SUPREME COURT OF NOVA SCOTIA
Citation: *MacLeod v. Marshall*, 2018 NSSC 302

Date: 20181128
Docket: *Halifax* No. 1201-070014
Registry: Halifax

Between:

Alan MacLeod

Petitioner/Applicant

v.

Shellie Marshall

Respondent

Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	May 28, 29, 30 & 31, 2018, in Halifax, Nova Scotia

Counsel:	Yvonne R. LaHaye, Q.C., for the Petitioner/Applicant Shellie Marshall, on her own behalf

By the Court:

[1] Alan McLeod and Shellie Marshall were married on July 21, 2006. They had been cohabiting since July of 2004. The parties did not agree on the date of separation. There are no children of the marriage. This has been a very contentious and difficult matter. The parties have been before the court a number of times prior to their divorce trial. At the time of the divorce trial 21 exhibits were tendered into evidence. All admissible evidence properly before the court was considered.

PRELIMINARY MOTIONS

[2] There were preliminary motions made at the commencement of the trial on behalf of Ms. Marshall. Ms. Marshall requested an adjournment in order to provide the court with further documentation. She indicated that she wished to introduce medical reports and police reports. The request for adjournment was denied.

[3] In considering a request for adjournment, the court is guided by the principles set out in *Darlington v. Moore,* 2012 NSCA 68. The Court of Appeal stated at paragraph 38:

> 38 Therefore, in reviewing the application judge's decision in this matter we must give deference to the exercise of her discretion. In Caterpillar Inc., this Court was considering the application of Rule 4.20(3) in considering a motion for an adjournment of a trial heard after the finish date. Rule 4.20(3) (as it was then) provided:
>
> > 4.20 . . .
> >
> > (3) A judge hearing a motion for an adjournment after the finish date must consider each of the following:
> >
> > (a) the prejudice to the party seeking the adjournment, if the party is required to proceed to trial;
> >
> > (b) the prejudice to other parties, if they lose the trial dates;
> >
> > (c) the prejudice to the public, if trials are frequently adjourned when it is too late to make the best use of the time of counsel, the judge, or court staff.

[4] I denied the request for adjournment on the following basis:

1. A date assignment conference was held on March 22, 2017 to ensure that the matter was moving forward before the court.
2. In September 2017 a pre-trial was held. Ms. Marshall had hired legal counsel that morning and the matter was put over.
3. In October 2017 counsel for both parties participated in a telephone conference. The conference was to ensure that discovery examinations would proceed as Ms. Marshall had requested an adjournment of the discovery examination. The matter was set over for a further organizational pre-trial.
4. In November 2017 counsel for both parties participated in a telephone conference to address the issue of trial readiness. The matter was put over to January 11, 2018 to allow Ms. Marshall's counsel to review the file and to address outstanding issues of disclosure made by counsel for Mr. MacLeod.
5. In January 2018 a further pre-trial conference was held to discuss trial readiness. Counsel was directed to provide names of witnesses at the next conference to be held. The matter was set for trial in late May 2018 and was referred to a case management justice on February 16, 2018.
6. The case management conference was put over to March 2018 because documentation had not been filed.
7. At no time during any of the pre-trial conferences or even at the time of the case management conference was the issue of evidence regarding medical records or police records brought up by Ms. Marshall or her counsel.
8. The request for an adjournment to gather this documentation was not made until May 4th and not forwarded to counsel for Mr. MacLeod until May 18, 2018.

OUTSTANDING ISSUES

[5] The issues before the court are:

1. Granting of a divorce;
2. Date of separation;

3. Spousal support- arrears, retroactive recalculation and prospective; and

4. Property Division.

BACKGROUND

[6] The evidence before the court confirmed the tumultuous nature of this relationship. Both parties confirmed their struggles with alcohol addiction, having been through various detox programs. Ms. Marshall alleges that she was the victim of domestic violence. Mr. MacLeod acknowledges that there were significant difficulties between the parties. He indicated that both parties could become aggressive to one another during arguments (particularly when they were both intoxicated).

[7] Both parties confirm that they lived together from 2004 and were married on July 21, 2006. At the time of their marriage, Ms. Marshall was 33 years old and Mr. MacLeod was 45. When the parties commenced cohabitation, Mr. MacLeod was working as a dentist full time. Ms. Marshall was working in an administrative capacity in a dental office. During their relationship the parties also pursued various business ventures including buying and renovating properties that they would sell or rent.

[8] The parties agree that Ms. Marshall left the matrimonial home on August 31, 2008 to reside in one of their rental properties (27 Lumsden Crescent). Although the parties were living in separate physical residences, they continued to have sexual relations on occasion. On November 5, 2009, Mr. MacLeod attended at the Lumsden residence. Mr. MacLeod found Ms. Marshall in bed with the man he had hired years earlier to be his accountant. As a result of the incident which ensued, Mr. MacLeod was charged with uttering threats and he subsequently pled guilty. Following this incident, Ms. Marshall travelled to Mexico with this gentleman around the Christmas holiday.

[9] On August 24, 2010, Ms. Marshall filed a Notice of Motion for Interim Relief pursuant to the former *Maintenance and Custody Act* RSNS 1989, c.160, seeking interim spousal support and costs. The hearing of the interim motion was scheduled for September 29, 2010 (Exhibit 11, tab 7). In support of the motion Ms. Marshall filed an affidavit sworn on August 6, 2010 (Exhibit 11, tab 9). The affidavit discloses that the parties physically separated in August 2008 but continued to work on reconciliation until June 2010. At that time she alleged that

she was no longer able to continue to consider reconciliation after threats and acts of Mr. MacLeod.

[10] Mr. MacLeod did not attend the hearing on September 29, 2010. He filed no evidence. Income was imputed to Mr. MacLeod and interim spousal support was set at $5,000 per month commencing in October 2010. This matter proceeded under the *Maintenance and Custody Act, supra*. Evidence provided by Ms. Marshall omitted to advise the court that Mr. Marshall had an existing child support obligation of $2,400 per month. The matter was then set over for a full day hearing. The hearing, however, was adjourned at the request of Ms. Marshall as she was attending a rehabilitation program in California regarding her issues with alcohol.

[11] The interim motion for spousal support did not return to court for further adjudication. A final order for spousal support was not made by the court in relation to the *Maintenance and Custody Act* proceeding. The matter then returned to court when Mr. MacLeod filed his Petition for Divorce in late 2016. The Divorce proceeding was heard May 28 – 31, 2018.

[12] The evidence disclosed that Mr. MacLeod has not worked as a dentist since January 2013. His alcoholism had reached a point that rendered him incapable of working in his profession. The level of his disability is detailed in his affidavit evidence. He attended a rehabilitation program in the spring of 2015 and has been sober since that time.

[13] His dental practice was sold in the fall of 2013 and once liabilities of the dental practice were paid he received $47,548.49. Particulars of the sale of the dental practice were provided to Ms. Marshall (Reference Exhibit 10).

[14] In March 2015 Mr. MacLeod declared bankruptcy. Liabilities were stated to exceed $730,000 at that time. At the time his monthly income was $1,800 from an RIF with Transamerica. That RIF is now exhausted. His disability insurer had cancelled his benefits in 2013. He retained a lawyer to have his benefits reinstated and received a lump sum payout from the insurer in the fall of 2016 in the amount of $426,663. Of this amount, $110,000 was paid in relation to debts owing to the trustee in bankruptcy.

[15] When the parties began cohabitation Ms. Marshall was earning approximately $20,000 per year in an administrative position in the dental practice.

She left that position to work in a business venture with Mr. MacLeod called MarMac Properties. This company was a property management company.

[16] Ms. Marshall testified that in approximately 2005/2006 she went to work for World Financial. She indicated that she was the face of the company that had 45 brokers and two branch managers. She stated that she taught financial strategies to clients, offered information to clients on tax breaks, capital gains, mortgage repayments, building your own company, etc.. She indicated that she travelled and marketed this company throughout the Atlantic Provinces.

[17] From 2011 to 2013 she worked for Focal Point. Her responsibilities included sales and marketing. Ryan Hayman had hired her for the position. She became romantically involved with Mr. Hayman in approximately November of 2011. She testified that she vacationed at various times with Mr. Hayman in Florida and visited his family between 2011 and 2014. She continued to see Mr. Hayman occasionally between 2014 and 2018.

[18] In 2015 Ms. Marshall began a relationship with Michael Kehout. She testified that she moved in with Mr. Kehout in October 2015 but two weeks after she moved in he called the police and kicked her out. She testified that she and Mr. Kehout have been on and off again in their relationship over a number of years. Ms. Marshall indicated that she and Mr. Kehout travelled occasionally including a trip to Mexico in 2016. She also testified to various trips to visit Mr. Kehout's family members.

[19] Since working at Focal Point she has held various positions. Currently she is self employed as a painter and a cleaner. She has a company, Cutting Edge, which had been in her mother's name but was transferred into her name in 2017.

[20] Mr. MacLeod filed a Petition for Divorce on December 9, 2016. The stated ground for divorce was a breakdown in the marriage in that the parties had been living separate and apart since July 1, 2010. Ms. Marshall's position is that despite the physical separation of the parties, the parties remained married and not separated for years thereafter. Ms. Marshall was repeatedly provided the opportunity by the court to provide her position on the date of separation of the spouses.

[21] A conference was held before Associate Chief Justice O'Neil on March 21, 2018. At that time, Ms. Marshall indicated that the parties did not separate until

summer or fall of 2014. By the time of trial, Ms. Marshall's position had changed and she indicated that the parties separated in 2016.

[22] Ms. Marshall filed an Answer to the Petition on April 6, 2017. Her Answer includes a reference to disputing the ground of marriage breakdown based upon one year's separation. She alleges at page two of her Answer that Mr. MacLeod treated her with physical or mental cruelty of such kind as to render intolerable the continued cohabitation of the spouses.

[23] Ms. Marshall has urged the court to consider her as the victim of domestic violence over a number of years. Mr. MacLeod also provided evidence that Ms. Marshall physically attacked him on occasion (punching him in the head and attacking him from behind). Given the time since separation, the conflicting evidence of the parties, the level of alcohol abuse of both parties and the findings of credibility, it is impossible to adopt the fault based analysis Ms. Marshall wishes the court to embark upon.

LAW & ANALYSIS

DATE OF SEPARATION

[24] Although they differ on the date of separation, the parties both confirm they have been living separate and apart for over one year. Based upon the totality of the evidence I find that the parties were living separate and apart as defined under the *Divorce Act*, RSC 1985 (2nd Supp.), C.3, (as amended) as of July 1, 2010.

[25] Section 8(3)(a) of the *Divorce Act, supra*, states that: "spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other." Subsection 3(b)(ii) indicates that a period of separation will not be interrupted if the spouses reside for a period in excess of 90 days with reconciliation as the primary purpose. I find that Mr. MacLeod and Ms. Marshall have been living separate and apart as of July 1, 2010.

[26] I will highlight some of the more salient points of evidence in making that determination:

1. Both parties claimed they were separated on their income tax returns every year commencing in 2008;

2. Ms. Marshall filed a sworn affidavit with this court in August 2010 declaring that she was separated from Mr. MacLeod as of July, 2010. Further, she indicated in the affidavit that there was no possibility of reconciling with Mr. MacLeod.

3. Ms. Marshall has been romantically involved with a number of individuals since 2009, even travelling internationally with them on occasion.

4. Although the parties had sexual relations after their physical separation in August 2008, there is no evidence that the parties resided for any period of time totaling or in excess of 90 days thereafter with the primary purpose of reconciliation.

5. Ms. Marshall continued to seek enforcement of the payment of spousal support through the Maintenance and Enforcement Program in 2013 – 2015.

[27] The law is clear that parties may be considered to be living separate and apart notwithstanding sexual relations between them. Justice Jollimore reviewed the case law related to a contested date of separation in the case of *Wells v. King* (2015), NSSC 232. At paragraphs 22 and 23 of her decision she states:

> [22] Ms. Wells makes much of the parties' sexual relations.
>
> [23] In *K.L.S. v. D.R.S.*, 2012 NBCA 16, the New Brunswick Court of Appeal addressed the question of when a separation exists. On behalf of the majority, Justice Green said, at paragraph 23, "surely we must also be open to the possibility that an estranged couple who no longer share a residence may at law be living separate and apart even though, for whatever reason, they continue to engage in consensual sexual activity with one another." I accept this possibility.

[28] I also refer to the case of *Oliver v Oliver*, 2011 BCSC 1126 in which the parties disagreed over the date of separation. At paragraph 95 of the decision, Justice Fenlon states:

> Determining when a marriage ends involves considering a number of factors, including sexual relations, joint social ventures, and communication and discussion of family problems: McKenna v McKenna (1974), 19 R.F.L. 357 (N.S.C.A.). Another factor is cohabitation. Parties are often found to be living separate and apart under the same roof, but it will be a rare case where they will be considered in a married relationship while choosing to reside long-term in separate residences…

[29] I do not find that the sexual contact between Mr. MacLeod and Ms. Marshall constitutes a termination of their separation. There is no evidence before me that the parties resided together with the primary purpose of reconciliation in excess of 90 days after July 1, 2010. The evidence of Ms. Marshall that the parties did not separate until 2014 (or 2016 as stated at trial) is not credible.

[30] Findings of credibility are within the purview of the trial judge. The factors in determining credibility of parties have been reviewed in numerous cases including the case of *Baker-Warren v. Denault*, 2009 NSSC 59, at paragraphs 18 and 19. Based on the totality of the evidence, where the evidence of Ms. Marshall conflicts with that of Mr. MacLeod, I accept the evidence of Mr. MacLeod. The numerous inconsistencies in the evidence of Ms. Marshall, both in oral testimony and in documentary evidence leads me to that conclusion.

SPOUSAL SUPPORT

[31] In her submissions, Ms. Marshall requested that the court enforce the interim spousal support order issued in September, 2010, while at the same time accepting that the parties were not living separate and apart. The court rejects that argument. Entitlement to spousal support arises as a result of and at the time of the separation of the parties. There is no entitlement to spousal support if the parties are not yet separated.

[32] Spousal support was paid by Mr. MacLeod up to 2013 when he went off work due to disability. There is discrepancy between the parties as to the amount of spousal support paid (which is set out in further detail below). It should be noted that the quantum of spousal support ordered in 2010 was set in the absence of evidence that Mr. MacLeod had a child support obligation to a former spouse in the amount of $2,700 per month at the time the spousal support order was made. Had the court been aware of the child support obligation, spousal support would have been adjusted accordingly.

[33] There is no question that Ms. Marshall was entitled to spousal support when the parties separated in July 2010. Mr. MacLeod was still employed as a dentist and the income disparity between the parties was evident. The income tax returns of the parties filed in 2010 disclose Ms. Marshall's income to be $21,250 in dividends and $15,000 in spousal support (Exhibit 12, tab 7), and Mr. MacLeod's line 150 income (after Re-Assessment) to be $357,254 (prior to Schedule III adjustments) (Exhibit 8, tab 8).

[34] At the time of separation in July, 2010, Ms. Marshall was 37 years old. From the commencement of the parties' cohabitation in 2004 to their separation in 2010 is a period of six years. Based on the Spousal Support Advisory Guidelines, the duration of spousal support was a period of 3 to 6 years from the date of separation subject to variation or review. Inputting the relevant financial information (inclusive of the child support obligation of Mr. MacLeod) results in spousal support payable in the range of approximately $1,820 to $2,420 in 2010. This is far less than the $5,000 payable pursuant to the interim order. Mr. MacLeod, however, never sought a variation of the interim order for spousal support. At the time of filing the Petition for Divorce, Mr. MacLeod sought a termination of spousal support as of 2013 when he ceased to be employed.

[35] I have taken into account section 15.2 of the *Divorce Act, supra*, and the factors noted in subsection (4). I have also taken into account the objectives of a spousal support order as set out in subsection (6). I have also considered all relevant case law inclusive of the leading cases on spousal support of *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.); and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.).

[36] This was a relatively short term marriage. There were no children of the marriage. There is no evidence that Ms. Marshall's career was negatively impacted by the marriage. There is no evidence that the roles of the parties during the marriage was anything other than a partnership with both parties continuing to work throughout the marriage. Although issues with alcohol were prevalent throughout the marriage, both parties suffered the effects of alcoholism. Ms. Marshall's entitlement to spousal support is on a non-compensatory basis.

[37] As stated by Justice Goodfellow in the case of *Day v. Day 1994*, CarswellNS 133, at paragraph 45:

> …It is perhaps an oversimplification on my part to simply say that the realities that exist upon breakdown of the marriage must be addressed, and when you have something like illness, disease or disability, whether or not such results in an entitlement to maintenance, particularly when such may be of a long term nature, depends very much on s. 15(5) of the Divorce Act. In many cases the length of the marriage and the functions performed by each spouse during such lengthy marriage or cohabitation are likely to be the determinative factors. If this marriage had lasted only 18 months, then quite likely there would not be any entitlement to maintenance, or if an entitlement, one that would be addressed by a very short limited time order or perhaps a minimum lump sum order for any adjustment that might be appropriate.

[38] I find it appropriate in the circumstance that spousal support ought to have been paid up to 2016, six years post separation. Although Mr. MacLeod ceased to be employed in 2013, he did have funds available to him through his RIF and disability payments (paid in a lump sum in 2016). The issue is the quantification of that support and the credits to be given to Mr. MacLeod for the payment of support.

[39] Turning first to the quantification of support. Spousal support ought to have terminated in 2016, six years post separation. As of July 2016, according to the MEP records, the balance owing to Ms. Marshall was $70,690.02 (Exhibit 10, tab 9). This is premised on spousal support payable at a rate of $5,000 per month. As noted above, this figure is excessive when one applies the appropriate ranges pursuant to the Spousal Support Advisory Guidelines. For example, Mr. MacLeod's income in 2014 was $70,005 (the majority of the income coming from RRSP's). In 2015 his income was $29,400.

[40] Mr. MacLeod asserts that the figure noted in the Maintenance Enforcement Program is incorrect as he provided monies directly to Ms. Marshall for her support. His calculation results in a credit to him of $108,087.45. This credit relates to additional cash payments, e-transfers and third party payments. Ms. Marshall does acknowledge that a number of payments made by Mr. MacLeod in November 2013 were not included in the records of the Maintenance Enforcement Program (Exhibit 9, tab 13, p2). These amounts total $2,740 which must be deducted from the balance of $70,690.02.

[41] Since July 1, 2016, the Maintenance Enforcement Program has collected the sum of $3,445.52. This amount should be deducted from the balance owing. Therefore the amount owing pursuant to the Maintenance Enforcement Records is $64,504.50 if spousal support had terminated on July 1, 2016.

[42] Mr. MacLeod seeks the following additional credits as against the amount owing:

1. In December 2010 he gave a $5,000 cheque to Ms. Marshall's mother (Exhibit 9, tab 11)
2. In December 2010 he paid $34,547.45 to Passages Addiction Rehabilitation Centre in Ventura, California.
3. In December 2011 he wrote a cheque to Ms. Marshall for $49,000 (Exhibit 9, tab 11)

4. In 2011 Mr. MacLeod transferred an additional $11,000 to Ms. Marshall (Exhibit 9, tab 12).
5. In June 2012 Mr. MacLeod provided e-transfers amounting to $1,300 (Exhibit 9, tab 12).
6. In July 2012 Mr. MacLeod gave Ms. Marshall a cheque for $7,000. He acknowledges that she repaid $2,500. He seeks a credit for the outstanding balance of $4,500.

TOTAL: $105,347.45

[43] Ms. Marshall does not dispute that she received the funds. She disputes that these monies were paid in relation to spousal support. For example, she indicates that the cheque for $49,000 was paid to her as partial payment of lottery winnings of Mr. MacLeod received post separation (in November 2010). She provided evidence that the monies used to pay her rehab program in California were a gift and not subject to any condition of credit as against spousal support. Even if I were to accept the assertion that the monies paid to Passages is not an appropriate credit to be given, the balance of the monies paid exceed the balance owing ($105,347.45 less $34,574.45= $70,800 which is in excess of the balance owing of $64,504.50). The monies received on behalf of Ms. Marshall were not claimed on her tax return. As a result of the monies being received without tax liability, she received more than she would have had support been paid in the usual manner. She acknowledged receiving payments directly from Mr. MacLeod at various points because CRA had "froze[n] [her] accounts".

[44] I accept that there are no further monies owing in relation to spousal support by Mr. MacLeod to Ms. Marshall. Any and all arrears currently noted in the records of the Maintenance Enforcement Program are to be adjusted to reflect a nil balance as of the current date. As a result, all pending enforcement actions taken by the Maintenance Enforcement Program will cease. Monies from Mr. MacLeod's lump sum disability payout are to be released to him.

PROPERTY DIVISION

[45] Pursuant to section 12 of the *Matrimonial Property Act*, RSNS 1989, c. 275 there is a presumption of equal sharing of matrimonial property. The case of *Simmons v. Simmons*, 2001 NSSF 35 (N.S. S.C.) has been repeatedly cited with approval by the court in Nova Scotia. *Simmons, supra*, sets out the principles for

the court to consider when dealing with a claim to divide matrimonial property. These principles were most recently cited with approval in the decision of *Ward v. Lucis*, 2018 NSSC 131.

[46] Mr. MacLeod asserts that there is no matrimonial property to be divided. His evidence is that any matrimonial property to be divided was lost in his bankruptcy. The issue from the court's perspective, however, is that the bankruptcy may not be determinative of the matrimonial property division. The separation of the parties occurred in July 2010 and the bankruptcy did not occur until 2015.

[47] Ms. Marshall confirmed on cross examination that she advised the court at an appearance in September 2010 that the parties had resolved the issues of property division. At the time of this hearing, however, Ms. Marshall asserted that she wished to have 50% of the matrimonial property as of 2016. As I have found the date of separation to be July 2010, therefore any claim to a division of matrimonial property would be as of that date.

[48] Ms. Marshall claimed that the lottery winnings of Mr. MacLeod are subject to division. I do not agree. The winnings were paid to Mr. MacLeod in November of 2011- post separation. The lottery winnings do not qualify as matrimonial property subject to division.

[49] Ms. Marshall acknowledged the significant indebtedness of Mr. MacLeod including the assumption of all matrimonial debt which led to his bankruptcy in 2015. It is worthy of note that at the time of Mr. MacLeod's bankruptcy in 2015, his liabilities exceeded $736,800. Ms. Marshall, however, in asserting her claim to divide the matrimonial property ignores the fact that much, if not all of the property was encumbered, lost in the bankruptcy and/ or paid out through the RIF (which is now exhausted).

[50] At the time of separation in July 2010 both parties had homes in their own names encumbered by mortgages. Both parties had vehicles- Ms. Marshall had a Mercedes and a truck and Mr. MacLeod had a Corvette, a Suburban, and an Echo. As at December 31, 2010, Mr. MacLeod had $112,500 in RRSP's and $81,000 in bank accounts. Any shareable equity in these assets is far overshadowed by the indebtedness including $587,829 owing to B2B Trust for investment loans (in addition to numerous other debts noted in his Statement of Property filed as Exhibit 6). Ms. Marshall acknowledged the debts to be matrimonial on cross examination as she stated that the parties "did everything together financially". In

2010, the relative equity position of the parties was negative. There was no further equalization payment due to Ms. Marshall in relation to the division of matrimonial property.

CONCLUSION

[51] I find that the jurisdictional matters required to grant a divorce have been established. I grant a divorce between the parties based upon the breakdown of the marriage on the ground that the parties have been separated in excess of one year prior to the granting of the divorce. I find that no further spousal support is payable and that the records of the Maintenance Enforcement Program shall be adjusted to show a nil balance owing. I find that there are no further monies owing to Ms. Marshall in relation to the division of matrimonial property.

Chiasson, J.