SUPREME COURT OF NOVA SCOTIA
Citation: Wilson v. Wilson, 2014 NSSC 300

Date: 20140812
Docket: Tru No. 1207-003714 (080651)
Registry: Truro

Between:

Marilyn Frances Wilson

Petitioner

v.

Richard James Wilson

Respondent

Judge:	The Honourable Justice Glen G. McDougall
Heard:	May 29, 2014 in Truro, Nova Scotia
Counsel:	Bradford Yuill, for the Petitioner Dianne Paquet, for the Respondent

By the Court:

INTRODUCTION

[1] This is a divorce proceeding. The marriage lasted 18 years. The parties were married on November 30, 1991 and separated on October 1, 2009.

[2] At the time of the hearing, the petitioner, Ms. Wilson, was about 45 years of age, and the respondent, Mr. Wilson, about 48 years. There was one child of the marriage, SMW, who was born on November 4, 1992 She is enrolled in a veterinary technician program in Ontario from which she expects to graduate in June 2015. She lives with her father who provides her with financial support.

[3] The parties agree that the marriage was a "traditional" one. Ms. Wilson did not frequently work outside the home. She was a homemaker and took primary responsibility for child care, meal preparation, cleaning and finances except when she was disabled by ill health. Ms. Wilson has experienced migraines and depression since suffering a head injury when SMW was about a year old. She was hospitalized for psychiatric care on a number of occasions during the marriage. The parties agree that her medical issues are severe. Ms. Wilson moved back to Nova Scotia from Ontario to live with her parents in June of 2010.

[4] Ms. Wilson was represented by a litigation guardian in the proceeding.

DIVORCE

[5] I conclude that there has been a breakdown of the marriage on the basis that the parties have lived separate and apart for at least one year immediately preceding this determination and that they were living separate and apart at the commencement of the proceeding. I am satisfied that the prerequisites for divorce pursuant to the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), s. 8, are met. I am also satisfied that there is no possibility of reconciliation and a Divorce Judgment is granted.

MATRIMONIAL PROPERTY

[6] Pursuant to the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, matrimonial property is presumptively subject to equal division: s. 12(1).

[7] The principal assets of the parties are the equity in the matrimonial home, pensions and RRSPs. The parties have agreed on the identity of the relevant property and gross values as follows:

ASSETS	Mr. Wilson	Ms. Wilson
Matrimonial home	$230,000.00	
1981 Honda motorcycle	$500.00	
Household contents	$4,500.00	
Tyco Defined Contribution Plan		
(a) October 1, 2009	$74,325.92	
(b) December 31, 2013	$97,251.87	
Sun Life RRSP		
(a) October 1, 2009	$30,517.81	
(b) December 31, 2013	$50,890.81	
Sun Life Spousal RRSP December 31, 2013		$28,807.07
Bank accounts	$3,000.00	
DEBTS		
RBC mortgage		
(a) October 31, 2009	$104,772.48	
(b) May 2014	$63,752.26	
RBC line of credit		
(a) October 1, 2009	$12,129.97	
(b) October 31, 2009	$13,580.00	
(c) May 2014	$68,995.81	
RBC Visa	$416.51	
RBC line of credit for SMW education (post-separation)	$29,993.91	
TD loan for windows (post-separation)	$19,968.63	

[8] While most valuations are agreed, issues remain as to notional disposition costs, post-separation inclusions and exclusions, valuation dates, quantum of equalization, and method of payment.

[9] With respect to the RBC line of credit, Ms. Wilson submits that it should be valued as of the separation date, October 1, 2009, rather than the end of the month

thus eliminating post-separation growth. Counsel for Mr. Wilson says this amount – $12,129.97 – should be increased by $3,000.00 to account for post-separation interest. Counsel suggests no authority for adding this amount to the debt as of the separation date. Any such carrying cost can be taken into account in the analysis of spousal support, however: see, for instance, ***Henneberry v. Henneberry***, 2004 NSSF 25, [2004] N.S.J. No. 123, at paras. 55-71. Although there was an indication that this line of credit was secured against the matrimonial home, I am satisfied that it is the type of debt referred to by Campbell, J. as being crystallized at separation. The RBC line of credit and the Visa account will be divided equally.

[10] Ms. Wilson opposes the inclusion of the other post-separation RBC line of credit as a matrimonial debt. This debt was allegedly incurred for SMW's education expenses. I am not satisfied on the evidence that this is a matrimonial debt.

[11] Ms. Wilson also opposes the inclusion of the post-separation loan for the acquisition and installation of new windows in the matrimonial home. She submits that any resulting improvement is for Mr. Wilson's benefit and should not be considered in the net division. He takes the position that this expenditure preserved or increased the value of the matrimonial home to the benefit of both parties. There is no evidence upon which the court can say what effect this expense had on the value of the home.

[12] As to pensions, in the leading case of ***Simmons v. Simmons***, 2001 NSSF 35, [2001] N.S.J. No. 276, Campbell, J. took the view that post-separation growth in a pension should not be shared as such growth "is a function of post-separation contributions or years of employment service of the member spouse" (para. 27). This would indicate that Mr. Wilson's pension should be valued for division purposes as of October 1, 2009 when its value was $74,325.92. I direct that it be divided at source in accordance with the applicable legislation.

[13] RRSPs are properly valued as of the date of division except for post-separation contributions (***Simmons*** at paras. 18-19, 32). While there is no separation date value in evidence for the spousal RRSP, only a value as of December 31, 2013, it appears that there have been no known contributions or withdrawals since separation. As such, this RRSP is valued at $28,807.07 for division purposes. Mr. Wilson's RRSP, by contrast, grew in value from $30,517.81 to $50,890.81 after separation. Counsel for Mr. Wilson indicates that interest on the separation date value is in the amount of $7,625.99 but suggests that

this growth should not be shared equally. ***Simmons*** appears to me to indicate otherwise. I will add the full amount bringing the value of Mr. Wilson's RRSP for division purposes to $38,143.80. I direct a rollover of the difference between the values of the two RRSPs which is $9,336.73. This would require a rollover of $4,668.37 from Mr. Wilson to Ms. Wilson in order to achieve an equal division of RRSPs.

[14] Ms. Wilson seeks occupation rent on the basis that Mr. Wilson has had exclusive possession and use of the home for some five years as of the time of the hearing. He has also had the benefit of receiving rental payments of $600.00 per month in the 54 months between separation and the hearing. The analysis by which a joint owner may be ordered to pay occupation rent was discussed in ***Soubliere v. MacDonald***, 2011 NSSC 98, [2011] N.S.J. No. 133, where Jollimore, J. said:

> 42 In Anger and Honsberger's *Law of Real Property*, 3rd ed. (Aurora: Canada Law Book Inc., 2010), at s. 14:20.140, the authors note that "Joint owners of property are inherently entitled to possession of the property they own and neither is entitled to exclude another. If one owner excludes the other, the owner in possession may be charged with occupation rent." A similar statement of the law was adopted by Justice Jones in *Davis v. Cipryk* (1977), 21 N.S.R. (2d) 266 (T.D.) at paragraph 8 where he quoted from the authors' *Canadian Law of Real Property* (Toronto: Canada Law Book Company Ltd., 1959).
>
> 43 In *Davis v. Cipryk* (1977), 21 N.S.R. (2d) 266 (T.D.), Justice [Jones] ordered Mr. Davis to pay monthly occupation rent of $150.00 for the twenty-two months when he solely occupied the home.
>
> …
>
> 45 In some cases, occupation rent is claimed where children are sheltered in the home and no support is otherwise provided for the children. In such cases (*MacLeod* (1994), 135 N.S.R. (2d) 49 (S.C.)) the claim for occupation rent isn't successful. Similarly, claims for occupation rent are unsuccessful where the occupant has paid the mortgage and property taxes in cases such as *Dodeman* (1991), 107 N.S.R. (2d) 113 (T.D.) and has not been compensated for this. Notably, these are cases which do not include claims under *the Partition Act* where there is recognition for payment of the mortgage and property taxes.

[15] Ms. Wilson seeks occupation rent of $500.00 per month for 54 months totalling $27,000.00. She is prepared to waive occupation rent, however, if the equity in the matrimonial home is determined based on the present-day mortgage payout. I am satisfied that this is the proper approach.

[16] As for disposition costs, counsel for Mr. Wilson seeks a real estate commission of six percent while counsel for Ms. Wilson argues for five percent. Mr. Wilson also argues that HST on the commission (13 percent in Ontario) and legal fees of $1,000 should be included in calculating disposition costs. I adopt a commission of five percent. Otherwise, I will attribute disposition costs as suggested by counsel for Mr. Wilson. This leaves a value of $152,252.74 based on the following calculation: $230,000.00 – $12,995.00 (commission + HST) – $63,752.26 (current mortgage balance) – $1,000.00 (legal fees).

[17] Mr. Wilson appears to have retained the motorcycle and the household contents which have a collective value of $5,000.00. Transferring the entirety of the $3,000.00 value in the bank accounts will offset this in part.

[18] As a result, the division of assets is summarized as follows:

ASSETS	**Mr. Wilson**	**Ms. Wilson**
Matrimonial home	$76,126.37	$76,126.37
1981 Honda motorcycle	$500.00	
Household contents	$4,500.00	
Tyco Defined Contribution Plan	$37,162.96	$37,162.96
RRSPs	$33,475.43	$33,475.43
Bank accounts		$3,000.00
DEBTS		
RBC line of credit	-$6,064.98	-$6,064.98
RBC Visa	-$208.25	-$208.25

[19] There is no dispute that Mr. Wilson has made voluntary payments to Ms. Wilson totalling $10,650.00. I am satisfied that this should be treated as an advance on the property division. Mr. Wilson's assumption of the matrimonial debts adds a further credit of $6,273.23. The other assets (excepting the home) come to a value of $75,638.39 in Mr. Wilson's possession and $73,638.39 in Ms. Wilson's. This will require a transfer of $,1000.00 in addition to the buyout of the matrimonial home. The result is total equalization of $77,126.37 from which Mr. Wilson may deduct credits of $16,923.23 for an equalization payment of $60,203.14.

CHILD SUPPORT

[20] Child support may be ordered pursuant to s. 15.1 of the *Divorce Act*. Mr. Wilson raises the issue of child support on the basis that the parties' daughter, SMW, has lived with him since the separation without any child support being paid by Ms. Wilson. There does not appear to be any dispute (although the point was not specifically argued) that SMW remains a child of the marriage at least for the next year. Nor does there seem to be any dispute that Ms. Wilson does not have the financial means to pay child support.

[21] The tenor of Mr. Wilson's submission appears to be acceptance that Ms. Wilson is in no position to pay a child support order which is clearly the case. It appears to be common ground that SMW will likely benefit as a dependent should Ms. Wilson's application for CPP disability benefits prove successful. But that cannot be quantified here. What Mr. Wilson seeks is, in effect, an award of retroactive child support by way of a division of the RBC line of credit incurred for SMW's education. This is included in the agreed statement of values in the amount of $29,993.91. I have already held that this line of credit is not a matrimonial debt.

[22] In oral argument, counsel for Mr. Wilson referred to s. 15.1(5) of the *Divorce Act* which permits the court to depart from the *Child Support Guidelines* where "special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child…" (s. 15.1(5)(a)). This appeared to be in support of the suggestion that part of Ms. Wilson's share of the property division should be allocated to SMW's education costs. Counsel's language seemed to classify this as a form of retroactive child support.

[23] While acknowledging Ms. Wilson's lack of income, Mr. Wilson takes the position that she will have resources available after property division from which to meet a child support obligation though "not to the point of depleting them in one year," in his counsel's words. As such, counsel argues that the line of credit relating to SMW's education costs should be included in the division (while conceding that it may not properly be a matrimonial debt). Counsel made a passing reference to s. 13 of the *Matrimonial Property Act*, although none of the factors listed in that section appear to relate directly to post-separation child care for a child over the age of majority.

[24] In the circumstances, I am not convinced that any order in relation to child support would be appropriate in this case.

SPOUSAL SUPPORT

[25] The *Divorce Act* permits the court to an order requiring a spouse "to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse": s. 15.2(1). The order may provide for support "for a definite or indefinite period or until a specified event occurs" and the court "may impose terms, conditions or restrictions in connection with the order as it thinks fit and just": s. 15.2(3). The considerations relevant to a spousal support determination are set out at ss. 15.2(4) and (6), which provide, in part:

> **Factors**
>
> (4) In making an order under subsection (1) … the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.
>
> …
>
> **Objectives of spousal support order**
>
> (6) An order made under subsection (1) … that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[26] There is no existing order or agreement governing maintenance. Mr. Wilson does not dispute that Ms. Wilson is entitled to spousal support. The quantum and duration of spousal support are in issue.

[27] Mr. Wilson's total income for 2013 as indicated on line 150 of his tax return was $77,537.00. It is agreed that his 2014 income is lower than his 2013 income over the same period. His Statement of Income and Expenses, filed May 28, 2014, shows total monthly income from all sources (including rent) of $5,568.10. This equates to an annual income of $66,817.20. Ms. Wilson has no employment income. She has applied for CPP disability benefits.

[28] Ms. Wilson seeks spousal support in the mid-range of the quantum suggested by a calculation under the *Spousal Support Advisory Guidelines* in the amount of $1,632.00 per month. She also advances a retroactive claim for 54 months' support while acknowledging that this exceeds the conventional three-year maximum for a retroactive award. Counsel submits that this is justified because Mr. Wilson was aware of the claim when the petition was filed and that Ms. Wilson has been supported by her parents in the meantime rather than by Mr. Wilson who actually had the obligation. Mr. Wilson replies that there was no motion for interim spousal support.

[29] Mr. Wilson proposes spousal support in the amount of $600.00 per month. His counsel also references the Advisory Guidelines which, by her calculations, give a range between $1,100.00 and $1,587.00. Mr. Wilson's position is that his current means are insufficient for his own needs particularly when his ongoing responsibility for SMW is taken into account. Counsel also suggests that Ms. Wilson's Statement of Income does not reflect her actual circumstances given that it makes reference to (for instance) expenses related to a vehicle when there is no indication that she actually has one. Essentially, Mr. Wilson's position is that Ms. Wilson is totally disabled and is living with her parents and therefore she should have few needs or expenses. Her counsel replies that there is no evidence that she cannot live on her own and says the budget provided is an anticipated one.

[30] The issue of spousal support as between a healthy payor and a sick recipient was considered in ***Haggerty v. Haggerty***, 2010 NSSC 9, 2010 CarswellNS 6. In that case, the parties had cohabitated for ten years. There were no children of the marriage. The petitioner was disabled to the degree that she could not work. O'Neil, J. (as he then was) commented on the leading Supreme Court of Canada

decisions on spousal support, ***Moge v. Moge***, [1992] 3 S.C.R. 813, and ***Bracklow v. Bracklow***, [1999] 1 S.C.R. 420:

> 27 … The decision in *Moge, supra,* is often described as finding the basis for spousal support to be one of compensating the receiving spouse for that spouse's economic disadvantage flowing from the marriage. The *Bracklow*, *supra*, decision is cited as establishing the non-compensatory approach which focuses on the concept of mutual obligation and need. *Bracklow*, *supra*, also introduced a contractual basis for ordering spousal support. The result is that the current body of law is more of an assessment of "needs" and "means". The real debate is frequently about amount and duration of spousal support.
>
> 28 The Supreme Court of Canada in *Bracklow* ... commented on how a marriage breakdown changes the presumption of mutual support that exists during marriage. In *Bracklow* Justice McLachlin, as she then was, introduced the court's judgment with the following:
>
> > I. Introduction
> >
> > 1. What duty does a healthy spouse owe a sick one when the marriage collapses? It is now well-settled law that spouses must compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union. But what happens when a divorce - through no consequence of sacrifices, but simply through economic hardship - leaves one former spouse self-sufficient and the other, perhaps due to the onset of a debilitating illness, incapable of self-support? Must the healthy spouse continue to support the sick spouse? Or can he or she move on, free of obligation? That is the question posed by this appeal. It is a difficult issue. It is also an important issue, given the trend in our society toward shorter marriages and successive relationships.
>
> 29 On behalf of the court, she answered the various questions. She stated *inter alia*:
>
> > 19 In analysing the respective obligations of husbands and wives, it is critical to distinguish between the roles of the spouses during marriage and the different roles that are assumed upon marriage breakdown.
> >
> > . . . . .
> >
> > 21 When a marriage breaks down, however, the situation changes. The presumption of mutual support that existed during the marriage no longer applies. Such a presumption would be incompatible with the

> diverse post-marital scenarios that may arise in modern society and the liberty many claim to start their lives anew after marriage breakdown. This is reflected in the *Divorce Act* and the provincial support statutes, which require the court to determine issues of support by reference to a variety of objectives and factors.
>
> . . . . .
>
> 32 Both the mutual obligation model and the independent, clean-break model represent important realities and address significant policy concerns and social values. The federal and provincial legislatures, through their respective statutes, have acknowledged both models. Neither theory alone is capable of achieving a just law of spousal support. The importance of the policy objectives served by both models is beyond dispute. It is critical to recognize and encourage the self-sufficiency and independence of each spouse. It is equally vital to recognize that divorced people may move on to other relationships and acquire new obligations which they may not be able to meet if they are obliged to maintain full financial burdens from previous relationships. On the other hand, it is also important to recognize that sometimes the goals of actual independence are impeded by patterns of marital dependence, that too often self-sufficiency at the time of marriage termination is an impossible aspiration, and that marriage is an economic partnership that is built upon a premise (albeit rebuttable) of mutual support. The real question in such cases is whether the state should automatically bear the costs of these realities, or whether the family, including former spouses, should be asked to contribute to the need, means permitting. Some suggest it would be better if the state automatically picked up the costs of such cases... However, as will be seen, Parliament and the legislatures have decreed otherwise by requiring courts to consider not only compensatory factors, but the "needs" and "means" of the parties. It is not a question of either one model or the other. It is rather a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court.

[31] In ***Haggerty***, *supra*, the support recipient was unable to work. Her disability had its onset during the marriage but was not caused by the marriage or the circumstances of the marriage. The resulting support order had a non-compensatory basis (paras. 30-32). The now Associate Chief Justice concluded that ordering indefinite support would result in an imbalance between recognizing mutual obligations and the "clean break" model. He took into account the petitioner's disability, the ages of the parties, the financial obligations assumed by the respondent during the marriage, the respondent's resources and obligations to his new family, and the petitioner's needs. He noted that failing to attain self-

sufficiency was not, by itself, a basis for a continuing obligation (paras. 41-44). He also took note of the *Spousal Support Advisory Guidelines* (paras. 48-52). He ordered the respondent, whose annual income was about $65,000.00, to pay spousal support of $900.00 per month for seven years.

[32] In ***Dingle v. Dingle***, 2010 ONCJ 731, 2010 CarswellOnt 10743 (Ont. Ct. J.), the applicant wife was unable to work due to medical conditions. For this reason, she had been entirely dependent on the respondent husband during the marriage. The parties had been married nine years and she brought an application for spousal support some seven years after their separation. The respondent's income had risen to about $90,000.00 while the applicant was on social assistance. Sherr, J. characterized the situation as one requiring an award of "needs-based, non-compensatory support" (para. 23). The Guidelines suggested termination of support when the applicant was 59 years old which the court rejected noting that this would not bring her to the age of eligibility for CPP or OAS (para. 43). Although Sherr, J. refused to award retroactive support due to the applicant's delay in bringing the application (paras. 33-38), he placed no time limit on the prospective support. He left it open for the respondent to seek reduction or elimination of the support obligation when the applicant became eligible for CPP or OAS (para. 48).

[33] As noted above, Mr. Wilson proposes a significantly lower quantum of spousal support than that sought by Ms. Wilson. His basis for the lower amount is, in essence, that he has acted reasonably in making voluntary payments of $200.00 per month as requested by Ms. Wilson; that he has maintained her on his medical and dental plan and paid her life insurance payments since separation; and that he has taken sole responsibility for supporting the parties' daughter, SMW, since the separation.

[34] As for ongoing support, I am satisfied that this is a situation of non-compensatory and need-based support. Ms. Wilson has been left in need due to the breakdown of the marriage though not entirely as a result of the marriage itself. Her disability appears to have arisen early in the marriage. That said, the roles assumed by the parties during the marriage were "traditional" in the sense that Ms. Wilson assumed primary responsibility for running the household and providing childcare while Mr. Wilson was the primary income-earner. Moreover, the marriage was a long one.

[35] These factors suggest that a spousal support order should be in a range well above what has been suggested by Mr. Wilson. As has been noted, while he has had primary care of the parties' daughter since separation, he has also had the benefit of not paying anything close to the quantum of spousal support that would be called for in the circumstances. Moreover, that child care obligation is expected to end within the next year.

[36] I conclude that a reasonable quantum of spousal support would fall within the ranges suggested by the parties on the basis of Advisory Guidelines calculations. Mr. Wilson's calculations give a range roughly between $1,100.00 and $1,600.00, while Ms. Wilson places the mid-range at $1,632.00. Using these figures as a general parameter, I am satisfied that ongoing monthly spousal support of $1,400.00 is a reasonable figure for the foreseeable future. This amount, as well as the indefinite duration, are both subject to variation if circumstances change. For instance, in the event that Ms. Wilson begins receiving CPP disability benefits.

[37] The Petition for Divorce was filed on April 27, 2012. I will allow retroactive support commencing in May 2012. Up to the date of this decision, this would give 27 months of retroactive support (May 2012 to July 2014). This results in a retroactive amount of $37,800.00. I will allow the monthly payments of $200.00 to count against this amount. These payments have been made since October 2010, for a total of 46 months up to July 2014. As such, the total retroactive amount would be $28,600.00. (I note that these figures are based on the assumption that the $200.00 payments have continued up to the date of the decision. If that is not the case, the credit should be adjusted accordingly). The amount of retroactive spousal support owed is also subject to any success Ms. Wilson might have in obtaining a retroactive CPP lump sum award. Any such award will have to be taken into consideration when determining the final amount to be paid for retroactive spousal support.

[38] This, likely, will also have to be considered in determining on-going spousal support. It might be subject to variation in the event that Ms. Wilson receives CPP disability benefits. As such, she shall be required to notify Mr. Wilson of the terms of any eventual approval of benefits. It will be open to Mr. Wilson to seek a variation at that time in order to reflect any change in circumstances arising from a grant of CPP disability benefits including any retroactive benefits that might be awarded. Until then the amount determined herein for retroactive spousal support shall be paid by way of an additional monthly payment of $200.00.

CONCLUSION

[39] Accordingly, the divorce is granted along with corollary relief as set out in the reasons above. Under the circumstances of this case, each party is responsible for their own costs of litigation.

McDougall, J.