

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Martin v Martin*, 2014 NSSC 236

Date: 2014-06-23

Docket: SFHMCA-088630

Registry: Halifax

Between:

Debra Maxine Martin

Applicant

v.

Donald Burns Martin

Respondent

Judge: The Honourable Justice Douglas C. Campbell

Heard: June 23, 2014 in Halifax, Nova Scotia

Counsel: Joyce Ruck de Peza for the Applicant
Donald Martin, the Respondent

By the Court:

[1] The applicant ("the wife") is separated from the Respondent ("the husband"). She applies pursuant to the Matrimonial Property Act, S.N.S., 1980, c. 9 for a division of assets and pursuant to the Maintenance and Custody Act R.S.N.S. 1989, c. 160 for spousal support. The husband has responded by opposing those claims.

[2] The parties were married for approximately 22 years and lived together for approximately 8 years prior to that. Accordingly, this is a long-term marriage.

[3] Both parties are in receipt of a disability payment from the Workers' Compensation Board.

[4] The finances of the parties are in disarray. I am satisfied that this state of affairs occurred largely because of the circumstances that resulted in a disability to both parties and the consequent reduction in their earning capacities, respectively. To that end, the parties have entered an Orderly Payment of Debts arrangement whereby each of them is required to pay \$150 per month to a Trustee to be distributed in accordance with that arrangement to their various creditors.

[5] At the same time, the parties are co-borrowers with respect to a chattel mortgage in favor of League Savings and Loan Company which represents a charge against their Mobile Home which is presently occupied by the Husband. I suspect that it is because of the fact that this is a secured debt that the payment to League Savings and Loan Company is not part of the Orderly Payment of Debts arrangement referred to above.

[6] Provided that the parties would have each paid their Trustee the approved installment of \$150 per month, they would have been discharged from these debts owing to those creditors at the end of that program.

[7] The Husband testified that he learned on a date that fell between the commencement of this hearing and its resumption that the Wife is in default of her obligation with regard to the Orderly Payment of Debts arrangements and that accordingly that bargained method of dealing with those creditors may be in jeopardy. The Wife concedes that she failed to make three payments of \$150 each and she is unclear why a person from the office of the trustee has stated that the arrears are in the sum of \$900 instead of \$450.

The Mobile Home:

[8] Throughout these proceedings and previously, the Husband has been willing to accept title to the mobile home and to take responsibility for the Chattel Mortgage payment, pad rental fee, insurance, and all other costs associated with operating it, even though the equity in this property appears to be negative.

[9] The Wife would have accepted this compromise if she could have been released from her covenants in regard to the above-noted Chattel Mortgage. In turn, the Husband has been denied approval to refinance the Chattel Mortgage in order to release the wife from her covenants; instead, he offers to indemnify her in respect of those covenants and to make diligent effort, after he is discharged from his obligation under the above-noted Orderly Payment of Debts arrangement, to seek a final release of the Wife's covenants above-noted. He estimates that he would have to be free of that program for at least two years before that could happen.

[10] The Wife has rejected this offer because she is focused upon receiving an immediate release of those covenants. Therefore, her first wishes for the court to order its immediate sale which would be designed to achieve a payout of the chattel mortgage.

[11] The practical difficulty with the Wife's position is that the best evidence available to this Court is that the fair market value of the subject mobile home is \$50,000. This comes from the appraisal admitted in evidence by the parties from an accredited appraiser.

[12] If the property were to be sold for the appraised value of \$50,000, there would be insufficient funds to payout the existing disposition costs and the Chattel Mortgage. Accordingly, if that appraisal accurately depicts value, a market sale at a price sufficient to pay out all encumbrances and closing costs will not be likely given that a purchaser would be expected to pay no more than fair market value and would rightfully insist upon clear title which would include a payout of the mortgage.

Break Even Sale Price of the Mobile Home:

[13] Although the disposition costs and the mortgage payout and other closing costs will change over time, the "break-even" sale price can be estimated based on current known values to be approximately \$67,831. This is calculated by a reference to the following expenditures reasonably necessary to effect a sale of the mobile home:

Sales Commission at 6% of \$67,831:	\$4681 (includes HST at 15%)
Estimated Legal fees:	\$600 (includes HST at 15%)
Current Mortgage payout	\$62,062
Miscellaneous closing costs, etc.	\$500
Total	\$67,831

[14] It is understood that these costs will vary as time goes by; nonetheless, it is clear that a listing price of approximately \$70,000 would be needed to trigger a possible break-even sale price sufficient to payout the mortgage balance, legal fees and other closing costs including sales commission and HST. There is insufficient evidence to clarify whether or not a mortgage payout penalty would also be applicable, in which case the suggested list price of \$70,000 may well be too low and a selling price would need to be higher than above calculated.

[15] While the Wife has an understandable desire to be released from the covenants of the Chattel Mortgage, and while that would be a goal which would ordinarily be pursued by any order of the this Court, the best evidence before this Court suggests that a market sale will not achieve a sufficient price to pay the Chattel Mortgage and thereby achieve the objective held by the Wife.

[16] I considered ordering a market sale with a list price of \$70,000 for a fixed period of time (to give the Wife an opportunity to pursue this objective by "testing" the market) followed by a Court-ordered buyout of her interest by the Husband if the market failed by then to produce the necessary price.

[17] However, on the facts of this case, including the current default in the Orderly Payment of Debts arrangement referred to by the Husband along with other stifling financial concerns facing both parties, I have concluded that such a

compromise would represent nothing more than a "fishing expedition" in pursuit of a value that is not supported by the expert evidence.

[18] If I should order a market sale even for a limited period of time in the face of an unknown as to what will happen in terms of the parties ability to deal with their creditors now that the Orderly Payment of debts arrangement is considered a nullity, it is likely that such a delay will exacerbate that situation. I have concluded that the delay is not in the best interest of either of the parties.

Disposition of Mobile Home:

[19] I have concluded that a "buy-out" by the Husband of the Wife's interest in the Mobile home is the only practical resolution even if it will not result in a release of her covenants on the Chattel Mortgage immediately, if ever. I say this, knowing that is quite possible that such a planned "buy-out" may fail by virtue of an intervention by the parties' creditors pursuant to the Orderly Payment of Debts program. However, this buy-out plan offers the best hope of a qualified resolution to the parties' financial crisis.

[20] I am drawn to this conclusion out of a desire to do what is best for both parties. From the point of view of the Husband, a "buy-out" gives him ownership and possession of the most economical place where he could live and gives him the opportunity to invest in its upkeep and improvement knowing that he will be the ultimate beneficiary of those expenditures, subject to the negative value that he will be assuming.

[21] From the point of view of the Wife, a market sale, being the alternative to a "buy-out" arrangement, would leave her exposed to a potential bankruptcy by the Husband and eventually a possible bankruptcy of herself; either of which developments would leave her exposed to the payback of the Chattel Mortgage, which is a secured credit, and with an indemnity from the Husband that would be potentially worthless. It is not, therefore, in her interest to attempt to market the property at a price not supported by the Appraisal in pursuit of the elusive and improbable goal of release of covenants on the Chattel Mortgage. The potential for her betterment rests with the "buy-out" and its corresponding indemnity, no matter how little value that indemnity may turn out to offer.

[22] One cannot expect the husband to suffer the indemnity without a promise that the wife will maintain her responsibility under the Orderly Payment of Debts arrangement (which, until it became a nullity very recently is \$150 per month)

because it is inextricably tied to his release. I therefore order that the Wife must meet that commitment, or any new commitment that may arise from a new or revised Orderly Payment of Debts arrangement, as a condition of the indemnity, above-noted.

[23] Because the current Orderly Payment of Debts arrangement is a nullity, it may be that the Husband is not able to take on the buyout even with assistance as above-mentioned from the Wife toward that program. I therefore wish to make it clear that the so-called "buy-out" by the husband is not mandatory; that is, he shall have the right to do so and the wife shall have the obligation to cooperate if he elects to do so.

[24] I am cognizant of the fact that the current arrangement with creditors may not be capable of being revived or that a new arrangement may replace it. Because I have recognized that the wife was unable to meet her payments on those occasions when they were missed, it would not surprise me if a new arrangement with the creditors would call for Ms. Martin's contribution to be reduced or even eliminated. Accordingly, the above remarks referring to Ms. Martin's contribution must be taken to refer to her yet to be negotiated contribution even if that contribution is nil.

[25] The question remains as to my authority for ordering a "buy-out" of the Wife's interest by the Husband. Obviously, that would not be done if neither of the spouses offer a buy-out and would possibly not be done if both offer a buy-out.

[26] Given the fact that the Husband is willing to effect a buy-out, I find that authority in section 15 (a) of the Matrimonial Property Act. It provides that I may order that the title to property of one spouse be transferred to the other spouse. Clearly, this does not refer only to real property but rather to any property and therefore includes a transfer of title to a Mobile Home.

[27] Section 15 of that Act ends with general words which allow the court to add such conditions that may be incidental to the operation of its order. Thus, the court has the authority to do that which I have decided above. To say it is another way, the order is to require the transfer of title by Ms. Martin to Mr. Martin so long as he continues to be able and willing to take on his promises, below noted, that go along with that transfer. It is not an order that he must do so.

[28] Accordingly, it is hereby ordered that the Wife shall within 14 days of the date of this decision (unless the Husband during that time-frame withdraws his

willingness to buy-out the wife's interest by so indicating his decision in writing), execute a proper Bill of Sale supplied by her counsel which shall legally effect the transfer of title to the subject Mobile Home from herself to the Husband, subject to the following conditions:

- a) the Husband shall indemnify (by the terms of the Order that arises from this decision) the Wife with respect to all costs associated with operating the subject Mobile Home (including the Chattel Mortgage installments in favor of League Savings and Loan Company, insurance, pad fee and other costs); and,
- b) the foregoing indemnity is subject to the Wife maintaining all payments with respect to her future obligation, if any, regarding the Orderly Payment of Debts arrangement (including any arrears with respect thereto, unless some new arrangement is made by the parties with regard to that matter); a breach of which shall have the effect of nullifying the above-noted indemnity by the Husband of the Wife; and,
- c) the Husband's obligation arising from this paragraph is conditional upon the Wife meeting and continuing to meet her obligation pursuant to the immediately foregoing subparagraph.
- d) whenever the Husband has the ability to do so, he shall make the diligent effort to refinance the Chattel Mortgage so as to remove the Wife's covenants therein.

[29] I accept the appraised value of \$50,000 as representing the best evidence of fair market value of the mobile home. Accordingly, its net worth is negative to the extent of approximately \$18,000-\$20,000. It would ordinarily follow that the wife would be responsible to reimburse the husband for half of that figure; in the circumstances, she is hereby relieved from that responsibility.

Husband's Pension at Suzuki:

[30] It was conceded by the Wife that there is no pension owned by the Husband at his former employment with Suzuki and, accordingly, this request for a division of it is dismissed.

Vehicles:

[31] I accept the evidence of the Husband that supports a conclusion that there should be no accounting by either party to the other with respect to vehicles. This is so for a number of reasons.

[32] Given the appraised value of these two vehicles which was a total of \$7500, if there was to be an accounting of them, their value is dramatically insufficient to offset the negative value in the mobile home being assumed by the husband. At best accounting of these vehicles would reduce the wife's equalization payment owing to the husband. Given that I have relieved her from that equalization payment, the offset is academic.

[33] Also, the fact that these vehicles were purchased from the husband's inherited funds is relevant. I agree with counsel that the inherited money was converted to a matrimonial asset as a matter of classification because it was used in its entirety in the family. This is not the end of the analysis. The inheritance factor would give rise to an argument for an unequal division pursuant to section 13 (e) of the Matrimonial Property Act, supra. which lists the date and manner of acquisition of the assets as a factor supporting a claim for an unequal division. Ignoring the vehicles from the division is therefore potentially justified by that factor alone.

[34] Mr. Martin concedes that he transferred title to one of those vehicles, a motorcycle, to his grandson pursuant to a promise that he had made to his grandson many years earlier. Counsel for Ms. Martin suggests that this was done to place the vehicle out of the reach of Ms. Martin in this proceeding. I disagree the fact that the husband no longer owns the asset would not have stood in the way of his having to account for its value in an asset division. Given the size of the unequal division arising from Mr. Martin's assumption of the mobile home chattel mortgage, a full accounting of its value would not have offset the equalization payment that would ordinarily be due from Ms. Martin to Mr. Martin. Accordingly, nothing turns on the fact that he made a gift of the motorcycle to his grandson.

Son's Obituary:

[35] Each of the parties seeks possession of a copy of their son's obituary. Both claim that the other has it in his/her possession. Both deny that fact. I hereby order that, in the event that either of the parties has the subject obituary in his or her possession either now or in the future, that they shall deliver a bona fide copy of it to the opposite party forthwith;

Wife's personal items:

[36] The Wife asks that I order that she may attend the Mobile Home accompanied by a Police Officer to obtain her chattels. The Husband denies having possession of such items. There would be no practical outcome in having the Wife attend at the Mobile Home for the purpose of retrieving items that the Husband says he does not have in his possession. Accordingly, I direct that if the wife wishes to do so, she shall make a list of the items which she claims are in the possession of the Husband to which she claims possession and that she provide that list to the Husband on or before 14 days following the date of this decision. I order the husband to provide to the Wife those items on the list which are in his possession and in respect of which he concedes that the wife should have possession.

Husband's tools and other personal items:

[37] The Husband asks for an order that the Wife return to him a number of personal items including valuable tools of his previous trade. The wife denies having possession of these items or control over their possession. I direct that the wife shall authorize and direct any person who has possession of tools or personal effects belonging to the husband to make those tools and items available to the Husband, within 14 days of the date of this decision (and to do so herself within the same timeframe in respect of those items in her possession), and to assist in every way with the transition of the possession of those items to the husband. The court hereby expressly reserves its jurisdiction to deal with the implementation, administration or application of the obligations outlined in this paragraph and it's immediately preceding paragraph.

Annuity:

[38] The Wife seeks to divide the husband's annuity through the Worker's Compensation board as a matrimonial asset. The evidence discloses that the payment that each of the parties received from Worker's Compensation Board is an entitlement provided by statute to compensate for both lost wages and damages

for personal injury associated with a work-related incident if any. Damages are expressly excluded from prima facie division under section 4 (1) (b) of the Matrimonial Property act, supra. The balance of the monies, in that payment, represents income replacement and as such it is not an asset capable of being divided.

[39] Counsel for the Wife concedes that this is so until a future date when the terms of the settlement allow for this income stream then to be “capitalized” and paid out in a lump sum to the employee, usually by way of a rollover to some form of investment vehicle or by way of a special arrangement made with the employee. She argues therefore that the future capitalized amount should be divided as an asset. There is no proof before me that this amount would be qualified to be treated as a pension under the pension splitting legislation. I have concluded that it is a mere consequence of the terms of the arrangement that the income stream is to be capitalized and that accordingly, the relevance of this payment, if any, is that it would go to the husband’s immediate and long-term ability to pay Spousal Support.

[40] Currently, there will be no division of this money pursuant to asset dividing principles. I will speak about it again, below, under the topic of Spousal Support.

Spousal Support:

[41] The Husband has an income from two disability insurance programs; one from the Workers Compensation Board and one from Canada Pension plan. He suffers a disability incurred through his work and I am satisfied that this disability is permanent.

[42] The Wife has an income from a disability program through Workers Compensation Board and is unable to work and this appears also to be permanent.

[43] If the only factor associated with the claim for Spousal support was the disparity in their incomes, the remedy sought by the Wife would be relatively automatic. This is so because the husband has an income in the low \$30,000 range while the wife has income in the thirteen thousand dollar range. Given the long-term nature of this marriage, entitlement to support with this discrepancy of incomes would seem to follow.

[44] The Husband contends that his situation is different for at least two reasons: first, he has to repay significant debts arising from the marital years (but so also

does the Wife unless a new arrangement is made with her creditors); second, he contends that he is not able to meet his disability treatment needs on his current income because of his commitment to the Orderly Payment of Debts arrangement referred to above and he has costs of owning and operating a vehicle to allow him to attend various medical treatments along with other costs arising from his disability such as snow removal and lawn mowing.

[45] It is to be noted that Mr. Martin's commitment to the debt repayment program has the potential to ultimately assist the Wife in terms of her exposure to creditors and that a bankruptcy by the Husband would be counterproductive to the Wife's financial goals because of her exposure to some of their mutual creditors, especially the above-mentioned Chattel Mortgage. It is also noteworthy that there is no evidence as to how the debt repayment program will be revived. Given the default that has already occurred on the part of the wife, and recognizing the options that would be open to the creditors, it is highly likely that Mr. Martin will find himself making a new arrangement with the creditors that causes him to take over some if not all of the wife's obligation if he is to avoid bankruptcy which is his wish.

[46] One option to which I gave serious consideration is a deferral of a Spousal Support until the Orderly Payment of Debts repayment schedule reached its conclusion and to order a modest spousal support payment to commence thereafter. On balance, I have concluded that the Husband has no ability to pay Spousal Support and that his improved circumstances that may occur at the end of the Orderly Payment of Debts schedule is so minor that it will do no more than to offer him an opportunity to assist with his ongoing disability treatment costs.

[47] It is also possible, although not relevant to my decision, that Mr. Martin may not be able to make an arrangement with his creditors and that his bankruptcy may be inevitable after which his ability to pay support would need to be reassessed.

[48] I have not ignored the fact that the Wife is in dire need of support from the Husband. If this decision was based on need alone, she would qualify without any question whatsoever.

[49] However, the test, whether it is pursued in the future pursuant to divorce proceedings or if it is assessed, pursuant to the Maintenance and Custody Act, which is the case here, relies on a balance of the needs of the claimant and the ability to pay of the respondent.

[50] Section 4 (i) and (j) of the Maintenance and Custody Act, supra, requires the court to consider the needs of both the claiming spouse and the payor spouse.

[51] Here, the needs of the claimant are clear beyond any doubt; however, similarly, the inability of the Respondent to pay given his medical condition and treatment needs is equally clear. In the end, the quantity of spousal support is measured by the lesser of the claimant's need and the respondent's ability to pay. The court must not order more than the payor can reasonably respond to pay even when the claimant has proven a need for that support.

[52] The question arises as to whether or not the Husband's annuity when it is received in approximate nine years by way of some form of rollover payment will be able to benefit the wife through a support order. I have concluded that it would be improper for the court to speculate about the husband's possible improvement in terms of his ability to pay spousal support when that event happens. There could be many changes of circumstances between today's date and that date that would bear on that analysis. Therefore, the court will draw no conclusion in that regard.

[53] I note in passing that, had the court divided the annuity effective when the payout occurs some nine years from now, it might have had the effect of triggering a claim or the right to a claim by the Husband for spousal support depending upon the parties' respective financial circumstances then.

[54] In coming to the undesirable conclusion that the Husband has no ability to pay in the face of a clearly established need for support on the part of the wife, I take minor comfort in the fact that the asset division, feable though it may be, favors the Wife beyond that which would ordinarily have been done. I am referring, of course, to the fact that the husband has taken on and unequal division of the negative value in the mobile home. He may, although it is not yet occurred, also take on an unequal share of the debt to the various creditors above-mentioned.

[55] How will the Wife meet her needs without a support order? There is no clear answer. The Husband contends that she has had income from babysitting in the past and there is no denying that that has been so but the question is whether she is capable of doing that type of work or earning that type of income in the future. The court has no answer to the dilemma that exists when there is not enough money to meet the clear needs of the separated litigants.

[56] There shall be no spousal support payable at this time except for a nominal sum of one dollar per year, commencing on July 1, 2014 and continuing on the first day of July of each and every year thereafter until further order of a court of competent jurisdiction. This nominal award is given to make clear the fact that the Wife has an entitlement to Spousal Support which cannot be met from the Husband's current ability to pay so that her entitlement may possibly be further quantified in the future if circumstances change.

[57] There will be no costs payable by either party to the other.

Douglas C. Campbell, J.