Date: 19991125
Docket No: C.A. 155948

NOVA SCOTIA COURT OF APPEAL
[Cite as: Reardon v. Smith, 1999 NSCA 147]

Glube, C.J.N.S.; Hart and Freeman, JJ.A.

BETWEEN:

HOLLY REARDON (SMITH)	)	B. Lynn Reierson
	)	Suzanne L. Kennedy
	)	for the Appellant
Appellant	)	
- and -	)	
	)	Deborah I. Conrad
	)	for the Respondent
CHRISTOPHER ADAM SMITH	)	
	)	
Respondent	)	Appeal Heard:
	)	October 6, 1999
	)	
	)	
	)	Judgment Delivered:
	)	November 25, 1999
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THE COURT: The appeal is allowed in part, per reasons for judgment of Glube, C.J.N.S.; Hart and Freeman, JJ.A. concurring.

GLUBE, C.J.N.S.:

I. BACKGROUND

1. Holly Reardon (Smith) and Christopher Adam Smith began cohabitation in October 1994. They married on July 2, 1995, had one child, a boy, born on April 3, 1996, and separated on January 4, 1997. Thus, they lived together for a total of 27 months.

2. On February 11, 1999, during the trial, Justice H. Carver granted a divorce on the basis of one year separation. The judge's written decision on the balance of the issues was rendered later that month. It dealt with a number of issues including awarding joint custody of the child, with his primary residence to be with his mother.

3. The issues on appeal relate to the distribution of certain stocks, matching stocks and stock options, an unequal division of the assets, retroactive child support, and the timing of awarding child support and child care costs.

4. The parties met while they were both employed in Toronto by General Mills, Inc. Ms. Reardon was offered and accepted the position of Regional Sales Manager in the Maritimes. She moved to Nova Scotia in August, 1994.

Soon after, Mr. Smith left his employment and moved to Nova Scotia. The parties bought a home in Dartmouth in October 1994 and moved in together. Mr. Smith was unemployed until December 1994. He obtained employment for seven months with a company and then moved to his current position as an Accounts Manager for Campbell Soup. Ms. Reardon remained in her position with General Mills. Shortly before the trial in 1999, she learned her employment was being terminated. It ceased at the end of April 1999. Throughout the period of cohabitation and marriage, Ms. Reardon's income was considerably higher than that of Mr. Smith. In 1995 she earned $102,900 to his $69,000; in 1996 her income was $85,700 to his $59,000.

5. Other facts will be related as required to determine the issues on appeal.

II. APPLICATION TO CLARIFY THE RECORD

6. Ms. Reardon applied to "clarify the record" concerning the issue of shares, matching shares and stock options. She swore an affidavit that certain evidence she gave at trial was correct, but other evidence was incorrect because she was confused.

7. Ms. Reardon submits that the tests set out in **Palmer v. The Queen**, [1980] 1 S.C.R. 759 (S.C.C.) do not govern in all cases and cites **Cavanagh**

v. Cavanagh (1999), 175 N.S.R. (2d) (C.A.) 331, para. 15. **Cavanagh** dealt with a challenge to the trial process and a possible conflict of interest by one of the trial counsel. In my opinion, the facts and principle espoused in **Cavanagh** do not apply in this case.

8. Ms. Reardon's position is that what she wants to introduce is nothing new but rather it will correct or clear up confusing and contradictory statements in Ms. Reardon's testimony and that "... the Court's interest in the administration of justice compels acceptance of this clarifying evidence."

9. Mr. Smith first argued the evidence fails to meet the tests set out in **Palmer** as the evidence was available and should have been produced, as requested, before the trial. Alternatively, he argues that if a clarification of the record is needed, then Ms. Reardon should be ordered to provide corroborating documentary evidence supporting the statements in her affidavit. Mr. Smith's memorandum on this application included a list of evidence being sought. In fact, this material was provided to Mr. Smith by Ms. Reardon just prior to this appeal being heard. Essentially, Mr. Smith agreed the material should be submitted to the Court of Appeal, although it was information which should have been provided to the trial judge but was not.

10. It is truly regrettable the information contained in the several

documents was not provided to the trial judge. Although the receipt of this material does not meet the **Palmer** tests, and it is not a basis for any finding of error by the trial judge, with the concurrence of Mr. Smith, and in an effort to finally resolve the matters in issue and in the interests of the better administration of justice, the packet of information relating to the stock issues on appeal was received and used by the Court. The information was received for the limited purpose of allowing this Court to conclude this case without sending it back to the trial court.

11. The documentary evidence requested by and provided to Mr. Smith and the Court is listed by Ms. Reardon as follows:

1. The date(s) the matching stock was issued to the Appellant and the total number of shares issued;

2. The number of shares exercised pursuant to all of those options conferred during the period of the marriage;

3. An accounting of the profits realized by Appellant from any exercise of the options and/or the number of shares retained by the Appellant after any such exercise of the options;

4. The details of any tax paid or expected to be paid by the Appellant with respect to any of the above-noted transactions and the date of such payments; and

5. Any changes of name in relation to the aforementioned stock options or matching stock that occurred post-separation.

12. Most of this information, although not all, could have been made available prior to the trial. It is useful as it clarifies the stock issues including dates and dollar figures which were not previously known.

III. STANDARD OF REVIEW

13. The role of the Court of Appeal in reviewing decisions under the **Divorce Act** and the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 is set out by Bateman, J.A. in **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47 (C.A.) at p. 52-53.

> [10] In **Moge v. Moge** (1992), 145 N.R. 1; 81 Man.R. (2d) 161; 30 W.A.C. 161; 43 R.F.L. (3d) 345 (S.C.C.), L'Heureux-Dube, J., at p. 359, accepted the following statement of Morden, J.A., in **Harrington v. Harrington** (1981), 33 O.R. (2d) 150 (C.A.), at p. 154:
>
> > As far as the applicable standard of appellate review is concerned I am of the view that we should not interfere with the trial judge's decision unless we are persuaded that his reasons disclose material error and this would include a significant misapprehension of the evidence, of course, and, to use familiar language, the trial judge's having 'gone wrong in principle or (his) final award (being) otherwise clearly wrong': **Attwood v. Attwood**, [1968] p. 591 at p. 596. In other words, in the absence of material error, I do not think that this court has an 'independent discretion' to decide afresh the question of maintenance and I say this with due respect for decisions to the contrary ...
>
> [11] Chipman, J.A., wrote, for the court, in **Edwards v. Edwards** (1994), 133 N.S.R. (2d) 8; 380 A.P.R. 8 (C.A.), at p. 20:
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> > Having regard to all the evidence and particularly the respective incomes of the parties, I cannot say that the trial judge erred in his assessment. This court is not a fact finding tribunal. That is the role of the trial judge. Ours, as has been said many times, is a more limited role. We are charged with the duty of reviewing the reasons of the trier of fact with a view of correcting errors of law and manifest errors of fact. The degree of deference accorded to the trial judge with respect to factual findings is probably no higher anywhere than it is in matters relating to family law. Hart, J.A., put it well when he said on behalf of this court in **Corkum v. Corkum** (1989), 20 R.F.L. (3d) 197 at 198:
> >
> > > In domestic matters the trial judge always has a great advantage over an appellate court. He sees and hears the witnesses and can assess the emotional aspects of their testimony in a way that is denied to us. Unless there has been a glaring misconception of the facts before him or some manifest error in the application of the law,

> we would be unwise to interfere.
>
> [12] A similar standard is applicable to appeals from a division of assets made pursuant to the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275.

14. The Court can interfere with the exercise of discretion by the trial judge if the judge gave no weight or insufficient weight to the considerations he ought to have weighed (**Roberts**, p. 57) or misdirected himself or is so clearly wrong as to amount to an injustice. (**Elsom v. Elsom**, [1989] 1 S.C.R. 1367; **Heinemann v. Heinemann** (1989), 91 N.S.R. (2d) 136 (C.A.); **Ellis v. Ellis** (1999), 175 N.S.R. (2d) 268 (C.A.); **Connolly v. Connolly** (1999), 172 N.S.R. (2d) 382 (C.A.)).

IV. ISSUES

> **ISSUE 1: The Learned Trial Judge erred in law in finding that the matching stock and stock options which were not exercisable at the separation date are divisible matrimonial property**.
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> **ISSUE 4: The Learned Trial Judge erred in law in his failure to consider the tax consequences of the exercise of the stock options and the sale of stock in fixing the divisible value of the stock purchased by the parties, the matching stock and stock options.**

15. It is appropriate to deal with these two issues together.

16. In his decision, Justice Carver found “the assets and the debts shall be split evenly up to April 1, 1997 ...”. He made an exception relating to $5,000, which I shall deal with later as it is an issue under its own heading.

17. At issue are three types of assets: stocks purchased in the joint name of the parties; matching stocks granted to Ms. Reardon; and, stock options available to Ms. Reardon.

18. During the period of cohabitation the parties purchased 42 shares of General Mills Stock in June 1995 for $3,059.98. In June 1996, 41 shares of General Mills stock were purchased for $3,343.14. These 83 shares were jointly owned by the parties. Ms. Reardon agrees these 83 shares are matrimonial assets which should be divided equally between the parties. This is not Ms. Reardon's position with respect to the matching stocks and stock options.

19. Matching stocks (i.e., stocks to match the 83 purchased shares) were granted to Ms. Reardon by her employer and were to take effect three years after the date of the stock purchases (i.e., 42 in June 1998 and 41 in June 1999, 18 and 30 months respectively after separation). Because Ms. Reardon refused to transfer out of the city, she was terminated and the matching stocks were prorated. She received 82 shares on May 3, 1999 in her name alone.

20. Based on Ms. Reardon's employment performance in 1995, she was given the opportunity to take up stock options in lieu of a salary increase. She was offered 1300 options. She took 650 options and the balance went to increase her salary. Her salary was 15% less than it would have been had she applied all of the options to a

salary increase. She exercised her right to 260 of the options on April 1, 1997 and is not disputing that the amount received for the 260 options is a matrimonial asset.

21. Ms. Reardon received additional options in 1995 and 1996 which were not exercisable for four years. Once again, because of her termination, these options were prorated. She was obliged to exercise the options or lose the balance. In exercising the options in 1997 and 1999, she received a capital gain of $40,878.69 in U.S. dollars. This total amount includes the value of the 260 options.

22. The Corollary Relief Judgment dated April 13, 1999 states as follows:

> (15) During the time of cohabitation, the Petitioner's [Ms. Reardon's] employer granted to the Petitioner two separate restricted matching stock purchase opportunities, 42 and 41 units respectively. Also, during this same period, the Petitioner's employer granted to the Petitioner stock options which could be taken up upon payment of cash. The matching stock and stock options are part of the matrimonial mix. Prior to cohabitation the Respondent and his father bought a condominium in British Columbia. During cohabitation the Respondent [Mr. Smith] paid out of the family income monthly amounts to cover the costs. These payments represent matrimonial assets but the property itself does not. This was a short marriage which brings this case within s. 13 of the **Matrimonial Property Act**. The assets and debts shall be split evenly up to April 1, 1997 with the exception that the Respondent shall be allowed a credit of $5,000 being an amount he brought into the marriage from his prior employment.
>
> . . .
>
> Stock purchase and stock options
>
> (c) All of the share purchased obtained as a result of the Petitioner's employer's Stock Matching Program, as well as all of the stock options granted to the Petitioner by her employer, regardless of when they were matched or became exercisable, as the case may be, are part of the matrimonial mix of property. As a result, they are to be divided equally between the Petitioner and the Respondent. The date of valuation of the shares for the purpose of this division is the date that this order was signed. If the Petitioner and the Respondent cannot agree on a method of

> division, the following division shall occur:
>
> (i) 83 shares of General Mills Stock are to be transferred into the Respondent's name exclusively. He will then sign off on the remaining 83 shares, leaving them as the exclusive property of the Petitioner. Unless otherwise agreed, all of the stock options shall be exercised immediately and the proceeds divided equally between the Respondent and the Petitioner.

23. Relying on **Roberts, supra**, (and the cases cited at p. 54 of **Roberts**), Ms. Reardon argues that the trial judge's decision to divide these assets acquired many months after the parties separated, gives Mr. Smith a windfall considering the short duration of the marriage. Also, there was no evidence he contributed to Ms. Reardon earning these assets.

24. I agree that a short marriage should not result in a windfall and that marriage is not an institution to create wealth. However, **Roberts** actually dealt with a case where much of the property was acquired before the parties married and Justice Bateman only divided equally the assets substantially accumulated during the marriage, and not those acquired before.

25. Further, Ms. Reardon submits, because the matching stocks and stock options were not exercisable until after separation, they had no value and therefore they are not matrimonial assets. Mr. Smith submits that a present right to acquire something in the future is property for the purposes of the **Matrimonial Property Act**. These were conferred as employment benefits during the marriage and in one instance, the decision to take the options in

lieu of a wage increase (even though the increase would have been quite small) did affect the parties' household income during the marriage.

26. Courts have made differing decisions depending upon the nature of the stock options and the circumstances of the case.

27. Where the matter at issue is one of division of assets (i.e., upon divorce), the courts tend to exercise their discretion to classify stock options and matching stock as property (**MacDonald v. MacDonald** (1997), 209 A.R. 178, leave to appeal to S.C.C. refused, (1998), 227 N.R. 399; **Gardiner v. Gardiner** (1996), 191 A.R. 139 (Alta. Q.B.); **Faulkner v. Faulkner**, [1997] A.J. 730 (Q.B.), aff'd (1998), 166 D.L.R. (4th) 378 (C.A.). Conversely, where the issue is one of support, the courts have, in some cases, exercised their jurisdiction and classified stock options and matching stocks as income (**Schnarr v. Schnarr**, [1999] B.C.J. No. 303 (S.C.); **Heinemann, supra**, at p. 139 where Hart, J. A. stated: "He presently enjoys an income of approximately $100,000 a year, made up of salary, bonuses, stock options, car allowances and other perks of his office").

28. **Gardiner, supra**, deals with stock options, analogizing them to an invested pension plan which is matrimonial property. A pension plan is a benefit accruing even though it may be contingent in its realization (para. 14). Justice Kenny found that stock options, whether exercisable or not, are

matrimonial property (para. 29), in the same category as the invested pension plan. “It is a present right to acquire something in the future” (para 30). I agree with that conclusion in dealing with a division of assets, and would find the stock options and matching stocks which Ms. Reardon has now exercised are matrimonial property. In exercising her right to the stock options and matching stocks, Ms. Reardon was not obliged to put any cash up front.

29. In this case, the matching stocks and stock options are matrimonial assets because the rights to these assets were acquired solely during the period of cohabitation.

30. Turning to the division of these assets, although this was a short marriage, Justice Carver exercised his discretion and determined they should be divided equally. I am unable to find any material error or misapprehension of the evidence. That I might have come to a different conclusion is not a basis for changing the equal distribution of these assets which were acquired during the marriage.

31. Although at the time Justice Carver gave his decision he may not have recognized that there were tax consequences to consider, I agree that any tax consequences should not fall solely on Ms. Reardon. Since there is to be an equal division of the joint stocks, the matching stocks and the stock options, income tax consequences should be considered. (**McPhee v. McPhee** (1998), 166 N.S.R. (2d) 237

(C.A.) at 239.)

32. The parties are now dealing with actual stocks and cash (formerly stock options) and the tax implications relating to those assets.

33. Although Ms. Reardon argued in the alternative that these were business assets, I am unable to come to that conclusion. Generally assets acquired by parties before or during marriage are matrimonial unless the party claiming otherwise shows on a balance of probabilities that the assets fall within one of the exceptions contained in s. 4(1) of the **Matrimonial Property Act**. (See **Adie v. Adie** (1994), 134 N.S.R. (2d) 60 (S.C.) at p. 63; **Clarke v. Clarke**, [1990] 2 S.C.R. 795.) To be a business asset, the purpose of the asset must be to generate income in an entrepreneurial sense. There has been no evidence to satisfy the Court that the matching stocks and stock options are business assets. Ms. Reardon acknowledges in her evidence that the opportunities to make these acquisitions arose from her value to her employer.

34. I would find that the entitlement to the matching stocks was part of Ms. Reardon's compensation package earned during cohabitation. The 83 shares jointly owned and the 82 shares in Ms. Reardon's name alone are matrimonial assets. An equal division can be achieved by Ms. Reardon transferring her interest in the 83 jointly owned shares to Mr. Smith, subject to a cash adjustment for the April 1, 1997 value of one share. There was no evidence as to whether this distribution attracts tax

consequences. In the event there are tax consequences and the burden falls disproportionately on one of the parties, then the other party shall provide indemnity to the extent of one half of the actual tax burden.

35. As for the net amount of $40,878.60 U.S. obtained by Ms. Reardon exercising the stock options, I would find it was part of her employment compensation package received during cohabitation and a matrimonial asset at the time of separation. The capital gain should accrue to both parties. As the money is in Ms. Reardon's name, the balance after calculation of tax consequences should be equally divided.

ISSUE 2: The Learned Trial Judge erred in law in fixing a valuation date for matching stock and stock options which was beyond the separation date or the valuation date for other assets.

ISSUE 3: The Learned Trial Judge erred in law in fixing an arbitrary date for valuation of the stock options, i.e. the date of the Order.

36. It is appropriate to deal with these two issues together.

37. The case law in Nova Scotia does not set any specific valuation date. The Court decides what is fair and just (see **Stoodley v. Stoodley** (1997), 172 N.S.R. (2d) 101 (S.C.)). (For decisions on various valuation dates: **Mason v. Mason** (1981), 47 N.S.R. (2d) 435 (C.A.) says it is at the time of trial; **Lynk v. Lynk** (1989), 92 N.S.R. (2d) 1 (C.A.) and **Tibbetts v. Tibbetts** (1992), 119 N.S.R. (2d) 26 (C.A.) say it is at the commencement of the proceedings subject to variation according to the evidence; and

Ray v. Ray (1993), 121 N.S.R. (2d) 340 (S.C.) says it depends on the nature of the asset and it could be the date of the divorce.)

38. Although Ms. Reardon is not asking that the valuation date chosen by the trial judge be overturned, she objects to his choosing different dates for different assets without any indication of why. I know of no requirement in Nova Scotia to assign a single valuation date for all matrimonial assets.

39. Ms. Reardon did not have to put up any funds to actually acquire the matching stocks and the stock options. (The latter resulted in a net amount of cash being received by her.) Matrimonial assets may passively (without putting in any more money) appreciate between separation and trial. In such cases, choosing the later date for division is sound policy and equitable for both parties. Thus, in my opinion, the trial judge chose a reasonable date; i.e., the date of the judgment. Having found that the stock options and matching stocks are matrimonial assets, I would find that the trial judge was not wrong in the date he chose. He exercised his discretion in choosing the date the corollary relief was signed (April 13, 1999). However, since these assets were actually acquired very soon after the date of the corollary relief order and the value is now known, in my opinion, the value to be used should be based on the value when they were exercised for both the matching stocks and the stock options.

ISSUE 5: The Learned Trial Judge erred in fact and in law in granting the Respondent (Mr. Smith) a $5,000.00 credit in addition to his one-half

interest in the value of the matrimonial home.

40. When the parties purchased the matrimonial home in October 1994, the down payment and the closing costs were made up of the following amounts:

> $20,000 from Mr. Smith's RRSP as a first time home buyer
>
> $5,500 from a $10,000 loan from Mr. Smith's mother
>
> Approximately $12,675 from Ms. Reardon made up of her initial balance in the house account from her additional employment income, employment income, and the balance of her personal account from Toronto ($3,697.70).

41. Ms. Reardon's employer reimbursed all or part of the closing costs, and the $10,000 loan was re-paid from a sales incentive cheque received by Ms. Reardon in June 1996. She alone paid approximately $2,685 in mortgage payments until Mr. Smith became employed. As of January 1995 both parties contributed to the account.

42. As noted previously, Ms. Reardon contributed substantially more income to this marriage than Mr. Smith. She also contributed $5,000 to a spousal RRSP for him.

43. Justice Carver divided the assets and debts equally with the exception of a credit of $5,000, an amount he found Mr. Smith brought into the marriage from his previous employment.

44. Justice Carver referred to Mr. Smith's testimony that he put a further $5,000 from the separation payment from his previous employer toward the purchase of the house. The Judge stated:

> I do not question the amount of the $5,000, but there is some question if it went toward the house purchase or general settling-in expenses." [p. 2].

45. The trial judge then went on to trace the funds actually deposited in a joint account between August 14, 1994 and October 8, 1994, which were used to make the down payment of $38,175.10. This did not include the amount of $5,000.

46. It would appear that only ss. 13(b), (d) and (e) of the **Matrimonial Property Act** could be applied as a basis for granting an unequal award.

> Factors considered on division
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> 13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
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> ...
>
> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
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> ...

> (d) the length of time that the spouses have cohabited with each other during their marriage;
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> (e) the date and manner of acquisition of the assets;

47. There is a heavy onus on Mr. Smith to show that an equal division would be unfair or unconscionable. (See **Harwood v. Thomas** (1981), 45 N.S.R. (2d) 414 (S.C. A.D.) at 417.) I would find that the trial judge erred in concluding that Mr. Smith met that onus.

48. Based on the bank records, the $5,000 from Mr. Smith did not form part of the down payment on the house. Even if one considers that Ms. Reardon's contribution to the house was from her income and from her bank account in Toronto, it was money she earned prior to the parties commencing cohabitation and amounted to $12,675. She alone made mortgage payments of $2,685. At that point, her payments toward the house totalled $15,360. One cannot ignore that she contributed $5,000 towards a spousal RRSP. She earned over $33,000 more a year than he did in 1995 and over $26,000 more in 1996. The trial judge also found that her debt at the beginning of cohabitation was $9,233.61 compared with his debt of $4,755.

49. Later on in the decision, Justice Carver stated:

> Here was a short marriage which brings this case within s. 13 of the act. There is no question the respondent in the initial stage brought into the marriage more than the petitioner brought to their marriage. The petitioner also brought a greater debt load. However, it must be remembered the petitioner brought a greater pay cheque in this marriage and she brought for both of them through her

> employment matching stock and stock options which I find are part of the matrimonial mix. I therefore find the assets and the debts shall be split evenly up to April 1, 1997 with the exception that the respondent shall be allowed a credit of $5000 being an amount he brought into the marriage from his prior employment. The assets includes the monthly payments made by the respondent each month from the date of cohabitation to April 1, 1997 on the British Columbia Property.

50. The British Columbia property refers to Mr. Smith investing $30,000 in real property in British Columbia with his father a month before the parties commenced cohabitation. Payments on account towards the B.C. mortgage were made from the parties' joint account from October 1994 to April 1, 1997. These were found to be matrimonial assets and to be equally divided, but the trial judge ordered in the corollary relief judgment that "The balance of the equity in the Respondent's B.C. property which was acquired pre and post separation" was excluded from the division.

51. Mr. Smith suggests Justice Carver's decision to award the credit of $5,000 arose because he perceived there were inequities which he needed to address. Mr. Smith attributes this to the disproportionate contribution to the down payment on the home and/or general settling-in expenses. He also raises the disparity of the parties' RRSP's as a possible reason. I am unable to find these views enunciated in the reasons of the trial judge.

52. Although the trial judge purported to do a specific analysis of the funds used for the down payment, he failed to consider other specific evidence, as earlier noted, which should have been taken into account in a decision to grant an unequal division. Although a trial judge has considerable discretion, I

would find on these facts that he made a significant error when he did not examine all of the evidence before making an unequal division.

53. In my opinion, the trial judge erred when he awarded Mr. Smith $5,000. I would find there is no factual basis for awarding an unequal division. I would not award a credit of $5,000 in addition to his one-half share of the value of the matrimonial home, the stocks, the matching stocks and the value of the stock options.

ISSUE 6: The Learned Trial Judge erred in law in failing to award child support and nanny costs from the date of separation to the date of the first payment ordered following trial.

54. The parties differ as to whether or not an award of retroactive child support and child care costs should have been made. Justice Carver in not making the award of child support retroactive stated:

> I refrain from ordering retroactive child support and nanny costs as the parties had an arrangement that worked reasonably well.

55. Ms. Reardon testified there was no arrangement between the parties concerning child support, although she acknowledges and Mr. Smith testified, there was an agreement that he would pay the joint debt and she would incur the costs of a nanny. Ms. Reardon argues that no child support was paid for over two years.

56. The parties hired a nanny to provide child care. At the time of separation, the beginning of January 1997, the child was just 9 months old and he continued to live with Ms. Reardon in the matrimonial home. The first nanny hired by the parties continued to provide child care until February 1998. A new nanny was hired in February 1998.

57. During the relevant period, Ms. Reardon earned $109,900 in 1997 and $99,700 in 1998. Mr. Smith's income was approximately $75,000 per annum. The nanny costs were approximately $1,200 per month.

58. The parties appear to agree that Mr. Smith actually paid $15,150 over a fourteen month period to retire the joint debt.

59. A review of the evidence indicates the following:

> In the affidavit of Mr. Smith, sworn February 9, 1999, he states he was to pay the debts, and Ms. Reardon was to pay the nanny costs. He acknowledges a request by Ms. Reardon for child support in April of 1997. Mr. Smith claimed his child care costs, covering the times when he was caring for the child since the separation, averaged $1,300 per month.
>
> In the affidavit of Ms. Reardon sworn February 2, 1999, she states until April 21, 1997, the nanny costs were made jointly and from April 21,

1997 until January 30, 1998, she paid all the costs totalling $9,531.98. From February 1998 on, Mr. Smith shared these costs.

Ms. Reardon testified there was no agreement, rather an announcement of who would pay what by Mr. Smith and that did not include child support. Further, that he offered to buy groceries and diapers in lieu of child support. She found that inappropriate as it seemed like excessive control on his part. She wanted to receive child support and pay half the debts herself; that is, each party would share the responsibilities.

Mr. Smith testified by paying off the debts, he was paying $250 over and above the nanny costs which he considered would offset child support. He suggested the child spent almost equal time with each parent and Ms. Reardon paid him nothing when he had the child. He started sharing the cost of the new nanny while he still was paying $450 a month on one loan. He had retired another loan at $1,000 a month.

60. It is not for the Court of Appeal to substitute its view of the facts unless the reasons of the trial judge disclose material error including a significant misapprehension of the evidence. (See the quote from **Roberts, supra**, in para. 13 above.)

61. Where there is contradictory evidence, the trial judge should assess credibility and make a finding of fact. The Appeal Court must pay a high degree of deference to such findings and should not interfere even if we take a different view of the evidence. (**Toneguzzo-Norvell v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at p. 121.)

62. The parties agree the court has the jurisdiction to award retroactive child support. Although the **Divorce Act**, R.S., 1985, c. 3 (2nd Supp.) [D-3.4], specifically allows retroactivity on a variation order (s. 17(1)), section 15 neither specifically authorizes nor prohibits retroactive payments. In my opinion, courts can consider such an application (see **McColl v. McColl** (1995), 13 R.F.L. (4th) 449 (Ont. Gen. Div.)).

[63. The trial judge might have decided that the nanny costs should have been paid on the basis of a 60-40 split and the debts on a 50-50 basis (as he awarded an equal division of assets) which would have meant that Mr. Smith overpaid. The trial judge could then have ordered child support back to an appropriate date - possibly April 1997 when the parties split their finances and when Ms. Reardon made her request for child support, and then given Mr. Smith credit for his overpayment. However, he chose to decide otherwise.

64. The right to child support is the right of the child(ren). (See **Shiels v. DeCarli**, (1996), 23 R.F.L. (4th) 95 (Ont. Gen. Div.) at para. 24.) Both parents are financially responsible for their children.

65. Sections 15 and 17 of the **Divorce Act** are reinforced by the Federal Child Support Guidelines. In the Guidelines, the objectives state:

> 1. The objectives of these Guidelines are
>
> (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

66. Dealing with child support orders, the Guidelines state:

> 3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (b) the amount, if any, determined under section 7.

67. The Child Support Guidelines solidify the position that both parties have financial responsibilities for their child. I recognize that parents should be encouraged to work toward a negotiated settlement without the custodial parent being obliged to make an immediate interim application for child support upon separation (**Steinhuebl v. Steinhuebl**, [1970] 2 O.R. 683 (Ont. C.A.)).

68. I further recognize that in appropriate circumstances, even without an application for interim child support, where the trial is two years after separation, a request for retroactive child support may be granted. In certain circumstances, retroactive support can be awarded back to the date of separation (**Lidstone v. Lidstone** (1993), 121 N.S.R. (2d) 213 (C.A.) dealing with spousal support), and it can also predate the commencement of proceedings (**MacNeal v. MacNeal** (1993), 50 R.F.L. (3d) 235 (Ont. Gen. Div.)).

69. The **Divorce Act** provides for child support (s. 15.1(1)) in accordance with the applicable guidelines (s. 15.1(3)). Sections 15.1(5), (6), (7) and (8) provide:

> (5) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied
>
> (a) that 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; and
>
> (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.
>
> (6) Where the court awards, pursuant to subsection (5), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so.
>
> (7) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.
>
> (8) For the purposes of subsection (7), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not

> consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

Similar requirements to subsections (5) - (8) are found in s. 17 dealing with variations.

70. In the case before the Court, I am unable to find any material error or significant misapprehension of the evidence by Justice Carver. Although the reasons he gave were the bare minimum as required by s. 15.1(6) of the **Divorce Act**, namely, "... the parties had an arrangement", there was some evidence which he must have accepted to support his finding and upon which he could conclude that "an arrangement" was reached. I would not award retroactive child support and nanny costs.

Issue 7: The learned Trial Judge erred in law in failing to order payment of child support to begin the first full month following the trial and the decision.

71. The trial judge ordered that the first payment of child support was due a month after the decision. I would find that the order to commence child support on April 1, 1999 was in error and was made without justification. Although the Court is asked to infer that it was to give Mr. Smith time to organize his affairs, no such comment was made by the trial judge. In my opinion, such a reason would be in error and not in accord with the Guidelines and the obligation to pay child support.

72. Using the Child Support Guidelines, Justice Carver awarded the amount of $580. I would find the first payment should have commenced on March 1, 1999 as the trial was heard in February, and the decision is dated February 28, 1999. The March 1, 1999 date should also apply to the proportionate payments under s. 7 of the Child Support Guidelines.

Costs

73. Counsel for Ms. Reardon asks that costs not be determined until after this decision is rendered. Unless the parties advise the Court otherwise, counsel for Ms. Reardon should make any submission on costs within two weeks of the receipt of this decision and Mr. Smith shall have another week to file a submission.

Disposition

74. The appeal is allowed in part and I would order the following:

1. that Ms. Reardon transfer to Mr. Smith her interest in the 83 shares currently jointly owned, subject to a cash adjustment for the April 1, 1997 value of one share and tax consequences if any (para. 34);

2. that the parties divide equally after calculation of tax consequences the

amount received by Ms. Reardon after exercising the stock options (para. 35);

3. that Mr. Smith not receive a credit of $5,000 in addition to his one-half share of the value of the matrimonial home;

4. that there shall be no retroactive child support;

5. that Mr. Smith's proportionate share of nanny costs and child support be paid in the amount of $580 for the month of March 1999; and

6. that the determination of costs await submissions.

Glube, C.J.N.S.

Concurred in:

Hart, J.A.

Freeman, J.A.