SUPREME COURT OF NOVA SCOTIA
Citation: Stewart v. Stewart, 2014 NSSC 39

Date: 20140130
Docket: SP No. 1205-003044
SPD 074445
Registry: Pictou

Between:

Mary Priscella Stewart

Petitioner

v.

Daniel Arthur Stewart

Respondent

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated February 4, 2014.
Judge:	The Honourable Justice Glen G. McDougall
Heard:	August 7, 2012, in Pictou, Nova Scotia
Final Written Submissions:	Petitioner: October 19, 2012 Respondent: October 25, 2012
Counsel:	Roseanne Skoke, for the petitioner Tammy MacKenzie, for the respondent

By the Court:

INTRODUCTION:

[1] This is a divorce proceeding. The parties were married on July 7, 1977. They agree that the separation date was March 1, 2011. The Petitioner, Ms. Stewart, filed a Petition for Divorce on March 7, 2011.

HISTORY OF THE PROCEEDING:

[2] The parties negotiated an interim consent order, effective June 9, 2011, and issued December 6, 2011. Under the interim order the parties agreed to joint custody of their daughter MLS, born August 3, 1993. Ms. Stewart would have primary care and provide the primary residence for MLS with reasonable access to Mr. Stewart to be negotiated through MLS directly. Mr. Stewart was ordered to pay child support of $592.00 per month based on an annual income of $68,200.00 and spousal support of $900.00 per month. Ms. Stewart was granted exclusive possession of the matrimonial home. A second interim consent order of December 6, 2011 dealt with the disposition of certain motor vehicles.

ISSUES:

[3] The issues for determination include: (i) the granting of the divorce; (ii) the division of matrimonial property; (iii) whether the parties' younger daughter remains a child of the marriage; and, (iv) entitlement to and quantum of spousal support.

DIVORCE:

[4] I am satisfied that the prerequisites for divorce are present. The marriage has broken down and the parties have lived separate and apart for one year. There is no possibility of reconciliation. The petition for divorce is granted pursuant to section 8 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

MATRIMONIAL PROPERTY:

[5] Matrimonial property is presumptively divided equally. Upon filing of a petition for divorce, either party may "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": *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 ("*MPA*"), at s. 12(1). In this case, Ms. Stewart seeks an unequal division of matrimonial property in her favour. Section 13 of the *MPA* 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:
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> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
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> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
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> …
>
> (d) the length of time that the spouses have cohabited with each other during their marriage…

[6] The conditions under which an unequal division may be ordered were considered in **Voiculescu** v. **Voiculescu**, 2003 NSSF 29, 2003 CarswellNS 252 (S.C. (Fam. Div.)), where Dellapinna, J., citing **Harwood** v. **Thomas** (1981), 45 N.S.R. (2d) 414 (S.C.A.D.), said, "[m]atrimonial assets are to be divided equally unless there is strong evidence showing that an equal division would be clearly unfair and unconscionable based on the factors listed in s.13… It is not enough to simply find a rationalization for an unequal division in s. 13" (para. 37). In **Young** v. **Young**, 2003 NSCA 63, 2003 CarswellNS 206, the Court of Appeal considered the circumstances in which an unequal division would be called for, and stated:

> 18 As set out above, substantially different considerations are applied to a division of matrimonial assets than the basic contribution assessment applied to the division of business assets. It is not sufficient, for an unequal division of matrimonial assets, that one of the s. 13 factors be present. The judge must make the additional determination that an equal division would be unfair or unconscionable. The terms "unfair" and "unconscionable" do not have precise meaning. Lambert, J. A. wrote in *Girard v. Girard* (1983), 33 R.F.L. (2d) 79, [1983] B.C.J. No. 4 (B.C. C.A.) *supra*, at p. 86:
>
> > I come then to the legislative purpose expressed in the word "unfair". That word evokes ethical considerations and not merely legal ones. It is not a lawyer's word. The section does not give a judge a broad discretion to divide property in accordance with his own conscience. There can be no doubt about that. There must be uniformity and predictability of judgment. The question of unfairness must therefore be measured by an objective standard. The standard is that of a fair and reasonable person whose values reflect those generally held in contemporary British Columbia. Such a person, while not insisting

> that everyone adopt his or her behaviour preferences, can recognize unfairness in the form of a marked departure from current community values.
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> 19 As directed in *Harwood v. Thomas, supra*, the judge must look at all of the circumstances, not simply weigh the respective material contributions of the parties. In *M. (S.B.) v. M. (N.)*, [2003] B.C.J. No. 1142 (B.C. C.A.), a recent decision of the British Columbia Court of Appeal, the court was asked to review the trial judge's unequal division of family assets. The *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 65(1) permits a deviation from the prima facie unequal division of family assets, where an equal division would be "unfair". I would endorse the approach to the question of unfairness outlined by Donald, J.A., for the court. It is consistent with the direction in *Harwood v. Thomas, supra* and the cases in this province which have followed:
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> > 23 . . . The question is not whether an unequal division would be fair; that is not the obverse of the test in s. 65(1). The Legislature created a presumption of equality - a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the 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. He must decide, in accordance with the language of s. 65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair, a reapportionment could be ordered on the basis that it is more fair, and that, in my opinion, is not what the statute intends. [Emphasis added by Court of Appeal.]

[7] In **MacDonald** v. **Ferguson**, 2010 NSSC 18, at para. 8, B. MacDonald, J. cited the comments of Richard, J. in **Jenkins** v. **Jenkins** (1991), 107 N.S.R. (2d) 18, 1991 CarswellNS 67 (S.C. (T.D.)), to the effect that a finding that an equal division would be unfair and unconscionable requires "something more than mere inconvenience." Justice Richard cited a dictionary definition of "unconscionable" as "variously … 'unreasonable,' 'unscrupulous,' 'excessive,' and 'extortionate'," and observed that these were "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" (**Jenkins** at para. 10).

[8] Mr. Stewart says Ms. Stewart has not established that an equal division would be unfair or unconscionable.

The matrimonial home:

[9] The court is authorized to make an order respecting the matrimonial home pursuant to section 11 of the *MPA*, which provides, in part:

> 11 (1) Notwithstanding the ownership of a matrimonial home and its contents, the court may by order, on the application of a spouse,
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> (a) direct that one spouse be given exclusive possession of a matrimonial home, or part thereof, for life or for such lesser period as the court directs and release any other property that is a matrimonial home from the application of this Act…

[10] Pursuant to the interim order, Ms. Stewart is currently responsible for taxes, insurance and maintenance of the matrimonial home which is not mortgaged. She says leaving the matrimonial home would have emotional and financial consequences for her and asks the court to continue the exclusive possession she enjoys under the interim order which she says has provided her with security during the marriage breakdown and ongoing health problems. She therefore asks for a postponement of division of the home with a continuation of her exclusive possession for five years. She says she is not in a position to purchase Mr. Stewart's interest due to credit card debt ($17,549.50 at separation), the uncertainty of her ability to maintain long-term employment to sustain a mortgage, and the parties' disagreement over valuation.

[11] Ms. Stewart asks the court to take her circumstances into account in accordance with **Moge** v. **Moge**, [1992] 3 S.C.R. 813, where the Supreme Court of Canada considered the analysis applicable to determining spousal support . She particularly calls upon the court to recognize and relieve her economic disadvantages arising from the breakdown of the marriage and to recognize the limitations placed on her by her circumstances. Among the circumstances she cites are the 33.5 year duration of the marriage; her age of 51 years; her health problems; her inability to buy out Mr. Stewart's interest given her limited ability to earn income or to borrow; and her need for security in housing. As Mr. Stewart points out, **Moge** was concerned with spousal support not property division. Ms. Stewart has pointed to no authority suggesting that the **Moge** principles are appropriately applied to property division.

[12] There are differing valuations for the matrimonial home. Ms. Stewart obtained an appraisal by Natalie Bell of $167,000. Mr. Stewart obtained a market valuation by Peter Fraser suggesting a probable selling range of between $123,000.00 and $127,000.00. Ms. Stewart says she is willing to accept the lower valuation. She asks the court to order exclusive possession to her for five years with the right for her to buy out Mr. Stewart's interest at the lower valuation. She adds a request that this disposition be linked to an order for spousal support of $1200 per month. In the alternative, Ms. Stewart seeks to have the home listed for sale at the higher valuation of $167,000 with the intention of selling for at least $155,000 and with her retaining exclusive possession until a sale occurs. She links this alternative disposition of the home to a request for spousal support of $1000 per month.

[13] Mr. Stewart agrees to Ms. Stewart retaining the matrimonial home at the higher valuation if his share is bought out. He maintains that the appropriate valuation of the matrimonial home is the June 2011 appraised value of $167,000.00. He notes that Peter Fraser only provided a market valuation, not an appraisal. Further, he submits, Ms. Stewart's request for extended sole possession without being required to buy out his interest amounts to an unequal division. He adds that Ms. Stewart could presumably borrow against the home - which is currently unencumbered - in order to make an equalization payment. While her mortgage pre-approval apparently depended upon the paying-off of her Visa debt, he suggests that this could be done with her share of the proceeds of the vehicles (discussed below). Mr. Stewart also maintains that he is being required to provide a home for MLS and her child in an apartment while Ms. Stewart has the four-bedroom matrimonial home to herself. He says this consideration, too, militates against an unequal division in her favour. Further, he says, Ms. Stewart's claim that she requires security of housing applies equally to him.

[14] Failing a buyout of his interest by Ms. Stewart, Mr. Stewart proposes that the home be listed for sale at the appraised price of $167,000.00 with a requirement to accept any offer over $125,000.00. In the interim, he seeks occupation rent. Ms. Stewart says any obligation for her to pay occupation rent should be offset by her assumption of the expenses related to the home and Mr. Stewart's own possession of equity in the home. Mr. Stewart says Ms. Stewart's housing expense of $228.00 per month for taxes and insurance is substantially less than his own housing costs of $740.08 per month for rent and insurance. He requests occupation rent of $256.00 per month half the difference between the parties' respective housing costs. This

would result in a payment by Ms. Stewart of $4,096.00 for the 16 months to the end of October 2012.

[15] I am satisfied that Ms. Stewart should be permitted to buy out Mr. Stewart's interest on the basis of the $167,000.00 appraisal. If she is unable to arrange the necessary financing by March 31, 2014, the property is to be listed for sale immediately thereafter at the appraised value, with the proceeds of the sale after the payment of all closing costs to be shared equally. If Ms. Stewart opts to buy out Mr. Stewart's interest, the price should be discounted by five percent for real estate fees. Additionally, if it is necessary to migrate the property under the *Land Registration Act*, S.N.S. 2001, c. 6, the cost should also be deducted from the appraised value.

[16] I am not satisfied that Mr. Stewart is entitled to occupation rent. Ms. Stewart has been paying the household expenses as stipulated in the consent order. Mr. Stewart's claim for occupation rent rests in part upon his alleged assumption of child care expenses, but, as will be discussed further below, I am not satisfied that any such duty exists.

Vehicles:

[17] Ms. Stewart submits that the parties are entitled to an equal division of the value of the various motor vehicles. She has possession of a 1997 Toyota Rav 4 which is valued at $1,600.00 and a 1992 Toyota Camry ($400.00). Mr. Stewart has possession of a 1997 Boxster Porsche Convertible ($9,500.00) which he wishes to retain. The parties appear to agree that these vehicles should be retained by the parties currently holding them.

[18] Pursuant to the interim order, the 1965 Ford Mustang was sold for $13,500.00 which is held in trust. While it was suggested that the parties agreed that the proceeds would be divided with Ms. Stewart receiving $6,500.00 and Mr. Stewart $7,000.00, these vehicles must be taken into account in the broader division and will be included in the category of vehicles already sold, to be divided equally. The 1967 blue Camaro was sold for $9,000.00 and the 1967 black Camaro for $3,800.00. It appears that the parties have agreed on an equal division. Out of the proceeds of $26,300.00, Ms. Stewart proposes that Mr. Stewart's half share be payable to her as part compensation for money allegedly concealed and disposed of by him.

[19] According to Ms. Stewart, Mr. Stewart gave their son Dan Jr. the 1996 Harley Davidson motorcycle (valued at $10,500.00) and the 1996 Chev truck ($1,200.00 according to Ms. Stewart; $800.00 according to Mr. Stewart). Mr. Stewart says Dan Jr. will purchase these vehicles. He denies her claim that he "gave" the vehicles to their son and says the evidence showed that both parties confirmed that they would be sold to him. He asks that the sale to Dan Jr. should be confirmed with a date set for the sale, failing which they should be disposed of in the same manner as the other surplus vehicles. Ms. Stewart says Mr. Stewart gave the Harley Davidson motorcycle to Dan Jr. after its exclusive possession was assigned to her in the interim order. As a result, she says, she is forced to forgo her own interest or seek repayment from her own son. She proposes that the court assign half the value of the motorcycle to her credit. She stated at trial that she was not opposed to Dan. Jr. buying the motorcycle.

[20] Ms. Stewart identifies a significant number of other vehicles that she says should be directed to be sold at auction. In the alternative, she says, Mr. Stewart could be given a first option to buy any or all of them before any auction. These vehicles (and their values) include: (1) a 1958 Chev Apache Pickup (valued at $24,725.00 according to Ms. Stewart $21,500 according to Mr. Stewart); (2) a 1991 Chev Silverado ($1,200); (3) 1996 Chev PKU Pickup ($800.00); (4) 1970 blue Ford Mustang (unknown, according to Ms. Stewart; $3,480.00 according to Mr. Stewart); (5) 1970 red Ford Mustang ($6,325.00, according to Ms. Stewart; $5,500.00 according to Mr. Stewart); (6) 1936 Ford Pickup ($1,725.00 according to Ms. Stewart $1,500.00 according to Mr. Stewart); (7) 1987 Chev Pickup (unknown); and (8) 1997 Chev Pickup ($2,300.00).

[21] Mr. Stewart indicated an interest in retaining the 1958 Apache. However, Ms. Stewart is not interested in retaining the other six vehicles as a form of equal division. He therefore suggests that the remaining vehicles be sold at auction, with the proceeds to be divided equally between the parties.

[22] The vehicles now in the respective parties' possession shall remain with them. The proceeds of the vehicles that have been sold will be divided equally. The remainder, including the 1958 Apache and the motorcycle and truck that have been earmarked for the parties' son, will also be sold and the proceeds shared equally. Where there are two proposed values for a vehicle, I adopt the lesser valuation. In the case of the 1987 Chev pickup, value unknown, I assign a nominal value of $100.00.

Disclosure and alleged disposal of matrimonial assets:

[23] Ms. Stewart alleges that Mr. Stewart failed to disclose funds in the amount of $36,233.00. She cites the evidence of April Duffy, the parties' daughter, and her husband Scott Duffy. Ms. Duffy testified that her father left cash in the amount of about $36,000.00 with them so that it would not have to be disclosed. She said she subsequently took photographs of the bags of cash in order to provide a record saying she had encouraged her father to disclose it. She said her father wanted the cash on hand to buy out the house if that became necessary. She said that when he did not disclose the money she informed her mother about it in January 2012. She said that when she returned the money he agreed that she could retain about $5,200.00 to buy furniture. Mr. Duffy confirmed that Mr. Stewart left a quantity of cash in their safe keeping, asking them to place it in a safety deposit box. He said Mr. Stewart asked them to keep the money until the divorce "blew over." He also said Mr. Stewart left some tools at their home asking them to keep them until after the divorce.

[24] Mr. Stewart denied that he tried to hide money saying that he gave it to Ms. Duffy in September or October 2010 because cash was going missing in his house. He said he gave it to her before he knew about the separation. He testified that he did not object to dividing the cash as a matrimonial asset.

[25] The figure of $36,233.00 appears to be comprised of undisclosed cash of $27,233.00 ($26,050.00 Canadian and $1,183.00 USD), plus a TD Bank draft of $9,000. Ms. Ms. Stewart suggests that the bank draft be divided into equal shares of $4,500.00 but that Mr. Stewart's share should be payable to her as compensation for her share of the gifted vehicles.

[26] Ms. Stewart says Mr. Stewart gave their daughter April Duffy $5200.00. Mr. Stewart says he gave Ms. Duffy a quantity of cash in the fall of 2010, and she returned it to him around September 2011, minus $5,200.00. Ms. Duffy testified that certain plastic bags containing cash, shown in photographs that were in evidence, were funds she was holding for her father. As Mr. Stewart says, it is impossible to tell from the photographs whether the bags actually contain the amounts written on them. In an affidavit dated February 27, 2012, Ms. Duffy stated that her father provided her with $36,233.00 (para. 33) or $26,050.00 plus $1,183.00, totalling $27,233.00 (para. 36). At trial Ms. Duffy confirmed the latter figure, but added that she did not count the change, amounting to about $4,000.00. The resulting amount would be roughly

consistent with Mr. Stewart's evidence that he gave Ms. Duffy $31,233.00 and received back only $26,033.00 - a difference of $5,200.00.

[27] Mr. Stewart's evidence was that he gave Ms. Duffy this money for safe-keeping in the fall of 2010, before the parties separated, as money and other items were missing from the home. He denies that he was attempting to hide these funds. He said he then forgot about the cash when completing his Statement of Property in the spring of 2011. Ms. Duffy, by contrast, testified that Mr. Stewart wanted to hide the money in order to buy out the house. In reply Mr. Stewart points to evidence that he had applied for mortgage preapproval in April 2011, in amount sufficient for half the equity in the matrimonial home, so that he could buy it out if necessary. As to the additional $5,200, Mr. Stewart says this was a loan, a claim with which Ms. Duffy did not disagree. He added that she retained this money without permission.

[28] In respect of the disagreement between his evidence and Ms. Duffy's, Mr. Stewart submits that his evidence should be preferred. He accuses Ms. Duffy of "siding with her mother and construing her evidence in an effort to 'help' her." He says her evidence was characterized by contradictions on various issues that impact on her credibility. He points to her evidence that Ms. Stewart tried to keep her out of the divorce followed by her acknowledgement that her mother had her subpoenaed and sought her assistance in preparing her disclosure. She also testified that her father had not tried to contact her since their falling-out but then acknowledged that he had in fact asked to see her and she refused. He also notes "generalized statements" by Ms. Duffy suggesting that Ms. Stewart was short of funds followed by her acknowledgement that she had no actual knowledge of her parents' bank accounts or bills. She also denied sending text messages to MLS confirming that Ms. Stewart had kicked her out of the house, but the messages were entered into evidence and MLS confirmed them.

[29] In support of his own credibility, Mr. Stewart points to his "honest and forthright" acknowledgement in cross-examination that he likely would not have come forward had he realized the omission in his Statement of Property. He adds that, contrary to Ms. Stewart's claim that he did not admit to the failure to disclose the money, he acknowledged the omission in his pre-trial submissions. As such, he submits that the sum of $26,033.00 should be added to his "side of the balance sheet" in asset division. In the event that the remaining $5,200.00 is recovered from Ms. Duffy, he says, it should be divided equally.

[30] I am satisfied that Mr. Stewart left $31,233.00 in cash with his daughter. Mr. Stewart will be credited with $31,233.00 in retained assets on account of the cash he left in Ms. Duffy's keeping. He must account to Ms. Stewart for half this amount. If he indeed loaned $5,200.00 to Ms. Duffy, that is a matter between the two of them, which does not affect the division of matrimonial assets. Ms. Stewart was not consulted or asked to consent to any such loan, and should not be left with a shortfall in assets as a result of such loan.

[31] In addition to allegedly undisclosed money, Ms. Stewart claims that Mr. Stewart failed to disclose certain details of his employment situation which she says has allowed him to buy vehicles in his own name with his employer's cheque and to have certain benefits, such as union dues, paid by the employer. These allegations will be dealt with under the heading of spousal support.

Pensions:

[32] It appears that the parties agree in principle to the division of their employment pensions. Ms. Stewart seeks division from the date of inception to the date of separation. Mr. Stewart's position is that all pensions earned during the marriage should be divided equally at source.

[33] Ms. Stewart says she is not currently named as a beneficiary on Mr. Stewart's pensions and seeks an order remedying this situation. In pre-trial submissions, she also requested that any early retirement package or bonus accrued during the marriage should be divided as a matrimonial asset. She also requests that periodic spousal support be fixed to ensure that Mr. Stewart will not retire early in order to avoid paying her.

[34] Pensions are divisible as matrimonial property. This includes pension entitlements earned before and during the marriage: **Morash v. Morash**, 2004 NSCA 20. Accordingly, the parties' respective pensions, all of which appear to have been earned during the marriage in any event, shall be divided and shared equally up to the date of separation.

Other Matrimonial Assets:

[35] The contents of the matrimonial home and the garage were appraised. The tools and garage contents (excluding the lawn tractor which was valued at $900.00) were valued at $6,795.00. The remaining contents of the home were valued at $1,670.00. Ms. Stewart proposes that she receive the remaining contents of the home and the lawn tractor while Mr. Stewart would receive the remaining tools and the contents of the garage. I indicated at trial that, failing agreement, all items will be sold at auction. Mr. Stewart requests that family heirlooms and the parties' personal belongings and clothing be exempt from any such order, limiting the auction to furniture, appliances, electronics, and household items. With respect to tools and lawn equipment, he says the sale should exclude items belonging to his employer which should be returned to the company directly or through him. He also seeks to retain the lawn tractor at its appraised value of $900.00.

[36] As previously indicated, I direct that the parties seek agreement on the division of household contents, including any tools needed for maintenance of the house, such as the lawn mower and snowblower. Any items on which they cannot agree shall be sold at public auction or yard sale, if necessary, with the proceeds (less any commissions should an agent be hired to conduct the sale) to be divided equally.

Matrimonial Debts:

[37] At the time of separation, Ms. Stewart had TD Visa debt of $17,549.50. Mr. Stewart had a line of credit balance of $14,784.35 and a Scotia Visa of $1,385.02. As of the time of his post-trial submission, Mr. Stewart indicates a balance of $4,021.86 for the Scotia Visa. He also has TD Visa debt of $2,755.81.

[38] Ms. Stewart says her Visa debt was incurred to pay her share of day-to-day matrimonial expenses and to maintain herself during the marriage. She says debt incurred by Mr. Stewart for dental work and hair implants should not be considered matrimonial debts, alleging that the dental work was purely cosmetic. She also claims that she should not be responsible for the cost of Mr. Stewart's trip to Thailand several months before the separation. Mr. Stewart responds that this trip took place before he knew about the separation. Similarly, he says, Ms. Stewart encouraged him to have the dental work done and he had it done during the marriage. He says Ms. Stewart herself had cosmetic dental work during the marriage. He denies Ms.

Stewart's allegation that he had cosmetic dental work done for the purpose of carrying on "extramarital relations."

[39] The parties shall be responsible for their respective debts as of the date of separation.

[40] As such, the division of assets and debts for equalization purposes is as follows (excluding pensions and household goods):

ASSET	MS. STEWART	MR. STEWART
Matrimonial Home	$. . . . . 83,500 (minus half of any disposal costs)	$. . . . . 83,500 (minus half of any disposal costs)
Vehicles in Possession	$. 2,000	$. 9,500
Vehicles Already Sold	$. 13,150	$. 13,150
Vehicles Earmarked for Son	$. 5,650	$. 5,650
Other Vehicles	$. 18,190	$. 18,190
Cash	$. 15,616.50	$. 15,616.50
Debts	$. . . . . -17,549.50	$. . . . . -16,169.37
TOTAL	**$. 120,557**	**$. 129,437.13**

[41] The difference between the parties' totals is $8,800.13. Mr. Stewart is thus required to make an equalization payment of $4,440.06.

Child Support:

[42] Several months after the birth of a child, MLS moved out of her mother's home to the home of the child's father in December 2011. The issue for determination is whether MLS continues to be a child of the marriage. According to Ms. Stewart, notwithstanding the interim consent order obliging him to pay child support of $592.00 per month, commencing with a half-payment in June 2011 and a full payment in July, Mr. Stewart only made the full payment in July and August 2011. Thereafter, she says, he unilaterally changed the quantum, paying nothing in September, $150.00 in October, $300.00 in November, and $150.00 in December. There were no payments after the end of 2011 as MLS was living independently. Ms.

Stewart did not seek enforcement of the arrears. She appears to agree that child support was no longer due at that point as MLS had withdrawn from her parents' care.

[43] Ms. Stewart says that MLS is no longer a child of the marriage. The *Divorce Act* defines "child of the marriage" as follows at s. 2(1):

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
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> (a) is under the age of majority and who has not withdrawn from their charge, or
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> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life…

[44] Ms. Stewart argued that MLS has not been a dependent since December 2011, when she left her household and moved to Guysborough with her boyfriend. Apparently after living with her boyfriend (who is the father of her child), MLS moved in with Mr. Stewart. It appears that she is estranged from her mother. While at trial MLS indicated that she intended to upgrade her education, there was no specific evidence of actual registration or the costs involved. Ms. Stewart says the August 2012 claim that MLS had moved in with Mr. Stewart should be treated skeptically, suggesting that she was only supporting her father's position. Ms. Stewart's position is that neither party has a legal obligation to support MLS.

[45] Mr. Stewart maintains that MLS remains a child of the marriage despite having reached 19 years of age due to her enrollment in a community college program. He adds that the evidence showed that MLS was "kicked out" of Ms. Stewart's household, leading her to move in with her boyfriend, then with him. MLS testified that she spent between two and three weeks each month at Mr. Stewart's home beginning in December 2011 or January 2012 and moved in with him full-time in early summer 2012. Mr. Stewart maintains that he has supported MLS and the baby since before they left Ms. Stewart's home.

[46] Mr. Stewart accordingly says Ms. Stewart's child support table obligation would be $302.00 per month. He appears to be seeking an order setting off this amount from spousal support. However, I am not satisfied that there is any child

support obligation. I am satisfied that MLS is no longer a child of the marriage. There was no specific evidence to establish her enrollment nor was there any specific evidence of the costs of the community college program in which she claimed to be involved. Any such order would require proof of enrollment and of continuing attendance. Nor would proof of such enrollment lead inevitably to a finding that MLS was a child of the marriage; the evidence must also lead to the conclusion that she is unable to withdraw from parental charge.

[47] As such, I conclude that MLS is no longer a child of the marriage. As such, neither party is entitled to child support.

Spousal Support:

[48] The factors and objectives of a spousal support order are set out at ss. 15.2(4) and (6) of the *Divorce Act*, which state:

> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
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> (a) the length of time the spouses cohabited;
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> (b) the functions performed by each spouse during cohabitation; and
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> (c) any order, agreement or arrangement relating to support of either spouse.
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> …..
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> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
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> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
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> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
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> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[49] The majority in **Moge** v. **Moge**, [1992] 3 S.C.R. 813, said, per L'Heureux-Dubé J., at 870:

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement ... Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution…

[50] The principles of spousal support are discussed in **Bracklow** v. **Bracklow**, [1999] 1 S.C.R. 420, where McLachlin J. (as she then was) observed that the court must consider all the relevant factors:

> 36 Against the background of these objectives the court must consider the factors set out in s. 15.2(4) of the *Divorce Act*. Generally, the court must look at the "condition, means, needs and other circumstances of each spouse". This balancing includes, but is not limited to, the length of cohabitation, the functions each spouse performed, and any order, agreement or arrangement relating to support. Depending on the circumstances, some factors may loom larger than others. In cases where the extent of the economic loss can be determined, compensatory factors may be paramount. On the other hand, "in cases where it is not possible to determine the extent of the economic loss of a disadvantaged spouse . . . the court will consider need and standard of living as the primary criteria together with the ability to pay of the other party": *Ross v. Ross* (1995), 168 N.B.R. (2d) 147 (C.A.), at p. 156, *per* Bastarache J.A. (as he then was). There is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.

[51] McLachlin J. went on to make the following comments about the non-compensatory purposes of spousal support:

> 41 Section 15.2(6) of the *Divorce Act*, which sets out the objectives of support orders, also speaks to these non-compensatory factors. The first two objectives - to recognize the economic consequences of the marriage or its breakdown and to apportion between the spouses financial consequences of child care over and above child support payments - are primarily related to compensation. But the third and fourth objectives are difficult to confine to that goal. "[E]conomic hardship . . . arising from the breakdown of the marriage" is capable of encompassing not only health or career disadvantages arising from the marriage breakdown properly the subject of compensation (perhaps more directly covered in s. 15.2(6)(a): see *Payne on Divorce, supra*, at pp. 251-53), but the mere fact that a person who formerly enjoyed intra-spousal entitlement to support now finds herself or himself without it. Looking only at compensation, one merely asks what loss the marriage or marriage breakup caused that would not have been suffered but for the marriage. But even where loss in this sense cannot be established, the breakup may cause economic hardship in a larger, non-compensatory sense. Such an interpretation supports the independent inclusion of s. 15.2(6)(c) as a separate consideration from s. 15.2(6)(a). Thus, Rogerson sees s. 15.2(6)(c), "the principle of compensation for the economic disadvantages of the marriage breakdown as distinct from the disadvantages of the marriage", as an explicit recognition of "non-compensatory" support ("Spousal Support After Moge", *supra*, at pp. 371-72 (emphasis in original)).

[52] The parties take different views of Ms. Stewart's entitlement to spousal support, beginning with the determination of incomes on which any spousal support order should be based.

Determination of incomes:

[53] Ms. Stewart is employed as a kitchen worker in the food services department of the Aberdeen Hospital, where she worked throughout the marriage. Her total income between 2007 and 2011 is as follows:

2007: $29,920.16 (union dues: $425.39)
2008: $34,269.88 (union dues: $513.05)
2009: $32.657.76 (union dues: $488.89)
2010: $35,845.50 (union dues: $536.42)
2011: $36,881.73 (union dues: $551.87)

[54] Mr. Stewart, an ironworker and operating engineer, is employed by Partners Construction as a site superintendent. His total income between 2007 and 2011 is reported in CRA summaries (2007-2009) and his T4 forms (2010-2011), as follows:

2007: $89,184 (union dues: $2,560)
2008: $102,643 (union dues $3,254)
2009: $94,706 (union dues: $3,562)
2010: $83,705.61 (union dues: $3509.30)
2011: $70,584.08 (union dues: $2493.66)

[55] As of July 30, 2012, the respondent's year-to-date earnings were $41,248.62. He calculates that this equates to an annualized amount of $71,017.67.

[56] Ms. Stewart says the non-disclosure of tax returns for the last two years makes it difficult to determine whether Mr. Stewart's income from all sources - including investments - is before the court, whether the respondent disposed of RRSPs, and what he received by way of tax refunds on account of paying spousal support. Moreover, she says, his disclosed income does not reflect various benefits and perks such as the use of a company vehicle and the ability buy vehicles with company cheques. She notes that his income had declined to approximately $70,000 in the separation year, 2011, while he was placing cash in the amount of $36,233.00 in the hands of his daughter and obtaining a bank draft for $9000 payable to himself. She asks the court to impute income to the Respondent.

IMPUTING INCOME:

[57] Ms. Stewart says Mr. Stewart has reported no overtime since 2010 after having average overtime earnings of $25,000.00 between 2007 and 2010. He denies working overtime hours and notes that in the construction industry hours and income fluctuate according to the work available. He points to evidence given on behalf of his employer by office administrator Beth MacNeill to this effect.

[58] Ms. Stewart alleges that there must have been an arrangement by which Mr. Stewart banked hours in order to pay back his employer's cheque for $20,328.00, which he used to buy a truck in 2010. Mr. Stewart testified that he had banked hours on occasion, adding that he had no paid leave for illness or vacation. Ms. MacNeill testified that banking hours was not a common practice although it was not unheard of. Mr. Stewart said the truck was bought with a loan which he paid back with the cash proceeds of vehicles he sold.

[59] There was also evidence that Mr. Stewart historically had the benefit of a company vehicle for personal use which Ms. Stewart says should be deemed at $8000.00 per year. Mr. Stewart says he is on call 24 hours per day and is required to take home a company vehicle. He pays for his own gas when he uses it for personal reasons. Moreover, he is still responsible for the costs of his own vehicle. He says there is no basis for a figure of $8,000.00 in any event. Ms. MacNeill testified that Mr. Stewart did not have access to a regular company vehicle.

[60] Ms. Stewart claims that Mr. Stewart's union dues are paid by his employer and therefore he should not enjoy a deduction for those dues. The principal evidence for this claim is the lack of an entry in box 44 of Mr. Stewart's T4. Mr. Stewart points to evidence - including his own testimony, that of Beth MacNeill, and tax receipts from the unions - indicating that he paid his own union dues.

[61] Ms. Stewart also says Mr. Stewart received "board income" (coded BRDE on company documents) which relates to the use of an employee's own vehicle to travel to work sites that are relatively distant. Ms. Stewart says this amount should be imputed at $5,000.00 per year between 2008 and 2010. He says, any such amount is included in his taxable income and provides no basis to impute additional income. Beth MacNeill said this money would be tax-free and that the rules governing it are strict. She confirmed that he would have received more than $5,000.00 under this heading in 2009 and 2010.

[62] Ms. Stewart also says Mr. Stewart has vacation pay paid out annually and not banked. She points to his 2010 vacation account at the time of separation in the amount of $5,700.00. She notes that his March 3, 2012 pay statement shows vacation pay of $5,138.12. According to Mr. Stewart, he has vacation pay deducted so that he can be paid while on vacation; he does not have paid vacation time. If vacation pay is to be included in his earnings, he submits, his income should be based on 46 working weeks. This would give him six weeks' vacation, the same as Ms. Stewart is entitled to. Ms. MacNeill confirmed that vacation pay would be taxable if Mr. Stewart took it out.

CONCLUSION ON INCOME:

[63] Ms. Stewart says Mr. Stewart's income should be imputed in the amount of $114,663.03 for 2011, and $67,706.11 for the first seven months of 2012, annualized

to $116,067.61. She goes on to say that it should be imputed for spousal support purposes at between $90,000.00 and $116,000.00. Mr. Stewart, however, says his income for support purposes should be no higher than $71,000, minus union dues of $2,673.66 (calculated on the basis of 2011 figures), leaving total annual income of $68,326.00. He says Ms. Stewart's annual income should be set at $36, 049.00.

ENTITLEMENT:

[64] Ms. Stewart argues that she is entitled to spousal support based on the parties' 33.5 years of marriage, her age (she is in her early fifties), her health problems (including the depletion of her sick leave benefits for surgery and recovery), her financial contribution to the family (including "support in enhancing husband's career"), and her employment history. She says long-term spousal support is called for in view of the unpredictability of her ability to work given her health problems.

[65] Mr. Stewart says Ms. Stewart is not entitled to spousal support. While the marriage was long-term, he argues, this is not reason, in itself, to create an entitlement to support. He maintains that she remains employed and capable of supporting herself. He says the parties shared child care responsibilities during the marriage and there was no evidence that any acts or sacrifices by Ms. Stewart led to advantages for his career any more than that he made sacrifices that benefited her career.

[66] Ms. Stewart has experienced health problems, specifically a brain tumour which required surgery in March 2010. She required further surgery to correct residual issues, including eye problems which caused double vision and permanent impairment of eye movement. She exhausted her employment sick leave benefits on the first operation and had to build up additional sick leave time for a second operation. Her evidence was that she made efforts to continue working while suffering from headaches and double vision. Mr. Stewart acknowledges that the petitioner has a long-term eye problem but denies that this impairs her ability to be self-supporting. She has maintained her usual employment and other activities throughout. He points out that any residual issues could be remedied with an eye patch although her evidence was that this would weaken the eye.

QUANTUM:

[67] Mr. Stewart has been paying spousal support of $900.00 per month based on an interim arrangement. Ms. Stewart now puts forward two alternatives as to quantum. If she receives exclusive possession of the matrimonial home for at least five years, she seeks $1,200.00 per month. If the matrimonial home is to be listed and sold forthwith, she requests spousal support of $1,650.00 per month.

[68] Mr. Stewart submits that any support order should be limited in quantum and duration. He emphasizes need and ability to pay. In response to Ms. Stewart's claim for support of $1,650.00 per month (in the event of an equal division of property), he submits that the Spousal Support Advisory Guidelines provide a range of between $1,009.00 and $1,304.00. These figures are, of course, premised on acceptance of Mr. Stewart's position on the parties' respective incomes.

[69] Mr. Stewart's position, however, is that Ms. Stewart's needs are overstated; he contrasts her lifestyle in the four-bedroom matrimonial home with his own life with their daughter, MLS, and her baby, in an apartment. In counsel's words, he says he "struggles to make ends meet while paying spousal support and attending to [MLS and the baby's] financial, educational and child care needs." He says his own expenses before paying spousal support are approximately $3,900.00 per month and that he has been forced to spend assets, including the $9,000.00 bank draft, and take on additional debt, while Ms. Stewart remains in the unencumbered matrimonial home and receives spousal support while providing no support to MLS.

[70] As noted earlier, Mr. Stewart says the table amount of child support would be $302.00. If Ms. Stewart were paying this amount, the *Spousal Support Advisory Guidelines* would suggest a range between $219.00 and $737.00 per month. If not, the range would be zero to $479.00. As such, he says, spousal support, if it is ordered, should be at the low end of the range depending on whether Ms. Stewart is ordered to pay child support. He adds that such an order should be retroactive to January 2012.

[71] I am satisfied that in view of the length of the marriage and the parties' respective incomes, along with Ms. Stewart's health problems, longer-term support is justified, albeit not in the quantum sought by Ms. Stewart. Spousal support should

continue at the previously-agreed amount of $900.00 per month until June 2014. After that, Mr. Stewart shall pay spousal support of $450.00 per month indefinitely.

INSURANCE AND BENEFITS:

[72] The parties agreed in the interim order to maintain the existing medical benefits and life insurance arrangements, with the parties remaining as beneficiaries. This would involve Ms. Stewart remaining named on the respondent's medical benefits for as long as possible under the plan. She requests a continuation of this arrangement in the final order. Mr. Stewart does not object to such an order in relation to medical and dental plans for as long as permitted by the plan and as long as he is required to pay spousal support. He submits, however, that MLS should be the beneficiary of his life insurance and that Ms. Stewart should be required to maintain life insurance for the benefit of MLS as well.

COSTS:

[73] Ms. Stewart seeks costs on the basis of a five-day hearing. She calls for costs consequences for Mr. Stewart's failure to disclose assets, though she acknowledges potential costs consequences for the delayed filing of her own post-trial submissions.

[74] Mr. Stewart requests the right to make further submissions on costs following the decision. He does make several points that he regards as relevant to the issue, however. He denies that his "erroneous and unintentional omission of the cash funds" from disclosure "increased time or costs in any way" given that he acknowledged the omission when it was brought to his attention, before trial. He goes on to allege that Ms. Stewart seeks double-recovery of the $5,200.00 that he says was wrongfully retained by Ms. Duffy. He denies that he "gave" the Harley-Davidson motorcycle to Dan Jr., saying the parties agreed that it would be sold to him. He also accuses Ms. Stewart of involving the children in their matrimonial conflict although he appears to concede that both parties have done so to some degree. He notes that, contrary to her claim in post-trial submissions that MLS witnessed an assault, MLS's own evidence was that she did not witness this and that her mother requested that she give a false statement.

[75] This being a family proceeding, I exercise my discretion to direct that each party shall bear their own costs.

Glen G. McDougall, Justice

SUPREME COURT OF NOVA SCOTIA
Citation: Stewart v. Stewart, 2014 NSSC 39

Date: 20140130
Docket: SP No. 1205-003044
SPD 074445
Registry: Pictou

Between:

Mary Priscella Stewart

Petitioner

v.

Daniel Arthur Stewart

Respondent

Judge:	The Honourable Justice Glen G. McDougall
Heard:	August 7, 2012, in Pictou, Nova Scotia
Final Written Submissions:	Petitioner: October 19, 2012 Respondent: October 25, 2012
Counsel:	Roseanne Skoke, for the petitioner Tammy MacKenzie, for the respondent

Erratum:

[76] Paragraph 71, page 22, first line, where it reads “until June 2013”, it should read “until June 2014.”

Glen G. McDougall, Justice