

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Sheehan v. Sheehan, 2010 NSSC 428

**Date:** 20101116

**Docket:** 1201-062713, SFHD-059102

**Registry:** Halifax

**Between:**

Susan Sheehan

Petitioner

v.

Shaun Sheehan

Respondent

**Judge:** The Honourable Justice Beryl MacDonald

**Heard:** November 4 - 5, 2010, in Halifax, Nova Scotia

**Written Decision:** November 16, 2010

**Counsel:** Kymberly Franklin, counsel for the Applicant  
Gordon Kelly, counsel for the Respondent

**By the Court:**

[1] This is a divorce proceeding. The Husband and the Wife married on August 17, 1991. They separated 16 ½ years later in April 2008 when the Husband was 39 years old and the Wife was 40 years old. At the time they separated the Husband was employed as a Vice Principal with the Halifax Regional School Board and the Wife was an administrator at the Nova Scotia College of Art and Design. Their employment remains unchanged. Two children have been born of this relationship and they are now 16 and 11 years old.

[2] At the commencement of the hearing I was satisfied that all jurisdictional requirements of the *Divorce Act* had been met and that there was no possibility of reconciliation. There had been a permanent breakdown of this marriage by reason of the parties having lived and continuing to live separate and apart from one another for a period in excess of one year from the commencement date of this proceeding. A divorce judgment was granted on November 4, 2010.

[3] When the Petition for Divorce and the Answer were filed the issues were the parenting arrangement, child support, both for the table and section 7 expenses, spousal support, and the division of debt and matrimonial property including pensions. The parties have now agreed upon a parenting plan and the child support to be paid as a result. They have agreed to share their debt equally calculated from the date of their separation.

**PARENTING PLAN**

[4] The Husband and Wife have agreed the children are to be in their joint custody under a shared parenting plan the details of which have been placed before this court and will appear in the order to be drafted as a result of this decision. Those details are lengthy and there is no need to repeat them in this decision.

**CHILD SUPPORT**

[5] The parties have chosen, because of the shared parenting arrangement, to determine child support by using the “set off” option. As a result the table amount of child support to be paid by the Husband to the Wife is \$ 497.00 based upon his total 2009 income of \$74, 989.00 less union dues of \$690.00 (for a resulting

income for child support purposes of \$74,299.00) and her total 2009 income of \$36,835.00.

[6] The Husband is paying the child care expenses which are \$140.00 per month for 10 months of the year, for a total of \$1,400.00. The required proportional contribution to the net cost to be paid by the Wife, if she does not receive spousal support, is \$23.00 per month. This amount is to be deducted from the child support to be paid by the Husband to the Wife. As a result, the parties have agreed the Husband is to pay the Wife \$474.00 per month on an ongoing basis for child support commencing November 15, 2010, subject to an adjustment in respect to this expense if spousal support is ordered.

#### HEALTH PLAN COVERAGE

[7] The Husband has agreed to continue to provide health insurance coverage for the children under his plan and he will continue to provide coverage for the Wife for as long as he can do so under the terms of the plan.

#### ISSUES FOR TRIAL

[8] As a result of the agreements between the parties the remaining issues are spousal support and the division of matrimonial property. The Wife requests a spousal support award, an unequal division of the matrimonial home, and an equal division of all other assets. The Husband contests the Wife's entitlement to a spousal support award and contests quantum if one is granted. The Husband seeks an equal division of matrimonial property but if the Wife is granted an unequal division of the matrimonial home he requests an unequal division of the real property in Cape Breton . There also may be an element of a request by the Husband for an unequal division of the matrimonial home pursuant to section 13 (a) " the unreasonable impoverishment by either spouse of the matrimonial assets". He alleges the value of the matrimonial home has diminished significantly because the Wife deliberately neglected to secure a renewal of a license permitting vehicular access to the matrimonial home.

[9] The parties have agreed that everything they own is matrimonial property. They have few assets. The assets are: the home in which they lived during their marriage, furniture and household effects, a 2003 VW Jetta, their pensions and real property in Cape Breton.

[10] The parties have agreed to a division of the furniture and household effects. They have agreed upon the values to be assigned to each asset except for the matrimonial home.

[11] My decision will begin with the division of matrimonial property because this division will be relevant to the spousal support issue.

#### VALUATION OF MATRIMONIAL HOME

[12] The value to be assigned to the matrimonial home is problematic. When the Wife's father purchased the home in 1964, it had no right of way for vehicular access. On May 1, 2000 the parties obtained a license from the Halifax Port Authority permitting vehicular access to the matrimonial property by passing over land owned by the Authority. The license was for a 10 year period that expired April 30, 2010. As a result of the expiry of this license the value of this property has diminished. With vehicular access this property may be worth \$430,000.00 as is suggested in the appraisal report prepared by Paul Young. Without access the value has been suggested to be \$240,000 by Paul Fennell in his appraisal and \$225,000.00 by Steve Horswill in his appraisal.

[13] The Husband requests I hold the Wife responsible for this diminishment in value and that, as a consequence of her failure to preserve the value of this property, I should decide the value of the matrimonial home is the average of the highest and lowest appraisals. This will apportion between the parties the result of the expiration of the license and the possibility of an increase in value if other access is obtained. To do so I must first find the Wife responsible for what has happened and then determine whether this is the consequence that should result.

[14] The Wife's father purchased this property without vehicular access. Just before or shortly after his death the Wife filed a petition pursuant to the provisions of the Private Ways Act, R.S.N.S.1989 c. 358. Part II of this legislation authorizes a Municipal Council, upon its acceptance of a petition by a owner of land within the municipality, to appoint a commissioner to determine the appropriate location of a "private way" or "road" leading to the owner's property if the commissioner considers the proposed way or road is "reasonable and practicable and requisite". The way or road may pass over land owned by neighbors. If the commissioner

cannot negotiate compensation with the neighbors for the passage of the way or road over their lands, arbitrators are to be appointed to make this determination.

[15] The Halifax Regional Council (as it then was) in January 1998 accepted the petition presented by the Wife and appointed a commissioner to carry out the tasks assigned by the Private Ways Act. The Commissioner concluded that because the neighboring land over which the proposed “road” must pass was land owned by and under the jurisdiction of the Government of Canada, the provincial jurisdiction would not apply. As a result the parties were forced to seek a remedy from the federal authority that had responsibility for the land in question which was the Halifax Port Authority.

[16] Neither party has provided any information about the process used to obtain a license from the Halifax Port Authority. Because the Commissioners’s report is dated September 14, 1999 and the license is dated May 1, 2000 the process appeared to require approximately 8 months to conclude. The license itself had no process for renewal. It was for a period of 10 years ending April 30, 2010. It was granted to the Husband and the Wife. It did not require the Halifax Port Authority to notify the parties if the property was to be sold or if there were title disputes. At a time unknown to me but at least by April 13, 2010, the Halifax Port Authority either sold this property to individuals or recognized their title to the land. The evidence suggests a recognition of title interest.

[17] The Wife did engage a lawyer to assist her with the access problem. I do not know when that process began but I do have a copy of a letter to her lawyer from a lawyer representing the owners of the land subject to the license. (Exhibit B to the Wife’s affidavit filed as Exhibit #5 ) That letter is dated April 13, 2010 and says:

We write to confirm that any interests which the Crown or the Halifax Port Authority may have previously claimed over the lands in question are resolved with my clients being recognized as the true and exclusive owners in fee simple.

Your client previously used these lands pursuant to a license agreement dated May 1, 2000. That license agreement expires on April 30, 2010 and will not be renewed.

[18] From this I conclude there was little the Wife could do to ensure the license would have been renewed. She did not deliberately allow it to expire as has been alleged by the Husband.

[19] The Wife now is returning to the provisions of the Private Ways Act as a means by which to gain vehicular access to the matrimonial home. Her petition is resisted by the owners of the land over which the access must run on the basis that this is in fact an expropriation requiring the procedures of that legislation to be followed. I do not know what the outcome of this litigation will be. I do not know if the Private Ways Act remains available as a remedy. I do not know whether the wife's petition to have a road laid out will succeed. I do not know what this litigation will cost. The Wife did inquire about the possibility of accessing the matrimonial home by passing over other adjoining lands presently owned by a developer. No definite commitment was made by the developer but any co-operation may come with a \$100,000 price tag.

[20] I am satisfied the Wife is doing what she can about this problem. There is no evidence before me to suggest a quick and easy solution. The problem may never be resolved and the Wife may be left with a landlocked piece of property permitting foot passage only over the neighboring property. If this property has a potential value of \$340,000.00 this value will not soon be realized. Under these circumstances I will not average the highest and the lowest value. I will use the higher of the two valuations given for the property as it presently exists - without vehicular access. The value of the matrimonial home is \$240,000.00.

## UNEQUAL DIVISION

[21] The Matrimonial Property Act, R.S.N.S., 1989 c. 275 requires all real and personal property (subject to enumerated exceptions) acquired by either or both spouses before or during the marriage to be divided equally between spouses. This real and personal property may be divided unequally if there exists a factor enumerated in section 13 of the Act which, when considered in the context of the entirety of the marriage, results in a conclusion that an equal division would be "unfair or unconscionable".

[22] In *Jenkins v. Jenkins* (1991), 107 N.S.R. (2d) 18 (T.D.), Richard J. reviewed the meaning of unfair or unconscionable as set out in s. 13 of the *Matrimonial Property Act* and said:

I propose now to deal with the division of matrimonial assets in accordance with the law as set out in *Donald*, supra, while remaining mindful of the comments of MacDonald, J.A., in *Nolet*. To support a finding that a division is "unfair and unconscionable" it seems that there must be something more than mere inconvenience. The Random House Dictionary defines "unconscionable" variously as "unreasonable", "unscrupulous", "excessive" and "extortionate". These are strong words, and when coupled with the requirement that "strong evidence" must be produced to support an unequal division the burden upon the party requesting an unequal division of matrimonial assets is somewhat onerous.

[23] In *Young v. Young*, (2003) 216 N.S.R. (2d) 94 (C.A.) Bateman J.A. held that the trial judge erred in granting an unequal division of the matrimonial assets in favour of the husband after a twenty-five year marriage. The trial judge's reason for so doing was based on the fact that the husband had owned a farm prior to the marriage which farm was sold before separation. Bateman J.A. reviewed the discretionary limitations of s. 13 of the *Act* and said:

20 Section 4 (1) of the Act expressly includes as a matrimonial assets (subject to the enumerated exceptions) all real and personal property acquired by either or both spouses before or during the marriage. Thus the mere fact of prior acquisition does not remove the assets from prima facie equal division. Section 13 (e) entitles the judge to take into account "the date and manner of acquisition of the assets" when considering whether an equal division would be unfair or unconscionable. Under the s. 13 analysis the significance of the prior acquisition must be looked at taking into account factors such as the timing of the contribution of the particular asset to the marriage; the parties use of the asset; the length of the marriage; the significance of the asset relative to the entire pool of matrimonial assets; and the age and stage of the parties at separation. This is not an exhaustive list. The judge failed to conduct a contextual assessment of the significance of Mr. Young's prior ownership of the farm.....

[24] In this case the matrimonial home was inherited by the Wife in December 1997 upon the death of the Wife's father. The Wife's father did not mention the Husband in his will although the parties were married at the date of his death and had been married for one year when he made his will on August 9, 1992. The Husband and the Wife had lived in this home with her father during his lifetime from their marriage in August 1991 until June 1992, when they moved into a rental premises, and then from the summer of 1993 continuously until their separation. At the beginning of their marriage the husband was enrolled in a Bachelor of Education degree at Dalhousie University and the Wife was enrolled in a Bachelor

of Fine Arts program at the Nova Scotia College of Art and Design. By 1992 both parties had part-time employment while continuing their educational pursuits . On March 24, 1994 the parties' first child was born. The Husband had completed his degree, the Wife had not. The Husband was employed as a substitute teacher and the parties had started a small artistic black - smithing business. Both were involved in this business although there were periods of time when the Husband would return to substitute teaching to provide additional income both for the family and to keep the business operating. On November 2, 1999 the parties second child was born . In September 2001 the parties dissolved the black-smithing business. The Husband had obtained full-time employment with the Halifax Regional School Board. In 2002 the Wife commenced a part-time teaching position at the Nova Scotia College of Art and Design.

[25] The Wife states in her affidavit entered as Exhibit #3 that the reason why she took a part-time job in 2001 was so she could remain at home to look after the parties' children. She states that in 2004 she took a second job and maintained two jobs to cover the family's living expenses. In addition, in 2006 when the husband returned to school part time to obtain his Masters degree she continued to work two jobs until 2007. Implicit in this evidence is the suggestion that on these occasions the Husband contributed little financially and it was the Wife's income that sustained the family and permitted the Husband to acquire his Master's degree. The husband's evidence is somewhat different. In his affidavit filed as Exhibit #10 he states that in addition to her part-time teaching course load at the Nova Scotia College of Art and Design the wife assumed an additional administrative position in 2005. He considered her to be working full time with the Nova Scotia College of Art and Design since at least 2005. This suggests she had one job although it may have had two components. The Husband worked continuously throughout the marriage, initially part time, then for a period with the Wife in the black - smithing business, then part time again and then by 2001, full time. The evidence satisfies me that all of his income was used to benefit the family.

[26] The evidence is also clear that both parties participated in parenting the children. There were occasions when the children were infants when the Wife may have played a more primary role but this situation changed when she became a full time employee.

[27] The Wife alleges that:



- the husband paid no rent to her father while they were living in his home
- the husband did not contribute to renovations to the matrimonial home
- the husband's contribution to upkeep and maintenance of the matrimonial home was insignificant
- her father did not intend for the husband to have any interest in the matrimonial home

[28] Neither the Husband nor the Wife paid her father rent when they lived with him during his lifetime. There is no evidence to suggest that they were asked to do so. Neither of the parties made any substantial renovations to the matrimonial home. The renovations that were completed were paid for. Since all of their earned income was used for family purposes no clear line can or should be drawn determining who paid for what. Neither party accumulated any assets other than those listed previously. Both contributed toward the upkeep and maintenance of the home.

[29] The intention of the Wife's father is hearsay as a statement from her. His Will speaks for itself. The house was given to the Wife. This fact will be relevant when considering subsection (e) of section 13.

[30] The Wife bears the burden of convincing this court that an unequal division is justified. The factors in section 13 she considers relevant to her claim are as follows:

- (a) the unreasonable impoverishment of either spouse of the matrimonial assets;
- (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
- (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;

(g) the contribution by one spouse to the education or career potential of the other spouse;

(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;

(j) whether the value of the assets substantially appreciated during the marriage;

### UNREASONABLE IMPOVERISHMENT

[31] The Wife's submission is that if the house was sold and the proceeds split equally with the Husband she would then be left with the split equity and nothing else. This is the reality of an equal division to be faced by both parties. They have nothing other than the matrimonial assets.

[32] Matrimonial assets can be considered to have been "unreasonably impoverished" if money is diverted from the family due to heavy drinking (*Mac Donald v. Mac Donald* 1993 CarswellNS 52 (N.S.S.C.) or by cashing in a matrimonial asset to invest in a business asset (*Baggs v. Baggs* [1997] N.S.J. No. 87(N.S.S.C.) or by incurring family indebtedness to preserve a business asset. (*Mac Donald v. Mac Donald* 2007 CarswellNS 262 (N.S.C.S.))

[33] Bateman J.A. in *Roberts v. Shotton* 1997 CarswellNS 8 (N.S.C.A.) remarked:

15 The Act was not, however, implemented as a tool to arbitrarily redistribute or equalize wealth between married persons....

23 Where the marriage is of reasonable duration, certain presumptions prevail: it is presumed that a spouse's non-monetary contribution to a marriage, through the assumption of child care and homemaking responsibilities is deserving of recognition; that in a marriage, parties generally operate as a team, pooling resources and making decisions in reliance on their joint means; that the disadvantage occasioned to a non-income earning spouse on marriage breakdown, should be alleviated to the extent appropriate through a fair distribution of the assets; that in most marriages it is unfair, undesirable and unnecessary to embark upon a tracing of the assets brought into the marriage by each party; that where

one party assumes primary responsibility for the organization of the marital assets, that spouse should not be permitted to arrange the assets in a way that disadvantages the other spouse on dissolution of the marriage. This is far from an exhaustive list.

- 24 When, however, a marriage, falls outside the norm for which the general guidelines have been developed, it is necessary to carefully scrutinize the circumstances and determine whether a different approach is required to achieve a fair result. Adherence to the general rules is not to be at the expense of equity.....

[34] The husband has done nothing to “impoverish” any of the matrimonial assets.

## DEBTS

[35] The parties have resolved the debt issues and as a result this is not a factor to consider. All of the debt was used by both parties to support the family and to pursue a joint business opportunity. The Husband is equally sharing this debt with the Wife as he should. Both contributed to the payment of debt during the marriage although not always equally. However, while one person was paying debt, another was buying groceries, paying for child care and so on. As I have said earlier, all income earned by both was used by and for the benefit of the family.

## LENGTH OF COHABITATION

[36] The Wife’s submission suggests this is a factor due to the length of time the parties spent living in the home and with whom they were living ie: the wife’s parents.

[37] This factor ordinarily refers to short term rather than long term marriages without reference to a specific asset. (*Briggs v. Briggs* (1984), 64 N.S.R. (2d) 40 (N.S.T.D.) and affirmed at (1984), 65 N.S.R. (2d) 126 (N.S.C.A.) and *Donald v. Donald* (1991), 103 N.S.R. (2d) 322 (N.S.C.A.)

[38] If, as is suggested, this factor is also relevant to a specific asset, I do not consider the Husband’s occupation of the home to be for a short term. While there was a period of time when these parties were occupying this home when it was owned by the Wife’s father, she became the effective owner of this property from

the date of his death notwithstanding her choice to leave title in the name of his estate. After the death of the Wife's father the parties lived in this property for 11 years in a marriage that has lasted 16 ½ years. This is not an insignificant period of time.

#### DATE AND MANNER OF ACQUISITION

[39] This was an inherited property brought into the marriage by the Wife alone. This is a factor to be considered in determining whether an unequal division is justified.

#### CONTRIBUTION TO EDUCATION

[40] When the Husband was attending university both to obtain his Bachelor and Master's Degrees he was working periodically and all of his income was used to support his family and pay for his education. During some of this time the Wife was also attending college and working part time. No doubt there were occasions when the wife had more money to contribute to joint expenses than did the Husband. However, there also would have been occasions when the Husband had more to contribute than did the Wife. Also the Husband used earned money to support the business expenses of the black - smithing enterprise, an enterprise providing the Wife an opportunity to pursue an artistic entrepreneurial career. The evidence does not suggest the Wife contributed significantly more than the Husband toward his expenses in obtaining his Bachelor or Master degrees. There is no evidence of the kind of self sacrifice that is evident in cases where this has been accepted as a factor to be considered. ( see comments in *Arthur v. Arthur* (1985) 67 N.S.R. (2d) 323 (N.S.T.D.)

#### CONTRIBUTION TO MARRIAGE AND FAMILY

[41] Marriage is a joint endeavour. Each spouse may contribute differently. One may work, the other may be a homemaker with primary responsibility for the children of the relationship. Both spouses may work but one may have greater parenting responsibilities than the other. One spouse may work full time and the other part time to accommodate child care concerns. These are normal situations that would generally result in a finding that both spouses are contributing equally to the marriage and family.

[42] In 1996 the Wife did use money received from a death insurance policy on the life of her father to support both she and the Husband. The amount has not been provided. There is nothing in the evidence to suggest that it's significance should justify a conclusion that she contributed more to this relationship than did the Husband. In this case both spouses contributed equally and this is a factor to be considered.

#### APPRECIATION OF ASSETS

[43] Some assets appreciate during a marriage, others depreciate. The one asset that often appreciates is the matrimonial home. This has not occurred in this case. It may have appreciated since it's acquisition date but I have no evidence to determine the value of the property at that time. This factor does not apply.

[44] Considering all of the relevant factors of section 13, I have determined that it is not unfair or unconscionable to divide the matrimonial home equally between these spouses. While the matrimonial home was inherited by the Wife this factor must be viewed in the context of a 16 ½ year marriage, where both parties worked and cared for their children contributing differently but equally to the marriage and the family with neither accumulating anything other than assets I have described earlier in this decision.

[45] The division of matrimonial assets is as attached as Schedule 1 to this decision. The expectation is that the Wife will pay the equalization amount of \$33,157.13 to the Husband. If she is unable to make this payment within sixty days from the date of this decision, the property will be placed on the market for sale. The equalization payment will then be recalculated based upon the sale price. I will retain jurisdiction to set the terms of sale if the parties cannot agree to those terms.

#### SPOUSAL SUPPORT

[46] Entitlement to spousal support and the factors to consider when making an award is governed by section 15.2 of the *Divorce Act R.S. , 1985, c.3*. Section 15.2(6) creates four statutory support objectives. The Supreme Court of Canada in *Moge v. Moge* [1992] 3 SCR 813 and *Bracklow v. Bracklow* [1999] 1 SCR 420 confirmed that all four objectives are to be considered in

every case. No one objective has paramountcy. If any one objective is relevant upon the facts, a spouse is entitled to receive support.

[47] In *Bracklow v. Bracklow*, *supra*, the Supreme Court analysed the statutory objectives and held that they create three rationales for spousal support:

1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.
2. Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.
3. Contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligations to each other.

[48] These rationales take into account both the factors set out in s. 15.2 (4) and the objectives set out in s. 15.2 (6).

[49] The Supreme Court did recognize that many claims have elements of two or more of the stated rationales. It confirmed that analysis of all of the objectives and factors is required. Pigeonholing was to be avoided. In this decision I will not comment on the contractual objective because it is not a factor in the case before me.

[50] Examples of circumstances that may lead to a decision that a spouse is entitled to compensatory support are:

- a) a spouse's education, career development or earning potential have been impeded as a result of the marriage because, for example:

- a spouse has withdrawn from the workforce, delays entry into the workforce, or otherwise defers pursuing a career or economic independence to provide care for children and/or a spouse;
  - a spouse's education or career development has been negatively affected by frequent moves to permit the other spouse to pursue these opportunities;
  - a spouse has an actual loss of seniority, promotion, training, or pension benefits resulting from an absence from the workforce for family reasons.
- b) a spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development.

[51] The perceived economic disadvantages of the spouse must be balanced against advantages received. Also a spouse is not entitled to support just because he or she suffered economic disadvantage if the other spouse did as well.

[52] Non-compensatory support incorporates an analysis based upon the concepts of economic dependency, need and ability to pay. If spouses have lived fully integrated lives, so that the marriage creates a pattern of economic dependence, the higher-income spouse is to be considered to have assumed financial responsibility for the lower-income spouse. In such cases a court may award support to reflect the pattern of dependence created by the marriage and to prevent hardship arising from marriage breakdown.

L'Heureux-Dubé, J. wrote in *Moge v. Moge, supra*, at p. 390:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin (1991)*, *supra*, and *Linton v. Linton, supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. *As marriage should be regarded as a joint endeavour, the*

*longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", supra, at pp. 174-75). (emphasis added)*

[53] Once it is decided that a spouse is entitled to spousal support, the quantum (amount and duration) is to be determined by considering the length of the relationship, the goal of the support (is it compensatory, non-compensatory or both), the goal of self-sufficiency, and the condition, means, needs and other circumstances of each spouse. In considering the condition, means, needs and other circumstances of each spouse one may examine the division of matrimonial property and consider the extent to which that division has adequately compensated for the economic dislocation caused to a spouse flowing from the marriage and its breakdown and any continuing need the spouse may have for support arising from other factors and other objectives set forth in s. 15(2). (*Tedham v. Tedham* 2005 CarswellBC 2346 (B.C.C.A.))

[54] Generally a non-compensatory claim in a short to mid length marriage is satisfied when a spouse becomes self-supporting and, in such a case, neither the payor spouse's greater income nor the inability of a recipient spouse to replicate a previous lifestyle, is a factor entitling a spouse to continuing support. Self-sufficiency, however, is a relative concept. It constitutes something more than an ability to meet basic living expenses. It incorporates an ability to provide a reasonable standard of living from earned and other income exclusive of spousal support.

[55] The Husband objects to the grant of a spousal support award because the wife has not proved her income and because she is not entitled.

[56] The parties have accepted the Wife's 2009 gross annual income of \$36, 835 for the purpose of calculating her child support obligation. The Husband does not accept this income for spousal support. The Wife has filed nothing to prove her 2010 salary. The Husband argues this is her claim to prove and failing to substantiate her 2010 income is fatal to her claim. I do not agree. Any award will be made subject to the finding that it was calculated based upon her 2009 income and if a subsequent income tax filing indicates a different income amount, this will constitute a change of circumstances permitting a recalculation of the award both retroactively and prospectively.



[57] In this case the Wife claims compensatory and non-compensatory entitlement. The essence of her compensatory claim consists of the following elements:

- she withdrew from the workforce to provide care for the children
- she delayed her career development to provide care for the children, to provide financial support for the family and to financially support the Husband's development of his career

[58] This marriage is what has become known as the "modern marriage"; a marriage in which both spouses have worked for the majority of their married life and where both have parented the children. The line between compulsion ( I must care for the children because my spouse requires this ) and choice ( I want to be at home caring for the children ) may be irrelevant. What is relevant is the objective analysis - what did the parties actually do and what were the relative advantages and disadvantages to each as a result. If one party clearly was advantaged to the disadvantage of the other a compensatory entitlement may arise.

[59] In this relationship the Wife did not complete her education. She suggests she delayed her career development to care for the children and support the family. Was she disadvantaged as a result? I cannot merely assume she was. She has been employed with the same employer since 2002. Her periods of short term employment were few. I have no evidence before me to suggest she would earn greater income if she had completed her degree. I have no evidence about what her other career paths she might have chosen, nor about the levels of income she might have earned. She was out of the workforce for a period of time but the majority of the time was spent pursuing an entrepreneurial career. Certainly the fact that the Wife was employed assisted the Husband when he decided to pursue his masters degree because it permitted him to work part time. However, if he did not have a family to support he may have been able to pursue his degree full time. This may have hastened his ability to earn greater income.

[60] I am not satisfied that the Wife has proven a disadvantage arising for any of the reasons she has evoked. The Wife does not have a compensatory claim.

[61] Non-compensatory support is based upon a need and means analysis. It raises the issue of spousal dependency and is most frequently found to exist when the spouse is not, or is unable to, become self sufficient. Self sufficiency must also include an analysis of the spouses ability to financially support dependent children. It is impossible to speak of self sufficiency for a spouse who has dependent children as if those children did not exist. Because they do, the spouse must have a residence suitable to house those children and to meet their financial needs when they are with that spouse. The spouse's expenses include those expenses. Child support does not pay for all of these expenses particularly when the parties have decided to use a set off approach to determine appropriate child support. The Wife's income, even with child support, appears insufficient to meet her reasonable personal needs and those of the children when in her care. I use the word appears because she has not filed an updated statement of expenses. Her last statement was filed on January 20, 2009 and I understand the mortgage payment may have reduced since that date. The debt payments she claimed individually are now included in the mortgage payment and that mortgage will be reduced by the amount of all debt to be shared by the Husband as a result of the property division. With these reservations a review of her financial requirements does suggest she will need a minimum of \$3,100.00 per month. This calculation excludes income tax, CPP and EI but includes other mandatory deductions. It must be noted that her budget does not include a vehicle, nor any expense to pursue the right of way issues. It is a bare bones budget. Her income combined with child support will provide her with \$3,545.00. However, the excluded expenses must be taken into account and there are certain benefits that also should be taken into consideration, such as the GST and child tax credit. The best way to get a clearer picture of her situation is to use a computer program to calculate net disposable income. The Husband has provided a calculation from Divorce Mate. The accuracy of the results provided by these computer programs is only as good as the information available to input and it is important for information to be recorded in the appropriate field. As a result these computations are at best a guide to potential outcomes. They do not provide exact outcomes but they are useful. The program takes into account income tax, CPP, EI, child support including each parties share of the section 7 expense, and the division of the child tax benefit as a result of the shared parenting arrangement.

[62] The computer calculation indicates the Wife's net disposable monthly income without spousal support is \$3,224.00. This may be sufficient to meet her expenses. However, I have concluded her expenses are "bare bones". She is

attempting to live within her means but her “need” should not be determined only in light of her frugality. Determining her “need” must permit something more than a strictly mathematical analysis, although this analysis is useful and must be considered. I am satisfied the Wife has a non-compensatory entitlement to spousal support so that she can financially support herself and the children on something more than her present budget.

[63] The Wife’s counsel has in her submissions requested spousal support in the amount of \$200.00 per month for a period of 10 years. This amount of spousal support would do little to change the Wife’s net disposable income. With this amount of spousal support her net disposable income would be \$3,304.00 only \$80.00 more than her net disposable income without spousal support. This happens because her income tax increases and her GST and child tax credit decrease as her taxable income increases.

[64] The Spousal Support Guidelines suggest a range of spousal support from \$18.00 to \$591.00 per month. If spousal support was \$500.00 per month her net disposable income would be \$3,471.00. The Husband’s would be \$3, 511.00.

[65] Does the Husband have ability to pay \$500.00 per month spousal support? His net disposable income would be marginally greater than the wife’s. The only financial information about the Husband’s expenses is a Statement of Expenses dated September 2008. The debt payments he claimed individually are now included in the mortgage on the matrimonial home. He will have to pay his share of all debt but this will be accomplished by a set off against his equity in the matrimonial assets or as a result of the sale of the home. He does have a vehicle. I estimate his expenses are \$3,900.00 per month. They are not extravagant but some could likely be reduced. The Husband has the ability to pay with some belt tightening of his own. The Husband is to pay the Wife \$500.00 per month spousal support commencing November 15, 2010. As a result the Wife’s share of the section 7 expense is \$27.00 per month which will require the Husband to pay monthly child support to the Wife in the amount of \$470.00.

[66] I will not time limit the spousal support award. These parties have dependent children and the youngest is 11 years old. The Wife’s housing situation is uncertain. The Wife may need to change her career path. If in the future the Wife increases her income or reduces her living expenses and as a result is able to

maintain a reasonable standard of living a variation or termination may then be justified.

---

Beryl MacDonald, J.S.C.

Attached - Schedule 1

PROPERTY DIVISION			
DESCRIPTION	VALUE	OWNERSHIP	
		HUSBAND	WIFE
Matrimonial Home	\$ 240,000.00		
Less 5% Commission	<\$ 12,000.00>		
Less HST	<\$ 1,800.00>		
Less Legal Fees	<\$ 1,000.00>		
	\$ 225,200.00		\$ 225,200.00
Cape Breton Property Net Value	\$ 21,062.50	\$ 21,062.50	
2003 Jetta	\$ 10,000.00	\$ 10,000.00	
Husband Pension	\$ 22,010.60	\$ 22,010.60	
Wife's Pension	\$ 7,435.40		\$ 7,435.40
Sub-Total	\$ 285,708.50	\$ 53,073.10	\$ 232,635.40
Less: Matrimonial Debt	\$ 113,248.03		
Sub-Total	\$ 172,460.47		
Equal Division	\$ 172,460.47 ÷ 2 = \$ 86,230.24		
	Wife to pay Husband \$ 33,157.14		

Further adjustment - \$ 4,310.00 withdrawn by Husband reducing equalization to be paid to him by this amount to \$ 28,847.14.