2002 **SFH # 17970**

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

BETWEEN: **APRIL DAWN MACDONALD** **-** **APPLICANT**

- and -

GARY GERARD MACDONALD **-** **RESPONDENT**

DECISION
[Cite as MacDonald v. MacDonald, 2003 NSSF 08]

HEARD BEFORE: The Honourable Justice DeborahGass
Justice of the Supreme Court (Family Division)

PLACE HEARD: Supreme Court (Family Division)
P.O.Box 8988, Station "A"
3380 Devonshire Avenue
Halifax, NS B3K 5M6

HEARING DATES: December 5 and December 11, 2002

DECISION: February 24, 2003

COUNSEL: Charlene Moore, counsel for April MacDonald
Jennifer Schofield, counsel for Gary MacDonald

April and Gary MacDonald were married April 17, 1993. They have three daughters, Meghan (9), Rachael (6 ½) and Natalie (3).

As far back as July 2001, their relationship appeared to be in distress. By May 2002, Ms. MacDonald decided she could no longer remain in the marriage but the parties remained living together under very difficult circumstances. This living situation was untenable and eventually (August 15, 2002) Mr. MacDonald moved out on a temporary basis until the issues of occupancy of the home and custody of the children could be resolved.

The parties' version of events leading up to, and following the separation are markedly different. Mr. MacDonald expresses that Ms. MacDonald is emotionally unstable, has threatened his life, requiring professional intervention, and she is not capable of caring for the children. She, on the other hand, describes Mr. MacDonald as controlling and threatening.

On the whole of the evidence, it would appear that over the past year and a half the parties have been under extreme stress, culminating in a traumatic physical separation, and continuing with the uncertainty of their situation, especially as it relates to the parenting arrangements for the children. All of the issues are very much intertwined, thereby exacerbating the stress on this family.

At issue are the following:

a) division of matrimonial assets and debts
b) exclusive occupation of the home
c) custody of children

d) access

e) child support

f) Section 7 expenses

A) The Matrimonial Home

The parties agree on a value of $114,000.00. This home however was purchased through Habitat for Humanity, a charitable organization which assists low income families in acquiring a house. The first mortgage on the home has an outstanding balance of approximately $69,500.00. The second mortgage is for $21,000.00. The circumstances of the property if one party buys out the other or if it is sold on the open market, are unclear.

B) The land in Cape Breton

Mr. MacDonald inherited 50 acres of land from his family in 1992, shortly after the parties were married.

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;

The evidence discloses that Ms. MacDonald planted some holly and rhubarb on the land and that one or more Christmas trees were cut from it. There are no buildings. They fished there, but rarely walked the land, and used the beach occasionally. Once, Mr. MacDonald’s brother cut some wood from it for a small

stumpage fee. It was listed as family property on their application for Habitat housing. The assessed value of the land is $20,100.00 and the cost to survey it for sale purposes, given its parameters, exceeds its value.

While “substantial use” is not the test, the Nova Scotia Court of Appeal held in *Fisher* v. *Fisher*, 2001 NSJ No. 32 that the use of the property must be more than trifling or insignificant. Cromwell J.A. in speaking for the Court went on to conclude at p. 10, that once there is use, the extent of which cannot be dismissed as trifling or insignificant, the asset is matrimonial.

The question here is whether on these facts, I conclude that the use is sufficient to bring what is prima facie not a matrimonial asset into the realm of being a matrimonial asset. Some cases have found occasional recreational use to be sufficient. *Coady* v. *Coady* (1995) 144 N.S.R. (2d) 106(S.C.); *McDonald* v. *McDonald* (2000) 184 N.S.R. (2d) 350 (S.C.) In some instances the property is adjacent to the home and used for play, parking, gardening, et cetera. *Bryden* v. *Bryden* (1995), 140 N.S.R. (2d) 308 (S.C.).

Here, while it appears that its use was minimal, it was referred to as family property for the Habitat application. Therefore the use made of the land brings it into the realm of matrimonial property. I must then consider how to quantify the extent to which it was used. Following *Fisher (supra)* and *Tibbetts, Tibbetts* v. *Tibbetts* (1991), 106 N.S.R. (2d) 255 (S.C.T.D.), if for example I should use the 5% - 10% of the value of the land then Ms. MacDonald’s equal share of that portion would be 2 ½ % - 5%. Considering the assessed value of the land at $20,100.00, this would amount to $500.00 - $1,000.00.

While Ms. MacDonald asserts it could be sold quickly for $70,000.00, there is no

evidence to support that. The best evidence is the assessed value. Mr. MacDonald asserts that the cost to survey it would be $38,000.00, based on the information of a realtor. The weight to be given to that evidence is not much greater than the weight to be given to the suggestion of its market value. However, it is reasonable to infer from the evidence that the costs (real estate and legal fees) associated with any sale would further reduce the proceeds, if any, to be divided.

I then consider the provisions of Section 13 (e) of the Act.

> 13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
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> .....
>
> (e) the date and manner of acquisition of the assets.

The land was inherited shortly after the marriage. Its use never changed. It was land belonging to his grandfather which was passed on to Mr. MacDonald. He intends to pass it on to his children as the fourth generation to own the land. For all practical purposes even if he did want to sell it, it is not marketable. Therefore, I conclude that to divide equally whatever minimal portion is available would distort the purpose and intent for this land and would be unfair. I would therefore order an unequal division in favour of Mr. MacDonald.

C) Matrimonial Debts

The Respondent will maintain the life insurance policies currently in existence and each party will name the other as beneficiaries of the policies for so long as the

children remain “children of the marriage” within the meaning of the *Divorce Act*. The parties will share equally the responsibility for the debt owing against the policies as of the date of separation, and no further debt shall be incurred.

The parties are equally responsible for the matrimonial debts as of the date of separation as follows:

1) Habitat Mortgages
2) Citifinancial Loan
3) Bay Card
4) MTT
5) NS Power
6) Loans against policies
7) CIBC Overdraft
8) $1,000.00 loan from Debbie

D) Pension

A modest pension is held by the Respondent with the Hudson’s Bay Company. The pension benefits earned during the marriage shall be equally divided.

E) Custody

The parenting history of this family shows that the mother was the primary care giver and homemaker while being a secondary wage earner. However the family dynamic was also one in which the father was a very involved parent, assuming many of the child care responsibilities when he was not working. It appears that when they were together they co-parented and supported each other in that regard. That has deteriorated since separation. It also appears from the evidence that the mother is willing to work out a parenting plan together to ensure there is consistency in both

homes.

Two of the children have some health issues. One has what might be described as episodic asthma and another has congenital heart blockage.

The mother smokes. It is an issue of concern. There is no dispute that second hand smoke is dangerous to children. It is recognized that children have the right to be raised in a smoke free environment. The Court has the authority to impose conditions on custody. A condition of custody will be that there will be no smoking in the home when the children are present.

The concerns raised about parenting and stability are not uncommon concerns which arise post separation. While there may have been concerns while the parties were together, their magnitude takes on significant proportions in the highly volatile and emotional aftermath of the marriage breakdown.

I conclude that both parents, despite the perceived flaws in the other, are capable of meeting the emotional, developmental and physical needs of these children. In determining primary care where the Court is satisfied that both parents are capable, then one must look to the willingness of each parent to foster and encourage the relationship with the other parent. In so doing, the Court must consider how each parent views the other, the ability to communicate and set aside personal animosity, and the willingness to co-parent.

Much of the evidence reflects each parent's tendency to put the most negative connotation on everything that has transpired involving the other parent's conduct and actions. It is time for this increasing hostility and mistrust to come to an end. These children need to know that despite their parents' separation, they will continue to be parented by both of them. At no time should they be put in the position of being

messengers between their parents, or sources of information about their separate lives.

I have considered the oral and affidavit evidence. I am satisfied that it is in the best interest of the children for there to be an order for joint custody. I am also satisfied based on the parenting history that it is in the best interest of the children to be in the primary care of their mother with maximum contact with their father to enable him to fully participate in their social and academic lives. I have heard evidence with regard to the father's work schedule and thus his parenting time will be fashioned to enable him to maximize his involvement with the children.

The father's parenting time with the children shall be on alternating weeks from Thursday evening until Monday morning. In the intervening week there shall be one overnight, which may be Thursday night for consistency. If the weekend involves a holiday, it will include the Monday. If there is an in service which does not fall on a weekend the children are with their father, he shall be first approached to determine if he is available for child care.

The parties shall share special holidays by dividing them equally and alternating each half (i.e. March Break, Easter, Christmas and summer) provided however that the parents are encouraged to work out alternate parenting arrangements which work for the children and themselves. In the event they do not agree on other arrangements, this parenting scheme shall prevail.

The children's residence shall not be moved from the jurisdiction without the consent of the other parent.

Neither parent shall remove the children from Nova Scotia without first providing notice to the other parent of destination.

F) Child Support

The Respondent's annual income is now $38,592.00. The table amount of child support is $708.00 per month retroactive to November 1, 2002.

G) Child Care

The cost of child care shall be apportioned 40% (mother)/60% (father) based on the parties' incomes after the payment of child support.

H) Interim Exclusive Possession of the Matrimonial Home

The Respondent seeks an order to buy out the Applicant's interest in the matrimonial home. There is little if any equity in the home considering the family debt as of the date of separation.

The Court must consider the best interests of the children in deciding this issue.

I am satisfied that in the present circumstances the Applicant does not have the financial means to procure other accommodation for herself and the children.

The complicating factor is that the house is a Habitat for Humanity dwelling with special mortgage provisions.

I conclude on the evidence before me that the Respondent is in a better position to find alternate accommodation.

Exclusive occupation of the home is generally granted on an interim basis, although there are instances when it is granted long term until the children have completed school and ceased to be dependents.

Here the mother is completing an educational program in June 2003, which will put her into the job market with the potential to earn $20,000 - $25,000 per year. She will no doubt continue to qualify for Habitat Housing. It is by far the best opportunity for the children to have good affordable housing.

Thus I am ordering that she shall have exclusive occupation of the home until the end of August or until she is able to make the necessary arrangements to purchase the Respondent's interest in the home, whichever occurs first. If she is unable to do so, the Respondent shall have the option to buy out the Applicant's interest (subject to Habitat's approval) before the house is placed on the market (again, subject to the regulations of Habitat and that agency's right of first refusal).

Either way the children should have the benefit of this home if it is at all possible for one or the other parent to purchase it. It is clear however that the Applicant would be unable to purchase a home through conventional means through her current and foreseeable income sources.

Disposition costs (legal fees and real estate fees) shall be factored into the equity remaining in the home. If either parent purchases the other's interest, every effort will be made to obtain financing independent of the other and the person acquiring the property shall be solely responsible for any obligations attached to the home and will indemnify the other for any claims arising therefrom.

Deborah Gass, J.

DG/ng