

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Hardin v. Culligan*, 2019 NSSC 235

Date: 20190724

Docket: 1203-003685

Registry: Bridgewater

Between:

Shirley Patricia Hardin

Petitioner

v.

Brent Augustine Culligan

Respondent

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: May 10, 2019, in Halifax, Nova Scotia

Counsel: Barbara Darby for the Petitioner

By the Court:

[1] Shirley Hardin filed a Petition for Divorce on September 8, 2014. Brent Culligan was served with the Petition on September 10, 2014. Mr. Culligan did not file an Answer and the matter came before the court as an uncontested divorce.

[2] Although uncontested, a hearing date was set as further information was required to be able to properly adjudicate on the issues before the court. The matter was before the court for a hearing on May 10, 2019.

[3] I requested additional information from the Petitioner to be provided to the court including translations by a certified translator of the documents purportedly written in the Japanese language. These documents included the marriage registration and a pay stub of Mr. Culligan. Counsel for Ms. Hardin forwarded the additional information on May 16, 2019 (with original copies of the translations provided on May 29, 2019).

ISSUES

[4] The issues to be determined are:

- a) Have the jurisdictional requirements been satisfied to grant a divorce?
- b) Is child support payable in relation to the parties' youngest child, Megan, on a retroactive and/ or prospective basis? If so, what is the quantum and duration of support?
- c) Is Ms. Hardin entitled to spousal support on a retroactive and/ or prospective basis? If so, what is the quantum and duration of support?
- d) What is the appropriate division of matrimonial property?

BACKGROUND

[5] The parties were married in Japan and all three of their children were born there: Emma, Luke and Megan. The family returned to Nova Scotia in 2001 but Mr. Culligan returned to Japan to work. At the time of the separation, Mr.

Culligan was living and working in Tokyo and had been travelling to Nova Scotia to visit for some period of time. Mr. Culligan has a doctorate in education from Temple University Japan with a specialization in teaching English as a second language.

[6] The parties' three children are: Emma (currently 26 years of age), Luke (soon turning 24 years of age), and Megan (20). Given the ages of the children, there is no need to specify custody and access in the Corollary Relief Order. It is not disputed that the children remained in the primary care of Ms. Culligan after separation.

[7] From the date of separation in September of 2013 to September 2018, all three children remained dependent children of the marriage. From 2013 to 2016 there were two children pursuing post secondary studies (Luke and Emma). Commencing in September 2017 all three children were in post secondary studies. Luke graduated from post secondary education and did not fit within the definition of a "child of the marriage" in 2018 following his graduation.

[8] Emma is studying engineering. She commenced her studies at Dalhousie and is currently attending Memorial University in Newfoundland. She is currently in a co-op program and also has income from a part time job. The post secondary expenses were covered by RESP for her first year. The balance of her expenses were paid using credit cards and loans. Mr. Culligan provided financial assistance directly to Emma but it is unknown how much he provided. Ms. Hardin contributed approximately \$269 per month to Emma to assist with expenses. Ms. Hardin is not seeking retroactive or prospective child support related to Emma.

[9] Luke completed a finance degree at Acadia in the spring of 2018. He is currently studying to be a certified financial analyst. The first two years were funded through an RESP. Ms. Hardin had planned to fund Luke's first year through the RESP which occurred. In the second year, however, Mr. Culligan refused to assist in Luke qualifying for a student loan. The only source of funding was the RESP funds- funds which were originally designated for Megan. In his last years at university, Luke qualified for student loans. Ms. Hardin also assisted Luke financially. She is not seeking retroactive or prospective child support related to Luke.

[10] Ms. Hardin is seeking ongoing child support for Megan. Megan began her university education in September 2017 and is studying marketing at St. Mary's University. Financial information was submitted by Ms. Hardin to confirm

expenses related to Megan. After inclusion of Megan's income, her monthly deficit is approximately \$1,700 per month.

[11] Mr. Culligan has made it abundantly clear that he does not intend to participate in the legal process. Despite being personally served with the Petition for Divorce and despite some communication with Ms. Hardin, he has not provided the court with any information.

[12] An *ex parte* order was granted by the Honourable Justice Wright which permitted documents to be served on Mr. Culligan by way of email. The order for substituted service was granted on December 11, 2018. At each stage of this proceeding, Mr. Culligan was advised by email. Counsel for Ms. Hardin confirmed that all documents were copied to Mr. Culligan at his email address as well as providing him with the Conference Memorandum (setting out filing deadlines) and notification of the date for the divorce trial.

[13] Ms. Hardin did provide the court with communication she received from Mr. Culligan which included the following:

“I do not think you or the Canadian government have any right to tell me how to support my children. Our divorce is no excuse for them to meddle in my affairs...

I will not be your bonded labourer. If necessary, I will return to Canada after Aoyama Tandai closes, set up a comfy cabin in the woods, and sue you for support. I would rather go to jail than send you money I earned by my work. I can use the jail time to catch up on my reading.”

[14] This email was received by Ms. Hardin on August 27, 2017. (ref. Exh 8)

[15] A pay stub was provided by Ms. Hardin dated January 18, 2019 to confirm Mr. Culligan's monthly salary to be 545,000 Yen. I was provided evidence regarding the exchange rate applicable near the time of trial which converted this figure to \$6,699 Canadian monthly. This is an annual salary of \$80,388. There have been repeated requests for financial disclosure from Mr. Culligan. Even in the face of a court order requiring him to file his financial information, Mr. Culligan filed nothing.

Issue 1- Divorce

[16] The first issue to be addressed is the jurisdictional requirements in relation to the granting of a divorce. The parties' cohabitation commenced in 1985. On February 19, 1992, they notified the Toshima-ku family register of their marriage.

The Petitioner provided evidence at the divorce trial that the marriage ceremony took place on February 29, 1992, in Tokyo, Japan. The parties separated on September 14, 2013, and have remained separate and apart since that time. I find that all jurisdictional requirements necessary to prove a divorce have been met and a Divorce Order will issue.

Issue 2- Child Support

[17] Pursuant to section 19 of the *Federal Child Support Guidelines*, I am able to impute income to Mr. Culligan. Section 19(1)(f) authorizes the court to impute such income to a spouse as it considers appropriate if that spouse has failed to provide income information when under a legal obligation to do so. I am prepared to impute income to Mr. Culligan in the amount of \$80,388 per annum. I have no evidence from Mr. Culligan in relation to appropriate deductions from his gross income and so find his income to be equivalent to gross income of \$80,388 per annum.

[18] Section 3(2) of the Guidelines states as follows:

“(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

(a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

(b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.”

[19] The evidence before me indicates that Megan resides in Halifax. Ms. Hardin resides in Lunenburg. In 2018 Ms. Hardin was diagnosed with cancer and as a result underwent chemotherapy. Her chemotherapy commenced in November 2018. Following her diagnosis, Ms. Hardin applied for and was approved for critical illness insurance coverage in relation to the mortgage on the matrimonial home.

[20] I am unsure as to what impact Ms. Hardin’s health will have on where Megan chooses to spend her time going forward. I am unsure if she will spend more of her time in Lunenburg or not. In determining whether to apply s.3(2)(a) or

(b), I must examine the circumstances and the context of this particular case. I find that child support in the unique factors of this case is appropriately quantified under s. 3(2)(a).

[21] The table amount of child support payable in relation to Megan is therefore \$686. Section 7 expenses have been quantified \$630 per month. Utilizing the method of proportional sharing of these expenses as between the parents would result in a s.7 contribution from Mr. Culligan of \$422 per month. Given the parties' incomes, the proportional sharing results in Mr. Culligan paying 67% of these expenses. The total child support payable by Mr. Culligan (table and section 7) is \$1,108 per month or \$13, 296 annually. Over the anticipated four year program of Megan this equates to \$53,184.

[22] Lump sum child support is permissible pursuant to section 11 of the *Federal Child Support Guidelines* which states:

“11 The court may require in a child support order that the amount payable under the order be paid in periodic payments, in a lump sum or in a lump sum and periodic payments.”

[23] There is retroactive child support owing for Megan for 22 months (since September 2017) in the amount of \$24,376. The retroactive child support will be satisfied by way of lump sum payment as detailed below.

[24] In relation to prospective child support, the court is also authorized to provide a lump sum payment in extraordinary circumstances. As stated in the case of *Snyder v Snyder*, 1995 CarswellNS 537 (NSSC):

“14. Lump sum maintenance is appropriate when there is an immediate need established, *Rossiter Forrest v. Forrest* (1994) 129 N.S.R. (2d) 130 and *Mosher v. Mosher* (1995) 140 N.S.R. 40.

15 It is also appropriate when resources are available that may be disposed of where there is an indication such disposition will likely diminish the prospects of recovery and compliance with the court's order.”

[25] Although decided pre- Guidelines, this case and the notion of lump sum child support was considered in the case of *Rhynold v Van der Linden*, 2006 NSSC 260. The court declined to order lump sum child support in that case because there were no arrears of child support, there was no indication that the payor was leaving the jurisdiction and some of the prior missed payments were beyond the control of the payor.

[26] Lump sum child support is an exceptional remedy but has been ordered in a number of cases including: *Groves v. Bourguignon-Groves* (2007), 42 R.F.L. (6th) 345 (S.C.J.); *Valenti v. Valenti* (1996), 21 R.F.L. (4th) 246 (Ont. C.J.); *TA v ST*, 2017 ABQB 414; *Roscoe v. Roscoe*, 2012 ONCA 817 (Ont. C.A.); *Segat v. Segat*, 2015 ONCA 16 (Ont. C.A.); *Carr v. Wilson* 2005 BCSC 1495; *T. (M.E.E.) v. W. (C.M.)* 2007 BCSC 1110; and *Myatt v. Myatt*, [1993] B.C.J. No. 215 (B.C. S.C.).

[27] In this case, I believe it appropriate to order lump sum child support as it relates to prospective child support for Megan. Mr. Culligan has indicated his intention to stop paying support to Ms. Hardin. He is residing in Japan and collection of child support may be difficult if not impossible. Megan is anticipated to have at least two more years of post secondary studies. Assuming child support would be payable for the four year university degree, there would be 26 further payments of support calculated at \$1,108, for total prospective child support of \$28,808. This amount will be paid by way of lump sum.

Issue 3- Spousal Support

[28] Ms. Hardin is entitled to spousal support on a compensatory and non-compensatory basis. The history of the relationship reveals that Ms. Hardin was the primary care parent for the three children. After returning to Canada, Ms. Hardin received a cooking certificate and at the time of separation was a cook at Shannex. Ms. Hardin went back to university and graduated with a B.Sc. in 2012. In 2016 she returned to university and earned a Master of Education graduating in May 2018.

[29] At times, Ms. Hardin held down two jobs. One job necessitated a commute from her home in Lunenburg to the HRM. She has diligently pursued educational and employment opportunities to ensure that her family was well cared for. As of September 2018 she became Food Service Supervisor at the Lunenburg and Liverpool hospitals. Her cancer diagnosis and subsequent treatment has impacted her employment and her independence. After completing a round of chemotherapy in Feb. 2019 she slipped on some stairs and badly sprained her right ankle and her left leg. She required Megan's assistance while she was healing.

[30] Mr. Culligan was the primary breadwinner for the family throughout the marriage. There has been and continues to be income disparity between the parties. Ms. Hardin is entitled to spousal support.

[31] Counsel for Ms. Hardin has provided calculations utilizing the parties' current circumstances and income levels. The calculation of lump sum support pursuant to that calculation ranges from \$201,541 and \$266,611. The calculation would be revised slightly when Megan completes university and the section 7 expenses were no longer proportionally shared between the parties. I decline to order lump sum spousal support in the amounts noted herein.

[32] Calculations were also provided in relation to retroactive spousal support. Spousal support should have been paid from 2015 to June 2019. The amount owing for that period is \$30,558 (\$7,350 for 6 months of 2019, \$6,096 for 2018, \$7,968 in 2017 and \$9144 in 2016).

[33] Lump sum spousal support is permissible pursuant to s.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. “

[34] In determining whether a lump sum is appropriate in this case, I must examine the circumstances of this particular case. I am mindful of the relevant case law including the case of *Miller v Miller*, 2009 NSSC 294 (NSSC) at paragraph 109:

“109 The author of the Divorce Act Manual sets out various circumstances that may justify a lump sum award of spousal support: a lump sum may serve as a "clean break" alternative to periodic payments; it may be a method of ensuring that payment is made where there is reason to be concerned about a risk of non-payment; it may be a method of paying off debts, past expenses or to make up for past support deficiencies; it may be a way to pre-pay expenses; and it may be a method of compensation for roles adopted during the marriage or a way of easing the payee's transition to self-sufficiency. (section 15:22:03)”

[35] As noted in the case of *Wadden v Wadden*, 1996 CnLII 1144 (NSSC), the court is concerned about a lump sum support payment in reality creating a re-allocation of assets. In referencing the decision of *MacNeil v MacNeil*, 1994 CarswellNS 42 (NSCA), the court held that the concerns related to a reallocation of assets did not apply in that case. At paragraph 69:

“I find that in this case the concerns addressed in *MacNeil v. MacNeil* do not apply because the request to have the respondent convey his property interest is not an attempt to redistribute marital assets, but simply to satisfy past and

continuing support obligations in circumstances where otherwise the respondent would not be able to do so.”

[36] The case of *Hemming v Hemming*, 1983, CarswellNS 57 (NSCA) was cited with approval in the case of *Miller*, supra. At paragraph 31 of the *Hemming* decision, our Court of Appeal stated:

“In my opinion the matter was brought into focus by Professor [McLeod] ... where, in an annotation to the report of *Stammler v. Stammler* contained in 11 R.F.L. (2d) he said (p. 84):

... Taylor, J., in *Stammler* realistically appraised the problems with respect to the interaction of a family asset division and lump sum award; both were economic wealth distribution devices. In general where the economic wealth had been divided by a 'provincial' scheme it ought not to be re-assessed by a 'federal distribution' scheme. Although periodic payments may truly reflect the support needs of a spouse, it is only in exceptional cases, e.g., if the husband were attempting to abscond or avoid his obligation, that lump sums truly accomplish support ends.

[37] The case of *Davis v. Crawford*, 2011 ONCA 294, expanded the authority of the court to order lump sum spousal support. In *Davis*, the court stated:

“69 In the end, it is for the presiding judge to consider the factors relevant to making a spousal support award on the facts of the particular case and to exercise his or her discretion in determining whether a lump sum award is appropriate and the appropriate quantum of such an award.

70 As we have said, we do not endorse the submission that lump sum spousal support awards must be limited to "very unusual circumstances" as a matter of principle. Nonetheless, we agree that most spousal support orders will be in the form of periodic payments...”

[38] It is clear that this is an exceptional case- Mr. Culligan has stated that the state will not dictate to him his financial responsibility to his family even in the context of a divorce. He has not participated in the trial. He has not forwarded funds to Ms. Hardin in months, despite her current circumstances and health care crisis.

[39] In examining the retroactive claims for child support of \$24,376 and spousal support of \$30,558- the total retroactive support due and owing is \$54,934. Schedule “B” of the submissions filed on behalf of Ms. Hardin indicates payments from Mr. Culligan in that time frame of \$36,396. This leaves retroactive support

(child and spousal) owing from Mr. Culligan to Ms. Hardin of \$18,538. This amount shall be paid as a lump sum by Mr. Culligan and will be deemed to be satisfied from the proceeds of the division of the property given the extreme unlikelihood of payment.

[40] With respect to the payment of prospective spousal support, I order that it be partially satisfied by way of a lump sum (as detailed below). I further order that spousal support payments in the amount of \$1,225 be paid by Mr. Culligan to Ms. Hardin commencing October 1, 2020 (as detailed below). The circumstances herein fit within the rule of 65 and as such indefinite spousal support would be payable.

PROPERTY DIVISION

[41] The parties have the following matrimonial property to be divided: their home, a lot in Texas, a motor vehicle, and various furnishings. There are corresponding debts to be considered: credit cards, a student loan and a mortgage.

[42] There is an issue as to whether the critical illness mortgage insurance proceeds should be factored into the property division. As a result of Ms. Hardin's cancer diagnosis, she was able to obtain insurance coverage in late 2018 which paid off the mortgage on the home to that date. I am prepared to allow Ms. Hardin to receive full credit for the insurance proceeds based on section 13 of the *Matrimonial Property Act*. I do so based upon the factors as noted in section 13 (f), (g), (i), (j) and (k). In particular I note (k) which references the proceeds of an insurance policy intended to represent compensation to an injured spouse.

[43] Ms. Hardin has been solely managing the home for a number of years. She has paid for the ongoing expenses related to the home including the mortgage. She has also paid for repairs and maintenance to the home. She will continue to be responsible for the home and the expenses associated thereto. It is unknown how Ms. Hardin's medical diagnosis will affect her financially as time goes on, but it is clear that the critical illness insurance is meant to compensate her financially as a result of her health. Mr. Culligan should not be the beneficiary of those funds, particularly in light of his cessation of payments to Ms. Hardin in late 2018 when she was undergoing cancer treatments.

[44] The proposed property division is set out at page 12 of Ms. Darby's brief. The proposal includes the retention in sole ownership of the lot in Texas by Ms. Hardin. I have not been provided with authority related to my jurisdiction to

transfer ownership to vacant property in Texas. If the lot were to be included in the division of property, it would result in an equalization payment owing to Mr. Culligan of \$59,654.

[45] This amount, however, does not include his 50% of the furnishings (a further \$500) nor does it include the value of the motor vehicle owned at separation valued at \$2,500. Mr. Culligan would have been entitled to \$1,250 in relation to the vehicle. In total, the equalization payment owing to Mr. Culligan would be \$61,314. This figure is excluding any credit given to Ms. Hardin for the student loan debt or the credit card debt which may well reduce the monies owing to Mr. Culligan. I have not been provided with the debt figures owing as of the date of separation and therefore am unable to factor them properly into the division.

[46] I am prepared to set off the \$61,314 owing to Mr. Culligan pursuant to the property division by the amounts owing for support. Taking into account retroactive support owing, would reduce the equalization figure by \$18,538 to \$42,776. Prospective child support is payable by Mr. Culligan to Ms. Hardin of \$28,808. Reducing the equalization payment by the prospective child support leaves the sum of \$13,968 payable to Mr. Culligan.

[47] I order that the balance of \$13,968 owing to Mr. Culligan be satisfied by a partial lump sum spousal support order as against his equalization payment. Lump sum spousal support is addressed at Chapter 10 of the *Spousal Support Guidelines: Revised User's Guide*, April 2016. The Revised User's Guide references the fact that there must be assets from which a lump sum amount may be payable.

[48] I accept that spousal support is payable to Ms. Hardin at the mid range as noted in the *SSAG* of \$1,225 per month. The payment of \$13,968 shall be applied to future payments of spousal support. The sum of \$13,968 is paid on an after tax basis. To appropriately credit this payment to Mr. Culligan would result in the \$13,968 payment being be grossed up for taxes which would have been owing by Ms. Hardin had support been paid on a periodic basis. Utilizing Ms. Hardin's marginal tax rate of approximately 30% would result in a grossed up spousal support figure of \$18,158. Mr. Culligan's obligation to pay spousal support is therefore satisfied for a period of approximately 15 months ($\$18,158 \div \$1,225 = 14.82$ months of payments).

CONCLUSION

[49] Ms. Hardin is entitled to child support and spousal support on a retroactive and prospective basis. All retroactive and prospective child support amounts are satisfied by the lump sum payment from the matrimonial property division. Retroactive spousal support payments are also satisfied from the lump sum. Prospective spousal support payments up to and including September 1, 2020 are satisfied. As of October 1, 2020, spousal support is due and payable from Mr. Culligan to Ms. Hardin in the amount of \$1,225 per month.

[50] Ms. Hardin is entitled to retain the proceeds of the critical illness insurance proceeds related to the matrimonial home pursuant to section 13 of the *Matrimonial Property Act*. Ms. Hardin shall retain the matrimonial property including the matrimonial home, the 2000 Dodge Ram motor vehicle, the contents of the home, and the vacant lot in Texas. The equalization payment due to Mr. Culligan as a result of the division of matrimonial property is to be used to satisfy his obligations to pay child and spousal support as noted herein.

[51] There is no specific parenting arrangement ordered as it relates to the adult “child of the marriage”, Megan. She (as well as her siblings) will determine the appropriate parenting plan with Mr. Culligan directly given their ages.

Chiasson, J.