

Date: 20000510  
Docket: 1201-51722

IN THE SUPREME COURT OF NOVA SCOTIA  
Cite as: Pierce v. Pierce, 2000 NSSC 142

Between:

MARGARET JOAN PIERCE

Petitioner

- and -

MICHAEL CHARLES PIERCE

Respondent

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DECISION

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HEARD BEFORE: The Honourable Justice John M. Davison

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: February 28, 29 and April 26, 2000

DECISION: May 10, 2000

COUNSEL: Sally Faught  
for the Petitioner

Diana M. Musgrave  
for the Respondent

DAVISON, J.:

[1] This is a divorce proceeding. The parties were married on August 10, 1985 and separated on December 17, 1996. There were two children born of the marriage. Brigette Anne Pierce was born on April 1, 1990 and Katherine Mary Louise Pierce was born on December 8, 1987.

[2] I have heard the evidence as to the possibility of reconciliation and determine that there is no such possibility. I am satisfied all matters of jurisdiction have been fulfilled. The requirements of the *Divorce Act* have been complied with in all respects, and the ground for divorce, as alleged, has been proved. The divorce judgment shall be granted on the grounds set forth in s. 8 (2) (a) of the *Divorce Act* in that there has been a breakdown of the marriage and the spouses have lived separate and apart for more than a year immediately preceding the determination of the divorce proceeding and have been living separate and apart since the commencement of the proceeding.

[3] Counsel for the parties have been successful in reaching agreement with respect to a number of issues. To be decided is the claim of the petitioner for

spousal support and the extent of quantum of child support. Filed with the court is a document entitled partial minutes of settlement dated August 24, 1998. The issues under the *Matrimonial Property Act* S.N.S. 1980, c. 9 were settled. The petitioner receives the matrimonial home and the respondent receives shares in a company known as Evergreen and Holly Limited which carried on business in Nova Scotia under the name of "Christmas By The Sea". It was also agreed that the petitioner would have custody of the two children, and the respondent is to have access every second weekend and one night per week together with access during part of the summer months.

[4] The petitioner is 41 years of age and has grade 12 education. She took a course which she termed a ward clerk course which involved filing and other matters with respect to medical procedures but states that it is now antiquated because most of the systems are on computers. She did not work as a ward clerk. At the date of the marriage, she did work for the Canadian Red Cross doing transport duties for the most part. She drove to clinics, loaded supplies and took blood to the truck and arranged for shipping of the blood. She worked for the Canadian Red Cross for about 10 years and had an approximate income of \$18,000 per year. She left this employment after her first child was born.

[5] The parties owned two stores (Christmas Stores), one in Saint John, New Brunswick , but by 1989 both were working in Nova Scotia. The petitioner worked in the store during the week and her mother, Mrs. Cusack, looked after the children. The second Christmas Store operates in premises at 1880 Hollis Street and is involved in the retailing of unusual items, including European glass and imported ornaments. Much of the work on the ornaments, including painting, are done by employees of the Christmas Store. The petitioner painted ornaments at her home and also did book work for the company and served at the store as a clerk.

[6] After the children were born, the petitioner did a great amount of her work at home but stated that she always did things for the store until the time of separation. She says the respondent worked long hours at the store.

[7] In addition she operated a clothing business between 1992 to 1995 out of her home earning minimal income. In her best financial year she had income from the business of \$900.

[8] In 1995 and 1996 she had a job which she described was flexible involving Canadian Greetings Cards. She worked while the children were in school for a wage of \$7 an hour. This employment took place in 1995 and 1996 and she earned during the last stages of this job about "\$1,000 or more". She was doing this at the time of separation but has left this job because the company went out of business.

[9] The petitioner has been unemployed since September of 1999. Before that month she worked for a short time for a company which was involved in the sale of chainsaws and equipment involving lawns and gardens. She worked for \$7 an hour but was laid off due to the company's lack of business. She says has no expectations she could return to this job and was receiving employment insurance until April, 2000.

[10] The petitioner says that she had a number of interviews for employment. She had eight or ten interviews involving companies including jewellery stores and dental offices, but she has not received an employment offer. The petitioner says that she would like to have taken some business courses at the Community College in Dartmouth, and in particular would like to include a receptionist course but says she does not have the money for the tuition which is \$1,500 for the course

and \$800 for the books. She is 41 years of age and says she does not qualify for assistance under Human Resources of Canada.

[11] Since April of 1999 the petitioner has been cohabiting with Richard Moquin, who is a member of the Canadian Armed Services with an annual income of about \$50,000. In addition, the petitioner's mother lives in the matrimonial home. She is 78 years of age and does not pay rent.

[12] Mr. Moquin moved into the matrimonial home in April 1999. He still had his own home and had expenses with respect to a mortgage and household bills. His home was sold in January 2000. He does assist the petitioner with respect to household expenses and pays an equal amount on the mortgage, on premiums for car insurance and home insurance and contributes toward the cost of food.

[13] The petitioner said that she desired to retain the matrimonial home for the benefit of the children. She says that the home had a value of about \$134,000 less a mortgage at the time of separation of about \$42,000. The present balance on the mortgage is \$38,000.

[14] As far as the petitioner was aware, the company shares which the respondent received were not valued at the time of the agreement.

[15] The partial memorandum of settlement dated August 24, 1998, provided the parties agreed that the Scotia line of credit be split equally between them based on the balance outstanding as of the date of the execution of that agreement. The petitioner says she has not complied with that provision in the agreement because she does not have the money to permit her to pay half of the balance due on the line of credit. She seeks to be absolved of that term of the agreement.

[16] The respondent filed a document which he prepared and which is said to be cheques written on his drawing account and deposited into a joint bank account for the support of the petitioner and the children which includes payment on mortgages, utilities and food. This chart would suggest that the respondent paid between the date of separation and October of 1997 monthly amounts of between \$3,400 and \$4,500. In November 1997 there was a reduction in payments made by the respondent which would indicate \$700 in spousal support and \$700 in child support. This continued from November 1997 to June 1998 when the payments were reduced to \$250 spousal support and \$700 child support. Since the summer

of 1998 the total payment per month by the respondent was \$700 which, as I understand it, is child support and nothing was paid for spousal support.

[17] The respondent is 53 years of age and resides at 79 Avondale Road in Dartmouth, Nova Scotia. He resides with one of his employees - Lynn Atkinson. He takes the position that the petitioner is not entitled to spousal support. In her written submissions, counsel for the respondent says that "Mrs. Pierce has nursing skills and training". She is mistaken with respect to that assertion, and I would advise that I was impressed with the evidence of the petitioner and accept her evidence in all respects. I accept that she took a ward clerk course which has now become antiquated in view of innovation of the computer system. I accept that she has never worked as a ward clerk, and I find that she is 41 years of age and that she has made good efforts to obtain employment without success. I do not agree with the assertion that the presence of the petitioner's mother gives the petitioner the capacity to enter the workforce at any time.

[18] The respondent argues that he has paid spousal support which has compensated for any economic disadvantage she may have suffered because of the marriage. As an alternative argument, the respondent says that if there should be



spousal support awarded, it should be a minimal amount in view of the fact that the petitioner has benefited from monies contributed by Mr. Moquin.

## **SPOUSAL SUPPORT**

[19] Spousal support is governed by the provisions of s. 15 of the **Divorce Act** 1985 which reads in part as follows:

### **Spousal support order**

**15.2 (1)** A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

### **Terms and conditions**

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

### **Factors**

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

### **Objectives of spousal support order**

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[20] The Supreme Court of Canada has enunciated principles inherent in the awarding of spousal support in **Moge v. Moge** (1992), 43 R.F.L. (3d) 345 (S.C.C.) and **Bracklow v. Bracklow**, [1999] 1 S.C.R. 420.

[21] The **Moge** case clearly directed the court to consider all four objectives in s. 15(6) and self sufficiency is only one objective and enjoys no paramountcy. In fact, its impact is modified by the words "insofar as practicable". The purpose of spousal support is to relieve economic hardship that results from marriage or its breakdown. Did the marriage or the breakdown impair or improve the wife's economic prospects?

[22] In the **Bracklow** case, the main issue was what duty does a healthy spouse owe a sick spouse when the marriage collapses. But the court does make reference to general principles involved in awarding spousal support. Justice McLachlin (as

she then was) refers to the four objectives set out in s. 15.2(6) as interpreted by the **Moge** case and says against these objectives the court must consider the factors set out in s. 15.2(4) of the **Divorce Act** and look at the "condition, means, needs and other circumstances of each spouse" and McLachlin J. states, at p. 14:

... The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.

[23] Again, at p. 442 McLachlin J. says:

... Under the Divorce Act, compensation arguments can be grounded in the need to consider the "condition" of the spouse; the "means, needs and other circumstances" of the spouse, which may encompass lack of ability to support oneself due to foregoing career opportunities during the marriage; and "the functions performed by each spouse during cohabitation", which may support the same argument. In sum, these compensatory statutory provisions can be seen to embrace the independent, clean-break model of marriage and marriage breakdown.

[24] I have considered all of the relevant circumstances and have concluded the petitioner is entitled to spousal support from the respondent. I have considered the means and needs and other circumstances of the spouse as directed by the *Divorce Act*. I have considered the age of the petitioner and her lack of training for a vocation at the age of 41. I have considered the function performed by each spouse during cohabitation and the fact that the petitioner was materially the primary care giver for the children.

[25] The marriage lasted 15 years. I find that during that time, any work she performed did not have any effective training to enhance her ability to find employment after separation. Her children are young and require parental support, but I find she still made a large number of attempts to obtain employment.

[26] In my view, it would be inappropriate to consider as a significant factor in assessing spousal support the presence of the mother who is a woman of advanced years or to rely on the presence of Mr. Moquin in her life who spends considerable time at sea.

[27] The petitioner's financial position has diminished since separation. Looking at all the circumstances the marriage breakdown has had adverse consequences on her financial position. The contribution made to her by Mr. Moquin at this time assists her financial position but does not compensate for the results of the breakdown of the marriage. She is entitled to spousal support.

### **CHILD SUPPORT**

[28] The parties agree the respondent will pay child support in accordance with the Federal Child Support Guidelines and will pay an agreed amount toward the expense of the children's gymnastics.

[29] The issue which separates the parties is the amount of income which should be attributed to the respondent for the purpose of calculating child support under the guidelines. Determination of the income has a bearing on the amount of spousal support.

[30] Ms. Musgrave for the respondent says the court should look only at the income tax return forms which she submits show a consistent income over the past

several years. It is her position the respondent is a person who earns an annual income of around \$50,000.

[31] Ms. Faught on behalf of the petitioner says the respondent effectively earns about \$90,000 each year. She makes reference to that portion of the guidelines which stipulate means of determining income and submits there are a number of factors which increase income over that set out in income tax return forms.

[32] Income is determined in accordance with sections 15 to 20 of the Federal Child Support Guidelines which read:

Determination of annual income

15. (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

Agreement

(2) Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

### Calculation of annual income

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by Revenue Canada and is adjusted in accordance with Schedule III.

### Pattern of income

17. (1) Where the court is of the opinion that the determination of a spouse's annual income from a source of income under section 16 would not provide the fairest determination of the annual income from that source, the court may determine the annual income from that source.

(a) where the amount in respect of the source of income has increased in each of the three most recent taxation years or has decreased in each of those three years, to be the amount from that source of income in the spouses's most recent taxation year;

(b) where the amount in respect of the source of income has not increased or decreased as described in paragraph (a), to be the average of the amount received by the spouse from that



source of income in the three most recent taxation years, or  
such other amount, if any, that the court considers appropriate;

or

(c) where the spouse has received a non-recurring amount in  
any of the three most recent taxation years, to be such portion  
of the amount as the court considers appropriate, if any.

#### Non-recurring losses

(2) Where a spouse has incurred a non-recurring capital or  
business investment loss, the court may, if it is of the opinion that the  
determination of the spouse's annual income under section 16 would  
not provide the fairest determination of the annual income, choose not  
to apply sections 6 and 7 of Schedule III, and adjust the amount of the  
loss, including related expenses and carrying charges and interest  
expenses, to arrive at such amount as the court considers appropriate.

#### Shareholder, director or officer

18. (1) Where a spouse is a shareholder, director or officer of a  
corporation and the court is of the opinion that the amount of the  
spouse's annual income as determined under section 16 does not  
fairly reflect all the money available to the spouse for the payment of

child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

Imputing income

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;

- (h) the spouse derives a significant portion of income from dividends capital gains or other sources that are taxed at a lower rate than employment or business income; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

#### Reasonableness of expenses

- (2) For the purpose of paragraph (1) (g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.

#### Non-resident

- 20. Where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.

[33] Quite apart from adjustments set out in Schedule III a figure which is consistent with "total income" on income tax return may be varied based upon a change in the pattern of income as set out in s. 17 or adjusted under s. 18 for shareholders, directors or officers of corporations if the amount paid does not

fairly reflect all of the income. There is also the non-exhaustive list of circumstances in s. 19 which may affect "income".

[34] A letter from a firm of chartered accountants dated September 4, 1997 was filed indicating \$58,717 was a five-year average (1993-1997) of "profits before owners' compensation and taxes" with respect to Evergreen & Holly Ltd. The letter said:

It should be noted that during the years 1993 to 1996 (1997 has not been finalized) you have paid out a combination of salaries and dividends to owners in amounts approximating the corporate earnings and, as a result thereof, shareholders' equity has increased during the period 1993 to 1996 by only \$5,780. As a result thereof, the company's equity at April 30, 1996 was \$34,722 which amount is insufficient to finance inventory at the \$100,000 level.

To date the above deficiency has been financed by suppliers (dating accounts) and bank operating loans which for the current year remained at \$25,000 (no repayments or advances during the year). It would be UNWISE to ASSUME tht your bankers are prepared to treat the \$25,000 loan as a PERMANENT SOURCE OF

FINANCING. In the absence of available personal capital, your only means of effecting a reduction in debt is the RETENTION OF EARNINGS inside the company and IN THE ABSENCE of any indication that corporate earnings can be reasonably anticipated to grow (see above history), you will have to exercise some restraint in your personal withdrawals.

[35] An income tax form for the year 1998 was filed indicating salary of \$20,100 and dividends of \$28,834 for a total of \$48,934.

[36] By letter dated April 24, 2000 a chartered accountant set out an analysis of the Salaries and Wages Expenses as follows:

XMAS BY THE SEA					
YEARS ENDED	APRIL 30	APRIL 30	APRIL 30	APRIL 30	APRIL 14
SALARIES AND WAGES ANALYSIS	1996	1997	1998	1999	2000
MICHAEL PIERCE	14,500.00	8,000.00	6,700.00	18,425.00	21,000.00
JOAN PIERCE	9,500.00	0.00	0.00	0.00	0.00
CINDY BOND	7,807.05	1,394.84	0.00	0.00	0.00
MARY SMITH	919.36	2,935.48	4,129.65	2,511.79	257.47
PAULA LEBLANC	7,110.49	8,298.11	8,719.65	0.00	0.00
DEANNA RYAN	0.00	81.12	0.00	0.00	0.00
LYNNE ATKINSON	0.00	0.00	2,100.00	15,561.04	18,491.00
DEBBIE MACCULLOCH	0.00	0.00	0.00	0.00	2,349.00
CASUAL LABOUR	350.00	854.00	210.00	50.00	200.00
	40,186.90	21,563.55	21,859.30	36,547.83	42,297.47
EMPLOYEE BENEFITS	281.43	1,195.79	967.76	1,983.19	2,000.00
	40,468.33	22,759.34	22,827.06	38,531.02	44,297.47

[37] Ms. Faught, on behalf of the petitioner, makes reference to the amount paid to Lynne Atkinson, who is living with the respondent, under date April 14, 2000 - \$18,491. Reference is made to the evidence of Paula LeBlanc who was an employee making a maximum of \$9,000 per year and the fact that no one was paid \$18,000 a year except Ms. Atkinson despite the argument there was little change in the profit picture over the years.

[38] Counsel for the respondent answers this submission by stating Ms. Atkinson was a full-time employee and it is said the only full-time employee. It is argued Ms. Atkinson was a hard worker who worked overtime.

[39] The respondent was engaged in a legal action involving the pursuit of damages for personal injuries. The respondent claimed \$185,000 for diminished earnings. There was settlement on terms which included a figure of \$60,000 for diminished earnings. The total of the final settlement for all elements of the loss was \$155,000 out of which the respondent paid 25% for contingency legal fees.

[40] Counsel for the petitioner argues that the respondent plans to retire at age 60 and the court should add \$5,000 to \$6,000 a year to account for the diminished earnings settlement.

[41] There is reference to retained earnings which were \$34,222 in 1996, \$40,525 in 1997, \$56,701 in 1998 and \$45,728 in 1999. Counsel for the petitioner argues the husband has not proved the retained earnings were to satisfy the bank and there was reference to the evidence that he gave a G.I.C. to the bank. It is suggested an amount of \$20,000 should be added into income.



[42] The respondent says these retained earnings have accumulated over a 12-year period and it is unreasonable for the petitioner to seek one-half of this accumulated figure to be paid annually.

[43] It is also argued there was a substantial amount of dividends paid over the years and this suggests an increase in income.

[44] The summary advanced by the petitioner is that income should be calculated taking into consideration the following figures:

Income	\$21,000
Dividend	32,000 - 38,000
Ms. Atkinson	9,000
Retained Earnings	20,000 - 25,000
Diminished earning settlement	6,000 - 10,000

[45] Care must be exercised in considering the submissions of the petitioner. A great deal of the argument for increased earnings is based on speculation which does not satisfy the evidentiary burden. Nevertheless, I am satisfied the petitioner

has advanced evidence to the effect the proper amount of income is in excess of the amount set forth in the income tax return forms.

[46] In particular, I am prepared to find that I am satisfied on the balance of probabilities there should be a slight increase when one considers the cumulative effect of the settlement figure, the dividends, the amount of retained earnings and the salary paid Ms. Atkinson. It is my view the income to be attributed to the respondent for calculation of spousal support or child support should be fixed at \$63,000. Child support according to the Federal Child Support Tables should be fixed at \$838 per month together with the agreed figure for gymnasium expense.

[47] For spousal support I fix the sum of \$450 a month. There has been a period of time when the respondent did not pay spousal support, and as a result, I will direct that the petitioner is not required to pay one-half of the line of credit debt to which she had agreed. Otherwise, there will not be a sum set for retroactive spousal support.

J.