

Date: September 28, 2001
Docket: S.P. 1205-001583

IN THE SUPREME COURT OF NOVA SCOTIA
(*Cite as: Mayer v Mayer [2001] NSSC 128*)

Between:

Kornelia MAYER,

Petitioner

-and-

Karl Georg Lorenz MAYER,

Respondent

DECISION

Heard Before: the Honourable Associate Chief Justice Michael MacDonald on
May 28, 29, 30 & 31, 2001 at Pictou, Nova Scotia

Oral Decision: May 31, 2001

Written Release
of Decision: September 28, 2001

Counsel: Hector J. MacIsaac, *Hector J. MacIsaac Inc*
for the Petitioner

Ian H. MacLean, *MacLean & MacDonald*
for the Respondent

This is a divorce matter involving several property-related issues.

BACKGROUND

The parties, both from Germany, were married in March of 1983. They have two teenage boys; namely Raalph Karl Mayer born May 11, 1986 and Mattias Peter Mayer born February 6, 1988.

Following Mr. Mayer's brief but very successful business career in Germany, the couple decided to move to Canada and to live off their investments. In the spring of 1992, they purchased a large farm in Union Centre, Pictou County. This became their matrimonial home when they emigrated approximately one year later in May of 1993.

While eventually transferring most of their assets to Canada, the parties left behind their matrimonial home in Vilshoven, Germany, a significant Austrian bank account, and other smaller German bank accounts. The Vilshoven home remains rented although the parties have recently agreed to sell it. Their Canadian investments now include several rental units in Pictou County, a mortgage on a local restaurant, and several bank investments.

Aside from Mr. Mayer's management of the rental properties and other investments, since coming to Canada, neither party has worked outside the home.

Their marital difficulties began shortly after getting settled in Canada. Ms. Mayer left the home in September of 1996. One day later she returned to attempt a reconciliation. This failed and in April of 1997, the parties began living in separate rooms. Ms. Mayer finally left the matrimonial home in August of 1997. They have lived separate and apart since that time. The two boys remain on the farm with their father. Ms. Mayer now lives in a common-law relationship with one Edward Mulholland. They live in Gairloch, Pictou County; not far from the matrimonial home.

The separation was extremely acrimonious. In addition to the parties' mutual contempt for the other, tragically, Ms. Mayer's relationship with her older son Raalph has been jeopardized. At present he wants no contact with his mother. Despite this hostility and to their credit however, the parties have settled most of their outstanding legal differences.

Therefore, I will now confirm the agreements that have been reached. I will then identify and resolve the outstanding issues.

AGREEMENTS

1. The parties agree upon the grounds for the divorce (i.e. a separation for a period in excess of one year).

Therefore I issue a divorce petition on the grounds of marriage breakdown.

2. Custody and access provisions respecting Raalph Mayer.

The parties have agreed that:

- (a) Mr. Mayer should retain sole custody.
- (b) Even though there is no contact between Ms. Mayer and Raalph, Ms. Mayer shall have reasonable access at reasonable times, upon reasonable notice, including the right to contact Raalph by letters and by telephone.

3. Custody and access provisions respecting Matthias:

The parties have agreed that:

- (a) Mr. Mayer shall retain sole custody.
- (b) Ms. Mayer shall have reasonable access, at reasonable times, upon reasonable notice, including but not limited to the following specific access:
 - (i) On Tuesdays and Thursdays after school until 8 p.m. Provided however that during the weeks that Ms. Mayer has weekend access with Matthias, there shall be no access on Thursdays pursuant to the terms of this subparagraph.

(ii) On Friday afternoons, after school until Saturday at 6:00 p.m.

(iii) Every second weekend from Friday at 5:00 p.m. until Sunday at 6:00 p.m. On long weekends, the weekend includes the holiday.

(iv) A period of not less than two (2) weeks and not more than one (1) month during each summer vacation.

(v) Regardless of any other access schedule, Matthias shall spend Father's Day with his father and Mother's Day with his mother.

(vi) Each party shall have Matthias for one-half of the Christmas holidays and one-half of the March break. It has been agreed by the parties that in 1999 Christmas Eve and Christmas Day until 2:00 p.m. was included in Ms. Mayer's share of the Christmas holidays, and that this arrangement should be alternated between the parties in subsequent years.

(vii) Each party shall be entitled to have Matthias for a period of not less than two (2) hours on his birthday, regardless of the usual access schedule.

(viii) Ms. Mayer should continue to be entitled to liberal telephone access to Matthias.

(ix) Either party may travel outside the country periodically for vacation periods, with the children. Provided however that in the event of any such travel by the children or either one of them, the other party shall be kept reasonably advised as to the itinerary and the other parent shall be provided with a means of contacting such child or children.

(x) Ms. Mayer shall be entitled to request and receive complete access to medical, school, religious and other records compiled by or on behalf of the professionals having responsibility for the children or either one of them, directly from these sources. Without limiting the generality of the foregoing Ms. Mayer shall be given timely notice of medical appointments, except in the case of an emergency, in which case Ms. Mayer shall be given full particulars as soon as is practicable thereafter.

(xi) Each party shall advise the other, in a timely manner, of their proposals for scheduling of extended access, including but not limited to travel outside the country.

(xii) Ms. Mayer shall ensure that Matthias shall not have any direct personal contact with Edward Mulholland while Matthias is in the care of Ms. Mayer.

4. Child Support

The parties agree that Ms. Mayer shall pay child support pursuant to the *Child Support Guidelines* at a figure to be ordered by the Court later in this judgment.

5. Spousal Support

Neither party seeks spousal support from the other. This is subject to Mr. Mayer's claim for an unequal division of matrimonial assets. If he is successful, Ms. Mayer reserves the right to seek spousal support.

6. Agreed upon Divisions/Valuations of Assets

The parties have agreed upon the following:

(a) The Union Centre property, being the former matrimonial home, is valued at \$144,000.00. Mr. Mayer shall purchase Ms. Mayer's one-half interest, net of future selling costs.

(b) The Scotsburn Road rental property will be sold for \$60,000.00 with the net proceeds divided equally.

(c) The Westville Road properties (two separate dwellings, each of which contains a single rental unit) are valued at \$46,000.00 Mr. Mayer will purchase Ms. Mayer's one-half interest, net of future selling costs.

(d) Mr. Mayer's Royal Bank of Canada account had a balance of \$100.00 at the time of separation. Ms. Mayer is therefore entitled to a \$50.00 credit.

(e) The New Glasgow Credit Union account in Mr. Mayer's name had a balance of \$8,000.00 at the time of separation and Mrs. Mayer is entitled to a \$4,000.00 credit.

(f) Ms. Mayer's bank account at the New Glasgow Credit Union had a balance of \$1,400.00 at the time of separation, and Mr. Mayer is entitled therefore to a one-half credit of \$700.00.

(g) Each of the parties had life insurance policies which are agreed to have been of equal value. Each will retain their own policy without any claim from the other.

(h) Mr. Mayer's Oldsmobile automobile had a value of \$200.00 at the time of separation, and Ms. Mayer shall be entitled therefore to a \$100.00 credit.

(i) Mr. Mayer's Ford truck had a value of \$3,000.00 and Ms. Mayer is therefore entitled to a \$1,500.00 credit.

(j) Mr. Mayer's Landini farm tractor had a value of \$10,000.00 and Ms. Mayer is therefore entitled to a \$5,000.00 credit.

(k) Mr. Mayer's John Deere brush cutter had a value of \$500.00 and Ms. Mayer is therefore entitled to a \$250.00 credit.

(l) Mr. Mayer's Worksaver rear blade for his farm tractor had a value of \$200.00 and Ms. Mayer is therefore entitled to a \$100.00 credit.

(m) Mr. Mayer's Craftsman lawn tractor had a value of \$750.00 and therefore Mrs. Mayer is therefore entitled to a \$375.00 credit.

(n) No value is assigned to the various farm animals, all of which are agreed to be and remain the property of Ms. Mayer.

(o) Mr. Mayer is entitled to a credit of 10,000.00\$ DM representing Ms. Mayer's agreed-upon equal share of the cost of divesting themselves of the liabilities associated with the lease of the Munich garages.

(p) Mr. Mayer is entitled to a credit to reflect the fact that he transferred the sum of \$30,000.00 to Ms. Mayer, pursuant to a Consent Order.

(q) Mr. Mayer is entitled to a credit to reflect the fact that he transferred money to Ms. Mayer from an Austrian bank account. A total of 292,000.00\$ DM was transferred on or about December 5, 1999.

(r) Mr. Mayer is entitled to a credit for the fact that he paid for the appraisal for the Union Centre property, which appraisal cost \$833.75. Although it is not mentioned, I presume and therefore direct that that would be a one-half credit.

(s) Finally, the parties' mortgage interest in the Vohs restaurant property is valued at \$130,000.00 with each party have a one-half interest.

ISSUES

I will now deal with and rule on the following issues:

1. Ms. Mayer's Inheritance:

Ms. Mayer inherited approximately \$6,000 from her mother's estate when her mother died approximately fifteen years ago. She placed these funds in a Credit Union account. Pursuant to s. 4(1)(a) of the *Matrimonial Property Act*, she claims that this money is exempt as an inheritance. Mr. Mayer claims that they are not exempt from division because they were used in part at least for matrimonial purposes.

S. 4(1)(a) provides:

"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;"

This issue was recently considered by our Nova Scotia Court of Appeal in the decision of *Fisher v. Fisher*, [2001] N.S.J. 32. Beginning at paragraph 43, Cromwell J.A. noted:

"Accepting the trial judge's findings of fact, the question is whether he applied correct legal principles in finding that the Franke farm was not a matrimonial asset? In my respectful view he did not. He appears to have applied a test under s. 4(1)(a) which requires that there be substantial use of an inherited or gifted property for the benefit of the spouse or children in order for it to be classified as a matrimonial asset. In my respectful view, that is not the test as set out in s. 4(1)(a).

According to the section, the inherited or gifted asset is not a matrimonial asset"... except to the extent to which [it is] used for the benefit of both spouses or their children." In my opinion, once it is established that there is use for the benefit of the spouses or children of an inherited property that would not otherwise be a matrimonial asset,

the property should be found to be a matrimonial asset unless such use is trifling or insignificant. I will consider the extent of the classification later in my reasons.”

In the case at bar, the evidence discloses that Ms. Mayer used part of this money to purchase family farm animals or pets. The farm was important to the family and this was clearly a matrimonial use. This use was more than trifling or insignificant. Considering the above principles, I find therefore that this use had the effect of transforming a portion of this account into a matrimonial asset. Mr. Mayer is thereby entitled to an interest accordingly.

The next question involves the portion of this asset which should be considered matrimonial. Cromwell J.A. in *Fisher, supra* continued at paragraph 51, with the following analysis:

“It is not possible or desirable to set out any hard and fast rules for determining the extent of use of an asset for the benefit of both spouses or the children. The fundamental issue, to use an expression that appears in some of the cases, is the extent to which the asset has gone into “the matrimonial pot”: see *Rossiter-Forest v. Forest* (1994), 129 N.S.R. (2d) 130 (S.C.) and *Stoodley v. Stoodley* (1997), 172 N.S.R. (2d) 101 (S.C.). This determination must be made having regard to the nature of the asset and what use, in the normal course of life, would constitute integration of an asset of that nature into the life of the family. Factors such as the degree to which the asset was kept and treated separately from matrimonial assets, the amount and nature of its use by, or on behalf of, the spouses or the children and the contribution of family resources to maintain or enhance the asset may be factors which will be helpful to consider in making this determination. This, of course, is not an exhaustive list.”

While the evidence as to the use of this account is sparse, and considering all the evidence before me, I consider 50% to be a fair designation in the circumstances. Mr. Mayer is therefore entitled to an equal interest of 50% of this asset or a net figure of 25% as of May 30, 1997, being the date of separation, which I understand is \$6,000.00.

2. Counseling Costs

As a result of this acrimonious separation, the parties and children were seen and treated by several counselors. These costs totalling \$12,551.41 were paid by Mr. Mayer. He seeks an equal contribution from Ms. Mayer. She feels that they were unnecessary and resulted solely from the harm caused to the children by Mr. Mayer's irresponsible and contemptuous allegations against her.

I find that like all bitter separations, it is impossible to find one blameless party. Regardless of fault, it is clear that these children suffered and the family needed treatment. This responsibility should therefore be shared. Mr. Mayer is therefore entitled to a corresponding credit from Ms. Mayer for one half of this cost.

3. Payments to Ms. Mayer

During the first 32 months of their separation, Mr. Mayer paid Ms. Mayer \$800.00 per month. Nothing was ever reduced to writing. Ms. Mayer asserts that Mr. Mayer agreed to this being spousal support with Mr. Mayer further agreeing not to claim it for tax purposes. Mr. Mayer insists that it was an advance towards her share of the assets as evidenced by the fact that he never claimed this money for tax purposes.

I find that considering all the circumstances of this case that these payments should be considered as spousal support. I find that Mr. Mayer cannot justify any other assertion. He controlled the investments during this time; investments to which Ms. Mayer had an equal interest. She had no other source of income. She would and should have been entitled to spousal support and this was a fair representation in the circumstances. In fact had I found that Ms. Mayer agreed to have this classified as an asset advance (which I do not find), then she would have been still entitled to an equivalent amount as retroactive spousal support. These payments do not affect the division of assets.

4. The Vilshofen Property

While the parties have agreed to sell this property and divide the net proceeds equally, there is a disagreement as to the process to be followed. Ms. Mayer does not trust Mr. Mayer to secure the best price. She therefore seeks an independent appraisal which in Germany can be quite expensive. Mr. Mayer simply wants to list it and collect the best price.

I find that it is best to simply list and sell this property. I accept Mr. Mayer's evidence that in Germany like Nova Scotia, real estate agents are knowledgeable and can advise as to the best asking price. To allay her mistrust, I offer Ms. Mayer three options. First, the agent shall be selected mutually. Secondly, both parties must agree on the sale price. Finally, I give Ms. Mayer the option to handle the sale should she so desire. Should there be disagreement as to the agent or the sale price, the matter may be remitted to a court of competent jurisdiction.

5. Mr. Mayer's Tools

Mr. Mayer has tools valued at \$1,850. and wishes to have them excepted under S. 4(1) of the *Matrimonial Property Act*. There is little or no evidence on this except that they exist. In short of evidence to the contrary, I presume they are personal to Mr. Mayer and not subject to division. I refer to *Bryden v. Bryden* (1995), 140 N.S.R. (2d) 308 Nova Scotia Supreme Court.

6. Household Contents

The parties agree that Mr. Mayer received \$4,295.00 value in household contents while Ms. Mayer received \$2,255.00 value. The only issue is whether or not a portion of Mr. Mayer's share should be designated for the children and thereby exempt from division. It is clear to me that as custodial parent, much of Mr. Mayer's share will benefit the children thereby warranting an adjustment in his favor.

In the absence of evidence on this issue, I find that it is fair to simply set Mr. Mayer's share as equivalent to that of Ms. Mayer. Therefore, there shall be no adjustment for household contents.

7. The RBC Dominion Securities Account

This was one of the most significant issues at trial. Its background is succinctly set out in Mr. Mayer's brief at page 16, and I quote:

“This account was held in Mr. Mayer's name and was closed on December 28, 1997. On December 17, 1997, a total of \$103,946.69 was transferred out of the account and into the account of Maria Huber, Konnie's step-mother. This transfer was affected at the request of Mr. Mayer, who will call evidence to show that he was directed to do so by Ms. Mayer's father. Mr. Mayer maintains that the money in the account came from Ms. Mayer's father

and that it was held by Mr. Mayer in trust for the boys. He maintains that it was therefore not his money and is therefore not subject to division between the parties.”

The brief further continues:

“Ms. Mayer’s father will be called upon to give evidence in this regard.”

For his part Ms. Mayer’s father Mr. Heinrich Bruning testified that in the spring of 1993 he cashed in life insurance policies he had for his grandchildren Raalph and Mattias and gave this money (\$120,000.00) to Mr. Mayer in trust. He was to invest it in Canada in trust for the grandchildren but Mr. Mayer could use the interest.

When Ms. Mayer left the matrimonial home Mr. Bruning became upset with his daughter’s lifestyle and directed Mr. Mayer to transfer the funds to Ms. Huber. Mr. Bruning would have directed them to go in his name but he was not in Canada at the time.

Mr. Mayer, for his part, testified that he did in fact invest these trust funds with RBC in September of 1993. They were blended with other personal funds, all in Mr. Mayer’s name (See *Exhibit 1, Tab 28*). Funds were in fact transferred in December of 1997 and are still with RBC in Ms. Huber’s name with Mr. Mayer retaining trading authority. According to the bank records (*Exhibit 1, Tab 27*), these funds totalled approximately \$105,000.00 at the time of transfer.

Having heard from the parties and Heinrich Bruning, Ms. Mayer’s father, on this issue, I am satisfied that there was never any such trust attached to these funds and that these funds should never have been transferred to Ms. Huber. While not exhaustive, I have reached this conclusion for the following reasons:

1. There is absolutely no documentation to support this alleged trust aside from Mr. Bruning’s self-serving letter demanding the transfer which inaccurately refers to an initial trust of \$100,000.00 as opposed to the alleged \$120,000.00.
2. Mr. Bruning has throughout the years and continues to hold his daughter, Ms. Mayer, in contempt. He had every reason to support Mr. Mayer’s efforts in hiding these funds from his

daughter. In fact they likely went into Ms. Huber's name to further complicate tracing.

3. Mr. Bruning was a confrontational witness who lacked credibility. He spent two years in jail for his part in a major car theft ring in Germany. I accept Ms. Mayer's description of her father's ruthless ways.
4. Mr. Mayer was very bitter towards his wife at the time of the transfer to Ms. Huber and was determined to hide whatever assets he could. In fact he admitted to lying under oath about other assets he had hidden.
5. This money was blended with other matrimonial money making the trust scheme appear like a fraudulent afterthought.
6. While the RBC account originated in just the name of Mr. Mayer, he intended it to be joint with his wife. Knowing the contemptuous relationship Ms. Mayer had with her father, I find it hard to accept that Mr. Mayer would want to put Mr. Bruning's trust funds into Ms. Mayer's name.

In short for many reasons some of which are set out above, I find that this trust fund allegation was no more than a scheme to deprive Ms. Mayer of her rightful share of this money. She is entitled to one half of its value as of the date of separation being April, 1997. This figure according to *Exhibit 15* is \$159,268.00. Although it is not in Mr. Mayer's name any longer, I find he maintains control. He shall pay Ms. Mayer \$79,634.21 out of his share of the assets as an unequal division under s. 13 of the *Matrimonial Property Act*. To order otherwise would be unconscionable.

8. The Austrian Bank Account

This is another highly contested asset. In the early 1990's when the parties were making huge sums of money, they invested almost 1,000,000.00\$ DM in an Austrian bank. Ms. Mayer has already received a large share of this. However Mr. Mayer now asserts that a portion of the funds (177,000.00\$ DM) are not his. In fact he says they belong to his aunt Ms. Hildegarte Stoiber, who died just two weeks ago. He asserts that these funds were given to him by his aunt to invest for her.

Furthermore, all the remaining funds were placed by Mr. Mayer in the name of a friend Mr. Gerhart Helfensterfer, so as to keep them from Ms. Mayer. Ms. Mayer vehemently denies any such arrangement insisting that this is just a fraudulent scheme to deny her.

Again, on this issue, I reject Mr. Mayer's version of events. I do so for the several reasons which include:

1. As earlier stated, Mr. Mayer was determined to hide assets from his wife.
2. He lied earlier at discovery when under oath he stated there were no more funds in Austria only to "come clean" in the fall of 1999 when faced with a disclosure order.
3. There is no satisfactory documentation to confirm any such arrangement. While it is conceded that his aunt did advance \$100,000.00 on an earlier occasion, this by all accounts had been returned to her at her instructions.
4. The timing of this assertion is suspect being just days after Mr. Mayer was forced to reveal the existence of the hidden account in Mr. Helfensterfer's name.
5. Ms. Stoiber's so-called confirmation letter looks suspicious in its direct language; something a trusting, elderly aunt may sign for a nephew.

In reaching this conclusion, I have admitted Ms. Stoiber's answered interrogatories even though she passed away before signing them. Given the formal nature in which they have been presented through the German Counsel, they meet the test of admissibility, being circumstantially reliable. However this evidence has insufficient weight to impact my finding that no such trust exists.

In addition to the above reasons, I note the following as relative to the interrogatories. According to her answer 19(zv), she has no documentation whatsoever relating to this account. Furthermore when asked about the present balance she responded "about DM

177,000\$”. This was said without any supporting documentation and is exactly the sum asserted by Mr. Mayer. If she were to approximate, one might expect a figure more rounded figure like 175,000.00\$ DM. Therefore, because I have had no opportunity to assess Ms. Stoiber’s evidence, it is difficult for me to rely upon it for the reasons stated.

While I wish there were better evidence, in all the circumstances of this case, I reject Mr. Mayer’s claim to a trust. Ms. Mayer is entitled to a one half interest of all the Austrian bank funds including the disputed 177,000\$ DM (but net of the funds she has already received). I direct an unequal division if necessary to achieve this.

9. Mr. Mayer’s Claim for an Unequal Division of Assets

Mr. Mayer has had custody of the children since separation and by all accounts has been doing a good job. He feels there will be much added expense for him despite any child support Ms. Mayer may pay. He therefore relies upon s. 13(h) for an unequal division of the assets. Section 13(h) provides:

“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 the following factors:

(h) the needs of a child who has not attained the age of majority.”

Having considered this submission by counsel for Mr. Mayer, I reject it. This is not one of those special cases where Mr. Mayer will be impoverished because he has custody of his children. Both parties have significant assets. Ms. Mayer will pay child support. A court has the ability to impute income to her should she not invest her assets wisely. Furthermore custody is never final while a division of assets is. For all these reasons I do not see an equal division of assets as unconscionable.

For the same reasons I see no need to credit Mr. Mayer for any assets he brought into the marriage as he seeks. His assets at the time of marriage were not significant. While he made lots of money in Germany during the marriage he was able to do so while Ms. Mayer raised the children.

10. Child Support

Ms. Mayer must pay child support based upon her income. Based upon this division of assets, I impute annual income of \$45,000.00. This coincides with Ms. Mayer's pre-trial submissions and they appear accurate. I therefore direct a monthly payment to Mr. Mayer of \$617.00 payable when the aforesaid division of assets is complete.

COSTS

The Court certainly takes a dim view on anybody who has tried to thwart the administration of justice by hiding or failing to disclose assets, because it makes it much more difficult for our system of justice to work in those circumstances. I have found that on the two major issues, the Austrian bank account and the RBC securities account, that that was exactly the case, and that Mr. Mayer was so responsible. For this reason, Ms. Mayer is entitled to an award for costs.

At the same time, however, it is not the duty to award punitive damages by way of costs. That would be wrong. Costs should be compensatory in nature and reflect the nature of the trial, which lasted two days. Furthermore, I accept Mr. MacLean's submissions that the parties have made great strides, to their credit, to narrow the issues down and to make this a two day trial. And finally, there has been mixed success in the issues that I have been asked to decide.

So, for these reasons, while I have stated that Ms. Mayer is entitled to costs, she is not entitled to costs in the amount suggested by Mr. MacIsaac. I direct Mr. Mayer to pay Ms. Mayer costs of \$5,000.00 plus disbursements for the trial, to be taxed if not otherwise agreed to by the parties.

Michael MacDonald
Associate Chief Justice