

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Malcolm v. Malcolm, 2003 NSSC 244

Date: 20031211
Docket: SFHD 016670
Registry: Halifax

Between:

Clark William Malcolm

Petitioner

v.

Sandra Helena Malcolm

Respondent

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: November 4, 2003, in Halifax, Nova Scotia

Written Decision: December 12, 2003

Counsel: Colleen Scheuer, for the Applicant
Deborah E. Gillis Q.C., for the Respondent

By the Court:

[1] This is an action by William Malcolm for divorce and equal division of the matrimonial home.

[2] Sandra Malcolm seeks an unequal division of the matrimonial home and alternatively a lump sum payment of spousal support and ongoing periodic spousal support.

[3] The parties married on February 29, 1996 and separated in March 2002. There is no possibility of reconciliation.

[4] I am is satisfied that all jurisdictional requirements of the *Divorce Act* have been met and that there has been a permanent breakdown of this marriage, by reason of the parties having lived separate and apart for a period in excess of one year. The Divorce Judgment shall issue.

[5] The remaining issues to be determined are:

1. Whether it is unfair or unconscionable to divide the matrimonial assets, principally the proceeds of the sale of the matrimonial home, equally between the parties?
2. And if so, what division of the assets is fair and conscionable?
3. Whether Sandra Malcolm is entitled to spousal support?

ISSUE 1 - Is an equal division unfair or unconscionable?

[6] William Malcolm seeks an equal division of matrimonial assets, principally being the proceeds of the sale of the matrimonial home.

[7] Would it be unfair or unconscionable to make such an equal division between these parties in the circumstances?

[8] Sandra Malcolm's position is that it would. She testified as to the circumstances that in her view would make unequal division appropriate:

- (1) William Malcolm impoverished the assets through his excessive drinking and spending habits;
- (2) Sandra Malcolm brought significantly greater assets into the marriage, including a home and a vehicle, and the vast majority of the household contents;
- (3) Sandra Malcolm contributed to the welfare of William Malcolm's children, making contribution to his payments of child support, providing substantial parenting, and making significant purchases for the children to whom she had no legal obligation to contribute;
- (4) Sandra Malcolm brought two significant tort damage awards into the marriage, and she paid off William Malcolm's substantial credit card debts on several occasions;
- (5) A motor cycle was purchased for William Malcolm of which he has exclusive use;

(6) Sandra Malcolm has, for the most part, paid down the matrimonial debt since separation;

(7) William Malcolm took steps to deprive Sandra Malcolm of the use of a motor vehicle.

[9] As a result the Respondent, Sandra Malcolm seeks to have the matrimonial debts paid out from the proceeds of the sale of the matrimonial home which are now in trust, and the balance of those proceeds in trust paid to her.

[10] The Petitioner, William Malcolm led evidence that:

(1) He too had a personal injury settlement which was used for matrimonial joint use and which was also used to pay down joint debt.

(2) While most of the furnishings in the matrimonial home were brought in by Sandra Malcolm, many of these items were replaced during the marriage.

- (3) His salary was used for matrimonial purposes, that is, both parties' pay cheques went into a joint account and all bills and expenses were paid by Sandra Malcolm from this account.

- (4) While there was credit card debt accumulated throughout the marriage, his credit cards were used for normal matrimonial purposes such as gifts and trips.

[11] Generally, William Malcolm suggests that Sandra Malcolm has not met the burden of showing that an unequal division would be fair and equitable and therefore the proceeds of the sale of the matrimonial home be divided equally.

[12] Under s.12(1)(a) of the *Matrimonial Property Act*, R.S.N.S. 1989, c.160 where a petition for divorce is filed either spouse may apply, as here, to have the matrimonial assets divided. It is clear that the division of matrimonial assets is *prima facie* equal with an unequal division permitted in only limited circumstances where there is convincing evidence that an equal division would be unfair or unconscionable.

[13] Section 13 of the *Matrimonial Property Act* enumerates factors which this Court can consider in exercising its discretion in awarding an unequal division.

[14] In my view, in the present case there is convincing evidence that an equal division would be unfair and unconscionable and in reaching my conclusion I rely upon the factors set out in s.13(a)(b)(e)(i)(k) of the *Matrimonial Property Act*.

[15] The parties cohabited for approximately seven years. Upon entering into the relationship Sandra Malcolm owned a home in Liverpool, had her own apartment in Halifax, a job, a car, furniture and no debt.

[16] William Malcolm on the other hand had very little furniture, high credit card debt, monthly maintenance payments and maintenance arrears.

[17] At the time of trial Sandra Malcolm is no longer financially independent. She lives in accommodations substandard to what she experienced prior to and during her marriage. She has borrowed money from friends and family to live on. She is in debt.

[18] William Malcolm is still employed and lives rent free with a partner who earns \$64,000 per year. He has no vehicle expense.

[19] Prior to the marriage Sandra Malcolm paid \$7000 to \$8000 in credit card debt for William Malcolm out of a personal injury settlement she received in 1995. In 1997 she sold her Liverpool home and a part of the proceeds went to pay William Malcolm's credit card debt. During the relationship he continued to have high credit card debt. Sandra Malcolm testified that these credit card debts were accumulated by William Malcolm for personal use including travel, hotels, drinking and partying. She testified William Malcolm also took cash advances on these cards to finance the drinking and partying during the marriage.

[20] William Malcolm denies that these credit cards were used in this manner suggesting rather they were used for gifts, trips and other matrimonial uses. I do not find William Malcolm credible on this issue. Firstly, he had high credit card debt prior to the marriage. This cannot be attributed to the marriage. Secondly, this high credit card use prior to the marriage is consistent with the evidence of Sandra Malcolm as to his spending habits during the marriage and inconsistent

with William Malcolm's position that his credit card debts were incurred for matrimonial purposes.

[21] Further expenditures were made by Sandra Malcolm from funds she accumulated prior to the marriage and from her personal injury settlement during the marriage.

[22] As well, Sandra Malcolm used the balance of her 1995 personal injury settlement for their joint use.

[23] Sandra Malcolm used her Liverpool home as collateral to finance the purchase of the matrimonial home. In September of 1997 she sold the Liverpool home and realized net proceeds of \$20,984.78. With these funds she paid off more of William Malcolm's credit card debt, paid out the bridge financing to purchase the matrimonial home and paid for renovations and additions to their new home.

[24] Sandra Malcolm received a second personal injury settlement in the sum of \$31,043.96 in May of 1999. These funds went into the marriage including paying

out a motor cycle loan in full for William Malcolm in the amount of \$10,435.

William Malcolm has possession of this motor cycle.

[25] During the relationship Sandra Malcolm contributed to the support of William Malcolm's children from his previous marriage. She saw that maintenance payments were made and she had a loving relationship with his children. Upon separation this relationship was cut off by William Malcolm.

[26] I find the financial contribution by Sandra Malcolm was approximately \$74,162.68 over and above her weekly pay. This amount consisted of two personal injury settlements of \$22,133.94 and \$31,043.96 respectively, and the proceeds of the sale of the Liverpool home in the amount of \$20,984.78.

[27] While William Malcolm earned a higher income and also had a personal injury settlement he spent excessively on his own personal lifestyle.

[28] Sandra Malcolm entered the marriage financially secure and debt free. She had a home, an apartment in the city, a job and a car. Now she is not financially secure, she is in debt and has very few assets. William Malcolm entered the

marriage in debt. He was able to enjoy a good standard of living during the marriage and continues to do so after the marriage. I have concluded that an equal division of assets between these parties would be unfair.

Issue 2 - What unequal division is fair?

[29] Having so concluded what is a fair and conscionable division of the matrimonial assets?

[30] The principal matrimonial asset comprises the proceeds from the sale of the matrimonial home. The net proceeds of the sale of the matrimonial home are \$55,747.13.

[31] Out of this sum of \$55,747.13 Sandra Malcolm is entitled to \$13,259.11 broken down as follows:

\$3,307.87	- Avco/Citi financial Loan
610.00	- Mr. Malcolm's insurance payments made by Ms. Malcolm
264.40	- House insurance paid by Ms. Malcolm
3,159.68	- Royal Bank loan payments made by Ms. Malcolm
5,738.19	- Royal Bank mortgage payments made by Ms. Malcolm

178.97 - Cell phone
amounts paid by
Ms. Malcolm.

All these payments, except for the cell
phone were in relation to matrimonial
debt. The payment on the debt
resulted in pay-down of the mortgage
principle.

[32] Out of the proceeds William Malcolm is entitled to the sum of \$2,047.92
broken down as follows:

\$1,197.92 -Royal Bank overdraft payment;
250.00 - one half of the value of the fridge and deep freeze sold by Ms.
Malcolm;
600.00 - contribution by Mr. Malcolm for supplies and purchases for
the Liverpool home;

These amounts credited to the parties are to be deducted from the proceeds of
\$55,747.13.

[33] The remaining amount of funds will be divided on the basis of 75% of these
funds to Sandra Malcolm and 25% of these funds to William Malcolm.

Issue 3 - What is the division of the remaining matrimonial assets?

[34] As to the division of the remaining matrimonial assets, I order as follows:

1. Each party shall assume his or her own credit card debt.
2. William Malcolm shall retain the motorcycle and motorcycle accessories acquired during the marriage.
3. Sandra Malcolm shall deliver up to William Malcolm the items belonging to his children, which items are presently boxed up and stored for retrieval.
4. Sandra Malcolm shall retain possession of the remainder of the household and personal goods in her possession.
5. William Malcolm shall retain possession of the remainder of the household and personal goods in his possession.

6. Sandra Malcolm shall retain possession of her 1981 Volkswagen and her motor cycle. This vehicle was brought into the marriage and disassembled by William Malcolm. I have allowed him to retain the motorcycle purchased by Sandra Malcolm and have allowed Sandra Malcolm to retain her motorcycle and the 1981 Volkswagen.

Issue 4 - Spousal Support

[35] The last issue to determine is whether Sandra Malcolm is entitled to spousal support.

[36] The relevant provisions of the *Divorce Act* are as follows:

- 15.2(1) A Court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the Court thinks reasonable for the support of the other spouse.
- (4) In making an order under subsection (1) or an interim order under subsection (2), the Court shall take into consideration the condition, means, needs and other circumstances of each spouse, including;

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[37] Sandra Malcolm seeks ongoing spousal support in the amount of \$600.00 per month. She suggests that she has suffered serious disadvantage due the marriage and its breakdown and used significant amounts of her assets to contribute to the family rather than saving them for herself.

[38] She suggests that she expended considerable energy towards providing a comfortable secure second home for William Malcolm's children. Because of the marriage Sandra Malcolm suggests that she suffered a serious impairment of her ability to seek self-sufficiency and develop her career because of the seizure of a vehicle that she used in her part-time work for Fantasia.

[39] William Malcolm on the other hand argues that this is clearly a case where there is no entitlement to support. It was a marriage where there were no children, although it is acknowledged that he exercised access to his children from his first

marriage and that Sandra Malcolm acted as their stepmother. He says that at no time was Sandra Malcolm primary caregiver. Both the parties were employed throughout the marriage. William Malcolm is of the view that Sandra Malcolm is in the same position today career wise as she would have been had the marriage not taken place. That is, she has been, for the most part, continuously employed and always been encouraged in her endeavours by him.

[40] I have considered the case law submitted by both counsel and the post trial submissions. As already stated, both parties worked throughout the marriage. There were no children of the marriage.

[41] The marriage was of relative short duration; the parties married in February 1996 and separated in March of 2002. I am not satisfied on the evidence that Sandra Malcolm suffered a serious impairment of her ability to seek self-sufficiency and develop her career because of the seizure of the vehicle that she used in her work for Fantasia. This was a part time job with very little earnings and there was no evidence to suggest otherwise.

[42] It was acknowledged that William Malcolm exercised access to his children from his first marriage and that Sandra Malcolm acted as their stepmother.

However, she was not the children's primary caregiver during access periods.

Both parties are young and employable. I dismiss the application for spousal support. Each party will bear his or her own costs.

Pickup, J.