SUPREME COURT OF NOVA SCOTIA

Citation: *Gaudet v. Gaudet*, 2018 NSSC 231

Date: 2018-09-25
Docket: 1207-004412
Registry: Truro

Between:

Lana Gaudet

Petitioner

v.

Ronald Gaudet

Respondent

Decision

Judge: The Honourable Justice Michael J. Wood

Heard: April 11, 12, 18 and July 12, 2018, in Truro, Nova Scotia

Counsel: Lloyd I. Berliner, for the Petitioner
Allison Kouzovnikov, for the Respondent

By the Court:

[1] Lana and Ronald Gaudet were married in January 2004. They have one child who was born in August 2005.

[2] The marriage broke down in May 2016. During that month Mr. and Ms. Gaudet met with a trustee in bankruptcy to discuss the family's difficult financial circumstances. A few days later they met jointly with a lawyer who prepared a separation agreement for their signature. The agreement purported to deal with issues of parenting, support and division of assets.

[3] During the divorce trial the parties reached an agreement on parenting and child support, and a consent order was prepared incorporating that agreement. The trial continued with respect to issues of division of assets, spousal support and s. 7 child support expenses.

[4] A key issue with respect to division of assets and spousal support is whether the separation agreement signed in May 2016 should be enforced. The two provisions in the agreement which are potentially relevant to what I must decide are the mutual waiver of all claims to spousal support and division of pension. Ms. Gaudet has a significantly larger income and accrued pension and argues that the agreement should be enforced in accordance with its terms. Mr. Gaudet takes the contrary position.

Circumstances Leading to the Separation Agreement

[5] In the spring of 2016 the Gaudet family was not in great financial shape. They were carrying a significant debt load in comparison with their family income. For the tax year 2016, Ms. Gaudet had an income of $89,222 and Mr. Gaudet of $42,169.

[6] On May 9, 2016, Mr. Gaudet disclosed that he had been having an affair and the marriage was over. Ms. Gaudet was devastated and said she had to try hard to keep things together as they worked through the process of separating.

[7] Mr. Gaudet said that he felt very guilty about the marriage breakdown. It was quickly agreed that Ms. Gaudet would stay in the family home with their son and Mr. Gaudet would move out. The discussions then focused on the family's debts and how they would be dealt with.

[8] A meeting was set up with Grant Thornton for May 20, 2016. A worksheet was prepared in advance listing various debts and assets. This was prepared by Ms. Gaudet with some input from Mr. Gaudet.

[9] The outcome of the Grant Thornton meeting was a recommendation to try and pay down the family debt. Bankruptcy was mentioned as a possibility. Following the meeting Mr. Gaudet redeemed some of his RRSPs and used the money to pay some family debt. Both parties also borrowed money from their families to be used for the same purpose.

[10] The parties agreed that the debts would be split equally, with the exception of a line of credit and the mortgage. Ms. Gaudet was to assume the mortgage in the amount of $165,500, as well as approximately $19,000 of the line of credit. Mr. Gaudet was to be responsible for $6,000 of the line of credit.

[11] At the time of the meeting with Grant Thornton the parties estimated the value of the family home to be $165,000 to $169,000. The assessed value for property tax purposes was $185,800 for the year 2016.

[12] Mr. and Ms. Gaudet agreed on a division of personal property, including automobiles. Mr. Gaudet was to receive a small amount of furniture, with most items remaining with the matrimonial home. During the discussions related to separation, there was no mention of spousal support or pensions. At the time neither party was aware of the value of the pensions.

[13] According to the evidence at trial, as of December 31, 2017, Ms. Gaudet's pension, would pay her $36,338 a year at her normal date of retirement (July 1, 2034). If the benefit which accrued during the term of the marriage was to be divided equally the annual amounts payable to Mr. Gaudet and Ms. Gaudet, as of her retirement, would be $11,439 and $24,899 respectively. Mr. Gaudet had an RRSP valued at $32,118, a deferred profit sharing plan worth $2,954, as well as a union pension, with a cumulative benefit of $642.92.

[14] On May 26, 2016, six days after the Grant Thornton meeting, Ms. Gaudet made an appointment with Ronald Chisholm for purposes of preparing a separation agreement. When Mr. Gaudet got home from work that day, she advised him of the appointment which was scheduled for 4:00 p.m. They went to Mr. Chisholm's office with the worksheet from the Grant Thornton meeting and he prepared a separation agreement which was signed that day. The parties' recollections of the meeting with Mr. Chisholm are not terribly clear, which is not surprising given the

emotional upset about the breakdown of the marriage and their difficult financial circumstances.

[15] Ms. Gaudet says she understood that Mr. Chisholm was acting for both of them and his bill was shared equally. She also recalled that Mr. Chisholm told Mr. Gaudet he could seek independent legal advice, and Mr. Gaudet declined. During the meeting with Mr. Chisholm she was crying and Mr. Gaudet kept taking her hand and apologizing. She recalls that Mr. Chisholm reviewed the draft separation agreement and kept making changes and printing new copies. The agreement was signed that day and Mr. Chisholm never met separately with either of them.

[16] Mr. Gaudet confirmed that Mr. Chisholm met with both of them and agrees that he was told that he should get his own lawyer. He recalls Mr. Chisholm telling him that the agreement was temporary and if there was anything that he disagreed with, he could take it to court. Mr. Gaudet recalls Mr. Chisholm reading the separation agreement, but he did not have his own copy. He said the agreement had a number of mistakes including the wrong names and Mr. Chisholm corrected these in various drafts. He signed the separation agreement and deed to the property that day, but he did not leave with a copy of the agreement. When he finally received a copy later, he did not recall some of the provisions being discussed.

[17] The agreement which was signed mistakenly gave the date of separation as August 1, 2015. It acknowledged full disclosure of the financial circumstances of each party and included the following financial terms:

- Each waived any right to claim spousal “maintenance” from the other.
- The personal property had been divided to their mutual satisfaction and each would keep all items in their possession.
- Each party would keep their own RRSPs, with the exception of a spousal RRSP of approximately $1,000 to be transferred to Ms. Gaudet.
- Each party would retain sole undivided ownership of any pension accrued during the marriage.
- The matrimonial home would be conveyed to Ms. Gaudet and she would assume responsibility for the mortgage.
- The Royal Bank of Canada line of credit in the amount of $49,130 would be split equally and the other line of credit in the amount of

$24,684 would be allocated – $18,792 to Ms. Gaudet and $5,892 to Mr. Gaudet.

[18] The agreement included a certificate of legal advice whereby Mr. Chisholm stated he was acting solely for Ms. Gaudet in relation to the separation agreement and explained it fully to her. There was also a wavier of independent legal advice signed by Mr. Gaudet confirming that he was advised of his right to obtain legal counsel and chose not to do so. It also acknowledged that he understood the nature and effect of the agreement.

Discussion and Analysis

Division of Property

[19] The separation agreement signed on May 26, 2016, sets out a division of assets and debts. Ms. Gaudet is satisfied with this division and believes that the agreement should be enforced in accordance with its terms. Mr. Gaudet argues that the circumstances of the agreement and its signing, are such that it should be set aside and not enforced. He is essentially satisfied with the division of property and debts according to the agreement, with the exception of the pensions which were not divided. He says that there should be an equal division of all assets, including pensions.

[20] Section 29 of the *Matrimonial Property Act,* R.S.N.S. 1989, c. 275 gives the Court the authority to vary or set aside the terms of a separation agreement in the following circumstances:

> Harsh or fraudulent contract or agreement
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> 29 Upon an application by a party to a marriage contract or separation agreement, the court may, where it is satisfied that any term of the contract or agreement is unconscionable, unduly harsh on one party or fraudulent, make an order varying the terms of the contract or agreement as the court sees fit. R.S., c. 275, s. 29.

[21] In *Zimmer v. Zimmer*, 90 N.S.R. (2d) 243, Davison, J. was considering a separation agreement which had been prepared by the wife and her lawyer and presented to the husband in his office for signing. The terms of the agreement were described as follows:

> 13 It cannot be denied that the Agreement prepared for the wife was heavily weighed in her favour. It provided that the wife should have the exclusive possession of the home at 154 Shore Drive after it was constructed and that the husband will convey his interest in that property to the wife. The wife was to have all of the furniture and effects from the matrimonial home on Wyndrock Drive with the exception of the stereo, V.C.R. television, microwave oven and the husband's personal effects. Under the terms of the Agreement, the husband agreed to retain his existing insurance policies naming the wife as the beneficiary as long as he is required to pay maintenance to the wife or the child. The husband agreed to obtain disability insurance in order to meet obligations under the maintenance clause if he should become disabled. On top of all of this, the husband was said to be solely responsible for the matrimonial debts.
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> 14 Except for the minor items of personal property to which I have referred, the only benefit to the husband was that he was permitted to keep and retain investments he holds in the Canadian Medical Association and his registered retirement savings plan.

[22] Justice Davison set aside the agreement as being unduly harsh under s. 29 of the *Matrimonial Property Act* for the following reasons:

> 32 Section 29 sets out three situations, any one of which would justify a court setting aside the agreement. The requirements are disjunctive. Under appropriate circumstances, "unconscionable" or "fraudulent" agreements can be set aside on principles of equity. The statute introduces a further ground - when the contract is "unduly harsh on one party".
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> 33 I have no hesitation in finding the agreement before me was "unduly harsh" on the husband. In doing so, I recognize the need to protect the sanctity of the freedom to contract. Obviously an agreement which could only be characterized as unbalanced or unfair should not be set aside as being unduly harsh. I would suggest the agreement should be found so severely unjust as to show on its face a disregard for the rights of one party. It is a test which would be more difficult to meet when both sides have had the benefit of legal counsel.
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> 34 The husband brought to the marriage the substantial portion of the assets and left the marriage with a few chattels the total value of which would not exceed $15,000.00 and is to be responsible for the marital debts. The wife receives conveyance of the matrimonial home and all its contents. It is agreed that the home is valued at $325,000.00 and from the photos presented in evidence appears to be a beautiful and elaborate home. The equity in the home and the value of the household contents is approximately $107,000.00. In addition, the husband is required to pay $5,000.00 a month support for an indefinite period of time and maintain his life and disability insurance. The marriage only had a life of eighteen months. It is clear that the provisions of the agreement which the husband signed without legal advice are unduly harsh and I have no hesitation in

> setting aside the whole of the agreement dated May 18th, 1987, pursuant to s. 29 of the *Matrimonial Property Act*.

[23] In *Dimick v. Dimick*, 2008 NSSC 333, MacAdam, J. considered the unconscionability component of s. 29, which he described as follows:

> 43 The requirements of s. 29 of the *Matrimonial Property Act*, and in particular the word "unconscionability," were reviewed in *Crouse v. Crouse* (1988), 88 N.S.R. (2d) 199 (S.C.T.D.). The Petitioner wife sought to reopen a separation agreement on the basis of undue influence and duress. In order to succeed on the ground of unconscionability, Hallet J. held, "the Petitioner must show that there was inequality in the position of the parties arising out of ignorance, need or distress which left her in the power of her husband and, secondly, that the bargain she reached was substantially unfair to her." (para. 16).
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> 44 If the court determines that one party exerted power over the other in an unconscionable way and so obtained a favourable bargain on the division of property, s. 29 requires a determination of whether the agreement was "substantially unfair." According to *Crouse*, at para. 47, this is
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>> not simply a matter of determining if the asset division was unconscionable. Agreements made by separating spouses must be looked at as a package. One cannot simply decide an agreement is unconscionable if the division of assets is substantially unfair; it may be that viewed in the light of the custodial parent giving up any claim for child support, the overall agreement is fair and reasonable.

[24] It is obvious from these authorities that assessment of a separation agreement under s. 29 of the *Matrimonial Property Act* for unconscionability or harshness requires consideration of the entire agreement and not just the division of matrimonial assets. The circumstances of the negotiation and the parties are also relevant.

[25] Mr. Gaudet says that the separation agreement in this case should be set aside because of the following:

- There was no disclosure of financial information between the parties, particularly with respect to pensions, which were among the most significant matrimonial assets.
- The parties did not have accurate information with respect to the value of the matrimonial home.

- Mr. Gaudet did not receive independent legal advice. Although the agreement waived his right to such advice, he signed it on the belief that the agreement was temporary, based upon information from Mr. Chisholm.

- The agreement incorrectly recites that there has been full disclosure, that personal property had been divided to the parties mutual satisfaction and that the parties had been separated since August 2015.
- The meetings with Grant Thornton, Mr. Chisholm and the bank were arranged by Ms. Gaudet and took place within a week. Mr. Gaudet was intimidated and overwhelmed by the marriage breakdown and separation.
- He did not see the separation agreement prior to meeting with Mr. Chisholm and did not have a copy while various versions were being read to him. He says that he did not have a copy when he left Mr. Chisholm's office.
- Mr. Gaudet's income was less than half of Ms. Gaudet's and he essentially had no pension. The separation agreement was substantially unfair to him.

[26] Prior to meeting with Mr. Chisholm in May 2016, the parties had agreed on the basic terms of separation. Ms. Gaudet was to remain in the family home with their son and would be responsible for the debt associated with that property. The vehicles were divided based upon who used them and most of the furniture would remain in the home. The largest debt, other than the mortgage, the RBC credit line of $49,000, was to be divided equally. The parties did not have a real sense of the value of their assets, but I am satisfied that they had a general intention to have the debts and liabilities equally apportioned.

[27] The family home was important because it provided a place for Ms. Gaudet and her son to live. Depending upon the value attributed to the home, there appeared to be little, if any, equity. Based upon a listing price estimate from a real estate agent, Ms. Gaudet believed it was worth $165,000 to $169,000. The mortgage balance was $165,500. The only asset of any real value was Ms. Gaudet's pension, however neither party had any idea what it was worth. We now know that if the amount accrued during the term of the marriage were to be divided equally it would generate an annual pension for Mr. Gaudet of approximately

$11,400 starting in July 2034. In light of Mr. Gaudet's demonstrated earning capacity, this potential stream of retirement income is very significant.

[28] The non-pension family assets did not offset the existing debts, which is why the parties were seriously considering bankruptcy in May 2016. The issue of pensions was never discussed prior to the meeting with Mr. Chisholm and neither party testified about it coming up when they met with him. The separation agreement includes cl. 9(a) which reads:

> 9(a) The parties release any and all claims each now has, or may have in the future, to the pension plan of the other, and the parties agree that each shall retain sole ownership of their respective pension plans. The husband shall retain sole undivided ownership of any employment pension he has accrued during the course of the marriage free from division from the wife. The wife shall retain sole undivided ownership of her employment pension through the Halifax Police Department, accrued during the course of the marriage free from division from the husband.

[29] The evidence suggests that Mr. Chisholm read various versions of the agreement to the parties, which should have included this clause. In his affidavit Mr. Gaudet says that he had no idea what kind of pension Ms. Gaudet had or what it was worth.

[30] The process by which the separation agreement came to be signed is far from ideal. Both parties were experiencing extreme emotional distress which was compounded by the dire financial picture. The meeting with Mr. Chisholm appeared to be rushed and there was some confusion about whether he was giving advice to both parties and whether the agreement itself was final or temporary. All of these circumstances lead me to conclude that exempting Ms. Gaudet's pension from an otherwise equal division of assets and liabilities would be unconscionable or unduly harsh to Mr. Gaudet.

[31] Section 29 of the *Matrimonial Property Act* permits the court to intervene where it is satisfied that "any term of the contract or agreement" is unconscionable or unduly harsh on one party. In such circumstances the court may make an order varying the terms of the agreement as it sees fit. In this case I am not satisfied that it is necessary to set aside the agreement as a whole but simply to amend cl. 9(a) to provide for an equal division of pension benefits accrued during the marriage at source and I would so order.

Spousal Support

[32] Where there is an application for spousal support and a pre-existing separation agreement, s. 29 of the *Matrimonial Property Act* is not applicable, however there are circumstances where the court may vary from the terms of the agreement. The governing principles are found in the Supreme Court of Canada decision in *Miglin v. Miglin*, 2003 SCC 24, which was considered in *MacDonald v. MacDonald*, 2013 NSSC 94, as follows:

> 78 *Miglin v. Miglin*, 2003 SCC 24, is seen as broadening the context in which agreements can be overturned moving from the limited circumstances where a court could find a radical and unforeseen change in circumstances casually connected to the marriage as in the Pelech trilogy to a broader discretion to assess the weight to be given to each objective in the spousal support provisions of the *Divorce Act* and to assess these and to give weight to each of these objectives in the back drop of the parties' circumstances.
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> 79 The Court in *Miglin* is dealing with an application to vary a spousal support award and the Court outlines a two stage process as set out in this summary:
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>> An initial application for spousal support inconsistent with a pre-existing agreement requires a two-stage investigation into all the circumstances surrounding that agreement, first at the time of its formation, and second, at the time of the application. Unimpeachably negotiated agreements that represent the intentions and expectations of the parties and that substantially comply with the objectives of the *Divorce Act* as a whole should receive considerable weight. Holding that any agreement that deviates from the objectives listed in s. 15.2(6) would inevitably be given little or no weight would seriously undermine the significant policy goal of negotiated settlement and would undermine the parties' autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns. It would also render the direction to consider prior agreements in s. 15.2(4)(*c*) meaningless. In searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act, but should also treat the parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where that agreement fails to be in substantial compliance with the overall objectives of the Act, including certainty, finality and autonomy.

[33] The objectives to consider when examining a request for spousal support under the *Divorce Act* are found in s. 15.2(6), which provides:

> Objectives of spousal support order
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> 15.2(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.

[34] Section 15.2(4) also requires the court to take into consideration the conditions, means, needs and other circumstances of each spouse, including the length of cohabitation and the functions performed by each during that cohabitation.

[35] Spousal support can be awarded on both a compensatory and non-compensatory basis. Compensatory support addresses the economic advantages and disadvantages flowing from the marriage or the roles adopted by the spouses in the marriage. Non-compensatory support is intended to address the financial disparity between the parties and their needs and means which arise upon marriage breakdown.

[36] The roles of the Gaudets in their marriage were primarily driven by the needs of their son who suffered from a serious medical condition. There were frequent medical appointments and treatments required. Ms. Gaudet’s employment allowed her the ability to take paid leave to care for him. Mr. Gaudet’s employment did not permit this. In addition, Ms. Gaudet suffered a workplace injury in 2012 and has been on disability leave since that time. This also permitted her to spend time with their son and attend to his medical needs.

[37] The financial situation of the family had been difficult for a number of years prior to separation. The result was the Mr. Gaudet had to work as much as possible in order to generate income. Ms. Gaudet’s employment was somewhat more flexible in allowing her to spend time with their son up until the time of her injury.

[38] I am not satisfied that there were any economic advantages or disadvantages to either spouse flowing from the marriage or their roles adopted in it which would justify compensatory spousal support.

[39] Non-compensatory support requires a consideration of the parties and their needs and means at the time of marriage breakdown. In 2016 Mr. Gaudet's income was $42,169 and Ms. Gaudet's was $88,155. Mr. Gaudet's has remained at approximately that level while Ms. Gaudet's increased to approximately $106,000 in 2017. Both parties filed statements of expenses. Mr. Gaudet lives in rental premises with his new partner and his budgeted expenses are very modest. Ms. Gaudet's expenses are higher, however she has primary care of the parties' son and is residing in the matrimonial home. At the time of separation she assumed responsibility for a greater portion of the family debt, which she was required to service. In addition Mr. Gaudet made an assignment of bankruptcy in the fall of 2016, which meant that the debt which he had agreed to assume under the separation agreement became the responsibility of Ms. Gaudet as the joint debtor. This increased her liabilities by approximately $30,000.

[40] Neither party could be said to be living in extravagant circumstances. In fact, each is struggling to get by to some extent. While there might be an argument in support of Mr. Gaudet's claim to non-compensatory support, it is not terribly strong. In order to set aside the separation agreement for spousal support purposes the agreement must fail to be in substantial compliance with the overall objectives of the *Divorce Act*, keeping in mind principles such as certainty and finality.

[41] Although I have concerns about the manner in which the separation agreement came together, particularly as it relates to the division of property and pensions, I am satisfied that the agreement to waive any claim for spousal support should be enforced in the circumstances of this case. Any potential entitlement on the part of Mr. Gaudet is offset by the increased financial burden born by Ms. Gaudet. Both parties should have the certainty arising from the terms of the separation agreement in moving forward with their independent lives.

Section 7 Expenses

[42] The Parties spent little time dealing with the claim by Ms. Gaudet for special or extraordinary expenses under s. 7 of the *Federal Child Support Guidelines* because of their focus on other issues. Ordering contribution to such costs is a discretionary exercise which requires consideration of factors such as the parties' income, costs of the activities, and any special needs of the child.

[43] Once an expense is determined to fall within s. 7 it is usually shared in proportion to the income of the parents. In some cases the court may impose a maximum amount for contribution based upon the payor's financial situation.

[44] Ms. Gaudet claims contribution for uninsured medical costs, activity expenses for hockey, boxing, baseball and soccer as well as summer camp. Not all are supported by current invoices or cost estimates. She suggests that Mr. Gaudet pay $129.89 per month starting May 1, 2018.

[45] Mr. Gaudet says that he has had no input into his son's extracurricular activities and has not seen accurate expense information for all of the costs being claimed. He feels that his contribution should be capped at $42 per month based upon his budget.

[46] Ms. Gaudet says that because of her son's medical condition it is important for him to be involved in a range of activities so that he can have as normal a childhood as possible. I accept that evidence but caution that the family budgets have limits on what can be afforded. Boxing and hockey seem to be the current activities of choice but that could change next year. Up to now Mr. Gaudet has had little input into decisions related to extracurricular activities. That should change under the new parenting agreement.

[47] In order to give the parties some flexibility I believe that Mr. Gaudet should contribute to the cost of two primary activities each year for s. 7 purposes. If Ms. Gaudet believes there are other activities that her son should participate in she will be responsible for the cost or will have to convince Mr. Gaudet that they are worthwhile and should be included. The activities which are to be covered by s. 7 should be specified each September.

[48] Mr. Gaudet is paying child support based upon *the Child Support Guidelines* for an income of $42,473. His contribution to s. 7 expenses will be 29% based on Ms. Gaudet's income of $106,197. It will apply to uninsured medical expenses required for his son as well as the costs of up to two extracurricular activities (and such additional activities as the parties agree).

[49] In light of Mr. Gaudet's current income and budget his maximum annual contribution to s. 7 expenses will be $750. The effective commencement date for the payment of these expenses will be May 1, 2018, and only costs incurred after that date will be included. Ms. Gaudet must provide proper receipts showing the amount of the expense and what it covers.

[50] The parties have had divided success and so there will be no award of costs. I would ask Mr. Berliner to prepare a form of order reflecting this decision and forward it to Ms. Kouzovnikov for her consent as to form.

Wood, J.