

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: John v. John, 2003 NSSC 9

Date: 20021219

Docket: 1201-55966

Registry: Halifax

Between:

Cyrus Jawahar John

Petitioner

v.

Sheila Joyce John

Respondent

Judge:

The Honourable Justice Donald Hall

Heard:

December 19, 2002, in Halifax, Nova Scotia

Written Decision:

January 15, 2003

Counsel:

Patrick L. Casey, for the Petitioner

Respondent was unrepresented and did not appear

By the Court:

[1] This is a divorce proceeding commenced by the petitioner, Mr. John. An answer and counter petition was filed by Mrs. John as well as an amended counter-petition was filed in July of this year.

[2] In the divorce petition Mr. John is seeking a divorce as well as division of matrimonial assets.

[3] In Mrs. John's counter petition, she is seeking a divorce as well and also a division of the matrimonial assets. She also claimed for spousal support, a division of Mr. John's military pension under the *Pension Benefits Act* as well as a change of her name to her maiden name under the *Change of Name Act*. With respect to the matrimonial property, Mrs. John apparently was asking the court to grant her an order for exclusive possession.

[4] Mrs. John, the respondent/petitioner by counter-petition, did not appear today for the trial of this matter. It seems that she had previously been represented by counsel each of whom withdrew because of inability to obtain instructions from

her. She, as I understand it, has never actually appeared in court respecting any of the interim proceedings, and indeed on December 2, 2002, when an organizational pre-trial was held by Justice Dellapina, she also failed to appear. At that time efforts were made to contact her by telephone. Similarly today efforts were made to contact her by telephone to assure the court that she was aware of the proceedings. There was no answer at her residence, but a message was left on her answering machine. At the same time I did ask Mr. Casey to confirm with the respondent's most recent counsel, Mr. Maddalena, whether he had actually informed her of this trial date. Mr. Maddalena confirmed that he had either spoken to her personally or had forwarded advice to her by courier informing her of the date of this trial. In those circumstances and due to the fact that it seems that the petitioner had great difficulty in initially locating her in order to have the originating documents served on her, it was felt that there was no point in delaying the matter further, and the court decided that the matter should be proceeded with today.

[5] Accordingly, the matter proceeded uncontested and without the benefit of any input from the respondent. This may indeed have worked substantially to the disadvantage of the respondent, but at the same time it made matters very difficult

for the court. However, the court will deal with the issues based on the evidence that was placed before it and the submission of counsel.

[6] First to deal with the various items of relief, the divorce itself was not contested or opposed by either party and as indicated, Mrs. John in her counter-petition also was seeking a divorce. I am satisfied that the parties have been living separate and apart for a period in excess of one year and that there is no hope of reconciliation. Accordingly, I will order that a divorce judgment shall enter.

[7] Dealing with the items of corollary relief, since there was no one here to support the request of the respondent for spousal support, and there was no evidence offered which would justify the court in finding that there was an entitlement to spousal support, I will simply find or indeed I will order that at this time there is no basis for making any award of spousal support to the respondent. The petitioner, of course, is not seeking spousal support.

[8] With respect to the counter-petition, since there was no one present to support it and the matter was scheduled for trial today along with the trial with respect to the petition, the counter-petition is dismissed.

[9] The main issue for the court to deal with is with respect to the division of the matrimonial property. A number of witnesses were called on behalf of the petitioner to support the position that was ultimately put forth by Mr. Casey on behalf of his client, Mr. John.

[10] Mr. Casey is seeking an unequal division of the matrimonial property in favour of his client. It is my understanding that his position is as outlined in the letter dated November 29, 2002 which was forwarded to this court by way of a brief and which I understand a copy of which was forwarded to Mrs. John. I take it therefore that Mrs. John is aware of the division being sought by Mr. John. From the evidence that has been presented, and I am not going to go into all of the reasons, but I am satisfied that under s. 13 of the *Matrimonial Property Act* an equal division would be unfair or unconscionable for a number of the factors set out in that section. First I refer to paragraph (d), the length of the time of the marriage - it was a relatively short marriage, only a period of five years although they had cohabited together prior to the marriage for two years; paragraph (e), the date and manner of acquisition of the assets - in that respect the petitioner, Mr. John provided the bulk of the funds for the acquisition of the assets and indeed

brought considerable assets, at least in the sense of money or monies worth, into the relationship at the time of the marriage. In particular, in connection with the purchase of the matrimonial home, it appears that he contributed some \$40,000 or so which he had acquired from the sale of a condo which he owned prior to the marriage.

[11] Further, under clause (g) it appears that Mr. John contributed approximately \$18,000 to the education of the respondent wherein she was able to obtain a Bachelor of Arts degree and a certificate in gerontology from Mount Saint Vincent University.

[12] There are other assets that are owned by Mr. John, but they were gifts to him and as such I am satisfied that they should not be included as matrimonial assets. In particular I refer to an interest in an Ottawa apartment building which he conveyed to his mother. It was a gift to him from his father prior to the marriage, also the TD Waterhouse investment account, again which was a gift from the father to Mr. John.

[13] Having said that and turning to the proposed division submitted by Mr. Casey, I am substantially in agreement with his proposal. With respect to the matrimonial home, I am satisfied that, despite the fact that the respondent has been residing in it since separation and has an order for exclusive possession, I am satisfied that the property should be the property of the petitioner, Mr. John having regard to the manner in which it was acquired. As well it is one of the major assets of the parties and in the division I am satisfied that it is necessary that it be conveyed to Mr. John to bring about the division that I have concluded is appropriate.

[14] It is also to be noted that since the separation, Mr. John has paid all of the mortgage payments in that time and has also paid for some of the utilities and other expenses related to the home.

[15] As to the vehicles, I am satisfied that the division proposed by Mr. Casey is appropriate. Mr. John will retain the motor vehicles in his possession and Mrs. John will retain the vehicles in her possession. She is also to have the household goods and furniture presently in her possession. Unfortunately no realistic or accurate valuation has been obtained because apparently Mrs. John refused to

cooperate in completing an appraisal. That also applies insofar as the valuation of the matrimonial home is concerned, so I am informed.

[16] Each party has a number of RRSP's registered in his and her name, and each will retain the RRSP's registered in their respective names.

[17] With respect to Mr. John's Canadian Forces employment pension, that is to be his entirely.

[18] This of course results in an unequal division very substantially in Mr. John's favour. However, in reaching this result, I am going to give one further direction as to the division. I have taken into account the fact that Mr. John has paid all of the matrimonial debts which I understand amounted to approximately \$14,000 and as well he has contributed, as I indicated earlier, approximately \$18,000 to the respondent's education. As well he has been obliged to pay substantial legal costs in this proceeding. Mr. Casey said his costs to date are \$15,000 to his firm and another \$2,000 was paid to the lawyer in Rimouski by Mr. John in connection with the separation and divorce.

[19] I have indicated to Mr. Casey that I am not receptive to an award of costs, but the fact that I am not prepared to make an order for costs is taken into account in the division that I have decided.

[20] As I have said, despite all of factors, there still should be some adjustment in favour of the respondent. In my view, to make a proper division there should be a payment of \$5,000 in cash from the petitioner to the respondent as a final aspect of the division, to be paid by Mr. John when possession of the matrimonial home is obtained by him.

[21] Again, I repeat that the court has had to labour under the difficulty of not having the respondent here to put forth her views and inform the court of her circumstances and possibly argue why the division should be different. However, in the circumstances, it seems to me that the division that I have directed is appropriate.

[22] Although I have dismissed the counter-petition, as I have stated the respondent did ask for a change of name, and I am prepared to order that her name be changed from John to her maiden name of Wile. She will have to provide me

with a separate document. I do not feel comfortable directing that it be included in the general order without her actually confirming that that is her wish. If she wishes to have her name changed back to her maiden name, all she needs to do is provide me with a draft order and I will sign it.

[23] Mr. John is to reimburse Mrs. John in accordance with the terms of the interim order if Mrs. John provides the figures.

[24] If Mr. John retains the property, he will remove Mrs. John's name from the obligation under the mortgage.

Donald M. Hall, J.