

**SUPREME COURT OF NOVA SCOTIA**  
**(Family Division)**

Citation: *Clowes v. Clowes (Burns)*, 2021 NSSC 163

**Date:** 20210513

**Docket:** 1201-071442

**Registry:** Halifax

**Between:**

Darren Wade Clowes

Petitioner

and

Kimberley Ann Clowes (Burns)

Respondent

**LIBRARY HEADING**

**Judge:** The Honourable Associate Chief Justice Lawrence I. O’Neil

**Hearing:** January 28 and 29, 2021 at Halifax, Nova Scotia

**Issue:** What is the appropriate allocation of marital debts and marital property?

**Summary:** After a lengthy marriage the parties separated. One party sought to assume all debt in exchange for a release of a spousal support claim. The Court ordered an equal division of the parties’ debts and assets. The Court found entitlement to spousal support but deferred quantification to a time when the parties financial situation stabilized. Current circumstances did not support an order requiring the payment of spousal support.

**Keywords:** Joint tenants; unequal division; spousal support

**Legislation:** *Matrimonial Property Act*, R.S.N.S. 1989 c.275

**Cases Considered:** *Darlington v. Moore*, 2015 NSSC 358

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**Heard:** January 28 and 29, 2021

**Further Submissions:** March 2, 2021

**Counsel:** Nancy Rideout, Counsel for Darren Clowes  
Kimberley Clowes (Burns), Self-Represented

**Oral Decision delivered February 3<sup>rd</sup>, 2021 at 3:00 p.m.**

[1] The Court is here today to give a decision following a hearing on Thursday and Friday, January 28 and 29, 2021. The Court has accelerated its preparation of these reasons in response to the pressures that the parties are under.

[2] However, the Court reserves the right to edit the following remarks and to hear further from the parties on a number of issues, as necessary. I am retaining jurisdiction. In particular, on the issue of the calculation of each party’s share of indebtedness at the time of separation, their respective ongoing income levels, and what quantum, if any, of spousal support should be payable by Mr. Clowes,

further consideration may be required. [*The Court heard further from the parties and those submissions are reflected in the addendum to this decision.*]

[3] I hope the conclusions the Court is in a position to make at this time will assist the parties in achieving some certainty and in taking the necessary steps to stabilize their financial circumstances and this will therefore contribute to their moving on from what has been a costly and inconvenient legal process both financially and emotionally.

[4] The parties impressed the Court as hard working and honest.

### **Background**

[5] Mr. Clowes is soon to be fifty-nine (59) years of age.

[6] Ms. (Clowes) Burns is fifty-three (53) years of age.

[7] The parties were married on September 1, 1990. The parties separated on January 1, 2018 but continued to live in the same home until the end of September 2018.

[8] The parties have two (2) sons, aged 28 and 25. They are no longer children of the marriage.

### **Issues**

[9] A number of issues were identified by the parties but not all required a ruling:

- A. (i) Division of Assets including the Matrimonial home and Life Insurance benefits  
(ii) Division of Debts
- B. Spousal Support (retroactive and prospective) claimed by the Respondent
- C. Divorce – agreement was reached
- D. Change of Name – agreement was reached
- E. Responsibility of Ms. Clowes (Burns) for costs flowing from her lack of cooperation to restructure matrimonial debts including the household mortgage. Alleged lack of cooperation from Ms. Clowes (Burns) re: Matrimonial Funds/Accounts

#### **A. Division of Assets**

## **1. Matrimonial Home**

### **(i) Ownership**

[10] The Matrimonial Home (house) is located at 66 Lawlor Crescent in Cole Harbour. The Parties hired a contractor to build the house in 2000. The grantees, meaning the parties herein, took title as Joint Tenants on March 23, 2000.

[11] During the construction of the home, the downstairs was roughed in for a future in-law suite for Ms. Clowes (Burns). In 2002, the mother of Ms. Clowes (Burns) moved in. She passed in 2018.

[12] In or around 2014, title to the house was put in Ms. Clowes (Burns) name in fee simple. This was solely because Mr. Clowes had been and would be working the majority of each year in Alberta, and the thought was he would start filing his taxes as an Alberta resident since the rates were lower. (After doing so, CRA apparently advised Mr. Clowes that he could not file as an Alberta resident because he owned property in Nova Scotia.)

[13] In any case, that led to this change in title. However, it is not disputed that it is a jointly owned asset and was at the time of separation.

[14] Although Ms. Clowes (Burns) did at various times during litigation assert that the home was hers, given it was in her name, that position was not pursued at trial. Regardless, I find that it is a matrimonial asset.

[15] The effective date for valuation of the home will be the date of disposition of that home.

[16] As I indicated, Ms. (Clowes) Burns vacated the property in late September 2018.

### **Applicable Law**

[17] *Matrimonial Property Act*, R.S., c.275

3 (1) In this Act, "matrimonial home" means the dwelling and real property occupied by a person and that persons spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest.

.....

4 (1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage

.....

Application for division of matrimonial assets

12 (1) Where

- (a) a petition for divorce is filed;
- (b) an application is filed for a declaration of nullity;
- (c) the spouses have been living separate and apart and there is no reasonable prospect of the resumption of cohabitation; or
- (d) one of the spouses has died,

either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

## **(ii) Division of Assets & Debts**

### **Assets**

### **Matrimonial Home**

[18] Mr. Clowes had proposed that he assume 100% of the responsibility for the payment of the parties' matrimonial debt in return for which Ms. Clowes (Burns) would waive her claim for spousal support – both retroactive and prospective, and Ms. Clowes (Burns) would quit claim her interest in the home to Mr. Clowes.

[19] Ms. Clowes (Burns) is agreeable to releasing her interest in the home if Mr. Clowes assumes responsibility for the parties' matrimonial debt. However, she will not waive her claim to spousal support.

[20] The value of the home will be equally divided. The effective date for valuation of the home will be the date of disposition of that home.

[21] The Court has an appraisal for the parties' former matrimonial home dated January 2019 (exhibit 4, tab 5), one year after their separation. Mr. Clowes asks the Court to use this valuation of \$365,000 for the home for the purpose of dividing the parties' interest in the home.

[22] Ms. Clowes (Burns) says the house has increased in value since January 2019 and an updated valuation should be ordered. Mr. Kempton, the appraiser who testified, agreed the house has probably increased in value because of an uptick in the value of real estate in 2020.

[23] The Court observes these parties are of very modest means and ensuring each party maximizes their entitlement when assets are divided and liabilities for debts are assigned is particularly important.

[24] Consequently, I am ordering the preparation of an updated appraisal by Mr. Kempton on or before the end of February, subject of course to his agreeing to perform that task.

[25] This 'revised' value will be used as the value of the home at the time of disposition. From this value will be deducted standard disposition costs including legal fees of \$1,000; real estate fees of 5% and adjustments for taxes and perhaps some other related costs should they be claimed.

[26] Mr. Clowes may purchase the property for the net value so determined. He will have up to March 31, 2021 to do so subject to the parties agreeing to other terms for disposition. Ms. Clowes (Burns) is to cooperate to effect an earlier transfer of the home to Mr. Clowes if he is able to achieve that transfer, that is to say the transfer may occur before the final valuation but that will not diminish any additional payment owed to Ms. Clowes (Burns). The need for an updated appraisal is not meant to hold up the disposition of the home given the pressure the parties are under to restructure their finances.

[27] The Court is also required to assess each party's share of responsibility for the parties' debt at separation and to rule on entitlement to spousal support and related issues.

## **Debts**

[28] The mortgage on the matrimonial home had a balance of \$320,605 shown in exhibit 4, tab m.

[29] The parties equally share responsibility for the mortgage at the date of disposition of the home to Mr. Clowes or to someone else. I am not ordering that the date of valuation of the mortgage be the date the parties separated.

[30] Mr. Clowes occupied the home since separation, and he has received rental income. These are significant benefits he has enjoyed by virtue of his having remained in the parties' former matrimonial home. Having said that, Ms. Clowes (Burns) remained in the home until the end of September of 2018. The expenditures of Mr. Clowes to the end of September 2018 were for the benefit of both parties, but thereafter, Mr. Clowes occupied the home to the exclusion of Ms. Clowes (Burns). From the time of their separation until the end of September, Mr. Clowes solely carried certain costs and that was a period of time when both benefited from costs he bore solely.

[31] Exhibit 5, tab x contains a number of debts that are identified as debts of the parties at the time of separation. Mr. Clowes has serviced these debts without a contribution from Ms. Clowes. He continues to do so. This requires an accounting. I reserve the right to hear further should these calculations be perceived by either side to be in error.

[32] These nine (9) debts are (exhibit 5, tab x, page 2):

1. Mortgage \$320,605 at separation already commented on (tab M, exhibit 4)
2. RBC Visa Avion - \$8,071 – not disputed
3. Capital One MasterCard - \$6,078
4. Amex - \$2,973 (tab 1, exhibit 4)

Comment: With respect to these three (3) credit cards, I am satisfied on a balance of probabilities the level of indebtedness shown for these cards is a matrimonial debt given the subject expenditures were incurred directly or indirectly for the benefit of

the family or as a result of the acquiescence or permission of the partner.

5. HRM Property taxes - \$14,498 – not disputed (see exhibit 4, tab S)
6. RBC Line of Credit - \$38,548 – not disputed (exhibit 4, tab L)
7. RBC Home Line of Credit - \$16,218 (see exhibit xx); the parties agree this amount should be reduced by more than \$8,200 to approximately \$8,000 – (exhibit 4, tab L)
8. Personal Car Loan for Ms. Clowes (Burns) car - \$11,696 (exhibit 4)  
There was agreement that Ms. Clowes (Burns) made three (3) payments on this account in early 2018. She should be credited with three (3) payments (tab O of exhibit 4)
9. RBC Chequing Overdraft - \$3,019 – not disputed (tab L and tab P of exhibit 4)

[33] Mr. Clowes says the share of these debts to the date of separation is to be determined by the parties after adjustments to the calculation shown at tab x of exhibit 5. However, there must also be adjustments to reflect Ms. Clowes (Burns) having made three (3) payments on the personal car loan (item 8) and after the RBC home line of credit (item 7) being decreased by more than \$8,000 to reflect an error.

[34] In addition, the payments on the mortgage after September 2018 are to be deducted from the total Mr. Clowes shows as joint family debts he has paid.

[35] In principle, Ms. Clowes (Burns) is responsible for one half the payment made by Mr. Clowes subject to the adjustments identified.

[36] During the post-separation period, Mr. Clowes claims he has paid \$115,013.03 to service these debts to December 17, 2020. This amount must be adjusted downward to determine Ms. Clowes (Burns) share of the liability as noted above.

## **Life Insurance**

[37] Mr. Clowes pays approximately \$164 each month as a premium on term life insurance which would pay \$200,000 on the death of Mr. Clowes. Ms. Clowes (Burns) is the beneficiary. Mr. Clowes indicated it was his intention to reduce her entitlement to \$100,000 and to name his children as beneficiary of the remaining \$100,000.

[38] Given the modest means of the parties, I do not require Mr. Clowes to continue this policy. However, given his willingness to continue the coverage, I

direct that as long as this policy is in place, one half of its value will be for the benefit of Ms. Clowes (Burns). Should Ms. Clowes (Burns) predecease Mr. Clowes, the benefit will be payable to a person identified as an alternative beneficiary named by Mr. Clowes.

### **Spousal Support**

[39] The legal principles governing spousal support were discussed in detail by me in *Darlington v. Moore*, 2015 NSSC 358. I will not repeat that discussion but rely on it for the following conclusions.

[40] I am satisfied Ms. Clowes (Burns) has established an entitlement to spousal support.

[41] Ms. Clowes (Burns) and Mr. Clowes pursued joint family and business objectives together. Ms. Clowes (Burns) participated in various enterprises with Mr. Clowes whether those businesses related to the trucking industry or the landscaping business.

[42] Ms. (Clowes) Burns stayed at home to care for the parties' children after the second child was born. She was also primarily responsible for meeting the household responsibilities when Mr. Clowes was away from the home for long days – trucking locally or for weeks at a time when employed in Alberta as a trucker.

[43] I am satisfied therefore, entitlement exists from the time of her departure from the home on October 1, 2018.

[44] However, the quantum of retroactive or prospective spousal support cannot be determined given the parties' incomes are uncertain for the immediate and long term. In addition, the Court will need to closely assess the financial circumstances of the parties since separation and determine the significance of Mr. Clowes having met the family's debt obligations since separation in January 2018, a period of three (3) years.

[45] Mr. Clowes is currently receiving employment insurance benefits. He applied for workers' compensation benefits following a back injury sustained, the Court believes in 2020. His claim for Workers' Compensation was declined by

the Alberta Workers' Compensation officers but an appeal of that decision was outstanding at the time of this hearing.

[46] Mr. Clowes is receiving treatment for his health condition in Nova Scotia and was scheduled to be assessed by a local surgeon in January 2021.

[47] If Mr. Clowes' appeal is successful, he will presumably receive a back payment and he will receive an ongoing financial benefit and predictable income. However, whether this expectation turns out to be correct remains unknown.

[48] Ms. Clowes places her potential income level at the \$16-\$18 per hour rate. In late 2018, her attorney declared Ms. Clowes (Burns) income as \$38,000. Her attorney, in a letter, suggested that number be used for the purpose of calculating the spousal support obligation of Mr. Clowes at the time. That attorney also suggested Mr. Clowes was earning in excess of \$100,000. Much has changed since then.

[49] After a number of employment changes since that letter, Ms. Clowes (Burns') income decreased.

[50] At the time of the hearing, she was in receipt of employment insurance, a benefit that will expire in several months.

[51] I am satisfied she has an annual income earning capacity in the \$31,000 - \$35,000 range.

[52] Ms. Clowes (Burns) seeks \$1,000 per month until she reaches the age of sixty-five (65) and a lump sum payment of \$28,000 as retroactive spousal support. As stated, Mr. Clowes offers to assume responsibility for the matrimonial debt including payments on that debt since separation in return for Ms. Clowes (Burns) releasing her claim to the matrimonial home and waiving her claim to spousal support.

[53] Mr. Clowes is not in a position to pay spousal support. That may change for reasons I have already given.

[54] The Court will therefore review the income level of the parties in late February with a view to determining the quantum and duration of spousal support

to be paid by Mr. Clowes, if any. In the event that a review at the end of February is premature or necessary information is not known, then a later date will be selected.

### **Pension**

[55] Neither party had a pension entitlement at the time of separation other than that which is available as a benefit of the Canada Pension Plan. Each may apply for a division of the Canada Pension benefit earned by the other during their period of cohabitation.

### **Divorce**

[56] The parties have established the fact of their marriage on September 1, 1990 (exhibit 2) and the fact of their separation on January 1, 2018. A breakdown in the marriage has been established.

[57] The parties have not reconciled and have no prospect of reconciliation. They have been residents of Nova Scotia in recent years,

[58] An order effecting a Divorce of the parties will therefore issue.

### **Name Change**

[59] An order changing the name of Ms. Clowes (Burns) to her birth name will issue. Her name will be changed to Kimberley Ann Burns (born May 16, 1967 at Halifax, Nova Scotia).

## **Addendum (April 2021)**

### **Assets**

[60] On March 3, 2021, the Court was advised the 2021 updated appraisal valued the home at \$470,000, an increase from the 2018 appraised value of \$365,000. After deducting a 5% sales commission plus HST of \$27,025; legal fees and HST of \$1,150, the net value is found to be \$441,825.

[61] The Court will hear further from the parties on a determination of the share of the net proceeds/value for each party.

### **Other Assets**

[62] Furniture and appliances have been divided.

[63] The only personal property to be factored into the calculation of each party's share of the matrimonial assets and debts is the following and the Court is told the parties have agreed on this being done:

1. 2013 GMC Terrain retained by Ms. Clowes (Burns) - \$16,034
2. Bank balance retained by Ms. Clowes (Burns) - \$348

### **Debts**

[64] In her March 2021 updated calculations, Ms. Rideout says the matrimonial debt balances shown at paragraph 32 *infra*, should be revised as shown below:

1. Personal car loan for Kim's car reduced to \$10,556 from \$11,696
2. RBC Home Line of Credit reduced to \$7,321 from \$16,218
3. RBC Mortgage reduced to \$316,564 from \$320,605
4. Amex increased to \$2,973 from \$3,949

[65] Ms. Rideout suggests no change in the following:

1. RBC VISA Avion \$8,071
2. Capital One Mastercard \$6,078
3. HRM Property Taxes \$14,498
4. RBC Line of Credit \$38,548
5. RBC Chequing Overdraft \$3,019

[66] Ms. Clowes (Burns) share of matrimonial debts is one-half of this amount. She was unable to meet this obligation. Mr. Clowes must continue to do so as a consequence.

[67] Mr. Clowes says the cost of his purchasing Ms. Burns interest in the matrimonial home exceeds the amount of matrimonial debt she is responsible for and he should keep the home as sole owner and assume sole responsibility for all matrimonial debt.

[68] The Court will hear further from the parties on how they propose to address this situation. Should they be unable to agree on an approach, the Court will decide.

**ACJ**