IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Phinney v. Phinney, 2005 NSSC130

Date: 20050530
Docket: 1204-003429
Registry: Kentville

Between:

Charles Ronald Phinney

Petitioner

v.

Lesley Carolyn Phinney

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	At Kentville, Nova Scotia, on March 29, 30, April 21, 2005.
Final Written Submissions:	May 18, 2005
Counsel:	Stephen A. Mattson, Q.C., counsel for the respondent
	Charles Ronald Phinney - represented self

By the Court:

[1] The issues in this divorce are:

(1) access
(2) spousal support
(3) division of the matrimonial home and
(4) division of Mr. Phinney's employment pension.

[2] The parties agreed, either before or during the trial that:

(1) they would have joint custody of their children with Ms. Phinney having primary care;
(2) payment of child support would be in accordance with the **Federal Child Support Guidelines;**
(3) Each party would retain any personal property presently in their possession (except for the matrimonial home and Mr. Phinney's pension); and
(4) the fair market value of the matrimonial home was $115,000.00.

BACKGROUND

[3] The parties started dating in 1986 or 1987. Ms. Phinney was about 19 years old and Mr. Phinney about 23 years old. They married on October 6, 1990. They dispute whether they were co-habiting between 1986 and 1990. Mr. Phinney said that before August, 1987 he was renting the mobile home and land on which the matrimonial home was eventually built In August, 1987, he purchased it for $25,000.00 in his own name. He says that he lived off and on with Ms. Phinney

until their marriage but that she was dating other men during this time (Howard Dowell and Wade M.) and they were not living in a common law relationship until their marriage. Ms. Joan Toole, Ms. Phinney's mother, who was subpoenaed by Mr. Phinney, testified that her daughter was dating Howard Dowell in 1989. Albert Wolfe, who rented and then sold the land and mobile home to Mr. Phinney testified that during the time that Mr. Phinney rented the property, and at the time of the purchase, Mr. Phinney was the only person living there. On cross-examination, he did not recall ever receiving rent from Ms. Phinney.

[4] Ms. Phinney testified that she and Mr. Phinney were going together when she was 17 and she was living at her parent's home. She says she moved in with Mr. Phinney before she graduated from Community College in 1988. She said her relationship with Howard Dowell predated this time.

[5] My assessment of the evidence is that they were going together during this time and, while Ms. Phinney often lived at Mr. Phinney's home before 1990, their relation was not a monogamous one or a common law-like arrangement. I accept that the period of cohabitation (meaning a monogamous relationship) began with the marriage in 1990.

[6] Mr. Phinney began working at the Michelin Tire factory in 1985 and continues to do so to the time of trial. He presently earns about $55,000.00 per year.

[7] Ms. Phinney has had several jobs before, during, and subsequent to, her marriage. Since 2004 she has managed a Rewards department store at the Greenwood Mall and her statement of financial information shows she makes $1,446.00 per month ($17,400.00 per year), which her Statement of Financial Information says “may increase as the year progresses due to increased hours”.

[8] The parties have two children, Leah, born July, 1992 and Lori, born June, 1994.

[9] The parties separated in September, 2002.

[10] By an interim order dated May 12, 2003, Murphy J. ordered that, based on an income of $50,000.00, commencing June 1, 2003, Mr. Phinney pay, in twice

monthly installments, child support of $679.00 per month together with 75% of s. 7 expenses, and spousal support of $350.00 per month.

[11] After the separation Ms. Phinney retained control of the matrimonial home except for a short period during an attempt at reconciliation. This failed reconciliation led to an interim order issued by this court on October 8, 2004, granting Ms. Phinney exclusive possession.

CUSTODY AND ACCESS

[12] The Phinneys have two children. Ms. Phinney has always been their primary care giver. Mr. Phinney has always been very active in their life and has a very close relationship with them, especially with Leah.

[13] A Custody and Access Report ("Report") was prepared for the Court by Deborah Pick when custody was in dispute. Late in the trial, after Ms. Phinney agreed to joint custody and when it appeared that she had not, and would not, interfere with Mr. Phinney's access, Mr. Phinney agreed to joint custody with Ms. Phinney having primary care, provided he receive access to the children in accordance with the recommendations contained in the Report. The Report made

it clear that the children, particularly Leah, wanted more time with their father. Ms. Phinney agreed that they should spend as much time with their father as possible, and that she would continue to encourage access, with a stipulation that Mr. Phinney stop using the children as a way to harass or denigrate her.

[14] The Report, and evidence at trial, established that Mr. Phinney had occasionally become angry and confrontational - most probably, in the Court's view, because of Ms. Phinney's relationship with Mr. Slayne, and Mr. Phinney's belief that marriage was for life and that he and Ms. Phinney should reconcile. As a consequence, he occasionally cancelled access, or acted immaturely in front of the children. Mr. Phinney has promised that any such conduct would not happen in the future and that he has moved on. If this conduct were to resume, there is no doubt that such it would interfere with future access. Only if the promise is kept will the children benefit from increased access with Mr. Phinney.

[15] In his post-trial memorandum, Mr. Phinney asked that the children spend every second week with him in the matrimonial home. This is contrary to the admission and agreement made by him late in the three day trial. The agreement as to joint custody with Ms. Phinney having primary care was unequivocal, and made

with full knowledge of its consequences by Mr. Phinney. The agreement was consistent with the Report recommendations and the trial evidence. The agreement would clearly implement the statutory objectives set out in subsections 16(8),(9) and(10) of the Divorce Act, and is in the best interests of the children. The Court therefore confirms the agreement.

[16] Mr. Phinney provided the Court with his 2005 work schedule; he agreed to provide annually his schedule so that the weekends he was scheduled to have the children would be weekends that he was not working. Mr. Phinney shall have the children with him every second weekend, and such other times as the parties may agree. This is not intended to equalize time between the parents, or to order a shared custody arrangement. If the scheduled weekends for access are for some reason not possible because of his work schedule, then he will advise Ms. Phinney as soon as possible of the change in his work schedule so that alternative weekend access can be arranged. Furthermore, because of the age of the children and their involvement in other activities, it is important that access not interfere with important pre-planned activities. Mr. Phinney must understand that access is for the benefit of the children.

[17] When the children are with Ms. Phinney, she shall have full authority to deal with their care. When the children are with Mr. Phinney, he shall have full authority to deal with their care.

[18] In her testimony during the trial, Ms. Pick noted that in the past there have been problems with communication between the parents. She recommended that Mr. Phinney pick up and drop off the children at the beginning and end of each access visit in a neutral location; the parking lot adjacent to Ms. Phinney's home shall be that place; both parties shall minimize the amount of communication at period of transition. Both parties will be civil to each other. Neither party will make any negative comment to or near the children about the other, or their families, or their friend.

CHILD SUPPORT

[19] Based on Mr. Phinney's income of $55,000.00, he will pay child support, effective June 1, 2005, in the amount of $742.00 per month in twice monthly installments of $371.00 on the 1st and 15th day of each month, which payments will be made through the Maintenance Enforcement Program by direct employment deductions.

SPOUSAL SUPPORT

[20] The objectives of spousal support are set out in s. 15.2(6) of the **Divorce Act**.

[21] With respect to the first objective, there is no evidence of any economic advantages or disadvantages to either party arising out of their marriage. Mr. Phinney already had his career with Michelin which did not change. He took an active part in the lives of his children during the marriage. During the marriage, Ms. Phinney sometimes worked and on other occasions stayed home with the children. Ms. Phinney received the benefits of Mr. Phinney's income and will receive a share in his Michelin pension.

[22] With respect to the second objective, neither party has any financial consequences arising from the care of children over and above any child support obligations. Mr. Phinney has paid and will continue to pay child support in accordance with the **Guidelines**. He has a secure and stable income and is paying the appropriate amount. Ms. Phinney was able to re-enter the work force during the marriage and her day to day care of the children has not interfered with her

ability to increase her employment income, or to move on with her life and enter into a common law relationship with Darrel Slayne.

[23] With respect to the third objective (which overlaps to some degree the second aspect of the first objective) there was some economic hardship arising from the breakdown of their marriage. Initially Ms. Phinney lost the benefit of Mr. Phinney's more substantial income and was on social assistance. In May, 2003, Murphy, J., ordered interim spousal support of $350.00. Since that time two things have happened that have reduced or eliminated the economic imbalance arising from the breakdown of the marriage. First, Ms. Phinney's work and prospects have increased significantly, and second, she has entered into a stable, common law relationship with Darrel Slayne, who has a significantly greater income than even Mr. Phinney (he stated his income was about $70,000.00 per year).

[24] With respect to the fourth objective, it is clear that Ms. Phinney does not personally earn nearly as much as Mr. Phinney. Before the separation, she re-entered the work force and her income is increasing. It is not the intent of s. 15.2(6) of the **Divorce Act** that, after separation, parties incomes will necessarily

be equalized. In this regard, see **Rutherford v. Rutherford**, 2004 NSSC 148, paragraphs 110 to 151 and, in particular, paragraph 128 (f).

[25] In addition, attaining economic self-sufficiency does not necessarily mean that Ms. Phinney must attain that self-sufficiency through employment income. It may be achieved through any means, including but not limited to, good fortune, good investing, an inheritance, or entering into a new partnership with someone who has a significant and secure economic status .

[26] The prerequisite to the determination of the quantum of spousal support is entitlement. While the draft proposal for the **Spousal Support Advisory Guidelines** states that the **Guideline** amounts are premised on a finding by a court that entitlement exists, the application of the ranges, and the basis for the calculation of quantum, does not appear to fully take into account circumstances where entitlement, based on the objectives in s. 15.2(6), is weak.

[27] Although there is some dispute about exactly where Mr. Phinney's income went after the separation and what bills were paid, it appears that until the spring of 2003 the mortgage on the home occupied by Ms. Phinney was paid out of the

Phinney's joint bank account. Between then and the interim order some arrears accumulated. After the interim order of May, 2003, Ms. Phinney lived in the home and paid the home expenses and paid the mortgage and received spousal support of $350.00 per month.

[28] It is not clear when Ms. Phinney started co-habiting with Darrel Slayne. The court was never satisfied with her answer about her arrangement with Mr. Slayne. Ms. Phinney suggests that she was simply visiting him and spending not more than fifty percent of the time with him. It appears that Mr. Slayne had his own children with him approximately half the time and at least on those occasions Ms. Phinney and her daughters were living with him. Mr. Phinney and his friends say that she was never at the matrimonial home.

[29] Brian Freeman, the next door neighbour, impressed the court as an impartial and straightforward witness. He has a clear view of the Phinney residence from his home. He states that from January, 2003 until December, 2004, activity around the Phinney home was “spotty”; for days, no one was there. His estimate was that Ms. Phinney lived there 30 percent of the time and that the house was empty 70 percent of the time. I accept his evidence over that of Ms. Phinney. His

evidence leads me to conclude that Ms. Phinney and Mr. Slayne were living together in a common law relationship from 2003, despite her evidence to the contrary.

[30] This conclusion is reinforced by exhibit 9, which was a note left by Ms. Phinney for Mr. Phinney in September, 2004, at a time when Mr. Slayne (on behalf of Ms. Phinney) had removed most of the furniture and the children's bikes and toys from the matrimonial home. The note, written by Ms. Phinney, reads:

> "Charles,
>
> We have moved in with Darrell. Please settle in court Oct 5 and leave us alone."

Mr. Slayne acknowledged that he added to the bottom of that note in large print the words: " READ AND HEED ". This note is clear evidence, at least from September, 2004, of that which this Court believes occurred long before that.

[31] Ms. Phinney acknowledged that Mr. Slayne had purchased mattresses for her girls to sleep on in his residence.

[32] It may have been that because of Mr. Phinney's religious beliefs and his strong belief that marriage was for life that she is hesitant to acknowledge her own moving in with Mr. Slayne.

[33] Another element of the evidence before the Court that leads me to discount Ms. Phinney's position was the evidence about her affair with David Ritchie. Shirley Ritchie, the wife of David Ritchie, testified that during the summer of 2002 her husband was having an affair with Ms. Phinney which he subsequently admitted to her. When she first found out about it she attempted to call Mr. Phinney at his home to advise him, but instead of him her husband answered the phone. She testified she attended upon Ms. Phinney at her workplace in the Greenwood Mall and ask her (unsuccessfully) to stop seeing her husband. Mr. Ritchie continued the relationship after the Phinney separation. Mr. and Mrs. Ritchie are now separated.

[34] David Ritchie was subpoenaed to give evidence by Mr. Phinney. While a reluctant witness, he acknowledged that he had driven Ms. Phinney and her children in the summer of 2002 in his vehicle, and that he had taken her out at least twice to bars, including on one occasion when she was driving after drinking

and was convicted of failing the breathalyzer. The record of conviction showed that offence occurred on July 26, 2002.

[35] Mr. Phinney had been unaware of this relationship; he says Ms. Phinney abused their daughters by requiring them to lie to him to cover her affair. The Court did not accept Ms. Phinney's version of the relationship with Mr. Ritchie and this affected her credibility with regards to the nature of her present relationship with Mr. Slayne.

[36] Ms. Phinney did not present to the court a budget showing the income and expenses of her and Mr. Slayne together. She maintained that she was living with the children in the matrimonial home and only spending some time at Mr. Slayne's home.

[37] Based on the evidence heard, the Court is not satisfied that Ms. Phinney has demonstrated, since at least 2004, a need (non-compensatory claim) for spousal support.

Arrears

[38] After the interim order of May, 2003, Mr. Phinney attended at the Maintenance Enforcement office to register the Order and instructed MEP to deduct $600.00 per pay (twice monthly) from his pay beginning September 27, 2003. There is conflicting evidence and exhibits as to the amount of the payments made under the interim order. The Court accepts, based on the signed receipts and the bank records of Ms. Phinney, that the MEP printout on pages 12 and 13 of Exhibit 4 are an accurate record of the amounts ordered to be paid under the interim order and of the amounts paid up to February 9, 2005. Th record shows the amount ordered as $19,594.50 and the amount paid as $13,550.00, leaving arrears of $6,044.50.

[39] The Court notes that Mr. Phinney reduced the amount deducted by MEP from $600.00 per pay to $350.00 per pay in February, 2004; this was at about the same time that Rev. Leon Langille, the parties' minister, attempted to mediate a resolution of their differences and prepared the agreement that was signed by Mr. Phinney but not by Ms. Phinney. As already stated, Ms. Phinney was co-habiting with Mr. Slayne before September, 2004.

[40] The Court finds that Ms. Phinney's entitlement to spousal support, compensatory and non-compensatory, had expired, or been fulfilled, by September, 2004.

The Court therefore orders that spousal support terminate as of September 1, 2004. The arrears shown on the MEP Report (Exhibit 4) should be reduced by the difference between $514.50 per pay and $339.50 per pay, from September 15, 2004. This is to reflect the $175.00 in spousal support included in each of those twice monthly payments. This would make the arrears, as of February 9, 2005, the sum of $4, 294.50 ($6,044.50 less ten payments of $175.00).

MATRIMONIAL HOME

[41] Ms. Phinney had the legal right to exclusive occupancy of the matrimonial home, and claims to have occupied it from September, 2002, except for a few months during an attempted reconciliation. She paid almost all of the mortgage payments from the spring of 2003 and all household expenses. The parties' briefs deal with Mr. Phinney's claim for occupancy rent. Any claim for occupancy rent should be offset against the house expenses and mortgage payments (which included principal amounts accruing to both Mr. and Ms. Phinney). This determination does not factor in the payment of child support by Mr. Phinney

since separation, a large component of which includes his contribution to putting a roof over the children's heads.

[42] The Court accepts that the fair market value of the residence, for the purposes of the **Matrimonial Property Act**, is $115,000.00 as set out in the letter of Darrell Foster.

[43] Because Ms. Phinney had exclusive possession of the matrimonial home, and no occupancy rent has been charged against her , the appropriate time to determine the balance owing on the mortgage is at the end of the period of exclusive possession. The only information available to the Court is the balance owing on the mortgage as of December 31, 2004, at which time the mortgage balance was $91,075.00. The Court therefore accepts that the equity in the matrimonial home for the purposes of division under the **Matrimonial Property Act** is the sum of $115,000.00 less the mortgage balance on December 31, 2004, of $91,075.00, less the disposition costs estimated in Ms. Phinney's memorandum of $7,900.00. The equity is $16,025.00 and the share of each is $8,012.50.

[44] Both parties want ownership of the matrimonial home. Ms. Phinney wants it as security in case her relationship with Mr. Slayne does not work out. Mr. Phinney helped to build the home himself, has a significant sentimental attachment to it, and wants to reside there with the children. It appears that the children would prefer, if possible, to live in the matrimonial home.

[45] Ms. Phinney proposes to offset against Mr. Phinney's share in the home, the arrears of child and spousal support, which she claims were in the amount of $6,044.00, plus arrears since February, 2005.

[46] Mr. Phinney does not state how he would pay Ms. Phinney for her share in the matrimonial home.

[47] While the Court presumes that Mr. Phinney would actually live in the matrimonial home if it was awarded to him, it is unlikely that Ms. Phinney, if the home was awarded to her, would occupy it any more in the future than she has in the past.

[48] In order for Mr. Phinney to acquire the matrimonial home he would have to find money to pay Ms. Phinney her equity ($8,012.50), plus the arrears of child and spousal support ($4,294.50), while continuing to pay child support of $742.00 per month and the substantial monthly mortgage payment. Based on the financial information before the Court, this is not a realistic plan. Even if Mr. Phinney could borrow or otherwise acquire the $12,307.00 necessary to pay out Ms. Phinney, he does not have the budgetary skills to maintain the house, the mortgage payment, child support ,and all his other expenses.

[49] If Ms. Phinney kept the matrimonial home she would owe Mr. Phinney $3,718.00 ($8,012.50, less arrears of support). She has no money. The least disruptive way this sum can be paid is to credit the amount against her share of Mr. Phinney's pension.

[50] While it is the children’s wish that the home not be sold, it is more important that the finances of the family be such as to provide for their ongoing needs.

[51] The Court orders that Mr. Phinney's interest in the matrimonial home be conveyed to Ms. Phinney and that Mr. Phinney receive credit for the amount in the division of the pension.

MR. PHINNEY'S EMPLOYMENT PENSION

[52] Since February, 2004, the law in Nova Scotia is clear. Despite pension division legislation that provides for division of up to 50 percent of pension credits earned during marriage or cohabitation, the provisions of the **Matrimonial Property Act** apply to the division of employment pensions, and, *prima facie*, all pension entitlement up to the date of separation is divided equally between the parties, unless one party can establish that it would be harsh or unfair, pursuant to s. 13. See **Morash v. Morash**, 2004 NSCA 20.

[53] Mr. Phinney joined the Michelin pension plan on July 1, 1985. He married in 1990. At the time of separation, Mr. Phinney was 38 and Ms. Phinney was 34.

[54] The only information before the Court with regards to Mr. Phinney's employment is Exhibit 17. It is an inter-office memorandum from Michelin summarizing some of the relevant pension terms, and it reads in part as follows:

. . . a separate pension can only be paid to the spouse upon the member's retirement. The determination of the spouse's portion of the benefit will also occur at the member's retirement date; in this way, a spouse will benefit from improvements to the member's pension that come into effect after ;the separation date.

Should the member's employment terminate or should the member die before retirement, the spouse will be allowed to transfer the value of his/her rights out of the plan and into an alternative retirement vehicle.

Should the parties wish to reach a settlement by equalizing matrimonial assets, they may decide to consult an independent actuary to estimate the value of the spouse's share of pension rights based on the information provided herein. . . .

In accordance with applicable pension legislation, the pension benefit subject to division will ultimately be determined on a “pro-rata on service” basis. The member's total accrued pension at retirement will be multiplied by the ratio of credited service during the marriage to total credited service.

No adjustment has been made to recognize the income tax status of the pension, i.e. pension is shown on gross (pre-tax) basis.

The member and the spouse may wish to estimate the value of the pension accrued during the marriage. If such is the case, they should contact an independent actuary.

No actuarial report has been prepared or filed to show the present day cash value (commuted value) of Mr. Phinney's pension at separation.

[55] The parties were married for twelve of the seventeen years that Mr. Phinney earned his pension. Both parties contributed in accordance with their ability and capacities to the household. None of the facts of this case support an unequal division of the pension.

[56] One of the reasons that this Court found that Ms. Phinney had no entitlement to ongoing spousal support was the fact that she would share in the pension that Mr. Phinney earned before and during the marriage.

[57] This Court is obligated to make an adjustment of Ms. Phinney's interest in Mr. Phinney's pension to reflect the $3,817.00 owed by Ms. Phinney to Mr. Phinney for the matrimonial home.

[58] When dealing with the assessment of damages in civil cases, S.M. Waddams in Chapter 13 in **The Law of Damages, 2nd Edition,** states as follows:

> . . . If the amount is difficult to estimate, the tribunal must simply do its best on the material available. . . .

[59] The Court does not have sufficient evidence to accurately determine the appropriate pension adjustment; the following is an estimate.

[60] Exhibit 17 shows that Mr. Phinney's accumulated monthly pension entitlement earned to the date of separation and payable at the normal retirement age of 65 (which age he attains 24 years from now in May,2029) is $979.00. Exhibit 17 shows that Ms. Phinney's share based on the period of their marriage is $363.00 (37%); she is sharing 50% of the amount earned during the marriage ($726.00 per month) and none of the amount earned before the marriage ($253.00 per month).

[61] The question is: what is the entitlement to $126.50 per month when Mr. Phinney reaches retirement age in June 2029 worth now, and what contingencies, positive and negative, could affect the present day or commuted value?

[62] The contingencies that could affect the value include, but are not limited to:

(a) the amount of income tax likely payable on the future payments;

(b) the life expectancy of Ms. Phinney, including the likelihood she will be alive when Mr. Phinney reaches retirement age, and her life expectancy after the future payments begin;

(c) the life expectancy of Mr. Phinney, and what might happen if he should die before reaching retirement age, or becomes ill and unable to continue working before retirement, or if he leaves early and receives a reduced pension; and

(d) how long Mr. Phinney may live after the normal retirement age and what impact that might have.

[63] It is unlikely, in the Court's view, that the discounted value of receiving $126.00 per month in pretax income beginning in 2029 would be any greater than $3718.00 (especially after the other contingencies are considered). The Court orders that an adjustment be made in the equal division of Mr. Phinney's pension to account for the amount owed by Ms. Phinney to Mr. Phinney. Because the present value of Ms. Phinnney’s share in the pre-marriage pension is likely less than the amount owing by her to Mr. Phinney, the Court orders that the Pension

Division Order entitle Ms. Phinney to an equal division of the pension benefits earned during the marriage.

SUMMARY OF DECISION

[64] At the beginning of the trial the Court was satisfied that there was no possibility of reconciliation. The jurisdiction of this Court was proven. The marriage was proven. The ground for divorce (separation for more than one year arising from a permanent breakdown of the marriage) was proven. The Court grants a divorce judgment.

[65] The Court grants joint custody of the children to both parents with Ms. Phinney to be the primary care giver and Mr. Phinney to have generous access in accordance with the Report, and subject to the terms and conditions set out in this decision.

[66] Mr. Phinney shall pay child support based on income of $55,000.00 in accordance with the **Federal Child Support Guidelines** in the amount of $742.00 per month, commencing June 1, 2005.

[67] Spousal support as set out in the interim order of May, 2003, shall terminate effective September 1, 2004.

[68] Arrears of child and spousal support are fixed in the amount of $4,294.50.

[69] Ms. Phinney shall own the matrimonial home and shall assume and pay for and indemnify and save Mr. Phinney harmless from the mortgage on the matrimonial home and shall on or before the date of the next renewal, arrange for the removal of Mr. Phinney from liability on the mortgage. Mr. Phinney shall receive credit for his share of the equity in the home in the amount of $8,012.50, less arrears of child and spousal support, for a net amount of $3,718.00.

[70] The pension entitlement of Mr. Phinney with Michelin North America (Canada) Inc. shall be divided equally between Mr. and Ms. Phinney; however, the actual calculation of the division of benefit shall be adjusted to include only the entitlement earned during the marriage (October 6, 1990 to September 30, 2002) to compensate Mr. Phinney for his interest in the matrimonial home.

[71] Success in this matter was divided. No costs are awarded.

J.