

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Baker v. Baker, 2011 NSSC 272

Date: 20110324

Docket: 1210-001034

Registry: Antigonish

Between:

Thomas Baker

Petitioner

v.

Joyce Baker

Respondent

Judge: The Honourable Justice Douglas L. MacLellan.

Heard: March 24, 2011, in Antigonish, Nova Scotia

Written Decision: June 23, 2011

Counsel: Daniel J. MacIsaac, Esq., for the petitioner
M. Louise Campbell, Q.C., for the respondent

By the Court:

[1] This is a divorce hearing. The parties, Mr. and Mrs. Baker were married on October 9th, 1971 and separated in early November 2005. The marriage was, therefore, in excess of 34 years.

[2] There were four children of the marriage all of whom are now over the age of majority. One child Viola is now 38 years old and lives with the petitioner Mr. Baker. She has epilepsy and has difficulty doing a normal job. She now runs a greenhouse on the property that had been the matrimonial home in South Side Harbour, Antigonish County.

[3] In November 2005, Mrs. Baker advised her husband that she was leaving the marriage and going to Calgary. That decision, according to her, was based on, to some extent, on the fact that she had been diagnosed with breast cancer and the medical advice was that she might only have about five years to live.

[4] She said she had been married at an early age and that her marriage was not a happy one. She said she decided in August 2005 to leave the marriage and in November told her husband of her decision. She said they discussed the fact that the

matrimonial home property was in his name and he felt that they should have papers signed to deal with her share of the property.

[5] She said that she told him that she wanted her share of the property to go to their four daughters and that he could do that in his Will. Mrs. Baker said that she then went with her husband to see Daniel MacIsaac, her husband's lawyer, and that Mr. MacIsaac prepared a separation agreement. (Exhibit 1 - Tab2). She said that on the same day she went to see Meghan MacGillivray, who is a lawyer, to get legal advice on signing the agreement. She said she spoke with Ms. MacGillivray for about 20 minutes and that she remembers that Ms. MacGillivray told her not to sign the agreement.

[6] She didn't follow that advice and signed the separation agreement and a deed of her interest in the matrimonial home to Mr. Baker. The deed is Exhibit 3 in this proceeding.

[7] In the separation agreement, Mrs. Baker gave up her claim to any property and/or spousal support. She agreed that she would deed the property to her husband which she did on the same day.

[8] The separation agreement made no mention of the arrangement about having her share of the property go to the children. Mrs. Baker testified that she did not even tell her lawyer, Ms. MacGillivray, about that arrangement. Ms. Baker left Nova Scotia and relocated to Calgary with her sister, but in a short period of time she got a job earning good money in the range of \$40,000.00 per year and continues to live there.

[9] Mrs. Baker now contests the separation agreement and asks that the Court set it aside under Section 29 of the *Matrimonial Property Act*. That Section provides:

“Upon an application by a party to a marriage contract or separation agreement, the court may, where it is satisfied that any term of the contract or agreement is unconscionable, unduly harsh on one party or fraudulent, make an order varying the terms of the contract or agreement as the court sees fit.”

[10] Mr. Baker argues, through his counsel, that the separation agreement should not be disturbed because in that agreement he gave up his right to spousal support and he also has relied on the fact that he was the owner of the property since 2005 when he got the deed from his wife.

[11] In 2005, Mr. Baker had income of about \$10,000.00. That is CPP Disability Benefits he receives as a result of being disabled. He is now 60 years old and had worked for many years as an auto body mechanic. He had an auto body shop in Boylston, Guysborough County, but gave it up a number of years ago, probably about 1987, because of his health problems. The family moved from Boylston and purchased the property at South Side Harbour. After selling the Guysborough property, the money from the sale of that property was used to purchase the land at South Side Harbour to build a house on it.

[12] Mr. Baker's income since the separation in 2005 has remained around \$10,000.00 per year. He indicates that he has a new companion who resides with him in the former matrimonial home.

[13] Mr. Baker also asks that I also consider the fact that the party's daughter has medical problems and therefore should be considered a child of the marriage. I am not prepared to consider the daughter's circumstances as being an issue in this proceeding. Mr. MacIsaac has not conceded that point substantially. She is 38 years old and runs a greenhouse on her father's property from which she earns income. I therefore determine that she is not a child of the marriage at this time.

[14] Following her move to Calgary in 2008, Mrs. Baker – actually she should be referred to as Ms. Gosbee because she goes by that – has earned about \$40,000.00 per year in income. At the time of the separation in 2005, her income was from EI as a result of a part-time job she had at a clothing store in Antigonish. I find that her income at the time would be about \$10,000.00, basically, the same as that of her husband.

[15] I consider that there are basically two issues before me. The first, and the principle issue, is should the separation agreement entered into by the parties in 2005 be set aside under Section 29 of the *Matrimonial Property Act*.

[16] The question that follows from that, of course, is that if I do not set it aside, of course, the parties would be bound by it and that would resolve pretty well all issues between the parties. However, if I do set it aside and do as requested by counsel for Ms. Gosbee what should the Court do about Mr. Baker's claim for spousal support in light of the difference in income of the parties at this time.

[17] The parties here were married for over 34 years. Ms. Gosbee looked after the children while Mr. Baker worked at the auto body shop. When he became disabled he took some part-time work to supplement, to some extent, the financial needs of the family.

[18] There is no question in my mind but that the separation agreement must be set aside under Section 29 of the *Matrimonial Property Act*. I have serious concerns about Ms. Gosbee's state of mind in November 2005 when she did not follow the legal advice given to her by her lawyer not to sign the agreement. She was at that time facing an uncertain medical situation and was very unhappy in her present circumstances. She simply just wanted out, to spend her last years of her life out of the marriage.

[19] The evidence before me in this proceeding is that the matrimonial home in 2005 had a value of well over \$100,000.00. She gave that up completely assuming that her share would go to her daughters. When she discovered that in 2008, she decided to contest the divorce which Mr. Baker had started and which was an attempt to confirm the provisions of the separation agreement.

[20] I find that at the time of the separation agreement there was, in effect, no discussion about spousal support. I therefore find that the separation agreement is unconscionable and unduly harsh on Ms. Gosbee and I set it aside. The terms of the agreement indicating that neither party has a claim to spousal support and/or that Ms. Gosbee has no claim to property.

[21] The second issue is the more difficult one before me today as I see it is that what should the Court do with the spousal support claim being advanced by Mr. Baker. His position, as I understand it is that he is satisfied getting no spousal support while he retains all of the property, but if he has to pay Ms. Gosbee for her share of the property, he wants the Court to consider his claim to spousal support and to consider that on a retroactive basis back to 2005 and in the future.

[22] In 2005, Mr. Baker would not have a claim for spousal support. Ms. Gosbee's income would not entitle him to support because their incomes were basically the same. If the parties had followed what you might call the normal course at that point and divided the property equally, which would appear to be the most obvious thing

to do, he would have had to buy-out Ms. Gosbee's share of the property. That would be difficult for him considering his income at the time and his ability to get funding to do that.

[23] In the years following the separation, Ms. Gosbee's income has improved significantly from about \$10,000.00 to \$40,000.00 on a regular basis since 2005. She has, however, of course, more expenses in light of the fact that she lives in Calgary.

[24] I wish to deal, however, with the property matter. The Court has before it two appraisals of the matrimonial home. Mr. Barkhouse, on behalf of Mr. Baker, places the value of the property in 2005 at \$110,000.00. Mr. MacInnis, on behalf of Ms. Gosbee, places the value in 2010 at \$176,000.00. Based on the evidence that I have heard from both Mr. Barkhouse and Mr. MacInnis, I conclude that the true value of the property in 2005 would be closer to the amount advanced by Mr. MacInnis. His appraisal is as of December 2010, and considering that fact and considering all of the evidence I have heard on the issue of property and the opinions expressed by both appraisals, I conclude that it would be appropriate in these circumstances to set the value of the property as of November 2005 at \$160,000.00. There is no mortgage on

the property and therefore half of that would be \$80,000.00. I accept the value at 2005 as being the proper time to determine its value because it was at that time that the parties were negotiating a separation agreement.

[25] It is further agreed here by the parties that Mr. Baker had other assets in 2005 as set out in his statement of property filed in this proceeding. Ms. Gosbee accepts the values placed on these assets by him which if Ms. Campbell's addition is correct, would total – I have the figure of \$15,200.00, and that is made up of a couple of vehicles a GlenAir Motor Home, a third motor vehicle, a cabin cruiser boat, and a mobile wharf. If I add-up Ms. Campbell's figures for these items as in the aid that she provided to me, my addition, subject to corrections, appears to come to \$15,200.00.

[26] The evidence is that Ms. Gosbee took at the time of the separation a CIBC VISA debt of \$7,500.00 for which Mr. Baker would be responsible for half of which would \$3,760.00.

[27] Therefore in summary as far as the property is concerned it breaks down as follows: On Mr. Baker's side would be \$7,500.00 – I'm sorry – I'm going to do my

own addition here. Again, I – the addition should be, or the multiplication should be – the house I value at \$165,000.00. I’m prepared to deduct from that amount \$11,000.00 for cost of sale and legal fees bringing it down to \$154,000.00.

[28] I’m sorry, I said \$15,200.00, actually it’s \$7,000.00. Okay. Let me add-up your figures there, Ms. Campbell.

[29] **MS. CAMPBELL:** I’m just going to find my schedule here.

[30] **THE COURT:** Fifteen hundred plus thirty-thousand - I got two figures written down here. That’s what I’m concerned about.

[31] **MS. CAMPBELL:** Certainly.

[32] **THE COURT:** I hate these calculators. Yes, 15,200 on his side and added to that would be 154 – it should be a total of 169 two, and Ms. Campbell has suggested that what you should do with that figure is divide it by two – 846, plus

3,076 – it comes to 88,360. Now that's subject to checking the math on that. In the normal scheme of things, I guess, what I am saying is that normally if this matter was heard just dealing with the property it would require an equalization payment based on the determinations I have made of \$88,360.00.

[33] The issue of spousal support to Mr. Baker still hangs over this proceeding. I conclude that if the property had been settled fairly in 2005 that Mr. Baker would, in the years following, have been entitled to spousal support.

[34] Ms. Campbell argues that I should not determine any entitlement to spousal support until I have heard evidence on her income and expenses during the years in question and in the future. That is a strong argument and I accept it. However, it does cause a problem in this proceeding.

[35] Normally the matter could be adjourned to have that evidence, but that is now not possible because of my personal circumstances. I would, however, order that in fairness to Mr. Baker that he is now entitled to amend his claim and advance an argument for spousal support based on the fact that I have set aside the separation

agreement. He will be entitled to advance a claim retroactively and in the future as far as spousal support is concerned. This unfortunately does not resolve this issue completely for the parties and I guess in hindsight I guess there might have been some benefit in having a proceeding just to determine whether the separation agreement could stand. However, that was not done and we are now faced with my determination about the separation agreement and not able to decide the issue of spousal support.

[36] In the circumstances, I would order that there be no payment of the property settlement until the issue of spousal support is dealt with by the Court. Mr. MacIsaac's suggestion that Mr. Baker's claim for spousal support once – if it is determined that he has a claim and the amount of the claim can then, of course, be set off against the property settlement to better enable him to continue to have the property.

[37] There are periphery issues in this case involving the daughter who has the business on the property and the lack of water on the property. There are a lot of

issues here that take this case out of the norm as far as being a straight forward situation where somebody is entitled to have a property sold.

[38] It also is complicated by the fact that Mr. Baker might not have any capacity to buy-out his wife's share of the property. However, these are not problems that can't be resolved if the parties put their minds to it.

[39] Now, I guess the question is, and I would conclude in this proceeding subject to hearing from counsel that any hearing in regard to the spousal support issue could be heard, as far as I'm concerned, by another Court because the issues would be very restricted and would only – the Court would only be faced with the issue of whether Mr. Baker has a claim for retroactive spousal support, and if so, the amount of the claim, and once that is determined whether he has a claim on a continuing basis for spousal support from that point onward.

[40] So that's my decision, counsel. Let me suggest in the circumstances that you might want to consider the possibility of going through a settlement conference

instead of having a hearing on the issue of spousal support and I don't know if both of you have an opinion on that.

[41] I'd certainly -- it would appear based on my schedule that I will not be hearing any subsequent matter on this file, and I certainly would be prepared to meet with counsel if you had any feeling to do that.

[42] **MS. CAMPBELL**: My Lord, I'm not adverse to a settlement conference. I guess my only difficulty is, of course, my client is not here...

[43] **THE COURT**: Yes.

[44] **MS. CAMPBELL**: She's in Alberta and I need to canvass it with her. I appreciate the Court's offer to try and see if we can do this today, but I truly believe I need to get from her her financial information for those years if we're considering retroactive spousal support.

[45] **MR. MACISAAC**: Was it today? Was – was – was the suggestion today?

[46] **THE COURT**: Yes. Yes, right now.

[47] **MR. MACISAAC**: Well – no I just wanted to be clear on that.

[48] **THE COURT**: I just thought that I might want to give you, I guess, my view at this point in the issue.

[49] **MS. CAMPBELL**: Well, I'm opened to hear anything you want, My Lord. I don't have any problem with that.

[50] **THE COURT**: You wouldn't be in anywhere bound by it...

[51] **MS. CAMPBELL**: No, I understand.

[52] **THE COURT**: ...but it might be helpful in how, at least...

[53] **MS. CAMPBELL**: In how we move forward.

[54] **THE COURT**: ...I am looking at the issue as far as the claim for spousal and how that could be set off against...

[55] **MS. CAMPBELL**: I have no difficulty with that.

[56] **THE COURT**: Okay. Well, I'll leave it at that as far as the formalities of the proceeding is concerned. I've made my decision on the - on the issue. I'm a little concerned, and I think it's appropriate that maybe no divorce orders be granted at this point to protect against everybody's right to advance a claim for support.

[57] **MS. CAMPBELL**: Yes.

[58] **THE COURT**: And therefore the matter of the divorce will also be adjourned until the subsequent hearing.

[59] **MS. CAMPBELL**: And – and – perhaps I’ll just – I’ll – my only thought as you were giving your decision, and I can understand the rationale behind the decision, is, I guess, if the application from Mr. Baker you’ve said it was open for him to come forward with an application.

[60] **THE COURT**: Yes.

[61] **MS. CAMPBELL**: ...for spousal support. If that doesn’t come forward in a timely fashion...

[62] **THE COURT**: Right.

[63] **MS. CAMPBELL**: ...then my client would bring it to the Court. Obviously, because her settlement on the division of assets...

[64] **THE COURT**: Yes.

[65] **MS. CAMPBELL**: ...is there and it's not going to...

[66] **THE COURT**: Yes.

[67] **MS. CAMPBELL**: ...come to fruition until that part is done.

[68] **THE COURT**: Yes.

[69] **MS. CAMPBELL**: So we don't want...

[70] **THE COURT**: What kind of time line...

[71] **MS. CAMPBELL**: ...any long delays.

[72] **THE COURT**: I would be in light of that be prepared to put a time limit on it that he would have to advance his claim within a certain period of time.

[73] **MS. CAMPBELL**: Yes. I think that would be reasonable.

[74] **THE COURT**: Mr. MacIsaac, do you feel comfortable committing to a time line on that?

[75] **MR. MACISAAC**: That's fine with me, My Lord.

[76] **THE COURT**: I was thinking two months.

[77] **MR. MACISAAC**: Two months is fine.

[78] **MS. CAMPBELL**: That's fine, My Lord. Yes, that's fine. Thank you.

[79] **THE COURT**: Okay. Two – unless Mr. Baker advances or advises the Court that he wishes to advance a claim for spousal support within two months, otherwise, the order in regard to the division of property will stand.

[80] **MS. CAMPBELL**; Thank you, My Lord.

[81] **THE COURT**: Thank you very much and I'll...

[82] **MR. MACISAAC**: Well, My Lord, I didn't conclusively hear from Ms. Campbell that she wouldn't participate in a settlement conference.

[83] **THE COURT**: Well, she'll go and talk to me.

[84] **MR. MACISAAC**: Her – the client...

[85] **MS. CAMPBELL**: Yes.

[86] **THE COURT**: She'll — she'll come and talk.

[87] **MR. MACISAAC**: Okay. That's fine. I just didn't hear that.

[88] **THE COURT:** No. Okay. Thank you. Oh, I'm sorry and I should say on the issue of costs, I'm not prepared to award costs to either party at this point.

J.