

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: MacDonald v. MacDonald, 2013 NSSC 94

Date: 20130311

Docket: 1217-000777

Registry: Port Hawkesbury

Between:

Paulette MacDonald

Applicant

v.

Pius MacDonald

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

January 22, 2013, in Port Hawkesbury, Nova Scotia

Counsel:

Wayne MacMillan, for the applicant
William Meehan, for the respondent

By the Court:

- [1] The parties to this Divorce petition were married for 33 years.
- [2] The issue before me at this time is simply the validity of the Separation agreement entered into on May 11, 2010.
- [3] The parties married on August 27, 1977 at Port Hawkesbury, Nova Scotia.
- [4] The respondent left school in grade nine, pregnant with their first child. There are currently no dependent children.
- [5] The parties separated on May 7, 2010. The petitioner, Ms. MacDonald, retained a lawyer and had the lawyer draft the Separation agreement according to terms that she provided to the lawyer.
- [6] The Separation Agreement was then sent to the respondent, who retained counsel. The agreement was subsequently signed by the respondent without further negotiation or modification.

The Agreement

- [7] The agreement is dated May 11, 2010.
- [8] It purports to be a full and final Separation Agreement bringing to a conclusion all of the outstanding issues between the parties.
- [9] The provisions relating to spousal support which are currently contested by the petitioner, form four and a quarter pages.
- [10] The agreement specifies that this is a full and final release of her entitlement to spousal support regardless of future circumstances that may arise.
- [11] The parties also dealt with the division of their property. The wife agreed to vacate the home, leaving the husband in the sole and exclusive occupancy.

[12] The home continued to be in the joint tenancy of the parties and her husband was to take full responsibility for its maintenance and upkeep.

[13] The apartment in the basement of the home was to be continually rented out for as long as the husband resided in the home. They were to share equally the benefit from the monthly rent for the apartment.

[14] The agreement acknowledged that the parties' possessions and personal effects were divided.

[15] They had a travel trailer which they continued to own jointly and the agreement provided for terms for sharing possession of the trailer.

[16] The husband was to take responsibility for the expenses relating to the trailer. If both agreed to a sale, the net proceeds were to be divided equally.

[17] The motor vehicle in the family was to remain with the husband. He was to maintain a valid will and whatever motor vehicle he owned at the time of his death was to be bequeath to his wife. (She did not drive)

[18] The parties acknowledged that the wife had no work-related pension. The wife identified the husband's pension and promised not to seek a division of this pension.

[19] The agreement made specific provision for health insurance, acknowledging that the wife had no work-related health insurance and that the husband's health insurance would continue to maintain the wife as beneficiary as long as that insurance was available to him.

[20] The life insurance through his employment which was named in the agreement was to continue to maintain the wife as beneficiary of both life insurance policies.

[21] The parties acknowledged their two debts and acknowledged that the husband would do his best to release the wife from the mortgage on the home and the loan on the travel trailer as soon as practicable.

[22] They acknowledged specifically that there was a judgment against a third party and that if either collected on their judgment they were to divide that equally.

[23] They further acknowledged that the husband may receive a disability tax credit from Canada Revenue and that in the event of payment to the husband, he would immediately pay one-half of the amount so received to the wife.

[24] The agreement contains the relinquishment of the estate rights and such standard releases including that each should be able to plead the agreement in estoppel in respect of any claim or application whatsoever pursuant to any legislation in Nova Scotia or in any other jurisdiction in relation to the matter dealt with in this agreement except for where the agreement expressly provides for a review of variation (which did not happen in this agreement) or except where there was a failure to disclose a specific circumstances relating to financial or asset position (which is not argued) and where it relates to a child or child support (which is not the case in this agreement).

[25] They agree that the terms of this agreement deal with spousal maintenance and agree that the agreement is not unconscionable or unduly harsh, that each had the benefit of legal advice and understood their respective rights, were fully advised, had satisfactory disclosure and that they entered into it voluntarily without undue influence or fraud or coercion or misrepresentation, that this would be binding upon the persons, their respective heirs, personal representatives, executors, administrators as assigned. It was witnessed with each bearing the name of the respective solicitors.

Reason advanced to overturn agreement

[26] The petitioner claims that due to the relationship she had with her husband, which she alleges was verbally and physically abusive toward her, she was afraid of the respondent and as a result of her fear mistakenly entered into a Separation Agreement on May 11, 2010.

[27] She specifically referred to an incident in 1987 when she attended a transition home in Sydney as a result of an assault committed against her.

[28] She states she believed that she was signing a temporary agreement walking away from the marriage and eventually getting a divorce; that she would then be able to settle everything when they filed for a divorce.

[29] She alleges that she did not understand what she was signing.

[30] She consulted a lawyer prior to entering into the agreement. The agreement was written according to her instructions.

[31] She advises she did not ask any questions regarding the agreement and was not advised of the repercussions of signing the agreement.

[32] She advises that if he did in fact advise her, she did not understand that this was a final resolution of all issues.

[33] She advises that when she entered into the agreement her "nerves were shot" and she was prescribed medication by her psychiatrist for the condition she was in. Had she known what she was entering into she would not have done so.

[34] No medical evidence was tendered.

[35] The petitioner advises that she left school in grade nine because she was pregnant, was married to the respondent for 33 years and now wishes to seek spousal support.

[36] The respondent confirms that there are no children of the marriage as defined by the *Divorce Act* and that they separated on or about May 7, 2010.

[37] The husband was served with a copy of a document entitled "a separation agreement" which he then took to a lawyer and signed without further negotiation or modification.

[38] The respondent acknowledged that both parties throughout the marriage had a problem with alcohol, that there were mutual assaults. He indicates that he was assaulted on many occasions.

[39] He argues that the parties were frequently drunk; that the petitioner had a problem with alcohol and attended the detox centre in Sydney on a number of occasions. He states that this was a mutually abusive relationship.

[40] He states that the petitioner was well aware of his financial circumstances.

[41] The respondent reminds the Court that it was the petitioner who consulted with counsel to prepare the agreement. He was not consulted about the terms of the agreement.

[42] They both had the benefit of legal advice; the agreement was entered into at her initiative, not his.

[43] It is his belief that the petitioner is seeking to overturn this agreement because he is eligible to receive a sum of money from his employment pension as a former employee of the pulp mill at Port Hawkesbury.

[44] He further advises that his pension benefits have been reduced from \$2,900 to approximately \$1,587 per month.

[45] He further advises that his current monthly income consists of this \$1,587 per month plus Old Age Assistance and Canada Pension Disability, for a total of \$2,866.75 per month.

Counsel

[46] Mr. Jason Boudrot, was counsel chosen by the petitioner to draft the agreement. He was subpoenaed to give testimony.

[47] He acknowledges that he was retained by Ms. MacDonald to draft a Separation Agreement.

[48] He met with her on April 27th, 2010 and opened his file on April 28th, 2010. At that time he received instructions from her.

[49] At that time she was living in the matrimonial home. She advised him she was moving out on May 7th.

[50] He advises that he canvassed a "wide range of issues with her" including whether there were dependent children, the incomes of the parties, the length of the marriage, the employment prospects of each party and the matrimonial assets and debts.

[51] While he does not recall specifically he believes it is his usual practice to advise a person and so advised Ms. MacDonald that before entering into a final agreement she should obtain full financial and asset disclosure including a valuation of pension and appraisal of the home. He does not have notes to confirm this.

[52] It is his recollection that she felt that she had sufficient knowledge of these issues and did not require such disclosure.

[53] He advises that his client provided him with specific information in relation to all issues including the approximate income of the parties, the value of the assets, rental income and insurances. To him, she appeared to be well informed in relation to the affairs of the parties.

[54] He believes that she was "quite specific as to what she wanted and what she did not want upon separation from Mr. MacDonald".

[55] He recalls specifically reviewing with her spousal support and/or division of the pension, given the length of the marriage and the income between the parties and against his advice she did not wish to pursue either of these issues.

[56] He specifically canvassed with her the sale of the matrimonial home so as to secure her equity. He said she did not want to pursue that issue.

[57] He recalls that she was "quite firm in her position that she wanted to proceed as set out in the separation agreement".

[58] He met with her again on May 11th to sign the Separation Agreement. He believes he followed his usual practice, read the Separation Agreement to her to review it with her and to explain all the relevant terms and conditions, the

warnings in relation to disclosure, spousal support, pension division, sale of the home.

[59] While he does not recall or does not have a signed waiver by her, in spite of the fact that she was acting contrary to his instructions, he believes he noted that the effect and intent of the Separation Agreement was to prevent and eliminate future changes in relation to the issues dealt with in the Separation Agreement.

[60] He does not recall her having any questions as to the content of the agreement drafted pursuant to her instructions or failure to understand. She was able to answer all of the questions posed to her without difficulty.

[61] He saw no indication she was being threatened or coerced. In fact, he believes that the agreement was made on her initiative.

[62] Mr. Boudrot's notes indicate that she sought no spousal support. In handwriting next to his notation is a handwriting "advised". The rest is unreadable.

[63] His notes set out the husband's income was \$44,000 and the wife's was \$17,000. In handwriting it notes that the petitioner did not drive and thus the car would be left in the husband's possession but willed to her in the event of his death.

[64] He advises that he had no communication with counsel for the respondent or the respondent himself.

[65] He received fully executed copies of that agreement from the respondent's counsel, Mr. Mac Isaac, after he had the agreement drafted according to his client's instructions and after she signed the agreement.

[66] He confirms that there were no negotiations or modifications made to the separation agreement drafted as instructed by his client, Ms. MacDonald.

[67] I am not in a position to judge whether the advice she received from her lawyer accorded with best practices.

[68] I have not received his entire file. I have only the handwritten notes of the solicitor taken at the time of the original interview and these handwritten instructions are very specific.

Financial Statement

[69] Ms. MacDonald filed a Statement of Income prepared on June 21, 2011 reflecting an annual income of \$26,936.16; a Notice of Assessment reflecting a line 150 income for 2010 of \$20,598; a Notice of Assessment for 2009 showing income of \$39,321; and for 2008 showing a total line 150 income of \$25,993.

[70] Mr. MacDonald shows a monthly income in his statement prepared March 8, 2012 of \$3,754.24, with CPP disability of \$936 for a total of \$4,690.24, which equals an annual income of \$56,282.88. He shows 2010 income of \$58,478; 2009 income of \$58,478; for 2008 income of \$57,720.

[71] Ms. MacDonald commenced her Petition for Divorce on June 30, 2011, served it on Mr. MacDonald on July 24, 2011.

[72] When she commenced her Petition for Divorce, she requested spousal support, costs, matrimonial property division and pensions benefits division.

[73] When she was asked to refer to the details of all agreements about separation, custody, property and support, she indicated that this question was not applicable to her. At the time she signed the petition on June 28th, 2011 she was represented by counsel (someone other than her current counsel). No reference was made to the agreement in the Petition for Divorce.

Property

[74] Both parties have filed a Statement of Property.

[75] Mr. MacDonald's valuation is that their matrimonial property is assessed as of 2010 at \$105,200 with a mortgage outstanding as of January 1st, 2011 of \$119,424. Neither party prepared a market value assessment to indicate what, if any, equity exists in that property.

[76] Mr. MacDonald listed the Jeep Compass at a value at May 2010 at \$8,000. He also listed the travel trailer at a value of \$20,000. Ms. MacDonald did list the travel trailer in her Statement of Property, but without a value.

[77] There remains an outstanding loan, apparently in the value of \$14,900 for the travel trailer and \$20,000 loan for the car loan. Both list other debts.

The Law

[78] **Miglin v. Miglin**, 2003 SCC 24, is seen as broadening the context in which agreements can be overturned moving **from** the limited circumstances where a court could find a radical and unforeseen change in circumstances casually connected to the marriage as in the **Pelech** trilogy **to** a broader discretion to assess the weight to be given to each objective in the spousal support provisions of the *Divorce Act* and to assess these and to give weight to each of these objectives in the back drop of the parties' circumstances.

[79] The Court in **Miglin** is dealing with an application to vary a spousal support award and the Court outlines a two stage process as set out in this summary:

An initial application for spousal support inconsistent with a pre-existing agreement requires a two-stage investigation into all the circumstances surrounding that agreement, first at the time of its formation, and second, at the time of the application. Unimpeachably negotiated agreements that represent the intentions and expectations of the parties and that substantially comply with the objectives of the *Divorce Act* as a whole should receive considerable weight. Holding that any agreement that deviates from the objectives listed in s. 15.2(6) would inevitably be given little or no weight would seriously undermine the significant policy goal of negotiated settlement and would undermine the parties' autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns. It would also render the direction to consider prior agreements in s. 15.2(4)(c) meaningless. In searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act, but should also treat the parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where that agreement fails to be in substantial compliance with the overall objectives of the Act, including certainty, finality and autonomy.

[80] **Miglin** determined that emphasizing self-sufficiency and a clean break is seen as too limiting a test.

[81] The Court must look to assessing the circumstances specific to the parties that would call for either compensatory or non-compensatory support.

[82] The *Divorce Act* advances as objectives certainty and finality of negotiated settlements.

[83] In the circumstances such as the one before me where one can anticipate an initial application for support under section 15.2, the Court does not ordinarily look to a change in circumstances except where there is a pre-existing order or agreement that the Court must consider.

[84] In the petition in this case, the wife gave notice she would be seeking spousal support and a division of pension. She did not give evidence of her current circumstances.

[85] Both of these issues were dealt with in the agreement with apparent finality.

[86] Her application before me on this occasion asks only that the Court determine that the agreement she entered into is invalid due to the fact she lived in a situation of domestic abuse and thus entered into what she now sees as an unfair, unwise decision; one she now considers a mistake.

[87] Evidence was not advanced on an application for spousal support .

[88] At this stage of the enquiry, the validity of the agreement is the sole determination the Court is in a position to decide.

[89] Thus, I must look at an assessment of the circumstances in relation to this family including the content of the agreement entered into between them.

[90] It is not the Court's purpose to look at a change in circumstances since the agreement; rather, "whether at the time of the application all the circumstances render continued reliance on the pre-existing agreement unacceptable".

[91] Thus, in assessing the validity of this agreement, the Court must embark on an enquiry into the circumstances surrounding the agreement at the time it was entered into in May of 2010.

[92] I have insufficient evidence of her circumstances to complete the second stage of the **Miglin** test.

[93] It appears that the approach chosen by the petitioner was to first determine whether the agreement was valid and then to decide whether to ask the Court to vary the agreement.

[94] In considering the circumstances of the parties, including the waiver of support that is contained in this agreement, regardless of a change in circumstances, I have to give considerable weight to the negotiated agreement which represents the intent and expectations of the parties, particularly if they substantially comply with the objectives of the *Divorce Act* as a whole.

[95] While the agreement appears to comply with the then existing intentions and expectations of the parties and was followed by the parties subsequently; in this circumstance it appears that the agreement entered into between the parties deviates from the objectives in section 15.6.

[96] Is the deviation sufficient to nullify the agreement?

[97] The existence of the deviation in and of itself does not result in automatic nullification.

[98] The Court must also consider sustaining the integrity of negotiated settlements where parties choose to enter into agreements to govern their separation and divorce in accordance with their own objectives and concerns.

[99] The Court must balance the interests of the individuals in constructing their own agreements and arriving at a consensus and finality with the objectives of the spousal support listed in the *Act*.

[100] If the agreement fails to be in substantial compliance with the overall

objectives of the *Act*, including certainty, finality and autonomy, it is in those cases that the Court should nullify or set aside the wishes of the parties as expressed in the pre-existing agreement.

[101] What then are the reasons that I should sustain or nullify the agreement? In particular, I am counselled to look at the presence of oppression, pressure or other vulnerabilities of the parties.

[102] Was there professional assistance? Did the petitioner receive legal advice? Is the substance of the agreement in substantial compliance with the *Act*?

[103] In doing so, I am directed not to presume an imbalance of power.

[104] Does the agreement reflect the original intention of the parties and is it in substantial compliance with the objectives of the *Act*.

[105] If and when the spousal support hearing takes place, the petitioner must show that the new circumstances that she finds herself in were not reasonably anticipated.

Facts and circumstance

[106] In these circumstances I am dealing with a party who has a grade nine education. I have no information as to the educational level of the respondent.

[107] If I am to believe both parties, and I have only their testimony, both misused alcohol and were abusive to each other.

[108] The respondent does not deny that they were mutually “abusive “ although I do not have evidence from either as to what that means to them. The petitioner denies she was abusive.

[109] From the evidence provided I am not in a position to believe one over the other.

[110] The petitioner is the instigating party in arranging the terms and drafting of the agreement .

[111] She attended a lawyer's office before the separation to obtain a legal separation. The agreement was drafted according to her instructions.

[112] The respondent was unaware of her intent and was surprised when he was served with the separation papers at their summer trailer.

[113] There was no negotiation or modification of any of the terms or conditions imposed by the petitioner.

[114] Certainly the agreement was more favourable to him as it relates to spousal support and pension division.

[115] Although she deferred her right to seek immediate sale of the home and possessions she retained her right to an equal share of the remaining property.

[116] The petitioner does not deny that she was sufficiently aware of the parties' financial position. She did not seek disclosure although her lawyer said he cautioned her to do so.

[117] The letter of instructions is specific enough to deal with maintaining her right to half the proceeds of the home, half the proceeds of the trailer while imposing on the respondent full responsibility for maintaining both while he continued to have exclusive possession of the home and part time possession of the trailer.

[118] She sought no spousal support in spite of the fact that there was a significant difference in their incomes.

[119] There is no evidence alleging a failure to disclose or a lack of knowledge on her part as to the respective incomes of the parties.

[120] I have insufficient information to determine to what extent there was equity in the home, either then or now.

[121] The lawyers notes contain information about many issues including life insurance, health insurance and retaining her benefit under each, as long as

possible.

[122] The notes also indicate that she is to have two of the family pets.

[123] They further indicate that she is to receive a share of a judgment they have against a construction company, if and when it is paid out.

[124] The notes also indicate that the husband's tools are to stay with him and the lawn mower is to be hers.

[125] The notes identify the date she intends to move out.

[126] The rent received by renting a portion of the home was to be split between the parties.

[127] The two sections of this agreement that she is not currently in favour of are her absolute waiver of spousal support and waiver of her right to a division of the pension.

[128] The petitioner indicates that she needed to leave an abusive relationship.

[129] She blames her lawyer because she advises he did not fully explain the finality of the contract.

[130] Her lawyer advises he did not perceive that his client was under any degree of undue stress or undue influence when he took instructions and subsequently when he had her sign the agreement.

[131] What happened between lawyer and client is not known to me.

[132] Her lawyer admits he went over the agreement with her before she signed. He testified that he advised her this agreement was not one he would advise her to sign.

[133] Unfortunately, there is no waiver signed by her as between her counsel and herself. That would have assisted somewhat in weighing her allegations.

[134] She maintains now she did not understand the clear terminology of the agreement that it was to be a full and final settlement.

[135] It is hard to understand why she would waive her entitlement to spousal support and her entitlement to a division of pension given her circumstances.

[136] Other than those two provisions, the balance of the agreement appears fair.

[137] On the face of it, it is certainly an agreement that a prudent lawyer would advise one's client not to sign.

[138] The lawyer first met with the petitioner on April 27th, 2010 and the agreement was not signed by her until May 11th, 2010. There was time to reconsider.

[139] This appears to be a situation in which the reasons for rejecting spousal support and a division of pension that existed at the time of the separation have been rethought by the petitioner.

[140] Two years later she recognizes she ought not to have done this. It was a mistake.

[141] I have not enough evidence to cause me to conclude that at the time of the signing of the agreement she was unaware of the consequences of her instructions or in the moment, suffering to such a degree of duress that this agreement did not reflect her original intentions.

[142] However, I have very little evidence about her current circumstances, what has happened since the divorce and what her circumstances were at the time of the application.

[143] Thus, it is impracticable for me to assess at least in a cursory measure, the second stage of the investigation as required by **Miglin** because I do not have the circumstances surrounding the parties at the time of the application.

[144] In looking at the objectives of the *Divorce Act* as a whole and those objectives set out in section 15.2(6), one must:

(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.

[145] This is a 33-year marriage. I do know that there is at least one child and that these parties had a grandchild who was tragically lost to cancer.

[146] I do not know the roles of the parties during the relationship nor whether each of the parents assumed traditional or non-traditional roles.

[147] I cannot assess the economic advantage or disadvantage arising from the marriage or its breakdown although I do know that termination of the relationship legally was brought on by the petitioner and that the respondent was entitled to retain at least possession of the assets but would be required to pay out to the petitioner her share of the assets upon dissolution or sale.

[148] The petitioner is in receipt of income from her employment; the respondent from his pension and disability. His employment and pension disability far exceed her income.

[149] The working of the agreement is unambiguous. There is no doubt that this was intended to be a final breakup and there were no dependent children of the marriage at the time of the separation.

[150] With respect to the division of assets, (except for the pension-likely the only significant asset) there is nothing that does not comply substantially with the objectives of the *Act* and the division of property, given that the petitioner has retained her right to an equal division and was able then and continues to be able to look at sale of the assets, indeed if there is any equity left in those assets.

[151] Simply testifying to living in an abusive environment (one which the respondent says was mutually abusive) in and of itself is insufficient evidence to allow a court to weigh the nature and extent of the abuse, to determine where in the marriage would it have produced such an effect that it would effectively interfered with a persons ability to contract for oneself.

[152] I have no difficulty accepting that a relationship marital or otherwise can be debilitating and can diminish a person's ability to think clearly and make appropriate decisions regarding how one should terminate a relationship safely, fairly and equitably.

[153] Proving this would require more evidence than I have before me.

[154] What I have before me is a situation where one party to the agreement decided to walk out, leave and "make it legal" as she said.

[155] The petitioner organized the separation according to her timetable and conditions .

[156] I do not have sufficient evidence that would allow me to conclude she was under threat or duress in the long or short term.

[157] Even if I believe (and I have no problem doing so) that the petitioner was determined to end a dysfunctional relationship once and for all, whether because of a life altering event such as the loss of her grandson (and I was not given the time sequence of these events)or other life altering event , and in doing so failed to consider the long term consequences to her, it was the Petitioner who set the tone and terms and her lawyer says, contrary to his advice .

[158] I have insufficient objective evidence to conclude that the wife was under such duress that the agreement should be nullified.

[159] While the waiver of pension entitlement was unwise and indeed unfortunate, the evidence does not support it was unconscionable.

[160] I therefore conclude that there is insufficient evidence to nullify the separation agreement entered into by both these parties.

[161] I am unable to determine on this evidence whether a spousal support award would be successful without further evidence.

Maira C. Legere Sers, J.