

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Ryan v. Ryan, 2010 NSCA 2

**Date:** 20100119

**Docket:** C.A. 309585

**Registry:** Halifax

**Between:**

Leonard Joseph Ryan

Appellant

v.

Agnes Martha Ryan

Respondent

**Judges:**

Oland, Hamilton, Fichaud, JJ.A.

**Appeal Heard:**

December 8, 2009, in Halifax, Nova Scotia

**Held:**

Appeal dismissed with costs.

**Counsel:**

Kim A. Johnson, for the appellant

M. Jean Beeler, Q.C., for the respondent

**Reasons for judgment:**

[1] Leonard Joseph Ryan appeals two aspects of the March 3, 2009 Corollary Relief Judgment granted by Justice Leslie J. Dellapinna. He argues the judge erred in finding that his then twenty-year old daughter, who was serving her hairdressing apprenticeship and working weekends at Chapters, was a “child of the marriage” until April 2009 and ordering him to pay child support accordingly. He also argues the judge erred by ordering him to pay \$45,000 to Agnes Martha Ryan, his former wife, pursuant to s. 18 of the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275, or alternatively, pursuant to s. 13 of the **Act**.

[2] The judge’s reasons setting out the facts in detail are reported as 2009 NSSC 61, [2009] N.S.J. No. 81. The relevant facts for the purpose of this appeal are that the parties married in 1986, separated in 2006, and have two children who were living with Mrs. Ryan, Patsy, their daughter, and Tyler, their son, who was 16. Mrs. Ryan worked full-time throughout the marriage. Mr. Ryan initially worked on a contract basis (as opposed to a permanent position) to allow himself the freedom to go to Newfoundland where he operates a hunting lodge for ten weeks every fall. In 1998 he began receiving Workers’ Compensation benefits which he supplemented by working in a friend’s business.

[3] With respect to their daughter’s circumstances the judge stated:

[8] Patsy graduated from high school in June of 2007. That September she went to St. Mary's University but didn't like it. Beginning in January 2008 she took a hairstyling course which cost her \$8,250.00. Four thousand of that cost was covered by an RESP that the parties had previously established and the balance she financed by way of a line of credit which was co-signed by her mother. There is now \$5,000.00 owing on that line of credit.

[9] Patsy completed her course in September 2008 and began an apprenticeship program in October. She also works part-time on weekends at Chapters. She will finish her apprenticeship in April or May of this year and if she performs adequately she will likely be given a permanent position where she is now apprenticing.

[4] The judge stated the following with respect to Mr. Ryan's Newfoundland asset, a commercial hunting lodge on 35 acres of land:

[21] Mr. Ryan received the Newfoundland property from his father as a gift by way of a deed on July 30, 1990. Before the property was owned by his father it had been owned by his grandfather.

[22] Before and after acquiring title to the property Mr. Ryan used the property for business purposes. It is from there that he operates a hunting lodge known as Island View Cabins. When he first obtained title to the property there was a small cookhouse and bunkhouse on the property and over the years he has built a new cookhouse and bunkhouse more suited to accommodate his clients.

[23] Each year during the parties' marriage Mr. Ryan has spent approximately ten weeks at the property where he meets with his customers and provides them with guiding services while they fish and hunt on the property. Over and above the cost of the licenses paid by each of his customers Mr. Ryan charges a fee - most recently \$1,200.00 per person. His tax returns show that in most years he has earned a profit.

[5] The judge found that the Newfoundland property was not a matrimonial asset because it was both a gift and a business asset. He found that Mrs. Ryan contributed to Mr. Ryan's Newfoundland asset and concluded she was entitled to compensation for that contribution under s. 18, or alternatively, under s. 13:

[27] Ms. Ryan did, however, invest in [the Newfoundland hunting lodge] both directly and indirectly. Mr. Ryan owns a tractor that he operates on the property which cost approximately \$14,000.00. According to him \$5,000.00 of the purchase price came from the family's savings. According to Ms. Ryan \$9,000.00 of the purchase price came from their savings.

[28] I accept Ms. Ryan's evidence that the contribution was \$9,000.00, half of which, arguably, was her money. It was Ms. Ryan who handled the family's finances and for that reason I find her memory of that purchase more reliable.

[29] In addition to Ms. Ryan's investment in the tractor (which in itself is a business asset) each and every year Mr. Ryan would leave his employment in Halifax beginning in early September until early November to operate his business in Newfoundland. While away from his job in Halifax he received no compensation from his employer and the money that he earned operating his business in Newfoundland, he admitted, never found its way to his family. Rather,

Mr. Ryan either spent that income on himself or reinvested the money back into the property - paying for the construction of the new cookhouse and bunkhouse.

[30] Not only did Mr. Ryan not financially support his family during this ten week period, they were also denied the benefit of whatever assistance Mr. Ryan would normally provide at home - leaving all the household tasks and child care responsibilities to his wife who also had to work full-time at her position as a nurse. Sometimes his absence caused his wife to incur added expense in the form of child care costs because he wasn't home to care for the children while she was at work.

...

[32] Ms. Ryan has satisfied me that she is entitled to compensation pursuant to section 18 of the *Act* from Mr. Ryan for her contribution to the Newfoundland property. She contributed money (from the family account) directly to the purchase of the tractor used on that property and money's worth to the management, maintenance, operation and improvement of the hunting lodge business by assuming sole responsibility for the family's household and the care of the children for over two months each and every year.

[33] Had I not been persuaded to order compensation pursuant to section 18 I would have ordered an unequal division of the matrimonial assets or a division of the Newfoundland property pursuant to section 13 to compensate Ms. Ryan in a similar amount because of her extraordinary contribution to the family which enabled Mr. Ryan to "manage, maintain, operate [and] improve [his] business asset." Her contribution to the family during Mr. Ryan's absence enabled him to operate his business and enhance its value.

[6] The judge determined Mrs. Ryan should receive \$45,000 for her contribution to Mr. Ryan's Newfoundland asset:

[34] The issue then becomes how much compensation should Mr. Ryan be required to pay to Ms. Ryan? The parties have agreed that the value of the Newfoundland property and Mr. Ryan's business is \$170,000.00. There is no evidence of how much that business asset increased in value during the years it has been owned by Mr. Ryan. Common sense suggests that it has increased in value because of the new bunkhouse and cookhouse.

[35] Mr. Ryan's tax returns for the years 2003 to 2007 inclusive show that the business has produced for him a net income (before tax) on average of \$3,729.90

per year exclusive of tips which may have been several hundred dollars more each year.

[36] Had Mr. Ryan continued working at his regular job each year, instead of going to Newfoundland, he could have earned \$400.00 before tax (approximately) each of the ten weeks he was away. His family was therefore denied approximately \$4,000.00 in added income each year (more in the years before his accident).

[37] I have concluded that Ms. Ryan is entitled to compensation from Mr. Ryan in the sum of \$45,000.00. In arriving at that figure I have taken into account the following:

- the length of the marriage and that Mr. Ryan spent approximately ten weeks every year of the marriage operating the lodge;
- when Mr. Ryan acquired title to the property;
- the income that Mr. Ryan could have earned and brought to the household each fall but didn't;
- the income that he did earn from the operation of his business and the fact that none of it was shared with his family;
- Mr. Ryan's Federal and Provincial marginal tax brackets;
- that Ms. Ryan was solely responsible physically and financially for the household and the children approximately 20% of each year while Mr. Ryan was in Newfoundland operating his business;
- Ms. Ryan's contribution to the purchase of the tractor;
- Ms. Ryan's contribution in the form of receiving phone calls from Mr. Ryan's customers each year (averaging approximately 12 calls a year);
- the value of the Newfoundland property;
- in addition to the land itself there are other business assets owned by Mr. Ryan including the tractor referred to earlier as well as other motor vehicles that are used in the operation of the business as well as a bank account used in the operation of the business

which had a balance on the date of separation of over \$13,000.00 with no obvious debts remaining to be paid at that time by the business; and

- the fact that Ms. Ryan previously agreed to an equal sharing of both her pension and Mr. Ryan's pension during their marriage. Had it not been for her agreement I may have been inclined to order an unequal division of her pension with Mr. Ryan receiving less than an equal share.

[7] With respect to child support for their daughter the judge said:

[44] Ms. Ryan also seeks prospective child support. There is no dispute that child support is payable for Tyler but it's Mr. Ryan's position that Patsy is no longer a "child of the marriage" and therefore he should not be required to pay child support for her. Patsy is 20 years old. She graduated from high school and has completed her hairstyling course. Her apprenticeship program will be ending in April or perhaps May of this year. The evidence did not disclose what her total income is from her apprenticeship position and her part-time employment with Chapters but Ms. Ryan's evidence was that she earns minimum wage from her apprenticeship program and slightly more than that from Chapters.

[45] Sub-section 2(1) of the *Divorce Act*, R.S.C. 1985, c. 3 defines a "child of the marriage" as "a child of two spouses or former spouses who, at the material time:

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause to withdraw from their charge or to obtain the necessaries of life."

[46] Sub-section 3(2) of the *Federal Child Support Guidelines* provides:

"Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

(b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child."

[47] I find that once Patsy completes her apprenticeship she will no longer be a "child of the marriage" as defined by the *Divorce Act*. She is now over the age of majority and once she has completed her apprenticeship she will be in a position to withdraw from the charge of her parents. I also find that given her modest income and because she has been paying for her educational expenses without contribution from her father (beyond the RESP), the table amount under the *Guidelines* is appropriate. I therefore order that child support will continue to be paid for Patsy for the months up to and including March, 2009 but will cease thereafter. Commencing April, 2009 Mr. Ryan will pay to Ms. Ryan child support for [Tyler] only. Therefore commencing April 15, 2009 and continuing on the 15th day of each month thereafter Mr. Ryan will pay the sum of \$294.00 per month being table amount for one child based on his annual income of \$33,200.00, until otherwise ordered.

[8] The relevant provisions of the **Act** are:

**12(1)** Where

(a) a petition for divorce is filed;

...

either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

...

**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:

...

(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;**

...

**(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;

...

**18 Where one spouse has contributed work, money or moneys worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order**

(a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefor; or

(b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,

**and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstance.**

(Emphasis added)

[9] This Court is deferential to trial judges' decisions dealing with child support and division of property, **Lace v. Gray**, 2009 NSCA 26:

[12] Recently in **Ezurike v. Ezurike**, 2008 NSCA 82, Bateman J.A., for the court, confirmed that this court is very deferential to trial judge's decisions involving family support and property issues:



[6] The standard of review on corollary relief appeals was summarized by Cromwell, J.A. for this Court in **McLennan v. McLennan**, 2003 NSCA 9, 212 N.S.R. (2d) 116; [2003] N.S.J. No. 15 (Q.L.):

[9] In both support and division of property cases, a deferential standard of appellate review has been adopted: **Corkum v. Corkum** (1989), 20 R.F.L. (3d) 197 (N.S.C.A.); **MacIsaac v. MacIsaac** (1996), 150 N.S.R. (2d) 321; 436 A.P.R. 321 (C.A.); **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47; 461 A.P.R. 47 (C.A.). The determination of support and division of property requires the exercise of judicial discretion. Provided that the judge of first instance applies correct principles and does not make a palpable and overriding error of fact, the exercise of such discretion will not be interfered with on appeal unless its result is so clearly wrong as to amount to an injustice: **Heinemann v. Heinemann** (1989), 91 N.S.R. (2d) 136; 231 A.P.R. 136 (C.A.) at 162; **Leblanc v. Leblanc**, [1988] 1 S.C.R. 217; 81 N.R. 299 at 223-24; **Elsom v. Elsom**, [1989] 1 S.C.R. 1367; 96 N.R. 165, at 1374-77; **Hickey v. Hickey**, [1999] 2 S.C.R. 518; 240 N.R. 312; 138 Man. R. (2d) 40; 202 W.A.C. 40 at paras. 10-13.

[10] With respect to Mr. Ryan’s argument that the judge erred in finding that his daughter continued to be a “child of the marriage” until April 2009, little needs to be said. The judge applied the correct principles of law, did not make a palpable and overriding error of fact, and the result is not so clearly wrong as to amount to an injustice. I would dismiss this ground of appeal.

[11] With respect to Mr. Ryan’s argument that the judge erred in finding that Mrs. Ryan was entitled to compensation pursuant to s. 18 of the **Act** for her contribution to his Newfoundland business, I am satisfied Mr. Ryan is correct. The judge erred by applying an incorrect principle of law when he took into account Mrs. Ryan’s assumption of housekeeping, child care and other domestic responsibilities each year when Mr. Ryan was in Newfoundland running his business, in reaching his conclusion that Mrs. Ryan was entitled to compensation under s. 18.

[12] The final words in s. 18 indicate that the determination and assessment of the contribution to be made to the other spouse from a business under that section is to be made “without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the

circumstance.” These words, together with the fact that s. 13(f) specifically provides that the effect of the assumption by one spouse of child care and household responsibilities for the family on the ability of the other spouse to manage, maintain, operate or improve a business asset is to be taken into account under s. 13 and that s. 13(i) specifically provides that the respective contributions of each spouse to the marriage is to be taken into account under s. 13, satisfy me that the Legislature did not intend that such an assumption of responsibilities is also to be considered under s. 18, under the guise of a contribution of “money’s worth ... in respect of the management, maintenance, operation or improvement of a business asset of the other spouse”, as the judge did.

[13] The case law supports this interpretation. The decision in **Young v. Young**, 2003 NSCA 63, speaks generally to the relationship between sections 13 and 18:

[14] Sections 13 and 18 of the **Act** are conceptually distinct. Section 13 permits, in limited circumstances, an unequal division of matrimonial assets or a division of an asset which is not matrimonial (see ¶ 11 above). Section 18 reflects a different approach to the division of business assets: ...

[15] There is no presumption that business assets be divided equally, or at all. Under s. 18, the division of a business asset is made solely in accordance with the contribution of the non-owning spouse to the business asset, ignoring the relationship of the parties. In contrast, the division of matrimonial assets is *prima facie* equal, with unequal division permitted only in limited circumstances. The inquiry under s. 13 is broader than a straight forward measuring of contribution. The predominant concept under the **Act** is the recognition of marriage as a partnership with each party contributing in different ways. A weighing of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Since the introduction of the **Act**, it has been repeatedly stressed by this Court, that matrimonial assets will be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable. ...

[14] In **Todd v. Todd**, [1995] N.S.J. No. 399 the court in paragraph 28 specifically stated that contribution to a spouse’s business via child care and household responsibility was not an appropriate factor to be considered under s. 18, and that s. 13 should be used for this purpose.

[15] The parties did not provide and I have been unable to find any case where a spouse’s assumption of responsibility for the family household and child care was

found to fall under the category of “money’s worth” in s. 18. Where a claim was made by a spouse for compensation for child care and responsibility for the family’s household, this was done by dividing the non-matrimonial asset under s. 13, rather than under s. 18. The cases indicate that where applications for division of a business asset are made under both sections, indirect contributions to the asset (such as assumption of child care and responsibility for the household) are properly considered under s. 13(f), while direct contributions to the asset (such as bookkeeping) are properly considered under s. 18; see for example **Matthews v. Matthews** (1990), 96 N.S.R. (2d) 376 (S.C.), that point upheld on appeal (1991), 104 N.S.R. (2d) 140 (C.A.), **MacDonald v. MacDonald**, 2007 NSSC 174, **Bennett v. Bennett**, [1992] N.S.J. No. 188 (C.A.), **O’Regan v. O’Regan**, 2009 NSSC 181, and **Grant v. Grant**, 2001 NSSF 13 at paras. 120-126.

[16] While I am satisfied the judge erred in awarding Mrs. Ryan compensation under s. 18, I am satisfied he did not err in his alternate conclusion set out in paragraph 33 of his decision, that she was entitled to an unequal division of matrimonial assets or a division of the Newfoundland business pursuant to s. 13 to compensate her for her extraordinary contribution to the family which enabled Mr. Ryan to manage, maintain, operate and improve his business asset. Without her contribution to the running of the household and her child care during the ten weeks the appellant spent Newfoundland each year, Mr. Ryan would have been unable to run his business.

[17] In reaching his alternate conclusion that Mrs. Ryan was entitled to compensation under s. 13, and in determining that the appropriate amount of compensation to be paid to Mrs. Ryan was \$45,000, the judge applied the correct principles of law, did not make a palpable and overriding error of fact, and the result is not so clearly wrong as to amount to an injustice.

[18] Accordingly, I would dismiss the appeal and order Mr. Ryan to pay costs including disbursements to Mrs. Ryan in the amount of \$4,000.

[19] Given the result of the appeal, there is no need for us to consider the issues raised in Mrs. Ryan’s notice of contention.

Hamilton, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.