

**IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)**

Citation: *Harrison v. Harrison*, 2004 NSSF 91

Date: 20041007

Docket: 1201-55910 (SFHD-11601)

Registry: Halifax

Between:

Joan Lorraine Harrison

Petitioner

v.

Peter John Harrison

Respondent

Judge: The Honourable Assoc. Chief Justice Robert F. Ferguson

Written Decision: (Part 2) October 7, 2004
(Part 1 was released on May 18, 2004)

Counsel: M. Jane McClure, for the Petitioner Kim A. Johnson, for the Respondent

By the Court:

[1] In June of 2001, Joan Harrison petitioned to end her marriage of almost twelve years. Prior to the trial (September of 2002), the parties, at an interim hearing, advised the presiding judge they had reached an interim agreement, presumably as to parenting arrangements and support payments. They also indicated they had arranged for a parental assessment. Again, prior to the trial (August of 2003), Joan and Peter Harrison were parties to an Interim Consent Order that stated, in part:

UPON the Application of the Petitioner, Joan Lorraine Harrison, for an interim order for child support at the table amount under the Federal Child Support Guidelines;

AND UPON IT APPEARING that the parties have the following children of the

marriage:

Julie Catherine Harrison, born [...], 1992 Lauren Elizabeth Harrison, born [...], 1993
Grant William Harrison, born [...], 1995

AND WHEREAS the parties each acknowledge that they have not received adequate financial disclosure from the other and are accepting, on a without prejudice basis for the purposes of this Interim Order only, that the annual income of Peter John Harrison is \$230,000.00 for the purpose of determining the table amount of child support;

AND UPON THE PARTIES CONSENTING HERETO: NOW UPON MOTION:
IT IS ORDERED THAT:

1 Peter John Harrison shall pay child support to Joan Lorraine Harrison pursuant to the Federal Child Support Guidelines and in accordance with the Nova Scotia table, the amount of \$3,477.00 per month, payable on the first day of each month, and commencing August 1, 2003.

[2] Subsequent to the divorce trial and prior to a decision being released, correspondence was forwarded as to the possibility of a further interim hearing regarding the issues of custody, access and child support. It was decided that a decision as to the parenting arrangements would issue prior to hearing further from the parties. That decision was issued on May 18, 2004. On May 27, 2004, a telephone conference was held with counsel for Mr. and Mrs. Harrison. It was decided the court should issue a decision with regard to the other outstanding issues (child support, spousal support and matrimonial property and debt) on the basis of the evidence presented at trial.

ISSUES

Ongoing Child Support

[3] Mr. Harrison, as the primary custodian of the children, is not, at this time, seeking child support from Mrs. Harrison.

Retroactive Child Support

[4] Mrs. Harrison is claiming retroactive child support beginning in 2003 based on her estimate of Mr. Harrison's annual income being \$236,190.00. In her submission she states:

The Petitioner makes no claim for retroactive child support or spousal support for 2001 or 2002.

The Petitioner claims retroactive child support of \$8,707 for 2003 (\$42,792 -

\$34,085). During this period the children resided with the Petitioner for six weeks and the Respondent for 2 weeks and that schedule rotated.

[5] Mr. Harrison, in responding to the claim for retroactive child support, in his submission, stated:

In (sic) became clear in evidence that all of the support Mr. Harrison paid from the date of separation is not reflected in Exhibit 4. After only briefly reviewing Exhibit 4, Mr. Harrison was able to point out several additional payments, some of which Mrs. Harrison now acknowledges. In our respectful submission, further oversights or errors likely exist which may not have been immediately apparent to

Mr. Harrison during the brief period he was given to review Exhibit 4. We thus respectfully submit that Exhibit 4 be given no weight whatsoever, and that this Honourable Court rely on Mr. Harrison's testimony that he paid support in accordance with their verbal agreements, except when he was not working. We further submit that his evidence in this regard is supported by the fact that Mrs. Harrison never filed an application for interim support of any kind.

Counsel for Mrs. Harrison has indicated in her submissions what the table amount of child support would have been from the date of separation until November 1, 2002, when Mr. Harrison left for Baku. However throughout that time period the Harrisons had shared custody of the children, so the table amount would not have applied. We respectfully submit that it would be more appropriate to attribute 50% of the support paid by Mr. Harrison during that period to child support, and the remainder to spousal support. It should also be taken into consideration that Mr. Harrison received no tax benefit for the spousal support he paid.

Nor does Mrs. Harrison's counsel acknowledge in her submissions that Mr. Harrison paid virtually all additional expenses for the children regardless of whose care they were in, including medical expenses, the cost of counselling, school supplies, school clothes and all extracurricular activities.

In our respectful submission, regardless of whether this Honourable Court accepts Mrs. Harrison's calculations of support or Mr. Harrison's, Mrs. Harrison clearly received generous support for the first two years from the date of separation. Given the circumstances, it is respectfully submitted that any deficiency in the table amount after Mr. Harrison received his pay raise in the spring is more than offset by the generous overpayment of support during the first two years, and we respectfully request that no retroactive order be made."

[6] In *Davey v. Davey* (2002), 205 N.S.R. (2d) 367, Williams, J. reviewed the law relating to retroactive support orders. He stated at p. 384-385:

The factors that govern the discretion to award retroactive support were outlined by

Rowles, J.A. in *L.S. v.E.P.* (1999) 50 R.F.L. (4th) 302 (BCCA) (at para.66):A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors mitigating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent;

(2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end. Factors which have mitigated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application. These principles have recently been specifically adopted by the Nova Scotia Court of Appeal (at pp.6-7, *Conrad v. Rafuse* 2002 Carswell N.S. 181). The Alberta Court of Appeal has recently revisited the issue of retroactive child support making it clear that such orders should be made in appropriate (not only exceptional circumstances) and may make orders that precede the date of commencement of the proceeding (see *Whitton v. Shippett* (2001) A.J. No 1568 (Alta. C.A.) and *Burke v. Burke* (2002) Carswell Alta. 380 (Alta. Q.B.)). Catherine Davey has asked that the child support order be varied retroactive to the date she ‘commenced’ that request.

[7] The parenting arrangements provided by the Harrisons for their three children, especially since the separation in June of 2001, have been somewhat unique and often unclear. In 2003, given what transpired, Mr. Harrison was involved in his children’s lives, especially their health and education, to a far greater extent than is usually the case with a parent whose employment takes him/her away from his children’s community on a regular basis. It does not appear that the children suffered from a lack of available funding during 2003. Mr. Harrison has now assumed total financial responsibility for the children. A retroactive order for child support payable by him to Mrs. Harrison could encroach his ability to provide future support for them. I am also mindful that during this period of disruption Mrs. Harrison withdrew approximately \$5,000.00 from a “children’s fund” which she claimed was necessary to provide for the children’s needs.

[8] Given the foregoing and the factors the court is required to taken into account when considering exercising its discretion toward retroactive child support, I conclude it would not be appropriate to exercise such discretion as it

pertains to Mrs. Harrison's request.

Spousal Support

Relevant Legislation

[9] Section 15.2 of the *Divorce Act*.

[10] Mrs. Harrison seeks ongoing spousal support in the amount of \$1,875.00 per month and a further lump sum payment in the amount of \$10,000.00 to assist her in preparing to return to the workforce.

[11] At the time of marriage Mrs. Harrison was twenty-six years old and employed at the Royal Bank. During her second maternity leave in the fall of 1993, she (then being thirty-one years of age) accepted a severance package as part of the Bank's downsizing process. There was agreement between she and Mr. Harrison that she would remain at home and provide full-time care for their two children. She has returned only briefly to the workforce since that date. At separation, Mrs. Harrison was thirty-eight years of age. In her submission, under the caption "Spousal Support," Mrs. Harrison states:

The parties reached a verbal agreement in September of 2002 that the Respondent would pay combined spousal and child support of \$4,500.00 per month (\$3,500.00 for child support and \$1,000.00 for spousal support) commencing October, 2002. The Petitioner states that she received less than \$4,500.00 per month for the period between October, 2002 and June, 2003.

In June, 2003 the Respondent unilaterally reduced the amount of support to \$3,477.00 per month and the Petitioner states that she received the sum of \$3,477.00 on June 18, 2003, again on August 12, 2003, again on September 1, 2003 and again on October 1, 2003.

Thus it appears that the Respondent unilaterally terminated spousal support as of June, 2003.

The Petitioner submits that she is entitled to spousal support as a result of her long term traditional marriage during which she left the work force to care, full time, for the children of the marriage. The Petitioner seeks an order for periodic spousal support for an indefinite term as well as lump sum spousal support to assist her in preparing to return to the workforce."

[12] Mr. Harrison opposes the payment of any lump sum payment and submits the reasoning of Smith, J. in *Gossen v. Gossen* (2003), 213 N.S.R. (2d) 217 (S.C.),

at paragraph 147 wherein Smith, J. states:

An individual claiming support to upgrade his/her education or to retrain, should provide the Court with a clear plan including complete particulars of the educational program they wish to embark on (including all costs associated therewith), the reason why upgrading or retraining is being suggested and the benefits that he/she expects to obtain as a result of this upgrading or retraining. The Court can then assess the reasonableness of the plan.

[13] I adopt Justice Smith's reasoning on this point. I find that Mrs. Harrison has not presented sufficient evidence to enable an appropriate assessment of the reasonableness of her plan and decline to order lump sum spousal support.

[14] Mr. Harrison acknowledged by his contribution to Mrs. Harrison since their separation her entitlement to spousal support. He submits she is no longer responsible to provide such support at this time for the following reasons: (a) the time that has elapsed since their separation and the financial provision he has made for her during that time; (b) her birth of another child since separation should not impose a continued burden on him to provide spousal support; (c) his income on returning home will be considerably reduced; and (d) he has assumed total child care costs associated with their three children.

[15] Since the separation, much of Mrs. Harrison's time and attention has been consumed by the inability of she and Mr. Harrison to finalize a plan as to the long-term care of their children. It was not until the decision of this court on May 18, 2004, that Mrs. Harrison was made aware she would not be providing day-to-day care for the children.

[16] I conclude Mrs. Harrison was entitled to support at separation and that such entitlement continues. Mrs. Harrison having another child, after separation, impeded her opportunity to become self sufficient but not more than the continued uncertainty as to the care of her three other children. Mrs. Harrison has established a monetary disadvantage arising from the marriage and further monetary disadvantage arising from its breakdown. Mrs. Harrison's lifestyle has deteriorated more significantly than that of Mr. Harrison; further, Mrs. Harrison's parenting arrangement requires her to provide for her three children for considerable periods of time.

[17] Arriving at an appropriate amount of spousal support is always difficult. In this instance, it is further complicated by the financial information available. Mrs. Harrison's main thrust was to be appointed primary care giver for the children.

Her financial information focussed on her monetary needs with four children in her care. Mr. Harrison's information portrayed him as working "off-shore" and earning in excess of \$200,000.00 per year. However, he had further informed the court that he was returning to the area to provide full-time care for his children and there was a distinct likelihood that his income would be considerably less than it had been in previous years. Although Mr. Harrison noted his income would lessen, he also stated, given his personal financial situation, the children's lifestyle would be maintained.

[18] It is ordered that Mr. Harrison will provide Mrs. Harrison with \$1,000.00 per month by way of spousal support. Payments will begin the month he ceased making child support payments to her.

Matrimonial Property and Debt

[19] Mr. and Mrs. Harrison do not agree as to what items should be considered matrimonial property and debt nor the values to be attributed to these items. Justice Hallett in *Gomez-Morales v. Gomez-Morales* (1990), 100 N.S.R. (2d) 137 spoke to this issue and stated at p. 12:

While one attempts to make the calculations with as much accuracy as possible, the basis of such calculations are generally estimates of value by experts. As a consequence, even as a general rule, a Court's division of property is, at best, an estimate of what is fair in the circumstances applying the criteria of the matrimonial property legislation. Furthermore, the Courts are regularly called upon in assessing damages arising out of personal injuries or death to fix amounts involving numerous contingencies and there is no reason why the Court should not do so in determining fair values in matrimonial property cases.

Relevant Legislation

[20] The *Matrimonial Property Act*.

[21] I find this is a situation where the matrimonial property and debt should be divided and assumed equally between the parties.

Matrimonial Property

RRSPs

[22] Mr. Harrison has an RRSP valued at \$83,636.80. I have reduced that figure by thirty percent to notionally account for income tax that will be incurred upon deregistration providing a net value of \$58,545.33. Mrs. Harrison has an RRSP valued at \$58,952.84. Reducing that figure by thirty percent would provide a value of \$41,266.99.

Matrimonial Home

[23] I accept the appraisal of August 2003 that the home had a value of between \$180,000.00 and \$187,000.00 and fix that value at \$185,000.00. This conclusion denies Mr. Harrison's request that the home be valued as of separation and attribute to him any increase in the value since that date because of his financial and personal efforts in that regard. I do, however, accept his proposal that the value attributed to the mortgage be that at separation or \$86,383.00. This acknowledges Mr. Harrison paying the mortgage since separation while continuing to provide child care payments to Mrs. Harrison and allowing her to use the home to some extent while providing child care. I further acknowledge that he did provide her with \$38,000.00 to establish her own residence.

[24] Finding the value of the matrimonial home to be \$185,000.00 the mortgage to be \$86,383.00 and the dispositional cost to be \$13,340.00 this asset has a net value of \$85,277.00.

Household Items

[25] I find the household items have been divided in an equitable fashion.

Children's Fund

[26] Mr. Harrison submits Mrs. Harrison should be assigned an asset in an amount of between \$5,000.00 and \$7,000.00 to reflect her diminishing the children's account. I conclude it would not be appropriate to assign an asset to her as it pertains to this fund. It is noted that one of the reasons I concluded retroactive child support would not be provided to Mrs. Harrison was an acknowledgement that she had used these amounts as child support.

Automobiles

[27] Mr. Harrison has retained an automobile of a value of \$7,000.00 and Mrs. Harrison one of \$10,000.00.

Debts

[28] I find that Mr. Harrison assumes a matrimonial debt of \$9,849.00 and Mrs. Harrison one of \$257.00 as it relates to their income tax obligations.

[29] It is ordered that the various assets and debts should be distributed between the parties as follows:

Assets	Mrs. Harrison	Mr. Harrison
Home		\$85,277.00
Automobile	\$10,000.00	\$7,000.00
RRSPs	\$41,267.00	\$58,545.00
Total Assets	\$51,267.00	\$150,822.00
Debts	Mrs. Harrison	Mr. Harrison
Revenue Canada	\$257.00	\$9,849.00
Net Equity	\$51,010.00	\$140,973.00
2 Net Equity ‘ \$95,991.00		
Equalization Payment	+ \$44,981.00	- \$44,981.00
Less advance payment to Mrs. Harrison (\$44,981.00 - \$38,000.00 ‘ \$6,981.00)		

[30] The foregoing conclusion will require a payment by Mr. Harrison to Mrs. Harrison in the amount of \$6,981.00.

[31] I would ask that counsel for the Petitioner prepare the order.

J.