IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Hanley v. Hanley, 2010 NSSC 73

Date: 20100329
Docket: SFPAOTH 026216
Registry: Halifax

Between:

Annie Margaret Hanley
Applicant

and

James Alexander Hanley
Respondent

Revised decision: The text of the original decision has been corrected according to the erratum dated April 19, 2010. The text of the erratum is appended to this decision.

Judge: Justice Lawrence I. O'Neil

Heard: February 15, 2010, in Halifax, Nova Scotia

Counsel: M. Louise Campbell, Q.C., for the Applicant
Patrick C. Binderup, for the Respondent

By the Court:

Introduction

[1] The parties are natives of Inverness county, Nova Scotia. They began dating while both were living in Toronto in the early nineteen sixties. The parties were married in 1964. They returned to Inverness County in 1969 and have remained. They separated in April 1970, reconciled in July 1977 and separated again in August 2002. They have two children, born in 1966 and 1978. Both are living independently,

[2] Ms. Hanley taught in the school system in the Toronto area before returning. Mr. Hanley worked as an electrician.

Background to Litigation

[3] Although no petition for divorce has been filed, the parties have been living separate and apart for more than a year and there is no reasonable prospect for resumption of cohabitation. The subject application for division of matrimonial assets was filed in 2003. It is for a division of matrimonial assets as provided for by the *Matrimonial Property Act*, R.S.N.S. 1989 c.275. The parties have reached an agreement that will result in equal division of the matrimonial assets with the exception of Ms. Hanley's teacher's pension. There is disagreement between the parties on whether the pension entitlement earned by her during the seven years the parties were separated (1970-1977) should be equally divided.

Issue

[4] Whether that part of Ms. Hanley's pension entitlement, earned during the period of the parties' separation (1970-1977), should be equally divided.

Position of the Parties

[5] The parties submitted pre-hearing briefs and post hearing commentary. There is agreement that s.13 of the *Matrimonial Property Act supra*, creates a presumption that matrimonial assets are to be equally divided between spouses. The parties also agree that as a result of the decision of our Appeal Court in *Morash v. Morash* [2004] N.S.J. No. 40, there is no doubt that pensions are classified as matrimonial assets and that pension entitlement earned before marriage is subject to division in the same way and on the same basis as pension entitlement earned during the marriage.

[6] It is argued on behalf of Ms. Hanley that the pension entitlement earned over the subject seven (7) years should be unequally divided after considering several factors; specifically those identified by s.13(a), (e) and (i) of the *Matrimonial Property Act supra*.

[7] She argues that an equal division would be unfair or unconscionable, taking into account these factors.

[8] Section 13 enumerates the factors to be considered upon division as follows:

> Factors considered on division
>
> 13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
>
> > **(a) the unreasonable impoverishment by either spouse of the matrimonial assets;** (emphasis added)
> >
> > (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
> >
> > (c) a marriage contract or separation agreement between the spouses;
> >
> > (d) the length of time that the spouses have cohabited with each other during their marriage;
> >
> > **(e) the date and manner of acquisition of the assets;** (emphasis added)
> >
> > (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
> >
> > (g) the contribution by one spouse to the education or career potential of the other spouse;
> >
> > (h) the needs of a child who has not attained the age of majority;
> >
> > **(i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;** (emphasis added)
> >
> > (j) whether the value of the assets substantially appreciated during the marriage;
> >
> > (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;

> (l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;
>
> (m) all taxation consequences of the division of matrimonial assets. R.S., c. 275, s. 13; revision corrected.

[9] In the pre-hearing submission and again through the evidence of both parties, the point is made that Mr. Hanley had a problem with alcohol in the early seventies. Ms. Hanley explained that his drinking and her health problems placed stress on the relationship and resulted in their separation in 1970. Mr. Hanley argues that he provided child care and sacrificed career opportunities during the period of separation. He submits that Ms. Hanley benefited from his efforts and sacrifices.

[10] I wish to consider the factors offered in support of the application for unequal division of the pension.

The Unreasonable Impoverishment by Either Spouse of the Matrimonial Assets, s.13(a)

[11] I am satisfied on a balance of probabilities that Mr. Hanley did have an alcohol problem and it was a factor in the parties' separation. However, there is no reliable evidence that permits me to conclude how significant a problem this was after the 1970 separation or even before.

[12] The parties agree that Mr. Hanley has not been drinking since 1980. He described himself as having been more of a binge drinker prior to 1980.

[13] Ms. Hanley's evidence was less precise. She did give one example of his "drinking and driving" during the period of separation. Mr. Hanley did participate in an alcohol rehabilitation program in the seventies.

[14] There is no evidence that his drinking problem impacted on the parties accumulation of assets. The asset in question was acquired during the period of the parties' separation, and the court is told that the parties' other assets are being divided equally.

[15] There is also evidence that Ms. Hanley developed an addiction to prescription medication and over the counter pain killers. This lead to her receiving residential rehabilitation services. Ms. Hanley testified that she did so on more than one occasion. Mr. Hanley said that she spent a month in the Nova Scotia Hospital as part of the treatment of her addiction. It appears the addiction and treatment of Ms. Hanley was in the late eighties and early nineties.

[16] Although Mr. Hanley did not identify when this happened, Ms. Hanley placed her addiction problem in the 1990s.

[17] I have reviewed the decision of Justice Goodfellow in *Keeler v. Keeler* [2000] N.S.J. No. 190 which required the court to consider the effect of a gambling problem on matrimonial assets. I have also considered the decision of Justice Gruchy in *O'Quinn v. O'Quinn* [1997] N.S.J. No. 527. Justice Gruchy found that one of the parties had impoverished matrimonial assets with her spending at bingo parlours.

[18] In *Martin v. Martin* [2007] O.J. No. 467, the court considered whether the husband's excessive drinking had depleted the matrimonial assets. The court concluded (at paragraph 25) that the evidence, "made out a convincing case for an unequal division of net family assets".

[19] In 1990, Ms. Hanley was placed on long term disability income and she stopped teaching. The basis for her disability appears related to her aneurysm in 1969. However, Ms. Hanley was unconvincing in explaining the connection and again the evidence was weak. The court observes that the onset of the disability was apparently when she was fighting her addiction problem.

[20] Overall, the parties' evidence was weak. Clearly, their memories were poor and neither wanted to over state the failings of the other. They impressed the court as 'dug in' on the issue placed before the court but respectful of each other. Ms. Hanley explained that the aneurysm she suffered in 1969 had affected her memory. Neither party could clearly and confidently answer basic questions about their incomes.

Date and Manner of Acquisition of the Assets, s.13(e)

[21] As stated, the pension entitlement in question was earned during the parties' separation. Mr. Hanley did not contribute to its acquisition by Ms. Hanley. The parties, although married, were not living together nor sharing household expenses. In some respects, their situation is analogous to the acquisition of pre marital/pre cohabitation assets by a party.

(i) The contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent, s.13(i)

[22] I am satisfied that the parties cooperated during their separation to co parent their daughter. Ms. Hanley was employed as a teacher and Mr. Hanley worked when employment was available in the construction industry. The extended family of Mr. Hanley assisted with child care. Once again, there is no convincing evidence that either party neglected their responsibilities during their period of separation or at other times during the marriage. I am satisfied that they cooperated and shared the parenting responsibilities based on what they viewed as workable and equitable. When Mr. Hanley was between jobs, he was a more involved parent, and when Ms. Hanley was not working outside the home, she was a more involved parent.

[23] Mr. Hanley stopped drinking in 1980 and Ms. Hanley developed an addiction in the eighties or nineties. Clearly, each of these problems would have placed a burden on the other spouse. They appeared to have addressed and managed these issues. I am satisfied that, as a couple, the parties were flexible in the parenting arrangement and responded to and managed the family obligations accordingly.

[24] Although the parties were living separate and apart for a period of time in the 70s, they did resume a friendly relationship within a year or two of their separation. At the time of their reconciliation in 1977, they were expecting their second child.

[25] In the words of Bateman, J.A. in *Morash v. Morash* [2004] N.S.J. No. 40, at paragraph 23:

> 23. . . . A measuring of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Matrimonial assets may be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable. (Young v. Young, supra). In applying s. 13, the question is not whether an unequal division would be fair or fairer, but whether the usual equal division dictated by the Matrimonial Property Act, would be unfair or unconscionable. "... [t]he issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair." (S.B.M. v. N.M. (2003), 14 B.C.L.R. (4th) 90; [2003] B.C.J. No. 1142, (Q.L.)(C.A.) per Donald, J.A. at para 23). Absent a factual context supporting unequal division, the court is not free to exclude from division assets acquired by one party prior to marriage. The trial judge did not engage in the s. 13 analysis, nor, had he done so, would the circumstances here have warranted an exclusion of the pre-marriage pension credits.

[26] None of the other factors of s.13 that could weigh in favour of an unequal division of the pension have application to the facts.

[27] A consideration of the length of time the spouses have cohabited (s.13(d)) weighs in favour of an equal division of all assets as does their contributions to the marriage and to the family (s.13(1)). I do not have evidence that either impoverished the matrimonial assets, that a marriage contract or separation agreement existed or that either is more responsible than the other for matrimonial or personal debts and liabilities.

[28] I am not satisfied that either contributed more than the other to their spouse’s education or career potential.

[29] Mr. Hanley argued that an unequal division of the pension entitlement can not be justified. He argues that this was a long term marriage of thirty six years, and cohabitation for twenty-nine years. He testified that he was an involved parent during the period of separation, providing child care and spending on the child. He said the relationship improved a year or two after the separation in 1970 and they cooperated as parents. He said he remained in Nova Scotia after the 1970 separation so that he could be an involved parent.

Case Law

[30] Justice Legere-Sers decision in *Verdun v. Dorrance* [2006] N.S.J. No. 431 reviewed the law since *Morash supra*, dealing with the division of pre cohabitation pensions. She identifies the perceived inequities that the relevant Nova Scotia legislation creates. Her decision is a helpful commentary on the state of the law.

[31] Ms. Hanley obviously believes that the pension entitlement earned by her during the parties' separation should be divided unequally. However, the *Matrimonial Property Act supra*, governs whether this should be so. After considering and applying the factors enumerated in s.13 of that Act (and set out above), I am satisfied that Ms. Hanley has not met the burden of establishing that an equal division of her teacher's pension would be unfair or unconscionable.

J.

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Revised Decision: The text of the original decision has been corrected according to the appended erratum dated April 19, 2010

Judge: Justice Lawrence I. O'Neil

Heard: February 15, 2010, in Port Hawkesbury, Nova Scotia

Counsel: M. Louise Campbell, Q.C., for the Applicant

Patrick C. Binderup, for the Respondent

Erratum:

Page 1, where it reads "Heard: February 15, 2009, in Halifax, Nova Scotia", it should read "Heard: February 15, 2010, in Port Hawkesbury, Nova Scotia".