

**IN THE SUPREME COURT OF NOVA SCOTIA**  
**Citation: *Clarke v. Clarke*, 2004 NSSF 43**

**Date:** 20040426  
**Docket:** 1201-005968  
**Registry:** Halifax

Between:

Colin Drake Clarke

Petitioner

v.

Carolyn Louise Clarke

**Judge:** The Honourable Justice Moira C. Legere-Sers

**Heard:** March 30, 2004, in Halifax, Nova Scotia

**Counsel:** Ronald Pizzo, for the Petitioner  
G. Michael Owen, for the Respondent

**By the Court:**

[1] The Petitioner, Colin D. Clarke, married the Respondent, Carolyn L. Andrew on April 23, 1983. The Petitioner was 19 and the Respondent 17 at the time of marriage.

[2] The parties separated on April 17, 1997, some 14 years later. The Petitioner initiated divorce proceedings on March 17, 2000 and the Respondent filed an Answer and Counter-Petition on March 29, 2000.

[3] There are two children of this marriage, Megan, born [...], 1983 and Ariel born [...], 1987. At the time of separation the children lived with their mother in

the matrimonial home located at [...]. Mrs. Clarke retained exclusive possession for five years, until July, 2002 when the home was sold.

[4] Megan left the matrimonial home in January, 2002; moved into an apartment located over her paternal grandparents' garage; and commenced a four-year university program in September, 2001. Ariel moved in with Mr. Clarke on July 12, 2002 when the home was sold.

[5] The Petitioner and Respondent have reached a consensus with respect to some issues. They have also indicated that they intend to accept the decision of the Court as binding on the remaining issues in dispute.

[6] The parties have submitted affidavits, waived their right to cross-examination. They choose to rest on their counsels' oral and written submissions.

[7] Once the parties have received this decision, counsel intend to incorporate the agreements they reached prior to this hearing, together with the decision of the Court on the outstanding issues, into a Corollary Relief Judgement and seek the Divorce on an uncontested basis.

[8] Those issues of consent are set out in their written submissions and include an agreement that all debts have been paid between the parties; they agree to an equal division of Mr. Clarke's pension benefits earned during the marriage and an equal division of severance pay benefits earned during the marriage and received by Mr. Clarke.

[9] They agree that neither the wife nor the husband will be seeking spousal

support from the other. Mr. Clarke's spousal support obligation terminates effective July 12, 2002. Any support arrears arising from the time the husband stopped paying support in July, 2002 are to be expunged. The Maintenance Enforcement records should be amended to reflect that agreement.

***History of child support orders and payments***

[10] The parties' income history is as follows:

	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
<b>Mr. Clarke</b>	54,960	59,090	59,220	74,544	65,824	69,690	65,562
<b>Mrs. Clarke</b>	11,194	11,738	12,623	14,269	11,498	14,670	16,726.55

[11] Mrs. Clarke's income for 1997 reflects a net business income of \$8,364.67 plus taxable spousal support of \$2,829.94 for a total of \$11,194.61. Her total income including child support for 1997 was \$17,202.61.

[12] Mrs. Clarke's income for 1998 reflects a net business income of \$7,807.16 plus taxable spousal support of \$3,931.66 for a total of \$11,738.82. Her total income including child support for 1998 was \$19,930.

[13] Mrs. Clarke's actual income for 1999 reflects a net business income of \$8,125.59 plus taxable spousal support of \$4,354.50 for a total of \$12,623.85. Her total income including child support for 1999 was \$21,109.

[14] On February 11, 1998, while both children lived with their mother, by

consent, the father was ordered to pay interim child and spousal support of \$1,025 per month.

[15] On January 28, 1999 he was ordered to pay \$737 per month for the support of the children plus \$54 per month representing one-half of the cost of Megan's dance class, based on the Petitioner's income of \$54,593 and the Respondent's income of \$14,269 (inclusive of Child Tax Credit). The Petitioner was also ordered to pay \$345 per month spousal support. The total support payment was \$1,136.

[16] In addition, he paid \$150 as a third party payment for the Scotia Line of Credit. The Scotia Line of Credit was eventually extinguished fully in October, 2001.

[17] In January, 2002, Mr. Clarke paid the total monthly support as stipulated in the 1999 order. During this month Megan moved out of the matrimonial home to the apartment over her paternal grandparents' garage. Her father now assists her by providing rent and other support directly to her. His obligation to support Megan through payments to the Respondent ceased January, 2002. Maintenance Enforcement shall adjust their records to reflect this.

[18] In February, 2002, he reduced his payment to Mrs. Clarke to \$901 and in March and thereafter until July, 2002 he paid \$720 per month. In July he paid \$360. All payments ceased when Ariel came to live with him and Mrs. Clarke moved into her partner's home. His obligation to pay child support to the Respondent for Ariel ceased in July, 2002. Maintenance Enforcement shall adjust their records to reflect this.

[19] Since July, 2002 the Respondent, Mrs. Clarke, has been paying the Petitioner \$100 per month somewhat regularly for the care and support of the children. She paid \$400 in total in 2002 and \$975 in 2003.

[20] Essentially, there are three issues before the Court.

***Retroactive child support***

[21] Each seeks an award of retroactive child support. The Petitioner is seeking retroactive child support payable by the Respondent for the children in his care from July, 2002 forward. Her income for the 2002 year was \$14,671. He asks for payment, according to the guidelines for two children, from July, 2002 to date (letter dated March 22, 2004, paragraph 14). His submissions call for contribution to one child (affidavit dated March 26, 2004, page 14, paragraph C).

[22] If one started the calculation in **August, 2002** up to and including April, 2004, at a base rate of \$125 per month for one and \$226 for two, that would result in a payment of \$2,625 for one; \$4,746 for two. The Respondent has paid \$1,375 which leaves a retroactive amount of \$1,250 for one or \$4,746, less \$1,375, equals \$3,371 for two. If payments for 2004 have been made she will be credited for those as well.

[23] I have no evidence of the actual cost of care for the oldest child in university. I am unable to apply a means and needs test or to analyze the costs of an adult child in university as one might normally do. The Respondent indicates she cannot contribute to the university costs. I know of no reason why the

Respondent should be exempt from contributing in some fashion to both children's needs.

[24] The Respondent is seeking a retroactive reassessment of child support from February, 1999 to January, 2002, based on the guidelines and the actual annual income of the Petitioner, as disclosed by him in preparation for this hearing. She argues that the Petitioner should have advised her of the increases in his income between the order of 1999 and this hearing.

[25] I have no evidence to substantiate that he withheld information or failed to respond. There was no application for an interim variation, although it ought to have been clear to all, until this matter was resolved, the issue of support in accordance with the guidelines was a live issue.

[26] The Respondent's calculations indicate that the difference between what was ordered and what ought to have been paid up to July, 2002 is approximately \$4,361.

[27] To be fair to both, if the Respondent was successful in her claim of retroactive support back to January, 2000, the same sense of fairness would dictate that the Respondent should be retroactively responsible for child support from February, 2002, when Megan left home, to July, 2002, and from August, 2002 to April, 2004 which would mean retroactive arrears of \$5,496 less what she paid to result in \$4,121 owing.

[28] There are some arrears that accumulated in 2001 during the two months Mr.

Clarke was on strike. Arrears for this period are \$837. The Petitioner advanced an argument that he ought to be excused for payment of these arrears, because he experienced a reduced income for a two-month period. However, the payment required was based on an income of \$59,220 and his actual income at the end of the 2001 year, even if one accounts for the strike, was \$65,829. There is no justification for taking a narrow view of the two month's reduction and reducing the monthly maintenance for that period. He will repay those arrears forthwith.

[29] He should pay \$240 to the Respondent. This will satisfy any and all retroactive claims by the Petitioner against the Respondent for the differential in income, and the Respondent to the Petitioner for the appropriate table amount for two children. He shall also pay the arrears for 2001 in the amount of \$837. The total retroactive assessment plus arrears equals **\$1,077**.

[30] Both parties will exchange copies of their full and completed income tax forms by May 15th of each and every year, including this year, copies of their assessments and reassessments, in order to effect appropriate calculations with respect to ongoing child support.

### ***Division of the Equity in the Matrimonial Home***

[31] The matrimonial home was purchased in August, 1991 at a cost of \$77,000. It was sold in July, 2002 for \$90,000. The Respondent remained in the matrimonial home until it was sold on July 15, 2002.

[32] After disbursements, \$66,167.12 remained from the proceeds of sale. \$25,000 has been advanced to the Respondent and \$20,000 to the Petitioner, with a

balance of \$21,167.12 left in trust pending this hearing. The Petitioner seeks an equal division of the total equity. The Respondent seeks an unequal division of the proceeds.

[33] On separation in April, 1997, the principle outstanding on the mortgage was \$51,153.65. On July 15, 2002 when the home was sold, the mortgage payout was \$16,859.58.

[34] The Respondent maintains she was solely responsible for the mortgage payments and property taxes. She argues that she has reduced the mortgage principal by \$34,294, paid interest in the amount of \$10,632, and paid the property taxes in the total amount of \$6,144. The Respondent also argues that she completed improvements and capital repairs to the matrimonial home to enhance the sale of it.

[35] During the five years of exclusive possession, the Respondent and her current partner undertook certain repairs. They include the following:

1. A new furnace and oil tank costing \$4,746.02, payable on a monthly basis with a final payout prior to sale in the approximate amount of \$500;
2. Her partner and she installed new floors in the livingroom, kitchen, hallway and two bedrooms; converted the den into a fourth bedroom;
3. They installed new flooring, molding, crack filling, et cetera, in the storage room. The Respondent indicates this was done for the purposes of sale;
4. They installed new ceiling border and molding in the laundry room;



5. They replaced the attic door;
6. They removed the patio door and replaced it;
7. They replaced the sub floor of the rec room for the purposes of sale.

[36] The total cost according to her figures, excluding labour, was \$8,375.51. In addition, she listed \$2,011.85 for general upkeep, painting, and repairs to the old furnace.

[37] During the period of time when the Respondent occupied the matrimonial home, the Petitioner paid to the Respondent a total of \$54,424.50 in support. He paid rent of \$28,576.50 and made post separation mortgage payments of \$9,544.95. The Respondent used the home to earn income by providing child care for others and she rented a room for part of the interim period of exclusive possession.

[38] The Petitioner received no occupational rent during the period of time that the Respondent had exclusive possession. He was not compensated for the wear and tear caused to the matrimonial home by the business.

[39] Ordinary, the matrimonial home should be valued at the date of division. Both spouses would be entitled to the benefit of a mortgage payout. (*Higgins v. Higgins* (2002) 19 R.F.L. (5th) 300 (Ont. S.C.J.); (*Simmons v. Simmons* [2001] N.S.J., No. 276 (S.C.(F.D.)).

[40] To allow the Respondent's claim, the Court would have to be satisfied that an equal division would be unconscionable. In *Higgins v. Higgins*, the Court identified a claim of the nature being advanced by the Respondent as a claim for unequal division of the equity by the occupying spouse.

[41] The Respondent seeks an unequal division of the remaining equity in the home to account for the following:

1. That the monthly payment of principal and interest paid by her reduced the mortgage from approximately \$51,153 to \$16,859 on sale;
2. That she absorbed the cost of general repair and capital improvements.

[42] The down payment for the home came from Mr. Clarke's parents in the amount of \$10,000. His support payments were assessed, bearing in mind the Respondent's costs of maintaining the home for the children and the Respondent. For the intervening five years, the Respondent has had exclusive possession of the matrimonial home. For most of those five years, both children lived with her. This exclusive possession order delayed the benefit of his share of the equity to the Petitioner.

[43] The Petitioner reviewed the entire documentation submitted by the Respondent in support of her argument that the repair and maintenance costs ought to be credited to her. He divided the expenditures by year as follows:

<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>
\$618.53	\$1,825.50	\$548.22	\$1,542.03	\$293.14	\$404.29

[44] The maintenance and repair costs have been analyzed by Mr. Clarke by year and by room. The total maintenance costs, excluding the furnace and oil tank, are \$5,231. The total cost of the furnace and oil tank is \$4,746, according to the Respondent's figures, purchased in December, 2000, paid out completely in July, 2002.

[45] These expenditures were not incurred at or around the closing date. Except for the furnace and oil tank, they appear to be ordinary maintenance and repairs. Where there are improvements outside the ordinary improvements (other than the furnace and oil tank) they are personal lifestyle enhancements and the extent to which they were necessary and/or enhanced the value of the home has not been proven. There is no evidence that these enhancements were agreed upon in advance. There was no evidence of a purchase and sale agreement tendered to indicate what, if any, conditions of sale existed. There is no consent on the evidence supporting the assertion that some of the ordinary repairs were necessary for sale.

[46] In short, there was no evidence as to the efforts made to obtain a consensus on the series of expenditures related to ordinary repairs or evidence of prior discussions, respecting the day-to-day repairs which total \$5,231 over the five-year period.

[47] I have no evidence that there was any expectation of recovery or request to participate in payment.

[48] The Petitioner lived in an apartment in the interim with rental payments in April, 2001 of \$525, initially, and at some point his rent increased to \$700, approximately.

[49] Counsel confirmed that there were some discussions on the purchase of the oil tank and furnace. The parties did not arrive at a consent as to how to pay for this necessary expenditure.

[50] The only obvious expenditure that was necessary and out of the ordinary was the purchase of the furnace and oil tank. It was a capital expenditure and was necessary to maintain the value of the home for both parties. The cost of that purchase ought to have been shared between the parties. Mr. Clarke will pay one-half of the total expenditures for the furnace and oil tank reimbursing Mrs. Clarke in the amount of \$2,373. The balance of the expenditures are reflective of ordinary maintenance expenditures.

[51] There was no suggestion by Mrs. Clarke that Mr. Clarke ought to be compensated for deferring sale of the matrimonial home for a five-year period or for the fact that she retained exclusive possession for that period. This in itself could take on the appearance of an unequal division of assets in her favour.

[52] I am not satisfied on the evidence that an equal division would be unfair or unconscionable.

[53] It appears that prior to the matter being brought before the Court, \$25,000 of the equity was released to the Respondent and \$20,000 to the Petitioner. The

equity in the matrimonial home will be divided to ensure that both parties receive an equal division of the total equity.

### *Horses*

[54] The Petitioner asks that the two horses purchased by them during the marriage be sold and the proceeds be divided equally.

[55] The Respondent maintains one horse was a gift to her and one was the child's horse. It appears the child is not as interested in the horse as she once was. The Respondent contends that these horses are personal property and not subject to division.

[56] Her horse (Turk) purchased in 1988 for \$3,300, is now 18 years old and suffers from arthritis navicular. The Respondent estimates his current worth is \$400 to \$500.

[57] The Petitioner does not ride horses. The Respondent is involved in raising and maintaining horses. She worked, without compensation, at the stables where the horses were boarded to offset boarding costs. She occasionally rented the horses to help defray the cost of maintaining them. She has boarded other horses in their barn for a fee, to offset the cost of maintaining them.

[58] The Petitioner maintains that these are matrimonial assets and that the Respondent used the horses to gain income. There were certain costs associated with the care of the horses. While the Respondent argues she helped to defray these costs of the horses by working at the barn and renting the horses, the balance of

any costs were absorbed by the family.

[59] Section 4(1) of the *Matrimonial Property Act*, R.S. c. 275, states as follows:

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

(d) reasonable personal effects of one spouse;”

[60] There is a legislative presumption that the assets of the marriage purchased by either or both spouses before or during the marriage are matrimonial assets unless specifically exempted. The Respondent argues that the horse is a reasonable, personal effect of one spouse.

[61] The evidence supports that these horses were purchased by both parties, the expenses were covered by both parties and, in particular, by the Petitioner, given the Respondent’s income level, and that the horses were used by the family and rented in order to pay off some of the expenses which takes it out of the realm of a personal effect of a spouse and out of the realm of a hobby as outlined in *Taylor v. Taylor* (1992) 111 N.S.R. (2d) 91.

[62] The Respondent has not provided evidence before me that would justify a conclusion in this family that this was a reasonable, personal asset and should be excluded from the assets of the family for the purposes of a division under the *Matrimonial Property Act*.

[63] The horses will be assessed, sold and the proceeds divided. Valuation may

be arranged by Mrs. Clarke within the 30-day period with Mr. Clarke's consent as to who shall evaluate the horses (such consent not to be unreasonably withheld). The costs of valuation are to be deducted from the sale price.

[64] The wife may have first option to buy the horses once a valuation has been established satisfactory to both. Failing an agreement on valuation within 30 days from the date of the decision, the Petitioner make take responsibility for selling the horses.

[65] Counsel for the Petitioner shall kindly draft the order.

J.