SUPREME COURT OF NOVA SCOTIA
(TRIAL DIVISION)

Citation: *Day v. Day* (June 1, 1987), Halifax 1201-37601 (NSSC(TD))

1987 CarswellNS 399.
5 ACWS(3d) 439
[1987] W.D.F.L. 1374

Date: 1987-06-01
Docket: 1201-37601
Registry: Halifax

Between:

Kathleen Mary Day

Petitioner

v.

Dennis Charles Day

Respondent

LIBRARY HEADING

Judge: The Honourable Justice J. Doane Hallett

Heard: June 1, 1987

Summary: Division of property after 9-year marriage with 2 children. The husband runs a garage which straddles two lots, appraised at $60,000 and $70,000. The matrimonial home, a bungalow with a finished basement and other amenities, was appraised at $80,000. There were differing values for the garage building. The husband had the option of buying the wife's interest in the assets for $40,000 for 20 days following the order being issued. On payment, the wife will sign a deed conveying her interest in the property subject to all existing encumbrances. Taxes will be adjusted as of the closing date: both will equally share the taxes up to the closing date. The husband must provide, at closing, proof that the wife is released from the mortgage. If the husband doesn't exercise this option or pay the wife when she delivers the deed, the property will be sold by a Sheriff's Sale after advertisement and in accordance with the usual foreclosure practice. The Sheriff will pay from proceeds:

outstanding property taxes,
sheriff's fees, and
divide the balance equally,

the sheriff will pay from the husband's share

the wife's taxed costs
the mortgage and
the balance owed the husband

CASE NO. 4 VOL. NO. 243 PAGE NO.

KATHLEEN MARY DAY (Petitioner) v. DENNIS CHARLES DAY (Respondent)

1986 No. 1201-37601 HALIFAX, N.S. HALLETT, J.

MATRIMONIAL PROPERTY ACT

Petition for divorce and division of matrimonial assets. Held, there should be an equal division of matrimonial assets.

Option extended to the respondent to buy matrimonial home property on which is located his garage business. In default, Sheriff's Sale ordered under Section 15 of the Matrimonial Property Act. Wife not a partner in the garage business. Maintenance of $700.00 a month ordered for children in wife's custody. Respondent's evidence not credible.

1986 File No. 1201-37601

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

KATHLEEN MARY DAY,

Petitioner,

- and -

DENNIS CHARLES DAY,

Respondent.

HEARD at Halifax, Nova Scotia, before the Honourable Mr. Justice Doane Hallett, Trial Division, on May 15, 1987.

DECISION June 1, 1987.

COUNSEL Ms. Sally B. Faught for the petitioner;

The respondent represented himself.

1986 File No. 1201-37601

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

KATHLEEN MARY DAY,

Petitioner,

- and -

DENNIS CHARLES DAY,

Respondent.

HALLETT, J.:

This is a petition for a divorce coupled with an application for a division of property under the Matrimonial Property Act, S.N.S. 1980, c. 9.

I am satisfied there is no possibility of reconciliation. The parties were married on June 18, 1977. There are two children of the marriage; Jennifer Marie Day, born February 13, 1978, and Dennis Anthony Charles Day, born January 4, 1980. The parties separated in the fall of 1986. The grounds for the divorce were mental cruelty. The grounds were not contested. I have heard the evidence of the petitioner and I am satisfied that since the celebration

of the marriage the respondent has treated the petitioner with mental cruelty of such a kind and nature as to render intolerable the continued cohabitation of the spouses and the divorce is granted.

The parties agreed that the petitioner would have the custody of the children and that the respondent would have access as follows:

> "1. Every second weekend from Saturday at 10 a.m. to Sunday at 6 p.m.
>
> 2. Every Wednesday from 3:30 p.m. to 7:30 p.m.
>
> 3. Two consecutive days every March break, said two days are to be either preceding the access weekend or two days following the access weekend.
>
> 4. One week during the month of July, provided the respondent gives the petitioner two weeks' notice.
>
> 5. One week during the month of August, provided the respondent gives the petitioner two weeks' notice.
>
> 6. Christmas Day from 6:00 p.m. to Boxing Day at 12:00 p.m.
>
> 7. The respondent is entitled to be informed with respect to all health, educational and other development matters with respect to the said children.
>
> 8. The respondent may pick up and deliver the children at the petitioner's residence.
>
> 9. The petitioner shall not remove the children from the Province of Nova Scotia without giving the respondent thirty days' notice of her intention to do so."

The principal issue in the case is, as usual, money; that is, what division of property should be made

under the Matrimonial Property Act and what maintenance should be payable under the Divorce Act. This is a case for equal division of the matrimonial assets. The only matrimonial asset of any significant value is a property at Oyster Pond, Jeddore, on which is located the matrimonial home and a large garage used by the respondent in connection with his snow plowing, auto body repair and salvage business.

The parties have agreed with respect to the division of other matrimonial assets as follows:

(a) They have agreed that each will retain the personal effects, furnishings, appliances, etc., in their respective possession. At the time of separation the petitioner moved from the premises and is living in a three-bedroom apartment with her two children in the City of Dartmouth. The respondent has continued to live in the matrimonial home. At any rate, they have agreed that the division of furniture, etc., will stand as is. It may be that the petitioner has gotten the better of this division but, at the same time, she has the children and would of necessity need to have more of the furnishings than would the respondent.

(b) The respondent has agreed to assign a life insurance policy on his life to the petitioner on the

condition that she make an irrevocable designation of the children as beneficiaries. The policy apparently has a face amount of $80,000.00 but it does not have any cash surrender value.

The main dispute between the parties is how to treat the property at Oyster Pond. The petitioner proposes that she convey her joint interest in the property to the respondent for the sum of $40,000.00 and that he would be liable for the outstanding mortgage to The Royal Bank of Canada in the amount of $27,319.00, which she says is a loan taken out in connection with the business and is not a matrimonial debt. The respondent says he can arrange to purchase the property with financial assistance from his father, who apparently operates a successful business in Halifax known as C. M. Day Trucking but that he is not prepared to pay her $40,000.00. His position is that she should share the indebtedness to The Royal Bank and that he would pay her $27,000.00, being half the value of the Oyster Pond property, if the property is worth $80,000.00, less half the debt which he says the petitioner should be responsible for as she was a partner in the business. A complicating factor, from my point of view, is that the evidence as to the value of the property to be attributable to the garage is not very satisfactory. As best I can determine from the appraisal reports that have been filed,

the petitioner's appraiser would put a value of approximately $15,000.00 on the garage and the respondent's appraiser $6,000.00. I am satisfied on the evidence that the petitioner, while she was the bookkeeper and had some say in the running of the business, was not in the legal sense a partner with the respondent as he alleges. I am also satisfied that The Royal Bank loan was taken out for the purpose of acquiring business assets, namely vehicles, tools and the garage erected on the property for the purpose of conducting the business operated by the respondent. The garage, etc., are business assets of the respondent.

The petitioner is not making any claim to the aforesaid business assets.

I have before me two appraisals, one submitted by the petitioner that the Oyster Pond property has a market value of $80,000.00, and one submitted by the respondent that it has a market value of $70,000.00. The property consists of ten acres, more or less, made up of two lots. Unfortunately, the garage straddles both lots and they cannot be considered as separate entities. I accept the evidence of the petitioner that the matrimonial home is a cut above the average bungalow in the area in that it has a fully finished basement and a number of other amenities. I have reviewed the appraisals and I am prepared to accept the appraisal of Mr. J. G. Storey, A.A.C.I., that the property,

as of the date of the appraisal, March 25, 1987, had a value of $80,000.00. I find that would probably continue to be an acceptable valuation to date of trial. The garage is a very substantial building which the petitioner's appraiser calculates to be an area of 143.2 square metres. The respondent described the building as being 30 x 50 feet. As previously noted, the petitioner's appraiser valued the garage at approximately $15,000.00 and the respondent's at $6,000.00. The petitioner suggested in evidence that it was worth $2,000.00, which is entirely too low a figure. The figure of $6,000.00 as put forward by the respondent's appraiser as the value of the garage seemed to be somewhat picked out of the air and that too is far too low. The valuation put forward by the petitioner's appraiser seems to have some foundation and is more likely to represent a fair market value of the garage. I am discounting it slightly to take into account the contrary opinion of the respondent's appraiser and I would value the garage building at $12,000.00 to the extent that that is necessary in order to make workable the option which I propose to extend to the respondent because of the unique situation with the business asset being located on the matrimonial home property..

To effect an equal division of matrimonial property between the spouses, I shall order, pursuant to Section 15 of the Matrimonial Property Act, that the

respondent have an option to purchase the petitioner's interest in the property for the sum of $40,000.00. The option will have to be exercised by the respondent within twenty days of the signing of the Order giving effect to this decision and will have to be exercised by the respondent delivering a written document in an acceptable form to the petitioner's solicitor at her law office within the said time period and providing at the same time evidence satisfactory to the petitioner's solicitor that the respondent has the financing to complete the purchase. I am anticipating the financing being provided by his father. If the option is exercised, the respondent shall be required to complete the transaction by payment of the purchase price of $40,000.00 upon delivery of a deed conveying the petitioner's interest in the property to the respondent subject to the existing mortgage and any other encumbrances that may result as a consequence of any actions taken or defaults made by the respondent. Taxes shall be adjusted as of the date of the completion of the sale with the petitioner being responsible for fifty per cent of the taxes and any other municipal charges outstanding as of that date. I have not deemed it necessary for these purposes to require an adjustment be made to take into account for tax adjustment purposes the fact that some of the taxes relate to the assessment of the garage.

$1,083.00 a month from her employment, receives $63.00 a month Family Allowance and is receiving $750.00 maintenance for herself and the two children, for a total of $1,896.00 a month. She shows a budget of $2,190.00, resulting in a monthly deficit of $294.00. However, included in her expenses is a monthly payment on a car loan which she proposes to pay off when she receives the proceeds of the sale of her interest in the home, be it to her husband or at Sheriff's Sale. She needs a car to get from her apartment to work and for the purpose of taking the children to school, babysitters, etc. I have reviewed her statement of expenses and they do not seem unreasonable under the circumstances. It is therefore necessary to consider whether the respondent has the ability to continue making the maintenance payments as ordered by Judge Niedermayer. At the hearing before Judge Niedermayer, the respondent produced a Statement of Financial Information showing he earned $800.00 a month and had expenses of over $1,000.00, thus resulting in a monthly deficit. Despite that fact, Judge Niedermayer ordered him to pay monthly maintenance of $750.00 a month. He disbelieved the respondent and so do I. In the evidence given by the respondent before me, he testified that he earns $390.65 every two weeks working for his father's company. He testified that last winter he did very little snow plowing as he did not have any drive or

enthusiasm for work. He testified that he had been a very hard worker and was asking himself where did it get him. I would infer he was referring to the fact that he was in the middle of a divorce and he was not happy with his lot. He also testified that last winter he was drinking heavily. Apparently he had been a heavy drinker but had given up drinking for a few years prior to the separation but began drinking following the separation; he testified that he quit three weeks ago. I am satisfied that the respondent has so ordered his affairs as to be able to come to Court and testify to a minimal income. He ceased operating the body shop shortly after the separation. He testified that he did not do very much snow plowing this winter which was a major source of income for him. The petitioner says his income was in the order of $30,000.00 to $40,000.00 a year when they were married whereas the books only showed him earning some $10,000.00. She said he did not issue receipts for a lot of cash that was received. On the other hand, she testified he received $20,000.00 or $30,000.00 a year for snow plowing which came in large cheques. I do not know that I can attach any credence to her evidence that his income was shown as low as $10,000.00 on the books of the company but I am satisfied he probably did not record all his income in his books as it would seem highly unlikely to me that the parties who were married in 1977 acquired the

The respondent's evidence was not entirely satisfactory. I am satisfied that he made it as difficult as possible in the pre-trial proceedings for his wife to obtain information with respect to his financial status. He has never filed Financial Statements as required pursuant to the Matrimonial Property Act. Arrangements were made through his solicitor to have him discovered but he did not show up for the discovery. The day before the trial he terminated the services of his solicitor and represented himself at the trial. He testified that the reason he stopped operating the body shop was that he had been advised by his doctors that he should not paint any more. However, he did not produce any medical evidence. He testified that he discharged his lawyer because he could not afford to pay him and I would have to concede that there may be some truth in that although it was also clear that the solicitor was prepared to attend at today's hearing but the respondent chose to act for himself. He disagreed with the list of tools that his wife said he had and used in connection with his auto body shop but, at the same time, he could not state to the Court what was an accurate list of the tools nor could he put a value on them. He did acknowledge that three trucks that he uses in his business had a value of some $8,000.00. Whether or not they have a greater value is hard to say but I am sure that the respondent valued them at as

low a figure as he felt he could get away with. He testified that his father's company was essentially doing winter work but had now acquired an excavator and a dozer and was getting into summer work. He says he cannot afford $750.00 a month maintenance for the children and that he is led to believe that most people pay about $250.00 a month a child and that he would be prepared to pay $500.00. How he would pay $500.00 on the salary he has testified he earns is a little hard to fathom, but only goes to show that the respondent does have access to more money than he has testified to in these proceedings. In short, I do not accept the testimony of the respondent as to his level of income and I am satisfied that he has so ordered his affairs that he felt he could come to Court and deny that he is in a position to earn something in the order of $30,000.00 or $40,000.00 a year. Apparently his plowing work is done on a sub-contract basis from his father's company. The only thing that has changed is that he and his wife have separated and, instead of doing plowing work on a sub-contract basis, he has become since the separation an employee of his father's company. I am satisfied this whole arrangement is a sham in an attempt to avoid his responsibilities to pay maintenance for the children. Considering the real means of the respondent and the needs of the petitioner and the children of the marriage,

reasonable maintenance should be paid. In my opinion, reasonable maintenance under the circumstances would be $700.00 a month payable in the amounts of $350.00 on each of the first and fifteenth day of each and every month, commencing forthwith. Payments are to be made to the Family Court in Dartmouth.

The petitioner has had substantial success as a result of these proceedings in that I have accepted her position that the debts were business debts and I have rejected the position taken by the respondent. I have also rejected the respondent's position on the maintenance issue. The respondent failed to provide financial information as required under the Rules in matrimonial disputes and has failed to attend a discovery which he says he did not know about; I do not accept his evidence on that point. He failed to make maintenance payments as ordered until the petitioner commenced proceedings to enforce payment. All in all, he made the conduct of these proceedings as difficult as possible for the petitioner. While I feel in many of these cases it is appropriate that the parties bear their own costs, this is not one of them. The petitioner has been successful. I shall order that the respondent pay her taxed costs.

J.

Halifax, Nova Scotia,
June 1, 1987.