SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *McKinnon v. Power*, 2019 NSSC 324

Date: 2019-10-30
Docket: 1206-7231
Registry: Sydney

Between:

Catherine McKinnon

Applicant

v.

Christopher Power

Respondent

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Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: August 20, 2019 in Sydney, Nova Scotia

Written Decision: October 30, 2019

Subject: Child support; spousal support; retroactive spousal support; division of assets & pensions

Summary: Child support denied; spousal support ordered retroactive to date of petition; review of spousal support set for date after divided pension benefits commence payment; other assets and debts divided.

Issues:
(1) Child support;
(2) Retroactive Spousal Support
(3) Division of Assets/Pension

Result: Wife's claim to child support denied, entitlement to spousal support proven, spousal support ordered, assets divided.

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Counsel:	Catherine McKinnon, Self-Represented Christopher Power, Self-Represented

By the Court:

Facts

[1] The parties began cohabiting in September, 1991 and married on September 11, 1999. They separated in May, 2006.

[2] Ms. McKinnon filed a divorce petition on October 13, 2017 seeking child and spousal support retroactive to May, 2006. She also requests an unequal division of matrimonial property and a division of pension benefits.

Divorce

[3] I'm satisfied that all legislative and procedural requirements have been met. The marriage has permanently broken down, with the parties living separate and apart for at least a year prior to the divorce trial. The divorce is granted per s.8 of the ***Divorce Act R.S.C. 1985 (2nd Supp).***

[4] Ms. McKinnon's request for a name change is also granted.

Child Support

[5] Ms. McKinnon's daughter K.M. is 29 years old. She stopped attending university full-time in February, 2019. She lived and worked at the Keltic Lodge on a full-time basis for a short time, but returned to live with her mother in April, 2019.

[6] Ms. McKinnon asks that Mr. Power continue to pay child support for K.M. until at least April, 2019. In his reply to the Petition (not framed as an Answer) Mr. Power says that child support should have ended in 2014. At trial he advanced no evidence to support that assertion.

[7] Ms. McKinnon says that K.M. should be considered a child of the marriage after until at least April, 2019 because K.M. suffers mental health issues, which Ms. McKinnon attributes to Mr. Power's post-traumatic stress disorder (arising from his 2004 Haiti deployment) and its effect on the family. She says that K.M. suffered a "relapse" in early 2019 which led her to move back home.

[8] The onus is on Ms. McKinnon to prove that K.M. continued to be a dependent child until April, 2019. She did not advance any medical or other evidence to prove that K.M. was unable to withdraw from her parents' care for health reasons, nor did K.M. testify about her circumstances.

[9] Before the trial, Ms. McKinnon agreed that any child support she had received after February, 2019 should be repaid to Mr. Powers. When she agreed to that on May 6, 2019, K.M. was living with her again. Ms. McKinnon didn't mention that K.M. was suffering a mental health crisis, or that she might still be dependent. At the same time, Mr. Power didn't raise the issue of a retroactive adjustment to 2014. Both parties were satisfied with an adjustment to February, 2019.

[10] In these circumstances, I'm not prepared to forgive any overpayment, nor am I prepared to adjust child support retroactively to 2014.

[11] Mr. Power raised concerns that he was paying twice, through enforcement measures taken by both the New Brunswick and Nova Scotia maintenance enforcement programs. He advanced no evidence to support this, but clearly there can't be double recovery.

[12] I direct that, as of March 1, 2019, any under/overpayment will be calculated (in Nova Scotia with reference to amounts collected in New Brunswick) and any sums owing by Ms. McKinnon will be off-set against the lump sum spousal support owing to her. If Mr. Power has underpaid, then the sums owing will be added to his arrears.

[13] I further direct that the Director of Maintenance Enforcement must limit any garnishee to collect arrears to 50% of Mr. Power's regular monthly income (which is eligible for garnishee) plus 100% of future D.V.A. lump sum payments made to Mr. Power.

Division of Assets, Debts & Pensions

[14] Mr. Power did not argue that his pension shouldn't be divided. Ms. McKinnon seeks an equal division. Mr. Power's pension benefits earned from the military under the ***Canadian Forces Superannuation Act*** during the period of the marriage (Sept 1, 1991 – May 24, 2006) will be divided equally, at source.

[15] The parties acquired a Jeep Wrangler together in 2015, when they briefly reconciled. When Mr. Power left, Ms. McKinnon filed a motion to deal with that vehicle, as she was jointly liable on the loan. I ordered Mr. Power to pay the loan as agreed, and directed that he was not to remove the Jeep from Nova Scotia. I also directed that any loan payments made by Ms. McKinnon would be considered unpaid spousal support, though that part of the order was never enforced.

[16] Mr. Power didn't abide by the 2015 order. He not only failed to pay the loan, but he took the jeep to New Brunswick, where it was repossessed and sold. Ms. McKinnon received a demand for payment of the balance owing on the loan of $5,086.53 in April, 2017. Neither party has been sued for the balance to date.

[17] Ms. McKinnon did not advance evidence at trial to show whether she paid any monies toward the regular loan payments on the jeep. The only evidence I have is with respect to the loan balance on April 26, 2017 after it was sold. I accept that Ms. McKinnon is jointly liable for that sum. I accept that this liability should be borne solely by Mr. Power in the circumstances. I direct that Mr. Power pay her $5,086.53, which shall be considered a lump sum spousal support payment (non-taxable) to compensate her for an immediate need, i.e. her liability for the Jeep debt. On receipt of those funds, she must retire the debt, so that both parties are relieved of any liability for the jeep in future. To the extent this might be considered an unequal division under s.13 of the ***Matrimonial Property Act*** [RSNS 1989, c. 275] I find the evidence sufficient to justify same.

[18] Ms. McKinnon says that each party assumed liability for and paid other matrimonial debts, and she considers these matters settled. Mr. Power rejects the suggestion that he's liable for a share of Ms. McKinnon's student loan, even though she undertook her education while they were still together and she's paid the loan since separation. He made no argument on the issue of other debts, so I direct that neither is responsible to pay the other any monies for other debts, including the student loan.

[19] Ms. McKinnon claims half of the monies Mr. Power received as severance pay when he was released from the military. She produced an undated document from D.N.D. estimating his severance at $8,834.93, based on his years of service. Mr. Power did not disclose his severance details, though he acknowledges that one was paid. I accept the figure from D.N.D. as the best evidence of its value and direct that Mr. Power pay Ms. McKinnon half of that sum, or $4,417.47 immediately.

Spousal Support

[20] Ms. McKinnon and Mr. Power cohabitated and raised two children together, one of whom (K.M.) was a young child brought into the marriage by Ms. McKinnon. Mr. Power stood *in loco parentis* to K.M.

[21] During the relationship, Mr. Power was employed with the military. Ms. McKinnon was in receipt of income assistance when they met, as she'd injured her back in 1989. She later worked service and retail positions. In September, 1999 she started pursuing her degree at Cape Breton University. The family relocated to New Brunswick in 2003, which interrupted her education. Ms. McKinnon eventually obtained her degree and worked at the University of New Brunswick.

[22] Ms. McKinnon argues that the delay in completing her degree impeded her ability to gain more lucrative employment after separation. She cites the example that by 2013, her income was still not on par with what Mr. Power earned back in 2004.

[23] Ms. McKinnon had health issues which also impacted her ability to earn an income. She retired in 2016, though she stopped working several years prior due to disability. She injured her back before the parties started cohabiting, but she worked throughout the relationship to supplement the family income. She was also the primary homemaker and childcare provider, because Mr. Power was either deployed, away on course, or otherwise busy with his military duties. He was medically discharged from the military and retired in 2011.

[24] After separation, Mr. Power re-partnered and established a new family. Ms. McKinnon says that he had little contact with their children, leaving her to function effectively as a single parent, with little financial support from Mr. Power. She did not re-partner, but entered a long-term relationship after separation.

[25] Ms. McKinnon seeks a division of Mr. Power's military pension, but identifies a problem with such a division - she understands that it must be invested and locked in until she reaches age 65. However, she's been told that her L.T.D. benefits from Manulife will be clawed back, dollar for dollar for what she's entitled to receive in pension benefits, even though she believes she can't start collecting her share of the D.N.D. pension yet.

[26] On a review of the applicable legislation and caselaw, it appears that Ms. McKinnon's understanding is not correct. Mr. Power is in receipt of his retirement

pension through the ***Canadian Armed Forces Superannuation Act*** [R.S.C., 1985, c. C-17]. Section 16(1) of the ***Act*** establishes several preconditions, one of which must be met before a military member can receive a pension annuity. Mr. Power appears to meet several of those criteria and he is in receipt of his pension, though he is not yet age 65. There is nothing in the ***Act*** to preclude a spouse who is entitled to a pension split from collecting an annuity, once the member's pension is in pay.

[27] Ms. McKinnon seeks a spousal support award retroactive to the date of the petition filed on October 13, 2017. She says that Mr. Power has failed to make a "consistent or determined effort to provide disclosure of his entire income" and she ask the court to impute income.

[28] Mr. Power brought copies of his tax returns to court on August 20, 2019. They show that in 2018 his Line 150 income was $47,376.12 and in 2017 it was $56,636.00. He filed a Statement of Income in November, 2017 that estimated his income at $67,786.44. These figures don't include the latest supplement paid by D.V.A. or any other non-taxable monies paid to Mr. Power.

[29] Ms. McKinnon calculates Mr. Power's income as follows:

- D.N.D. pension $1,106.31/month
- Manulife (L.T.D.) $2,736.19/month
- D.V.A. benefits $1,800.00/month
- C.P.P. $813.56/month
- Suppl. D.V.A. pension $307.62/month *began April 1, 2019.

[30] In addition, Mr. Power also received several lump sum awards from the Department of Veteran's Affairs after 2011, which total $218,256.03. He may be entitled to future payments of up to $200,000.00. These monies were paid to him tax free.

[31] Ms. McKinnon argues that these D.V.A. awards should be considered income for purposes of support. She calculates the annual amount by dividing it by 29 years, assuming he'll meet a life expectancy of 75. This equates to an extra income of $7,517 per year from 2012-2041. I accept the rationale for this, as

discussed in **Darlington v Moore, 2013 NSSC 103** and in the case cited by Ms. McKinnon (**Hewitt v. Rogers, 2018 ONSC 1384**).

[32] Ms. McKinnon didn't include Mr. Power's D.N.D. pension income in her calculations, as she recognizes that it will be split with her. In total, excluding Mr. Power's pension and absent a gross-up of the D.V.A. monies, she estimates his annual income at approximately $75,405.92. I accept her figures as accurate, based on the evidence available. Ms. McKinnon's annual income from L.T.D. and C.P.P. is approximately $22,800.00.

[33] Mr. Power failed to pay any spousal support after separation, even though Ms. McKinnon requested it. He failed to provide disclosure of his income information until the trial, despite notices from court staff and directions from the court. He knew after being served with the petition that spousal support was requested.

[34] The parties' relationship lasted approximately 15 years. It was a traditional marriage in most respects, with Mr. Power working outside the home and being the primary income earner, and Ms. McKinnon staying at home to raise the children and working to supplement the family income.

[35] I am satisfied that Ms. McKinnon is entitled to spousal support. She has a compensatory claim, as well as a non-compensatory claim. Mr. Power's argument that she isn't entitled to support due to "adultery" has no merit. There's no evidence that she had a new partner who helped to support her after separation.

[36] I am also satisfied that spousal support should be paid retroactive to October 1, 2017. Mr. Power failed to pay any support for Ms. McKinnon after separation. He also fell into arrears of child support.

[37] He says that he now faces a debt of $60,000.00 to Revenue Canada, but the returns he filed show just over $16,000.00 owing. If there are penalties and interest due on outstanding amounts, the fault lies with Mr. Power, who filed his tax returns years late in some cases. His P.T.S.D. may explain those delays, but he must bear any hardship arising from a retroactive spousal support award, rather than Ms. McKinnon. My direction to limit the amount that M.E.P can garnishee will alleviate some of that hardship.

[38] Ms. McKinnon is only 47 years old. She made efforts to become self-sufficient and worked after separation, but she is now disabled. Her income at

present is significantly less than what Mr. Power receives from his disability and other benefits and pensions.

[39] She was almost exclusively responsible for their children's development and care after separation. Their son lived with her until 2015, and their daughter still lives with Ms. McKinnon, though she's not working.

[40] Her statement of expenses shows that she cannot make ends meet on her income alone, even on a modest budget. She needs the money and Mr. Power has the ability to pay. The **D.B.S. (S.C.C.)** analysis weighs in her favour.

[41] The ***Spousal Support Advisory Guidelines*** provide guidance, but they are not binding. I have considered the parties' means, needs and circumstances. I direct that Mr. Power pay spousal support of $1,600.00 per month from October 1, 2017 to March 30, 2019. Effective April 1, 2019 that amount will increase to $1,750.00 monthly. A spousal support review will be scheduled after June 1, 2020 to consider the fall-out from the division of Mr. Power's D.N.D. pension and C.P.P. credits, as well as any impact on Ms. McKinnon's L.T.D. payments.

[42] At that time **both** parties must make full disclosure of **all** sources of income, along with their 2019 tax return and supporting documents (whether filed or not) and notice of assessment if available. Any correspondence from their pension or disability administrators dealing with the reconciliation of benefits post-pension division must also be disclosed.

[43] Finally, Ms. McKinnon seeks security for spousal support, by way of payment of a percentage of Mr. Power's life insurance if he predeceases her. His C.F.S.A. benefits include life insurance of $114,500.00, which reduces by ten percent each year after age 61. If Mr. Power predeceases Ms. McKinnon, spousal support will end, but she will still have need.

[44] I therefore direct that Mr. Power continue to pay the premiums to maintain his life insurance coverage, and that he designate Ms. McKinnon as beneficiary of 50% of his C.F.S.A. life insurance benefits, for so long as spousal support is payable to her. Failing such designation, 50% of his C.F.S.A. life insurance benefit will be impressed with a trust in favour of Ms. McKinnon. Failing payment of premiums to maintain the policy, Mr. Power's estate shall be liable for the amount which otherwise would be payable to Ms. McKinnon.

[45] Both parties will bear their own costs of the divorce proceeding. Court staff will prepare the order.

MacLeod-Archer, J.