SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Saunderson v. Lang, 2011 NSSC 282

Date: 20110608
Docket: SFHD-071417, 1201-064761
Registry: Halifax

Between:

Larry Robert Saunderson

Petitioner

v.

Betty Marie Lang

Respondent

Judge:	The Honourable Justice R. James Williams
Heard:	May 30, 2011, in Halifax, Nova Scotia
Counsel:	Barbara Darby, for the Petitioner Owen Bland, for the Respondent

By the Court:

[1] This is the second divorce proceeding between Larry Robert Saunderson (born October 12, 1959 - now 52) and Betty Marie Lang (born August 24, 1962 - now 48).

I. FIRST MARRIAGE, FIRST DIVORCE

[2] The parties (first) married August 22, 1987 in Regina, Saskatchewan. They separated on August 10, 1995 (per Ms. Lang's Divorce Petition of August 21, 1995). They had three children:

Johnathan Clayton Ryan Saunderson (born June 20, 1983);

Jeremy Bryan Matthew Saunderson (born December 4, 1987);

Camellia Jessica Saunderson (born October 3, 1988).

[3] The Divorce Petition arising from their first marriage was filed by Ms. Lang, claiming custody, child support and costs. The issues of spousal support and matrimonial property were not pleaded. The parties lived in Alberta at the time; it was an Alberta divorce.

[4] The Divorce Corollary Relief Judgment (of the Alberta Queen's Bench) dated January 19, 1996, provided that the three children were in the "sole custody" of Ms. Lang, that Mr. Saunderson had "reasonable access" and that Mr. Saunderson pay Ms. Lang $900.00 per month in child support.

II. SECOND MARRIAGE

[5] On May 17, 1996 the parties remarried (in Wainwright, Alberta). They lived in Alberta until July of 1999 when they moved to Nova Scotia. They separated January 1, 2007.

III. THIS PROCEEDING

[6] Mr. Saunderson filed a Petition for Divorce (here in Nova Scotia) on July 29, 2010. Their children are grown. The issues now before the Court arise from the marital and divorce history I have outlined. They include:

A. Divorce;

B. Division of assets pursuant to the *Matrimonial Property Act*, including issues concerning:

i. resolution of debt issues;
ii. release of proceeds of sale of matrimonial home; specifying terms;
iii. the Petitioner's long term service award;
iv. pension division (Petitioner's pension).

C. Spousal support.

IV. DIVORCE

[7] The parties' (second) marriage has been proven. The parties have been separated for more than one year. There is no possibility of reconciliation. The divorce will be granted upon the filing of a Divorce Judgment.

V. DIVISION OF ASSETS

[8] The principle property issue(s) between the parties relates to Mr. Saunderson's position that Ms. Lang's share of his pension and long term service severance award should be limited to the length of their second marriage only, i.e. May 17, 1996 to January 1, 2007. His counsel asserts the issues of division of pension and long term service award for the period of August 22, 1987 to August 10, 1995 (the first marriage) is, because of the "first divorce",

a. a matter of *res judicata*;

b. subject to Ms. Lang now being estopped from making such a claim;

c. a matter this Court should consider under s. 13 of the *Matrimonial Property Act* (Nova Scotia) - saying the Court should make an unequal division by limiting the division of these assets to the time frame of the second marriage; effectively saying it would be "unfair and unconscionable" to divide the assets over the course of both marriages.

[9] In referring to *res judicata* Mr. Saunderson's counsel refers to Phipson on Evidence:

> **Res Judicata in a wider sense:** "...the Court requires parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea if *res judicata* applies, except in special cases, not only to point upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

[10] In arguing that Ms. Lang was estopped from seeking a pension/long term service award division that included the "first marriage years", it was asserted:

> This estoppel principle is discussed by the Supreme Court of Canada: *Grandview v. Doering* [1976] 2 SCR 621 at p. 634 (Tab 6):
>
> > I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction the Court requires the parties to that litigation **to bring forward their whole case**, and will not (except under special circumstances) permit the same parties to open the same subject of litigation **in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.** The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, **but to every point which properly belonged to the subject of litigation, and which the parties,**

> **exercising reasonable diligence, might have brought forward at the time.** (emphasis added)

Phipson describes a form of estoppel by judgment under the category of abuse of process:

> To bring a claim that could and should have been made as part of previous litigation is a form of abuse of process. The rule is not based on the doctrine of *res judicata* in a narrow sense, nor even on any strict doctrine of issue estoppel or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. (44-45)

[11] The "first divorce" took place in Alberta. Property division was not pleaded. The provisions of the Alberta *Matrimonial Property Act*, RSA 2000, c. 8, include this provision (which was in force at the time of the first divorce):

> s. 6(1) An application for a matrimonial property order . . .
> (b) may be commenced not later than two years after the date of the decree nisi, declaration or judgment.

[12] Ms. Lang could have initiated an application concerning matrimonial property under the applicable Alberta legislation up to two years after the January 19, 1996 divorce. The parties remarried May 17, 1996, only six months after their (first) divorce. The parties' property issues were never before the Alberta Court. There was no final settlement of those issues. There was no obligation to have brought them forward at the time of the first divorce, nor before the second marriage.

[13] The parties remarried at a time when she could have made claims under the Alberta *Matrimonial Property Act*. The time frame for being able to make a claim under the Alberta legislation has expired. It did so because they remarried not because of any negligence, inadvertence, accident or lack of reasonable diligence on the part of Ms. Lang or her representative. The public policy rationale for barring "successive suits" has no application here.

[14] I conclude the principles of *res judicata* and estoppel do not apply.

[15] The *Matrimonial Property Act* (Nova Scotia) states at s. 4(1):

> s. 4(1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real or personal property acquired by either or both spouses before or during their marriage.

[16] Section 13 of the *Matrimonial Property Act* (Nova Scotia), provides that an unequal division in circumstances where dividing the assets equally would be unfair or unconscionable, taking into account a series of enumerated factors.

[17] Pension benefits and long service awards are matrimonial assets subject to division.

[18] Mr. Saunderson's counsel suggested it would be "unfair or unconscionable" to divide the pension and long service award beyond the length of the second marriage considering s. 13 of the *Matrimonial Property Act* (Nova Scotia) and in particular:

> S. 13 (c) a marriage contract or separation agreement between the parties.

I conclude there was no such agreement.

> S. 13(d) the length of time that the spouses have cohabited during their marriage;
> S. 13(e) the date and manner of acquisition of assets.

I have considered these s. 13 factors, as well as the following:

> S. 13(g) the contribution of one spouse to the education or career potential of the other spouse;
> S. 13(i) the contribution made by each spouse to the marriage and the welfare of the family, including any contribution as a homemaker or a parent;
> S. 13(l) the value of 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;
> S. 13(m) all taxation consequences of the division of matrimonial assets.

[19] The asset division includes assets acquired before or during the marriage. Here there is effectively one relationship - from August 22, 1987 to January 1, 2007. I have considered the evidence of the parties' relationship, marriages and provisions of the *Matrimonial Property Act* (N.S.). I conclude the appropriate division of pension and severance entitlement should provide for and equal sharing of these assets, as they were earned over this time frame.

[20] A division of the pension and severance award from the date of their first marriage (August 22, 1987) to the date of their final separation (January 1, 2007) will include a period when they were not together (August 10, 1995, the date of their first separation, to May 17, 1996, the date of their second marriage). The principles discussed in Morash v. Morash [2004] NSJ No. 40, NSCA, are subject to consideration of the factors outlined in s. 13 of the *Matrimonial Property Act*. Here I conclude that it would be unfair, considering the evidence before me, s. 13 generally and s. 13(i) (c) and (d) in particular, to order that the division of these assets predate the first marriage - when the division ordered already includes the time frame between their first separation and second marriage when they were temporarily apart.

[21] When and if he receives the severance benefit, the severance benefit will be divided between the parties with Ms. Lang entitled to one half of the after tax value (to Mr. Saunderson) of the severance earned between August 22, 1987 (the date of the first marriage) and January 1, 2007 (their final separation date); with the severance being treated as last tax dollars in his calculations.

[22] Mr. Saunderson will pay Ms. Lang her share of this benefit by May 1 of the year following the calendar year of his receipt of these monies (i.e. after his tax filing) and provide her copies of all documentation related to the receipt of the benefit payment and a copy of the relevant tax return.

VI. SPOUSAL SUPPORT

[23] Ms. Lang seeks no retroactive spousal support. Mr. Saunderson has paid support informally or pursuant to an interim order since the parties' separation in January of 2007 - four and a half years.

[24] Mr. Saunderson's counsel has suggested that the "first marriage" is not relevant to the consideration of spousal support. The legislation makes it clear, in my view, that it is.

[25] The *Divorce Act* provides at:

> s. 15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the Court shall take into consideration the condition, means, needs and other circumstances of each spouse, including:
> a. the length of time the spouses cohabited;
> b. the functions performed by each spouse during cohabitation; and
> c. any order, agreement or arrangement relating to support of either spouse.

[26] The parties' first divorce was silent on the issue of spousal support. It was not dealt with.

[27] The parties' first marriage was August 22, 1987. They separated August 10, 1995. They were together eight years.

[28] The second marriage was May 17, 1996. They separated January 1, 2007. They were together ten and a half years.

[29] In total they were together eighteen and a half years. They had three children. Mr. Saunderson was the principal wage-earner. He was in the military. They moved frequently as his postings dictated. At times he was away, at times she worked outside the home. But for times when he was away (and that was not infrequently), it appears they shared household duties. There is no doubt, however, that she provided the primary care to the children.

[30] Section 15.2(6) of the *Divorce Act* provides:

> An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

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

[31] Before the marriage, Ms. Lang worked as a receptionist, and as a waitress. She worked in various jobs during the marriage. She worked as an assistant Manager at EB Games, then at Bentley (from shortly before separation). She became a regional auditor at Bentley after the separation. That position provided her with a car, and had she not left the job it would have provided her with an income of $25,000 to $30,000.00 per year.

[32] In February 2009 she left the job temporarily for stress reasons - the stress arose from a new position that involved travel, being away from the (grown) children and her first grandchild, the divorce, and her father's illness. Her father died in March 2010. She eventually quit the job at Bentley. She stated (paragraph 6 of her Affidavit of January 7, 2010):

> ...My only concern with Bentley was that they wanted me to travel to several provinces for business and I did have concerns about what that amount of travelling would mean for the children, my grandchild, the house and what would happen to my pets. Bentley's wanted me to go to Saskatchewan and Manitoba to do inventory and I would be gone for two and a half to three weeks at a time including travelling I was doing in Atlantic Canada . . . I was under a considerable amount of stress from work, separation, my dad's cancer and the uncertainty of the future. I left Bentley's . . .

[33] Ms. Lang's parents lived in Saskatchewan. It appears the "Bentley job" would have taken her to them, her father. It appears from her oral evidence that she left Bentley as she did not want to travel and be away from her grandchild and "animals".

[34] Since October of 2009 she has been working part-time as a bartender - and earning something in the vicinity of $10,000.00 per year.

[35] She went back to Bentley briefly in April 2010 (not to her previous position), was earning approximately $14,000.00 per year to start but quit as she was "having problems dealing with the loss of (her) Dad."

[36] She had a medical plan with Bentley She has $200.00 plus per month in medical expenses.

[37] She entered a cohabitation/common-law relationship with a Mr. Dalton April 1, 2011. It is unclear if he has a medical plan she can access.

[38] Mr. Saunderson earns $71,212.00 per year. Ms. Lang earns something in the range of $10,000.00 per year. Ms. Lang could be earning more. She left work for reasons largely unrelated to the marriage or its breakup. It was a long relationship. Ms. Lang's role in the relationship disadvantaged her economically and had her take a primary role in parenting. She has repartnered. She is or will be sharing Mr. Saunderson's pension and long service award.

[39] Ms. Lang seeks $1,300.00 per month in spousal support. The Interim Order is $1,000.00 per month. She has received support from Mr. Saunderson for four and a half years since the separation.

[40] A support order of six more years would provide her with post-separation support for ten and a half years - to approximately age 55 - and, in my view, address all the factors and objectives referred to in s. 15.2(6) of the *Divorce Act*

[41] Considering these factors, the evidence before me and the factors and objectives enumerated in the *Divorce Act*, I conclude that the appropriate spousal support order should provide that Mr. Saunderson pay spousal support to Ms. Lang as follows:

a. from June 1, 2011 to and including May 1, 2012 at $1,300.00 per month;

b. from June 1, 2012 to and including May 1, 2017 at $1,000.00 per month.

His support obligation to her will then terminate.

VII. SUMMARY

[42] Pension: Divided equally as earned from August 22, 1987 to January 1, 2007.

[43] Severance: Divided equally (valued on an after-tax basis) when and if received, as earned from August 22, 1987 to January 1, 2007.

[44] Spousal Support: Paid by Mr. Saunderson to Ms. Lang as follows: $1,300.00 per month from June 1, 2011 to May 1, 2012; $1,000.00 per month from June 1, 2012 to May 1, 2017.

VIII. COSTS/REMAINING ISSUES RE DIVISION OF PROPERTY

[45] Should either party wish to be heard on the matter of costs or any remaining issues relating to adjustments on the division of their matrimonial property (which I would reserve jurisdiction on), they may arrange a date with Scheduling.

J. S. C. (F. D.)

Halifax, NS