

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** *Somers-Dilny v Dilny*, 2019 NSSC 247

**Date:** 20190904

**Docket:** 106171

**Registry:** Sydney, NS

**Between:**

Shirley Somers-Dilny

Applicant

v.

Stephen Dilny

Respondent

---

**LIBRARY HEADING**

---

**Judge:** The Honourable Justice Lee Anne MacLeod-Archer

**Heard:** January 28, 29, 2019 in Sydney, Nova Scotia

**Final Written** March 8, 2019

**Submissions:**

**Written Decision:** September 4, 2019

**Summary:** Division of assets and pension; parenting arrangements; child support; spousal support

**Issues:**

- (1) Division of Assets
- (2) Parenting Arrangements
- (3) Support

**Result:** Equal division of assets. Child support and spousal support awarded. New parenting arrangement put in place.

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.  
QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.***

---

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *Somers-Dilny v Dilny*, 2019 NSSC 247

**Date:** 20190904

**Docket:** 106171

**Registry:** Sydney, NS

**Between:**

Shirley Somers-Dilny

Applicant

v.

Stephen Dilny

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: January 28, 29, 2019, in Sydney, Nova Scotia

Final Submissions: March 15, 2019

Written Release: September 4, 2019

Counsel: Alan Stanwick for the Applicant  
Emma Astephen for the Respondent

## **By the Court:**

### **Facts**

[1] The parties were married on May 23, 1998 and separated on March 10, 2017. They have one child, Riley who is now age 15.

[2] Mr. Dilny works as an operating engineer with the local union, and also operates his own business. Ms. Dilny is unemployed, due to physical impairments arising from severe arthritis.

[3] The issues before the court are as follows:

1. What is the appropriate division of Assets and Pensions?
2. What are the appropriate parenting arrangements for Riley?
3. What child support is payable?
4. Is spousal support payable, and if so in what amount?
5. What Ancillary orders are appropriate?

### **What is the appropriate division of Assets and Pensions?**

[4] The parties own a home which was appraised at \$168,000.00 in June 2017. The mortgage balance at the time of separation on March 10, 2017 was approximately \$120,400.00. Mr. Dilny wishes to retain the home, as it was built near his family, on lands he purchased before meeting Ms. Dilny. He initially claimed an unequal division of the matrimonial home, but abandoned that claim at trial.

[5] Ms. Dilny advanced a claim for unequal division of the matrimonial home at trial. She says that she invested about \$96,000.00 in the home, after she received a settlement in 2002 for a motor vehicle accident.

[6] Ms. Dilny says that the home was built to suit her needs, with extra wide doors to accommodate a wheelchair and a hot tub. Mr. Dilny denies this, saying that he started building the home well before he met Ms. Dilny in 1997, and that the doorways are built to code, not to accommodate her special needs. He provided records to show that a building permit was issued in 1994, and that the framing

was complete in 1996. This evidence supports his contention that the home was not built specifically to meet Ms. Dilny's needs, though by good fortune it does.

[7] Ms. Dilny hasn't worked for many years. She wouldn't likely qualify for a mortgage. She seeks a Quit Claim deed, asking that Mr. Dilny's share of the equity be waived in an unequal division of the home's value in her favour.

[8] An equal division of matrimonial assets is presumed. The onus of establishing an unequal division is a heavy one. I must consider section 13 of the *Matrimonial Property Act [RSNS 1989, c. 275]* which reads:

*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:*

*(a) the unreasonable impoverishment by either spouse of the matrimonial assets; N/A*

*(b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred; N/A*

*(c) a marriage contract or separation agreement between the spouses; N/A*

*(d) the length of time that the spouses have cohabited with each other during their marriage; this was a long-term marriage*

*(e) the date and manner of acquisition of the assets; Mr. Dilny purchased the land and started building the home before he met Ms. Dilny; she used her MVA settlement monies to help build the home.*

*(f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset; Ms. Dilny was primarily responsible for Riley's needs, thus freeing up Mr. Dilny to pursue his trade and business interests.*

*(g) the contribution by one spouse to the education or career potential of the other spouse; N/A*

*(h) the needs of a child who has not attained the age of majority;* Riley still lives at home with his mother.

*(i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;* Ms. Dilny was the primary caregiver and homemaker; Mr. Dilny was the primary income earner.

*(j) whether the value of the assets substantially appreciated during the marriage;* there's no evidence of whether the home appreciated in value.

*(k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;* Ms. Dilny used her settlement monies to finish the matrimonial home, thus depriving her of funds to secure her future needs, including a home.

*(l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;* N/A

*(m) all taxation consequences of the division of matrimonial assets.*  
N/A

[9] To the extent that Ms. Dilny seeks an unequal division of the equity in the matrimonial home, her claim must fail. An equal division of the equity would not be fair or unconscionable. Her contribution to the home was significant, but it came on the heels of Mr. Dilny's contribution. He acquired the land and started building the home before the parties met.

[10] However, I am prepared to order that she be granted title to the home, in an equal division as set out in Schedule "A". The home suits her and Riley's needs and provides her with some security for the future. Mr. Dilny will execute and deliver a Quit Claim deed to her within thirty days.

[11] Ms. Dilny will be responsible for the mortgage balance and she must make immediate application to refinance in her name only, so that Mr. Dilny is freed of his obligations under the mortgage loan.

[12] Both parties seek an equal division of the RRSPs (Assante and BMO) by way of a tax-free spousal roll-over under the *Income Tax Act* [R.S.C., 1985, c. 1].

- [13] Mr. Dilny cashed \$10,000.00 of his RRSPs after separation. He didn't pay any of the monies to Ms. Dilny, though he testified that he used \$2,400.00 to pay the overdraft on the joint CIBC account.
- [14] The evidence shows that the overdraft as of March 10, 2017 was only \$996.00. Using the RRSP money to pay down a joint debt is reasonable. Mr. Dilny kept the rest of the proceeds for his own use.
- [15] Ms. Dilny had her own expenses during the same timeframe. She didn't cash RRSPs, and received no financial assistance from Mr. Dilny until he was ordered to pay interim child and spousal support.
- [16] Mr. Dilny's Assante RRSP (\$28,200.00 as of March 31, 2017) will be divided equally. The value to be divided will be the value on the date the division is effected (to reflect changes in value since separation). Mr. Dilny will sign any necessary forms and deliver them to Ms. Dilny within thirty days.
- [17] Ms. Dilny's RRSP at BMO was worth \$7,039.00 as of March 10, 2017. That RRSP will be divided equally by way of rollover. Ms. Dilny will sign any necessary forms and deliver them to Mr. Dilny within thirty days.
- [18] In the event either party fails to sign the necessary documents and provide them to the other, the Sheriff will be authorized as their Trustee to do so forthwith. I reserve jurisdiction to deal with any disputes arising from the RRSP division.
- [19] The TFSA was used to pay off matrimonial debt. There will be no division or adjustment for same. The joint bank account was in overdraft on March 10, 2017 and some of the RRSP proceeds were used to pay that off.
- [20] Mr. Dilny had a bank account with funds in at separation, which will be divided equally.
- [21] Mr. Dilny's pension credits with the operating engineer's union will be divided equally at source, for the period of the marriage. Mr. Dilny will cooperate in the execution of any and all documents necessary to affect that division within 30 days, failing which Ms. Dilny will be authorized as Trustee to make inquiries of the pension administrator, to obtain information and forms, and to sign all necessary documents on behalf of Mr. Dilny.

[22] In August, 2017, Mr. Dilny received \$13,750.00 as an insurance settlement for the Ram truck he retained at separation. He didn't share those funds with Ms. Dilny. Yet he'd borrowed money on the joint line of credit to purchase the Ram in 2016. He will retain the insurance proceeds and compensate Ms. Dilny for her interest in the truck and her payments on the LOC through an equal division.

[23] Mr. Dilny's uncontradicted evidence is that two of the dirt bikes listed in evidence are used by Riley. Their value will not be divided.

[24] Mr. Dilny has another bike and tools which he retained. Their value is offset by the contents of the home and the hot tub, which Ms. Dilny will retain.

[25] The Toyota Rav 4 which Ms. Dilny retained after separation will remain in her possession. Mr. Dilny will be solely responsible for the associated loan. I've accepted the appraised value as opposed to the Kijiji value advanced by Mr. Dilny for the vehicle. That appraisal was completed 14 months after separation, whereas the ad is undated and doesn't reflect the actual vehicle at issue. The appraisal is the best evidence of the truck's value. Mr. Dilny will sign any documents necessary to transfer title to the truck to Ms. Dilny within 30 days.

[26] Ms. Dilny is paying the line of credit and will remain responsible for that debt.

[27] The division of assets is shown in Schedule "A" to my decision. It shows Ms. Dilny owing an equalization payment of \$6,564.50 Mr. Dilny. That sum will be offset against sums owing to Ms. Dilny for spousal support (below).

### **What are the appropriate parenting arrangements for Riley?**

[28] In any decision involving children I am guided by the best interests of the child. The parties were married, so the *Divorce Act* [R.S.C., 1985, c. 3 (2nd Supp.)], applies. At the time of trial, Riley was 15. He was living with his mother, but Mr. Dilny was exercising access. Mr. Dilny said that Riley wanted to spend more time with him, but Ms. Dilny wouldn't allow it. He seeks shared parenting of Riley, while Ms. Dilny seeks primary care with a specified access schedule for Mr. Dilny.

[29] In considering either parent's position, I must balance the principle of maximum contact with the other statutory factors laid out in the *Divorce Act*. These include the child's physical environment, discipline, cultural development, participation in extracurricular activities, and time availability for the child.

[30] Ms. Dilny doesn't work, so she has ample time for Riley. She values education and she encourages him to do well in school. She is concerned that his father places less value on education and has influenced Riley negatively, by allowing him to disregard his school obligations and spend too much time on his bike. Mr. Dilny denies that Riley's grades have declined since separation, and he says that he too encourages Riley to do well in school.

[31] The parties also disagree on whether Mr. Dilny is willing to take Riley to his scheduled extracurricular activities. Mr. Dilny says that on days he has Riley in his care, he takes him to those activities, which Ms. Dilny denies. In turn, Mr. Dilny says that Ms. Dilny hasn't been flexible with extra access and doesn't always return his text inquiries, which she denies.

[32] It's clear that Mr. Dilny and Riley share some of the same interests, such as racing bikes and operating equipment. Ms. Dilny feels that Mr. Dilny lures Riley away with promises of fun, and that he encourages Riley to be disrespectful and to disobey his mother. The evidence supports her view. In particular, the texts placed in evidence make it clear that Mr. Dilny uses disrespectful language in describing her to Riley.

[33] Mr. Dilny's texts with Riley are not the only indicator of a disrespectful attitude towards Ms. Dilny. In his evidence, he was equally dismissive. When asked about his priorities after buying a new 4-wheeler in May, 2017 when he wasn't paying support for his wife and son he replied "she's not my wife anymore, we're separated". It appears he decided to make Ms. Dilny's life difficult after separation by selling the vehicle she was using after separation, and taunting her in texts that she couldn't afford to live in the home alone.

[34] Mr. Dilny's attitude towards Ms. Dilny does not support a cooperative parenting arrangement wherein the parties share parenting or agree on reasonable access. Mr. Dilny doesn't recognize the need to keep Riley out of the conflict. He testified that he tells Riley to ask his mother if he can spend time with him. Mr. Dilny says that he only resorted to that approach because he doesn't always receive a reply to his texts. No unanswered texts were placed in



evidence to prove this, but it's possible that Ms. Dilny ignores some of his texts because the tone is abusive. I do not fault her for that.

[35] Putting Riley in the position of having to ask his mother to spend time with his father places Riley squarely in the middle of this parental conflict. Even at the age of 15, he should not have to negotiate time between his parents. For that reason, I am making a specified parenting order that reflects the need to keep him out of the fray. It also maximizes time with his father.

[36] It is in Riley's best interests to live primarily with his mother. Ms. Dilny will have custody of Riley, with liberal access with his father. Mr. Dilny will have access every weekend on a 2-week schedule as follows: Week 1: Friday from 3:00 pm (or when school lets out) until Sunday at 4:00 pm; Week 2: Thursday from 3:00 pm (or when school lets out) until Sunday at noon. If a long weekend falls on week #1 Riley will stay with his father until Monday at 4:00 pm.

[37] I'm not ordering alternating weeks as proposed by Mr. Dilny, because it's not in Riley's best interests to spend every second week with his father. His academic performance would likely suffer, as would his attitude towards his mother.

[38] Mr. Dilny will be entitled to obtain information from third parties about Riley's health, education, and extracurricular activities without the need for authorization from Ms. Dilny.

[39] In addition, Mr. Dilny must take Riley to any regularly scheduled extracurricular activities on his scheduled access time. He will also have open communication via text, email, or other means in the evenings until 9:00 pm when Riley is not in his care.

[40] Irrespective of the regular schedule, Mr. Dilny will have access with Riley on Father's day Sunday until 6:00 pm; Christmas eve from noon – 9:00 pm, Christmas day from noon - 6:00 pm; Boxing day from noon – 6:00 pm; New Years' day from noon – 9:00 pm; and on March break from Friday at 3:00 pm through to Wednesday at 6:00 pm; and Easter Sunday until 4:00 pm.

**What child support is payable?**

[41] At the time of the interim hearing in 2017, I found that income of \$48,321.00 should be imputed to Mr. Dilny. That was based on his line 150 income as reported on his 2016 income tax return, which included a business loss of \$3,453.00.

[42] In 2017 he reported line 150 income of \$72,423.00. This includes the \$10,000.00 RRSP he cashed after separation, which is a non-recurring source of income. In that year, he also reported gross business income of \$10,446.00, but a net loss of \$1,528.51.

[43] Mr. Dilny had not yet filed his 2018 tax return when the trial was held. I am therefore working off of his 2017 return in determining his income. I am satisfied that Mr. Dilny's 2017 line 150 income does not fairly reflect the income he has available to pay support. His business losses include CCA deductions for vehicles; those losses do not represent actual payments out of pocket. He also deducts amounts for a personal vehicle which are allowed for tax purposes, but which create a personal advantage, and unfairly reduce his income for support purposes.

[44] I have not imputed income to Mr. Dilny for monies he earns "under the table". There was evidence that he deals in cash, but not the extent of it. I cannot pull a figure from the air; imputed income must have a sound evidentiary basis.

[45] I am satisfied that Mr. Dilny's income for purposes of both the child support guidelines and spousal support should be imputed in 2017 and 2018 at \$64,825.00. This reflects his line 150 income, adjusted for the RRSP, with his CCA deduction added back at 100%, and the amounts he deducted for utilities and vehicle expenses added back at 50%.

[46] Mr. Dilny will pay child support under the Nova Scotia table at \$554.00 monthly, commencing March 1, 2017 and continuing monthly until further order of the court. Amounts paid under the interim order will be credited against monies owing under this decision. The *DBS* factors support such a retroactive adjustment.

[47] Mr. Dilny will also pay section 7 expenses for Riley as follows: sailing costs \$150/week over 8 weeks = \$1200.00 annually. Mr. Dilny will pay 90% or \$90.00/month towards this expense, commencing August 1, 2019 and continuing until further order of the court.

[48] Because Mr. Dilny reports self-employment income, I cannot order recalculation under the regulations as Ms. Dilny requested.

[49] Mr. Dilny will provide Ms. Dilny with a copy of his 2018 tax return forthwith, complete with all schedules. Such disclosure must be made annually, by June 30<sup>th</sup> of each year for so long as Riley is a dependent child. Mr. Dilny must also disclose his 2018 Notice of Assessment forthwith, and any Notices of reassessment for 2018 upon receipt. He will make such income disclosure each year for so long as Riley is a dependent child.

**Is spousal support payable, and if so in what amount?**

[50] Mr. Dilny's primary obligation is to pay child support, plus extraordinary expenses for Riley's activities. Spousal support can only be assessed after those are considered.

[51] Ms. Dilny receives CPP disability benefits of \$877.00 monthly, including Riley's portion. She was injured in a motor vehicle accident in 1995 and started receiving CPP in early 1997. This was after they met.

[52] Ms. Dilny was disabled when they met and dependent on Mr. Dilny throughout the marriage. She cannot work to support herself and she has been disadvantaged by the marriage breakdown. She is entitled to spousal support on a compensatory and non-compensatory basis at this time.

[53] Ms. Dilny requests spousal support in the high range, but given Mr. Dilny's child support obligations, that's not practical given that he has child support obligations and must pay his own expenses. I recognize that she has high medication and treatment costs that are no longer covered by Mr. Dilny's plan. Her medication alone averages about \$248/month.

[54] Mr. Dilny agreed to maintain his medical coverage at the interim hearing, but then called the company to advise of their separation. He says he called because there was a questionable expense put through, but I find that his real motivation was to cancel the coverage and make Ms. Dilny's life difficult.

[55] Irrespective of his motivation, the end result is that Mr. Dilny's coverage is no longer available. Given her high medication and treatment costs, I'm prepared to award spousal support in the mid-range. This also takes into account the fact that Ms. Dilny still has a child in her primary care, this was a

long-term relationship, she cannot work to increase her income, and Mr. Dilny is able to pay.

[56] Both parties prepared *SSAG* calculations. Mr. Dilny's calculations include Riley's portion of CPP benefits Ms. Dilny receives. Ms. Dilny's calculations use Mr. Dilny's line 150 income from 2017 which includes the \$10,000.00 RRSP. Neither is correct. Using the adjusted incomes, I award \$800.00 spousal support per month, payable effective July 1, 2019 and continuing until further order of the court.

[57] Ms. Dilny also seeks retroactive spousal support from March 1, 2017 to September 1, 2017. This period pre-dates the interim order. Mr. Dilny knew that Ms. Dilny needed support. He failed to pay any support, despite cashing an RRSP and having his own income and savings.

[58] Ms. Dilny seeks retroactive support in the amount of \$10,934.00 (\$1,562.00 X 7) which falls in the high range of spousal support based on a higher income than I've imputed to Mr. Dilny. Given that spousal support would not be tax deductible to Mr. Dilny if paid in a lump sum, and because I have assessed prospective support in the mid-range, Mr. Dilny would owe retroactive spousal support in the lump sum of \$4,424.00 (7 X \$800 less 21%). That amount will be offset against the equalization payment owing to him, leaving a balance owing to him of \$2,140.50.

[59] Ms. Dilny also seeks an adjustment for spousal support paid between October 1, 2017 – February 1, 2019, during which time Mr. Dilny paid \$300/month under the interim order. I find it's reasonable to adjust the amount paid, because Ms. Dilny needs that money and Mr. Dilny was able to pay.

[60] Mr. Dilny will pay an additional lump sum of \$11,455.00 (\$500 X 29 less 21%) for those 15 months. After deducting the balance owing to him for the equalization payment (\$11,455 - \$2,140.50) he must pay Ms. Dilny the sum of \$9,314.50 within thirty days. Failing such payment, he must roll over RRSPs worth \$11,790.50 to Ms. Dilny. That figure is grossed up to reflect the taxes she would pay on the RRSP when cashed.

### **What Ancillary orders are appropriate?**

[61] Ms. Dilny asks that Mr. Dilny reimburse their son's bank account for monies he withdrew to buy a lawn tractor he uses in his business. I accept that Mr.

Dilny inappropriately used \$1,300.00 from Riley's bank account for that purchase. He says it was for Riley's use, and at Riley's request. I do not accept that a 12-year-old would want to purchase a lawn tractor to help his father in his business, nor do I accept that this was a reasonable expense, even if Riley had asked for it. Further, the tractor was used to generate funds in Mr. Dilny's business, but there's no evidence that Mr. Dilny deposited the profits into an account for Riley.

[62] The monies in Riley's account were intended for Riley's use. They were deposited by Ms. Dilny, and I accept her evidence that she was pressured to add Mr. Dilny as a joint account holder shortly before he withdrew the funds. Although the withdrawal took place three months before separation, it is sufficiently proximate in time to the separation to deal with it.

[63] Mr. Dilny must repay \$1,300.00 to the bank account established for Riley's use and education within 30 days.

[64] The parties may make submissions on costs in writing within thirty days. Counsel for Ms. Dilny will prepare the order.

MacLeod-Archer, J.

				Division of Assets				
				Mr.	&	Ms.		
				O	Comments			Value
<b>Matrimonial Assets:</b>								
Real Estate:								
1)								168,000.00
Less: Mortgage								120,400.00
Other Debt								
Commission at 5% +hst						0.04		7,728.00
Legal Fees								575.00
Net Proceeds								<b>39,297.00</b>
2)								
Less: Mortgage								
Other Debt								
Commission at 5% +hst						0.05		0.00
Legal Fees								
Net Proceeds								<b>0.00</b>
3)								
Less: Mortgage								
Other Debt								
Commission at 5% +hst						0.05		0.00
Legal Fees								
Net Proceeds								<b>0.00</b>
4)								
Less: Mortgage								
Other Debt								
Commission at 5% +hst						0.05		0.00
Legal Fees								
Net Proceeds								<b>0.00</b>

	O	Comments	Value	Mr.	Ms.
<b>Net Proceeds of Real Estate:</b>					
1)	0	0	39,297.00		39,297.00
2)	0	0	0.00		
3)	0	0	0.00		
4)	0	0	0.00		
<b>Investments:</b>					
<b>Pensions:</b>					
union pension Mr Dilny		divided at source			
2)					
<b>RRSP's:</b>					
Mr		equal division			
Ms		equal division			
3)					
<b>Life Insurance (CSV):</b>					
1)					
2)					
<b>Bank Accounts:</b>					
Mr Dilny			3,408.00	3,408.00	
2)					
<b>Vehicles:</b>					
Rav 4			6,000.00		6,000.00
GMC			13,750.00	13,750.00	
<b>Furniture, etc.:</b>					
household furnishings		offset - tools, etc			
2)					
<b>Other:</b>					
bikes/tools		offset - furniture			
RRSP cashed		net 30%	7,000.00	7,000.00	
<b>Total Matrimonial Assets</b>			<b>69,455.00</b>	<b>24,158.00</b>	<b>45,297.00</b>
<b>Less: Matrimonial Debts:</b>					
Rav 4 loan			12,061.00	12,061.00	
LOC			21,067.00		21,067.00
Jt account overdraft			996.00	996.00	
4)					
5)					
6)					
7)					
<b>NET MATRIMONIAL ASSETS:</b>			<b>35,331.00</b>	<b>11,101.00</b>	<b>24,230.00</b>
<b>Equalization Payment:</b>				6,564.50	-6,564.50
<b>NET MATRIMONIAL ASSETS (AFTER DIVISION)</b>				<b>17,665.50</b>	<b>17,665.50</b>