

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Ryan v. Ryan*, 2018 NSSC 289

Date: 20181102

Docket: *Halifax* No. 1201-069291

Registry: Halifax

Between:

Tracey Patricia Ryan

Petitioner

v.

Joseph Anthony Ryan

Respondent

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: March 19 & 20, 2018, in Halifax, Nova Scotia

Counsel: Amber Penney for the Petitioner
Godfred Chongatera for the Respondent

By the Court:

[1] Tracey Ryan filed a Petition for Divorce on February 19, 2016 and sought relief pursuant to the *Divorce Act* and *Matrimonial Property Act*. In her claims for relief, Ms. Ryan requested that the Separation Agreement executed on November 28, 2013 be incorporated into and form part of the Corollary Relief Order. Joseph Ryan filed an Answer to the Petition on March 15, 2016. In his Answer, Mr. Ryan stated “the Separation Agreement is unenforceable due to the circumstances surrounding execution.” As a result, the proceeding was bifurcated to allow the court to address the validity of the Separation Agreement as a preliminary issue.

[2] The hearing took place on March 19 and 20, 2018. Evidence was heard on behalf of Ms. Ryan and Mr. Ryan. Affidavits were also filed on behalf of Mr. Ryan by Mr. Gannon and Mr. Marsman.

[3] There were preliminary matters which addressed issues of admissibility of evidence. Counsel for Ms. Ryan objected to the admission of the affidavit of Mr. Gannon as it was tendered well beyond the extended filing deadlines given by the court. Counsel for Mr. Ryan took no position in relation to the admissibility of the affidavit of Mr. Gannon. I ruled that the affidavit of Mr. Gannon was not to be considered by the court as it would be akin to Mr. Ryan splitting his case. I am mindful of the decision of *Marshall v. Annapolis County School District Board*, 2009 NSSC 375, NSSC, which confirmed that evidence cannot be introduced under the guise of reply evidence when it ought to have formed part of the case in chief.

[4] Ms. Ryan’s counsel also objected to an affidavit tendered by Mr. Ryan which contained inadmissible evidence and was filed out of time. I ruled various paragraphs and exhibits to the affidavit were inadmissible but did permit the redacted affidavit to be considered by the court.

ISSUE

[5] The sole issue for determination is the validity, or lack thereof, of the Separation Agreement dated November 28, 2013.

BACKGROUND

[6] The parties were married on February 14, 1987. Both parties acknowledge they separated for the first time in 1995. They reconciled after a period of months

and separated for the final time the spring of 2013. Ms. Ryan asserts the date of separation to be March 6, 2013 and Mr. Ryan asserts the date of separation is March 18, 2013. The parties have three children: Meaghan (28), Joshua (20) and Zachary (18). The Separation Agreement stated at paragraph 4 that only Joshua and Zachary were children of the marriage as of November 2013 as defined in the *Divorce Act*, RSC 1985, C.3, (2nd Supp) (as amended).

[7] For the first eight years of the parties' marriage, Mr. Ryan was employed as a substitute teacher and worked part time for Canada Post. He began working full time for Canada Post in approximately 1994 when he stopped substitute teaching. From 2007 until separation, Mr. Ryan also held various positions as a bartender, at construction, and other odd jobs.

[8] Ms. Ryan worked as an assistant at a lawyer's office until she became pregnant with their first child, Meaghan. She then worked as a temporary employee with Canada Post from 1988 until 1995. From 1995 to 2008 she worked part time at Canada Post. Ms. Ryan was on call with Canada Post after Meaghan's birth and took the full year maternity leaves after the births of both Joshua and Zachary.

[9] From the date of marriage until their first separation in 1995, both parties acknowledge that Ms. Ryan controlled the finances. There were financial strains during the marriage. Shortly after the parties were married, Mr. Ryan lost money as a boxing fight promoter when the event lost money. Ms. Ryan testified that these were monies (\$10,000) that came from their personal savings. Mr. Ryan stated in his affidavit that the financial loss was even greater (at \$16,000). Shortly thereafter, the parties agreed that Ms. Ryan would manage the household finances.

[10] Mr. Ryan conceded that he had a bad credit rating from failed business ventures. He indicated that he also attempted "multi-level marketing projects" as well as being involved in businesses with Chris Mayne and George Bronson. None of these financial ventures appear to have been financially successful. Mr. Ryan also acknowledged that during the marriage he spent money on gambling although he could not recall any specifics. He testified that although he did occasionally abuse alcohol, he did not drink every day and he did not drink around the children.

[11] Mr. Ryan testified that Ms. Ryan was very good with managing money. After she took over the finances, she opened an investment account in Mr. Ryan's name as she already had one in her name. She made equal deposits into each

investment account. When Mr. Ryan would get paid he would advise Ms. Ryan of how much money he wanted and the balance of the funds were used by Ms. Ryan to pay bills. Ms. Ryan indicates that her control over the money was one of the reasons for the parties' first separation in 1995.

[12] The financial situation between the parties altered significantly in 1995. The parties separated for approximately six months and reconciled thereafter. Ms. Ryan testified that from the point of reconciliation in 1995 and onward, the parties kept their finances separate. The parties differed in their recollection of who paid which bills.

[13] Ms. Ryan testified that she paid the power bill, the cable bill, the oil bill, and the vast majority of the mortgage payments on the matrimonial home. She indicated that Mr. Ryan was solely responsible for the water bill and that they would frequently receive threatening phone calls from the water company and the water was cut off on one occasion for non-payment.

[14] Mr. Ryan testified that he paid the power bill and the grocery bill. He indicated that he also continued to give his earnings to Ms. Ryan every month. He indicated that he was working diligently at Canada Post, at a construction job, delivering newspapers, working as a bartender and working at a corner store. I fully accept the evidence of Mr. Ryan that he was working hard to earn money at various jobs but I am not certain as to where the funds he earned went.

[15] I have no difficulty in accepting the evidence of Ms. Ryan that the parties kept their finances separate following the separation in 1995. Ms. Ryan testified that she had to cancel a joint line of credit because Mr. Ryan withdrew monies from it without repayment. She indicated that she was unaware of why he withdrew monies from the line of credit further lending credibility to the parties' separate finances. Additionally, Ms. Ryan testified that she provided Mr. Ryan with her credit card in order to repair the front steps of the home. He refused to return the card when requested and when the card was returned, he had charged \$4,000 in relation to gambling.

[16] A rental property was purchased in Ms. Ryan's sole name in 2002. Ms. Ryan indicated that she wished to have this rental property to assist in her retirement years as her pension from Canada Post would have been drastically smaller than the pension of Mr. Ryan. Her evidence was that she bought, managed and maintained the property with minimal assistance from Mr. Ryan. She indicated that Mr. Ryan did install floors and did some painting. Ms. Ryan further

testified that she paid him for his work on the rental property. Ms. Ryan stated that on one occasion a tenant did not pay and Mr. Ryan offered to speak to him as he thought it would be more appropriate for a man to speak to him.

[17] Mr. Ryan's evidence is in stark contrast. He indicated that they both purchased the rental property and that he acted as "the landlord/ superintendent". He testified that he did everything in relation to the rental property. Other than the *viva voce* evidence of Mr. Ryan, there is nothing to support Mr. Ryan's claims. Mr. Ryan did not dispute that the mortgage for the rental property was solely in Ms. Ryan's name as a result of his poor credit rating. He did not dispute that Ms. Ryan managed all of the finances related to the property. He did not contradict the fact that there was a superintendent in the building who worked for Podium Properties. Ms. Ryan testified that Mr. Ryan's assistance with the rental property was minimal and he was paid for any work done by him.

[18] Ms. Ryan testified that Mr. Ryan's drinking was an ongoing problem in their relationship. She testified that his drinking increased to the point where he was going to a friend's home or a bar almost every night and coming home drunk. Mr. Ryan confirmed that he has had issues with gambling and alcohol consumption. He testified that his issues with alcohol resurfaced in 2011.

[19] The parties' final separation occurred in March, 2013. Ms. Ryan had discovered that Mr. Ryan had been unfaithful and the parties separated. Following the separation, Mr. Ryan was off work due to stress leave and received disability payments. Evidence was provided of the difficulties encountered by Mr. Ryan during the months following separation which included an encounter at the matrimonial home resulting in criminal charges being laid against him. Despite these difficulties, Mr. Ryan had the support of various family members including his sister. He also noted the assistance of various friends, including Mr. Gannon and Mr. Marsman. He rekindled a relationship with a woman and travelled to Arizona for a week to visit with her.

[20] In September 2013, Ms. Ryan contacted Mr. Ryan to advise that she wished to discuss a financial settlement between them. She further advised Mr. Ryan that she was going to be filing for divorce. Based on discussions between the parties there appeared to be an agreement reached. Ms. Ryan then retained legal counsel to draft a separation agreement based on the discussion of the parties.

[21] In October, 2013, Mr. Ryan secured rental accommodations. He indicated that he had decreased his alcohol consumption somewhat. By early November

2013 he had returned to work. Text messages sent in mid to late October, 2013, were entered into evidence. Those text messages disclose Mr. Ryan's growing impatience with having an agreement drafted by Ms. Ryan's lawyer.

[22] The impatience of Mr. Ryan grew to the point on November 8, 2013, when he advised Ms. Ryan that she could forget about it and he would go with "his lawyer". Mr. Ryan referenced meeting with "his lawyer" in discussions with Ms. Ryan. He confirmed having met with legal counsel in relation to his separation from Ms. Ryan. In late November, Mr. Ryan advised that if the Separation Agreement had not been prepared by Ms. Ryan's lawyer that he would take charge himself. He continued to press for both the written agreement and the equalization payment that he was receiving pursuant to the agreement. Mr. Ryan confirmed that he travelled to Arizona for a week to visit with a female friend to "take a step back from the situation and gain perspective" (reference paragraph 111 of Mr. Ryan's affidavit).

[23] An agreement was drafted by Ms. Ryan's counsel in November, 2013. Ms. Ryan testified that the agreement contained the terms as agreed upon by the parties. Mr. Ryan did not dispute the written agreement reflected the parties' negotiation. Mr. Ryan picked up the Separation Agreement from Ms. Ryan's counsel on November 27, 2013.

[24] Mr. Ryan and Mr. Marsman testified to the fact that they drank together that evening. The affidavit of Mr. Marsman indicated that the two men purchased beer, Grand Marnier and some Ameretto shooters. He testified that Mr. Ryan drank 9-10 beer and four shots of alcohol. On cross examination, however, Mr. Marsman could not recall where he picked Mr. Ryan up that evening, could not recall the specific date, could not remember how much was drank by either himself or Mr. Ryan and could not remember signing the agreement.

[25] What is known is that Mr. Marsman and Mr. Ryan spent a few hours together the evening of November 27, 2013, consuming alcohol together. Later in the evening Mr. Marsman returned home. The following morning, Mr. Ryan dropped off a signed Separation Agreement to the office of Ms. Ryan's counsel, (November, 28, 2013).

[26] Mr. Ryan received the two instalments of the equalization payments due pursuant to the Separation Agreement. In January 2014 when he was confirming the second instalment of the equalization payment, Mr. Ryan texted Ms. Ryan and stated, in part:

“... You know I could have taken so much more...”

[27] The Separation Agreement contained terms related to all financial matters including the issue of child support. The Agreement provided for Mr. Ryan to pay monthly child support to Ms. Ryan at a level lower than the applicable table amount of support. Despite agreeing to pay a lowered amount of child support to Ms. Ryan in 2013, Mr. Ryan did not pay any child support until ordered by this court to do so in June 2017.

LAW & DISCUSSION

[28] The sole issue before the court is the validity of the Separation Agreement dated November 2013. Both counsel referred the court to the cases of *Miglin v. Miglin*, [2003] 1 S.C.R. 303 (S.C.C.), as well as *Baker v. Baker*, 2012 NSCA 24. There is a two stage analysis pursuant to *Miglin*, supra:

Stage One: Have the circumstances that led to the signing of the separation agreement been tainted as a result of oppression, pressure or vulnerabilities? There must evidence of a fundamental flaw in the negotiation process. Further, does the Agreement substantially comply with the objectives of the Divorce Act?

Stage Two: As stated by the Court of Appeal in *Baker*, supra, at paragraph 26:

“Stage two moves the gauge forward in time to assess whether the parties “find themselves down the road of their post-divorce life in circumstances not contemplated” (para 87). Justices Bastarache and Arbour said:

88 ... the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties’ intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.”

[29] The court in *Baker*, supra, cited with approval the principal stated in the case of *Rick v. Brandsema*, 2009 SCC 10. *Rick v. Brandsema* confirmed that the *Miglin* analysis offers guidance when examining the validity of agreements in the

context of the division of matrimonial property. In *Rick v. Brandsema*, supra, the court held at paragraphs 44-45:

[44] Where, therefore, “there were any circumstances of oppression, pressure or other vulnerabilities”, and if one party’s exploitation of such vulnerabilities during the negotiation process resulted in a separation agreement that deviated substantially from the legislation, the Court in Miglin concluded that the agreement need not be enforced (paras. 81-83).

[45] Notably, the Court also stressed the importance of respecting the “parties’ right to decide for themselves what constitutes for them, in the circumstances of their marriage, mutually acceptable equitable sharing” (para 73). Parties should generally be free to decide for themselves what bargain they are prepared to make.

[30] In the present case, the court must first determine whether there was some sort of vulnerability on the part of Mr. Ryan during the negotiation process.

[31] Mr. Ryan indicated that he was vulnerable in the negotiations with Ms. Ryan as a result of his mental health. He indicated his mental health was compromised as a result of severe depression as well as alcohol consumption. There was no admissible medical evidence provided to the court in relation to the mental health issues of Mr. Ryan. The parties did testify, however, to incidents involving Mr. Ryan which were indicative of mental health issues for Mr. Ryan.

[32] The most significant incident occurred in or around August 2013. At that time, Mr. Ryan went on a binge drinking episode and attended the home of a friend. His affidavit evidence indicates that he considered suicide and took a knife with him from his friend’s home and went to Seaview Park. While there he reconsidered taking his life and left the Park. He attended at the family home inebriated and in a poor mental state. Mr. Ryan advised Ms. Ryan that he had contemplated suicide. Mr. Ryan’s evidence was that Ms. Ryan was sympathetic to him and advised that he would be alright. She also allowed Mr. Ryan to sleep on the couch at the matrimonial home that night.

[33] Mr. Ryan testified that after that evening he began to make positive changes. He found a two bedroom apartment near the matrimonial home. He also testified that he had curbed his drinking to a degree. He had also rekindled a relationship with a friend and travelled to see her in Arizona.

[34] Evidence of Mr. Ryan's circumstances around the negotiation and signing of the agreement confirmed the following:

1. He had returned to full time work.
2. He had secured rental accommodations.
3. He had travelled to the States to visit a friend and to gain perspective on the separation
4. He had consulted legal counsel
5. The discussions regarding the division of the finances did not occur for six months following separation.
6. Discussions between the parties regarding financial matters took place over a number of months.

[35] Despite these positive circumstances, Mr. Ryan indicates that he was still struggling with mental health issues when the Agreement was signed. Compounding these difficulties is the fact that there was no formal financial disclosure provided prior to the execution of the Agreement. Although the parties are free to contract and to waive the requirement to provide financial disclosure, the court must examine this as one of the factors to be considered in assessing the ability of the parties to negotiate fairly.

[36] One must examine the totality of the circumstances in determining whether there were vulnerabilities on the part of Mr. Ryan to the extent contemplated at the first stage of the *Miglin* test. I accept that based on these particular circumstances, Mr. Ryan may have been in a vulnerable position.

[37] I must then determine whether Ms. Ryan took advantage of his vulnerability. To the contrary, it was Mr. Ryan pressuring a conclusion to their financial matters. Evidence confirmed he wanted the agreement signed and wanted his equalization payment from Ms. Ryan.

[38] Even if I were to conclude that there were vulnerabilities on the part of Mr. Ryan that were taken advantage of by Ms. Ryan, I would be unable to conclude that the agreement did not conform with the legislative parameters of the *Matrimonial Property Act*. Pursuant to section 12 of the *Matrimonial Property Act*, there is a presumption of equal sharing of matrimonial property.

[39] Section 29 of the *Matrimonial Property Act* states as follows:

“Harsh or fraudulent contract or agreement

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.”

[40] In determining the unconscionability of the provisions related to property division, the court must be provided with evidence as to what would have been a fair and equitable division. Mr. Ryan has indicated that he wishes the court to re-apportion the property division to allow him to make a claim as it relates to the rental property and to the matrimonial home. The most significant error in this approach would be that it would allow Mr. Ryan to cherry pick the provisions he wishes to change for his financial gain while ignoring others.

[41] Accepting Mr. Ryan’s proposition would fail to recognize that Mr. Ryan kept his employment pension. The largest evidentiary gap in this proceeding was the value of various matrimonial property including the pensions of each of the respective parties. It is an impossible task for the court to determine the extent of a fair division of matrimonial properties when it has not been provided with the figures to conduct an appropriate analysis. It is clear, however, that Mr. Ryan’s pension would be greater given his years of service and his full time employment (as compared to Ms. Ryan’s years of partial employment).

[42] Further, Mr. Ryan did not request any re-visitation of the provisions related to child support. The Agreement discloses a monthly child support payment below the amount provided for in the Federal Child Support Guideline tables. Despite setting the amount payable, Mr. Ryan never abided by the terms of settlement and did not pay child support to Ms. Ryan.

[43] It is also clear that there were issues of alcohol use and gambling during the course of the marriage on the part of Mr. Ryan. Ms. Ryan maintained consistency and stability for the children of the marriage. She was primarily responsible both during the marriage and after to ensure that bills were paid and there were reasonable and appropriate arrangements for the children. These factors may have been considered by the court in an analysis pursuant to section 13 of the *Matrimonial Property Act* for an unequal division of matrimonial property in favour of Ms. Ryan.

[44] Mr. Ryan has not met the burden on him to vitiate the Separation Agreement dated November 28, 2013. Although there may have been vulnerability on the part of Mr. Ryan in the negotiation process, there is no evidence that the agreement reached was unfair and unconscionable in the circumstances. The Separation Agreement is valid and enforceable.

Chiasson, J.