IN THE SUPREME COURT OF NOVA SCOTIA
Citation: McSween v. McSween, 2003 NSSC 41

Date: 20021115
Docket: 1206-003548 / 110392
Registry: Sydney

Between:

Claude Adrian McSween

Petitioner

v.

Donna Marie McSween

Respondent

Judge:	The Honourable Justice Frank Edwards
Heard:	November 13, 14 and 15, 2002, in Sydney, Nova Scotia
Written Decision:	February 20, 2003
Counsel:	Gerald B. MacDonald, for the Petitioner Theresa Marie Forgeron, for the Respondent

By the Court (orally):

[1] I am going to deal in summary fashion with the matter now so that the parties know where they stand and should it become necessary for me to issue a written decision, I am reserving the right to do so. In that event I may elaborate upon and clarify the points that I am about to make now without changing the bottom line as far as the various issues are concerned.

[2] On the debt issue, Mr. McSween did continue paying the truck loan. It is common ground between the parties that included a pre-existing debt of $2,300.00 plus approximately $2,000.00 which was used by the parties to go to Ontario. As such there is a $4,300.00 matrimonial debt involved some portion of which was extinguished by him following the separation. I would probably have to call in an actuary to figure it out with precision but I am going to ballpark that and give him credit for $2,000.00 on that amount.

[3] As far as the debt concerning the television is concerned, there is conflicting evidence about whether or not it was a Christmas present or whether it was a required purchase to replace the television which had stopped working. I do not put too much of a fine edge on that because even if it were a Christmas present purchased by a husband for a wife or ***vice versa,*** the money comes out of the common pool (where independent bank accounts are not

maintained). Although it is a present, it is still encumbers both of them because it has to come out of the family income. Calling it a Christmas present does not take it out of the matrimonial debt pool. He extinguished the debt, he is to be given credit for that.

[4] If I understood correctly, between the Sears and the Visa, Ms. Forgeron, I believe you said that would result in a credit to him of $885.00 and with the appraisal in as well. I accept that and he will get that credit. I will leave it to counsel to do the math and figure out where the setoff takes place. I am dealing with the big picture items now.

[5] The parties were in a common-law relationship from late 1978 or 1979 until the marriage in 1991 which continued until the date of separation in 1998. For purposes of property division, I do not draw a distinction between the common-law relationship and the formalizing of the relationship through marriage in 1991. I look at it in the sense that they effectively lived as husband and wife from late 1978 or 1979 onward to the date of separation. I consider that the same as if they had been formally married for the 20 year period. During that time, it was a so-called traditional marriage in the sense that he was the breadwinner and she was the homemaker. Until 1989 she did work outside the home and contributed to the family income during that

period in addition to performing all the functions of a housewife. That included laundry, cooking, caring for the children, various chores around the home which I will get into a little bit later when I talk about the entitlement to the house.

[6] It was a long-term relationship during which the parties, as I have already stated, were effectively man and wife with all the legal obligations and responsibilities that that entails.

[7] The main source of contention in this matter revolves around entitlement to the family home. On the one hand I have Mr. McSween who feels that he is entitled to it because he in fact purchased the property in 1965, that is, approximately 14 years before his relationship with Ms. McSween began. The house was in a run down condition at the time and he did significant work on it including raising the house and putting a concrete block basement under it. To use his words he “gutted” the inside of it and redid the inside of the house. He did significant improvement upon it.

[8] He was divorced from his first wife and that divorce was finalized in the mid 80's. But at that time he did pay $5,000.00 to his first wife for her share in the equity of the home and that $5,000.00 was obtained by getting a loan from the Credit Union. By this time he was in the relationship with the

present Ms. McSween. They got the $5,000.00 loan at the Credit Union and that was eventually paid off through their joint efforts from family income. I know there is a dispute in the evidence about precisely how that payment was made but I am satisfied that it was family income, which extinguished the Credit Union loan. The point is, as far as the entitlement to the house is concerned, that in the mid 80's his equity in the house was valued at approximately $5,000.00.

[9] On the other side, Ms. McSween says that when she came into the relationship or when the common-law union began, the house was run down. Significant improvements were made after she came on the scene. Without giving an exhaustive recount of the evidence, that included two occasions upon which siding was put on the house, once in 1979 and then some time after that during the course of the 20 year relationship. The heating system was converted from a hot air system to a hot water system. The panelling in the house was replaced by gyproc drywall throughout the downstairs and on the upstairs ceilings. A garage was constructed on the property. She took part in the construction of that garage and I accept her evidence on that point. There was also evidence from her about hiring the contractor to clear

away the brush and what not from the back yard and evidence of the efforts she made to improve the look of the property through landscaping.

[10] I also accept her evidence that she did substantial physical work in contributing to the enhancement of the property and that went beyond normal maintenance items such as snow clearing and mowing the grass. She did exterior painting on the exterior of the basement as well as the garage. In fact during the construction of the garage she was involved with Mr. McSween and a couple of friends in the hands-on construction and she talked about completing the wiring as far as the installation of plugs and switches and lights.

[11] These are just examples, as I say, without being comprehensive of the type of contribution she made to the property. When the property was appraised in 1999 it was valued at $50,000.00. There is some question about whether or not that value would still pertain given the downturn in the local economy with the cessation of the coal mines. The assessed value is somewhere in excess of $37,000.00. The point is that an asset that Mr. McSween had $5,000.00 equity in the mid 80's is by the end of the 90's worth $40,000.00 or $50,000.00. I am satisfied that the enhancement in the value of the property was due equally to the efforts of both Mr. and Ms. McSween.

[12] If I were to take it on an emotional attachment basis only, I would have to say that Ms. McSween probably has the edge. I am satisfied by her evidence that she has taken meticulous care of the property and that is evident in the pictures, particularly of the interior which are contained in the appraisal.

[13] On the other hand, Mr. McSween, he has a 14 year head start on her with the property. Some of the structural enhancements which he made early on, in particular putting the foundation under the property and doing the interior, that cannot be discounted. I am left in a position where I find it impossible to say that the right thing to do here would be to give it to one or the other. I do not think that I or any objective assessor of the situation on the basis of the evidence that has been presented in court could really give the house to one or the other. Therefore I am going to order that the sealed tender process be the mechanism used to determine who gets the house. Obviously through that process the person who wants the house the most will submit the highest tender.

[14] We have already discussed the terms. I think both parties are in agreement that, if the tendering process were to be put in place, there be a 45 day period during which time the successful tender would have to pay to the other person. If the successful tender was not able to raise money, then the other

person would have the option to purchase the property at the end of that 45 days for the successful higher tendered price. I think by that stage an additional 30 days to complete the process would be more than adequate.

[15] Also, Mr. McSween will have the option before he submits his tender to inspect the premises. This should be arranged through Counsel. I would expect that that inspection would be done in the presence of a third party, whether it be Mr. Miller or a real estate agent that both can agree upon. Ms. McSween is to be out of the home during that inspection.

[16] In my preamble, I mentioned the fact that as far as property division is concerned, I am considering this the same as I would if the parties had been officially married for the 20 year period of their relationship.

[17] The pensions which are being received by Mr. McSween involve a pension in pay, his Canada Disability income and his Workers' Compensation income. There is also the R.S.P. of $60,925.53 and the cash payment. I consider all of those to be matrimonial assets and I say that notwithstanding the fact that Mr. McSween was obviously gainfully employed long before his relationship with Ms. McSween began. As Ms. Forgeron pointed out, the definition of matrimonial property in Nova Scotia encompasses assets which are acquired before the relationship began as well as after. If we were

talking about a five or six year or even ten year relationship, I would feel differently about it. But here we have a long-term 20 year relationship. I am therefore not discounting the fact that Mr. McSween had started racking up entitlement, if I can use the vernacular, to pension before the relationship with Ms. McSween. But the fact remains that a long-term relationship was sustained by that pension entitlement for the 20 year period. The pensions were used as matrimonial assets and were intended to be used in that manner. I am not drawing a distinction between the pension in pay and the Workers Compensation or the CPP disability because those particular payments (I recognize that there is not unanimity on this throughout the case law) replace the lost ability to earn income. They are intended to replace, so far as money can do so, the ability to earn income for the benefit of the worker or disabled person so that he can continue to meet his obligations, and that is contribute to the support of the spouse and family. Mr. McSween is 62 years old so he has no intention of going back into the work force. Indeed that was the decision made by Mr. and Ms. McSween back in 1989 or thereabout when he started to get the compensation and CPP, not that he had a choice in the matter at that time.

[18] Although it is not particularly germane, I would have to say that, if I were dealing with the spousal support issue, I find it significant that the decision was made by both Mr. and Ms. McSween that she would not return to the work force after the cessation of her employment at the Pier Electric and Confection business. They had agreed to live from that point on on the income that he was bringing into the household. I think it bears saying that Mr. MacDonald submitted that I should have regard to the fact that she is still capable of entering the work force and at least supplementing the income she would receive from Mr. McSween and his pensions. I do not feel that that is a practical submission. Number one, there was the decision by the two of them that she would not re-enter the work force. Had the marriage continued she would not have been required to do so; Number two, even if that were not the case, I do not feel that it is practical to suggest that a 60 year old person in her particular circumstance, and I am referring to her medical condition, could sustain viable employment even if she were able to obtain same. That in itself is a doubtful proposition in the economy in which we now find ourselves.

[19] I am satisfied that there should be an equal division of the pensions and the disability income. I am satisfied that it would not be inequitable or unjust to make that division in the circumstances of this case.

[20] Ms. Forgeron indicated that normally she would be looking for a source division of pension but that is not feasible in this particular situation. I do not think I have to get into the reasons why. Mr. McSween will be the trustee for her portion of the pension in pay as well as the CPP and the Workers' Compensation. The gross of the pension and RSP's will be divided. We already discussed that. That is one half of the $12,182.88. He can do a spousal rollover on the one half of the $60,925.53.

[21] Ms. Forgeron submitted that even with the order for half the pensions, Ms. McSween is still in a precarious financial position because of the fact that there is no survivor benefit pertaining to Mr. McSween's pension. I am looking at Exhibit 11 and it states that the pension in pay is payable to age 65 or death and "does not carry a survivor's benefit". Ms. Forgeron asked me to fashion some sort of security for that. She suggested a collateral mortgage on Mr. McSween's portion of the house if in fact he ends up getting the house. I think that I made it clear that I reject that proposition because that would be unfair to Mr. McSween by forcing him to pay Ms.

McSween for her equity in the house and then put a lien on his portion. I am persuaded that it would really take nothing away from him and give her some protection if a trust mechanism were set up with respect to his half of the $60,925.53. That is locked in and therefore he cannot touch it anyway before he is 65. It would have no negative consequence for him but on the other hand, it would provide her with some measure of protection should Mr. McSween die before he reaches his 65th birthday. I accept Ms. Forgeron's submission in that regard.

[22] She argues that the current life insurance of $10,000.00 with Donna McSween as beneficiary does not provide adequate protection and would not be of much assistance to her. That point is well taken and that of course is a big reason why I am ordering the security I have just mentioned.

[23] The health plan coverage is a tough situation. Tab 15 of exhibit 10 lists the costs of medication for Ms. McSween for 10 months. The figure I get is $566.88 for a 10 month period beginning January 2002 and ending October 2002. A substantial portion of that is a $219.94 expenditure for Zolcor which is a medication taken for high cholesterol. Ms. McSween will continue to be on that medication for an indefinite period of time. My understanding from the evidence that her need for that will be reviewed by

Dr. Patel from time to time but as far as the foreseeable future is concerned, she is going to be required to do that.

[24] As Mr. McSween's spouse, she is entitled to medical coverage and that expense had the marriage continued that expense would have been taken care of. However, referring to exhibit 11, paragraph 5 on page 2, I read the following: "Health Plan Coverage: Upon divorce Donna Marie McSween would not be a spouse under the plan definition therefore she would not be eligible for coverage after the divorce is finalized."

[25] The breakdown of the marriage does present a substantial negative economic consequence for her in terms of the cessation of a medical plan coverage. I am therefore going to order that Mr. McSween will be responsible to pay one half of the cost of her medication. In order to receive that money from him, she will have to present receipts to him the same as the parties would have to have done for a third party insurer if the insurance were continued. She will only be entitled to compensation for drugs which are eligible under this plan had this plan continued after the divorce. In other words, such things a over-the-counter medication which are not normally covered by a health plan Mr. McSween would not be responsible for.

[26] I think I that covers everything. There is an agreement between the parties about the division of household contents. Both are agreed that the contents will be divided under the supervision of Dennis Miller, or if he is not available, some other third party upon whom they both agree. It will be a flip of a coin for first pick and alternated after that.

[27] The parties are agreed that Mr. McSween gets to keep the truck which is now valued at approximately $3,500.00.

[28] By way of obiter I wish to comment upon the alleged common-law relationship with Mr. McGean. To be candid, a lot of court time was expended on that particular issue unnecessarily. The evidence does not satisfy me that there is a common-law relationship. There may be but, on the evidence before me, I could not so find. Perhaps the relationship is being kept in abeyance pending the outcome of this proceeding. I do not know and that is neither here nor there. Even if there were a common-law relationship, its only relevance would be to bear upon the need of Ms. McSween for spousal support. As it turns out, there is going to be no order for spousal support because of the property division. Even if there were, the impact of her common-law relationship with Mr. McGean would have been minimal because I hold to the view that the emphasis in awarding spousal support

should be compensatory rather than based on need. Need is a factor to be considered but I am more inclined to the view that when a man and a woman have an extended relationship and it breaks down, they are both entitled to roughly equal standards of living. All things being equal, they should make as even a division or distribution of the assets or income or obtain sufficient support to maintain roughly equal standards of living. If Mr. McGean had been a local doctor or other high income earner which would have had a huge impact on Ms. McSween's standard of living, then perhaps I would have to reassess that position. But the evidence is that he himself is on a disability pension and therefore is not likely to have contributed a substantial amount to the enhancement of her standard of living.

[29] Are there any points that Counsel can think of that I have not touched on that I should have?

MR. MACDONALD: My Lord, I only have one question, I guess. The security on the ... on Mr. McSween's half of the R.R.S.P., is that until age 65?

THE COURT: Yes.

MS. FORGERON: My Lord, just for confirmation, Ms. McSween remains the beneficiary of the $10,000.00 life insurance ...

THE COURT: Oh yes.

MS. FORGERON: ... okay. And my Lord ...

THE COURT: That should be included in the order.

MS. FORGERON: I've asked my client for instructions with respect to costs. She indicates that she does not want me to seek costs in light of the decision.

THE COURT: Each party will bear their own costs.

J.