

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Coolen v. Coolen, 2004 NSSC 1

Date: 20040105
Docket: 1204-003456
Registry: Kentville

Between:

Brenda Louise Coolen

Petitioner

v.

Robert Brian Coolen

Respondent

Judge:

The Honourable Justice Gregory Warner

Heard:

In Kentville, Nova Scotia, on December 19, 2003.

Counsel:

Lynn M. Connors, counsel for the petitioner
Robert Brian Coolen - represented self.

By the Court:

[1] The primary issues in this divorce are the division of household contents and the entitlement to and quantum of spousal support.

[2] Brenda and Robert Coolen were married in 1973 and separated on September 3, 2002, when Brenda left the matrimonial home at Lower Sackville, Nova Scotia. Both are fifty years old. They have two children, both of whom are no longer dependents.

[3] Robert Coolen has been fully employed throughout the marriage - first with the Canadian Armed Forces, then with Corrections Canada, and since 1989 as a By-law Enforcement Officer for the City of Halifax (H.R.M.).

[4] Brenda worked after the marriage as a medical receptionist at a hospital and continued to work part time after the couple's children were born.

[5] Between 1984 and 1986 Brenda was diagnosed with multiple sclerosis; she ceased employment and since 1992 has been in receipt of a disability pension under the Canada Pension Plan.

HISTORY OF PROCEEDINGS

[6] On February 19, 2003, Brenda Coolen commenced divorce proceedings and an interim application for spousal support, sale of the matrimonial home, payment of the household bills until sale and the maintenance of Brenda as a beneficiary on Robert's employment life insurance and medical plan.

[7] By interim order dated March 20, 2003, the Honourable Justice Boudreau ordered all of the above including interim spousal support of \$550.00 per month. The matrimonial home was sold in July. Robert has complied with all of the provisions of the interim order.

[8] On September 5, 2003, Brenda Coolen gave notice of trial and on December 19th, 2003, the trial was held, at which I granted their divorce..

[9] In these proceedings Brenda was represented by counsel and Robert was unrepresented. This made it difficult to obtain agreements with respect to corollary relief matters.

MATRIMONIAL PROPERTY

[10] The assets to be divided consist of:

- (1) the net proceeds from the sale of the matrimonial home in the amount of \$35,637.28;
- (2) a 1998 Chev truck in the possession of Robert valued at \$14,000.00;
- (3) Robert's pension Plan with H.R.M.; and
- (4) the contents of the matrimonial home.

[11] The parties have agreed before trial that a Canada Pension Plan disability pension received by Brenda at the rate of \$460.00 per month and a Veteran's Affairs disability pension received by Robert at the rate of \$241.00 per month are not matrimonial assets and are not to be divided.

[12] The only debts are the costs of the interim application in the amount of \$300.00 ordered to Brenda against Robert, and Robert's claim for Brenda's portion of a 2002 income tax assessment against him in the amount of \$1,798.78.

[13] The parties agreed that the net proceeds from the sale of the matrimonial home and Robert's pension to the date of separation shall be divided equally.

[14] Originally it appeared that the value of Robert's truck was agreed upon by both parties. It was valued by Robert in his Statement of Property at \$14,000.00 and in his affidavit filed in relation to the interim application in March and at the beginning of the divorce hearing. During the hearing he attempted to argue that his truck was worth less. I find that his truck was worth \$14,000.00 at the time of separation and that Brenda is entitled to one-half the value.

[15] Robert claimed a sharing of a 2002 income tax assessment. I am satisfied that, despite my concern that he did not produce at trial a Notice of Assessment confirming the amount of the claimed debt, his evidence at the hearing was honestly given and that he did, in fact, have this liability. Brenda's counsel set forth a calculation of Brenda's proportionate share if I so found and I accept that Brenda's proportionate share to the date of separation of this debt is \$599.00.

CONTENTS OF THE MATRIMONIAL HOME

[16] The major dispute with regards to matrimonial assets was the value of the household contents. It consumed their energy before the trial and much of the trial time.

[17] Brenda Coolen claims that the division was even. She relies, in part, upon a letter dated October 9, 2003, signed by Allen and Eric Smith on the letterhead of Leon's Furniture set out in Exhibit 2, tab 12.

[18] Robert Coolen claimed that the division was substantially in Brenda's favour. He relied upon a hand written list prepared by him and filed with the court at the time of his Answer on March 6, 2003 and contained in Exhibit 10.

[19] After hearing the evidence at trial, I am more satisfied with Robert's position than Brenda's position for several reasons.

[20] With respect to the Leon's letter, it only valued a small portion of the items received by Brenda, the writers did not describe who they were and what qualifications they had to give the appraisals and the writers did not describe when they valued the items and in what condition they found them. For example, the value of the computer (Model 1988) was given as \$ 200.00. This appears to have been made after Brenda acknowledged that the computer had "crashed" and was unworkable. At the time she obtained possession on separation it was in good working order and she had used it up until the time it crashed. Another example is the value of the snow blower set at \$50.00. The snow blower was described as not working. I am satisfied that the snow blower was in good operating condition at the time Brenda took it and it worked for the next winter season and that if it had been properly maintained would have had the value that Robert Coolen put on it. A third example is the valuation of "assorted kitchen pots" at \$50.00. These pots apparently included a set of Paderno pots, which pots have a lifetime replacement guarantee. I accept Robert Coolen's assessment as to their value. These examples and the fact that the appraisal was for only a small portion of the assets received by Mrs. Coolen led me generally to discount her valuation and to generally accept Robert Coolen's valuation.

[21] Robert Coolen was ridiculed for placing values of \$2,000.00 on family photos and \$1,500.00 on a collection of pins that he had accumulated over many years. My impression of his evidence with regards to these was that he was putting a “subjective” value on items that had little market value. His motives were honest but misguided and I do not accept his value with regards to these emotional items. This, however, does not distract from my view that his valuation of the other items was closer to their real market value at the time of the separation than the values placed by Brenda Coolen.

[22] I noted that Robert Coolen was not challenged on the extent of the items that he claimed Brenda had taken from the house , nor in respect of his assertion that Brenda had returned in his absence and cleaned the house outof everything she wanted, leaving him with little of any value.

SUMMARY - MATRIMONIAL PROPERTY

- (1) Robert’s H.R.M. pension shall be divided so that Brenda receives fifty percent of the benefits earned by Robert to September 3, 2002, the date of separation. The division shall be made in accordance with the procedures set up by H.R.M. and briefly summarized in Exhibit 11.
- (2) The net house proceeds of \$35,657.28 shall be divided into two equal parts of \$17,828.64.
- (3) From Robert’s share, Brenda shall receive the costs of the interim application ordered by Justice Boudreau in the amount of \$300.00, plus the sum of \$7,000.00, being one-half the value of Robert’s truck.
- (4) From Brenda’s share, Robert shall receive \$599.00, being Brenda’s portion of Robert’s 2002 income tax liability.
- (5) Robert shall receive credit for Brenda’s disproportionate share of the household items, which credit will be as set out later in this decision.

SPOUSAL SUPPORT

Entitlement

[23] An order made under S 15.2(6) of the **Divorce Act** for the support of a spouse should:

1. recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
2. apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses through child support;
3. relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
4. in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

See **Annual Review of Family Law 2003** by James G. McLeod and Alfred A. Mamo (Thomson/Carswell) at p. 209.

[24] First Objective: Robert did not receive any advantages and Brenda was not called upon to make any sacrifices to her career by reason of their marriage. Early in their marriage Brenda was diagnosed with multiple sclerosis and apparently had other medical conditions which limited her ability to work. Robert made compromises in his career, especially during times that Brenda was incapacitated, to both provide the household income and manage the household and children.

[25] Second Objective: Because of Brenda's medical condition early in their marriage, there does not appear, in the case at bar, to have been financial consequences arising from child care that would support a claim for spousal support.

[26] Third Objective: To the extent that Brenda suffers from multiple sclerosis and other medical conditions, which may prevent her from re-entering the work force, she will suffer economic hardship from the marriage breakdown.

[27] Fourth Objective: It appears that because of her condition, and her age and the length of time that she has been out of the workforce, that full self-sufficiency, and the promotion thereof, may not be a reasonable expectation. This is not to preclude the possibility that Brenda may be sufficiently employable as to contribute to her own financial support.

[28] The Supreme Court of Canada's decision in **Bracklow v. Bracklow** [1999] 1 S.C.R. 420, is relevant to the case at bar for two reasons.

[29] First, **Bracklow** was a case involving a spouse who was unable to work because of health problems unrelated to the marriage or its breakdown. The court found an entitlement to support in recognition of the pattern of economic dependence that had developed during the marriage.

[30] Second, the court in **Bracklow** declared that the four objectives in s. 15 of the **Divorce Act** are carried through three types of support: compensatory, non-compensatory and contractual. Even though I have reservations about the extent to which Brenda Coolen is entitled to support on the basis of the compensatory principle and even though there appears to be no contract (either express or implied) that would support a claim for spousal support, it is clear, on the evidence that on a needs and means basis (the non-compensatory principle) that there is a disparity in the economic circumstances as between Robert and Brenda and there is a need on the part of Brenda. The need arises from the third statutory objective.

[31] Further guidance is found in two recent decisions of the British Columbia Supreme Court dealing with disabled spouses, namely, **Rayvals v. Rayvals**, 2002 BCSC 128 and **Garrod-Schuster v. Schuster**, 2001 BCSC 741.

EVIDENCE OF BRENDA'S MEDICAL CONDITION

[32] At the beginning of the hearing, Robert Coolen indicated an intention to challenge Brenda's claim that she could not earn income by reason of her medical condition. Brenda's counsel objected as she had written to Mr. Coolen before trial advising of her intention to subpoena and call medical evidence if he intended to argue this point. I advised the parties that I was prepared to give Brenda's counsel an adjournment to get the medical evidence, if Robert pursued this argument, especially in light of Ms. Connor's letter to him. At this point Mr. Coolen agreed not to pursue this position (rather reluctantly).

[33] During the hearing the only evidence with respect to Brenda's medical condition or ability to work was her own evidence. In cross examination Robert Coolen challenged her with respect to her ability to work.

[34] From her evidence it appears that Brenda has suffered severely from multiple sclerosis in the past. She was hospitalized, in a wheelchair in the years 1990 - 1992, she used the drug “prednisone”; however, she also testified that she had been in remission for many years (at least four years) and that during this time she had not consulted her family doctor or a specialist with respect to her multiple sclerosis, nor had she received any treatment for it.

[35] Brenda also testified that her medical conditions included (1) a heart condition since the age of 21 which required her to take the drug “metoprolol”; (2) depression, which required her to take “clonazepam”; and (3) diabetes, for which she had three prescriptions.

[36] Brenda acknowledged that she had volunteered at a daycare for several months before the Separation. She denied, on cross examination that she had been paid for this work. The point with respect to her “volunteering” at the daycare, as far as the court is concerned, is that Brenda appeared to have the ability to contribute towards her own support.

[37] No medical reports of any kind were tendered by Brenda to show that, at the present time, her medical condition prevented her from any employment or that she had been advised by a medical professional that she should not be employed. Such reports would have assisted Brenda in discharging the onus on her to satisfy the court, on a balance of probabilities, that her medical condition prevented her from any employment whatsoever. Our **Civil Procedure Rules**, and in particular **Civil Procedure Rule 31.08**, provide a mechanism for the tendering of expert medical reports without the attendance of experts. It would have been fair if Robert Coolen had received such medical reports before he was asked by Brenda’s counsel to advise whether he was prepared to concede that Brenda’s condition prevented her from obtaining gainful employment.

[38] It is ultimately the duty of the proponent of a position to satisfy the court, on a balance of probabilities, of that position. I am satisfied that Brenda has multiple sclerosis; however, her evidence does not satisfy me that she is not able to contribute, through employment, to her own support.

[39] I am prepared to infer that Brenda is not able to be fully self-sufficient (by reason of her absence from the workforce for such an extended period of time) at the present time, and I am prepared to order spousal support.

[40] Because of the length of the remission (with respect to multiple sclerosis) and because of the absence of medical evidence as to how this and her other medical conditions could affect Brenda Coolen's ability to secure any kind of employment and because during the trial she did give evidence with regards to her "volunteering" for work in a daycare, I believe that any order with respect to spousal support should be subject to review, so as to give Brenda the opportunity to satisfy this Court that her medical condition is such as to prohibit any type of full or part time employment.

QUANTUM OF SUPPORT

[41] There are two approaches to analyzing the quantum of spousal support. First, there is an analysis of Brenda's budget (means and needs test) and second, is an analysis of Brenda's and Robert's comparative incomes and living standards.

MEANS AND NEEDS ANALYSIS

[42] Exhibit 2, tab 15 contains Brenda's present and projected budget. The former total \$1,660.00 and the latter \$1,720.00 per month (exclusive of income tax).

[43] As a result of Robert Coolen's cross examination of Brenda with respect to some of those items and including, in particular, drugs, dental, glasses, donations, life insurance, laundry, dry cleaning, savings and holidays, I am satisfied that either the expenses are not and will not be incurred or, were not incurred during the marriage, and in some cases were exaggerated. I find that her proven budgetary needs (exclusive of income tax) is at best \$1,400.00 per month.

[44] With respect to Robert's income and ability to pay, I expressed at the beginning of the trial, and during the trial, concern about the quality of the evidence that he presented as to his income.

[45] During the hearing Robert stated that his 2003 base income was approximately \$38,500.00. His T4 slip from H.R.M. for 2002 was \$35,717.00. He advised that he was paid \$22.00 per hour for 35 hours per week, which totals approximately \$40,000.00 in annual income. His October, 2003, pay record (Exhibit 8) showed other possibilities.

[46] I determine, for the purposes of calculating spousal support, that his employment income is at present \$40,000.00 per year and in addition he receives a disability pension of \$2,900.00 per year for a total income of \$42,900.00.

[47] Robert's budget shows expenses (before spousal support and income taxes) of \$2,648.00 per month (\$31,776.00 per year).

[48] If Robert Coolen were to pay spousal support of \$900.00 per month, he would have taxable income of approximately \$32,000.00 annually on which he would pay, by my estimate, approximately \$6,000.00 income tax. This would leave him short on his budget to the extent of about \$6,000.00 per year.

[49] If Brenda were to receive spousal support of \$900.00 per month, her gross annual income would be approximately \$16,300.00, and I estimate she would pay income taxes of approximately \$2,000.00. Based on \$1,400.00 per month in expenses she would be short of her budget by about \$2,500.00 per year.

COMPARABLE LIVING STANDARDS ANALYSIS

[50] By comparing their respective net incomes after the payment of \$900.00 per month in spousal support, I have calculated that Robert would have approximately \$26,000.00 per year and Brenda would have approximately \$14,200.00 per year. This would give Robert 64.6 percent of their total net income and Brenda 35.4 percent.

[51] Because I have ordered Robert to maintain Brenda as a beneficiary under his health/medical plan and on part of his life insurance, Brenda gets an additional financial benefit that brings their net incomes closer together.

SUMMARY RE SPOUSAL SUPPORT

[52] I conclude that apportioning the incomes of Robert and Brenda in this manner; that is, by ordering spousal support of \$900.00 per month to begin on January 1, 2004, would result in a fair apportionment of their incomes, and meet the objectives set out in section 15 of the **Divorce Act**.

[53] Because the evidence at the hearing with respect to Brenda's medical condition and her inability to work was not satisfactory and because Robert failed to produce copies of his most recent tax returns and the best information available with respect to his income, I am making this order with respect to spousal support subject to review within one year. At that time, I would expect Robert to provide complete copies of all income tax returns and up to date income information, and Brenda to provide medical evidence to support her position that her medical condition restricts her from any form of full or part time employment for which she is suited.

MEDICAL PLAN

[54] On the facts of this case it is obvious that Brenda would suffer substantially if she was not maintained on Robert's medical plan. I order that he maintain Brenda as a beneficiary under his medical/health plan with his employer. I understand that he can elect to maintain his former spouse on his medical plan and his obligation to Brenda in this regard is greater than his obligation to any future partner. I calculated the cost to Robert to maintain Brenda on his medical/health plan as a benefit to Brenda in determining the quantum of spousal support.

LIFE INSURANCE

[55] Robert apparently has term life insurance with his employer for two times his annual salary. In light of the quantum of spousal support, I order that for so long as he is required to pay spousal support that he shall designate and maintain Brenda as the beneficiary to the extent of one times his annual income (50% of the said policy).

RETROACTIVE SPOUSAL SUPPORT

[56] Brenda has requested an adjustment of spousal support retroactive to August 1, 2003, based on the sale of the home in July, 2003.

[57] Based on my determination that spousal support should now be \$900.00 per month and it was previously \$550.00 per month, the potential amount of the claim would be five months at \$350.00 per month or \$1,750.00.

[58] Previously I found that Brenda received substantially more than Robert in the division of household contents. I believe that her benefit was at least, if not more, than the amount of the retroactive adjustment in spousal support sought by Brenda.

[59] I therefore find that any retroactive adjustment of spousal support is offset by the disparity in household contents.

COSTS

[60] The trial involved disputes with respect to household contents and, with respect to the claim for spousal support, was extended by the lack of any medical reports or evidence.

[61] For these reasons I make no order with respect to costs.

Warner, J.