

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Morrison v. Morrison, 2013 NSSC 358

Date: 20131104

Docket: 1206-6234

Registry: Sydney

Between:

Monica Elizabeth Morrison

Petitioner

v.

Hector William Morrison

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: September 9, and 10, 2013, in Sydney, Nova Scotia

Oral Decision: November 5, 2013

Written Decision: November 7, 2013

Counsel: Candee McCarthy, for the petitioner
William Burke, for the respondent

By the Court:

[1] **Introduction**

[2] Hector and Monica Morrison were married on May 29, 1965. Unfortunately, the Morrison relationship was not a happy one for many years. Ms. Morrison eventually sought to terminate the relationship by filing a petition for divorce on July 26, 2011.

[3] Despite their attempts, the parties were unable to resolve the legal issues confronting them. A trial was thus held on September 9 and 10, 2013. During the trial, the parties and Florence White, Mr. Morrison's sister, testified. The oral decision was rendered on November 5, 2013.

[4] **Issues**

[5] The court will determine the following issues in this decision:

- What is the date of separation?
- What are the assets and debts of the parties for division purposes?
- What is the appropriate division?
- Should spousal support be awarded?

[6] **Background Information**

[7] After their marriage, the parties resided together in the jointly own matrimonial home situate at 83 Sterling Road, Glace Bay. They raised their four children there. The youngest child left the family home in 2008. Their children are now independent adults.

[8] Throughout much of the marriage, Mr. Morrison was employed by the Cape Breton Development Corporation. After he retired in 1996, Mr. Morrison continued to receive income through the salary continuation program until he turned 65.

[9] Ms. Morrison was a traditional homemaker during most of the marriage. From 1998 until 2005, however, she began to work outside the home, in a local department store. Ms. Morrison was employed on a part time basis.

[10] The parties' relationship was strained. They held different views on a number of topics. They disagreed on many ordinary life choices, such as the use of a dryer over a clothes line; the cost of hot water; and where budget restrictions could be made. Mr. Morrison felt he was frugal, although he acknowledged that others thought he was cheap.

[11] The ability to discuss and resolve issues was not a strong feature in either party's personality. Rather, one party would make an independent decision, and the other party would react by making another independent decision. For example, on one occasion, Mr. Morrison was displeased about gas money. Ms. Morrison had given Mr. Morrison money for gas on a Monday. Their son had used the family vehicle, and apparently did not refuel after use. Mr. Morrison asked Ms. Morrison for money for gas. She refused citing the earlier payment. As a result, Mr. Morrison opened his own bank account and thereafter deposited all of his pays there. Mr. Morrison thus assumed control over the family finances. He did not engage Ms. Morrison in a discussion about this change; Ms. Morrison had previously handled the family finances. Instead of consensus, there was unilateral action.

[12] Family sickness also placed a strain on the parties' relationship. Mr. Morrison's mother, Isabel Morrison, became ill in the late 1990's. Mr. Morrison and his siblings agreed to spend significant time caring for their mother on a rotating basis. This continued until her death in 2011.

[13] For her part, Ms. Monica Morrison was not happy with the amount of time that Mr. Morrison spent caring for his mother. Ms. Morrison eventually stopped making Mr. Morrison his daily sandwich. Ms. Morrison had started to work outside the home and had less free time. Further, she advised Mr. Morrison that since he was capable of feeding his mother at her home, he was capable of feeding himself at their home. Mr. Morrison took exception to the fact that Ms. Morrison would no longer make him a sandwich in the same fashion as she had for 25 years. The parties did not discuss this issue. Rather, they became entrenched in their positions.

[14] Health issues also struck closer to home. Mr. Morrison was diagnosed with cancer in 2003. Ms. Morrison left her employment for a period of time to provide care to Mr. Morrison. In 2005, Ms. Morrison developed breast cancer. Both have since recovered from these serious health conditions.

[15] The parties occupied separate bedrooms for many years. Why and when this occurred was not perfectly clear. Initially, there were problems with snoring and restless sleeping, and then the matrimonial discord increased. In any event, separate bedrooms were a permanent feature in the parties' relationship for years.

[16] 2011 was a year of considerable flux for the Morrises. Mr. Morrison's mother died in early 2011. Mr. Morrison and his siblings discussed ownership of their family home which is situate at 453 Upper North Street, Glace Bay, N.S. They decided that Mr. Morrison would purchase the family homestead, based on a preferential value of \$30,000. Each sibling was given an interest of \$10,000. Mr. Morrison bought 453 Upper North Street. He used \$10,000 in savings to purchase his brother's interest. To buy out his sister, Mr. Morrison borrowed \$7,500 from a credit line, and he continues to owe her another \$2,500 by virtue of a non-documented personal loan. All this was accomplished without any discussion with Ms. Morrison.

[17] Once Ms. Morrison discovered that her husband had purchased 453 Upper North Street, she decided to file for divorce. The original petition indicated a separation date of January 2000. An amended petition was later filed by Ms. Morrison indicating a separation date of July 20, 2011.

[18] Both parties continued to occupy the matrimonial home until 2012. Mr. Morrison moved permanently into the Upper North Street property on April 27, 2012. Ms. Morrison vacated the matrimonial home in October 2012 because she was not able to manage the coal furnace. She later returned to live in the home on June 20, 2013. Ms. Morrison hopes to retain the home.

[19] **Analysis**

[20] **What is the date of separation?**

[21] Mr. Morrison states that the separation date is 2000, as was alleged in the original petition for divorce. In support of his position, Mr. Morrison states that the parties led separate lives beginning in 1999. Finances were separated at that time. There was minimal social interaction. The parties occupied separate bedrooms. He notes an absence of a meaningful and mutual relationship after 1999.

[22] In contrast, Ms. Morrison argues that the date of separation is July 2011. Ms. Morrison indicates that she misunderstood her original lawyer, who stipulated the separation date as 2000, and not 2011. Although Ms. Morrison acknowledges a difficult and challenging marital relationship, she nonetheless states that the final decision to separate was not made until 2011.

[23] Section 8(2)(a) of the *Divorce Act* states that marriage breakdown is established if spouses live separate and apart for at least one year immediately before the determination of the divorce. Section 8(3)(a) of the *Divorce Act* states that intention is determinative of separation.

[24] In **Dupere v. Dupere** (1974), 9 N.B.R. (2d) 554 (N.B.Q.B.) as affirmed in (1974), 10 N.B.R. (2d) 148 (N.B.C.A.), the court noted the distinction to be drawn between an unhappy couple living together and a separated couple living in the same home. The following factors were deemed relevant when determining the date of separation:

17 I think the following general statements can be extracted as representing the weight of judicial opinion:

18 (1) Great care must be exercised in considering the evidence and each case determined on its own circumstances.

19 (2) There can be a physical separation within a single dwelling unit.

20 (3) A case is not taken out of the statute just because a spouse remains in the same house for reasons of economic necessity.

21 (4) To meet the statute there must be both (a) physical separation and (b) a withdrawal by one or both spouses from the matrimonial obligation with the intent of destroying the matrimonial consortium.

22 (5) Cessation of sexual intercourse is not conclusive but is only one factor to be considered in determining the issue.

23 (6) There may be an atmosphere of severe incompatibility but remain one household and one home — a distinction may be drawn between an unhappy household and a separated one.

[25] I have also reviewed and applied the law as stated in **French v. French** (1997), 162 N.S.R. (2d) 104 (N.S.S.C.); **McKenna v. McKenna** (1974), 10 N.S.R. (2d) 268 (C.A.); **Wood v. Wood** (1980), 6 Man. R. (2d) 36 (Q.B.); **H. (T.) v. H. (W.)** (2007), 250 N.S.R. (2d) 334 (N.S. S.C.); **M. (J.E.) v. M. (L.G.)** (2007), 252 N.S.R. (2d) 61 (N.S.S.C.); **Blue v. Blue** (2006), 249 N.S.R. (2d) 330 (N.S.S.C.); and **Gardner v. Gardner** (2005), 232 N.S.R. (2d) 68 (N.S.S.C.).

[26] I find that the date of separation is July 2011. In making this decision, I am cognizant of the fact that the parties were embroiled in an unhappy relationship for many years. Mr. Morrison unilaterally made financial decisions with no discussion, and in a dictatorial fashion. Not surprisingly, Ms. Morrison bristled because of his rulings. Ms. Morrison also acted unilaterally and without discussion. Despite their marital discord, however, the parties continued to reside together and continued to present themselves as a married couple. There was no settled intention to terminate the relationship until Ms. Morrison filed for divorce in July 2011. This is confirmed by the following:

- The parties filed as married in all income tax returns until 2011. Prior to 2011, they presented as married to the government and received tax benefits as a result of this designation.
- The parties did not apply to divide their CPP credits until after the petition for divorce was filed. The CPP division was effected in 2012.
- The parties did not advise their adult children, family, or friends that they were separated, and their marriage over, until the petition was filed in 2011.
- The parties presented as a couple during their son's wedding in August 2010.

- Mr. Morrison indicated that he was married when he ran for public office during a federal election in 2006.
- During cross examination, Mr. Morrison conceded that the events of 1999, were the beginning of the end and that the end did not really occur until Ms. Morrison filed for a divorce. Mr. Morrison also stated that he continued to make and pay for renovations in the matrimonial home until 2010. In 2010, he realized that the relationship would not likely improve.

[27] I am satisfied, on the totality of the evidence, that the intention to permanently separate and terminate an unhappy marital relationship was not made until 2011 when the petition for divorce was signed. The event which precipitated the divorce request and the intention to dissolve the marital union was Mr. Morrison's decision to purchase the Upper North Street property without ever discussing the purchase with Ms. Morrison.

[28] **What are the assets and debts of the parties for division purposes?**

[29] The parties own real and personal property, which property will be analysed on an individual basis.

[30] *83 Sterling Road, Glace Bay*

[31] This is the matrimonial home. It is matrimonial property. The appraised value is \$34,000. For division purposes, the following disposition costs will be deducted: 6% real estate commission of \$2,040; GST of \$306; and migration fees of \$1,500. Dispositions costs total \$3,846. The matrimonial home is thus valued at \$30,154 for division purposes.

[32] Ms. Morrison has 60 days to determine if she wishes to purchase Mr. Morrison's interest in the matrimonial home according to the equalization schedule to be discussed. If she does not wish, or is unable to do so, the matrimonial home will be listed for sale and sold for its fair market value, and the net proceeds equally divided between the parties.

[33] *435 Upper North Street, Glace Bay*

[34] Mr. Morrison argues that this asset is exempt because it represents an inheritance that was never used by Ms. Morrison.

[35] Ms. Morrison, on the other hand, states that the real property, with the exception of \$10,000, is matrimonial property that is subject division. She argues that Mr. Morrison's purchase of this property was nothing more than a savvy business investment.

[36] Section 4(1)(a) of the *Matrimonial Property Act* indicates that all real and personal property acquired by either spouse, before or during the marriage, is matrimonial property, with the exception of gifts, inheritance, trusts or settlements received by one spouse from a third party, except to the extent that they are used for the benefit of both spouses, or their children.

[37] In **Fisher v. Fisher**, 2001 NSCA 18 (N.S.C.A.) Cromwell J.A., as he then was, interpreted the meaning of "extent of use" in s.4(1)(a) of the *Act* at paras 44 to 51. In para. 51, he states as follows:

[51] It is not possible or desirable to set out any hard and fast rules for determining the extent of use of an asset for the benefit of both spouses or the children. The fundamental issue, to use an expression that appears in some of the cases, is the extent to which the asset has gone into "the matrimonial pot" : see **Rossiter-Forrest v. Forrest** (1994), 129 N.S.R. (2d) 130 (N.S.S.C.) and **Stoodley v. Stoodley** (1997), 172 N.S.R. (2d) 101 (N.S.S.C.) This determination must be made having regard to the nature of the asset and what use, in the normal course of life, would constitute integration of an asset of that nature into the life of the family. Factors such as the degree to which the asset was kept and treated separately from matrimonial assets, the amount and nature of its use by, or on behalf of, the spouses or the children and the contribution of family resources to maintain or enhance the asset may be factors which will be helpful to consider in making this determination. This, of course, is not an exhaustive list.

[38] The Upper North Street property is Mr. Morrison's family home; it has an appraised value of \$53,000. Disposition costs comprised of real estate commission, GST, and migration fees, reduce the property's value to \$47,843. Further, the debt associated with this property must also be deducted. This debt includes the line of credit which was used to assist in the purchase, and later used to renovate the home, with an approximate balance of \$13,000. Further, the

personal loan owed to Mr. Morrison's sister, in the amount of \$2,500 is also outstanding. Thus, the Upper North Street property has a net value of \$32,343.

[39] In this case, the Upper North Street property was acquired on the heels of the parties' separation, and actually precipitated the final intention to terminate the relationship and the marriage. The North Street property was the home of Mr. Morrison's family of origin. The property was acquired by Mr. Morrison and his two other siblings after his mother died.

[40] Mr. Morrison and his siblings reached an agreement that a preferential price of \$30,000 would be attached to the family home, so that the home could be maintained and kept in the family. Mr. Morrison thus paid Ms. White \$7,500, and he owes her an additional \$2,500. There was no promissory note, or other document signed to confirm this fact. I do, however, accept the evidence of Ms. White and Mr. Morrison on this point. Further, Mr. Morrison paid his other sibling, Fraser Morrison, \$10,000, from savings which were accumulated during the marriage.

[41] At separation, the Upper North Street property had a value that exceeded \$30,000. I do not accept the argument, that the purchase of the Upper North Street property was a savvy business investment. Rather, the Upper North Street property was acquired by Mr. Morrison, at a preferential price, because of his status as a child of Isabel Morrison, and as a sibling of Florence White and Fraser Morrison. Thus, Mr. Morrison secured a portion of the property as a result of an inheritance and a portion as a result of a gift.

[42] There is, nonetheless, a portion of the property's acquisition that must be classified as matrimonial. That portion is derived from the \$10,000 in savings that Mr. Morrison injected into the purchase of the home, together with an annual, simple interest of 5%. Thus, for division purposes, the sum of \$11,325 will be included as matrimonial property, which is slightly more than one third of its net value, as calculated above.

[43] *Household Contents*

[44] At separation, household contents were situated in both homes. Mr. Morrison stated that he had purchased household contents from his pays and used

them in the Upper North Street property. Further, Mr. Morrison also took items from the matrimonial home and placed them in the Upper North Street property. I find that the household contents have already been equally divided and each party will retain the household contents currently in his or her possession without further indemnification to the other.

[45] *RRSPs*

[46] The RRSPs, which are locked in and held in the name of Mr. Morrison, will be equally divided through the tax free mechanism of a spousal roll-over. The RRSPs are valued in excess of \$71,000, but will be divided based upon their value as of the date of division, which will include all interest or other benefits accruing, from the date of separation until the date of division. Both parties will co-operate with the execution of all documentation to effect the division and transfer.

[47] *Sunlife Shares*

[48] Mr. Morrison did not provide a statement showing the value of these shares. In his oral evidence, he estimated a value of \$7,776. These shares will be equally divided, but the value to be assigned will be their value as of the date of division. Mr. Morrison will supply proof from the financial institution as to the current value of the shares, and this amount will be updated in the equalization schedule, in the event Ms. Morrison retains the matrimonial home. Otherwise, the shares will be subject to an equal, source division.

[49] *Bank Account Balance*

[50] Mr. Morrison held a bank balance of \$1,200.48 at separation which will be subject to an equal division.

[51] *Cash Surrender Value of Life Insurance*

[52] The cash surrender value of the life insurance is approximately \$7,220, and will be subject to an equal division. Mr. Morrison will supply a statement from the financial institution with proof of the current value of the life insurance, and this amount will be updated in the equalization schedule, in the event Ms.

Morrison retains the matrimonial home. Otherwise, the cash surrender value will be subject to an equal, source division.

[53] *Pensions*

[54] The parties already made application and have had their CPP credits equally divided. There were no other pensions.

[55] *Vehicles*

[56] Mr. Morrison owned a 2000 Crown Victoria, which he valued at \$1,000 in his Statement of Property. No one challenged that value, and it is accepted. There were no other vehicles owned by either party in July, 2011.

[57] *Occupation Rent*

[58] Mr. Morrison claims occupation rent for the matrimonial home. Ms. Morrison disputes this claim.

[59] Occupation rent is a remedy that is not granted on a regular or frequent basis. This is not an appropriate case for this court to exercise its discretion by awarding occupation rent for the following reasons:

- Both parties continued to occupy the matrimonial home post separation, albeit for different periods of time.
- Mr. Morrison was legally entitled to attend at the matrimonial home, and indeed he continued to do so, after the petition for divorce was entered.
- The matrimonial home cannot be insured. The parties lost their insurance several years prior to separation.
- The matrimonial home is old and requires much updating. I have no independent evidence of what an appropriate rent, if any, could be secured by renting the matrimonial home.

- The home is serviced by coal fire heat, which was one of the reasons Ms. Morrison had to vacate the home for a period of time. This negatively impacts on marketability.

[60] *Debts*

[61] There is no other debt that is joint between the parties. Each party will be responsible to pay any debt held in their individual names.

[62] **What is the appropriate division?**

[63] Ms. Morrison claims an unequal division of the assets in the event she was unsuccessful in her argument concerning the Upper North Street property. Mr. Morrison seeks an equal division.

[64] As Ms. Morrison is seeking the unequal division, she carries the burden of proof. It is a burden which requires proof of unfairness, or unconscionability: **Harwood v. Thomas**, (1981), 45 N.S.R. (2d) 414 (NSCA); **Ritcey v. Ritcey**, (2002), 206 N.S.R. (2d) 75 (NSSC); **Jenkins v. Jenkins**, (1991), 107 N.S.R. (2d) 18 (TD); **Dennis-Fisher v. Fisher**, (1994), 131 N.S.R. (2d) 367 (NSCA); and **Jess v. Strong**, (1998), 169 N.S.R. (2d) 271 (NSSC).

[65] In **Jenkins v. Jenkins**, Richard J. reviewed the meaning of unfair and unconscionable at para. 10, which states as follows:

[10] I propose now to deal with the division of matrimonial assets in accordance with the law as set out in Donald, while remaining mindful of the comments of Macdonald J.A. in Nolet. To support a finding that a division is "unfair and unconscionable," it seems that there must be something more than mere inconvenience. The Random House Dictionary of the English Language, unabridged ed. (Random House, 1971) defines "unconscionable" variously as "unreasonable," "unscrupulous," "excessive," and "extortionate." These are strong words and, when coupled with the requirement that "strong evidence" must be produced to support an unequal division, the burden upon the party requesting an unequal division of matrimonial assets is somewhat onerous.

[66] I have reviewed the evidence, case law, and the submissions of the parties. Ms. Morrison did not dislodge the burden upon her. An equal division would not produce a result that was either unfair or unconscionable. This was a long term

marriage. It is appropriate that both parties share in the benefit of the assets that were accumulated as a result of their joint efforts throughout the marriage. This does not include that portion of the Upper North Street property that was acquired by virtue of Mr. Morrison's inheritance and by virtue of a gift received from his siblings by their agreement to take less than the fair market value for their share of the property. The legislation did not intend such results. Ms. Morrison has not proven that she is entitled in an unequal division by virtue of the enumerated categories set out in s. 13 of the *Act*: **Donald v. Donald**, (1991), 103 N.S.R. (2d) 322 (N.S.C.A.).

[67] Thus, for division purposes the following represents an equal division of the matrimonial assets should Ms. Morrison retain the matrimonial home:

ASSET VALUE	HUSBAND	WIFE
Matrimonial Home 83 Sterling Road		\$30,154
Matrimonial Funds injected into Upper North Street	\$11,375	
Cash Surrender Value of Life Insurance	\$7,220*	
Bank Account	\$1,200	
Shares	\$7,776*	
Vehicle	\$1,000	
TOTAL	\$28,571	\$30,154

* To be determined based upon updated asset statement.

[68] Ms. Morrison owes Mr. Morrison the sum of **\$791.50**, if she wishes to retain the matrimonial home: $\$30,154 - \$28,571 / 2$, together with an equal source

division of the RRSPs. This figure will, of course, be subject to updating by confirmation of the values noted, as indicated previously.

[69] Should Ms. Morrison not retain the matrimonial home, there will be a source division of the RRSPs, shares, and the cash surrender value of the life insurance. The matrimonial home will be sold and the net proceeds equally divided between the parties. Mr. Morrison will forwith pay Ms. Morrison **\$6,787.50** for one-half of the bank balance, together with one half of the value of the car, and the matrimonial portion of the Upper North Street property.

[70] **Should spousal support be awarded?**

[71] Ms. Morrison seeks spousal support from Mr. Morrison. Ms. Morrison concedes that Mr. Morrison has a limited ability to pay support on a periodic basis. As a result, Ms. Morrison seeks lump sum spousal support in an amount which equals one-half of the equity of the matrimonial home. Mr. Morrison disputes this claim.

[72] The court derives its authority to grant spousal support pursuant to s. 15.2 of the *Divorce Act*. Factors and objectives to be considered are set out in ss.15.2(4) and 15.2(6) of the *Act*. Lump sum maintenance can be ordered for a specific or immediate need. Lump sum maintenance must be based on spousal support principles. Lump sum maintenance cannot be invoked as a means to redistribute property, and it is the purpose, and not the effect of such an award, which is determinative: **Davis v. Crawford**, 2011 O.N.C.A. 294 (Ont. C.A.).

[73] I have examined the statutory provisions, and the case law, including that which was submitted on behalf of Ms. Morrison. I have reviewed the evidence in its totality. I have analysed the property, income and expenses of the parties, to the extent that such were placed before me in the evidence. I deny the spousal support claim of Ms. Morrison. In so doing, I note that both parties have incomes comprised of CPP, OAS, and GIS, the payment of which results in comparable incomes. Although the marriage was lengthy and traditional, at the end of the day, both parties have approximately the same incomes. Mr. Morrison does not have an ability to pay spousal support, and it is inappropriate to award spousal support, lump sum or periodic, in such circumstances.

[74] Although Mr. Morrison has marginally more property than does Ms. Morrison, it is not appropriate for me to redistribute property under the guise of lump sum maintenance. The purpose of the lump sum request was one based on redistribution, and not on support principles.

[75] **Conclusion**

[76] The following relief is therefore ordered:

- A divorce based upon a permanent breakdown in the marriage as evidenced by the one year separation.
- The change in Ms. Morrison's surname to her maiden name of Campbell, as requested.
- A division of the assets and debts as stated herein.
- A denial of the claim for spousal support.

[77] Ms. McCarthy is to draft the divorce and corollary relief orders and forward to Mr. Burke for approval as to form. The court retains jurisdiction to determine any ancillary issues which may arise from third party financial holders, or as a result of the ruling as it relates to division issues. In such a case, the parties are to contact my assistant in writing with the details of any outstanding issues, and a post trial conference will be convened.

[78] If either party wishes to be heard on the issue of costs, written submissions are to be provided no later than November 28, 2013, with response submissions no later than December 6, 2013.

Forgeron, J.