Date: 20010226
Docket: 165352

NOVA SCOTIA COURT OF APPEAL

[Cite as: Davidson v. Davidson, 2001 NSCA 41]

Bateman, Hallett and Oland, JJ.A.

BETWEEN:

MURIELLE ANDREE DAVIDSON

Appellant

- and -

WILLIAM PARKER DAVIDSON

Respondent

REASONS FOR JUDGMENT

Counsel:	Mark T. Knox for the appellant Robert Ritchie Wheeler for the respondent
Appeal Heard:	February 9, 2001
Judgment Delivered:	February 26, 2001
THE COURT:	Appeal allowed in part per reasons for judgment of Hallett, J.A.; Bateman and Oland, JJ.A. concurring.

HALLETT, J.A.:

[1] This is an appeal from an oral decision of Saunders, J. (as he then was) rendered in divorce and related matrimonial property proceedings. Three aspects of his decision are challenged. The appellant asserts that the trial judge erred in calculating the value of the respondent's severance pay and accumulated leave that he had earned as a member of the Canadian Armed Forces, and further, that the trial judge erred "in calculating the amount contributed by each of the parties towards the matrimonial obligations during separation."

[2] The respondent enlisted in the armed forces on April 22nd, 1976. The parties were married on December 27th, 1980. The parties agreed that, for the purposes of the proceedings, their date of separation was April 25th, 1998.

[3] The parties agreed that matrimonial assets would be divided equally. Therefore, the factors set out in s. 13 of the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275, that could justify an unequal division of matrimonial assets do not come into play.

[4] The parties agreed that severance pay was a matrimonial asset.

[5] The trial judge found that the accumulated leave was a matrimonial asset. The classification of these assets as matrimonial is not in issue on this appeal.

SEVERANCE PAY:

[6] In calculating the value of the respondent's severance pay for the purpose of dividing the parties' matrimonial assets equally, the trial judge accepted the calculation method submitted by the respondent's counsel. In so doing he erred as counsel based his calculation on severance pay earned in the period from the date of the marriage to the date of separation rather than from the date of the respondent's enlistment in the armed forces. This was an error of law. Section 4 of the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 includes within the meaning of matrimonial assets all real and personal property acquired by either spouse before or during the marriage, thus, severance pay earned between April 22nd, 1976, the date of enlistment, and December 27th, 1980, the date of the marriage, is a matrimonial asset. Severance pay earned after the date of separation would be excluded (s. 4(1)(g) **Matrimonial Property Act**). It bears noting that apparently, in advocating before the trial judge for the inclusion of the severance pay from the date of enlistment, the appellant did not rely upon s. 4 of the **Matrimonial Property Act**.

[7] The value of the severance pay to which the respondent is entitled for the purpose of calculating the equal division of matrimonial assets is the gross sum earned from April 22nd, 1976 to April 25th, 1998. At trial the parties had agreed that its value as of the date of separation, April 25th, 1998, would be discounted by 33.33 per cent to recognize the income tax consequences to the respondent when he receives the same.

ACCUMULATED LEAVE:

[8] Counsel for the respondent made the same error in calculating the value of the respondent's accumulated leave as he did in calculating the value of the severance pay for the purpose of the equal division of matrimonial assets. The trial judge erred in law in accepting his calculation.

[9] Leave accumulated from April 22nd, 1976 to April 25th, 1998, shall be the basis for calculating the value to the respondent of the accumulated leave for the purpose of equally dividing the matrimonial assets under the **Act**.

[10] The trial judge discounted the accumulated leave by 48.79 per cent accepting the respondent's submission that the respondent's marginal income tax rate when he either receives cash for his accumulated leave or takes paid leave at the time of his retirement would attract tax at that rate. The calculations assume that the respondent would receive all his accumulated leave of $32,537 plus his full annual salary of $53,338 in one calendar year. These were the calculations made by the respondent's counsel, submitted as an exhibit and accepted by the trial judge. A review of the relevant legislation shows that as of the date of the trial, July, 2000, the highest combined federal and Nova Scotia marginal rate of tax payable on taxable income was 45.67 per cent, not 48.97 percent. This rate was made up of a federal tax rate of 29 per cent (Stikeman *Annotated Income Tax Act* (29th ed., 2000)) and the Nova Scotia provincial rate of 16.67 per cent (**An Act Respecting Certain Financial Measures**, S.N.S. 2000, chap. 4, Part II - Income Tax, s. 8 assented to June 8th, 2000, effective January 1, 2000).

[11] The appellant did not assert at trial that 48.97 per cent was not the correct combined marginal rate to apply. The appellant took the position that the accumulated leave should be discounted by 33.3 per cent on the premise that certain decisions of the Nova Scotia Supreme Court have discounted RRSPs at that rate. Other decisions have used different discount rates. The appellant equates accumulated leave with an RRSP. There are differences; the main difference being that an RRSP fund is earning income for the holder while accumulated leave is not.

[12] As of November 22nd, 1999, the respondent had accumulated leave valued at $32,537 calculated from the date of his enlistment. There was no evidence as to the value of the accumulated leave as of the relevant date, April 25th, 1998.

[13] There is a fundamental question, which I do not propose to answer in this appeal because the record is simply not clear enough to make any definitive finding nor were the submissions adequate. The issue is whether or not the discount for income tax should be based solely on using the taxpayer's highest marginal rate rather than a rate equal to the average rate of tax applicable to the taxpayer's entire taxable income or a rule of thumb rate established by practice and endorsed by the judiciary. There was no evidence before the trial judge or before us that there is an accepted practice among family law practitioners as to an appropriate discount rate with respect to valuing accumulated leave for the purpose of dividing matrimonial assets.

[14] There are also contingencies that would have to be taken into account in this case and in all similar cases. For example, whether the paid leave would be received in one calendar year or spread over two years. If the latter, the income of the recipient of the additional income created by the receipt of accumulated leave would likely be reduced in each year and might warrant a lesser discount rate. The respondent's income will be reduced from the current range of $54,000 a year once he retires. We do not know what his pension income will be. On the other hand, he may secure employment that, coupled with his pension, even if paid over two years, would put him in the highest tax bracket. He will also have personal tax credits and other possible tax credits and losses on real estate which will have the effect of reducing his taxable income. We have no idea as to what these are or might be in the year he eventually retires and in the taxation year he takes his accumulated paid leave. We do not know in what year or in what month he will retire.

[15] This is not an appeal in which to make a definitive finding as to what the discount rate should generally be with respect to valuing accumulated leave. It very well may be that a standard discount rate could not be established that would apply in all cases.

[16] The respondent testified that he would take the paid leave by way of monthly income and in that period possibly take training that would improve his employment opportunities when he retired.

[17] While it can be rationally argued that the income derived from his accumulated leave ought to be discounted at the respondent's average rate of

tax payable on his entire taxable income, the trial judge did not reach an irrational conclusion in accepting the evidence and the submissions of the appellant that the value of the respondent's accumulated leave should be discounted by his highest marginal rate, 48.79 per cent, rather than at 33.3 per cent as proposed by the appellant. It is not irrational to suggest that the additional income arising from the receipt of the accumulated leave ought to be discounted at this rate as the evidence supports the finding that the respondent's tax bracket would require that this additional income be taxed at the highest marginal rate paid by residents of Nova Scotia. Nor could the trial judge be faulted for relying on the tax rates counsel presented to him in the absence of any challenge.

[18] Even though the rate of 48.79 per cent presented to the trial judge as the appropriate rate was not correct, it ought to be recognized that the respondent's receipt of the benefit is deferred until his retirement and that fact alone can warrant a discounting over and above the discount that recognizes the effect of income tax on the receipt of this benefit. The appellant, on the other hand, in effect, receives her share of the asset immediately.

[19] Considering the evidence before the trial judge, I am not persuaded that the trial judge erred in finding that the value of the accumulated leave should be discounted by 48.79 per cent.

[20] Assuming accumulated leave is a matrimonial asset, whether it should be discounted by a percentage equal to the recipient taxpayer's highest marginal rate or discounted at a rate that is the average rate of tax payable on the recipient's entire taxable income or discounted at some other rate cannot properly be decided in this appeal.

[21] We do not have the information to make the actual calculations but the result of altering the method of calculating the value of severance pay and accumulated leave for the purpose of dividing matrimonial assets equally will increase the value of the matrimonial assets in the respondent's name and require him to make a further equalization payment to the appellant.

[22] Counsel ought to forthwith obtain the necessary information from the Department of National Defence to make the calculations in accordance with this decision and review the same with counsel for the appellant for the purpose of obtaining the appellant's approval of the calculations. The payment ought to be made within ten (10) days of such approval.

THE THIRD ISSUE: that the trial judge "erred in calculating the amount contributed by each of the parties towards the matrimonial obligations during separation".

[23] With respect to matrimonial debts, Justice Saunders stated:

> Let me turn now to a consideration of matrimonial debts. On balance, I found the documentation assembled and presented by the petitioner [the respondent on appeal], to be far more compelling than the challenges advanced by the respondent. In particular, I am satisfied by the banking correspondence, the receipts and all of the other records presented by Mr. Davidson, that he made the payments he said he did as and when reflected in Mr. Wheeler's tables [counsel for the respondent herein]. Whenever Mr. Davidson's evidence conflicted with that of Mrs. Davidson, I prefer the evidence of Mr. Davidson, the petitioner. I found the respondent's evidence on these points to be vague, uncertain, illegible or otherwise inconclusive and thus, I accept Mr. Wheeler's methodology and results in fixing the make up payment due the parties, for all that is due the respondent from the petitioner, for all of the short falls experienced on the three properties as being the sum of $9,432.84. This sum just stated includes my endorsement of Mr. Wheeler's submission that his client is entitled to enjoy ½ of the respondent's tax refund for 1997, as well as her contribution towards ½ of his tax debt for 1997, with two provisos. First, that none of that debt reflects any repair work not authorized by the respondent, and secondly, that Mr. Davidson is and will be obliged to pay Mrs. Davidson half of the respondent's costs for oil and power in relation to the Lochaber property during their separation.

[24] Immediately after the oral judgment was rendered, counsel for the appellant asked for clarification from the trial judge respecting his finding with respect to the matrimonial debts in the name of the respective parties and for which that party would continue to be responsible pursuant to the judge's ruling.

[25] The appellant's key concern as raised on this appeal and before the trial judge pertained to a Scotiabank line of credit in the name of the appellant only. The trial judge had fixed the amount owing to Scotiabank at $5,124 being the amount the respondent submitted to the trial judge should be recognized as a matrimonial debt of the appellant for the purpose of dividing assets equally. As of the trial date the appellant owed Scotiabank $24,219 on the line of credit. She submitted that this was the amount of the matrimonial debt for which she was responsible and should be given credit. She asserts that this sum should be used in calculating the net financial position of the parties for the purpose of ascertaining which party would be required to make an equalization payment and how much that payment should be. At the date of separation the amount of her indebtedness to

Scotiabank on the line of credit was $20,166. The respondent submitted that, had the appellant not used that account for other purposes, the payments on the line of credit by the respondent would have reduced it to $5,124 at the time of trial. The appellant argued that this indebtedness was not reduced because she was required to write cheques on the account to pay expenses associated with the three properties they owned over the two year period they were separated.

[26] In that part of his decision dealing with the division of matrimonial debts, the trial judge stated:

> I found the respondent's evidence [the evidence of the appellant on appeal] on these points to be vague, uncertain, illegible or otherwise inconclusive and thus, I accept Mr. Wheeler's methodology and results in fixing the make up payment due the parties, ...

[27] Likewise, I have found both the evidence tendered at trial by the appellant and the submissions made to us on behalf of the appellant on the issue of the amount of the appellant's indebtedness on the Scotiabank line of credit for which she claimed she should be given a credit to be vague, uncertain and inconclusive.

[28] I agree with the submission of counsel for the respondent that to accept the position of the appellant on this issue would result in her making a double recovery for her having paid more than her one-half share of the expenses associated with the properties. Were it not for the fact that the respondent recognized that she had paid more than her share of the expenses associated with the properties and that he was prepared to pay and did pay to her the so-called make up payment of $9,432.84 to correct this imbalance her submission would have merit.

[29] Having reviewed the evidence and the submissions of counsel, I am not persuaded that the trial judge significantly misapprehended the evidence nor did he err in result in fixing the amount of the Scotiabank line of credit in the appellant's name for the purpose of the division of assets and sharing of liabilities at $5,124. I would not interfere with his finding on this issue.

[30] I would allow the appeal in part but without costs as success has been divided.

Hallett, J.A.

Concurred in:

Bateman, J.A.
Oland, J.A.