

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

**Citation:** *Mosher v. Mosher* (December 27, 1984), Halifax 1201-29048 (NSSC(TD))

~~1983 O.S. 105-970~~

[1983] W.D.F.L. 447.

**Date:** 1984-12-27  
**Docket:** 1201-29048  
**Registry:** Halifax

**Between:**

1984 WL 443987

**Donalda Marie Mosher**

Petitioner

v.

**Neil Cyrus Mosher**

Respondent

**LIBRARY HEADING**

**Judge:** The Honourable Justice J. Doane Hallett

**Heard:** December 27, 1984

**Summary:** Wife seeking an unequal division of property after 25-year marriage with 3 children. The parties have a home (worth \$63,000), a 1981 Monte Carlo (worth \$5,500). The wife had recently inherited \$27,000 and it to buy the car, repay a loan and renovate the home (the husband did the work). The remainder was invested in RRSPs. RRSPs total \$5,500. Debts (car loan, mortgage and loan) total \$15,300. The husband has a firefighter's pension and the wife will lose her interest in it with the divorce. The wife's mother loaned money for the purchase of the couple's first home and was not repaid and the wife's inheritance was also deducted to the family: subsection 13(e). The wife provided all the housework and childcare while the husband provided little more than the money to run the household: subsection 13(i). The husband shall keep the car and his pension, and the wife, the RRSP. He will transfer his interest in the home and its contents to her and she will give him a mortgage for \$10,000 bearing 8% interest, repayable by the end of December 1987.

**Key words:** Family, Matrimonial property, Unequal division

**Legislation:** *Matrimonial Property Act*, S.N.S. 1980, c. 9, subsection 13(e) and 13(i)

1983

Prothonotary's no. 1201-29041

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

B E T W E E N:

DONALDA MARIE MOSHER

Petitioner

- and -

NEIL CYRUS MOSHER

Respondent

HEARD at Halifax, Nova Scotia, before the Honourable  
Mr. Justice Doane Hallett, orally on December  
27th, 1984

DECISION December 27th, 1984 (Orally at conclusion of hearing)

COUNSEL D.W. Quackenbush, Esq. for the petitioner  
D.J. Clarke, Esq. for the respondent

1983

1201-29048

IN THE SUPREME COURT OF NOVA SCOTIA  
TRIAL DIVISION

BETWEEN:

DONALDA MARIE MOSHER,

Petitioner

-and-

NEIL CYRUS MOSHER,

Respondent

HALLETT: J.

This is a petition for divorce. Heard with it was an application for a division of assets pursuant to the provisions of the Matrimonial Property Act. With respect to the divorce I examined both parties on the question of reconciliation and I am satisfied there is no possibility of reconciliation. The petition of Mrs. Mosher for a Decree of Divorce is granted. The evidence establishes that since the celebration of the marriage the respondent has committed adultery with Gina Hemsworth and the divorce is granted on those grounds.

The main issue between the parties relates to money, as is usually the case. The parties were married on June 21, 1958 and separated in 1983. There were three children of the marriage, only one of whom remains at home with Mrs. Mosher.

It is appropriate first to consider whether there should be an equal or unequal division of assets. Mrs. Mosher seeks an unequal division of assets and the burden of proof is on her to show that it would be unfair or unconscionable to simply divide the assets equally.

Since 1962 Mr. Mosher has been a Fireman and worked his way up to the position of a Lieutenant, which he now holds. The evidence satisfies me that through most of the marriage the

respondent was away from the home a great deal; partly due to the nature of his employment and due to the fact that for a number of years he had a part-time job. But also it is clear from the evidence that he spent substantial parts of his free time socializing at the Fireman's Club and other clubs while Mrs. Mosher stayed at home. She had worked prior to the marriage but ceased employment upon being married. As I indicated there were three children and she was essentially a homemaker and from all the evidence a very good housewife and mother. In recent years she has had some part-time employment and from her Statement of Financial Information earned \$6,000.00 in 1984. I am satisfied from the evidence that she has a fairly serious degenerative problem in her lower back that prevents her from sitting for any length of time and thus would interfere with her capacity to find employment as a stenographer, for which she trained as a young girl prior to the marriage in 1958, and had worked for a few months. She is presently doing salesclerk work and has difficulty standing for any length of time. I am satisfied that this does interfere with her capacity to work full-time; although it is clear that she is able to work on a part-time basis.

The principal asset of the marriage is the matrimonial home at 3213 Bersford Road, Halifax, which is in the parties' names as joint tenants. It has a value of \$69,000.00 and it is encumbered by a mortgage in the amount of \$6,000.00. Payments are approximately \$120.00 a month. Mr. Mosher owns a 1981 Monte Carlo motor vehicle, which has a present value of \$5,500.00. It was purchased in 1982 and the purchase price was provided by a trade-in of the existing motor vehicle which Mr. Mosher had. As I recall his evidence the trade-in allowance was something in the order of \$2,600.00. Mrs. Mosher had recently received an inheritance following the death of her mother. The inheritance was in the amount of \$27,000.00, which was used in part to purchase the automobile. She provided \$7,000.00 towards the purchase of the automobile and the balance of the purchase price was financed through a car loan. As I recall, it was something in the order of \$6,000.00.

Out of her inheritance she also paid off an existing loan the Moshers had in the approximate sum of \$7,000.00 and approximately \$7,000.00, probably a little more, was spent purchasing materials to do renovations to the matrimonial home, which for the most part were carried out by Mr. Mosher. With the few other thousand dollars she had, she purchased RRSP's, which I assume are those shown on her financial statement.

The Statement of Property shows household items, major appliances and furniture valued at \$2,365.00. I would infer, although there is no direct evidence on the point, that these appliances and furnishings are in the matrimonial home as the evidence would disclose that Mr. Mosher is living in an apartment with Gina Hemsworth and he apparently has provided the furnishings for that apartment. I would infer from a review of Exhibit 8 that the furnishings are in the matrimonial home.

The Statement of Property also shows that Mr. Mosher has a pension through his employment as a fireman with the City of Halifax. A letter from C.A. Sherman, the Principal Clerk in the Office of the Treasurer for the City of Halifax, which has gone into evidence by agreement, indicates that Mr. Mosher's contributions plus interest as of December 31, 1984 total \$24,250.00. The letter goes on to state that Mr. Mosher, having reached 45 years of age on December 1st, that in the event he should resign from the service of the Halifax Fire Department and subsequently request a refund of contributions, Mr. Sherman writes that the City is required to hold back all contributions made on or after January 1st, 1977 under the Province of Nova Scotia Pension Benefits Act, Section 22. As far as I know there is not any breakdown of his contributions between when he first went with the Fire Department in 1962 and contributions he made on or after January 1st, 1977. At any rate, a pension is clearly a matrimonial asset as stated in Lawrence and Lawrence, but it is difficult to put a value on it. However, in my opinion a pension is worth very much more in reality than any amount that could be obtained by a

contributor withdrawing his contributions even if he could withdraw the whole amount. In a sense to talk of his having an asset that has a dollar figure the equivalent to what he could withdraw is rather illusionary because it is fairly obvious in cases such as this that it would be unthinkable for Mr. Mosher to withdraw his contributions even if he could withdraw all of them or to the extent that he could.

So in considering the division of assets pursuant to the Matrimonial Property Act, it is difficult to come up with hard figures on a pension plan but it has a very real long term value which accrues in this case to Mr. Mosher. It is equally clear that on divorce Mrs. Mosher will lose benefits as a survivor that she might be entitled to pursuant to the pension plan. In summary, it is not really possible to put a hard dollar figure on what that pension plan is worth to Mr. Mosher, but it must as a matrimonial asset be considered in looking at what would be an appropriate division of the assets.

The Statement of Property indicates that Mrs. Mosher has RRSPs at the Bank of Montreal and Bache Securities in the amount of \$5,500.00. There is some life insurance on the life of Mr. Mosher, none of which has any cash surrender value. As indicated, there is a car loan on which there is a balance owing of \$5,300.00. There is a mortgage on the residence in the approximate amount of \$6,000.00 and since the separation of the parties Mr. Mosher has increased his loan at the Credit Union to \$4,000.00. I gather there was a loan with the Credit Union prior to separation and it has gradually been increased to the present figure. These monies were borrowed for his own personal purposes.

In his testimony Mr. Mosher indicated that he thought a fair division of assets would be to divide the matrimonial home equally. He would retain the motor vehicle, which is in his name and, of course, retain his pension. I think that answer of Mr. Mosher is quite indicative of what would appear to be his attitude throughout the marriage that shows that he did not look upon his wife as an equal partner and I think it goes a long way to explaining his attitude throughout the marriage. An argument was made on behalf:

Mr. Mosher that Mrs. Mosher had accepted his conduct. I cannot agree with that. Mrs. Mosher, without any job skills and with three young children, I think took what was fairly sensible advice from a lawyer back in the early seventies that she should stick with the marriage as best she can until the children grow up. From the evidence I have heard that is exactly what Mrs. Mosher did; she stick with it and made out as best she could, but certainly one would not consider that she had accepted the domineering attitude of Mr. Mosher. In short, Mr. Mosher's sense of fairness seems a little out of whack with reality.

In many of these cases where the wife is seeking an inequal division it is difficult, and in many, many cases, not possible to find on the facts that the wife is entitled to an inequal division, but this is not one of the cases. This is a very clear case for there being a division of assets in favour of Mrs. Mosher. The factors under Section 13, which dictate that it would be unfair and unconscionable to simply divide assets equally are as follows. Subsection (e) provides:

"(e) the court will take into account in attempting to assess what the proper division of assets should be, the date and manner of acquisition of assets."

It is significant to note that when the Moshers bought their first home in 1970 that the total downpayment of \$3,500.00 was loaned to the Moshers by Mrs. Mosher's mother on terms that if it is not repaid at the time of her death it was to be forgiven. A few years later Mrs. Mosher's mother died. So, in effect, Mrs. Mosher provided for the downpayment. She received the inheritance of \$27,000.00 following the death of her mother, \$7,000.00 of which she used to pay off a loan incurred during the marriage for various family expenses I would assume. She provided \$7,000.00 for materials, et cetera, to do substantial repairs to the home which were carried out by Mr. Mosher, which is to his credit. She provided \$7,000.00 towards the purchase of the car

which he wished to have. It is to be noted that Mrs. Mosher does not drive. In short, she has made a very substantial contribution to the matrimonial home in cash.

One of the other factors that the court may take into account under Section 13 is 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. Mrs. Mosher will lose the chance of acquiring any survivor rights that would accrue to her had the marriage continued and had her husband predeceased her following his retirement and he was receiving a pension from the City of Halifax.

Also under Section 13, Section (i) provides,

"(i) the court will take into account in assessing what is an appropriate division 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."

While it is clear from the evidence Mr. Mosher provided funds to run the household it would appear that he provided little else. I am satisfied there was a substantially greater contribution by Mrs. Mosher to the welfare of the family than by Mr. Mosher, particularly over the last five years when it would appear that Mr. Mosher was seeing Miss Hemsworth several times a week and was constantly away from the home.

However, having said that of the various factors that I have taken into consideration under Section 13, most significant is the fact that virtually all the money that has gone into the home apart from making payments on the mortgages, which would have come out of Mr. Mosher's salary, were provided by Mrs. Mosher.

I am satisfied Mrs. Mosher made a real attempt to preserve the marriage but her husband was obviously not interested.

Taking into consideration the factors I have referred to, Mrs. Mosher has satisfied me on the evidence that it would be unfair to divide the matrimonial assets equally and I shall therefore order that the assets be divided and liabilities assumed in the following manner. There are two items that more or



less offset one another. The 1981 Monte Carlo motor vehicle has a value of \$5,500.00. It is in the name of Mr. Mosher and he shall retain it and he shall resume the responsibility for the loan payments and shall indemnify and save harmless Mrs. Mosher from any claim that might be made by her if she cosigned the note. He will make all reasonable efforts if she did cosign the note to have her name removed as a cosignature.

The RRSPs which are in the name of Mrs. Mosher shall remain in her name. They total \$5,500.00 and she shall have the exclusive property right in those.

I shall order that Mr. Mosher convey his interest in the matrimonial home to Mrs. Mosher conditional on Mrs. Mosher executing a mortgage in favour of Mr. Mosher in the amount of \$10,000.00 to be repaid on or before December 31, 1987 with interest at 8 percent per year. Mrs. Mosher shall assume full responsibility for the mortgage on the premises.

It goes without saying that Mr. Mosher shall retain his pension rights pursuant to the pension plan he has as a Fireman with the City of Halifax.

With respect to the life insurance through his employment, Mr. Mosher shall have the right to deal with the insurance as he sees fit. While this division may appear to be very much weighted in favour of Mrs. Mosher, it is not weighted as much in her favour as it might first appear in that Mr. Mosher will have the benefit of his pension plan when he reaches age 56, should he choose to retire at that time and certainly will have the benefit of the pension plan when he reaches age 60, which is apparently the mandatory retirement age; at which time he will have a pension, according to his evidence, of 70 percent of the average of his last five years of employment with the City. However, it does effect the division of property that gives Mrs. Mosher a greater than 50 percent interest in the matrimonial assets and I am satisfied that she is entitled to it.

With respect to the furnishings, they shall be the property of Mrs. Mosher and Mr. Mosher shall, if requested by counsel for Mrs. Mosher, execute a bill of sale transferring the furnishings in the matrimonial home to Mrs. Mosher. And maybe there will be

some items that Mrs. Mosher will choose to give to her husband but that is up to her.

That deals with all the assets and liabilities of the parties. With respect to the \$4,000.00 Credit Union loan, as I understand it that is in the name of Mr. Mosher. In the event that Mrs. Mosher may have signed it - there is no evidence to suggest that she had but that does not mean that she did not - but I would rather doubt that in so far as the loan was brought up to that figure subsequent to the separation and as I understand the evidence was essentially taken out by Mr. Mosher for his own personal needs and it seems to me, as I recall it, Mrs. Mosher was not aware of the loan, but in the event that she is a co-signer, she is to be indemnified by Mr. Mosher with respect to any liability she might have under that loan.

Now, the matter of dealing with the question of maintenance. Section 11 of the Divorce Act provides:

"11 On the granting of a Decree Nisi if the court thinks fit and just to do so, having regard to the conduct of the parties and the condition, means and other circumstances of each of them make an order with respect to the payment of maintenance."

I have reviewed the Statements of Financial Information provided by both parties and considering the foregoing principle I am satisfied that Mrs. Mosher has a need for maintenance in the amount of \$750.00 a month and I am satisfied that Mr. Mosher has the ability to make such payments. I am satisfied that his income is higher than as stated on Mr. Mosher's Statement of Financial Information as the salary shown of \$2,329.00 was arrived at by simply multiplying his pay cheque, which he receives every two weeks, by 2, whereas it should more correctly be multiplied by 2.16, thus increasing the amount of his monthly salary to \$2,515.75. Similarly his overtime was understated by \$20.00 a month and he has vacation pay on top of the other items that he shows. Vacation pay would work out to about \$65.00 a month, giving him a monthly income of approximately \$2,934.00. There was an error in Mr. Mosher's Financial Statement that shows his Federal Tax to be overstated by approximately \$1,000.00. To make a long story short, at the

present time Mr. Mosher is paying \$525.00 a month maintenance to Mrs. Mosher under an interim order, and based on the revised figures which I have made reference to he would have a surplus of approximately \$200.00. I am satisfied that he is in a position to pay \$750.00 a month to Mrs. Mosher and she clearly has a need for such an amount of money.

I have reviewed her Statement of Financial Information. The suggested budget figures are conservative and do not take into account the fact that she will have to pay income tax. Her Statement shows that at the present time, including the maintenance which she receives from her husband in the amount of \$525.00, and the fact that she receives room and board from one of her sons the amount of \$960.00 a year and her income of \$6,000.00 a year, for a total monthly income of \$1,105.00 against expenses of approximately \$1,200.00 and as I have indicated there is no provision for income tax and that is the principal reason why I have increased maintenance from \$525.00 to \$750.00 a month trying to arrive at something that would be reasonable with respect to Mr. Mosher's ability to pay and Mrs. Mosher's needs. I am working on the assumption that Mrs. Mosher can continue to earn \$6,000.00 a year and I have some doubt in my mind as to whether she can earn any more due to the discomfort she has in her back when she has to stand long periods of time, but I would urge Mrs. Mosher to get as much employment as she is able to stand, considering her back condition. It cannot be overlooked that Mrs. Mosher has limited job skills, has been a housewife for over some 25 years.

The maintenance payments in the amount of \$750.00 shall commence on the 1st day of January, 1985 and they will continue to be paid bi-monthly \$375.00 out of each paycheque, payable on the 1st and the 15th. As both counsel are aware, maintenance orders are always subject to variation as the circumstances change, but based on the situation as it now exists I am satisfied that that is appropriate by way of monthly maintenance.

With respects to the matter of costs, although in many cases of contested divorces, principally over the issue of money, I have ordered that the parties bear their own costs. In this case Mr. Mosher position where he wished to retain full ownership

of two of the three major assets acquired during the marriage and 50 percent of the matrimonial home is so unreasonable that I am going to order that Mr. Mosher pay the costs of Mrs. Mosher, to be taxed. She obviously had to come to court to get any kind of reasonable division of property and reasonable maintenance. She has succeeded. Very often, as I have indicated, these cases end up with the court coming down somewhere inbetween the positions of the two parties; this is not one of them. Mr. Mosher's attitude is completely unreasonable and it warrants an order of costs to be made against him. I am basing my conclusion with respect to what Mr. Mosher's attitude was from his evidence in this courtroom today. His sense of fairness seems to be substantially out of line with anything that appears to be reasonable to me. In the event that Mr. Mosher does not pay the costs, and I am aware that he has not paid the suit costs which he was ordered to pay on the interim application almost a year ago, Mrs. Mosher shall be entitled to deduct the amount of the costs from the \$10,000.00 and deduct interest on them for the period unpaid, interest rate to be 8 percent, in addition to any other remedies she may have with respect to the collection of costs.

A copy of the Decree Nisi shall be forwarded to Mr. Mosher's counsel, Mr. Daniel Clarke, 6464 Chebucto Road, Halifax, Nova Scotia B3L 1L4.

If any further directions are required with respect to the division of property I will be glad to hear representations from both counsel, but with respect to the conveyances and the mortgage back, that should be done forthwith and in no event later than January 15, 1985.



J.

Halifax, Nova Scotia

December 27th, 1984

1983

No. 1201-29048

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

B E T W E E N:

DONALDA MARIE MOSHER

Petitioner

- and -

NEIL CYRUS MOSHER

Respondent

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DECISION OF HALLETT, J.

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