

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Drozdowski v. Drozdowska, 2011 NSSC 89

Date: 20110303

Docket: SFHMCA-067442

Registry: Halifax

Between:

Slawomir Anthony Drozdowski

Applicant

v.

Monika Regina Drozdowska

Respondent

Judge:

The Honourable Justice Deborah Gass

Heard:

December 1, 2 & 3, 2010, in Halifax, Nova Scotia

Counsel:

Kim A. Johnson, for the Applicant

Michele J. Cleary, for the Respondent

By the Court:

[1] This proceeding began by way of an application filed by the Applicant, Slawomir Drozdowski, under the *Maintenance & Custody Act* for custody and maintenance, as well as an application under the *Matrimonial Property Act* for exclusive possession of the matrimonial home, and costs.

[2] The Respondent, Monika Drozdowska, made a counter-application for custody, child support, spousal support, exclusive occupation of the family residence, and costs, all under the *Maintenance & Custody Act*.

[3] Ms. Monika Drozdowska and Mr. Slawomir Drozdowski were married September 3, 1994. They lived together for two years prior to their marriage. They are the parents of two children: Dominik Anthony Drozdowski born July 1, 2000 (now 10) and Elizabeth (Ela) Marie Drozdowska born June 17, 2004 (now 6).

[4] Sometime in 2009, the parties ceased living together as husband and wife while continuing to occupy the matrimonial home together with the children.

[5] Mr. Drozdowski brought his application for exclusive possession in November 2009, followed by Ms. Drozdowska's application seeking similar relief.

[6] An interim order had been made on February 10, 2010 providing for the parties to have interim joint custody of their two children Dominik Anthony born July 1, 2000 and Elizabeth (Ela) Marie born June 17, 2004, with specified parenting time. Further, the mother was to have interim exclusive occupation of the home with the children and the father was to pay interim child maintenance of \$893/month based on an income of \$63,210.00.

[7] The parties attempted to resolve outstanding matters, but were unable to do so, leaving property and parenting issues to be decided. The matter was set for trial December 1 - 3, 2010. At the commencement of the trial the application was amended by consent to include the division of property, including pensions.

[8] While they were living together, prior to their marriage, Mr. Drozdowski's parents purchased a house for them, as they were without means to do so themselves. This property, known as 13 Shepherd Road, was owned by Mr. Drozdowski's parents until after the birth of their grandchild in 2000, and after the

mortgage had been paid, when they gave the property to their son and daughter-in-law.

[9] The parties in turn sold 13 Shepherd Road and used the proceeds of the sale (about \$57,000) to purchase their new home at Keyworth Lane.

[10] Each party has a different version of how their current matrimonial home came to be. Mr. Drozdowski claims it was never intended that 13 Shepherd was anything other than property owned by his parents for which they paid rent as tenants, and his parents gifted the house to him as an advance on his inheritance. His evidence is that he in turn used the equity from 13 Shepherd as the down payment on Keyworth Lane and he should be compensated 100% for that contribution.

[11] Ms. Drozdowska's version is that she brought some funds from Poland which were applied in part towards the purchase of the home, and that while the property was in his parent's name, they were responsible for the mortgage payments, maintenance and upkeep, and all the costs associated with ownership.

[12] In addition, Mr. Drozdowski asserts that Ms. Drozdowska co-owns a fairly substantial piece of property in Poland with her brother; and that joint funds were occasionally sent to Poland for the upkeep of this property.

[13] Ms. Drozdowska asserts that that property in Poland was an inheritance and her share was sold when she left the country. The property was retained by her brother but her name is still on the deed. She says some of the proceeds of her share was applied to the purchase of 13 Shepherd in August 1993 and that, apart from this, the property in Poland was never used for matrimonial or family purposes.

[14] While there are differing versions and the truth lies somewhere in between, I will draw a number of conclusions from the facts that are relevant to the applicable law in this regard.

The Law:

[15] Matrimonial assets are defined in s. 4 of the *Matrimonial Property Act*, which states:

4 (1) In this Act, “matrimonial assets” means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of

(a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;

[16] Section 12 of the *Act* sets out the presumption of equal division of the matrimonial assets:

12 (1) Where

(a) a petition for divorce is filed;

(b) an application is filed for a declaration of nullity;

(c) the spouses have been living separate and apart and there is no reasonable prospect of the resumption of cohabitation; or

(d) one of the spouses has died,

either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

[17] Section 13 allows for an unequal division of assets under certain circumstances:

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;

(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;

(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;

(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.

[18] The person claiming an unequal division carries a heavy onus of proof in establishing that an equal division would be unfair or unconscionable, according to *Harwood v. Thomas* [1981] N.S.J. No. 6 N.S.S.C.A.D.

[19] A review of the case law suggests that the unequal division cases are only successful where the claims are clearly and unequivocally substantiated.

[20] The mere fact that a party brings the matrimonial home into the marriage is not, in and of itself, grounds for an unequal division. *Selbstaedt v. Selbstaedt* [2008] N.S.J. No. 20 N.S.S.C.F.D.

[21] Nor was the wife's claim for an unequal division granted in *Wood v. Wood* [2005] N.S.J. No. 439 N.S.S.C. In this decision the wife argued that she should have the benefit of an unequal division because the matrimonial home was built on land given to them as a wedding present from her uncle, and her family's construction company built the septic system and did the excavation. The court was not satisfied that the evidence came close to supporting a claim that an equal division was unfair or unconscionable, and an equal division was ordered.

[22] Cases of unequal division usually involve short term marriages where substantial assets were brought into the marriage by one of the parties.

[23] In a very recent decision of this court, *MacDonald v. Ferguson* [2010] N.S.J. No. 11, N.S.S.C.F.D., MacDonald, J. dismissed a claim by the husband for an unequal division of the matrimonial home. He had argued that family gifts which were used to purchase the house were paid to him alone and he used inheritance money to pay out a line of credit on the property.

[24] Justice MacDonald thoroughly canvassed the evidence and case law and rejected the husband's argument. She concluded that the gifts were for the benefit of both parties. The payout was not of such significance to warrant an unequal division. The funds, which amounted to about \$97,000.00, were tied in with the parties' investments and how they were managed by the husband. She concluded that it was not unfair or unconscionable to equally divide the asset under all the circumstances.

[25] The facts of the case before me are not dissimilar in principle to the facts in *MacDonald v. Ferguson*.

[26] There is nothing in the evidence before me to suggest anything other than that 13 Shepherd was a gift intended for both of them. When they started out they were students. They did not have much money and did not qualify for a mortgage. The house was purchased by the parents for the benefit of both parties and was ultimately given to both of them. This gift was made to the parties after they had

lived in the home and had it absolutely and completely for their own use for seven years and had their first child. The house was not big enough for a growing family and was given to them so they could sell it and apply the proceeds towards a down payment on the current matrimonial home. It was clearly a gift to both of them. It is not an inheritance. There is no evidence to support Mr. Drozdowski's contention that it is an advance on his inheritance and that it was intended to be so at the time it was given, or at any time during the marriage.

[27] Even if that were the case, and I am satisfied on the evidence that it is not, it would have been an inheritance used in its entirety for the benefit of the family and thus not exempt, pursuant to s. 4(a) of the *Act* (supra).

[28] Title to the property was given to both of them and it was used to purchase their new home. Even if title was given to him alone, there is nothing in the evidence to suggest it was done only for the benefit of Mr. Drozdowski to the exclusion of his wife and family.

[29] With respect to the property in Poland, Mr. Drozdowski asserts that this should be taken into consideration. Unfortunately, there is no evidence apart from the testimony of each of the parties. There is no value attached to this property and it is not unreasonable to conclude that Ms. Drozdowska's description of events is consistent with the chain of events that actually occurred - i.e. she left Poland to reside in Canada and brought some money with her. Whether she applied those funds towards 13 Shepherd or not, does not influence the decision one way or the other. At no time was this property in Poland which she describes as an inheritance, used for matrimonial purposes, except for the \$6,000 she says she applied to the property, but that contribution Mr. Drozdowski denies in any event. The evidence about this property is so vague and unsubstantiated to be of no weight in determining the issue of unequal division.

[30] Thus, Mr. Drozdowski has not discharged the burden of proving that an equal division would be unfair or unconscionable, and there will therefore be an equal division of the matrimonial property.

[31] The parties reached substantial agreement on the other assets and debts. Where there is disagreement, the differences are relatively small and the court resorted to a somewhat arbitrary determination of values.

[32] There was a dispute over the sum of \$5,000.00 in savings which was purportedly withdrawn by the Applicant. I determine that it was before final separation and cannot be particularized and therefore it will not be considered in the equalization calculation.

Parenting Order:

[33] The parents are at odds as to the extent of Dad's involvement in the lives of their two children. Mom states that Dad was minimally involved when they were together, whereas Dad's recollection is quite the opposite. Each parent seeks primary care, although it is suggested by the Applicant that the custody be split between the parents, with the elder child, the son, residing primarily with Dad, and the daughter with Mom.

[34] The sole consideration for the court is what is in the best interests of the children, and not what works best for the parents.

[35] Both parents work full-time and are equally available to parent. The mother is currently in the matrimonial home and the father resides in an apartment in his parents' home nearby. The children have three weekends out of four with their father from Friday afternoon to Sunday evening and every Tuesday and Wednesday after school until 7:30 p.m.. Occasionally, Dominick spends extra time with his father, sometimes as much as three to four nights at a time during the week. The mother disagrees with that estimate, suggesting it is more often two nights per week.

[36] The father is of the view that Ela, the younger child, spends half her time with her father, while Dominick is with his father almost full-time. He wants to have child support adjusted to reflect a split/shared custody situation.

[37] On the other hand, the mother's evidence is that too much access with the children is a problem for the father. She suggests that Ela is not as anxious to stay overnight with her father because he cannot accommodate both children properly in his present setting.

[38] He wants to buy a home in the neighbourhood. His parents are involved with their grandchildren. It appears from the evidence that Dominick spends half his time with Dad. Ela does not.

[39] Considering all of the evidence and the parenting history, both before and since separation, I conclude that it is in the best interests of the children for the parents to have joint custody of both children. The child Ela shall remain in the primary care of her mother with reasonable access at reasonable times upon reasonable notice to include, but not limited to, after school on Tuesday and Thursday and one overnight per month. The parties will share the parenting of Dominick with him spending approximately equal time with both parents, being alternating weekends from Thursday to Sunday and two other overnights each week which shall be Tuesday and Wednesday unless otherwise agreed.

Child Support:

[40] The full table amount of child support is payable by the Respondent to the Applicant, for support of Ela and the provisions of s. 9 of the Child Support Guidelines apply for the support of Dominick:

9 Where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child maintenance order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the parents;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each parent and of any child for whom maintenance is sought.

[41] For the purpose of setting the table amount, the sworn statement of income of the father for 2010 shows an income of \$63,210. From his 2009 pay stubs his income was \$64,339. His 2008 income was \$62,461. His 2007 income was \$65,619, and his 2006 income was \$60,476. While there is some fluctuation, it appears that it is insignificant and for the purpose of setting the table amount I will base it on the income in his sworn financial statement.

[42] The table amount for one child is \$550/month, and for two children it is \$890/month.

[43] However they are in a shared parenting arrangement for Dominick. In that situation the court must consider the mother's income. Her statement of income sworn in early 2010 showed income of \$24,000 based on EI benefits. However she returned to work in 2010 and according to her evidence, her current income is \$37,500.00. The table amount she would pay for one child is \$328.00.

[44] Beginning with the set off amount, monthly payment by the father to the mother for Dominick would be \$172, resulting in a total support payment of \$722/month. The court must also consider the cost of shared parenting and the condition, means, needs and other circumstances of the parents and children. Considering the pattern of parenting time and the responsibilities that have evolved, I conclude that an adjustment of the table amount is warranted, resulting in a payment of \$800 per month.

[45] They shall proportionately share the cost of any agreed upon extra-curricular activities or camps on a 60% - 40% basis. Should there be no agreement, and should child care costs or day camp be necessary, this will constitute a change in circumstances to warrant a review of child support.

CONCLUSION:

[46] The parties will have joint custody of the children. The Respondent mother will have primary care of Ela and the parties will share parenting of Dominick.

[47] The father's parenting time with Ela and Dominick will be as outlined above.

[48] The parties shall sign the necessary documentation for passports to be issued for both children.

[49] Both parents shall have the right to travel with the children temporarily outside Canada for holidays, provided that 60 days notice of intention to do so is given to the other parent with particulars of the itinerary, addresses, contact numbers and dates of departure and return. The parents will execute the necessary documentation to enable such travel. Neither party shall remove the children to reside outside of Halifax Regional Municipality without the consent of the other parent or court order.

[50] The Respondent shall pay to the Applicant child support for the two children in the amount of \$800/month commencing April 1, 2011.

[51] They shall share proportionately (60% - 40%) the costs of agreed upon extra-curricular activities, day camps, and child care. Should there be no agreement, and should child care or day camp be a necessity, this shall constitute a change of circumstances prompting a review of child support.

[52] The Applicant shall maintain the children as beneficiaries of his life insurance through his employment, naming the Respondent as trustee, for so long as the obligation to pay child support is in effect.

[53] The parties will exchange, on an annual basis, their tax returns and notices of assessment on or before June 1st of each year.

[54] The wife shall pay the husband \$125,068.50 as an equalization of matrimonial property and he shall transfer his interest in the matrimonial home to her in accordance with Schedule "A" attached hereto.

[55] Submissions, if any, on costs shall be made by March 31, 2011, with a response to be filed by April 15, 2011.

J.

SCHEDULE "A"

PROPERTY DIVISION

<u>ASSETS</u>	<u>WIFE</u>	<u>HUSBAND</u>	<u>TOTAL</u>
Pensions of each party divided at source by agreement			

Matrimonial Home \$240,000 less disposition costs	225,000.00		225,000.00
Contents (agreed value)	10,000.00		10,000.00
2006 Chevy Uplander		8,000.00	8,000.00
2008 Honda Motorcycle		6,250.00	6,250.00
TD Mutual Funds (agreed value)		1,413.00	1,413.00
TOTAL ASSETS:	235,000.00	15,663.00	250,663.00
Student Loans	(2,500.00)	(14,900.00)	
Motorcycle Loan (agreed value)		(7,000.00)	
Car Loan (agreed value)		(1,400.00)	
Debt to Parents		(10,000.00)	
	235,000.00	15,663.00	250,663.00
	<u>- 2,500.00</u>	<u>- 33,300.00</u>	<u>- 35,800.00</u>
	232,500.00	(17,637.00)	214,863.00
Equalization payment from wife to husband	<u>-125,068.50</u>	<u>+125,068.50</u>	
	107,431.50	107,431.50	

Equalization payment owing by wife to husband: \$125,068.50.