SUPREME COURT OF NOVA SCOTIA

Citation: *Kalkman v Beveridge*, 2018 NSSC 122

Date: 2018-05-24
Docket: 1204-006521
Registry: Kentville

Between:

Cinda Lee Kalkman

Petitioner

-and-

William Kellock Beveridge

Respondent

Judge: The Honourable Justice Gregory M. Warner

Heard: March 5, 6 and 7, 2018, in Kentville, Nova Scotia

Counsel: Marion Hill, counsel for the petitioner
G. Douglas Sealy Q.C., counsel for the respondent

By the Court:

Introduction

[1] Cinda Kalkman ("Ms. Kalkman") seeks a divorce, an equal division of their matrimonial assets, as well as retroactive and prospective spousal support for the length of the marriage at the high end of the *Spousal Support Advisory Guideline* (the "*Guidelines*") range. This court granted her interim spousal support in the amount of $3,300.00 per month, commencing February 1, 2017. In her pretrial brief, she claimed an equalization payment of $495,565.43; in closing submissions, this was reduced to $413,161.77, by excluding the parties' RSPs.

[2] William Beveridge ("Dr. Beveridge") seeks a divorce and an unequal division of matrimonial assets that would result in an equalization payment of $4,277.00, arguing Ms. Kalkman's entitlement to spousal support is, at best, on a non-compensatory basis and, if continued, should be at the low end of the *Guideline* range ($2,800.00) for no more than 30 months.

[3] The parties dispute what is 'in the matrimonial pot' and subject to division. Both parties seek costs.

[4] Dr. Beveridge and Ms. Kalkman met in 2005 at the stables where each had a daughter that rode horses.

[5] After turning down an invitation in July 2007, Ms. Kalkman accepted a dinner invitation from Dr. Beveridge on December 21, 2007, and they began dating. Dr. Beveridge was raising four children as a single parent; Ms. Kalkman was raising three children as a single parent.

[6] On March 17, 2010, they married. He was 54, and she was 47. In August 2010, Ms. Kalkman and her children moved into Dr. Beveridge's home.

[7] In November 2014, they had a disagreement over what Dr. Beveridge described as a 'minor thing'. He arranged for marriage counseling, but the marriage went downhill. On October 30, 2015, Ms. Kalkman moved out of Dr. Beveridge's residence and asked Dr. Beveridge to leave her alone.

[8] Dr. Beveridge was and continues to be an orthopaedic surgeon. Dr. Beveridge accepts Ms. Kalkman's accountant's analysis that his income, which

included attribution to him of the 'salary' and dividends paid to Ms. Kalkman, is about $400,000.00 per year.

[9] Ms. Kalkman was for many years the bookkeeper and office assistant at her brother's construction business earning $26,000.00 annually. She entered massage therapy college in 2004, graduated in June 2006 and commenced working full-time as a massage therapist in July 2006. Her net professional income averaged about $27,500.00 before their marriage and $23,200.00 during their marriage. She states that her income has increased by about $5,000.00 per year since separation.

[10] Throughout their relationship, the parties kept their finances separate. Dr. Beveridge paid the household bills (other than groceries, which were shared) and paid for their many vacations. Ms. Kalkman paid her clothing and vehicle expenses, as well as for the specific needs of her children.

[11] After they began dating, but before they were married, Ms. Kalkman's finances were tight, so Dr. Beveridge gave her $118,000.00 to pay her bills. This included $28,000.00 in 2008 to purchase a new vehicle as well as $80,000.00 in September 2009 to settle her divorce (she had separated in 1996) and buy out her ex-husband's interest in her matrimonial home. There is an issue of whether the entire $80,000.00 was paid to Ms. Kalkman's former spouse, as the Corollary Relief Order refers to a payment of $40,000.00.

[12] In addition, beginning in 2009, he paid her a 'salary' from his medical corporation and dividends from his family trust. The 'salary' payments totaled $260,900.00 before tax (about $195,000.00 after tax); the dividends totalled $30,500.00. He gave her the use of a spare office in his medical office to operate her massage therapy business rent free.

[13] As with his own children, Dr. Beveridge paid (through dividends from his family trust) half of the post-secondary education costs of Ms. Kalkman's children totaling $89,746.00.

[14] Ms. Kalkman sold her home in May 2011, clearing about $183,000.00. In September 2011, she paid $29,914.00 from her account, mostly to her brother's company, for renovations to the sunroom in Dr. Beveridge's home. On November 1, 2011, she gave Dr. Beveridge a cheque for $100,000.00.

Property Issues

[15] The *Matrimonial Property Act of Nova Scotia* (*"MPA*") governs the division of assets.

[16] I incorporate my description of the *MPA* regime, and the analysis for unequal division of matrimonial assets pursuant to s. 13 of the *MPA*, from this court's decision in *Pothier v Pothier*, 2017 NSSC 230 (paras 12 to 24, 116 to 138).

[17] Not everything is in dispute between the parties in this case, but the analysis is most conveniently made in three parts:

1. the characterization of the assets and debts, determination of which are divisible,
2. their values, and
3. whether to make an unequal division pursuant to s. 13 of the *MPA*.

Issue #1 Characterization of the Assets and Debts

[18] It is not disputed that Dr. Beveridge's professional assets, Beveridge Medical Inc. and W. K. Beveridge Family Trust (2031), are exempt from division as business assets. Similarly, it is not disputed that Ms. Kalkman's massage therapy business assets, including the money held in the RBC business account, are exempt from division as business assets.

[19] Dr. Beveridge lives in his grandparents' homestead. He purchased it from his mother in August 2004 for $420,000.00. He says that he remortgaged the property in 2006, in the amount of $517,500.00, and carried out renovations costing at least $260,000.00. He testified that his pre-marital investment in the property is $677,400.00.

[20] The mortgage debt, as of the date the parties commenced cohabiting, was about $450,000.00 ($444,104.00 on December 31, 2010). Exhibit #15 shows lump sum prepayments by Dr. Beveridge of more than $275,000.00 on the mortgage during the marriage. Exhibit #8 corroborates Dr. Beveridge's evidence that most of these payments coincide with an inheritance he received from his mother's estate of about $235,000.00. The application of his inheritance to the reduction of the mortgage is relevant to Dr. Beveridge's claim for an unequal division of marital assets.

[21] By agreement, Dr. Beveridge's homestead at Delhaven was appraised by John Bedard as of October 30, 2015. The report was admitted by agreement. John Bedard was not called as a witness. No other appraisal evidence was tendered.

[22] John Bedard placed a fair market value of $745,000.00 on the entire property. The property consisted of three separate lots: 37 acres on the northwest side of the highway, containing the residence, a horse barn and outbuildings; two lots on the southeast side of the highway, one containing 8½ acres, the other 13½ acres. The latter lots were described as orchards and partly pasture, both bordering on water.

[23] Dr. Beveridge claims that only the 37-acre parcel is divisible matrimonial property. The other two lots, consisting of orchards and pasture, were leased by Dr. Beveridge to local farmers. Mr. Bedard appraised the two lots across the highway at $250,000.00, leaving the homestead lot's value at $495,000.00.

[24] While the court accepts that during their marriage the two lots were not used in connection with the residence, this fact does not make the two lots on the southeast side of the road exempt from division. The onus is on Dr. Beveridge to establish that the two lots are exempt. I am not satisfied that the property was used, or intended to be used, to generate income in an entrepreneurial sense. The fact that these lots were not used by the family is however relevant to the analysis of Dr. Beveridge's unequal division claim.

[25] The parties agree, and the court finds, that the appraisal value of the homestead is $745,000.00, less real estate commission, legal fees and HST, or, for the purposes of division, $700,437.50.

[26] When Ms. Kalkman moved into Dr. Beveridge's residence, they used the contents of the residence that were previously in the residence. Ms. Kalkman's furnishings were eventually stored in the horse barn. Shortly after Ms. Kalkman moved out on October 30, 2015, she returned to the residence and took several of the items that belonged to her or her children. She left behind several pieces of her pre-marriage furniture, stored in the horse barn, despite Dr. Beveridge's many requests for her to remove them.

[27] Ms. Kalkman's counsel arranged for an appraisal of the household contents by W. G. Brayley. His appraisal report is the only appraisal before the court. He was not called as a witness.

[28] The Brayley appraisal identifies items removed by Ms. Kalkman and valued by him at $1,665.00, the Kalkman items stored in the horse barn at Delhaven at $1,190.00, and the remaining household items in Dr. Beveridge's possession at $36,911.00. Dr. Beveridge testified that these household contents were acquired over many years before his marriage to Ms. Kalkman. He also contests the ownership and origin of some of the appraised items.

[29] As noted in the appraisal report, Dr. Beveridge testified that the baby grand piano, valued by Brayley at $5,800.00, does not belong to him but is held in a trust for the benefit of his oldest daughter. This was not challenged.

[30] Dr. Beveridge testified, and I accept, that 39 of the 41 Lorenzen mushrooms (valued by Brayley at $11,030.00) were inherited by him and two of his siblings. The mushrooms have not been divided yet and remain at the homestead. Two of the forty-one mushrooms were purchased by him. I estimate the value of those two Lorenzen mushrooms as $250.00 each. The remaining mushrooms are exempt from division as inheritances to Dr. Beveridge and two of his siblings and were not used for the benefit of Ms. Kalkman or any children.

[31] I therefore deduct from Mr. Brayley's valuation of the household contents in Dr. Beveridge's possession the piano at $5,800.00 and 39 mushrooms at $10,530.00. Dr. Beveridge retains items valued at $19,981.00 and Ms. Kalkman's items valued at $2,855.00.

[32] Ms. Kalkman claims that Dr. Beveridge owns a hovercraft, which she submits has a value of $20,000.00 as of separation. No appraisal evidence has been provided.

[33] Dr. Beveridge contests this claim. His evidence is that, because of conversations with Ms. Kalkman's brother about possibly acquiring from him a used hovercraft if he could fix it (which never occurred), Dr. Beveridge became interested in hovercrafts. He contacted an English manufacturer about becoming its North American dealer, and he visited their premises in England. A series of e-mails with the manufacturer (Exhibit #11) suggest that to be successful as a dealer, Dr. Beveridge would need to first purchase a demo. Dr. Beveridge decided to try becoming a dealer.

[34] In April 2014, through a numbered company owned by his family trust, he purchased a hovercraft for about $31,000.00 and registered a business domain name for the business. Dr. Beveridge testified that Ms. Kalkman thought he was

crazy to do so, but he was determined to try. When the hovercraft was received, and he was 'breaking it in', he burned the engine and had to have it rebuilt. It is still not operable nor in a condition to be sold. He testified that he would sell the hovercraft if he could.

[35] The e-mails and other documents in Exhibit #11 corroborate Dr. Beveridge's evidence that the purpose of purchasing the hovercraft in the company and registering the domain name, was to start a business in an entrepreneurial sense. The fact that the business did not get off the ground because of the engine difficulties, nor the fact that during the 'break-in period' some family members went on a few break-in cruises, does not detract from my conclusion that the purpose for the purchase of the hovercraft by the numbered company was to operate a business in an entrepreneurial sense. It was not for personal use or as an investment.

[36] Neither the numbered company nor the hovercraft are divisible matrimonial assets; they are business assets. If I am wrong in this regard, no evidence was tendered that proves the value of the hovercraft in its condition at the time of separation.

[37] The parties agree on the ownership and values of their respective vehicles. Ms. Kalkman owned a 2008 Legacy valued at $3,000.00 (purchased with the $28,000.00 given to Ms. Kalkman by Dr. Beveridge in 2008), and Dr. Beveridge owned a 2008 Outback, a BMW and a four-wheeler, valued at $16,400.00.

[38] It is not disputed that the RESP, held by Ms. Kalkman for the benefit of her children, in the approximate amount of $8,600.00 is not divisible matrimonial property.

[39] Both parties had RSPs. Ms. Kalkman had added to hers during the marriage; Dr. Beveridge did not add to his RSPs during the marriage. In closing submissions, both counsel agreed that their respective RSPs were to be excluded from the list of matrimonial assets to be divided despite the Nova Scotia Court of Appeal decision in *Morash v Morash,* 2004 NSCA 20. The pre-tax values of their respective RSPs were: Ms. Kalkman, $8,541.00; and Dr. Beveridge, $247,641.00. For the purpose of the unequal division analysis, I have reduced Ms. Kalkman's RSP value by an imputed income tax rate of 25%, and Dr. Beveridge's value by an imputed rate of 50%, in recognition of the reality of their likely respective tax rates if and when they cash them.

[40] It was not disputed between the parties that Ms. Kalkman had three bank accounts, with an approximate balance of $5,185.00 as of the date of separation and that Dr. Beveridge had one bank account, with a balance of $4,185.00 at the date of separation.

[41] It is not disputed, and the evidence before the court, is that Dr. Beveridge has life insurance policies with no cash surrender value, and Ms. Kalkman has one life insurance policy with a cash surrender value of $89.94.

[42] Over the years, Dr. Beveridge purchased gold bars and stored them in his office safe. He was unable to say how many were acquired after the marriage. They are matrimonial assets. They were valued at $27,658.00.

[43] At the time of separation, Ms. Kalkman owed a student loan, incurred before marriage, in the amount of $8,975.00. In addition, she owed two lines of credit and two credit card debts totalling approximately $22,556.00.

[44] Dr. Beveridge argued, and the court agrees, that Ms. Kalkman's student loan relates to her massage therapy course and is a business debt, not a debt related to their marriage.

[45] With respect to the two lines of credits and two credit cards, Dr. Beveridge appears to question how they could have arisen, considering the amount of monies paid to her. No statements relating to the charges on these accounts were tendered into evidence. The only evidence before the court shows that these amounts were outstanding at the date of separation, so they must be determined to be divisible matrimonial debts. However, the fact that their existence was not known to Dr. Beveridge and there was no satisfactory evidence as to why they existed is relevant to the unequal division analysis.

[46] Dr. Beveridge claimed in this proceeding that Ms. Kalkman should be responsible to him for amounts owed to him by her daughters and obtain his release from his guarantee on her second child's line of credit. These debts were amounts that exceeded the 50% of each child's education funding that he agreed to pay to his and Ms. Kalkman's children without obligation to repay. Each child was to be responsible to pay or repay amounts beyond the 50% he agreed to fund.

[47] This decision does not deal with those obligations. Those are obligations between Dr. Beveridge and the respective children.

Issue #2 Valuation

[48] I have reviewed the value of each of the assets in the section dealing with the characterization of the assets and debts. Attached to this decision as Schedule "A" is a spreadsheet itemizing the assets and debts, identifying those which are divisible and who owns or retains them, as well as what payment would result from an equal division.

Issue #3 Unequal Division

[49] Section 13 of the *Matrimonial Property Act* reads:

> **Factors considered on division**
>
> **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:
>
> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
>
> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
>
> (c) a marriage contract or separation agreement between the spouses;
>
> (d) the length of time that the spouses have cohabited with each other during their marriage;
>
> (e) the date and manner of acquisition of the assets;
>
> (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
>
> (g) the contribution by one spouse to the education or career potential of the other spouse;
>
> (h) the needs of a child who has not attained the age of majority;
>
> (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;

(k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;

(l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;

(m) all taxation consequences of the division of matrimonial assets.

Submissions

[50] Dr. Beveridge claims that an equal division of matrimonial assets would be unfair or unconscionable considering, among the exhaustive list of factors: 13(d), 13(e), 13(g), 13(i) and 13(j).

[51] In support, he refers the court to the analysis in *Shotton v Roberts*, 1997 NSCA 197 ("*Shotton*"); *Connolly v Connolly*, 1999 NSCA 173 ("*Connolly*"); *Gossen v Gossen*, 2003 NSSF 7 ("*Gossen*"); *Smith v Smith*, 2011 NSSC 269 ("Smith"); and, *Parke v Vassallo*, 2014 NSSC 68 ("*Parke*").

[52] In *Shotton*, the Court of Appeal overturned an award of one-third of the matrimonial assets to Ms. Roberts. The Court of Appeal divided only the assets acquired during the marriage. The parties had cohabitated for about 14 months. Ms. Roberts received about 5% of the parties' assets.

[53] In *Connolly*, the parties' only significant asset was the husband's pension, accumulated over 30 years. The parties had cohabitated for ten years. It was a second marriage for each with no children born of the marriage. The trial judge held that it would be unconscionable to divide the portion of the pension entitlement earned before cohabitation between the parties and divided only the portion earned during the marriage. The Court of Appeal upheld the decision. It described a 10-year marriage as of medium length and 5-year marriage as of short duration.

[54] *Gossen* involved a less than 3-year marriage, during which two children were born to the parties. The court excluded from division the husband's insurance agency, two corporations that owned five rental properties worth $512,000.00, and his pre-marriage RSPs of $86,000.00. The court dismissed the wife's request for an

unequal division of the remaining matrimonial assets worth about $101,000.00 in her favour. Effectively, the court equally divided the assets, and in the case of the RSP the increase of its value, that had accumulated during the marriage.

[55] *Smith* involved a 4-year marriage, during which one child was born. The parties had divided their property unequally in the husband's favor in a separation agreement. The wife applied to vary the agreement as unfair and unconscionable. Justice Jollimore determined that an unequal division had occurred - Ms. Smith received 30% and Mr. Smith 70% of the assets, but she upheld the unequal division.

[56] *Parke* involved a 4½-year marriage between older parties who had been previously married. No children were born of their relationship. At separation, Ms. Parke's assets were worth about $485,000.00 and Mr. Vassallo's, about $185,000.00. Most of their assets were acquired prior to their marriage without assistance of the other. Mr. Vassallo sought an equal division of their assets (meaning a payment to him of about $150,000.00). Ms. Parke sought an unequal division where she would recover from Mr. Vassallo about $101,000.00 that she had advanced to him during their marriage.

[57] Justice Jollimore thoroughly reviewed the applicable s. 13 factors, highlighting the following: the length of cohabitation, the manner of acquisition of their assets, Ms. Parke's contribution to Mr. Vassallo by way of debt payments and university tuition by Ms. Parke, as well as their age disparity (Ms. Parke was 65 and Mr. Vassallo was 52). She held that an equal division would be unfair and unconscionable then ordered an unequal division, with each party essentially keeping what assets they had when they entered the marriage, and Ms. Parke receiving $10,000.00 per s. 18 for her contribution to his business.

[58] Dr. Beveridge submits that each party should keep what they now have, with no, or a very small, equalization payment.

[59] The parties cohabitated for about five years, it was a second marriage for each and no children were born of the marriage (*MPA*, s. 13(d)).

[60] He says all the assets he seeks to retain were acquired by him before the marriage, most were passive assets for which no additions were made during the marriage and his premarital investment in the Beveridge family homestead was $677,000.00, almost equal to the agreed value for the purposes of division of $700,000.00. The mortgage on the residence was largely paid for by an inheritance

he received from his mother's estate. Dr. Beveridge submits that Ms. Kalkman had few assets when she entered the relationship and she kept what she had when she left (*MPA*, s. 13(e)).

[61] He contributed to Ms. Kalkman' s career by providing her rent-free space so she could operate her massage therapy business on her own (*MPA*, s. 13(g)).

[62] Dr. Beveridge claims to have made a substantial contribution to the marriage as identified in *MPA* 13(i), which he described as follows:

1. Each of the parties kept their finances separate.

2. Ms. Kalkman kept all her earned income.

3. In addition, he paid virtually all the household bills, except for some of the groceries.

4. He supported her children and paid one-half of Ms. Kalkman's children's post-secondary education expenses until their separation.

5. He paid to Ms. Kalkman $291,000.00 for her miscellaneous, personal expenses during the marriage, and gave her $118,000.00 before the marriage to clean up her poor financial circumstances.

6. He paid all the expenses for 18 trips and vacations (13 outside Canada) both for Ms. Kalkman and, on seven of those occasions, for one or more of her children.

[63] He says his contribution to the family was significantly greater than, and more than offsets the $100,000.00 she paid to him and the $30,000.00 she contributed to renovations, when she sold her house in 2011.

[64] He disagreed with Ms. Kalkman's evidence that she had to sacrifice her career to care for him and his children. He argued that he contributed significantly to the household. When Ms. Kalkman moved into the residence, his oldest child left for university; a year later another left for University; his two youngest children remained in their primary care for only two out of the five years of their marriage.

[65] With respect to *MPA*, s. 13(j), Dr. Beveridge submits that the value of the matrimonial assets did not substantially increase during the marriage.

[66] Ms. Kalkman submits that the parties were married for five years, seven months, and that their relationship before their marriage was akin to cohabitation, even if they did not live under the same roof.

[67] She seeks an equal division of assets, except for their respective businesses, RSPs and her children's RESP.

[68] She seeks equal division of the three lots at Delhaven. She submits that the two lots across the highway from the home were used for matrimonial purposes. The fact that Dr. Beveridge used his maternal inheritance to pay down the significant mortgage on the matrimonial home meant that it ceased to be exempt from division and should not affect the s. 13 analysis. She says the bulk of the mortgage was paid during the marriage and included her contribution of $100,000.00.

[69] She cites *Selbstaedt v Selbstaedt*, 2004 NSSF 110, at para 65, as guidance on the heavy onus on the party seeking unequal division to show it would be unfair or unconscionable to divide matrimonial assets equally.

<u>Analysis</u>

[70] The court does not have a general discretion to divide divisible matrimonial assets and debts unequally, even if it is unfair.

[71] The discretion is limited to the establishment by the claimant on strong evidence, limited by the factors enumerated in s. 13 of the *MPA,* that an equal division would be unfair or unconscionable. In *Harwood v Thomas* (1981), 45 NSR (2d) 414 ("*Harwood*"), at para 7, the court wrote:

> Equal division of matrimonial assets … should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be equally clearly unfair – not whether on a precise balancing of credits and debits of factors largely imponderable, some equal division of assets could be justified."

[72] The Law Reform Commission of Nova Scotia's May 2016 Discussion Paper on Division of Family Property, beginning at p. 178, contains an accurate and useful outline of how Nova Scotia courts have interpreted and narrowed the discretion afforded by s. 13 of the *MPA* from a threshold question of simple

unfairness to a higher standard of unconscionability. See also *Cunningham v Cunningham*, 2017 NSSC 244 at para. 27.

[73] Before looking at the big picture, I am obligated to examine the individual s. 13 factors.

The length of time the parties cohabited (*MPA*, s. 13(d))

[74] It is somewhat unique in this case that the period of cohabitation is less than the length of the marriage. The parties married in March 2010, but Ms. Kalkman and her children only moved into Dr. Beveridge's residence in August, as Dr. Beveridge's oldest daughter was leaving for university. The period of cohabitation was five years, two months.

[75] There is no magic in describing or identifying a length of a marriage as short, medium or long. In *Connolly*, the Court of Appeal appears to have assumed that a 10-year marriage was of medium length and a 5-year marriage was short. In *Cunningham*, the court described a ten-year marriage as 'mid-length'. In *Parke*, Justice Jollimore treated a 4½-year marriage, with many of the other s. 13 factors present in this case, as a short marriage.

[76] The NSLRC May 2016 Discussion Paper, at p. 49, states that in 2005 the average length of a marriage in Canada at divorce was 14.5 years.

[77] The significance to the analysis of the length of the marriage as a factor in the case law is affected by things such as the ages of the parties and whether the parties are starting out in life together, or later in life with different histories.

[78] In this case, Dr. Beveridge was 54 at the time of marriage and 59 at the time of separation; Ms. Kalkman was seven years younger. This was a second marriage for both. Each had primary care of their children.

[79] In this context, the marriage was more like a short interlude in a longer life than the norm for newly-weds.

[80] The relevance of this marriage being a short marriage arises from the concept often applied in divorce proceedings that the longer the marriage, the greater the merger of their finances, lifestyles, and reasonable expectations for the future.

[81] In this case there has been no merger of their finances during this brief marriage. They shared the use of part of Dr. Beveridge's homestead, his furniture, and his income. This factor favours an unequal division.

<u>The date and manner of acquisition of assets (and debts)</u> (*MPA*, s. 13(e))

[82] I divide this analysis into two time periods: assets and debts acquired before marriage, and changes in assets and debts during the marriage.

[83] Before their marriage, Dr. Beveridge owned almost all the assets in his possession at the time of the separation.

[84] He purchased the homestead in 2004 and renovated it at a total cost of approximately $677,000.00. In 2011, Ms. Kalkman paid for renovations costing $30,000.00. At separation, the homestead was appraised and valued by agreement at $700,000.00. This appraisal includes two lots in respect of which there was very little, if any, use by Ms. Kalkman or her children.

[85] Dr. Beveridge owned the household contents before the marriage. He owned his vehicles. He had purchased most of the gold bars in his possession before the marriage. At separation, all these assets were valued at about $765,000.00.

[86] He owed about $450,000.00 on a mortgage at the time of marriage. It was paid off by January 2015. From all the evidence, I conclude that the monies used to pay off the mortgage came from three sources: an inheritance on his mother's passing in the amount of about $235,000.00, the $100,000.00 from Ms. Kalkman in 2011 and the balance of about $115,000.00 plus interest from Dr. Beveridge's income earned during the marriage.

[87] The source of Ms. Kalkman's assets is not the same. The household items she owned at the time of the marriage were stored during the marriage and returned to her at separation. Her 2008 Legacy vehicle (valued at $3,000.00 at separation) was purchased in 2008 with a cheque for $28,000.00 given to her by Dr. Beveridge for that purchase.

[88] Ms. Kalkman separated from her prior spouse in 1996 and lived in their home with her children until she moved into Dr. Beveridge's home in August 2010. In September 2009, Dr. Beveridge gave her $80,000.00 to settle her divorce and get title to her home, as well as other monies to pay other debts she had at the time. She sold her home in 2011, clearing $183,000.00. As noted, she spent

$30,000.00 on renovations to the homestead and gave Dr. Beveridge the $100,000.00 in November 2011.

[89] Ms. Kalkman had a student loan related to her massage therapy courses before the date of the marriage. It has not been included in any balance sheet as it is acknowledged, and I conclude, that it is not a matrimonial debt.

[90] Effectively, Ms. Kalkman came into the marriage with no net worth, except as a result of the $118,000.00 given to her by Dr. Beveridge before their marriage. This is a significant factor supporting an unequal division in Dr. Beveridge's favor.

<u>The contribution by one spouse to the education or career potential of the other spouse</u> (*MPA*, s. 13(g))

[91] When Ms. Kalkman started dating Dr. Beveridge, she was employed at a massage studio owned by someone else and effectively splitting her income with the owner. Before and continuing after the marriage, Dr. Beveridge provided her with use of a spare office to carry on her profession. She became self-employed with free rent. While the free rent was a benefit to her, Ms. Kalkman says that, because of the way Dr. Beveridge worked in his office, it limited the times she could book appointments. These circumstances balance each other out. They do not support an unequal division.

<u>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</u> (*MPA*, s. 13(i))

[92] The parties dispute the extent to which each carried the load on the home front.

[93] Dr. Beveridge states that he was a good and frequent cook and did all the outside home maintenance. In addition, he paid for a housekeeper to come in and clean. He says that Ms. Kalkman spent much time with her mother.

[94] Ms. Kalkman disputed the extent of Dr. Beveridge's home contribution, and emphasized the burden on her to tend to the needs of their combined seven children.

[95] The court notes that, of Dr. Beveridge's four children, one left for university when Ms. Kalkman moved in, a second followed the next year, and that the two youngest children lived with them for only two of the five years of their

cohabitation. Similarly, Ms. Kalkman’s children left for university starting shortly after their marriage.

[96] The court accepts that during vacation periods it was likely hectic in the home, but otherwise discounts the extent to which the children were an increased burden on either parent.

[97] Dr. Beveridge submits that the financial contribution made by him to the marriage and welfare of Ms. Kalkman and the family is relevant to the court’s analysis on this point.

[98] During the marriage, the parties kept separate finances, and appear not to have shared information about their finances. They did not share expenses, except for groceries. Dr. Beveridge paid all the household expenses. Dr. Beveridge took Ms. Kalkman on 18 trips, 7 with one or more of her children, and paid all the expenses. Dr. Beveridge paid through his family trust about $89,000.00 towards Ms. Kalkman’s children’s post-secondary education.

[99] Ms. Kalkman’s financial contribution was part of the groceries, and for her personal expenses, such as her vehicle and clothing as well as expenses for her children. For this responsibility, Ms. Kalkman had control of her work income of about $23,200.00 per year, the balance from the sale of her home in 2011, about $260,000.00 in ‘salary’ (about $195,000.00 after tax) and $30,500.00 in dividends from Dr. Beveridge.

[100] Ms. Kalkman submits that the salary and dividends were paid to her were simply income splitting to save Dr. Beveridge taxes. That is true, but it does not detract from the fact that, because of their separate accounts, she received, in addition to her own resources from work and the sale of her home, significant monies for which she had limited financial responsibility for the household.

[101] Dr. Beveridge makes the point that effectively he supported her children. He notes that despite Ms. Kalkman’s Corollary Relief Order requiring the children’s father to pay $806.00 per month in child support, she never pursued or started receiving child support until sometime in 2015.

[102] Dr. Beveridge questioned why there were two lines of credit and two credit cards in Ms. Kalkman’s name, totalling $22,000.00 at the time of separation.

[103] The statements accounting for these debts were not produced at trial. Considering the amount of the monies received by Ms. Kalkman, it is difficult to understand why these debts exist.

[104] Section 13(i) justifies an unequal division in Dr. Beveridge's favour.

Conclusion

[105] No two cases are identical, but the matrix in *Parke* is as close to the circumstance in this case as any.

[106] Taken as a whole, Dr. Beveridge has discharged the onus of proving it would be highly unfair and unconscionable to divide their divisible matrimonial assets and debts equally.

[107] This was a second marriage for both. It was a relatively short marriage. No children were produced of this marriage. Ms. Kalkman came into the marriage with no financial assets, except those that were the result of pre-marital gifts of Dr. Beveridge. She received significant direct financial support and payments from Dr. Beveridge, for which she had limited financial responsibility during the marriage. The assets that remain at the time of separation are basically the assets Dr. Beveridge brought into the marriage at age 54. He is now 62.

[108] During the marriage, Ms. Kalkman benefitted significantly both directly and through the substantial support provided to her children by Dr. Beveridge.

[109] She did not have to give up her profession. This marriage appears to have more of the characteristics of a 'modern' marriage than of a 'traditional' marriage.

[110] Dr. Beveridge has established that it would be very unfair, unreasonable and unconscionable to order an equal division of their assets and debts.

[111] The issue is not whether there should be an unequal division, but the extent of the unequal division. Ms. Kalkman seeks an equalization payment of over $400,000.00. Dr. Beveridge seeks no or minimal division, based on the analysis in *Parke*.

[112] Separate from the issue of spousal support, which is dealt with next in this decision, the division proposed by Dr. Beveridge would leave Ms. Kalkman with matrimonial assets of about $11,000.00 and non-business debts of about

$22,000.00; Dr. Beveridge would have no debts and matrimonial assets of about $769,000.00.

[113] As stated by the Court of Appeal in *Harwood*, the exercise of how the uneven division should be effected is not a precise balancing of credits and debits.

[114] I agree in principle and on the facts in this case that it would be very unfair that a division of assets on separation be close to 50%. This was a short 'modern' marriage. One partner contributed disproportionately (even recognizing their disproportionate incomes) to the household expenses. That partner brought into the marriage substantially all of the assets that existed at separation, and those assets had not appreciated in value.

[115] I note that Dr. Beveridge paid down the mortgage during the marriage to the extent of about $115,000.00 plus interest from earnings during the marriage. Ms. Kalkman 'repayment' to Br. Beveridge in 2011 of about $130,000.00, more than offsets Dr. Beveridge's pre-marital assistance to Ms. Kalkman of $118,000.00.

[116] It is also concerning that Dr. Beveridge's proposed division (based on the *Parke* analysis) would basically leave Ms. Kalkman "in a state of unreasonable impoverishment" as described in s. 13(a) of the *MPA*.

[117] Having concluded that an equal division would be unconscionable, I conclude that a fair division requires that Dr. Beveridge pay to Ms. Kalkman an equalization payment of $75,000.00. Out of that, Ms. Kalkman will be responsible for the debts in her name.

Spousal Support

The Law

[118] Prospective and retrospective spousal support is claimed.

[119] Section 15.2 of the *Divorce Act* states that the court may order spousal support. The court is required to consider the condition, means, needs and other circumstances of each spouse, including the length of cohabitation, the functions of each spouse during cohabitation and any arrangement respecting support (*Divorce Act*, s. 15.2(4)).

[120] The four objectives of spousal support are set out in s. 15.2(6) as follows:

Objectives of spousal support order

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(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.

[121] Case law, notably *Moge v Moge*, [1992] 2 SCR 813 ("*Moge*"), and *Bracklow v Bracklow*, [1999] 1 SCR 420 ("*Bracklow*"), interpreted s. 15.2 as setting out three bases for spousal support:

(a) compensatory support for economic sacrifices by the lower income spouse and/or economic advantages to the higher income spouse arising from the marriage relationship,

(b) non-compensatory support – financial need of the lower income spouse if the higher income spouse has the ability to meet that need upon separation, and

(c) where it exists, a reasonable agreement or arrangement between the parties respecting their finances.

[122] Because of significant divergence in court decisions and for the purpose of providing some predictability at separation, the Federal Government commissioned the *Spousal Support Advisory Guidelines*. These *Guidelines* are not enacted in any statute or regulation. Unlike the Federal and Provincial *Child Support Guidelines* (which are enacted), these *Guidelines* are truly advisory, intended to provide some logic to the analysis.

[123] In the 13 years since the first draft of the *Guidelines*, trial and appellate courts have more or less come to accept that the *Guidelines* are helpful in determining issues of quantum and duration. Some courts, for example the Ontario

Court of Appeal in *Fisher v Fisher*, 2008 ONCA 11 ("*Fisher*"), suggest that support orders outside the suggested *Guidelines* range require reasons explaining why the *Guidelines* do not generate the appropriate result.

[124] Quantum and duration are not the only analytical issues. The first is entitlement. The *Guidelines* do not purport to assist in respect of this issue.

[125] Spousal support is not automatic. It is a statutory remedy based on the factors in s. 15.2(4) and the objectives in s. 15.2(6), as interpreted in the case law.

[126] A disparity of income that produces a positive range for support under the *Guidelines* does not automatically lead to entitlement. If the disparity does not relate to a compensatory or non-compensatory basis for entitlement, there is no entitlement.

[127] The threshold issue of entitlement to spousal support based on compensatory principles discussed in *Moge* is usually not a serious issue where the marriage relationship is of such length that economic merger occurs, or where the payor has (to borrow from the unjust enrichment analysis) been enriched at the expense of the recipient, or the recipient has been deprived by reason of, their respective roles in the marriage. When based on non-compensatory principles discussed in *Bracklow*, transitional support is not usually a serious issue when the recipient has an inability to meet their basic needs by reason of the end of cohabitation.

Submissions

[128] Ms. Kalkman claims spousal support on both a compensatory and non-compensatory basis. This court heard an interim motion for spousal support on February 21, 2017, and issued a decision on March 8, 2017, ordering that effective February 1, 2017, there would be payment of interim spousal support in the amount of $3,300.00 per month.

[129] Ms. Kalkman seeks retroactive spousal support from the time of separation (November 1, 2015) to January 31, 2017. She submits the quantum should be the same as in the interim order. She seeks spousal support for the length of the marriage, which she identifies as five years, seven months, and that the quantum be at the high end of the *Guidelines* range.

[130] Dr. Beveridge submits that Ms. Kalkman has no contractual or compensatory claim for spousal support. He acknowledges a non-compensatory

entitlement but submits it should be of limited to the low end of the range for both quantum and duration; it should be only transitional in nature.

[131] He contests a retroactive award on the basis that he was the one who repeatedly asked Ms. Kalkman to sit down and try to settle their differences, but she ignored his requests and made no request for support until she issued the Petition and motion for interim spousal support, at the same time, on November 28, 2016.

Analysis

[132] With respect to entitlement, the lines that divide any factual matrix into the compensatory versus the non-compensatory foundation for spousal support are seldom clear. In this case the basis for spousal support is clearly non-compensatory.

[133] The marriage was short. It had more of the characteristics of a ‘modern’ marriage than a traditional marriage. Both contributed through their continued employment outside the home and in the home; however, even considering their respective means, Dr. Beveridge appears to have contributed disproportionately.

[134] Of the four objectives of spousal support, the first, third and fourth are relevant.

[135] The first relates to any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown. An advantage usually means a benefit, gain or more favorable circumstance. A disadvantage usually means a loss, detriment, or less favorable circumstance. Ms. Kalkman suffered no disadvantages, either to her and her children’s quality and standard of living, or to her own career, arising from the marriage. On the contrary, she and her children benefitted significantly. The loss to her of a higher standard of living and greater financial security, when she left the marriage, is an disadvantage. This disadvantage is addressed in the property analysis, and assessment of the third spousal support objective.

[136] The third objective of spousal support is to relieve any economic hardship arising from the breakdown of the marriage. By reason of the breakdown of what was a short marriage, Ms. Kalkman lost the sharing of a much higher standard living with Dr. Beveridge than she enjoyed before their marriage. It is the transition back to her former life which underpins her non-compensatory claim.

[137] The fourth objective, promotion of economic self-sufficiency of each spouse within a reasonable period of time, is not a significant issue in this proceeding. While Ms. Kalkman did not produce documentary evidence of her current income, her testimony was to the affect that she had increased her professional income by about $5,000.00 a year, and that it continues to increase. This makes it more than she was earning before or during her marriage.

[138] While income disparity itself does not prove entitlement, significant income disparity, in circumstances where the recipient has become used to the largesse of the payor for even a short period of cohabitation, creates some entitlement on a non-compensatory basis.

[139] Two determinations remain to be made: quantum and duration of support.

[140] The parties' incomes are not seriously contested. Dr. Beveridge accepted Ms. Kalkman's accountant's calculation that his average income is $400,000.00 per year.

[141] The court determined Ms. Kalkman's professional income from her income tax returns during the marriage as about $23,200.00. This was $3,300.00 per year less than the average before the marriage. The best evidence before the court is her oral evidence that her income increased by about $5,000.00 per year since separation making her annual income about $28,200.00.

[142] The *Guidelines* are supported by algorithms and a formula that provides a range of quantum and duration for spousal support. The *Guidelines* were intended to provide a logical framework for the award of reasonable spousal support based on the *Divorce Act* and the caselaw.

[143] Imputing Dr. Beveridge's income of $400,000.00 and Ms. Kalkman's income of $28,200.00 in to the Child View program generates a range of spousal support at the high end of the range of $3,098.00; in the mid-range of $2,711.00; and at the low end of $2,324.00.

[144] The *Guidelines* suggest that, when entitlement is established, save in exceptional circumstances (that are not applicable to this matrix), spousal support should be payable for between one-half of and the length of cohabitation.

[145] In this case, I have determined that the period of cohabitation was five years, two months. This creates a suggested length of support of between 31 and 62 months.

[146] The caselaw provides several factors to assist in placing the quantum within the range identified in the *Guidelines*.

[147] Section 15.2(4) identifies the condition, means, needs and other circumstances of each spouse including the length of cohabitation and their respective functions during the marriage.

[148] Common factors that may favor a support award at the higher end of the range include:

- the recipient has a strong compensatory claim;
- the recipient has limited income and earning capacity;
- the recipient has compelling needs;
- the recipient is older;
- there is no property to be divided;
- the recipient has primary care of young children or children with special needs;
- the marriage is long term; or,
- the marriage is short, but with young children requiring a stay-at-home custodial parent.

[149] The factors that may support an award in the higher end of the range in this case are that the recipient has a limited income and is receiving little from the division of assets.

[150] Common factors that may support an award in the lower end of the range include:

- the recipient has a weak or no compensatory claim;
- the payor has a limited income or earning capacity;

- the recipient does not have significant need;
- the recipient is younger than the payor;
- there has been an unequal division of property in favor of the recipient;
- the debts of the parties exceed the assets, and the payor is carrying those debts; or
- the recipient has remarried or repartnered.

[151] The factors that may support a lower award in this case are that the recipient has a weak or no compensatory claim, the marriage was short, and the payer is older than the recipient (and near retirement age).

[152] Not all the factors carry the same weight in any particular factual matrix. The most significant factor in this case is the non-existent, or at best weak compensatory claim. Other relevant considerations are, on one hand that the recipient has a limited income and income potential and received limited assets in the property division, and on the other hand that the marriage was short, and the payor is older and near retirement age.

[153] I conclude that spousal support should either be close to the mid-range of quantum for close to the low end of the range of duration, or close to the low end of the range of quantum for close to the mid-range in duration. The appropriate resolution in this case is the former.

[154] The mid-range in quantum is about $2,700.00 per month. The low end of the range for duration is about 31 months. I find that Ms. Kalkman's entitlement to spousal support will be exhausted by payment of $2,700.00 for 36 months. Giving credit to Dr. Beveridge for payments made under the interim order at the rate of $3,300.00 for 15 months (February 1,2017 to May 31,2018), leaves his remaining spousal support obligation at $47,700.00. Dividing that by $2,700.00 per month leaves a support obligation of 17.67 months, which I round up to 18 months.

[155] In summary, Dr. Beveridge shall pay Ms. Kalkman spousal support, effective June 1, 2018, for 18 months, at the rate of $2,700.00. At that point, Ms. Kalkman's entitlement to spousal support will have been exhausted.

[156] I decline to award retroactive spousal support for two reasons:

1. Ms. Kalkman did not respond to Dr. Beveridge's early efforts to resolve their support and property issues and only claimed spousal support when she filed the Petition and interim motion, and
2. the prospective payments ordered will exhaust Ms. Kalkman's support entitlement.

Costs

[157] Success in this proceeding has been mixed, but the respondent has been more successful than the petitioner. If the parties are unable to agree to costs, the court will receive written submissions from the respondent within four weeks and from the petitioner within two weeks thereafter.

Warner J.

				Value	Petitioner	Respondent
					(Ms. Kalkman)	(Dr. Beveridge)
Matrimonial Home						
Appraised			$745,000.00			
Real Estate		5%	$ 37,250.00			
HST		15%	$ 5,587.50			
Legal Fees			$ 1,725.00			
	Net:			$700,437.50		$700,437.50
Houshold Contents						
Total Value			$ 39,166.00			
Less: piano in trust (consent)			$ 5,800.00			
Less: mushrooms			$ 10,530.00	$ 22,836.00	$ 2,255.00	$ 20,581.00
Vehicles						
2008 Subaru Legacy				$ 3,000.00	$ 3,000.00	
2008 Subaru Outback				$ 9,000.00		$ 9,000.00
BMW Z3				$ 7,000.00		$ 7,000.00
Hovercraft (business asset, by determination, no valuation)						
4-wheeler				$ 400.00		$ 400.00
Savings						
RRSP (#831) (non-matrimonial by consent)						
$ 8,541.39	less	25%	$ 6,406.04			
Scotia MacLeod RRSP (#015) (non-matrimonial by consent)						
$ 247,641.00	less	50%	$123,820.50			
RESP (#52D) (non-matrimonial, benefit the children)						
			$ 8,597.38			
RBC (#821) Petitione	Business Asse		$ 1,405.23			
RBC (#329)				$ 4,888.63	$ 4,888.63	
TD Chequing (#019)				$ 16.39	$ 16.39	
TD Savings (#096)				$ 279.96	$ 279.96	
Canada Life Insurance (cash surrender value)				$ 89.94	$ 89.94	
RBC (#765)				$ 4,185.79		$ 4,185.79
Sunlife Insurance (Respondent's life insurance, no cash surrender value)						
Gold bars in safe				$ 27,658.00		$ 27,658.00
	Total Assets			**$779,792.21**	**$ 10,529.92**	**$769,262.29**
Debts						
RBC Student Loan (#051) (non-matrimonial debt - determination)						
			$ 8,975.37			
RBC Credit Line (#75-001)				$ 6,428.00	$ 6,428.00	
RBC Visa (#6184 and #6192)				$ 5,611.74	$ 5,611.74	
TD Line of Credit (#075)				$ 5,957.88	$ 5,957.88	
TD Visa (#6191)				$ 4,558.19	$ 4,558.19	
	Total Debts:			$ 22,555.81	$ 22,555.81	$ -

			Value	Petitioner	Respondent
				(Ms. Kalkman)	(Dr. Beveridge)
Division:			$779,792.21	$ 10,529.92	$769,262.29
	Total Assets:		$ 22,555.81	$ 22,555.81	$ -
	Total Debts:		$757,236.40	-$ 12,025.89	$769,262.29
				$ 390,644.09	**$390,644.09**
		Net:	$378,618.20	$ 378,618.20	$378,618.20