

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Mitchell v. Mitchell, 2004 NSSF 101

Date: 20041119

Docket: 1201-55323 (SFHD-008555)

Registry: Halifax

Between:

Judith Lee Mitchell

Petitioner

v.

Darrell Edgar Mitchell

Respondent

Judge: The Honourable Assoc. Chief Justice Robert Ferguson

Heard: October 13, 2004, in Halifax, Nova Scotia

Written Decision: November 19, 2004

Counsel: Patrick L. Casey, Q.C., for the Petitioner
Cheryl Arnold, for the Respondent

By the Court:

[1] Judith Mitchell and Darrell Mitchell were married on July 10, 1987, and separated in October of 2000. That same month, Ms. Mitchell petitioned for divorce. Mr. Mitchell filed an Answer in February of 2001 which was withdrawn on July 19, 2001. The parties entered into an Agreement of Minutes and Settlement in April of 2001. The Notice Withdrawing Answer states it was done “in order that this divorce may proceed on an uncontested basis.”

[2] The parties agree the terms of a Corollary Relief Judgment will reflect the Agreement, with the exception of the issue of spousal support. Mr. Mitchell submits he not be required to continue spousal support. Ms. Mitchell requests an order providing such support indefinitely.

DIVORCE

[3] I have heard the evidence as to the possibility of reconciliation and determined there is no such possibility. I am satisfied all matters of jurisdiction have been fulfilled. The requirements of the *Divorce Act* have been complied with in all respects and the grounds for divorce as alleged has been proved. The Divorce Judgment shall be granted on the grounds set forth in s. 8(2)(a) of the *Divorce Act* in that there has been a breakdown of the marriage and the spouses have lived separate and apart for more than a year immediately preceding the determination of the divorce proceeding and have lived separate and apart since the commencement of the proceeding.

EVIDENCE

[4] The marriage in 1987 was the second for Mr. Mitchell and the third for Ms. Mitchell. There are no children of this relationship. Prior to the marriage, Ms. Mitchell was residing in Chester with her fourteen-year old daughter and employed as a personal care worker. Mr. Mitchell was living in Halifax employed by the Department of National Defence.

[5] The couple settled in Halifax. Ms. Mitchell did not resume employment. She did, for nine years of the relationship, work two hours per day during the school term as a School Board monitor. Mr. Mitchell continued to be employed with the

Department of National Defence. Since separation, Ms. Mitchell has completed a retraining course as a personal care worker and has secured full-time employment with an annual income of approximately \$22,500.00 per year. At separation, Mr. Mitchell was earning approximately \$83,000.00 per year; currently he has income of around \$102,000.00 annually.

[6] Mr. Mitchell's monthly financial statement indicates (while paying \$2,000.00 spousal support) an income of \$8,071.00, expenses of \$5,228.00 and an after-tax surplus of \$1,112.00.

[7] Ms. Mitchell's monthly financial statement indicates an earned income of \$1,875.00, expenses of \$2,828.00 and an after-tax surplus (while receiving \$2,000.00 in spousal support) of \$115.00.

[8] Mr. Mitchell's Statement of Property discloses:

Home (less mortgage)	\$ 48,376.00
Furnishings	\$ 3,500.00
Automobile (less loan)	\$ 5,229.00
Savings	\$ 26,000.00
GIC	\$ 10,000.00
TOTAL	\$ 93,105.00

[9] Ms. Mitchell's Statement of Property discloses:

RRSP ("locked in") - Her share of Mr. Mitchell's Pension	\$ 74,294.00
GIC	\$ 11,644.00
RRSP	\$ 916.00
Bank Account	\$ 974.00
TOTAL	\$ 87,828.00

ISSUE

Spousal Support - Entitlement, Duration and Amount

Entitlement

[10] Under the heading of “Spousal Support” the Agreement and Minutes of Settlement states:

“11. The Respondent, Darrell Edgar Mitchell, shall pay to the Petitioner, Judith Lee Mitchell, for her maintenance and support the sum of \$2,000.00 per month, commencing on the 1st day of May, A.D., 2001, and continuing on the 1st day of each and every month thereafter to and including the 1st day of August, A.D., 2001.

12. The Respondent, Darrell Edgar Mitchell, shall pay to the Petitioner, Judith Lee Mitchell, for her maintenance and support the sum of \$2,300.00 per month, commencing on the 1st day of September, A.D., 2001, and continuing on the 1st day of each and every month thereafter to and including the 1st day of June, A.D., 2002.

13. The Respondent, Darrell Edgar Mitchell, shall pay to the Petitioner, Judith Lee Mitchell, for her maintenance and support the sum of \$2,000.00 per month commencing on the 1st day of July, A.D., 2002, and continuing on the 1st day of each and every month thereafter until further Order of the Court based upon a variation according to the principles contained in the Divorce Act of Canada.

14. The parties hereby confirm that all of these periodic payments are amounts representing maintenance pursuant to Sections 56 and 60 of the Income Tax Act of Canada with the intent that the payments shall be deductible by the Respondent and taxable to the Petitioner.

15. Payments are to be made payable to Judy Mitchell and forwarded to the Director of Maintenance Enforcement, P.O. Box 803, Halifax, Nova Scotia, B3J 2V2, upon notification of registration with the Program. In the interim, payments are to be forwarded directly to the Petitioner. The current mailing address of the Petitioner, Judith Lee Mitchell, is c/o Patrick L. Casey, Casey Rodgers Chisholm Penny, Barristers & Solicitors, 175 Main Street, Suite 203, Dartmouth, NS, B2X 1S1, and the current mailing address of the Respondent, Darrell Edgar Mitchell, is 104 Cranberry Crescent, Dartmouth, NS, B2W 5C1.

16. Each of the parties shall provide to the other not later than June 30 of each year a copy of their respective Income Tax Returns with all supporting schedules and information slips and the Notice of Assessment received from Revenue Canada.

17. The Petitioner shall notify the Respondent as soon as practicable after obtaining full-time employment of the particulars of such employment.”

[11] Given the circumstances, there could be a question as to if the court is required to consider a request for spousal support or a request to vary the existing obligation of Mr. Mitchell pursuant to the Agreement. I conclude from the submissions the issue relates to a determination of spousal support pursuant to s. 15.2 of the *Divorce Act*:

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.

(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.”

[12] Mr. Mitchell, by virtue of the Agreement, acknowledged Ms. Mitchell’s entitlement to support when the couple separated. Given the passage of time, Ms. Mitchell’s current employment and past support, Mr. Mitchell now submits Ms. Mitchell is not entitled to a continuation of such support.

[13] Mr. Mitchell’s pre-trial brief states, in part:

“It is respectfully submitted that the Respondent, Mr. Mitchell, has adequately provided for the Petitioner, by way of spousal support since the time of separation. The parties were involved in a thirteen-year non-traditional marriage. The Petitioner was able to stay at home during the course of the marriage by her own choice. The Respondent assisted the Petitioner in attaining her GED and a personal care worker course, by paying a portion for retraining, and providing increased support so the Petitioner would not have to work while studying. The Petitioner received \$30,000.00 at the time of separation as her share in the matrimonial home. In addition, the Petitioner was awarded in the Agreement her share of the Respondent’s employment pension and entitlement to a share of his severance package. The Respondent has done all that he should be required to do to assist the petitioner for her retirement years.

The Petitioner fails to be entitled to the continuation of spousal support, regardless of which spousal support model is used and in keeping with the objectives of the *Divorce Act*. Accordingly, the Respondent is seeking the immediate termination of the payment of spousal support. If, and only if, your Lordship does not see it just to cease payment of support immediately, it is the Respondent’s position that a future cut off date be set, as this is not a case for indefinite support, as well as an appropriate amount determined.”

[14] Ms. Mitchell acknowledges her entitlement as to quantum may have lessened but submits she should receive support on an indefinite basis. Her pre-trial brief states, in part:

“The Petitioner is 51 years of age and has health issues. She works either an 8 hour shift or a 12 hour shift and finds the longer shifts difficult.

The Respondent has been employed for over 20 years as a Civilian employee with the Department of National Defence. He earns over \$100,000.00 annually. His income has increased substantially from what it was at the time that the Agreement was entered into (it was stated to be \$83,312.00 as that time).

During the marriage, the Respondent traveled (sic) for purposes of employment and the Petitioner was responsible for caring for the home. She did not pursue a career.

The Petitioner has a small GIC, which is the amount remaining from the buy-out of the matrimonial home as per the terms of the Agreement.

The Respondent has continued to contribute into his employment pension. In 2002, he contributed \$4,391.11 and in 2003, he contributed \$4,188.63.

The Respondent was able to buy-out the Petitioner's interest in the matrimonial home and has maintained that asset while the Respondent has found it necessary to encroach on the GIC for personal expenses. The Respondent has built a considerable amount of equity in the home. In addition to that, the Respondent shows savings of over \$26,000.00 and a \$10,000.00 GIC. The Petitioner has no such savings apart from the aforesaid Guaranteed Investment Certificate, which represents the remaining portion of her share of the house proceeds.

The Petitioner has not been able to put aside additional savings towards retirement since the separation of the parties whereas the Respondent has been able to do so as noted previously.

Due to the physical requirements of her employment, her age, and the disparity in the incomes between the parties, the Petitioner seeks ongoing spousal support. The Respondent seeks a termination date.

...

Further, we request that the Court order spousal support in the minimum amount of \$1,500.00 per month which will allow Ms.

Mitchell an opportunity to set aside a realistic sum for her retirement in addition to the amounts received by way of statutory division of pension for the 13 year marriage period.”

[15] The Supreme Court of Canada in *Bracklow v. Bracklow*, [1990] 1 S.C.R. 420, stated at para. 15:

“The lower courts implicitly assumed that, absent a contractual agreement for post-marital assistance, entitlement to support could only be founded on compensatory principles, i.e., reimbursement of the spouse for opportunities foregone or hardships accrued as a result of the marriage. I conclude, however, that the law recognizes three conceptual grounds or entitlement to spousal support: (1) compensatory; (2) contractual; and (3) non-compensatory. These three bases of support flow from the controlling statutory provisions and the relevant case law, and are more broadly animated by differing philosophies and theories of marriage and marital breakdown.”

[16] The *Annual Review of Family Law, 2002*, McLeod and Mamo, in reference to this decision stated at p. 193:

“In *Bracklow v. Bracklow*, the Supreme Court of Canada held that there were three types of support:

1. compensatory support, (both specific calculable and unspecific) to address the economic advantages and disadvantages to the spouses flowing from the marriage (or the roles adopted in marriage);
2. non-compensatory dependency based support, to address the disparity between the parties’ needs and means upon marriage breakdown; and
3. contractual support, to reflect an express or implied agreement between the parties concerning the parties’ financial obligations to each other.”

[17] In this instance, there is no submission as to contractual entitlement.

[18] This was a relationship of 13 years. At the beginning of this marriage, Ms. Mitchell chose not to continue her occupation as a personal care worker. This choice was not at the request of Mr. Mitchell nor was it required to provide child care or to further Mr. Mitchell’s employment opportunities. Mr. Mitchell did not

insist she continue her employment and his income was sufficient to provide for the couple and Ms. Mitchell's child of her previous marriage. At the conclusion of the relationship, Ms. Mitchell received \$30,000.00 as her share of the value of the matrimonial home and \$72,000.00 representing her share of the pension benefits Mr. Mitchell had acquired during their marriage. Mr. Mitchell has provided spousal support for the last four years.

[19] I conclude, considering the factors set out in s. 15.2 of the *Divorce Act*, Ms. Mitchell's entitlement to spousal support, recognized by Mr. Mitchell at their separation, continues to this date. The division of matrimonial property and payment of support since the separation has not satisfied Ms. Mitchell's entitlement on either a compensatory or a non-compensatory basis.

Duration and Amount

[20] The *Annual Review of Family Law, 2002*, McLeod and Mamo, under the heading of "Duration of Support" at p. 221, states:

"The duration of support should reflect the support objective that the support order is intended to address: *Bracklow v. Bracklow, supra*. Usually, support is awarded because a dependant is not self-sufficient as a result of the roles adopted in marriage. A court should not assume that a dependant will be able to achieve self-sufficiency. There is no deemed self-sufficiency and a support order should continue until a dependant has overcome the effect of the roles adopted in marriage: *Moge v. Moge, supra*." [Emphasis added]

[21] Ms. Mitchell was 34 on entering this relationship, 47 at separation and is currently 51 years of age. She testified as to health problems that may impede her ability to work full time in her current occupation. From her testimony, I conclude she believes her entitlement to support should continue until her retirement.

[22] Mr. Mitchell is younger than Ms. Mitchell and will probably be employed longer. He has an income that, at the moment, would allow him to provide spousal support.

[23] The relative standard of living of the spouses before, during and after marriage is often mentioned as a factor when considering the duration and amount

of spousal support. In this instance, there is ample evidence as to the couple's incomes when married, separated and at trial. The same cannot be said as to information pertaining to their standard of living; for example, there is little information as to the couple's activities while married, their spending patterns, if as a couple they travelled or how they spent their vacations. Mr. Mitchell has available income, but there is no evidence his lifestyle has been enhanced since separation. Ms. Mitchell has need of income, according to her financial statement, but there is no evidence that her lifestyle has dramatically changed since their separation.

[24] In *Bildy v. Bildy* (February 22, 1999), Docket No. C27449, Court of Appeal for Ontario, the couple divorced after 13 years of marriage. There were children of the union entitled to child support. At trial, the spousal support payment was limited as to time. Ms. Bildy appealed. The Court of Appeal allowed the appeal as it pertained to the spousal support order but did not order indefinite support payments. Mr. Bildy was required to continue his payments for a further seven years or to terminate in April of 2006.

[25] In *Phinney v. Phinney* [2002] N.S.J. No. 540, the couple divorced after a 13 year relationship. There were children in this relationship entitled to child support. The divorce occurred in 2000. In 2002, Mr. Phinney's obligation to provide spousal support was varied by being reduced and terminated as of August of 2004. Ms. Phinney appeal this decision and was successful. Mr. Phinney was required to continue his spousal support payments until December of 2006.

[26] In both previously mentioned cases, the recipient of a limited term spousal support order was successful on appeal. Their success, however, did not come in the form of an indefinite order for support but rather an extension of the time such support would be paid.

[27] As noted in *Bildy v. Bildy, supra*, and *MacLean v. MacLean* (2001), 200 N.S.R. (2d) 34, given s. 17 of the *Divorce Act*, limited term orders may be the subject of further application.

Quantum

[28] As to quantum, Ms. Mitchell considers Mr. Mitchell's current income, not the income he was earning at separation, the figure to be used in any determination as to her support. In her pre-trial submission she states:

“Mr. Mitchell's income has increased dramatically since the separation of the parties, and Ms. Mitchell should be entitled to share in that lifestyle as his success is directly attributable to the roles of the parties during the years of this marriage. See *Zammit v. Zammit* and *Marinangeli v. Marinangeli* referred to above.”

[29] The *Annual Review of Family Law, 2002*, McLeod and Mamo, on this point, states at p. 233:

“Where support is awarded because a dependant is unable to support himself or herself because of the role he or she adopted in marriage, the amount of support should reflect the accustomed family lifestyle. A dependant should not be entitled to increased support because a payor's fortunes improved after separation unless the dependant contributed to the payor's career so that the payor would be unjustly enriched if the payee were restricted to the accustomed lifestyle.”

[30] Ms. Mitchell's entitlement to support based on Mr. Mitchell's current income four years after the separation is tenuous at best. Mr. Mitchell was an employee of the Department of National Defence when the couple married. He remained so employed during the marriage and is so employed at this time. There is no evidence to suggest that Ms. Mitchell's remaining out of the workforce, contributed to Mr. Mitchell's career to such an extent that he would be unjustly enriched if Ms. Mitchell's support was restricted to the lifestyle available to the couple at separation.

[31] I conclude an order requiring Mr. Mitchell to provide spousal support to Ms. Mitchell in the amount of \$1,500.00 a month until January 1, 2008, will adequately provide for her compensatory and non-compensatory entitlement resulting from their relationship. I further find providing support for that period of time, in that amount, (which I consider in excess of her current need) and the division of matrimonial property will overcome the effect of the roles adopted by the couple during the marriage.

[32] I would request that counsel for the Petitioner prepare the order.

J.