

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: MacLean v. Cox, 2017 NSSC 309

Date: 2017 - 12 - 05

Docket: 1201- 068809; SFHD-096826

Registry: Halifax

Between:

Kelly Anne MacLean

Petitioner

v.

Gregory Edward Cox

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: September 13 and 14, 2017

Submissions: September 25, 2017 by Mr. Cox
October 27, 2017 by Ms. MacLean

Counsel: Bryen E. Mooney for Kelly MacLean
Gregory Cox on his own

By the Court:

Introduction

[1] The only issue in this divorce is Kelly MacLean's claim for an unequal division of matrimonial property. She bases her claim on subsections 13(a), (b), (d), (e) and (h) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 270.

Family history

[2] Kelly MacLean and Greg Cox married in February 2008, after living together for two years. Each has children from a previous relationship. They had no children together. Ms. MacLean and Mr. Cox separated in June 2014. Their separation was difficult.

[3] At trial, I heard only from Ms. MacLean. Mr. Cox had prepared an affidavit and financial statements, but chose not to offer evidence. He made his choice understanding that his affidavit and financial statements would not form part of the record on which I made my decision. In addition to my cautions that I would have only Ms. MacLean's evidence on which to base my decision, Mr. Cox obtained advice from a lawyer before confirming his choice not to offer evidence. With Ms. MacLean's consent, Mr. Cox made submissions at the end of the trial and I was permitted to consider aspects of his pre-trial brief. I did not consider those parts of his brief which contained information that wasn't in evidence.

[4] The parties have been separated for more than one year and there is no reasonable prospect of their reconciliation. I grant the divorce.

Property division

Matrimonial assets

[5] In dividing property, I must first identify the assets and then classify them as matrimonial or non-matrimonial. Once items are identified and classified, they must be valued. The same process must be undertaken when dealing with debts. Here, there is no disagreement about any of these issues.

[6] The *Matrimonial Property Act* says that matrimonial assets are to be divided equally. In limited circumstances the *Act* allows for an unequal division of matrimonial assets and a division of non-matrimonial assets. There must be strong evidence to support an unequal division.

[7] The parties' matrimonial property is comprised of the net proceeds from the sale of the matrimonial home, Ms. MacLean's employment pension, and the household contents.

The matrimonial home

[8] The matrimonial home was sold in August 2015 after a motion for its sale. After certain debts were paid, \$34,148.98 remains in a non-interest bearing trust account.

Ms. MacLean's pension

[9] Ms. MacLean began contributing to her pension in July 1989, almost seventeen years before the couple began to live together. She continues to be a member of the pension plan. Her pension was not valued. The plan's administrator provided a summary statement, that showed the commuted value of the pension from the date the parties married until the date they separated. The commuted value reflects the future pension Ms. MacLean will receive over her lifetime. Commuted value calculations are based on assumptions about the growth in contributions' value and the plan member's life expectancy. The commuted value of Ms. MacLean's pension from the date the parties married until the date they separated is \$103,846.20.

The household contents

[10] Mr. Cox cross-examined Ms. MacLean at length, having her acknowledge that he owned most of the household contents before they began to live together.

[11] When they separated, Mr. Cox removed his personal items from the home. Other items remained in the home. Some of these remaining items were thrown out because they were damaged or broken. Others were given to neighbours. Still others were sold with the home. The items which weren't thrown out, given away or sold with the home have been stored since mid-2015, either at Ms. MacLean's home or her mother's home.

[12] While I heard considerable evidence about when the contents were acquired, I heard no evidence about their value. Mr. Cox didn't dispute that the items which were thrown out had no value. The value of the items which were sold with the house is reflected in the price paid for the house.

[13] Some photographs of the household contents also pictured Mr. Cox's sons as toddlers and youngsters. His sons are now aged 19 and 23. This means that the furniture is at least 10 to 15 years old, and possibly older. The household contents are secondhand furniture.

[14] The absence of evidence about of the value of household contents is a problem that various judges have commented on in earlier cases.

[15] Judges are not appraisers and valuing household contents, item by item, is an "unnecessary and inefficient use of court time" according to Justice A. Boudreau in *Robinson*, 1992 CanLII 4690 (NS SC).

[16] When provided with lists and photographs, it's "impossible" to determine whether contents are divided equally, according to Justice D. Campbell in *SLK v. MMH*, 2009 NSSC 319 at paragraph 19.

[17] Where the parties said the contents were worth "little" or that their worth wasn't known, Justice Dellapinna assigned no value to household contents: *Phillips-Curwin v. Curwin*, 2008 NSSC 198 at paragraph 12.

[18] I have no evidence about the value of the contents and I'm unable to value them. I will deal with their division later in my reasons.

Debts

[19] Before the couple married, Mr. Cox went bankrupt. Ms. MacLean had a good credit history so she could obtain credit and debts were contracted in her name.

[20] When the couple separated, there were various debts. These are outlined in the table below. This information originated with Ms. MacLean and Mr. Cox did not dispute it.

Debt	Amount owed
Mortgage	221,000.00
Homeowner's credit line	22,000.00
Personal credit line	12,495.11
Taxes	1,500.00
Property insurance	900.00
MasterCard	14,844.95

[21] From the parties' separation in June 2014 until the matrimonial home was sold in August 2015, Ms. MacLean was primarily responsible for the home's expenses: the mortgage, property taxes, insurance and utilities. She was also solely responsible for the credit line that was secured against the home and a MasterCard which had been used for family expenses. Mr. Cox made some contributions to these expenses but in the main they were paid by Ms. MacLean. Again, this evidence came from Ms. MacLean and is not disputed by Mr. Cox.

[22] Ms. MacLean's post-separation payments are shown in the table below.

Debt	Amount paid
Mortgage	15,792.02
Homeowner's credit line	764.08
Personal credit line	8,563.75
Taxes	1,519.97
Property insurance	909.00
MasterCard	10,881.00
Total debt payments	38,429.82

[23] Mr. Cox did not challenge this evidence.

[24] In preparation for selling the home, Ms. MacLean spent \$672.85: \$434.25 to have it appraised, \$193.20 to have the carpet cleaned and \$45.40 for paint. Ms. MacLean did the painting herself. Mr. Cox did not dispute this evidence.

[25] Ms. MacLean admits that she used the credit card and credit line to pay bills so their balances have increased since the separation.

[26] In January 2017, the parties agreed that some of the proceeds from the sale of the home would be used to retire the personal credit line and the MasterCard. This was done and the \$34,148.98 which remains in trust reflects the retirement of these debts.

Should there be an unequal division of property?

[27] The value of matrimonial assets is presumed to be divided equally: *Matrimonial Property Act*, section 12. A person seeking an unequal division bears the heavy burden of showing that it would be “unfair or unconscionable” to divide assets equally, having regard to the factors listed in section 13 of the *Act*. For Ms. MacLean and Mr. Cox, dividing the value of the matrimonial assets is complicated by the problematic valuations: only the proceeds of the home’s sale have a clear value. There has been no valuation of Ms. MacLean’s pension or the household contents.

[28] Ms. MacLean asserts that the matrimonial assets should be divided unequally having regard to five factors listed in section 13 of the *Matrimonial Property Act*.

Unreasonable impoverishment of matrimonial assets: subsection 13(a)

[29] Ms. MacLean says that Mr. Cox unreasonably impoverished matrimonial assets. I dismiss this as a basis for an unequal division.

[30] The couple’s debts are not unusual in nature or size: a mortgage, a credit line secured against the home, a credit card, a personal credit line, property taxes, and property insurance. The value of the parties’ assets has not been extinguished by debt. The debts are family ones, incurred to support the family. There is insufficient evidence to establish that the debts were unreasonable: *Larkin*, 2012 NSSC 439.

The amount of each spouse’s debts and the circumstances in which they were incurred: subsection 13(b)

[31] Ms. MacLean says that there should be an unequal division having regard to the amount of debts and liabilities of each spouse and the circumstances in which they were incurred.

[32] Mr. Cox didn’t dispute that the debts were incurred for the family. I have evidence that Mr. Cox used the personal credit line to finance his son’s tuition (\$3,000.00) and that, on another occasion, he withdrew \$1,500.00 from it. Around the time of the tuition withdrawal there was another withdrawal of \$3,260.00. This was not identified as a withdrawal by Mr. Cox so I assume it is Ms. MacLean’s withdrawal. Mr. Cox used the personal credit line to pay his personal income taxes. Personal taxes are a matrimonial debt, so this use of the credit line is appropriate: *Ferguson*, 2012 NSSC 377, *Bureau*, 1997 CanLII 1446 (NSSC), *Webb* (1994), 135 NSR (2d) 161 (SC). Ms. MacLean hasn’t satisfied me that Mr. Cox’s use of the credit line is such that property should be divided unequally.

[33] While the debts were incurred for the family, they were incurred entirely in Ms. MacLean's name because Mr. Cox couldn't obtain credit. A debt isn't automatically shared simply because it was incurred for the family. Whether the debt will be shared depends on whether the division of matrimonial assets in equal shares would be unfair or unconscionable: "In most conceivable situation fairness and conscience dictate a sharing of matrimonial indebtedness": *Cameron*, 1995 CanLII 4433 (NSSC) at paragraph 26, affirmed by *Cameron*, 1996 CanLII 5598 (NS CA).

[34] During the parties' relationship, each used their earnings to support the household. They didn't earn equal amounts, but the *Act* does not require that for assets to be divided equally. After the separation, Ms. MacLean was virtually alone in servicing the debts and preparing the house for sale. She paid more than \$38,000.00 toward the debts while earning a salary that would have been in the range of \$60,000.00 to \$70,000.00 if it approximated her earnings in 2015.

[35] Ms. MacLean's sole responsibility for family debts following the separation is an appropriate basis for an unequal division of the value of matrimonial assets which would repay her for the costs she has paid.

The length of the parties' cohabitation: subsection 13(d)

[36] Ms. MacLean says that the parties' marriage is "not a long-term marriage" and this should entitle her to an unequal division. Including pre-marriage cohabitation, the parties cohabited for eight years.

[37] The duration of the parties' cohabitation is not a basis to unequally divide the value of their matrimonial assets.

[38] "The length of the marriage, as a factor relevant to unequal division, is more commonly considered where the marriage is of **unusually short duration**", according to the Court of Appeal in *Leigh v. Milne*, 2010 NSCA 36 at paragraph 41 [emphasis added]. This reasoning is longstanding.

[39] The parties' relationship is not a short one. The jurisprudence is replete with short marriages where property is divided unequally: the 14 month marriage in *Roberts v. Shotton* (1997), 156 N.S.R. (2d) 47 (C.A.); the 17 month marriage in *McKearney-Morgan v. Morgan*, 2012 NSSC 236; the two year marriage in *Green*, (1989), [1990] 23 R.F.L. (3d) 398 (A.D.); the less than 2 year marriage in *Boutilier-Stonehouse v. Stonehouse*, 2008 NSSC 74; and the approximately 2 year marriage in *Zimmer* (1989), 90 N.S.R. (2d) 243 (T.D.).

[40] In *Briggs* [1984] W.D.F.L. 1459 (A.D) the Court of Appeal upheld Justice Hallett's trial decision of *Briggs* (1984), 64 N.S.R. (2d) 40 (T.D.) at paragraph 13: "[Subsection 13(d)] is normally only to be considered if the period of cohabitation was of **very short duration** as it could be unfair under such circumstances to divide matrimonial assets equally if one of the parties had brought substantial assets into the marriage and the other had brought virtually nothing." [emphasis added]

[41] Ms. MacLean and Mr. Cox's marriage is not a marriage where one party brought substantial assets into the marriage and the other brought virtually nothing. Mr. Cox brought secondhand household contents while Ms. MacLean brought a pension. Their home was acquired together in a relationship of eight years.

The date and manner of acquiring assets: subsection 13(e)

[42] Ms. MacLean also claims an unequal division based on the date and manner of acquisition of assets.

[43] The home was purchased by the parties, together, prior to their marriage. Both spouses worked on its renovation. When renovations were complete, Mr. Cox went through bankruptcy proceedings. While Mr. Cox's employment and income were not as steady as Ms. MacLean's, there was no evidence that his income was not, in the main, used for the household.

[44] Mr. Cox brought the vast majority of the contents to the couple's home. He owned them prior to their cohabitation. The value of these items isn't known.

[45] Matrimonial assets include all real and personal property acquired by one or both spouses **before** or during their marriage: subsection 4(1). The portion of Ms. MacLean's pension which pre-dates the marriage is a matrimonial asset: *Morash*, 2004 NSCA 20 at paragraphs 14 – 16 and paragraph 22.

[46] Ms. MacLean began contributing to her pension long before the parties began to cohabit. I have no evidence about the amount of her contributions prior to cohabitation. The commuted value of her pension was calculated having regard to the duration of the parties' marriage, not their cohabitation. I do not know whether her pension is a defined benefit plan or a defined contribution plan. This difference could have a significant impact on the value of her pension.

[47] Regardless of these deficiencies in the evidence, it is clear that Ms. MacLean contributed to her pension for almost seventeen years before the parties began to cohabit. She contributed to her pension for almost twice as long as the parties cohabited and there was no diversion of family income to finance these contributions. These facts are relevant to an unequal division of a pension: *Connolly*, 1999 CanLII 1172 (NSCA); and *HRB v. PLB*, 2005 NSSC 220.

[48] The date and manner of the acquisition of Ms. MacLean's pension is a basis for an unequal division of assets.

**Each spouse's contribution to the marriage and the family's welfare:
subsection 13(i)**

[49] Ms. MacLean's final basis for an unequal division is the contribution made by each spouse to the marriage and the family's welfare, including any contribution as a homemaker or parent.

[50] There was no specific evidence about either party's contribution as a homemaker or parent. The couple had no children together and there was no evidence of the roles either assumed in caring for the home or children. I dismiss this as a basis for an unequal division.

How should the value of matrimonial assets be divided?

[51] Typically, when property is divided, it is done on the basis of the combined value of all the assets. That isn't possible here. The matrimonial home's value has been reduced to dollars deposited into a trust account. The pension's value is not in a form that's divisible into cash. The household contents have no identified value. So, I will deal with the division of each asset on its own.

The matrimonial home

[52] Through the separation and at its end, Ms. MacLean paid expenses to sell the home and various debts. She remained in the home for a period after the separation so some of these costs ensured she had a home. Of the \$15,792.02 spent on the mortgage, I attribute one-third (\$5,264.00) to her housing costs. This reduces the debts shown in the table at paragraph 22 to \$33,165.82. As well, Ms. MacLean spent \$672.85 preparing the home for sale. These amounts total \$33,838.67 and should be equally divided, leaving Mr. Cox responsible for \$16,919.33.

[53] The net proceeds from the sale of the home are \$34,148.98. Ms. MacLean is entitled one-half this amount (\$17,074.49) on an equal division. The remaining sum would belong to Mr. Cox. Where I have calculated that Mr. Cox owes Ms. MacLean \$16,919.33 for the debts and expenses she has paid, Ms. MacLean will receive a further \$16,919.33, in addition to her half share of \$17,074.49. The remaining \$155.16 will be paid to Mr. Cox.

[54] The trust funds shall be distributed so Mr. Cox receives \$155.16 and Ms. MacLean receives \$33,993.82.

Ms. MacLean's pension

[55] The portion of Ms. MacLean's pension which was earned during the period from September 2006 to June 7, 2014 shall be divided equally between the parties. All contributions before September 2006 and after June 7, 2014 shall remain Ms. MacLean's. This is an unequal division, reserving all pre-cohabitation contributions for Ms. MacLean. I find this is appropriate for because these contributions were financed solely by Ms. MacLean and they were not funded by diverting money from the household.

Household contents

[56] I explained to the parties that without evidence of the value of the household contents, one option for determining their value would be to order the items be sold. Regardless, neither party offered any evidence of the items' value so I am left with no basis upon which to determine their value.

[57] Mr. Cox does not live in Nova Scotia. To order a sale of the contents burdens Ms. MacLean with this task and makes her responsible for accounting to Mr. Cox. She has already been responsible for moving the items from the home when it sold and storing the items for the past two years.

[58] I order Ms. MacLean to prepare a complete inventory of all household contents from this relationship which are stored in her home and her mother's. Once the list is prepared, she is to divide the inventory into two lists of equivalent value. The complete inventory and the two lists must be emailed to Mr. Cox by December 31, 2017. By January 19, 2018, Mr. Cox must email Ms. MacLean, identifying which of the two lists he selects as the list of items he wants to keep. Items on the other list will belong to Ms. MacLean.

[59] Mr. Cox has until February 9, 2018 to remove the items on the list he has chosen. Ms. MacLean must allow him 20 hours to do this. Any items which he has not removed by February 9, 2018 will belong to Ms. MacLean and she may do what she wishes with them. If she wishes to keep them, she may do so. If she wishes to give them away, she may do so. If she wishes to sell them, she may do so and the proceeds of the sale will be hers.

Conclusion

[60] Ms. Mooney will draft the corollary relief, pension division and divorce orders for my review. Draft orders should be sent to Mr. Cox for review. Mr. Cox will have 10 business days from the date the orders are sent to him to review the orders. If he does not advise Ms. Mooney of any errors in the orders, she may send them to me for review and endorsement.

[61] If either party wishes to be heard on costs, written submissions must be filed by December 31, 2017 and copied to the other party at the same time they are filed at the court.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia