she was the primary care-giver of the children throughout the marriage.

[13] With respect to the second and third grounds of appeal, again without endorsing all the reasons given by the trial judge, this Court is also not satisfied the trial judge erred in awarding costs to the respondent in the amount of $2000. While the amount of $2000 for a one day trial may be on the high side, this Court is satisfied it does not amount to a penalty. Trial judge's have considerable discretion to determine whether costs should be awarded and, if so, what the amount will be.

[14] Accordingly the appeal is dismissed with costs payable by the appellant to the respondent in the amount of $500 plus disbursements.

Hamilton, J.A.

Concurred in:

Chipman, J.A.
Cromwell, J.A.