No. 1201-55056

IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *MacKay v. MacKay*, 2002 NSSF 43

BETWEEN:	**SALLY CAREW MACKAY**	**PETITIONER**
	-AND-	
	RICHARD WILLIAM MACKAY	**RESPONDENT**

DECISION

2002-NSSF-043

HEARD:	**BY THE HONOURABLE JUSTICE LESLIE J. DELLAPINNA ON THE 8TH DAY OF OCTOBER, 2002**
DECISION:	**OCTOBER 25, 2002**
COUNSEL:	**MICHAEL I. KING - PETITIONER**
	HELEN L. FOOTE - RESPONDENT

DELLAPINNA, J.

Sally and Richard MacKay met in the Spring of 1993 while, unbeknownst to Ms. MacKay, Mr. MacKay was still married to his former spouse. They began dating and by November 1, 1993 were living together in Ms. MacKay's apartment on Kent Street in Halifax. On many weekends Mr. MacKay returned to the home that he shared with his then spouse. His explanation to Ms. MacKay was that he was returning to Shelburne to spend time with his mother. Mr. MacKay does not seriously dispute those facts but takes the position that the parties did not truly begin cohabiting until April 1994.

I accept that for pension division purposes the parties' cohabitation commenced November 1, 1993.

Even after learning of Mr. MacKay's deception, Ms. MacKay agreed to marry Mr. MacKay after his divorce was finalized and they were married on December 13, 1996.

During their marriage, they had two children namely Richard William MacKay born [...], 1996 and Ian Zachary MacKay born [...] 1998.

The parties separated on June 14, 1999. Since that time the children have continued to reside with Ms. MacKay.

It is acknowledged by both parties that Mr. MacKay's present gross annual income is $63,000.00.

Ms. MacKay is currently unemployed but as of September, 2002 began a program of studies at CompuCollege where, among other things, she is studying accounting and how to be a payroll administrator. This course will run for 14 months ending in November, 2003.

The parties resolved many of the issues that arose from their marriage and subsequent separation including, most importantly, an agreement on joint custody with the primary residence of the children remaining with Ms. MacKay and with Mr. MacKay having reasonable access with certain minimum access specified in the parties' agreement. They were unable to agree on one access issue. The Court was also asked to rule on the amount of child and spousal support to which Ms. MacKay would be entitled and the division of Mr. MacKay’s pension earned during their relationship and certain debts that existed at the time of the parties' separation.

THE DIVORCE

I am satisfied that all jurisdictional and procedural issues have been properly addressed. I am also satisfied that there has been a permanent breakdown in the marriage of the parties as evidenced by the fact that they have been living separate and apart since June 14, 1999. There is no possibility of a reconciliation between the parties. A Divorce Judgment will issue.

CUSTODY AND ACCESS

As previously stated the parties agreed, for the most part, on the custody and access arrangements for the children. To the extent that they reached agreement, the Court approves of that agreement and the terms of their agreement will be incorporated into the Corollary Relief Judgment. During the course of the trial, the parties also agreed that on those weekends when Mr. MacKay will have the children, it will not be necessary for him to contact Ms. MacKay the preceding week to confirm the arrangements. On those weekends when he has the children, he will pick the children up at 4:00 p.m. on Friday. Only if he is not exercising access or if due to work related commitments he is unable to pick the children up by 4:00 p.m., he is to contact Ms. MacKay by phone no later than the preceding Wednesday evening to advise her.

The remaining access issue that was not resolved by agreement was whether Mr. MacKay would have access to the children each Saturday in addition to every second weekend.

Mr. MacKay argues that because of the young ages of the children, two weeks between weekend access visits is too long a period of time to pass for the children not to see their father. Also, because he is in the Navy, he is frequently away at sea and by seeing the children on alternate weekends plus each Saturday, they are able to make up the time that they miss with their father when he is away. It is his view that it is in the children's best interest that they see their father each weekend. He also argues that that has been more or less the pattern of the access since the parties separated.

Ms. MacKay argues that because she takes courses during the week she does not get to spend that much time with the children that is unencumbered by her courses, Richard's homework or her course assignments. The weekends afford her the only opportunity to spend meaningful time with the children, and it is her position that it is in their best interest that she have time with the children every second weekend uninterrupted by Mr. MacKay's access. She acknowledges the importance of the children spending time with their father and has offered additional access to make up for some of the time Mr. MacKay missed with the children when at sea, and she has told him that he can have additional time during the week with the children to take them for supper for example. In response Mr. MacKay states that because of the distance between their two homes, weekday access is not practical for him. If he cannot have the children each Saturday he proposed as less desirable options spending part of

each Sunday with the children or picking the children up Friday evening and returning them by noon on Saturday.

The Court is concerned only with what is in the children's best interest. Both parents presented reasonable positions and I accept that both parents are motivated only by their love for the children.

The children have a good relationship with their father which should be encouraged. Since the parties separated, the children have seen their father most weeks except when he has been away at sea. Ms. MacKay acknowledges that access between Mr. MacKay and the children every second weekend is not enough and for that reason she has offered weekday access as an option. Regrettably, because of the distance between the parties' homes, the relatively young ages of the children and everyone's schedules, weekday access is often not possible. Therefore, it will be ordered that in addition to the alternate weekends that the parties have agreed upon, Mr. MacKay will have access to the children each Friday evening from 4:00 p.m. until Saturday at noon by which time he will return the children to the residence of Ms. MacKay.

CHILD SUPPORT

Mr. MacKay agrees to pay the table amount for child support based on his income of $63,000.00. Although Ms. MacKay has child care expenses of $496.00 per month while taking her CompuCollege courses, she has not sought a contribution to her child care expense pursuant to section 7 of the Child Support Guidelines but rather has asked that it be considered along with her other expenses in the calculation of Mr. MacKay's spousal support obligation. Mr. MacKay agrees with that approach.

I therefore order Mr. MacKay pay to Ms. MacKay child support in the table amount of $838.00 per month commencing the first day of November, 2002 and continuing on the first day of each and every month thereafter until otherwise ordered. The Corollary Relief Judgment will contain the usual provisions requiring disclosure of Mr. MacKay's Tax Return and Notice of Assessment to Ms. MacKay on an annual basis no later than June 1 of each year commencing June 1, 2003 and, unless the parties agree otherwise in writing, such support payments will be paid to Ms. MacKay through the offices of the Director of Maintenance Enforcement. Mr. MacKay is also ordered to maintain the two children of the marriage on his medical/dental plan through his employment for so long as such coverage is possible under the terms of the plan or any replacement plan as the case may be.

DEBTS AND SPOUSAL SUPPORT

At the time of the parties' separation, they had minimal assets and, relative to the value of their assets, fairly significant debts. Their assets were comprised of personal effects, furniture and appliances and an automobile. They also had a motor vehicle loan as well as a number of credit card debts. In the year subsequent to their separation, Mr. MacKay received a refund of income tax totalling $1,968.00. Whereas the parties separated in mid June, 1999 only approximately one half of that refund could be considered as matrimonial in nature.

Of the furniture, each party retained those furniture items which they brought to the relationship and of those items that were acquired during the marriage, it is generally agreed that Ms. MacKay received a greater share. The Court received no evidence of the value of the household furnishings but was left to assume that in monetary terms, the value was minimal.

It was verbally agreed between the parties that Mr. MacKay would assume responsibility for his CIBC Visa account having a balance outstanding of $6,207.42 as well as his Toronto Dominion Visa account having a balance owing of $4,433.54. Assuming one half of Mr. MacKay's 1999 Income Tax refund to be a matrimonial asset, he therefore assumed net debts of $9,656.96.

It was also agreed that Ms. MacKay would assume responsibility for her Scotia Bank Visa account having a balance owing of $3,965.93, her CIBC Visa account having

a balance owing of $3,287.14 and the Bank of Montreal car loan having a balance owing of $13,047.06. She also retained ownership of the motor vehicle which the parties agreed had a value of approximately $9,500.00. Taking into account the value of the motor vehicle, Ms. MacKay assumed net debts of $10,800.13. Whereas Ms. MacKay retained possession of household furnishings having a value slightly greater than that which was retained by Mr. MacKay, it is my conclusion that the parties each assumed a debt load, net of assets, of an equal amount as of the date of their separation.

In order to retrain herself for the workforce, Ms. MacKay began a course of studies at CompuCollege in September, 2002. Her tuition and book expense came to a total of $12,095.00. To finance her studies, she took out student loans totalling $18,585.00 and as well received grants totalling $2,360.00. It was argued on behalf of Ms. MacKay that Mr. MacKay will benefit indirectly from Ms. MacKay's education and her financial investment in that education by the early elimination of his spousal support obligation. The Court was therefore urged to require Mr. MacKay to assume responsibility for Ms. MacKay's credit card debt that existed as of the date of separation and Ms. MacKay would then assume full responsibility for her student loans.

Mr. MacKay testified that he was prepared to assume responsibility for her credit card debt provided the debt payments could be structured as spousal support payments and provided also that he is credited for that payment by a reduction in the

amount that Ms. MacKay would otherwise receive by way of a division of his pension benefits earned during their relationship. He also argued that he should be entitled to a spousal support order that would terminate at the conclusion of Ms. MacKay's course at CompuCollege.

Subsection 4(1) of the **Matrimonial Property Act** defines matrimonial assets as follows:

> " 4 (1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of
>
> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
>
> (b) an award or settlement of damages in court in favour of one spouse;
>
> (c) money paid or payable to one spouse under an insurance policy;
>
> (d) reasonable personal effects of one spouse;
>
> (e) business assets;
>
> (f) property exempted under a marriage contract or separation agreement;
>
> (g) real and personal property acquired after separation unless the spouses resume cohabitation."

Section 12 provides for the equal division of matrimonial assets and Section 13 provides for the unequal division of matrimonial assets or the division of non-matrimonial assets in the event that a mere equal division of matrimonial assets is found to be unfair or unconscionable taking into account the factors listed in Section 13. Except for the consideration that is given to debts in Section 13, the **Act**, on its face, does not appear to provide for the division of debts. However, this Court has previously held that the words "matrimonial assets" must be held to include "net" matrimonial assets and therefore debts that were incurred during the marriage for the

purpose of acquiring a matrimonial asset or for family related purposes. In **Larue v. Larue** (2001), N.S.S.F. 23 Campbell J. stated;

> " Common sense demands that the words "matrimonial assets" as used in section 12 of the **Matrimonial Property Act** be interpreted as referring to the "net" matrimonial assets of the couple.
>
> This interpretation has the additional benefit of clarifying that the court has authority to allocate (as between the spouses and without impact on the creditors) the debts whether they be jointly or separately owed. The words in section 12 relevant to this point are:
>
> > " ... to have the matrimonial assets divided in equal shares notwithstanding the ownership of these shares, and the court may order such a division."
>
> If "matrimonial assets" refers to their value net of debts, it follows that the court has authority (which it did not have prior to 1980) to allocate debts as well as assets.
>
> ...
>
> I agree with Justice Williams' summary in **Grant**, *supra*, of the judge made definition of "matrimonial debt" which includes but is not limited to debt incurred for the benefit of the family unit, during the marriage, for ordinary household family matters reasonably incurred and, if incurred after separation, necessary for basic living expenses or to preserve matrimonial assets. The debt must be capable of legal enforcement. To that definition I would add the obvious comment that debts which are incurred for the purpose of acquiring a non-matrimonial asset or for non-family purposes would not be matrimonial in nature.
>
> In summary, matrimonial debts should be identified and subtracted from matrimonial assets as part of the evaluation exercise in considering a section 12 presumption of equal division. It is that net value which should be divided equally by ordering an equalization payment to be made. Then and only then are the exceptions in section 13 of the **Act**, to be considered one of which is subsection 13(b). Couples rarely accumulate assets alone. Their joint venture usually produces net worth, being the excess of assets over debt and it is that net worth which should be shared." (paragraphs 38 - 41)

In the event that a couple's matrimonial debts exceed the value of their matrimonial assets, the resulting deficit should be divided equally subject to s.13 considerations.

It has not been argued that the distribution of debts as of the date of the parties' separation was unfair or unconscionable as those words are contemplated in section 13. It is the assumption of further debt by Ms. MacKay which causes her to believe that the debt load distribution between the parties is unfair. The student loan debt which she incurred well after the parties separated is not a matrimonial debt. It is perhaps for that reason that Ms. MacKay proposes a division of her credit card debt.

In my view there is no reason to order a redistribution of the credit card debt or responsibility for the motor vehicle loan. The parties' assets and debts as of the date of their separation was fair and equitable. However, the division of those debts as well as the student loan debt which Ms. MacKay has incurred are circumstances that are relevant in determining the appropriate level of spousal support. Section 15.2 of the **Divorce Act** provides as follows:

> " 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
>
> (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).
>
> (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs,

> and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
>
> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (*a*) the length of time the spouses cohabited;
>
> (*b*) the functions performed by each spouse during cohabitation; and
>
> (*c*) any order, agreement or arrangement relating to support of either spouse.
>
> (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
>
> (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. "

Mr. and Ms. MacKay's incomes and expenses including their debt payments form part of their "condition, means, needs and other circumstances" as contemplated by subsection 15.2(4). In addition, I have considered a number of other factors including;

(i) the relationship between Mr. and Ms. MacKay was relatively short in duration;

(ii) prior to their cohabitation and subsequent marriage, Ms. MacKay had obtained her grade 12 designation although not her high school certificate, had a diploma

from Ms. Murphy's Business College and during her relationship with Mr. MacKay obtained two university credits;

(iii) Ms. MacKay's employment history prior to the marriage included a brief period of employment as a medical receptionist, then as a secretary for a personnel agency, then for a year and a half as a receptionist for Simpson Hurst Limited, approximately a year as a receptionist/insurance agent for MacDermott Insurance and then as a nanny for less than one year.

(iv) she has not been employed outside of the home since just before the birth of the parties' first child;

(v) the parties have two children who are six and four years of age;

(vi) neither party has any savings, investments or other assets upon which they could rely directly or indirectly for support;

(vii) the parties have been separated for three years, four months;

(viii) Mr. MacKay has paid interim support since the parties' separated;

(ix) Mr. MacKay is gainfully employed as a member of the Canadian Armed Forces earning a gross annual income of $63,000.00;

(x) Mr. MacKay is cohabiting with Ms. M. who is employed as an office manager earning a gross annual income of approximately $32,000.00. Ms. M.'s income was relevant to the court in assessing the reasonableness of Mr. MacKay's household expenses but was not otherwise a factor in the determination of Mr. MacKay's spousal support obligation;

(xi) Mr. MacKay will be paying child support to Ms. MacKay in the sum of $838.00 per month. Other than the support she receives from Mr. MacKay, Ms. MacKay will have no other income until at least the completion of her CompuCollege courses in November, 2003 although she will continue to receive the child tax benefit currently in the amount of $508.00 per month but which is likely to reduce as a consequence of the order that will follow from these proceedings;

(xii) Ms. MacKay will, at least until the end of her course in November 2003, have child care costs of $495.00 per month (inclusive of the Excel lunch program cost of $200.00 per year);

(xiii) the loan and grant money received by Ms. MacKay exceeds her total tuition and book expense by $8,850.00 or $632.00 per month for the duration of her 14 month course. Ms. MacKay testified that the excess was intended to assist her with child care and other living expenses;

(xiv) the training that Ms. MacKay is receiving through CompuCollege is intended to broaden her employment options. It is not simply a refreshing of her previous secretarial training;

(xv) although optimistic of her chances for obtaining employment upon completion of her CompuCollege course and although apparently motivated to achieve self-sufficiency, Ms. MacKay is not guaranteed any employment at that time;

(xvi) After allowing for known credits and deductions, Mr. MacKay's combined federal and provincial tax bracket is approximately 37 percent and Ms. MacKay's

combined federal and provincial marginal tax rate, keeping in mind child support is not taxable in her hands, is virtually zero.

As stated by Cromwell, J.A. in **Fisher v. Fisher** (2001), 12 R.F.L. (5th) 348 (C.A.) in paragraph 82:

> " The fundamental principles in spousal support cases are balance and fairness. All of the statutory objectives and factors must be considered. The goal is an order that is equitable having regard to all of the relevant considerations. As was stated in **Bracklow** [[1999] 1 S.C.R. 420] at paragraph 36:
>
> > ... There is no hard and fast rule. The judge must look at all of the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.

I am satisfied Ms. MacKay is entitled to spousal support on a non-compensatory basis. She has a need for financial assistance from Mr. MacKay and Mr. MacKay has the ability to assist her with that need. Unfortunately, but not surprisingly, Mr. MacKay's financial circumstances are such that he cannot afford to provide Ms. MacKay with all of the support that she needs. Out of necessity both parties will have to pare their expenses wherever possible. Both should consider the feasibility of consolidating some of their debts to reduce their monthly cash outlay.

I have reviewed the financial statements of the4 parties (which I have adjusted to take into account Mr. MacKay's income and source deductions and adjustments to the parties' expenses which were identified during the course of their testimony) and have

considered the factors and objectives as contained in section 15.2 and as a consequence order the following:

(1) In addition to the child support, Mr. MacKay will pay to Ms. MacKay spousal support in the sum of $450.00 per month commencing the first day of November, 2002 and continuing on the first day of each and every month thereafter until otherwise ordered.

(2) Mr. MacKay will maintain Ms. MacKay on his medical/dental plan for so long as such coverage is legally possible under the terms of the plan.

(3) I do not consider this an appropriate case for the fixing of support for a definite period of time. However, the order shall include a provision stating that the spousal support provisions of the Corollary Relief Judgment may be reviewable upon application by Mr. MacKay, without the need of having to prove a change in circumstance, any time after January 1, 2004 with a view at that time to terminating Ms. MacKay's spousal support entitlement.

PENSION DIVISION

I have considered Mr. MacKay's request that the share of his pension benefits earned during the course of their relationship that Ms. MacKay would otherwise receive be reduced in light of his spousal

support payments. However, I do not believe that it is appropriate to reduce her entitlement for that reason alone. Therefore, pursuant to the **Pension Benefits Division Act** of Canada, Ms. MacKay will be entitled to one half of the pension benefits that have accrued to Mr. MacKay during the course of their relationship and for the purposes of that order, I consider their cohabitation to have commenced on November 1, 1993 and to have ended on June 14, 1999.

SUMMARY

In summary, the following will be ordered:

(a) Mr. MacKay will pay child support to Ms. MacKay in the sum of $838.00 per month commencing the first day of November, 2002 and continuing on the first day of each and every month thereafter until otherwise ordered.;

(b) Mr. MacKay will maintain the two children of the marriage on his medical/dental plan through his employment for so long as such coverage is possible under the terms of the plan or any replacement plan as the case may be;

(c) Mr. MacKay will pay Ms. MacKay spousal support in the sum of $450.00 per month commencing the first day of November, 2002 and continuing on the first day of each and every month thereafter until otherwise ordered;

(d) Mr. MacKay will maintain Ms. MacKay on his medical/dental plan for so long as such coverage is legally possible under the terms of the plan or any replacement plan as the case may be;

(e) the spousal support provisions of the Corollary Relief Judgment may be reviewable upon application by Mr. MacKay, without the need of having to prove a change in circumstance, any time after January 1, 2004 with a view at that time to terminating Ms. MacKay's spousal support entitlement;

(f) Ms. MacKay will be entitled to one half of the pension benefits that have accrued to Mr. MacKay during the course of their relationship, cohabitation to have commenced on November 1, 1993 and to have ended on June 14, 1999.

Unless the parties are able to agree, I am prepared to hear them on the issue of costs.

_____
Leslie J. Dellapinna J.