

IN THE SUPREME COURT OF NOVA SCOTIA  
Citation: *MacDonnell v. MacDonnell*, 2005 NSSC 182

Date: 20050627

Docket: S.T. 1207-002579 (032879)

Registry: Truro

Between:

Gerald Michael MacDonnell

Petitioner

Michelle Christine MacDonnell

Respondent

Judge:

The Honourable Justice Walter R.E. Goodfellow

Heard:

June 6, 2005, in Truro, Nova Scotia

June 27, 2005, in Halifax, Nova Scotia

Written Decision:

June 28, 2005

Counsel:

Joseph A. MacDonell, for the petitioner

C. LouAnn Chiasson, for the respondent

**By the Court:** (Orally)

**BACKGROUND:**

[1] Gerald Michael MacDonnell, now 42, and Michelle Christine MacDonnell, now 40, began cohabiting in 1987 when Mr. MacDonnell was 25 and Mrs. MacDonnell, 23. They married October 21, 1993 and have been blessed with two children, Andrea Christine MacDonnell, born May 19, 1988, now 17 and Jillian Evonne MacDonnell, born March 18, 1991, now 14.

[2] The parties separated in January 1997 and resumed cohabitation in April 1997. Mrs. MacDonnell says she did not move back into the matrimonial home before the agreement of April 9, 1997 was executed and Mr. MacDonnell's evidence is that they were back together again for a short period before the April 9, 1997 agreement was executed.

[3] The parties separated in February 2004 and in this divorce proceeding the major issue is the validity and/or weight to be given to the executed marriage/reconciliation contract of April 9, 1997.

**DIVORCE:**

[4] I found that there was no possibility of reconciliation and that all the jurisdictional requirements of the Divorce Act of Canada were met and that there had been a permanent breakdown of this marriage by reason of the parties having lived separate and apart for a period in excess of one year and directed that a Divorce Judgment be issued.

**CUSTODY:**

[5] The relationship between Mr. MacDonnell and the children, particularly the oldest child is strained. However, the corollary relief judgment will contain a provision of joint custody as defined in *Loughran v. Loughran* (2000), 182 N.S.R. (2d). Communication for the foreseeable future with respect to consultation will, of necessity, be in writing. In addition, Mrs. MacDonnell will insure that Mr. MacDonnell receives in a timely fashion any and all school reports. It is agreed that the day to day care of the children shall remain with Mrs. MacDonnell and given the ages of the children, access shall be as may be worked out between the children and their father.

**ISSUE:**

[6] Counsel advised the court that if the main issue were determined they quite probably would be able to affect a settlement of all other outstanding issues. The main issue being:

**Issue 1 - Is the Marriage Contract/ Reconciliation Agreement Executed by the Parties and Dated April 9, 1997 Valid and Binding Upon Them?**

[7] I have already noted that the parties separated in January 1997, and shortly after separation Mr. MacDonnell had his solicitor prepare a draft separation agreement. The draft separation agreement dealt with the property aspect and, in particular, Mrs. MacDonnell was to execute a deed conveying any interest she had in the matrimonial home at Enfield to her husband subject to the existing mortgage at the Royal Bank. In return, Mr. MacDonnell was to pay his wife the sum of \$10,000.

[8] Shortly after the parties separated they began seeing each other. Indeed, Mr. MacDonnell had assisted in her relocation and she, in turn, had him over for

dinner, etc. It is clear that Mrs. MacDonnell wished from almost the outset to return to the matrimonial home with the children and when they decided to reconcile the separation agreement was redrafted as a marriage contract and the settlement term with respect to the matrimonial home remained the same. There is a conflict as to whether or not the parties had resumed cohabitation for a very short period prior to April 9, 1997 - Mrs. MacDonnell taking the position that it was a condition precedent to reconciliation that she signed the marriage contract. Mr. MacDonnell takes the position that they were actually back together again when she signed the marriage contract.

[9] It matters not which version is accurate due to my findings of fact with respect to the pressures and desperation of Mrs. MacDonnell to resurrect the marriage and have the children residing in their home in a family unit. I am satisfied that if she had not signed the marriage contract that Mr. MacDonnell would not have proceeded with reconciliation.

[10] Before reciting the various findings of fact I take the state of the law to be that marriage contracts/reconciliation agreements are not void as against public policy even where they address issues of custody, access, child and spousal

support. In my view a correct statement of the law in that regard is contained in the case comment by Elizabeth Jollimore, Q.C. in the Nova Scotia Law News, Vol. 23, No. 6.

[11] The court must take into account all the circumstances and in particular any agreements between the parties whether they are verbal separation agreements, marriage contracts, prenuptial agreements, trial separation agreements, reconciliation agreements, etc., etc. This does not mean that the agreements will prevail and indeed, when it comes to marriage contracts the weight to be attached to a marriage contract will depend entirely on the circumstances.

[12] My remarks with respect to marriage contracts, etc., no longer being automatically void as against public policy are not essential to my determination in this case.

[13] Justice Kelly, in my view, is correct in *Rogerson v. Rogerson* (2004), 222 N.S.R. (2d) 324, where he concluded that s. 29 of the *Matrimonial Property Act* requires an inquiry into whether a challenged agreement is “unconscionable, unduly harsh on one party or fraudulent” before setting it aside.

[14] The only provision of the marriage contract/reconciliation agreement under attack is the issue in relation to the matrimonial home. It is solely a property issue and the determination is to be made pursuant to s. 29 of the Nova Scotia *Matrimonial Property Act*.

[15] In concluding that the separation agreement turned into a marriage contract in 1997 followed by seven years cohabitation was unconscionable, I make the following findings of fact:

1. Mrs. MacDonnell committed a one night indiscretion. I accept her evidence that this produced a climate of guilt which continued to exist and while Mr. MacDonnell may not have overtly fostered a continuation of her guilt complex, he had more than difficulty in handling it and knew of its impact on Mrs. MacDonnell.

2. When the separation took place in January 1997 Mrs. MacDonnell, who throughout the marriage had been the primary caregiver for their two daughters, recognized almost immediately the desirability of the family unit getting back

together again in the family home. The family home was acquired, according to Mr. MacDonnell, when their daughter, Andrea, was approximately one year of age and Andrea was born in 1988 and at the time of the separation had resided in the home for almost eight years which in itself is almost her entire life. In addition, the younger daughter, Jillian, had resided in the home since her birth in 1991. In a given case, the level of desperation can be of such magnitude when it is related to the desirability of children being in their home as to be a major feature in rendering a contract unconscionable where the other party has, as was the case here, a clear recognition of the degree of desperation. Desperation in relation to saving a marriage itself can be an important feature in rendering a contract unconscionable, *Sears v. Sears* (1998), 168 N.S.R. (2d) 362.

3. Mr. MacDonnell, in his evidence, confirmed that shortly after the separation Mrs. MacDonnell was calling wanting to come back home and indicating that the children missed their father.

4. Mrs. MacDonnell's evidence is that she was under the threat of Mr. MacDonnell advising the children about her one night affair. Mr. MacDonnell's response is that this was a ridiculous statement and that he would never have

adopted such a course of action. The truth is probably somewhere between the two versions and I am satisfied to the extent that Mrs. MacDonnell believed this to be a real possibility while Mr. MacDonnell may well have never raised the issue he possessed a realization that such was a pressure upon Mrs. MacDonnell, albeit on balance more likely self-imposed existed and impacted upon her emotionally.

5. Mrs. MacDonnell says that when they moved back together Mr. MacDonnell advised her that he would never enforce the agreement and he denies ever having made such a statement. I think, quite probably, on occasion he gave an indication to Mrs. MacDonnell that he would not likely enforce the agreement but I am far from certain that he expressed it with the clarity advanced by Mrs. MacDonnell. Mrs. MacDonnell did, I am satisfied, come to believe the state of affairs existed in which he would not enforce the provisions of the marriage contract.

6. At the time of signing the marriage contract there had been absolutely no negotiations between Mr. MacDonnell and/or his solicitor and Mrs. MacDonnell. While Mrs. MacDonnell did have independent legal advice, it was only in relation

to the agreement itself and no inquiry of any depth was undertaken nor was there any disclosure as to the totality of resources, etc.

7. While Mrs. MacDonnell had independent legal advice that told her unequivocally that she should not execute the agreement, the fact that she did so is additional weight to the degree of desperation that prevailed.

8. The initial agreement was a separation agreement and was geared to address a finality at that point in time. When it was turned into a marriage contract/reconciliation agreement no change was made to provide prospectively for any degree of contribution should there be an extended period of cohabitation. The parties continued to live together for approximately seven years after the agreement was executed during which Mrs. MacDonnell made a major contribution to the home as a homemaker and mother. During this period of time the parties net worth increased substantially due to the increased value and built-up of equity in the matrimonial home probably to a level in excess of \$100,000. It would be grossly unfair and unconscionable to enforce an agreement that provided absolutely no recognition nor did it address prospectively the probability of contribution by Mrs. MacDonnell. Both these parties made their respective

contributions to the marriage. Mr. MacDonnell worked long hours at two different jobs and the downside was that Mrs. MacDonnell was at home looking after the children for a lengthy period of time within their marriage. He worked so many hours that when he was home there was little opportunity for any family or married life. There had been other problems within the marriage that the parties have had to contend with but in the final analysis Mrs. MacDonnell has made a major contribution to the marriage as a mother and homemaker.

[16] For the foregoing reasons, I have concluded that the onus upon Mrs. MacDonnell pursuant to s. 29 of the *Matrimonial Property Act* has been met in that she has established on a balance of probabilities that the agreement of April 9, 1997 is unconscionable and must be set aside.

[17] In *Miglin v. Miglin*, [2003] 1 S.C.R. 303, [2003] S.C.J. No. 21, 2003 SCC 24, the Supreme Court of Canada was asked to alter a full and final spousal support release clause in a separation agreement. The couple had been married for 14 years, and separated in 1993. Ms. Miglin sought to reopen the spousal support portion of the Agreement five years later.

[18] While it is not necessary to do a *Miglin* analysis, as the only issue before me is a property issue, I have no reservations in saying that following the two stage approach of *Miglin* I would have held at the first stage a power imbalance existed of such magnitude and the vulnerability that existed on behalf of Mrs. MacDonnell was also of such magnitude that in all the circumstances the agreement would be held invalid. In addition, at the stage 2 analysis of *Miglin* the agreement in 2004 failed to come anywhere near substantial compliance with the general objectives of the *Divorce Act*.

[19] After giving my decision on the validity of the agreement, counsel now advise that they require some time to try and work out a resolution of outstanding issues, the major one being: what now to do with the matrimonial home which continues to be occupied by Mrs. MacDonnell and the children.

[20] I have agreed to make myself available to deal with any outstanding issues should the parties fail to reach resolution.

**J.**