

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: S.K.B. v. S.P., 2012 NSSC 121

Date: 20120322

Docket: 1217-000708

Registry: Port Hawkesbury

Between:

S. K. B.

Petitioner

v.

S. P.

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

January 19, 2012, in Port Hawkesbury, Nova Scotia

Counsel:

Jennie Donnelly McDonald, for the petitioner
James MacIntosh, for the respondent

By the Court:

[1] This Divorce proceeding was initiated on November 6, 2009. An answer was filed on September 29, 2011. The petitioner's former counsel withdrew as solicitor of record on October 17, 2011.

[2] The petitioner's current counsel has put forward, with considerable effort, an attempt to organize the petitioner's evidence to make it more comprehensible. Ms. Donnelly McDonald cannot be faulted for the lateness of the petitioner's submissions nor the lack of verification. Counsel has obviously made every effort to argue the petitioner's case with what information she was able to obtain from her client.

[3] The respondent has been represented throughout.

[4] Both the petitioner and the respondent personally have wasted some time rehashing old disputes. This has not been helpful sorting through and finding a resolution to the issues that remain between them.

[5] The parties have not pursued a resolution swiftly. The resulting passage of time adversely affected the clarity of evidence of debts, balances and values.

[6] The parties lived together for 15 years, seven of which were in a common law relationship until they married on November 21, 2001.

[7] It is difficult to determine the exact date of their separation. In July, 2009, the petitioner left the matrimonial home to travel to *. The parties have not reconciled since that date.

[8] There are two dependent children, J. J. M. K. P., born December *, 1995, and A. J. K. K. P., born July *, 1997. The children have been living with the father since separation.

[9] I am satisfied that there is no possibility of reconciliation. All jurisdictional and procedural requirements have been met. I grant the divorce based on the ground of permanent breakdown of the marriage as evidenced by the fact that the parties have been separated for a period in excess of one year preceding the determination of the divorce.

[10] The petitioner asked for shared custody, spousal support, costs, division of property and pension.

[11] The respondent agreed to joint custody, primary care remaining with him. He continues to enjoy exclusive possession of the matrimonial home. He seeks a division of assets, as well as a division of pension.

[12] I was given no pension information.

[13] The children have lived with their father since separation and during a previous separation. Their children in common are 16 and 14 years old. The petitioner is 43 and the respondent is 47 years old.

[14] The respondent has been the children's care giver and primary parent since birth.

[15] The parties met in 1994 in C.. For each, this is their third marriage. Both have grown children from their former unions.

[16] The petitioner's former spouse is deceased. She is in receipt of a widow's allowance.

[17] The evidence of both parties is confusing and inexact as to dates of significant events in their lives.

[18] The respondent noted that in 2001 the parties separated while living in C.. Child protection became involved in their lives and for six months the children were removed from their home. The oldest child was taken into care and the petitioner's younger son and two girls were returned to the respondent. At that time the petitioner was ordered out of the home.

[19] The proceedings with child protection were protracted.

[20] The petitioner was required to see a mental health professional before they were allowed to reunite. The respondent was also required to take a parenting course.

[21] The parties moved from * to Nova Scotia in 2002.

[22] They received \$37,363.00 from the sale of their C. home. Much of this was spent on the move for a truck for the respondent in the amount of \$14,000.00 and for a van for the petitioner in the amount of \$6,000.00. The respondent's truck was repossessed in 2002.

[23] They purchased their current matrimonial home at * , * , in 2008 for \$75,000.00. Each contributed to the down payment of \$8,000.00 on the joint account. The petitioner added \$4,850.00 from an educational savings plan which she identified as scholarship monies set up for her children.

[24] The parties lived in their * property for the remainder of 2008, up until July, 2009, when the petitioner left the home.

[25] The petitioner left for * in July, 2009, because she said as Executor of her mother's estate she was required to collect her mother's remains and relocate them.

[26] She also testified she left to do service work with the *. She enrolled with an organization called “*”. She did not pursue this once her daughters were in the accident in August, 2009.

[27] The respondent was informed in August, 2009, that while in *, the petitioner was engaged to be married.

[28] Regardless of what occurred, the petitioner admits that while in * she and the respondent had a conversation and concluded that the relationship was over.

[29] In August, 2009, while visiting their grandparents in * , the children were seriously injured in a car accident. The paternal grandparents and another person were killed. The respondent went to C. the day after the accident to bring his children back to *. They continue to live with him today.

[30] The petitioner accused the respondent of cutting off her access to their accounts. As a result, she said she had no money to come home. She borrowed money from a friend to return to Canada, in October, 2009, three months after the accident.

[31] A Custody and Access Assessment was undertaken in July, 2010. It is dated July, 2010.

[32] Neither party referred to this assessment and the assessor did not testify. This assessment speaks to the many issues that exist in this family. The mother was unable, at that time, to confirm with the assessor whether she intended to stay in Canada or live elsewhere.

[33] The de facto custody situation has continued with the children in the primary care of their father, with intermittent contact with the mother.

[34] The mother has requested shared parenting.

[35] The respondent is the primary care taker and the mother has had intermittent and sporadic contact with the children. The children seem to be in contact with her more frequently lately.

[36] The assessment recommended eventually a much more extensive period of contact between the mother and the children. The assessor has made recommendations to the mother to improve her relationship with her daughters.

[37] There was no evidence before me that the mother addressed the recommendations for personal counselling in order to address her personal issues.

[38] I do not have sufficient evidence to award a shared custody situation which would significantly change the status quo which has existed since the children's birth and, more particularly, from the date of separation in July, 2009.

[39] This request is not supported on the evidence. It is unlikely, in any event, that the children would abide by that direction given the lack of current contact and their age and stage of development.

[40] The parties shall be jointly responsible for the children. They shall continue to reside in the primary care of their father.

[41] The parties do agree that the mother shall be informed of the details of the daughters' recovery from the car accident and be provided medical reports received by the respondent with respect to their condition. As well, she is to be kept updated on the status of any civil action taken to recover for the children.

[42] The respondent shall provide to the petitioner, the name and contact numbers for the lawyers involved with this action and the mother shall be entitled to receive information from these solicitors on an ongoing basis upon reasonable request.

[43] The respondent shall have such access as can be arranged by agreement between the respondent and the petitioner to accommodate the children given their ages and stages of development.

[44] The mother is entitled to be kept informed as to their health and development and to contact with the children as can be agreed upon and arranged between the parties.

Child Support

[45] The respondent acknowledges that the petitioner is currently unable to pay child support while receiving only her widow's pension. He requests that she keep him informed of when she becomes employed and pay in accordance with her Employment Insurance or employment income.

[46] The parties shall be obliged to exchange on a regular basis, on or before June 1st of each and every year, their Income Tax Return together with all schedules, Notices of Assessment and Re-assessment.

[47] The petitioner shall inform the respondent within 48 hours of finding employment and provide him with the details of the employment so that he can determine if the matter should be brought back to court for an assessment of child support.

[48] For child tax credit purposes and by way of this order it is confirmed that the children have remained in the father's primary care and sole custody since 2009.

[49] The petitioner shall provide access for the children to any medical or dental coverage she has as a result of previous, current or future employment.

Spousal Maintenance

[50] The petitioner admits that during the periods of time that they lived together, she was the primary financial provider, contributing not only her widow's pensions but working at various jobs throughout.

[51] The petitioner now seeks compensation by way of spousal support. She argues she earned the greater income throughout their life together; she was therefore unable to retrain. She asks for compensatory support.

[52] The petitioner was educated in *. There she received her * training. She immigrated to Canada in 1988 with her first husband who worked with the Canadian Armed Forces. They had two children.

[53] In Canada, she worked with Junior Ranks Military Facility in * until both she and her former husband were posted to * in 1989. She has also worked as a Nurses Aid, worked as a waitress and as a cook in a restaurant.

[54] In April of 1991, she worked with the Canadian Armed Forces as a Private in the Communications Squadron.

[55] When her husband died on in 1991, she became eligible for a widow's pension. She received an honourable discharge from the Canadian Armed Forces in April of 1992.

[56] The day before the Divorce hearing on January 13, 2012, she filed her affidavit. Exhibit "B" to her affidavit is a summary of income of both the petitioner and the respondent from 2002 to 2010.

[57] In each year, except for 2009, her income exceeded that of the respondent's. She earned a low of \$17,191.00 in 2009 and a high of \$34,657.00 in 2007.

[58] The respondent declared a business loss of \$33,593.00 in 2002. His highest income earning year was 2008 when he declared income of \$33,606.00.

[59] The petitioner advised that in 2010 that she lived on her pension, social assistance, and employment insurance.

[60] In the fall of 2011, she began *. She is currently suspended from the job.

[61] In 2009, the respondent's income was \$25,029.00.

[62] In the 2010 year, the respondent's income was \$11,924.39. Of that, \$1,617.00 came from employment income; \$10,264.00 from Employment Insurance benefits and \$42.89 from interest and investment income.

[63] The respondent began to work again in February, 2011. He continues to work in *, earning \$12.00 per hour with a guarantee of 38 hours per week.

[64] As of the September 6, 2011, statement, the respondent's annual income is \$19,368.00. With this income he has and continues to be the parent responsible for supporting the two children since separation.

[65] The petitioner does not appear to have been disadvantaged by the marriage. She testified she was the primary financial provider and as a result, lost out on training opportunities.

[66] The petitioner has not successfully made a case for entitlement to spousal support.

[67] The respondent is in no position to pay spousal support as he has the sole responsibility for the financial support of the children without contribution from the petitioner.

The Home

[68] The home was purchased during the relationship by funds from both parties. While the deed was put in the name of the respondent it is clearly a matrimonial asset.

[69] Both parties agreed to sell the home. It shall be placed on the market immediately by the parties in order to affect sale.

[70] An appraisal of the home reflects a value of \$92,500.00. There may well be difficulty selling the home due to the building's state of disrepair and market conditions in the area.

[71] The actual sale price shall determine the value of the home. In the event the home does not sell by September 30, 2012, the respondent shall arrange to pay the petitioner her half (½) share of the equity in exchange for a quit claim deed .

[72] The respondent shall be responsible to maintain the home prior to sale.

[73] The parties shall be responsible to share the ordinary disbursements including real estate commission, HST, legal fees not exceeding \$800.00 and the first mortgage of \$71,729.00 as of December 31, 2009.

[74] The 2nd mortgage with Citifinancial (account ending in 427), with principal amount as of December 31, 2009, being \$11,128.54, was taken out by the respondent without the consent of the petitioner. This shall be his responsibility entirely.

[75] I presume the second mortgage is registered against the property and will have to be paid out of the proceeds of sale. If this is the case, the respondent shall be responsible to reimburse the petitioner for her share of the equity, if any exists, calculated before the second mortgage is deducted.

[76] The respondent will indemnify the petitioner, should the payment of this mortgage affect her share of any equity, after sale and ordinary disbursements.

[77] The equity shall be shared equally as there is no evidence to support an unequal division.

[78] The respondent wishes to remain in the home until June, 2012; the end of the school year. There was no objection to that. It may well be that a sale cannot be effected by that time in any event.

[79] I leave it to the parties to negotiate a date of sale in order to effect the sale of the home as priority. The closing date of the end of the school year shall not be an obstacle in the event a purchaser is obtained, subject only to the agreement of the parties otherwise.

Pensions

[80] The petitioner seeks to keep her pension and the respondent has not disclosed any pensions nor submitted a pretrial brief or evidence dealing with any pensions he or she may have.

[81] I decline to divide the pensions as I have no evidence as to what, if any, exist.

Matrimonial Debts

[82] The debts listed in the petitioner's original Statement of Property have not been proven.

[83] On the eve of the hearing, documentation supporting various debts was filed with the Court and with counsel for Mr. P.. These documents relate to outstanding indebtedness from 2001.

[84] The petitioner tendered a MasterCard statement as of April 27, 2001, showing a balance as of \$6,333.61.

[85] The petitioner seeks to be reimbursed for the respondent's share of the Nova Scotia Power bill in the amount of \$1,200.00 and the Eastlink phone bill in the amount of \$1,800.00.

[86] The power bill statement is dated February 12, 2008. It relates to an apartment the parties lived in prior to purchasing the matrimonial home. In her

oral evidence, Ms. K. B. indicated that she has paid the power debt, the electrical debt in order to set herself up in an apartment on her return from * in 2009.

[87] She was in receipt of social assistance and they deducted a portion of it from her wages.

[88] She asks to be reimbursed for the flight back from * on October 11, 2009, when she returned from her * trip. This is reflected in her evidence . This is not a matrimonial debt.

[89] The petitioner indicated that the only outstanding debts with Easyhome relate to the lease agreement apparently dated January 5th or May 1, 2008, for the fireplace and home theatre in the amount of \$2,421.66.

[90] If there is an amount outstanding on this lease agreement relating to the stereo system and fireplace /tv stand, it shall be the respondent's responsibility. The property associated with this debt remains in the matrimonial home.

[91] The repairs to the van subsequent to separation do not constitute a matrimonial debt. The petitioner took that van with her after separation.

[92] The Small Claims Court judgement as a result of a loan she took out with Easy Financial on July 2, 2009, is not a matrimonial debt as referred to earlier. It financed her trip to *.

[93] The Court does not have sufficient evidence to identify other debts appropriately and precisely as matrimonial debt. The Court does not have statements indicating the balance as of the separation date and has no way to interpret what, if any, division of this debt ought to take place.

[94] The Court is not aware of any payments made specifically on these debts and whether any balance is currently outstanding.

[95] The only outstanding debt other than her trip debt, is her taxes and the mortgage.

[96] No inquiry was made by the petitioner to verify the amount of debts that existed as of the date of separation.

[97] The petitioner confirmed that she did not go to the Credit Bureau and ask for an up-to-date statement of outstanding matrimonial debts. She confirmed that she did not go to the original source to determine the state of that indebtedness as of the date of separation.

[98] She simply tendered old statements she could find. The prejudice to the respondent is simply too great to consider these debts as matrimonial debts.

[99] The respondent was unable, with late disclosure, to even address many of the statements of indebtedness.

[100] Capitol One is a debt for rent on *, which was paid in the amount of \$3,600.00. The respondent wrote a cheque on the Capitol One account for back rent for an apartment they lived in before they purchased their home. He is now unable to pay Capitol One. This is in collection as well.

[101] The respondent agrees to be responsible for his debt and the petitioner will be responsible for the van and any debt in her own name.

[102] The respondent shall be responsible for any debt relating to the Sony stereo system and fireplace/TV stand remaining in the home.

Income Tax Debt

[103] In 2003, the petitioner's income tax statement shows a refund of \$1,655.97. In 2004, there were arrears of \$2,649.57. In 2006, there was a balance owing of \$2,312.38. In 2007, there was a balance owing of \$5,819.45. In 2008, there was a balance owing of \$9,529.87.

[104] In 2008, Mr. P., had a final balance owing of \$603.98. That balance increased in 2009 to \$2,516.00. The return summary for 2010 for the respondent shows a balance of 0.

[105] The income tax debt that remained outstanding at the time of separation July, 2009, is a legitimate matrimonial debt to be shared and deducted from the remaining equity, if any, after sale of the home.

[106] The petitioner will have two months from the date of this decision or up to two weeks prior to the closing date of the home, which ever is earlier, to provide to the respondent's counsel proof that there is an income tax debt that existed as of the date of separation.

[107] The remainder of the debts have not been proven sufficiently to allow me to effect a division.

Division of Household Possessions

[108] In Appendix "A" of the petitioner's Statement of Property filed on January 14, 2009, there is an itemized list of matrimonial items valued at \$304,788.19 and additional items on the final page totalling \$9,446.99.

[109] The valuations appear to reflect the petitioner's recollection of the original purchase price. Given the historical income of both parties, these valuations also appear exaggerated.

[110] There is no supporting evidence or documentation to establish a credible basis for the evaluations as noted. I do not accept Appendix "A" as a true statement of what possessions were in the home.

[111] There is insufficient evidence before me to allow me to conclude what was there at the time of the separation, what each party took from the home and what remains. Nor can I identify any values for these possessions.

[112] Any personal possessions of Ms. K. B. shall be returned to her forthwith.

[113] In Mr. P.'s Statement of Property prepared September 13, 2011, he shows house contents of \$9,000.00 and itemizes them as if they have already been divided. The evidence does not support that in its entirety.

Conclusion

[114] The parties shall share joint custody of the children with primary care with the father; the mother shall have reasonable access at reasonable times on reasonable notice as can be arranged between the parties.

[115] The mother shall be entitled to access to the children's medical and legal information, in advance, on request as directed in this decision. In addition, the mother shall have access, as does the father, to third party service providers on a reasonable basis.

[116] The matrimonial home will be put for sale immediately and sold. The parties are jointly responsible for the first mortgage; the respondent is responsible for the second mortgage.

[117] Her tax liability shall also be paid up to and including the month of July, 2009, should there be any proceeds out of the sale of the matrimonial home.

[118] As between the parties, the respondent shall be responsible for his debts and that shall include the debt for any furniture remaining in the home.

[119] No spousal support shall be paid.

[120] The petitioner is temporarily unable to pay child support but will advise of any income in addition to her widows allowance for the purpose of calculating child support as directed in the decision. The terms directed with respect to medical and dental shall be included in the order.

[121] Ongoing financial disclosure shall occur on or before June 1 of each year.

[122] The petitioner's counsel shall prepare the Divorce Judgment and Corollary Relief Judgment.

Moira C. Legere Sers, J.