SUPREME COURT OF NOVA SCOTIA
Citation: Larkin v. Larkin, 2012 NSSC 439

Date: 20121017
Docket: Yar. No. 1208-003002 (SYD-072789)
Registry: Yarmouth

Between:

Helen Larkin

Petitioner

v.

Donald Larkin

Respondent

Judge:	The Honourable Justice A. David MacAdam
Heard:	October 16, 17, 2012, in Yarmouth, Nova Scotia
Final Written Submissions:	September 12, 2012
Written Decision:	December 18, 2012
Counsel:	Andrew S. Nickerson, Q.C., for the petitioner Wayne S. Rideout, for the respondent

By the Court:

Introduction

[1] This proceeding involves a divorce and division of a matrimonial asset. The parties were married in 1972. They separated on April 30, 2009. Their two adult children are no longer children of the marriage pursuant to the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.)

Matrimonial Property Act Section 13

[2] The only dispute relates to the division of matrimonial property. Specifically, the parties dispute the disposition of the pension earned by the petitioner, Mrs. Larkin, during the marriage. She retired from federal government employment with a public service superannuation pension of $2368.39 per month. Together with her Canada Pension, this is her sole source of income. She seeks an unequal division of the pension on the basis of ss. 13(a), (b), (i), and (j) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, which provide:

> 13 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 account the following factors:
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> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
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> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
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> ....
>
> (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
>
> (j) whether the value of the assets substantially appreciated during the marriage...

[3] B. MacDonald J. summarized the effect of section 13 in *Sheehan v. Sheehan*, 2010 NSSC 428, at para. 21:

> The *Matrimonial Property Act*, R.S.N.S., 1989 c. 275 requires all real and personal property (subject to enumerated exceptions) acquired by either or both spouses before or during the marriage to be divided equally between spouses. This real and personal property may be divided unequally if there exists a factor enumerated in section 13 of the Act which, when considered in the context of the entirety of the marriage, results in a conclusion that an equal division would be "unfair or unconscionable".

[4] Forgeron J. considered the law governing unequal division of matrimonial assets in *O'Regan v. O'Regan*, 2009 NSSC 181. She said, at paras. 32-33:

> As Ms. O'Regan is seeking an unequal division, she bears the burden of proof. It is a heavy burden which requires proof of unfairness or unconscionability: *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414 (N.S. C.A.).
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> In *Jenkins v. Jenkins* (1991), 107 N.S.R. (2d) 18 (N.S. T.D.), Richard J. reviewed the meaning of unfair and unconscionable as set out in s. 13 of the *Matrimonial Property Act* at para. 10, which states as follows:
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> > 10 I propose now to deal with the division of matrimonial assets in accordance with the law as set out in Donald, while remaining mindful of the comments of Macdonald J.A. in Nolet. To support a finding that a division is "unfair and unconscionable," it seems that there must be something more than mere inconvenience. The Random House Dictionary of the English Language, unabridged ed. (Random House, 1971) defines "unconscionable" variously as "unreasonable," "unscrupulous," "excessive," and "extortionate." These are strong words and, when coupled with the requirement that "strong evidence" must be produced to support an unequal division, the burden upon the party requesting an unequal division of matrimonial assets is somewhat onerous.

Credibility and weighing evidence

[5] The court considered the burden of proof in a civil case in *O'Regan, supra.*, where Forgeron J. said, at para. 15:

> In *C. (R.) v. McDougall*, 2008 SCC 53 (S.C.C.), Rothstein, J. confirmed that there is only one standard of proof in civil cases - proof on a balance of probabilities.

> He further held that there are no degrees of probability within the civil standard. In every civil case, a judge should take into account the seriousness of the allegations or consequences, or inherent improbabilities; however, these considerations do not alter the standard of proof. In all cases, the court must scrutinize the evidence when deciding whether it is more likely than not that an alleged event occurred. The evidence must always be clear, convincing, and cogent to satisfy the balance of probabilities test. Testimony must not be considered in isolation, but rather examined based upon the totality of the evidence.

[6] Forgeron J. went on to cite the following review of the considerations relevant to assessments of credibility, from *Baker-Warren v. Denault*, 2009 NSSC 59:

> For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. v. Gagnon*, 2006 SCC 17 (S.C.C.), para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.), para. 49.
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> With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:
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> > a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re*, 2008 NSSC 283 (N.S. S.C.);
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> > b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
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> > c) Did the witness have a motive to deceive;
> >
> > d) Did the witness have the ability to observe the factual matters about which he/she testified;

> e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
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> f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.);
>
> g) Was there an internal consistency and logical flow to the evidence;
>
> h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
>
> i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[7] The evidence is far from precise, or is contradicted, with respect to various events. Each party acknowledges an addiction: alcoholism on the part of the respondent, Mr. Larkin, and gambling on the part of the petitioner, Mrs. Larkin. It is evident that a certain amount of the income earned by both parties was consumed by these addictions. The extent of such spending is unclear, but I am satisfied it was substantial and affected their ability to fund the family's ongoing expenses.

[8] Having regard to the various considerations outlined in *Baker -Warren v. Denault, supra.*, where there is a discrepancy in the evidence between the parties, except as otherwise noted, I prefer the evidence of Mrs. Larkin. She had a more specific recall of the events and circumstances of the parties than Mr. Larkin did.

Section 13 analysis

s. 13(a): unreasonable impoverishment of matrimonial assets

[9] It appears that a seven-unit apartment building the parties owned, as well as two homes, were sold in the early 1990s. The specific date is unclear. Mr. Larkin testified that the sale resulted in a loss and was necessitated by the fact that the parties had overextended themselves and were unable to service the debt relating to the properties.

[10] Although Mr. Larkin's drinking had commenced before 1990, Mrs. Larkin's evidence was that he began to drink excessively around the mid-1990s. This would appear to have been after the disposal of the properties. Mr. Larkin submitted a letter dated November 14, 2011, from Joe Anne Hunter, Interim District Manager Adult and Seniors for Mental Health Addiction Services of the South West Nova District Health Authority. Ms. Hunter's letter indicates that Mr. Larkin presented himself for his first session with Addiction Services on April 26, 1994, due to an impaired driving charge, and attended regularly until 1996. She indicates that he met the requirements of the DWI program until October 1996. He was referred again by the Registry of Motor Vehicles, while facing another impaired driving charge, on June 19, 2006. This would suggest that Mr. Larkin was having substantial difficulties with the consumption of alcohol by the mid-1990s, though it does not indicate that his excessive drinking started before the disposition of the property, as had been suggested by Mrs. Larkin.

[11] Mrs. Larkin testified that it was her belief that the reason the parties had no assets on separation was because the assets they had previously owned were lost as a result of Mr. Larkin's drinking and his resulting reputation in the community. She stated that his reputation left him unable to obtain work as a carpenter, which was his trade, in the local area. As a result, with her assistance, he found periodic work in western Canada.

[12] Mr. Larkin acknowledged that his drinking could have damaged his reputation in the community, but said he did not believe that it led to him losing work locally. As an example, he noted that he had recently done work for a customer for whom he had done work in the 1990s. He attributed the declining availability of work to a downturn in the local economy.

[13] On the evidence relevant to s. 13(a), I am not satisfied that there was unreasonable impoverishment of matrimonial assets by either spouse. The evidence, while admittedly imprecise, suggests that the assets which the parties had accumulated were disposed of before Mr. Larkin developed a problem with excessive drinking. Disposal of assets because the parties were overextended is not an unreasonable impoverishment, in these circumstances.

s. 13(b): debts and liabilities

[14] As to s. 13(b), the evidence is again contradictory. Essentially, Mr. Larkin says that the family's financial problems were caused by money expended by Mrs. Larkin on account of her gambling addiction. Mrs. Larkin, however, blames Mr. Larkin's alcohol addiction. That both addictions existed is not denied by either party. There was some evidence as to how much Mr. Larkin would have spent on alcohol at certain times (for instance, at bars), although generally this evidence was vague. There was also evidence from Mrs. Larkin that she would bet between $40-$50, and up to $200 on several occasions. I am satisfied that both parties spent excessive sums on their addictions. According to the records of assessments by Addiction Services, Mrs. Larkin clearly recognized the financial impact of her gambling. In one assessment, in response to an inquiry as to what scared her, she said financial losses. In a June 2006 assessment, she agreed that gambling caused financial problems for her and her household. I am prepared to conclude that the family unit suffered as a result of both of their addictions, which caused much of their resulting debt and liability.

[15] In June 2008, less than a year before the April 2009 separation, the parties re-mortgaged the family home for $59,375.00. It appears that several accounts were paid out, with the remainder, $6557.61, ending up with Mr. Larkin, notwithstanding that the record indicates that the remainder was disbursed to both of them. Mr. Larkin said these funds were expended on the home and vehicles. He also testified that $20,000.00 of the proceeds were used to pay expenses, none of which were his. Mrs. Larkin said the remaining $6557.61 was paid out to Mr. Larkin, and that she had no recollection of it being used for family expenses.

[16] The evidence does not warrant an unequal division on the basis of s. 13(b).

s. 13(i): contribution to the marriage and family

[17] Mrs. Larkin stated that Mr. Larkin provided minimal funds towards household expenses and the children's activities and education (for context, the children were 20 and 22 years old in 2000). Mr. Larkin said he worked on their vehicles and on the home, which he said was a "fixer upper" when they purchased it. Subsection 13(i) refers to contributions to the welfare of the family, not simply the maintenance of family assets. Mr. Larkin acknowledged that on many weekends – and on most weekends, as his addiction grew – he spent his time drinking at a neighbour's home or in bars. As such, he was not available to the

family, and particularly to the children, at such times. He said he did take them on trips to parks and zoos. Nevertheless, it is clear that during this time period, Mrs. Larkin was the parent responsible for the children and the home. Their contributions were clearly unequal in this regard.

[18] Both parties worked outside the home. Mr. Larkin testified that he was involved with the children, but he acknowledged that Mrs. Larkin was more involved than he was. She was not, however, a "stay-at-home parent". She was employed, and it was her employment that generated the pension that is the subject of this application. Although it would be unrealistic to expect equal contributions to the family unit at times when the parties were not working, nevertheless the evidence indicates that the disparity here was both unfair and unconscionable. Mr. Larkin effectively abandoned the family while spending the weekends drinking excessively. He did acknowledge that when he was drinking, Mrs. Larkin would be responsible for the children.

[19] In *Sheehan, supra*, B. MacDonald J. noted that although both parties may work, one may nonetheless have greater parenting responsibilities than the other. This is not necessarily unusual (para. 41). In this case, however, I am satisfied that the balance between the parenting responsibilities assumed by the two parties was more unequal than would be reasonably expected in a marriage where both parents worked outside the home. I am not persuaded by his evidence that this was somehow excusable because he often returned from working to spend time maintaining and improving the home. He acknowledged that on weekends during his addiction he spent most of his time drinking, either in the company of a neighbour or at bars. These circumstances support the conclusion that an equal division would be unfair or unconscionable. In my view, it would be both.

s. 13(j): appreciation of assets during the marriage

[20] Mrs. Larkin commenced her employment (which resulted in the existence of the pension at issue) shortly after the parties were married. As such, the pension was created and appreciated during the marriage. The authorities are clear that a pension is a matrimonial asset and is subject to division. As such, there is nothing of relevance in this consideration.

Conclusion

[21] Although I am satisfied that an equal division of the pension would be unfair and unconscionable, this does not inevitably lead to an unequal division whereby Mrs. Larkin would receive the entire asset. Mr. Larkin's conduct entitles Mr. Larkin to an unequal division but not the full pension. I am satisfied that a division where Mrs. Larkin retains seventy-five percent of the pension is fair; Mr. Larkin is therefore entitled to a one-quarter share of the pension.

[22] Judgment accordingly.

MacAdam, J.