

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Morash v. Morash, 2003 NSSC 63

Date: 20021230
Docket: 1207-002187
Registry: Truro

Between:

Carol Morash

Petitioner

v.

Frederick Morash

Respondent

DECISION

Judge: The Honourable Justice J. E. Scanlan

Heard: January 29 & 30, 2003, in Truro, Nova Scotia

Written Decision: March 19, 2003

Counsel: Ms. Lynn Reiersen, Solicitor for the Petitioner
Mr. Lloyd Berliner, Solicitor for the Respondent

By the Court:

- [1] As I will outline in greater detail, the main unresolved issues in this proceeding are who will retain the cottage property and what portion of the Respondent's pension and employment income the Petitioner is entitled to.
- [2] Carol Morash and Frederick Douglas Morash were married on August 15, 1970. Cohabitation ceased on May 7, 2001. There were two children borne of the relationship but there are no children of the marriage at this point in time. Both of the children are now adults.
- [3] As regards the divorce itself I am satisfied as to the fact, and I have already ruled, that there is no possibility of reconciliation. I am satisfied the grounds for the divorce and all jurisdictional matters have been proven. I am satisfied it is appropriate that a divorce shall issue. I am prepared to sign a divorce order.
- [4] This is a rather lengthy marriage by most standards. It was what one could define as a traditional marriage. Mr. Morash was the major bread winner for this family and Mrs. Morash stayed at home and raised the children. I say that occurred for the most part. Mrs. Morash did have some part-time work and some intermittent work early on in the marriage prior to the children being born and some work after the children were born. As I have stated Mr. Morash was the major bread winner. I would say as well, that

these parties have benefited substantially from the marriage and from the roles that each of them have played during the marriage. Not only have they raised two children but, from a financial perspective, both parties leave this marriage in relatively good financial shape. A reference was made by Mr. Berliner to the assets each of the parties will have following the final division of assets. Each of them have, in addition to the pension benefits, assets worth approximately 1.46 million dollars in their respective names. This does not include the cottage. As I have indicated the parties have done very well in terms of the marriage, the roles that each of them assumed and in terms of the career that Mr. Morash was able to pursue as a result of the responsibilities assumed by Mrs. Morash during the marriage.

[5] It is a credit to the parties and to counsel that the major issues, including division of most assets and valuation of assets have been resolved as between the parties. There were substantial negotiations no doubt that led to the division of major stock portfolios, RRSP's and life insurance. There were also agreements as to cash surrender values on many items including bank accounts and GIC's. There was a consent to the sale of the matrimonial home and agreements leading to a division of a vast majority of the assets. In addition there have been agreements dealing with smaller

items including some of the contents of the cottage. There remains some dispute as regards the contents of the cottage wherein Mr. Morash is saying if he gets to keep the cottage he wants to keep most of the contents other than those which he has agreed to convey to Mrs. Morash.

- [6] The two main areas of contention are; one who should retain ownership of a cottage the couple owned at Bass River. When I say cottage I am including a lot of approximately three acres which is included with the cottage lot. By consent the parties have backed out a one acre lot which was and is intended to be conveyed to Mr. Morash's sister. I am really just dealing with the remaining three acres although I will be ordering quit claim deeds to tidy up title on that other part as well. The second contested issue relates to division of pension. Mrs. Morash takes the position that she is entitled to a division of pension for the entire period of the marriage plus pension benefits earned prior to the marriage and post separation up to this date. In addition, there is a rather unique feature in this case wherein I am asked to deal with issues related to monies paid to Mr. Morash by his former employer post separation. Mr. Morash had stopped his work with his employer, Island Tel/Aliant prior to the separation but continued to receive an income from that company for some three and one half years post work (after he stopped

doing the job that he was doing formerly). Most of that period was post separation. The monies I am asked to divide are not the salary amounts but they are bonus amounts of \$54,000.00 per annum that were paid to Mr. Morash up to and including December 31, 2002. The Court does not have any information and is not prepared to speculate on whether or not he will receive any bonus amounts for the additional one month or so in 2003.

- [7] I want to first deal with the issue of the cottage. Mrs. Morash's position was that either she gets to keep the entire cottage property or that she keeps a back portion of the cottage property at Bass River for herself. She referred to the fact she has a very substantial attachment to the Bass River area and, more specifically, a very substantial attachment to that specific property. She referred to the fact that shortly after she and Mr. Morash started seeing one another they started going to the Bass River area. They first went to Mr. Morash's parents cottage which is adjacent to the disputed cottage property. When they acquired their own cottage lot, she indicated she and the children would go there throughout most of the summer. In fact she suggested that she was spending more time at the cottage than Mr. Morash was.

[8] I am satisfied it is not in the interest of either of these parties for them to continue to occupy the cottage by sharing it. I am satisfied there has been enough animosity in this case wherein both parties would benefit from a clean break in spite of what Mrs. Morash says.

[9] I note there was an initial application before this Court wherein Mrs. Morash was seeking exclusive possession of the matrimonial home and that order was granted. In addition, there was an earlier order wherein Mr. Morash was asking that he have exclusive possession of the cottage property and that too was granted. That is not a factor which factors heavily in my decision as to who should now have the cottage property. I refer only to those earlier applications to highlight the rancour that existed then and still exists to a large part as between these parties. I am satisfied to put Mrs. Morash in the immediate vicinity of Mr. Morash by having her some few hundred feet behind his cottage, which he too enjoys, would not be in his best interest in spite of what Mrs. Morash says she would be prepared to do. It is my intention, after considering all of the evidence, to order that Mr. Morash will be entitled to the cottage property in its entirety. That is the four acre lot which will be deeded by quit claim deed to Mr. Morash. He

can then deal with his sister as regards the required subdivision to deed that one acre property or whatever it turns out to be to his sister Claire.

- [10] In saying this I am satisfied that I must take into account the very substantial connection that Mr. Morash has to that property. It was Mr. Morash's family that was there prior to Mrs. Morash ever seeing or knowing Mr. Morash. He started going to that area when his father first rented a property as early as 1955 in the vicinity. His parents were eventually able to purchase a small lot from the Vance family and then the family acquired a larger lot. It was several years later before Mr. and Mrs. Morash were able to acquire the initial cottage lot. They kept adding to the property throughout the years. There was a continuous presence by Frederick Morash's parents and siblings in the immediate vicinity. His family continues to reside there. Mr. Morash even goes so far as to note that there is something of a memorial for his mother on the lot immediately adjacent to the disputed lot. In addition Mr. Morash, as does Mrs. Morash, has many friends in the immediate vicinity. These friends include the Larkins, the Butlers and the Tuckers. I do not try and qualify the extent of those friendships. I doubt one could say those friendships can be measured so that Mrs. Morash or Mr. Morash could say they have a superior relationship with those neighbours. I am satisfied

they both have good relationships with those neighbours. I am satisfied, in terms of his community and his family, Mr. Morash has roots that are at least as extensive as Mrs. Morash. The fact that Mr. Morash grew up in Great Village some few minutes drive away from there and has come to know that as home since birth basically impresses me in finally determining that he has a slightly greater connection to the area than Mrs. Morash.

[11] I have indicated already it is not appropriate for Mrs. Morash to be living in his back yard. As Mr. Morash has indicated, he intends to marry as soon as possible after the divorce is granted and he can legally be married to Ms. Feener. Ms. Feener is also from that area and I do not expect they will be leaving the community.

[12] When I talk about clean break, I do note through direct evidence of Mrs. Morash the effect that this marriage break-down has had on the children. This is really just an aside because they are not “children of the marriage” as defined within the **Divorce Act**, they are a part of this proceeding in many, many ways. They were part of the marriage and no doubt suffered as a result of the marriage break-down. I cannot see that it would be in the best interest of these children to see an ongoing conflict. It would be in the best

interest of these adult children to recognize that there is a clean break as between the parties and to move on with their lives.

[13] I might comment in passing as well to Mr. and Mrs. Morash, children no matter how old are always children. I would suggest very strongly that you do not in any way attempt to pit one side against the other and gain loyalties of the children so as to gain their favour. It is not going to help the children even though they are 27 and 28 years old. Jennifer is still very dependant in many ways on her parents because of her many disabilities. I think it is important for her to understand that the mother she has known all her life is still her mother with all of those good qualities that, no doubt, she witnessed throughout her childhood and adolescent years. By the same token Mr. Morash is every bit the same human being he was from day one. Nothing about him has changed. Only the relationship, in terms of the parents living together, has changed. I expect that Jennifer needs every bit of reassurance and every bit of help and support she can get from both parents so I say to both of you do not interfere with that in any way, shape, or form.

[14] The same goes with Karen. I understand she lives in the U.K. and that she gets home only on a rare occasion just because of the distance. I think it is

important for her to be allowed to enjoy both parents to the fullest possible extent. Everybody knows in terms of the uncertainties of life that neither one of you are going to live forever nor is she. Do not interfere and rob her of any opportunity she has to know her family and for you to know her and her family. Just be careful, as I have said they are not children anymore but recognize that you are very important in their lives.

[15] Granting the property to Mr. Morash alone does allow the children to recognize that you each have your own lives. As I have said the main determining factor in relation to the cottage property is the substantial connection, which is a lifetime connection and a family connection for Mr. Morash.

[16] In saying that Mrs. Morash, I do not under state the importance of the property to you in any way, shape, or form. It is simply a single property and there is only so much that can be done with it. In this case it is not appropriate to divide it.

[17] In relation to the cottage property there was an appraisal and only one appraisal as to value. It came out at approximately \$52,000.00. Mr. Morash is going to be required to pay one-half of the value of that property over to Mrs. Morash. I will be ordering the signing of that quit claim deed as well.

I do not expect that I will have to deal with the issue by way of ordering a transfer as opposed to ordering the signing of the quit claim deed. I expect that will be the end of that. Certainly if she was not prepared to sign the deed I would simply order a transfer as a result of a Court order as opposed to the deed. I do not want to have to do that.

[18] Mrs. Morash did suggest that she would be prepared to pay \$150,000.00 for the property if she was to be granted title. I am not satisfied that amount is in any way reflective of the market price and it should not be used as a basis for calculating a property division of assets. The division is based on an equal sharing of value. To convey the property at market value is more in line with the intent of the legislation. The fact she was prepared to pay a premium does not affect the market value.

[19] As regards the contents of the cottage, Mr. Morash has agreed to transfer a number of items from within the cottage to Mrs. Morash. I understand, during submissions from Mr. Berliner, that would include not only the cedar chest and the clothing that Mrs. Morash still has in the cottage but also the kitchen table and chairs. I expect that undertaking will be completed. As regards the balance of the contents of the property, Exhibit 9 referred to a list

of contents in the cottage, I see nothing in terms of the evidence before me to indicate they should not stay with the cottage. The valuation, exclusive of the kitchen table, is \$1,100.00. Mr. Morash, since he is getting the cottage, will have to pay Mrs. Morash \$550.00 as regards her share of the cottage contents.

[20] Mr. Morash has indicated that certainly he was not intending to sell the property and, if anything, it would be left to his daughters. I am not going to impose upon him a condition that requires it to be conveyed to his daughters. That is really as between a father and his children. If it is something that is represented by Mr. Morash to Mrs. Morash, and indirectly I assume to the children, one can only anticipate that he probably will do it. It is not a condition of the conveyance.

[21] There was another piece of real property in River Denys in Cape Breton. In terms of substantial connection to that property, I am satisfied that the real substantial connection to that property was Mrs. Morash and her family. It is located in a community where her family has a number of cottages and it is appropriate that she keep that property. Mr. Morash is not suggesting he would want the property. There is an issue arising from the fact that in 1999, prior to the separation, Mrs. Morash signed a deed conveying the

property to herself and her two daughters in joint tenancy. Mr. Morash asserts that he did not know anything about this and that it was his understanding the property was still in Mrs. Morash's name. He now argues he should be entitled to an equal division of that asset based on the total market price. The parties have agreed that lot of land is worth \$6,000.00. The question is; does Mr. Morash get half of the total \$6,000.00 or half of a one-third interest which Mrs. Morash retains? Counsel, for the moment I ignore the technical aspect of a joint tenancy wherein you do not own a third of it, but it is really a survivorship interest. I am satisfied, given the nature of the deed that was prepared, it would not be inconsistent with estate planning objectives for Mrs. Morash to prepare that type of a deed so as to ensure that her daughters would get the property. Mr. Morash says, based on his memory, he cannot be specific in terms of what did or did not transpire as regards estate planning discussions. I accept the evidence of Mrs. Morash. I am satisfied it was a valid transfer for estate planning purposes. As such Mrs. Morash retains a one-third interest. That would be worth approximately \$2,000.00 of which Mr. Morash is entitled to \$1,000.00.

[22] I turn next to the issue of the division of pensions. Certainly the normal way that pensions are treated is to require a division of pension based on the pension benefits as earned during the term of the marriage. Ms. Reiersen, on behalf of Mrs. Morash, is arguing that these pensions should be divided from the date of Mr. Morash's beginning his employment in 1966 through to and including today's date. I am satisfied after reviewing the case law and referring to cases like **Best v. Best**, [1999] 2 S.C.R. 868, Supreme Court of Canada; the case of **Taylor v. Taylor**, (1992), 38 R.F.L. (3d) 313, decided by Justice Goodfellow; and the case of **Simmons v Simmons** [2002] N.S.J. No. 276, decided by Justice Campbell, that the pension benefits as earned prior to the marriage should not be included in the division of pension. There is no good reason to depart from the normal situation wherein pre-marriage pensions are not considered as part of the division. In this case there was no evidence that a common law relationship existed prior to the marriage. There was nothing that Mrs. Morash did in relation to the pension benefits that in any way contributed to that portion. Certainly this is not a case of undue impoverishment wherein if I do not order a division including the pre-marriage calculations that Mrs. Morash is going to be somehow impoverished. Given the relative positions of both parties, as I have said,

there is no good reason to depart from the normal situation. I do take into account the comments of Justice Goodfellow in the case of **Horne v. Horne** (2000) N.S.S.C. 282, but certainly I am not satisfied this is something that would justify departure from the norm in this case.

[23] I now turn to the issue of income earned post-separation. I refer to that as a severance package or golden hand shake for lack of a better term. In view of the maintenance paid post separation and the present agreement to divide the majority of pension income in the future there is no issue as regards division of the monthly pension amount. There was a bonus attached to the severance package. It is that bonus portion that is in issue.

[24] I want to refer in greater detail to the situation as regards Mr. Morash in relation to the monies he earned after he stopped his every day employment. By way of background, I note Mr. Morash worked his way up through the ranks in Maritime Tel and Tel. He had approximately one year at Dalhousie in a Bachelor of Commerce program but did not finish his degree. The money he was earning through the summer periods enticed him so much he found it hard to continue with his formal education. That lack of education does not appear to have negatively impacted his career. I am satisfied his career success is somewhat reflective of his ability. It is also reflective of

the contribution that Mrs. Morash made. Mr. Morash worked his way up through the ranks in Maritime Tel to upper level management in the Maritime Tel organization.

[25] In January, 1991, Mr. Morash had an opportunity to go to work with the PEI Telephone Company. Although he was not promised at the time that he would become the CEO, he had the expectation that he would become the CEO in that company. Within a relatively short time of going to Prince Edward Island he did in fact become CEO for the PEI Telephone Company. He retained that position through to 1999.

[26] There was a merger of a number of provincial telephone companies in the Maritimes to form a company known as Aliant Tel. It soon became apparent that the situation between Mr. Morash and this larger company was not the same as with Island Tel. There was a mutual understanding that it might be best for Mr. Morash to move on. I reference Exhibit #6, tab 10 and 11 which reflect the fact that in 1999 Mr. Morash and Aliant had a parting of the ways. He was no longer required to continue performing the job he normally performed at Island Tel. He was offered a package which included a one year paid leave followed by two years wherein he would receive, among other things, his normal salary.

[27] If I can back up for a moment, for the last several years that Mr. Morash was employed with Island Tel he was earning a performance based bonus. He indicated the base rate on that bonus was \$30,000.00. Because it was performance based it could range from zero to 150 percent of the base rate. In other words he could, based on his performance, get zero dollars or he could get \$45,000.00. Historically he was earning the bonus and there is nothing to indicate, in terms of his employment situation that he would not have continued to earn the bonus had he stayed as an employee of Aliant. Mr. Morash argues that the bonus was still performance based. I heard no evidence other than Mr. Morash on that point. I am satisfied that, based on his evidence, there were things he could do to lose not just the incentive payment but indeed the base salary itself. In that regard I refer to Exhibit #6, tab 10 which indicated:

I am enclosing a copy of a non-competition and confidentiality agreement for your review. It would be our intent that you would sign this document on your departure.

I am satisfied this was a very important aspect of the agreement as between Mr. Morash and Aliant. Mr. Morash agreed not to compete or to take up some other vocation that would compete with Aliant Tel. There is no evidence before the

Court to indicate he had tried to find other work . Looking at an individual who is now 55 years old in the job market in 1999 one would expect if he was going to get into the job market it would be something of the same type of work that he was doing and trained in for those many years. That is the type of work where he would have the most to offer and probably the most to gain. He was giving up something in terms of the non-competition agreement.

[28] In addition, there is nothing before the Court to indicate as to whether there was a survivorship right should he die before the expiry of the three year period. In addition there is nothing in the documents which indicates the bonus was guaranteed. Mr. Morash testified that he could not be sure the bonus would be paid until he actually received the cheque. That uncertainty is indicative of the fact the bonus portion of the money was not vested.

[29] Mr. Morash also indicated that, as part of the agreement between him and Aliant, he was required to speak well of the Company and to speak well of the merger. He said he did make some appearances at company functions after ending his full-time employment. He also referred to the fact he was still on the Board of Directors for some time. That Directorship did not continue but it did last for a period of time. In summary, he was required to do something in return for that severance money.

[30] Ms. Reiersen, on behalf of Mrs. Morash, points out the fact that Mr. Morash had an option of taking that entire package at the time that he decided not to continue with his every day work. I hesitate in using the word full-time employment because on the books he is still an employee even to this day but the character of his employment changed. Mrs. Morash argues that instead of taking the lump sum Mr. Morash made the decision to extend it over the three and one-half year period. I am satisfied that decision was made after discussion between the parties based on what the parties themselves jointly decided was in their best interest. This decision to extend was not just for Mr. Morash's benefit. The net result of that decision, of course, was that Mr. Morash still had some things to do or had prohibitions in terms of what he could or could not do in the future. There were, therefore, some strings attached. In return the couple obtained additional benefits including extended health care and an automobile provided by Aliant.

[31] I refer to the **Chaytor v. Chaytor** [1994] N.S.J. No. 342 decision and note this is not a case where the monies were earned for past performance and where they were vested in Mr. Morash. He had nothing more than a contract which required a number of things to be done and not to be done. The non

competition agreement is a very substantial clause that could have severely limited his income earning ability had he decided to seek work with another employer. Mr. Morash risked losing the severance monies. In conclusion I am satisfied after considering all aspects of the severance agreement the bonus portion of the severance agreement is not a matrimonial asset which Mrs. Morash is entitled to share in.

[32] In terms of the future I understand, again through representations from the parties, that the ongoing monthly income for Mrs. Morash derived from the division of pension assets will be substantial; \$63,500.00 per year. In addition to the pension she will have capital assets worth approximately 1.46 million dollars. In addition there will be a division of Canada Pension benefits. Mrs. Morash should have a comfortable retirement and enjoy a lifestyle equivalent to that of Mr. Morash. If I refer to the case of **Moge v. Moge** and **Bracklow v. Bracklow** and other cases that refer to unreasonable impoverishment and division of assets, this is not an impoverishment case in any way, shape, or form. The decision I have rendered sees a division of assets and income which is equal in all respects except the bonus income earned and received post separation and a limited amount of pension benefits earned prior to the marriage and post separation.

[33] I wish to deal with a point in relation to the taxes on dividends that have already been divided. Mr. Morash referred to the fact that he has had to pay taxes on dividends for shares which they are going to divide. He has provided the Court with a calculation and it has not been disputed as regards what his taxes were on those dividends. I am satisfied that there is \$2,974.00 which Mrs. Morash owes to Mr. Morash in that regard. If she were not ordered to pay that tax on dividend she would in essence receive a larger benefit which is not justified in this case.

[34] Mr. Morash agrees to divide the bonus received up to the date of separation. I am satisfied it would be appropriate to enforce that concession and enforce that gratuitous payment of \$4,453.36 to Mrs. Morash.

[35] There are also a number of things that we noted throughout the trial which must go in the corollary relief judgment. By agreement this includes a requirement that Mrs. Morash must sign a waiver allowing Mr. Morash's new spouse to become entitled to a survivorship benefit for the portion of the pension which he continues to receive.

[36] I did not deduct disposition costs from the River Denys property because I don't understand that there was ever an expectation that it would be sold outside this family. That is in accordance to Mrs. Morash's evidence. The

same applies to the cottage property. I understand Mr. Morash to say the cottage is going to stay in his family. For that reason I do not expect there will be any real disposition costs to either of these parties now or in the future.

[37] Given the fact that Mr. Morash is keeping the cottage he now has an appraisal which he can use for any number of reasons down the road. Therefore I am not going to award to him appraisal costs at this point in time.

DECISION COSTS (after submissions by counsel)

[38] **THE COURT:** The **Civil Procedure Rules** in relation to offers to settle are there to encourage the parties to settle at the earliest possible date. In matrimonial disputes whether it involves children, or in this case property, you can see there are very substantial emotional overtones. It is often difficult for the parties to separate emotions from the facts. In this case the emotions were truly tied up in the facts of the case as it relates to the cottage. That was one of the more substantial aspects of the dispute. In this case

there was also the issue of the pension and the incentive allowances. I recognize how substantial Mrs. Morash's attachment was to that property and how important it was to her. In making my decision I also

recognized how important the cottage was to Mr. Morash. It is just a matter of degree in this case. It is very unfortunate this matter had to be litigated.

[39] I look as well to the unique aspect of the incentive amounts or the bonus amounts, whatever you want to call them. I say this was a case that was very unique. We do not have many high ranking executives with those types of golden hand shakes where the date of the separation is so close to the date of receiving this type of package. For Mrs. Morash to come to this Court and ask for the Court to make a decision as to whether or not she is entitled to it is not unexpected. It is not unreasonable for her to say, look there is a fair bit of money involved here and I would like to see if I am entitled to a share of it. It is not an easy case for the Court and it was not an easy case for Mr. and Mrs. Morash.

[40] In view of the uncertainties of this case and the relative merits to each of the claims, I am satisfied that it is appropriate that each party bear their own costs. No

doubt they are substantial on both sides. It would be unreasonable in view of the comments that I have made to require Mrs. Morash to contribute to Mr. Morash's costs.

[41] Mr. Berliner will prepare the Corollary Relief Judgment.

[42] I am going to order that if you do not have the form of an order resolved within 30 days that it be brought back to Court. It is not appropriate that these matters be left and negotiated to infinity based on trying to wiggle something out of the other side on an order.

[43] I do thank counsel. You've done an excellent job simplifying a complex case. I hope your clients appreciate it as well. Thank you.

J.