

2001

File No. 1201-56071
SFHD12249

IN THE SUPREME COURT OF NOVA SCOTIA (FAMILY DIVISION)

BETWEEN:

PAULETTE CECILIA COOLEN

- PETITIONER

- and -

RONALD JOSEPH COOLEN

- RESPONDENT

[CITE AS: COOLEN v. COOLEN, 2002 NSSF 6]

DECISION

Before The Honourable Justice Moira C. Legere on the 15th and 16th day of January, 2002.

DECISION: January 25, 2002

COUNSEL: Kay Rhodenizer - for Paulette Coolen
Richard Arab - for Ronald Coolen

LEGERE, J.

This is an Interlocutory Application for spousal maintenance coupled with a request for retroactive spousal maintenance or lump sum maintenance in the alternative. The interim application was filed August 30, 2001. The interim hearing was scheduled on September 25, 2001 for hearing on January 15, 2002. There is a Petition for Divorce dated the 10th of August, 2001.

The parties were married on June 12, 1999 and separated on March 25, 2000. The parties cohabited prior to the marriage commencing March (Mrs. Coolen) or September (Mr. Coolen) of 1990 to the date of marriage. There was no cohabitation contract prior to the marriage. It appears that the total period of cohabitation, admitted to by both parties, approaches the ten year mark.

This is a second marriage for the Respondent (the Applicant in this proceeding). I have no information whether there is a previous marriage for the Petitioner. The Petitioner, Mr. Coolen, was born July 7, 1948 and is 53 years old; the Respondent, Mrs. Coolen, was born on October 28, 1946 and is 55 years old. They were 42 and 44

approximately at the time they commenced living together.

As a result of a previous divorce settlement Mrs. Coolen remained in the matrimonial home with her two children. A lump sum award in favour of her former husband was secured as a lien against the home. Mrs. Coolen continued to live in this home with Mr. Coolen through the years of cohabitation and marriage. Mr. Coolen left this home in March of 2000.

The Respondent's two children are now independent and no longer live in the home. I have not been provided with the Minutes of Settlement or Corollary Relief Judgement that sets out the details surrounding her obligation to pay off the lien. I do not know whether the obligation to pay the lien was triggered as a result of the children's independence.

Prior to the commencement of cohabitation with Mrs. Coolen, Mr. Coolen lived in a condominium which he owned and sold when he commenced living with Mrs. Coolen. He advises that there were no proceeds from the sale of this condominium to bring into the marriage. At the time when their cohabitation began Mrs. Coolen was mortgage free.

I do not have detailed information about the manner in which Mr. and Mrs. Coolen negotiated their financial affairs. I do have information that shortly after they

began to live together in 1991 they established a joint bank account. Mr. Coolen advised that he understood all of their joint expenses, namely joint household expenses, would be paid out of this account. He advised that throughout the course of the relationship they would assess and reassess their contribution to the joint account based on their needs. His usual contribution was approximately \$500.00 bi-monthly.

There is a dispute about the classification of this line of credit. It is a dispute that will be settled at trial if not by agreement of the parties. It was set up with the consent of both parties through Mrs. Coolen's bank. Mr. Coolen is listed as a co-borrower on that line of credit. I have not been provided with sufficient evidence or asked to make an assessment as to whether this line of credit ought to be considered a mutual matrimonial debt. In the interim, however, both parties have signed it and both are clearly liable to the bank although Mr. Coolen is currently not assuming any on-going responsibility to pay down the debt.

This line of credit is currently being serviced by the Respondent, Mrs. Coolen. In part, as a result of the breakdown of the marriage and the financial situation resulting from that, Mrs. Coolen seeks spousal support. To the limited extent necessary I have been given evidence relating to the debts being serviced by Mrs. Coolen.

The debt was created, in Mr. Coolen's evidence, to address any unexpected expenses such as emergency repairs for the home. It was entered into shortly after the

1994/95 years when they had to enter into fairly significant roof repairs.

The line of credit was maximized prior to the date of the marriage on June 12, 1999 but within the period of cohabitation. Mr. Coolen argues that he was unaware of the extensive expenditures resulting in a balance as of June 15th of \$43,195.26. He was unaware of and did not consent to the use of this money to maintain the household as it was set up for emergency or unexpected costs. He was not aware it had been used for anything else. In January 2000 when he attempted to obtain a bank loan himself he was advised that the line of credit was presently maximized.

He alleges the following:

1. He was never advised that Mrs. Coolen accessed the line of credit;
2. He was aware of no emergencies that would require access to the money;
3. He was unaware that it was being accessed on a regular basis.

The line of credit was originally established in August 1996 and he indicates he learned at Discovery in December 2001 that Mrs. Coolen had taken \$15,000.00 from the line of credit to pay off a line of credit in her name alone through which she had purchased her Mazda. He indicates he did not see any of the bank statements concerning this line of credit.

He has analyzed the statements and believes that the entire debt is Mrs.

Coolen's responsibility. He advises that he believes she accessed \$9,358.51 as cash advances and \$28,018.73 for personal expenditures. He indicates that she used it prior to the marriage for her own purposes and never paid down the line of credit at any time. The line of credit is, of course, secured by the matrimonial home.

Mr. Coolen has provided the court with a summary of the transactions with respect to this line of credit commencing September of 1996 and continuing through to October 31, 2001. Unfortunately some of the items, indeed most of the items, are difficult to identify or classify. Both parties have difficulty reconstructing where the funds went. Simply put, the parties are going to have to reflect on and attempt to verify the purchases associated with this statement if they are going to assist a trial judge in determining and classifying whether and to what extent this is a matrimonial debt. That is not my task.

I do have evidence concerning one purchase that has been clearly identified. On October 31, 1996 a cheque was written in the amount of \$1385.27 and on the 9th of October roofing materials was purchased. The cheque is identified for roofing materials by hand writing on the statement. I do not have a copy of the actual cheque. What I do have is a sales receipt delivering building materials to Mr. Andrew Lambert, brother of Mrs. Coolen. He repaired the roof. This evidence has not been controverted by Mr. Coolen. That leads me to conclude that at least one purchase was made to maintain the matrimonial home and which directly benefitted Mr. Coolen.

Mrs. Coolen is unable to identify and recollect with sufficient clarity purchases as they relate to this account. She does indicate that she purchased gifts for Mr. Coolen and paid for their extravagant wedding out of this account. She is unable to identify any significant expenditures, however. In addition, there are insurance payments made from this account on the increasing balance as it grew and those insurance payments insured repayment in the event of death of either of the parties. Clearly, prima facie, this was a joint debt with joint legal responsibility and the insurance would have benefitted both parties.

Mrs. Coolen gave evidence that when the joint household account was overdrawn monies were taken from the line of credit to pay the household expenditures. She advised that she fairly frequently raised the issue with Mr. Coolen, indicating that she did not have sufficient funds to cover the joint expenditures.

While I do not doubt his lack of knowledge of the exact details of the account it appears on the face of the evidence to beg the question how could Mrs. Coolen and he sustain the extent of their mutual expenditures and lifestyle on their separate salaries if the line of credit was not used. The evidence of her contribution to the wedding, to gifts for him and their friends could be sustained only with additional monies. It ought to have been obvious.

Not having the specific information necessary to make a determination on the classification of this asset I accept the testimony of both parties that the debt is prima facie a joint debt. Both are jointly responsible to the bank and I will leave to the trial judge the allocation and determination as to its status and division.

In September of 1994 Mrs. Coolen negotiated a mortgage with the Toronto Dominion Bank for approximately \$60,000.00. A portion of the funds paid off the lien against the house which she owed to her former spouse. The evidence of Mrs. Coolen is that with the remainder of the monies (approximately \$10,000.00 - \$15,000.00) she paid off some mutual debts.

Mr. Coolen admits that after separation he continued to consider himself obliged and continued to make regular contributions to the joint bank account in the amount of \$500.00 bi-monthly. He believed he was obliged to contribute to the outstanding mortgage. Post-separation he believes he contributed approximately \$9,500.00 into the joint account. As of December 2000 he advises the outstanding balance of the mortgage was approximately \$23,777.00. On September 28, 2000 Mr. Coolen decreased his monthly payment to \$200.00 bi-weekly. He indicates he continued to make the payments because he felt badly, because he hoped that Mrs. Coolen would be able to re-establish herself, that he hoped to amicably enter into separation negotiations and resolve their dispute without the need for court application and he felt this was a mutual debt and that he had some responsibility to it. He reduced the payment from \$500.00

bi-monthly to \$200.00 bi-monthly because he was no longer obtaining the benefit of living there. He wanted to pay for his own living accommodations and utilities as he commenced living in his mother's home which is mortgage-free.

As a result of the separation Mrs. Coolen is absorbing full responsibility for this debt. Because of this she indicates in her affidavit that she cannot maintain the house, service the line of credit, keep her car functioning and meet her daily needs without interim support from her husband.

Mr. Coolen and Mrs. Coolen have filed Statements of Property and clearly both have several separate financial responsibilities. The assessment of that, again, is not before me.

Both entitlement and quantum are at issue with respect to spousal support. Mr. Coolen's counsel argues strenuously against any retroactive assessment of spousal support at an interim hearing. He also maintains that there is no entitlement and that there is no evidence of need. He argues that should I require spousal support because she is paying the debt that I am interfering with the division of property.

The parties are in significantly different financial situations. They lived extravagantly given their current financial circumstances. Mr. Coolen continues to live fairly extravagantly given they are in the throes of separation. The evidence causes me

to conclude that if I find entitlement, there is an ability to contribute.

At the time the parties began cohabiting Mrs. Coolen was still in receipt of child support from her former spouse. That terminated when the children became independent. Mr. Coolen recalls that it terminated within a few years of their cohabitation. At the time Mrs. Coolen began working increased hours, leading to full time work at Kings College Library. She earns \$27,880.00 annually. Mrs. Coolen has been working for approximately ten years at Kings College Library and works regular hours from 9:00 a.m. to 3:00 p.m. Mr. Coolen is a special investigator with Canada Customs & Revenue Agency and he earns \$67,392.00 annually. He believes he is able to retire within two years.

Entitlement

Counsel have argued the issue of compensatory and non-compensatory awards. The court must consider the facts surrounding this relationship and the economic impact of the relationship on the parties. This is the argument strongly proposed by the Petitioner in favour of a spousal support award.

The request for spousal support in this relationship is not advanced by a party to a traditional spousal relationship. This is a second marriage. There are no children of this marriage. Both parties worked throughout the marriage, albeit earning significantly

different amounts of income. While I do have some evidence of the manner in which they negotiated the joint and separate indebtedness I certainly do not have specific information as to the details of their financial relationship.

Mrs. Coolen argues that the Respondent's abrupt leaving and failure to contribute towards joint indebtedness has required her to maintain the indebtedness, thereby depleting her resources and ability to support herself. Unless the court intervenes she will not be able to maintain herself appropriately. She earns the lower income and is not in a position to maintain the indebtedness initiated during the relationship.

She allowed her husband and he willingly initiated and consented to extravagant holiday arrangements, largely paid for by him, recognizing her lesser ability to pay. In addition, throughout the course of the marriage, she used borrowed money to sustain the joint account and to sustain herself. She advises the court she informed her husband she could not sustain this spending.

I have no evidence that Mrs. Coolen was responsible for solely caring for the household or assumed a role of a traditional spouse in caring for the husband who was the primary bread-winner. She maintained her own employment. The marriage itself did not call upon her to pull herself out of the labour force to her disadvantage.

The evidence appears to support an argument that because of their joint lifestyle choices they jointly engaged in indebtedness which has put her, now separate with a

lesser income, in a disadvantaged state. Until she is able to reestablish herself she argues she requires on-going maintenance.

The evidence is clear that she cannot sustain a standard of living that she maintained while they were living together. Neither can she sustain an indebtedness of that magnitude or a life style that is equivalent to that which she enjoyed while married and cohabiting with Mr. Coolen. Indeed the strategy she used to maintain the matrimonial home and their lifestyle with Mr. Coolen present may not have been feasible with their joint incomes.

He agrees that they entered into a mortgage and that he felt some joint obligation towards this mortgage. Clearly this mortgage was a feasible indebtedness while they were living together. It may not be a mortgage she can sustain on her income without assistance. If Mr. Coolen had not been on the scene, I cannot determine how she would have managed to pay off her former spouse in accordance with terms which are unknown to the court. She may have to consider as a serious option the sale of the matrimonial home. I do not have sufficient information to cause me to conclude anything with respect to that. I do know there was a lien and there is a possibility that the independence of the children would trigger the responsibility to pay the lien. To the extent that they clearly discussed and agreed upon the mortgage and his contribution to the mortgage, at a time when the marriage appeared to be sustainable, the termination of the marriage has clearly placed Mrs. Coolen in a disadvantaged position rising out of

the decisions made by the couple as a couple.

This is not a case where spousal support will be indefinite. It is not a situation where she ought to be allowed sufficient monies to retrain. It is a marriage of medium duration with no children. It is my conclusion that the economic disadvantage arises out of the financial decisions that are made as a result of the marriage and not as a result of the role that she assumed in the marriage.

Once there is a determination on the division of property and division of debts Mrs. Coolen may well be in the position of determining whether she can afford to continue living in the matrimonial home with or without Mr. Coolen's support. It appears that the kind of support required by Mrs. Coolen is non-compensatory in that she is placed in a situation of hardship which results from the decisions they made as a couple and the breakdown of the marriage.

This type of support has been endorsed as possible in **Moge** (1992) 3 S.C.R. 813, 43 R.F.L. (3d), 345 at 386 - 387. Justice L'Heureux- Dubé said as follows:

The Act refers to economic advantages and disadvantages following marriage or its breakdown ... Section 15(7)(a) and 17(7)(a) of the Act are expressly compensatory in character while sections 15(7)(c) and 17(7)(c) may not be characterized as exclusively compensatory. These latter paragraphs may embrace the notion that the primary burden of spousal support should fall on family members and not the state. In my view, the equitable sharing of the consequences of divorce does not exclude other considerations, particularly when dealing with sick or disabled spouses. While the losses or disadvantages flowing from the marriage in such cases may seem minimal in the view of some, the effect of its breakdown will not, and support will still be in order in most cases.

This recognizes entitlement to support on the basis of need existing at the point of the marriage breakdown regardless of the “cause” of the need.

Each case must be decided on its own facts and the Supreme Court of Canada has not excluded a factual case by case analysis on the issue of spousal support. Courts have awarded non-compensatory claims based on the very issue that exists in this case which is a significant drop in the standard of living, in situations where the wife has worked but has significant lower earnings than the husband.

In this case there is a significant drop in household income since the separation and this has disadvantaged the wife, particularly in relation to financial arrangements which were entered into as a couple and which are no longer tenable in her current position. It is not my intention awarding support to conclude there is a need for long term support to replace the lost income from the husband (**Hoxford v. Hoxford**) 1999 (2 R.F.L.) 5th, 257 (S.C.J.); **Curic v. Curic** (1999) O.J. No. 2450 (S.C.J.). I have decided that there is an entitlement, based on an interim basis, for spousal support. The question of duration is best left to the trial judge.

Need Analysis

I move now to an assessment of need. I reflect on the Financial Statement as set out. My definition of "interim" is not restricted to "interim pending resolution of the divorce proceedings". Clearly the parties ought to have the flexibility of negotiating a division of property and spousal support package which allows for self sufficiency. It also allows for the option, failing consent of the parties, to have a trial judge assess the long term need based on the classification and division of assets and debts as assessed at trial.

In assessing the Statement of Income and Expenses and Mrs. Coolen's monthly expenditures I am aware that trial dates have not yet been set. I am unable to conclude that the monthly expenses which have been paid in lump sum will not recur.

Ability to Pay

I have reviewed Mr. Coolen's Financial Statement and made the adjustments necessary in light of the viva voce testimony. I have reviewed his Statement of Property and I am satisfied that there is an ability to pay a lump sum award reflecting retroactive maintenance to August 2001.

I have reviewed the Financial Statement and the request of Mrs. Coolen for \$1100.00 monthly which would increase her tax liability by approximately \$367.85. I have reviewed her Financial Statement and while she continues to be responsible for the joint indebtedness it appears she has needs in the vicinity of \$800.00 per month. I

have the request of \$1100.00 and the tax implications are reasonable and I order that amount payable monthly and retroactive to the date of the application, August 30, 2001. Mr. Coolen shall be given credit for any payments made during the period from August 30, 2001 and forward.

I am expressly leaving out a determination on retroactive for the trial judge prior to the August 2001 date (ie: between the date of separation and the date of application).

The sum associated with August 2001 - January 2002 shall be paid within thirty (30) days and the monthly payments will be paid on the first of each month commencing February 1, 2002. The first two payments shall be paid directly to Mrs. Coolen and unless the parties expressly opt out, the balance of payments shall be paid through the Maintenance Enforcement Program. Mrs. Coolen's counsel will prepare the order.

Moira C. Legere, J.