

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Lewis v. Lewis, 2004 NSSC 251

**Date:** 20041124

**Docket:** S.P.1205-002238

**Registry:** Pictou

**Between:**

Sylvia Maureen Lewis

Petitioner

v.

Michael Miller Lewis

Respondent

**Judge:** The Honourable Justice C. Richard Coughlan

**Heard:** September 13, 14 and 20, 2004 in Pictou, Nova Scotia  
and November 24, 2004 in Halifax, Nova Scotia

**Decision:** November 24, 2004 (Orally)

**Counsel:** Roseanne M. Skoke, for the Petitioner  
Michael Miller Lewis, self-represented

**Coughlan, J.:** (Orally)

- [1] Sylvia Maureen Lewis petitioned for divorce from Michael Miller Lewis and seeks joint custody of the children of the marriage, with primary day-to-day care to her, division of matrimonial assets and child and spousal maintenance.
- [2] I am satisfied all jurisdictional requirements of the *Divorce Act* have been met, and there has 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 a divorce judgment shall issue.
- [3] The parties were married April 9, 1994 and separated January 30, 1998. Ms. Lewis had two children prior to the marriage: David Lance Lewis, born February 25, 1986 and Robyn Marie Lewis, born May 16, 1990. Mr. Lewis adopted these children. A child, Celine Laura Lewis, was born to the parties on October 3, 1994. Consequently, there are three children of the marriage.
- [4] Since the separation, with the exception of a time David lived with Mr. Lewis, the children have been in the primary care of their mother. There is a Family Court order issued August 14, 1998 giving the parties joint custody of the children, with Ms. Lewis having primary day-to-day care.
- [5] The petitioner and respondent shall have joint custody of the children of the marriage, namely: David Lance Lewis, born February 25, 1986; Robyn Marie Lewis, born May 16, 1990 and Celine Laura Lewis, born October 3, 1994, with Ms. Lewis having primary care of the children.
- [6] Mr. Lewis shall have reasonable access to the children, at reasonable times, upon reasonable notice, and in particular, every second weekend from Friday night at 4:30 p.m. until Sunday at 6:00 p.m. Mr. Lewis shall be solely responsible for transporting the children from Ms. Lewis' home during his exercise of access.
- [7] Mr. Lewis shall pay maintenance to Ms. Lewis for the support and maintenance of the children based on the Federal Child Support Guidelines for Nova Scotia for three children. Based on his present income of \$72,732.60 per annum, maintenance shall be payable in the sum of \$1,233.00 per month, commencing December 1, 2004.
- [8] Mr. Lewis shall maintain medical and dental coverage for the children on the plan he currently has through his employer.
- [9] Since Mr. Lewis has been paying child maintenance pursuant to the Family Court order issued August 14, 1998, the parties informally adjusted the amount of maintenance payable to account for Mr. Lewis' increase in

income. The order providing for child maintenance was not varied - although Mr. Lewis paid increased maintenance. Consequently, the records of the Maintenance Enforcement Program of Nova Scotia show a credit balance of \$10,544.00 in Mr. Lewis' favour as of July 30, 2004. No credit balance should exist. The corollary relief judgment shall contain a provision to correct the records of the Maintenance Enforcement Program of Nova Scotia.

- [10] Ms. Lewis is seeking a contribution from Mr. Lewis toward child care expenses. Section 7(1)(a) of the *Regulations* establishing the Federal Child Support Guidelines provides as follows:

**7.(1) Special or extraordinary expenses** - In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

- [11] For the purposes of the Guidelines, I find Ms. Lewis' income to be \$20,395.44.
- [12] In *Raftus v. Raftus* (1998), 166 N.S.R. (2d) 179, both Bateman, J.A. and Flinn, J.A. stated that child care expenses pursuant to s. 7(1)(a) are not required to be "extraordinary".
- [13] Ms. Lewis will incur child care expenses as a result of her employment. Mr. Lewis shall pay a proportionate share of child care expenses actually incurred by Ms. Lewis. Based on Mr. Lewis' present income of \$72,732.60 and Ms. Lewis' income of \$20,395.44, Mr. Lewis' share of the child care expenses actually incurred is 78.1 %. Ms. Lewis shall provide Mr. Lewis with invoices for the child care and he shall pay his portion of the said invoices, less any income tax deduction or credit relating to the child care expense.
- [14] Ms. Lewis paid \$2,255.00 toward the cost of orthodontic work for Robyn and Mr. Lewis shall reimburse Ms. Lewis 78.1 % of the \$2,255.00, being \$1,761.15.

[15] I now deal with the division of matrimonial assets. Section 4(1) of the *Matrimonial Property Act*, R.S.N.S. 1989 c.275 defines “matrimonial assets” as follows:

**Matrimonial assets**

**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, with the exception of

- (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
- (b) an award or settlement of damages in court in favour of one spouse;
- (c) money paid or payable to one spouse under an insurance policy;
- (d) reasonable personal effects of one spouse;
- (e) business assets;
- (f) property exempted under a marriage contract or separation agreement;
- (g) real and personal property acquired after separation unless the spouses resume cohabitation.

[16] The possible matrimonial assets are: Mr. Lewis’ pension, Ms. Lewis’ pension, Ms. Lewis’ severance payout, proceeds from the sale of the matrimonial home, household furniture, value of the Dodge Caravan lease and balance in the family bank account.

[17] Pension benefits and pensions in payment are matrimonial assets subject to division. In dealing with the portion of a pension subject to division, Bateman, J.A., in giving the Court’s decision in *Morash v. Morash* (2004), 221 N.S.R. (2d) 115 (C.A.) stated at p. 123:

The presumed equal division of matrimonial assets recognizes marriage as a partnership with each spouse contributing in different ways. A measuring of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Matrimonial assets may be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable. (*Young v. Young, supra*). In applying s. 13, the question is not whether an unequal division would be fair or fairer, but whether the usual equal division dictated by the *Matrimonial Property Act*, would be unfair or unconscionable.” ... [t]he issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair.” (*S.B.M. v. N.M.B.*, [2003] B.C.J. No. 1142; 183 B.C.A.C. 76; 301 W.A.C. 76; 14 B.C.L.R. (4th) 90 (C.A.), per Donald, J.A., at ¶ 23). Absent a factual context supporting unequal division, the court is not free to exclude from division assets acquired by one party prior to marriage. ...

- [18] Therefore, both Mr. Lewis’ pension and Ms. Lewis’ pension from their commencement date to the date of separation are subject to equal division unless there is convincing evidence that an equal division would be unfair or unconscionable.
- [19] As of November 10, 2004, the amount which would be paid to Mr. Lewis as a result of the division of Ms. Lewis’ pension from the date of inception to date of separation, January 30, 1998, is approximately \$120,697.40. The amount paid to Ms. Lewis as a result of the division of Mr. Lewis’ pension from date of inception to date of separation is approximately \$52,811.64. The amount which would be paid to Ms. Lewis as a result of the division of Mr. Lewis’ pension for the period of cohabitation, April 9, 1994, to January 30, 1998, is approximately \$17,056.71. The amount that would be paid to Mr. Lewis as a result of the division of Ms. Lewis’ pension for the period of cohabitation is approximately \$9,577.54.
- [20] The severance payout received by Ms. Lewis in the amount of \$28,719.14 was acquired during the marriage and is a matrimonial asset, subject to division. As of June 30, 2004, the payment which was invested had grown to \$36,349.66. In the case of the severance payment which passively appreciated between separation and trial, the date to value the asset for division is the time of trial. (*Reardon v. Smith* (1999), 180 N.S.R. (2d) 339 (C.A.))
- [21] The net proceeds of the sale of the matrimonial home of \$3,859.55 is a matrimonial asset.

- [22] The household furniture is a matrimonial asset. I was not provided with any formal appraisals of the household furniture and furnishings, and I am left to assign a value with limited information. Mr. Lewis did provide a valuation he prepared, valuing the household furnishings at \$6,370.00. His valuation does not accurately reflect the value of used furniture and furnishings. Ms. Lewis did not provide a valuation. I assign a value of the household furniture and furnishings as of the date of separation of \$1,500.00.
- [23] The value of the vehicle lease is a matrimonial asset and had a value of \$2,104.00.
- [24] The family bank account had a balance as of January 30, 1998 of \$334.29, and is a matrimonial asset.
- [25] Is this an appropriate case for an unequal division of the matrimonial assets, that is, would an equal division be unfair or unconscionable? Section 13 of the *Matrimonial Property Act* provides, in part:

**13** Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:

....

(d) the length of time that the spouses have cohabited with each other during their marriage;

(e) the date and manner of acquisition of the assets;

....

(g) the contribution by one spouse to the education or career potential of the other spouse;

....

(l) 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;

- [26] The marriage was of short duration - less than four years. Most of the pension entitlement and entitlement to severance payment were earned

when the spouses were not married. Ms. Lewis took the severance package and stayed home with the children, while Mr. Lewis was a full time student. Considering the factors set out in s. 13 of the *Matrimonial Property Act*, and in particular ss. (d), (e), (g) and (I) and the facts of this case, it would be unfair and unconscionable to have an equal division of the parties' respective pensions and severance package.

[27] Ms. Lewis shall receive one half of the value of Mr. Lewis' pension accumulated between April 9, 1994 and January 30, 1998. Mr. Lewis shall receive one half of the value of Ms. Lewis' pension accumulated between April 9, 1994 and January 30, 1998. Ms. Lewis shall retain the severance payment as her property.

[28] The proceeds of the sale of the matrimonial home were used to enable Ms. Lewis to obtain a mortgage on property she purchased in Pictou County. Ms. Lewis has the household furnishings. The value of the vehicle lease was used to obtain a vehicle for Ms. Lewis. Ms. Lewis also used the balance of the family bank account. These amounts total \$7,797.54 - one half of which is \$3,898.92. Ms. Lewis is to pay Mr. Lewis the sum of \$3,898.92.

[29] Ms. Lewis is seeking spousal support. Section 15 of the *Divorce Act* governs spousal support orders. Section 15.2(4) provides in making an order:

... the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

Section 15.2(6) sets out the objectives of a spousal support order.

[30] The parties cohabited for slightly under four years. At the time of the marriage, both were employed by the Canadian Armed Forces. Mr. Lewis was a part time student at McGill University. Ms. Lewis was a Master Corporal, employed as an administrative clerk in Halifax, Nova Scotia. Ms.

Lewis requested a transfer to Montreal, Quebec. Mr. Lewis was working in Montreal.

- [31] Ms. Lewis was pregnant and, on her doctor's advice, took early maternity leave in August, 1994. While on maternity leave, Ms. Lewis was informed her Department was downsizing and she was offered a termination package. The parties talked and a decision was made she would leave the Military. The plan was she would go back to work eventually. Ms. Lewis continued to receive her full salary until September, 1995 and then applied for a termination package, and received a lump sum payment of \$28,719.14 and a monthly pension. Mr. Lewis became a full time student at university. The parties returned to Nova Scotia and separated on January 30, 1998.
- [32] After separation, Ms. Lewis obtained part time employment with the Canadian Armed Forces in Pictou County. She gave up her employment as the Forces wanted her to take courses which would require her to leave home for periods of time - including wanting Ms. Lewis to go to Ellesmere Island for three months. Ms. Lewis felt she could not leave her family for three months. Since leaving the Armed Forces, she worked in Pictou, Antigonish and Guysborough Counties, administering drug and alcohol tests for the offshore oil industry. She went back to school to upgrade her skills and is presently working as a commissionaire. As a forty-nine year old, she testified it is difficult to compete with university students for jobs.
- [33] Is Ms. Lewis entitled to spousal support?
- [34] The marriage in question was of short duration - less than four years. At the time of the marriage, both spouses were employed in secure positions with the Canadian Forces. Ms. Lewis terminated her employment and stayed home to look after the children. Mr. Lewis pursued his university education. Ms. Lewis stated it was always her intention to return to the workforce. After separation, she obtained part time employment with the Forces.
- [35] When considering the objectives of a spousal support order, it is clear Ms. Lewis suffered an economic disadvantage arising from the breakdown of the marriage. She gave up a secure job with the Armed Forces, with its attendant seniority and pension benefits, while Mr. Lewis was pursuing his university studies. In addition, as she has primary care of the children, this factor has an impact on her employment prospects. Ms. Lewis gave up her employment in Pictou County with the Armed Forces as that position required her to leave her children for extended periods, which she was



unable to do. The order must also provide for the economic self-sufficiency of each spouse within a reasonable time, and also relieve any economic hardship of the spouses arising from the breakdown of the marriage.

- [36] After considering the evidence of this case, the objectives set out in s. 15.2(6) of the *Divorce Act*, and the factors set out in s. 15.2(4) of the *Divorce Act*, I find Ms. Lewis is entitled to spousal support. Ms. Lewis has not received spousal support for which she has had a need, which maintenance in the past I deem would have been in excess of \$3,898.92, and I award Ms. Lewis lump sum spousal maintenance in the amount of \$3,898.92, which may be satisfied by offsetting the amount Ms. Lewis is to pay Mr. Lewis for his interest in the matrimonial assets. The lump sum is required to provide for Ms. Lewis' self-sufficiency and to relieve economic hardship on her part.
- [37] Ms. Lewis shall have periodic spousal support in the amount of \$1,000.00 per month for a period of two years, commencing December 1, 2004.
- [38] I award the petitioner costs in the amount of \$1,000.00.

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**Coughlan, J.**