SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Koken v Dokueva*, 2014 NSSC 209

Date: 2014-06-12

Docket: 1201-066787 / SFHD-084725

Registry: Halifax

Between:

Mehmet Koken

Applicant

v.

Markha Dokueva

Respondent

Judge:	The Honourable Justice Douglas C. Campbell
Heard:	June 9, 2014 and June 11, 2014 in Halifax, Nova Scotia
Counsel:	Mehmet Koken, Applicant Krista Forbes for the Respondent

By the Court:

[1] This is a divorce proceeding. The evidence with respect to the divorce was heard on a previous date and the Divorce Order was granted then. The purpose of this hearing is to deal with matters of Corollary Relief; specifically, the Petitioner (hereinafter occasionally the "male spouse") seeks a division of assets pursuant to the *Matrimonial Property Act, S.N.S., 1980, c. 9* (hereinafter "the *MPA*"). The Respondent (hereinafter occasionally the "female spouse") also seeks a division of assets and, in addition, requests spousal support pursuant to the *Divorce Act, R.S., 1985, C. 3 (2nd Supp.)* (hereinafter, the "*Divorce Act*").

[2] The Respondent was represented by counsel while the male spouse represented himself.

[3] The English language is not the first language for either of the parties. The first language for the female spouse is the Russian language. She indicated that she was not comfortable dealing with matters in English and required a person who could interpret English questions and answers using the Russian language.

[4] The male spouse indicated that he was generally comfortable with the English language despite the fact that the Turkish language is his first language. I He indicated that he was generally fluent in the Russian language and was confident that he could assess whether translations from English to Russian or from Russian to English made by the Interpreter were accurate.

[5] Accordingly, the trial proceeded with the assistance of the Interpreter translating to Russian those questions, answers and comments that were made in English and *vice versa*. Despite the many (and somewhat typical) challenges of conducting and managing a Trial with an Interpreter (as opposed to simultaneous translation), the Court is satisfied that the language barrier was appropriately addressed.

Division of Assets and Debts:

Pensions:

[6] Each of the parties contributes to a pension through their employment, respectively, at the IWK Hospital located in Halifax, Nova Scotia. The pleadings do not specifically call for a division of pensions. In fact, their existence may not have been known to the party opposite until the opening of the trial.

[7] I am satisfied that the general pleading for a division of matrimonial assets is sufficiently broad to allow the court to invoke its jurisdiction to divide pensions pursuant to pension splitting legislation. Further, there appeared to be no opposition to the exercise of that jurisdiction in the sense that neither party made a motion to exclude it.

[8] Therefore, the order will include a provision that each of the parties' pension benefits made available to each of them through their employer, being the IWK Hospital, shall be divided through the provisions of the applicable pension splitting legislation for the period of the parties cohabitation while contributing to their respective pension plans. For that purpose, the period of cohabitation of the parties shall be deemed to be from the date of their marriage on May 3, 2002 until February 4, 2013, which is the date when the petition for divorce was filed by the Petitioner.

Marriage date/Separation date:

[9] The parties were first married in a religious ceremony in Georgia (the country) on May 3, 2002. The Respondent emigrated to Canada and the Petitioner followed later. They then went through a legal marriage ceremony in Canada on May 5, 2005.

[10] It is not clear to me when the parties' membership in the above-noted pension plans, respectively, began but it is likely that they both joined sometime after their second marriage and therefore the period of cohabitation may have commenced prior to the period of pension contributions respectively. In the end, therefore, nothing turns on the choice of commencement date for the marriage.

[11] It seems logical to me that, in the absence of evidence questioning the validity of a foreign marriage, that marriage should be recognized. For that reason, I hereby declare that the period of cohabitation began on their earlier marriage date

being May 3, 2002. Their pension divisions shall be for a period beginning after that marriage date when they were members, respectively, of the Pension Plan.

[12] The date of separation of the parties is contentious. The male spouse stated in his affidavit that he formed an intention to withdraw from the marriage, and executed that intention, in February 2010. The female spouse says she was not aware of any such intention. The parties continued to reside in the same residence and therefore the female spouse concludes that separation occurred very recently. She offers evidence in her affidavit of marital behavior to support her position.

[13] The significance of the separation date is that it could have financial consequences in terms of the relief sought in the Divorce proceeding. For example, that date will have significance in the calculation of a pension division such as the one ordered above. The identification of such date could also affect, in certain cases, the classification of assets as between "matrimonial assets" or debts and "non-matrimonial assets" or debts. This is so because the *MPA* excludes from the definition of "matrimonial assets" those assets that are acquired after the date of separation.

[14] In addition, the date will be significant to establish grounds for divorce when the marriage breakdown is said to have occurred by reason of separation for a period in excess of one year.

[15] It is important to note that there is no provision in any relevant statute or otherwise that requires the establishment of one, and only one, separation date for all purposes. It is perfectly logical that one date could represent separation for purposes of dividing pensions and assets while another date could represent separation for purposes of establishing divorce grounds. More will be said about this below.

[16] In declaring the date of separation for purposes of measuring the period of time when a pension shall be divided by statute, is important to note that the legislation, (in this case, the *Pension Benefits Act, R.S.N.S., 1989,c. 340*), does not refer to a separation date. Indeed, section 61 (1) of that Act indicates that when a member of a pension plan (among other things) files a petition for divorce, "… the pension or pension benefits **earned during the marriage**…(*emphasis added*) may be divided in accordance with the regulations between the member or former member and that person's spouse…"

[17] Given that the case law establishes that pension benefits and pensions are "matrimonial assets" within the meaning of the *MPA*, which in turn excludes post-separation acquired assets, it is logical that the practice (that has developed in the courts and by administrators of pension plans) to divide that portion of the pension earned to a date when separation occurred seems to be justified and is understood.

[18] It has long been established by the cases that a married couple may be separated and therefore not "cohabiting" in a marital sense even though they reside in the same residence and even if they behave in certain ways expected of a married couple.

[19] In light of the foregoing comments, I have concluded on the evidence before me that an appropriate date of separation for purposes of dividing the pension pursuant to the above legislation is the date when the Petition for divorce was filed being February 4, 2013.

Miscellaneous matrimonial assets:

[20] There is no dispute that the bank account at PC Financial, the 2003 Chrysler motor vehicle and the contents of the matrimonial home are "matrimonial assets" within the meaning of the *MPA*.

[21] It appears that there is no dispute that the above-noted bank account had a value of $180 and that it is assigned to the male spouse.

[22] The parties disagree as to the value of the **2003 Chrysler motor vehicle**. The male spouse stated in his Statement of Property that it is worth $1500 and the female spouse suggests $2000. Neither party provided corroboration for their evidence. Nonetheless, a value must be assigned in order for this agreed matrimonial asset to be part of the division. In the absence of professional or other reliable evidence of value, I have accepted the midpoint of their respective positions which is $1750.

[23] The Petitioner concedes that this vehicle could be assigned to the female spouse (and in summation he stated that he would agree that it has no value and therefore needs not to be accounted for by her) but she does not want it because she believes she cannot afford to operate it. I have concluded that the male spouse is in the better position to operate the vehicle and, in the event that he is not, he is in the better position to sell it and therefore I have assigned its value, above-noted, to him. There is no corroboration to support a nil value.

[24] **The contents of the matrimonial home** have not been valued by anyone other than the parties themselves. The male spouse in his Statement of Property suggests a value of $7300 while the female spouse indicated a value of $14,000. It was not clear to the Court whether one or the other of the parties were using replacement cost (which would be incorrect) as a benchmark of value or depreciated value. It is impossible for the Court to assign a precise value. The male spouse, in his Statement of Property, listed each individual major item by placing a separate value on each. The female spouse placed a global figure on these items.

[25] A factor of interest in resolving the contents valuation debate is that the female spouse suggests that she will take possession of a few items; namely, a table and a bed. In cross examination, she clarified that she meant the dining room suite and the master bedroom suite.

[26] This factor is reviewed in light of the male spouse's stated willingness to allow the Respondent to take whichever of these items she may choose. The fact that the physical division of these items has not yet been agreed leaves the Court short of information as how to value them and how to assign value as between the parties. Nonetheless, these assets must not be ignored.

[27] The impression I was left with from the evidence is that the female spouse is unlikely to take more than half of the items, measured by their value. In the absence of more reliable evidence as to value, it seemed incumbent upon the Court to settle on a value between the parties' respective positions. I hereby assign $9000 to the value of the contents and make the assumption that the eventual physical division will approximate $5000 value in the possession of the male spouse and $4000 value in the possession of the female spouse.

[28] In making this somewhat arbitrary allocation, I take some comfort in the fact that the male spouse's Statement of Property listed alleged value for the items requested by the wife at $3400 which represents 46.5% of his total valuation. My assigned allocation is approximately 45% to the female spouse.

[29] Although this adjudication is somewhat arbitrary, I might say that such is often necessary in Family Law where the parties often do not have the resources to have professional valuations of furniture and other chattles. The Court is left with the task of attempting to do rough justice in the circumstances. As is the case here, furniture and related chattels do not usually present a large value. A nearly equal or equal assignment of value neutralizes, to some extent, the effect of the arbitrary

nature of that decision regarding overall value in circumstances where, as here, I am satisfied that the physical division of them will be roughly equal.

Matrimonial home:

[30] The parties' matrimonial home is located at 49 Birch Cove Lane. It was purchased in September 2010 which is a number of months after the date which the male spouse initially identified as the separation date. If that date were accepted, he would at least have an argument that it, being a post-separation acquired asset, is not shareable as a "matrimonial asset". In summation, he conceded that February 4, 2013 is the appropriate separation date as it was the date when the petition was issued. (The female spouse relies on a later date being September 6, 2013, being the date of an alleged assault by the male spouse on her.)

[31] The facts in this case are that the parties, whenever they ceased behaving as a married couple, continued to mingle their finances for a very long time and, to some extent continuing to the date of this Trial.

[32] In a perfect world, all separating couples would divide their assets and debts and determine their spousal support issues (thereby separating their income streams) as soon as they separate and there would be no co-mingling of finances thereafter (except in the case of assets waiting to be sold with proceeds to be shared). Each would then be on their own to use their settled resources as they see fit.

[33] However, it is usually impractical and often impossible to make a separation of finances on the day of separation. It usually takes months, often many months, for that to occur because a number of events usually are required to unfold; such as, the negotiation and execution of a separation agreement or the issuance of a Corollary Relief Order, the sale of major assets such as a matrimonial home or the payoff of debts that are no longer affordable to the separated couple or the provision for an orderly transition for children and many more events.

[34] Accordingly, the establishment of the separation date, for purposes of dividing assets and debts and establishing formal spousal support arrangements does not always end the analysis.

[35] It may be true that a proper statutory interpretation of the words "… real and personal property acquired after separation….." as those words appear in section 4 (1) (g) of the *MPA* demands that a separation date be declared and that assets and

debts acquired thereafter are treated as non-matrimonial assets in terms of classification.

[36] The case law regarding the definition of "separation"(which is often required to be addressed in the context of the parties residing in one residence after their marriage commitment has been terminated) must be followed. As such, it is probable that the "separation date" would be said to have been either of the dates urged upon the Court by the Petitioner or by the Respondent.

[37] I have concluded that the separation date is February 4, 2013 which is the date on which the Petition was issued. The evidence discloses that the parties were unclear of each other's intention about ending the marriage. Certainly the issuance of a petition for divorce dispels that misunderstanding. I reject the earlier date of February, 2010 because it predates the purchase of their home. It is not logical that they would buy a home together if they were separated. I have also rejected the female spouse's suggestion of September 6, 2013. Although the alleged assault might have been seen by her as the "final straw" that ended the marriage, they would have been functioning in the face of a Petition for Divorce for the several months preceding.

[38] Even if I had declared a separation date prior to the acquisition of assets or debts, I would not necessarily have ignored those post-separation items on the facts of this case. Such a determination would have meant that such assets and debts would be excluded from *prima facie* division under section 12 of the *MPA*, but there would be an inevitable and necessary unequal division of assets pursuant to section 13 thereof in order to make for an overall equitable division as is required by section 13. For example, even if the first Line of Credit had been taken out after the separation date, the court could not ignore the fact that it was apparently used to pay off a pre-separation debt to the male spouse's brother.

[39] Section 13 (e) of the *MPA* permits the Court to take into account the date and manner of acquisition of the assets. The history in this case is that some of the house equity came from the money borrowed from the male spouse's brother which was later paid off by the line of credit. It might have been said to have been a post separation line of credit. This history of acquisition of equity could not be ignored.

[40] It follows logically that the measure of that inequality of division would be related to the value of the post-separation assets and debts in circumstances such as these where the parties' finances continued to be mingled until trial. The net effect

of that mathematical exercise is exactly the same as if the post-separation assets and debts had been included as part of the *prima facie* equal division under section 12 of the *MPA*.

[41] It follows therefore that it is does not matter whether I am wrong in my determination of the separation date since it is my conclusion that all of the parties assets and debts (except the second line of credit) should be divided in such a way that there is an overall equality of net worths as between the parties.

[42] To say it another way, if I were compelled to choose a separation date that fell prior to the acquisition of certain assets or debts, there would nonetheless be an unequal division of all of the so defined pre-separation assets and debts in an amount that would equalize all assets and debts acquired both before and after such a separation date (except for the second line of credit). My conclusion would have been different if the co-mingling of the assets and debts and of the parties respective incomes had not occurred.

Matrimonial debts:

[43] The Petitioner has two lines of credit. The first is with CIBC and has a current payout value of $17,196.35. The second is with TD bank and has a current payment of $4694.69. The female spouse contends that these debts were incurred by the Petitioner without her knowledge or consent, after the date of separation and that, for these reasons, they are not shareable.

[44] The lack of knowledge by one party to a *MPA* proceeding of a debt being incurred is relevant information that could, in appropriate circumstances impact the outcome [for example when that fact triggers the application of section 13 (a) which refers to the impoverishment of assets or section 13 (b) which refers to the amount of the debts and the circumstances in which they were incurred], but it is not a factor which necessarily dictates that the debt should not be shared or that it is not matrimonial as to classification.

[45] One test for this conclusion is to ask whether lack of knowledge of the existence of a matrimonial asset would allow it to be sheltered from division. Clearly the answer is in the negative. It would be unthinkable that one spouse could acquire matrimonial assets and, by virtue of hiding them from the other spouse, escape responsibility to share them on a subsequent breakdown of their marriage. If that is true of assets with a positive value it must also be true of those which have negative values; that is debts.

[46] It must be noted that the *MPA* does not provide a definition for "matrimonial debts". Some would suggest that this means that there is no *prima facie* entitlement to divide them equally or otherwise. If debts can only be divided by the unusual resort to unequal division by relying on section 13 (b) of the *MPA*, it would mean that, in the normal case, assets would be divided equally and debts would be ignored with the impact that the parties' net worth would be routinely divided unequally – a result clearly not intended by the legislature.

[47] It is my view that the *MPA* must be interpreted so as to give effect to the intention of the legislature that the parties net worth will be divided equally except when unequal division is appropriate by virtue of one or more of the subsections of section 13 of the *MPA*. Therefore, it follows, that the reference in section 12 of the *MPA* to an equal division of "matrimonial assets" (which is often referred to as a *prima facie* determination) must necessarily be interpreted to be a reference to matrimonial assets, net of debts. To conclude otherwise is to promote the absurdity that comes from equally dividing assets and ignoring the division of debts.

[48] For the reasons given above, and specifically the fact that the parties finances remained co-mingled long beyond any date by which the parties or one of them might define their separation date, the inquiry should be whether or not these debts were used to provide proceeds that assisted the couple (even as a separated couple) either by increasing the value of the equity in their respective or jointly owned matrimonial assets or by supporting their consumption needs.

[49] I accept the evidence of the male spouse which is that he borrowed a substantial sum from his brother to make the down payment on the matrimonial home which occurred on date prior to the separation. He concedes that the female spouse invested some of her own funds toward that purchase. The Petitioner acknowledged that the line of credit was opened many months after the house was purchased. He explained this timing gap by stating that he opened the first line of credit later but before separation date and used its proceeds to pay back his brother for the above-mentioned funds.

[50] The fact that the parties had a relatively secretive relationship on matters of finance supports my conclusion that the Petitioner's evidence in this regard is to be accepted in spite of the fact that the Respondent had no knowledge of the borrowing from the brother. I accept however her evidence that she was unaware and therefore does not believe that the down payment money was borrowed from the male spouse's brother.

[51] Evidence from the male spouse regarding the second line of credit was vague and uncorroborated. The Court cannot determine whether it should be taken into account either under a section 12 or section 13 of the *MPA*. The onus is on the male spouse to prove the existence and the purpose of this debt in order to establish it as a shareable one. He has not done so.

[52] Accordingly, I will include the first of these two lines of credit in the asset division of the parties and assign it to the male spouse. I will exclude the second one. I direct that the male spouse shall make diligent effort to have the respondent's name removed from the covenants of these debts if such covenants exist and that, in any event, the Corollary Relief Order shall contain a provision that the Petitioner indemnifies the Respondent from these two debts. I say this knowing that the evidence seems to suggest that there are no such covenants make this directive out of an abundance of caution for the benefit of the female spouse.

Equalization chart:

[53] In accordance with the above remarks, assets and debts of the parties are to be valued and assigned in accordance with the division of assets chart which is attached as Exhibit "A" to this decision.

Disposition of the Matrimonial Home:

[54] The parties have discussed the possibility of an arrangement whereby the Petitioner would purchase the interest of the Respondent in the matrimonial home (a so-called "buy out") and have not been able to reach agreement. For that reason, the female spouse seeks an order that the property be sold for fair market value on the market. Authority for that request is derived from section 15 (b) of the *MPA*.

[55] It is not known to the Court whether the impasse in the parties' negotiations toward a buy out arose out of their inability to agree on a valuation of the Matrimonial Home or whether it arose over their disagreement with respect to the treatment of the lines of credit or the value or treatment of other assets or whether it occurred because of their opposite positions regarding spousal support. It occurs to the Court therefore that once the parties are aware of the treatment of those issues as directed by this decision, it is possible that they might be able to overcome the impasse and agree upon a buy out of the Respondent's interest in the matrimonial home.

[56] It is my view that, in the absence of overwhelmingly cogent evidence of value, the Court should not direct a buyout by one spouse of the other's interest.....Section 15 of the MPA does not provide that authority explicitly. Section 15(a) should be interpreted as providing that authority only when there is no significant doubt as to such value....to conclude otherwise is to engage the Court in an exercise likely destined to operate haphazardly to the prejudice of one spouse and to provide a corresponding windfall to the other spouse.

[57] To promote the negotiation of an agreed buy-out, a separate section of the chart shown in Exhibit "A" depicts the hypothetical equity in the matrimonial home measured under two scenarios: the first of which is this Court's assessment of a high valuation, being $286,000 and the second of which is this Court's assessment of a low valuation, being $270,000. The division of assets chart then calculates the net settlement after the buy-out under these two scenarios. This information is offered in case it generates discussion between the parties about a buy out to avoid the need for a market sale.

Mortgage Payout Penalty and Sales Commission:

[58] The male spouse argued that, in calculating the realizable value of the Matrimonial home for by out purposes, the Court should reduce the market value by a potential mortgage payout penalty that may be charged by the financial institution involved.

[59] The female spouse would eliminate that penalty from the calculation. In addition, she argued that the Sales Commission should be reduced to 3% to reflect the fact that the Petitioner may have a current arrangement with a listing agent for a reduced commission of 3%.

[60] These items can be thought of as "disposition costs". A few words about disposition costs are therefore appropriate.

[61] When property, often real estate, is being sold on the market as part of the parties' asset division settlement, the actual net proceeds will dictate the settlement amount. When one of the parties will buy out the interest of the other party, the buyout figure is hypothetical because the sale price is unknown and the disposition costs are unknown.

[62] In that instance, the Court should deduct from the presumed sale price (that is determined by the Court to represent market value) amounts that represent

disposition costs provided there is a reasonable likelihood that such costs will be incurred. These include sales commission, HST on the sales commission, legal fees, HST on the legal fees and sometimes payout penalties on the mortgage. The object of the Court is to come to a realistic figure, net of these somewhat inevitable costs, which the "buy out" spouse would be expected to share if the property was actually sold on the market and the disposition costs were actually incurred. It is necessarily hypothetical exercise.

[63] It is true that there may be circumstances when some of these disposition costs will be avoided. Therefore, a larger figure should be shared with the other spouse. However, it is usually impossible to assess with certainty when that will be the case. In the result, the task is to come to a hypothetical figure using realistic assumptions about the probability of disposition costs so as to provide the buy-out spouse with a settlement figure that is a fair and reasonable estimate of the amount she/he might reasonably expect to realize in the marketplace.

[64] The governing principle is that the buy-out spouse should not expect to receive more than 50% (or whatever other percentage division applies in the case) of those proceeds that are likely to be realized.

[65] There may be circumstances when certain disposition costs are so clearly avoidable that the "buy out" calculation should ignore them. This will be rare. In ordinary circumstances, disposition costs should be presumed to be likely to be incured. In many cases, when disposition costs, such as sales commission are reduced or avoided, that outcome occurs because of significant labour or influence by the other spouse. It follows, that the assumption of standard disposition costs is no real detriment to the opposing spouse because the spouse in charge of the sale will have incurred that labour. The small compensation that comes to her or him from doing so is not something about which the opposing spouse should complain.

[66] In the current case, there is evidence that the sales commission might possibly be less than 5%. It is to be noted that the standard multiple listing commission is 6% and that the practice of using 5% arises out of a desire to recognize that, sometimes, a better commission can be negotiated. It is a compromise. No further compromise is needed except when the evidence clearly justifies it and that is not the case here.

[67] **Regarding mortgage penalty**, there is no evidence before me that the mortgage penalty will actually apply. I have nothing but mere speculation in that regard. Accordingly, I am not prepared to reduce the sale price for the possibility,

unproven, of a mortgage penalty. The onus is on the male spouse to prove the probable inevitability of this disposition cost and I find that that did not occur.

[68] In conclusion on these points, the hypothetical real estate division prices are properly reduced by the mortgage balance, sales commission at 5% and legal fees at $1000 plus HST on both without any regard for the possibility of a mortgage penalty. The mere conjecture as to the possibility of a reduced sales commission has not been proven. In the future, if the male spouse profits from a reduced sales commission, he will have deserved that gain because of the effort that it will entail.

[69] I direct that the parties shall have 30 days from the date of this decision to attempt to negotiate a buy out of the Respondent's interest in the matrimonial home by the Petitioner. At the end of 30 days, or sooner if either of the parties should declare an impasse in regard to a potential buy out, the matrimonial home shall be listed for sale and the net proceeds thereof (after payment of the encumbrances, closing costs, selling costs, legal fees, HST and the payout of the first of the two lines of credit) shall be divided equally between the parties. The following terms apply to the above required market sale:

1) the parties shall attempt to agree through meaningful consultation with each other upon the choice of a listing agent for the above-noted sale and in the event that they are unable to so agree, the decision of the male spouse shall be final and binding on the parties;

2) the parties shall attempt to agree upon the listing price and in the event that they are unable to agree, the recommendation of the above-noted listing agent shall bind the parties and they shall each execute the listing agreement that includes that price;

3) as the listing agent solicits offers for the purchase of the matrimonial home, he or she shall insist that the parties have 96 hours in which to accept or reject such offers so as to enable the parties to respond to such an offer and to apply to the court if necessary;

4) if an offer to purchase the property is accepted by both parties within the above-noted 96 hours, the usual legal implications of that acceptance will apply; however, if one of the parties is willing to accept such an offer and the other of the parties is not willing to accept the offer, the willing party may bring the matter to this court on whatever short notice is available to them for a determination by the

court of whether or not the offer is to be accepted despite the unwillingness of the one party and the Court hereby reserves jurisdiction to do so;

5) both parties shall cooperate with the closing of the sale of the property in every way, including the execution of whatever deeds or documents are necessary to give effect to the closing on terms consistent with the accepted offer to purchase whether that acceptance occurs by agreement of the parties or by order of the court;

6) both parties shall be entitled to receive all documents associated with the closing of the sale of the property including, but not restricted to, the statement of adjustments and the statement of disposition of funds prepared by the lawyer representing the parties or one of them as the vendor;

7) a lawyer shall be chosen by the parties to conduct the sale transaction and in the event of disagreement, the choice made by the female spouse shall govern that decision; it being understood that such lawyer may choose to represent only one of the parties in which case the other of the parties shall be self-represented or shall choose and pay for a lawyer of his or her choice;

8) the Court hereby reserves jurisdiction to deal with any matter relating to the administration, implementation, decision-making, the acceptance of offers or the making of counter-offers or acceptance thereof or any other matter arising out of this decision and to adjudicate and to give direction and to impose conditions necessary to resolve any matter in dispute between the parties relating to the sale of the matrimonial home.

Spousal Support:

[70] It is difficult to measure the time during which the parties were together as a married couple. This is so because they were married twice and absent from each other in the interval.

[71] However, it is safe to say that the marriage was of short to medium duration.

[72] It is relatively clear that, largely by reason of health developments, the female spouse is unable to maintain self-sufficiency. By contrast, the male spouse earns a modest income which exceeds that which is earned by the female spouse.

[73] In the face of those circumstances, this Court has concluded that the female spouse has an entitlement to spousal support of limited duration in a relatively modest amount.

[74] Counsel for the female spouse argues that, because the male spouse has insufficient income to provide appropriate support for the female spouse, there should be an award of lump sum maintenance which could be satisfied from the male spouse's share of matrimonial assets. I know of no legal principle that would allow that to be done.

[75] The *Divorce Act* in section 15.2 (4) requires the court which makes the spousal support order to take into consideration the "condition, means, needs and other circumstances of each spouse including…" This translates to an analysis and a balancing of both the recipient spouse's need and the payor spouse's ability to pay. When there is a need that cannot be met from the other spouse's ability to pay, one does not "double dip" into the asset division entitlement of the payor. This conclusion is by analogy supported by the ratio in the case of *Boston versus Boston* 2001 SCC 43.

[76] Further, since the passage of the *MPA* in 1981, the court has repeatedly taken the view that lump sum support is rare and that it must be restricted to a clear case of a particular need (such as the purchase of a vehicle) that can best be satisfied by a lump sum. Here, there is no such lump sum need. The Respondent's need is for periodic assistance. The presentation is that the female spouse needs more support than the male spouse can pay and that he should therefore do so from assets. With respect, that argument defies the principal that spousal support will sometimes be limited by the payor's ability to pay even though, as is the case here, the recipient spouse can establish a greater need.

[77] In establishing an amount of spousal support the court takes account of the fact that the male spouse earns an income of approximately $42,000 per year but that he is on paid leave from his employment which indicates that his reliance on that income is not indefinite.

[78] The female spouse has an income through part-time work at a retail coffee shop that may be subject to reduction or even elimination because of her health problems. At best, she might earn $16,000 per year.

[79] These facts indicate that a Spousal Support award in a likely amount that will be difficult for the payor and insufficient for the recipient. The Court must somehow fashion an award that recognizes these competing factors.

[80] This is a short to medium-term marriage in terms of its length. Recognition must be given to the fact that the parties during a period of separation now approaching 1.5 years have lived in the same residence and shared expenses and that they will likely continue to do so until a buyout or market sale of the matrimonial home occurs. This period of indirect support must be reckoned as part of an overall terminal award.

[81] Spousal Support shall be payable by the male spouse to the female spouse in the amount of $500 per month for a period of 30 months. In coming to this conclusion, the Court has recognized that the Spousal Support will necessarily be tax deductible to the payor and taxable to the recipient.

Costs:

[82] Neither party shall pay costs to the other in respect of this matter.

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Douglas C. Campbell, J.