

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: LeBlanc v. LeBlanc, 2008 NSSC 292

Date: 20081015

Docket: 1217-000621

Registry: Halifax

Between:

Natalie Ann LeBlanc

Petitioner

v.

Barry John LeBlanc

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

March 6, 2008; July 8, 2008; and September 4, 2008; in
Port Hawkesbury, Nova Scotia

Counsel:

M. Louise Campbell, Q.C., for the Petitioner
Coline Morrow, for the Respondent

By the Court:

[1] This Divorce Petition was issued July 20, 2007. There were two previous applications dated April 14, 2005, and September 23, 2005, under the *Maintenance and Custody Act* and the *Matrimonial Property Act*. By consent these applications have been brought under the umbrella of the *Divorce Act* to effect a resolution on all issues.

[2] The parties married on May 16, 1987, and separated on February 12, 2005.

[3] The oldest child intends to enter university in September 2008 and the youngest child is in school.

[4] Mr. LeBlanc resides in the matrimonial home. There is not now an issue related to exclusive possession.

[5] There is one interim order dated December 11, 2007, directing the Applicant, Mr. LeBlanc, to pay to the Respondent, child support for the two children, Collette Elise LeBlanc, (born June 12, 1995,) and Brittany Anne LeBlanc,(born November 21, 1998), in the amount of \$168.00 per month commencing October 1, 2007, continuing thereafter until further order of the Court. This is based on an assumed income of \$12,160.00.

[6] The parties agree that the mother shall maintain the children on her employment medical plan. Mr. LeBlanc was ordered to reimburse the Petitioner for one half of the orthodontic costs for the child Brittany, that being one half of the cost not covered by the mothers medical plan.

[7] At the commencement of the proceeding, counsel advised that the matters of custody and access were not in dispute. The parties advised that both children were living with the mother. One of the children had moved since the separation from the mothers home to the fathers home and returned to her mothers home. The terms of the interim order are not in dispute.

[8] Subsequent to the commencement of the proceeding, one of the children removed herself from the matrimonial home and the issue of child support, if any, will be addressed at a further date. This child intends to attend university in September. The parties have agreed to discuss appropriate contributions.

[9] Counsel agreed at the commencement of the proceedings that the sole issue before the Court was pursuant to the Matrimonial Property Act.

[10] The parties agree that there is an RRSP with the Bank of Montreal that relates to the educational costs for the children. The parties confirm that neither intends to use this without the consent of the other or for any other purposes other than that for which it was designed. It is excluded from the division of matrimonial assets.

[11] The parties agree that the BNB Autobody Shop, for which Mr. LeBlanc is the sole proprietor, his tools, his equipment, and the building adjacent to the matrimonial home are not subject to division as they relate to his business.

[12] Ms. LeBlanc is not seeking any compensation, valuation, or participation in the business and seeks to extract herself of any responsibility for any indebtedness of the business.

[13] I am satisfied that there is no possibility of reconciliation. I am further satisfied that all jurisdictional elements of the Petition have been proven and I grant the Divorce on the grounds of one year separation.

[14] At issue is the evaluation of the matrimonial home in Louisdale, Richmond County, Nova Scotia; the valuation of the 2002 Toyota Solara being used by Ms. LeBlanc; and the characterization of certain debts.

[15] Ms. LeBlanc seeks to extract from their equalization chart any debts that were incurred by the business.

[16] Ms. LeBlanc seeks to attribute occupation rent to Mr. LeBlanc for his being maintained in the matrimonial home since the separation.

[17] Mr. LeBlanc has withdrawn his application for spousal support.

[18] The Respondent, Mr. LeBlanc, has been attempting to maintain the matrimonial debt without any assistance from the Petitioner. The debts are significant for these parties.

[19] The parties agree that they have reviewed all of the household items and possessions and effected a division of them in favour of Ms. LeBlanc. She had the children when this division was made.

[20] Although it may not have been an equal division of household items, both parties have agreed that there is no need to determine the valuation and disturb the division that has already taken place.

Matrimonial Home

[21] Two appraisals of the home have been admitted into evidence. The third appraisal, done by G. Ratchford and Associates, dated January 7, 2008, was not admitted due to the fact that the appraiser was not available to testify and was not able to be cross examined.

[22] The first appraisal from Mr. Wambolt, is dated December 6, 2007, and was prepared on behalf of Ms. LeBlanc. Mr. Wambolt is a property appraiser and real estate broker having begun as a property appraiser in 1974 with the provincial government assessing properties for the purposes of tax assessments. He went into private practice and between 1974 and 1976 he took an appraisal course from Dalhousie University. He has been a real estate broker for 20 years, owning his own company for 15 of those 20 years. His area of particular expertise is generally in the Richmond, Inverness, Guysborough Counties/Antigonish area. He has testified previously in Supreme Court and in Federal Court and has been qualified as an expert.

[23] He has recently taken a Certified Review Appraisers course to address comparison analysis and is a member of the Nova Scotia Appraisers Association, the Canadian Association as well as the American Association. He has extensive experience.

[24] Mr. LeBlanc was not satisfied with Mr. Wambolt's appraisal. He believed Mr. Wambolt was best friends with his major competitor and, therefore, his report would reflect a bias.

[25] While both Mr. LeBlanc and Ms. LeBlanc are known to this appraiser, there is no evidence to support any bias.

[26] Mr. Wambolt has effected a valued appreciated replacement cost and comparison approach. In the comparison approach, he used six comparables for vacant lots and seven for buildings. He has arrived at a valuation of \$130,000.00, not including the body shop, the veranda and the pool. It was agreed that these aspects of the matrimonial home be excluded.

[27] He has raised environmental concerns regarding the property and has been advised by Mr. LeBlanc that there are no concerns that would detract from the value of the property.

[28] Mr. Wambolt has been examined and cross examined on the second appraisal. He has indicated what he believes to be the frailties with the second appraisal.

[29] The second appraisal, dated January 22, 2008, was prepared by Regan MacAdam whose qualifications include membership in the Appraisal Institute and 18 years working full time in Inverness County, and parts of Richmond and Antigonish Counties. She is certified. She has not previously testified as an expert. The focus of her employment relates to appraisals and not real estate sales. She has some experience in the retail aspect previous to her current employment as an appraiser. Much of her practice relates to appraisals for bank and financial institutions.

[30] Her appraisal currently, without reference to the veranda, pool and body shop, is \$108,500.00, although she allows for a couple of thousand dollars increase since her evaluation in the winter of 2008 to accommodate an increase in valuation typical of the summer months.

[31] She identifies what she believes to be some frailties in Mr. Wambolt's report and acknowledges she has made one error in her comparable assessment.

[32] Both realtors are familiar with the comparable properties and both conclude differently with respect to the land value. Mr. Wambolt places a \$20,000.00 land value on the property and Ms. MacAdam a \$14,000.00 value on the property.

[33] Both agreed that they used more properties to do the comparable analysis given that it was difficult to find comparable properties in the area.

[34] Ms. MacAdam acknowledges that her numbers may not be perfect. With respect to their differences, she presumed a fifty percent square footage valuation for the upper level given the angle in the roof; whereas Mr. Wambolt identified an eighty percent adjustment.

[35] Mr. Wambolt has factored in the location. The adjustment factored in for the location by Ms. MacAdam has been a more significant adjustment.

[36] The differences between the experts, besides in experience, appears to relate more to perspective and a subjective evaluation of the possibility of sale. Both have considerable experience in the field, although Mr. Wambolt clearly has more experience with respect to sales. That does not appear to be Ms. MacAdam's primary function.

[37] The selection of the buyer for a home with a business property attached would attract a particular person in the nature of a body shop, a business carried on by Mr. LeBlanc and his father before him. This may narrow the buyer market; however, Mr. Wambolt indicates he has adjusted for that.

[38] There was criticism of the Wambolt report because it did not contain a grid. Neither counsel asked Mr. Wambolt to bring his files nor was there any request to disclose the basis of his report, it was available had they asked to review his calculations.

[39] I am satisfied that on balance that Mr. Wambolt's assessment is the more appropriate assessment in these circumstances and I place a valuation on the fair market value for the matrimonial home, exclusive of the veranda, pool, and shop, at **\$130,000.00**, in accordance with Mr. Wambolt's report.

[40] The mortgage debt to be subtracted from the sale price minus the ordinary disbursements is the balance as of the date of the hearing. The remaining disbursements have been agreed upon, that is five percent real estate, HST, and \$1,000.00 plus HST for legal fees.

[41] In addition, there are sewer charges and an outstanding tax account. These are disbursements that would ordinarily be taken off at the time of sale before the

proceeds are divided. No fault can be attributed to Mr. LeBlanc alone for their non payment and the accumulation of interest charges.

[42] Ms. LeBlanc believes they ought to have been paid by Mr. LeBlanc. However, Mr. LeBlanc was left carrying all the debt load after separation. He made payments that preserved the asset for both parties. He could not be expected to take on more than his salary allowed.

[43] Both parties are responsible for these debts.

[44] Ms. LeBlanc is seeking to have the Court determine that Mr. LeBlanc should have been paying occupational rent. *Simmons v. Simmons* (196) N.S.R. (2d) 140, 613 A.P.R. 140.20 R.F.L. (5th) 153 indicates that Courts are generally reluctant to assess occupational rent in these matters unless there are exceptional circumstances and there are no such circumstances in this case. I decline to order occupational rent.

[45] The second item that the parties did not agree on was the valuation of the 2002 Toyota Solara. Mr. LeBlanc's believes this may be classified as a lightly damaged vehicle.

[46] Mr. LeBlanc applied the red book value to both the cars. They agree on the valuation of \$9,000 for his car as of the date of separation. Mr. LeBlanc believes her vehicle ought to be valued at approximately \$18,500.00. This does not take into effect any actual appraisal of the vehicle.

[47] Ms. LeBlanc retained Mr. MacKeigan of Trimac Toyota Limited to effect an appraisal of the vehicle. He confirmed that this vehicle is listed as salvage. He effected a search using a car proof claims report based on the vehicle VIN number, year, make, model, body style, and assembly location.

[48] The records indicate that in Alberta and Quebec it is listed as salvage and in Nova Scotia it is not. Mr. MacKeigan indicates that, in his opinion, the permit has been "washed" in order to affect resale and in order to affect valuation and to mask the fact that this vehicle has had significant damage.

[49] In his opinion this vehicle ought not to have been passed for inspection. Had he inspected the car, he would not have allowed this vehicle to pass inspection. He

has taken the black book value for March of 2005 at \$19,275.00 and made various legitimate deductions for a net value of \$16,905.00.

[50] He advises that the vehicle was written off in an accident, according to the records, prior to March 2005, and then rebuilt, although it has not been listed as a re-built car. He indicates it would only be worth sixty percent of a vehicle not accident repaired.

[51] He advises that the air bags have not been replaced after being deployed in the accident and there is a difficulty with the day time running lights. He has valued this vehicle at approximately \$10,100.00 for March 2005.

[52] He believes it needs a great deal of work to bring it to black book value.

[53] Mr. LeBlanc takes issue with this valuation. He advises that air bags are not a legal requirement and day time running lights can be fixed. Other than that, he indicates that the car was in a slight accident and believes it should be valued at the full amount. Mr. LeBlanc completed many of the repairs to this vehicle.

[54] Mr. LeBlanc indicates that Mr. MacKeigan is a competitor of his and it would be his intent to compete as a competitor for business.

[55] I was impressed with Mr. MacKeigan's testimony, his experience and his forthright approach. He acknowledges he did not know Ms. LeBlanc, who asked him to do the valuation, and he was not aware that it was Mr. LeBlanc, who he has knowledge of in the community, who was the other party to this proceeding. I am satisfied that there is no obvious or objective evidence of bias.

[56] Mr. MacKeigan has 21 years managing experience with a Toyota dealership. He is a Mechanic by trade. He does appraisals of motor vehicles for taxation purposes and he also is extensively involved in buying and selling vehicles. He is familiar with what the market will bear.

[57] Mr. LeBlanc acknowledges that he has no license to sell but historically, prior to separation, he bought perhaps two vehicles per year, fixed them up and sold them. His experience in the market is far less extensive than that of Mr. MacKeigan, who is an objective witness to this proceeding.

[58] The evidence satisfies me that the valuation provided by Mr. MacKeigan is the appropriate valuation to apply to achieve a fair market value as of the date of separation.

[59] The parties have an agreement on certain outstanding indebtedness as of the date of separation and they agree that these are matrimonial debts:

- Mortgage
- overdraft \$1,036.62
- overdraft with Credit Union \$500.00
- Seaboard Tire \$477.36
- phone bill - \$400.26
- cell phone - \$319.11
- cable -\$120.52
- Home Hardware - \$682.68
- power bill - \$385.44
- Sears - \$672.95
- water and sewer - \$1,927.81
- municipal tax bill to March 2008 - \$3,676.07

as well the parties agree that there was \$500.00 withdrawn by Ms. LeBlanc from the tax account which is subject to division.

[60] The parties disagree on a number of items as follows:

- Mosaic credit card (Ms. LeBlanc) - \$2,500.00
- oil bill - \$1,638.02
- MBNA Master Card \$11,000
- consolidated loan \$15,896
- American express.\$3,040.30

[61] Ms. LeBlanc believes that \$992.70 in oil was specifically delivered to the business tank and she wishes to have that deducted from the total bill before division. Mr. LeBlanc will agree to a deduction in the amount of \$600.00. Should I accept Ms. LeBlanc's proposal that leaves \$645.32 of the total oil bill subject to division. In her final submissions counsel for Ms. LeBlanc offered a formula

which would leave a debt of \$894.76 for house oil to be divided between them. I accept this compromise as appropriate and fair.

[62] There is a Bank of Montreal consolidated loan. It is currently \$15,896.00. Ms. LeBlanc believes there were some purchases that should be attributed to Mr. LeBlanc's business. She seeks to have these deducted to arrive at an appropriate value for the balance outstanding on the consolidated loan. Mr. LeBlanc disagrees. I have reviewed the accounts. There is agreement that some of this debt may be attributed to the purchase of Ms. LeBlanc's car, the boat and the 4 wheeler. All of those items have been included in the calculations for the division of property.

[63] I am not convinced on the totality of the evidence that this is truly a business debt. No expenditures were incurred after separation besides interest charges. It shall be included in the division of debts. Ms. LeBlanc must bear as much responsibility for this as Mr. LeBlanc. There is no justification for placing the burden of this debt on one party more than the other.

[64] Ms. LeBlanc advises that the MBNA credit card is in Mr. LeBlanc's name. The debt is in the approximate amount of \$11,000.00. Mr. LeBlanc testified this card was used to purchase a computer for one of the children. There were no new purchases on the MBNA credit card after separation. There are cash withdrawals and household purchases. Mr. LeBlanc testified there were two cards for this account.

[65] The card shows between December, 2003, and April, 2004, expenditures related to auto body work and automotive purchases. The bill of sale for her car is dated October, 2003. There is evidence to support that Mr. LeBlanc did extensive work on her car to repair it and make it road worthy. I am unable to conclude this debt is a business debt.

[66] Mr. LeBlanc had an American Express card and Ms. LeBlanc had a Mosaic card. She alleges his American Express card, in the amount of \$3,000.00, is a business debt and she was unaware of its existence. Both cards were used for household purchases. These balances, as of the date of separation, shall be included in the division of debts.

[67] Both parties, in this circumstance, acknowledge the poor state of their financial affairs at separation.

[68] Counsel shall complete a revised equalization chart now that the contested issues have been resolved.

[69] Should there be any problems in effecting this decision and the corresponding equal division of assets and debts, they may return to this court to effect the division, including the transfer of property.

[70] Counsel for the Petitioner shall draft the order.

Justice Moira Legere Sers