NOVA SCOTIA COURT OF APPEAL
[**Citation:** *MacPhail v. MacPhail*, 2002 NSCA 159]

Date: 20021210
Docket: CA 179475
Registry: Halifax

Between:

Frank Raymond MacPhail

Appellant

v.

Deborah Gail MacPhail

Respondent

Judge(s):	Bateman, Cromwell and Saunders, JJ.A.
Appeal Heard:	November 28, 2002, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Cromwell, J.A.; Bateman and Saunders, JJ.A. concurring.
Counsel:	Wayne J. MacMillan, for the appellant Lisa B. Fraser-Hill, for the respondent

Reasons for judgment:

[1] The appellant, the former husband of the respondent, appeals a corollary relief judgment of Gruchy, J. in the Supreme Court. The appeal challenges the judge's finding that certain real property, known to the parties as the "MacAulay lands", was not a matrimonial asset and his refusal to order "retroactive" child support for two adult children.

[2] The parties were married in June of 1974 and separated in July of 1995. In 1991, the respondent's mother, Mrs. MacAulay, conveyed the MacAulay lands to herself, the appellant and the respondent as joint tenants. The appellant was not aware of this conveyance at the time. Apparently the conveyance was made after Mrs. MacAulay's husband had passed away and at a time when she was in frail health. The judge accepted that the purpose of the conveyance was to avoid probate fees on her death. The appellant and the respondent paid nothing for this conveyance, never occupied or exercised ownership in any fashion over these lands and did not contribute to the cost of maintaining them.

[3] At some point, the appellant became aware of the conveyance. However, in June of 2001 he quit claimed his interest in the lands, apparently in an effort to reassure Mrs. MacAulay that her home and property were secure notwithstanding the breakdown of the marriage. Mrs. MacAulay remained alive at the time of trial.

[4] The judge found that the MacAulay lands were not a matrimonial asset. The appellant submits that the judge erred in reaching this conclusion. I agree. The judge did not relate his findings to s. 4 of the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275. Neither counsel nor I can find anything in that section which would support the judge's conclusion.

[5] It was argued before the judge as an alternative submission that, if the MacAulay lands were a matrimonial asset, an unequal division excluding the appellant from sharing in them would be appropriate. In light of his conclusion that the property was not a matrimonial asset, the judge did not address this submission. However, there is no dispute that the record is adequate to permit this Court to consider whether it should exercise the discretion which the judge had under s. 13 of the **Act** to order an unequal division.

[6] There must be clear and strong evidence to justify an unequal division: see, for example, **Donald v. Donald** (1991), 103 N.S.R. (2d) 322; N.S.J. No. 214 (Q.L.) (C.A.). However, in my view, on the record before the judge, such evidence was present here and this is an obvious case for an unequal division excluding the appellant from sharing in these lands pursuant to s. 13 (e) of the **Act**. The lands were acquired without cost to the appellant or his former wife from her mother. The former spouses did not use the lands for their benefit or the benefit of their children and did not contribute in any way to their upkeep or maintenance. The appellant's quit claim after separation, while not determinative, is consistent with the conclusion that section 13(e) should be applied with respect to the property.

[7] It follows that while I think the judge erred in finding that these lands were not a matrimonial asset within the meaning of s. 4 of the **Act**, I would give effect to the respondent's alternative argument and find that it would be unfair and unconscionable for the appellant to share in these lands taking into account the date and manner of their acquisition. I would order an unequal division to the extent of excluding him from any interest in them. Thus, I would reach the same result as did the trial judge, although for different reasons and based on a different legal conclusion.

[8] The second issue raised by the appellant concerns child support. At separation, the couple's two children were 18 and 16. Both continued initially to reside with the appellant in the matrimonial home. Both children obtained university degrees away from home and ceased to be children of the marriage in 1999 and 2000, respectively.

[9] The judge found that the former spouses had an informal agreement that the respondent would not seek spousal support or disturb his and the children's occupation and use of the matrimonial home if the appellant would look after the children's education. While the appellant does not accept this finding, there is no doubt that the parties acted consistently with such an understanding. After separation, the respondent upgraded her education, struggling financially at first on employment insurance and social assistance. She completed two university degrees and started a career in which her earnings are now comparable to, or exceed, the appellant's. She did not claim spousal support even while on social assistance. The appellant supported the children and substantially assisted them with the very considerable costs of their education.

[10] By 1999, the respondent had secured employment with income comparable to the appellant's. The appellant had up to date financial disclosure from the respondent late in that year. But it was only in early 2001, after both children were no longer children of the marriage, that the appellant formally sought "retroactive" child support for the period from separation until the dates in 1999 and 2000 by which the children had become independent. As noted, the judge declined to order such support.

[11] The awarding of "retroactive" child support is a discretionary matter: see **Reardon v. Smith**, (1999), 180 N.S.R. (2d) 339; N.S.J. No. 403 (Q.L.)(C.A.). A leading authority on the exercise of this discretion is found in the British Columbia Court of Appeal decision in **S.(L.) v. P.(E.)** (1999), 175 D.L.R. (4th) 423; B.C.J. No. 1451 (Q.L.) (B.C.C.A.) which has been referred to with approval by the Alberta Court of Appeal in **Ennis v. Ennis** (2000), 5 R.F.L. (5th) 302; A.J. No. 75 (Q.L.) at para. 28 and by this Court in **Rafuse v . Conrad** (2002), 205 N.S.R. (2d) 46; N.S.J. No. 208 (Q.L.). It is exceptional to award support before the date of application for it. In exercising the discretion to do so, relevant considerations include, but are not limited to, need on the part of the children; whether the award will benefit the children; whether there has been blameworthy conduct on the part of the non-paying spouse such as, for example, failing to disclose income; whether there is a reasonable excuse for the delay in applying for support; and whether, although formal application has not been made, there has been notice that child support will be sought.

[12] Several of these factors strongly support the judge's refusal to exercise his discretion in favour of "retroactive" child support here. The conduct of the parties supports the respondent's position and the judge's finding that there was an informal understanding between the parties. This was to the effect that the respondent would not seek spousal support and would not disturb the appellant's and the children's possession and use of the matrimonial home and contents while the appellant would not seek child support. This was not a formal agreement and was not necessarily an arrangement which a court would have sanctioned at the time. However, it was not an unreasonable working arrangement in the interests of the children in all of the circumstances and the parties acted in conformity with it. The children were well provided for and the respondent quickly became completely self-sufficient. There was a significant delay by the appellant in formally asserting a claim for child support. The appellant did not formally seek child support until more than a year after he had the respondent's updated financial

information showing her improved financial situation and after the children were no longer dependent. The appellant concedes that a “retroactive” child support order in this case will not directly benefit the children at this point. These factors provide a proper basis for the judge’s decision.

[13] I would conclude, therefore, that the judge did not err in refusing to exercise his discretion to order child support in the circumstances of this case.

[14] I would dismiss the appeal with costs fixed at $500 inclusive of disbursements.

Cromwell, J.A.

Concurred in:
Bateman, J.A.
Saunders, J.A.