SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *CB v. AB*, 2024 NSSC 91

Date: 20240328
Docket: 1206-7772
Registry: Sydney

Between:

CB

Applicant

v.

AB

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	January 26, 2024, in Sydney, Nova Scotia
Written Release:	March 28, 2024
Counsel:	Candee McCarthy for the Applicant Alan Stanwick for the Respondent

By the Court:

[1] This is a decision in a divorce proceeding involving parties who were married on June 4, 2011, decided to separate in August 2020, and lived under the same roof until December 16, 2020. They lived together for almost 5 years before their marriage, so their relationship spans 14 years.

[2] The couple have two children, ages 9 and 6. They reached an agreement to share parenting and for payment of child support under the *Parenting and Support Act,* R.S.N.S. 1989, c. 160 (*PSA*), at a settlement conference in 2021. Their agreement is reflected in a Final Consent Order issued July 29, 2021.

[3] CB then filed his Petition for Divorce on January 18, 2022. AB filed a Response and then an Amended Response on April 14, 2022.

[4] The issues to be decided include:

1. Divorce
2. Division of assets and debt
3. Parenting arrangements
4. Child support

DIVORCE

[5] The parties have been separated since 2020. They have not reconciled nor is there any possibility of reconciliation. I'm satisfied that the marriage has permanently broken down, and that all requirements have been met. I therefore grant the divorce. No change of name was requested.

DIVISION OF ASSETS AND DEBTS

[6] The parties own a home which they shared until December, 2020. CB originally wanted to sell the matrimonial home or have AB buy-out his interest. He now says that he wants to buy-out her interest.

[7] AB seeks an order for a deferred division, at least until she is in a position to buy-out CB. She doesn't want to sell.

[8] In December, 2020 when CB left the home, AB stayed with the children, effectively exercising exclusive occupation of the matrimonial home.

[9] CB paid the mortgage for the first year after separation (including the months when they were living under the same roof) while AB paid the trailer loan. They switched responsibility for these debts about a year after separation. AB has been paying all occupation costs of the home since then, including the mortgage.

[10] AB claims compensation for the extra interest she paid on the mortgage after CB refused to lock in at a lower rate when the mortgage came due for renewal. Instead, it renewed at a higher rate in an open mortgage. CB says that it was reasonable not to lock in, as he wanted to either buy-out AB's interest or sell the home. Locking in would have resulted in a penalty.

[11] CB argues in his brief that a court cannot specifically order a buyout of another spouse's interest, but can direct the parties to negotiate same (relying on ***Koken v. Dokueva***, [2014] NSJ No. 307). I don't read Campbell, J.'s decision as saying that a buy-out can't be ordered. What he said was:

> **56** It is my view that, in the absence of overwhelmingly cogent evidence of value, the Court should not direct a buyout by one spouse of the other's interest... Section 15 of the MPA does not provide that authority explicitly. Section 15(a) should be interpreted as providing that authority only when there is no significant doubt as to such value...to conclude otherwise is to engage the Court in an exercise likely destined to operate haphazardly to the prejudice of one spouse and to provide a corresponding windfall to the other spouse.

[12] In this case, the value of the home is known, and the parties agree on the appraised value as of July 29, 2022 at $215,000.00. I am satisfied that it's appropriate to order a buy-out in these circumstances.

[13] In his spreadsheet calculating the proposed asset division, CB presented figures based on the mortgage balance as of February 8, 2022. On that date it was $100,426.85. AB presented a similar spreadsheet, but based on the current mortgage balance, which is $93,385.66. However, in AB's submissions her counsel conceded that using the February 8, 2022 mortgage balance benefits his client, and that her claim for compensation for paying the higher interest rate becomes moot if that figure is used. I accept that the higher balance that should be used in calculating the buy-out.

[14] I calculate the net equity in the matrimonial home at $103,533.00. This reflects the appraised value less the mortgage, as well as notional disposition costs (4% realty fees plus tax, as well as legal fees of $1,150 including tax). The

spouse who buys out the other's interest must pay the other spouse half that amount in an equal division.

[15] AB initially asked to defer a sale until the children were older, but she now wishes to buy-out CB's interest in the home. She testified that she hadn't got bank approval yet, as she needs a full year's employment before being approved for a mortgage. So she's asking for some time to complete the buy-out. She did not say when she might qualify for mortgage approval.

[16] CB wishes to buy-out AB's interest in the home. He argues that she isn't in a position to buy him out, and that her suggestion that her buy-out be deferred constitutes an unequal division.

[17] AB has only been employed on a full time basis for a year, with two months off last summer. So although she's had exclusive occupation of the home for three years, I accept that her opportunity to secure mortgage financing arose fairly recent.

[18] I am aware that there's a housing shortage province-wide and in particular, in the Sydney area. I appreciate that CB wishes to move on, but there's no urgency in his receiving his share of the equity as initially suggested. There's no evidence that he plans to buy a home, rather it's likely he'll move into his fiancé's home instead. He has housing alternatives, but AB does not. If she is unable to secure affordable and safe housing, that negatively affects the children.

[19] It's appropriate to allow AB the opportunity to buy-out CB's interest, but not to defer that for long. She will have 30 days from the date of this decision to purchase CB's interest. Should AB not complete the sale within 30 days, CB may opt to purchase her interest instead. He must complete the sale within 30 days of the expiration of AB's option. In that event, AB must vacate the home by the closing date.

[20] Failing completion of a purchase by either spouse during the option periods laid out above, the matrimonial home must be immediately listed for sale through a realtor chosen by CB. He will have control of the sale and is authorized to set the listing price and negotiate a sale price based on the advice of his chosen relator. He may also choose a lawyer to complete the sale and he is also authorized to sign all listing and closing documents should AB not cooperate in doing so.

[21] I direct, pending closing of a sale, and so long as she remains in the home, that AB will be solely responsible to pay the mortgage, property taxes, utilities, and home insurance. If unpaid, these debts will be adjusted on closing to reflect her responsibility to pay them. If she moves before the closing to CB, he will pay those costs and he will be reimbursed half of what he paid (i.e. AB's share) at closing from the proceeds.

[22] Additional terms of a third party sale arrangement include:

- AB must cooperate with viewings;
- Viewings must be arranged at reasonable times with reasonable notice to AB; and
- AB must maintain the property in a suitable condition for viewings.

[23] I retain jurisdiction to resolve disagreements arising from the buy-out or sale of the home. In particular, I am mindful that the figures in Schedule "A" may change if there is a third party sale.

[24] The parties also owned a truck and a travel trailer when they separated. CB kept both after separation, but he traded the trailer in August, 2023 and was given a trade-in value of $28,000 for it. He assumed responsibility for the trailer loan about a year post-separation and continues to maintain the new trailer loan. The payout on the loan for the older trailer exceeded the trade value (Ex 4, tab 7). There's no evidence of the trailer's value when the parties separated, so the only evidence available for calculating a division is from August, 2023.

[25] The 2019 Sierra truck was valued at $45,000 in September, 2022. At that time, the loan balance was $58,034. AB says that the truck shouldn't be included in the asset division because she didn't agree with its purchase, but it was acquired well before separation. It is a matrimonial asset subject to division.

[26] CB will retain the truck and trailer. The values and associated debt are captured in the spreadsheet attached as Schedule "A" to this decision.

[27] CB will also retain his pension, which the parties have agreed will be divided at source for the period of the marriage (the joint accrual period). The parties will equally share any administration fees charged by the pension administrator.

[28] CB also claims half of the household contents as of separation. Neither party provided a detailed list of what was in the home at separation, what items CB took, or what items he wishes to retrieve. Nor have I got evidence of value for the contents. I cannot attribute a value without evidence, so I direct that each party retain the contents in their possession without claim by the other.

[29] When they separated, CB and AB had a number of credit cards and debts. Schedule "A" shows the amounts owing and who took responsibility for what debts. I have not included the portion of the Home Depot debt claimed by CB as it relates to a deck placed on the travel trailer after the parties decided to separate. I have not included the Schwartz debt either. CB used that account to buy furniture for the children after the parties decided to separate and the furniture remains in CB's possession.

[30] AB claims compensation for paying the trailer insurance since 2020. Exhibits 13 & 16 show that the home policy covered both the matrimonial home and the travel trailer that CB took with him. I'm prepared to order compensation, but not in the amount claimed because AB had exclusive occupation of the home after December, 2020 and was responsible for occupation costs, including house insurance.

[31] The trailer premium is shown on the insurance documents. Exhibit 13 shows the premium of $418 for the policy period of November 28, 2022 – November 28, 2023. The following year the premium was $550 (Exhibit 16). I calculate that AB is entitled to compensation of $1,151 for paying the trailer premium to the end of March, 2024.

PARENTING ARRANGEMENTS

[32] The parties agreed to joint custody and a shared parenting arrangement under the *PSA* in 2021. They agreed that AB would have the children in her care from Sunday at 5 pm until Thursday after school. She says that she asked for this schedule to ensure consistency for the children through the school week.

[33] Under that order, CB has parenting time from Thursday after school until Sunday at 5 pm. In the summer his parenting time starts on Thursday at 9:30 am and ends on Sunday at noon.

[34] When the Final Consent Order was issued, AB was working part-time and planning to return to school on a full-time basis. She now works full-time.

[35] She seeks to vary the order to allow her an overnight with the children on Saturday every second week. She says this would permit her to spend more time with the children. She says that with their homework, her work obligations, and the children's activities, she gets very little quality time with them during the school week.

[36] CB wishes to maintain the current schedule, which he says meets the children's needs. He doesn't wish to disrupt their routine. However, if the parenting arrangements are to be changed, he seeks primary care and decision-making responsibility.

[37] CB argues that AB has a higher burden to prove a material change, given that the 2021 order was reached by consent. I reject that argument, as the civil onus doesn't change from a balance of probabilities.

[38] This hearing was held under the *Divorce Act*, RSC 1985, c 3 (2nd Supp)(*DA*). The *PSA* order is entitled "Final Consent Order". CB relies on ***CFF v. MRF***, 2012 NSSC 426 (citing ***Yu v. Jordan***, 2012 BCCA 367) to argue that the onus is on AB to prove, on a balance of probabilities, that there's been a material change in circumstances since the *PSA* order was issued. He further argues that she has not met the test.

[39] AB concedes that she must prove a material change in circumstances. She says the fact that she now works full time constitutes a material change, and that if those circumstances had existed in 2021, a different parenting order would have resulted.

[40] I agree that AB must prove that there's been a material change in circumstances in order to vary the parenting arrangements, per s.17 of the *DA*. A material change is one that affects the children's needs or the ability of the parents to meet those needs. I find that AB has not met the onus of proving a material change since the consent order was negotiated and issued.

[41] In reaching that conclusion, I make the following findings:

- AB's change in work status isn't material, in that she was planning to return to school on a full-time basis within months of the settlement in 2021, and now she's a full-time employee. Both scenarios require her to be out of the home Monday to Friday; and

- AB's anticipated change to student status and then full-time employment was known to the parties in 2021.

[42] Since I have not varied the *PSA* Order, I decline to grant CB's request for primary care and decision making-responsibility. However, the parties agree that they will offer the other parent first option to care for the children when they cannot. That change to the order will be made by consent.

[43] Both parties sought other "tweaks" to the existing order, but without a material change in circumstances, I cannot vary the order. One such change involves CB's request for the right to take their son to his IWK appointments in Halifax on an alternating basis. AB doesn't agree and notes that the order already permits CB to attend all appointments. She says that he hasn't gone to recent appointments because the IWK wouldn't allow him to attend without a COVID-19 vaccine. CB says that he didn't attend because he doesn't get notice early enough. I find that it's a combination of both circumstances.

[44] Clause 3 of the Final Consent Order states that "Both parties must be informed and able to attend all appointments concerning the children and shall have access to all third party records involving the children." The order doesn't say who must inform whom. The IWK sends appointment notices to AB only. In effect, unless AB tells CB about the appointment, he's left with no knowledge of when appointments are scheduled (short of calling the IWK periodically to check if there are appointments pending, which isn't practical).

[45] It's clear that communication has been challenging for the parties. The Final Consent Order is silent on a subject that in most cases is a foundational issue. Communication can make or break a co-parenting arrangement. Therefore, as an incidence of the shared parenting arrangement, I'm directing that a clause be added to the order dealing with communication to address that omission.

[46] I direct that the parties immediately acquire and start using a communications app such as Our Family Wizard. CB will pay the first year's cost for both parties, and thereafter each parent will pay their own annual fee.

[47] AB must populate the App calendar with all scheduled medical appointments for the children, as soon as she is given an appointment date. If CB wishes to attend an appointment, it's up to him to satisfy the healthcare providers' requirements for in-person attendance.

[48] CB asks that AB also populate the App with the dates for important school events, but he has access to the schools portal and remains responsible for staying up-to-date on the school calendar.

[49] The parties will discuss and agree on s.7 expenses through the App to avoid confusion and disagreement. AB must upload receipts or estimates for CB's review if she seeks his contribution.

[50] Communication must be child-focused and appropriate. In case of emergency, obviously the parties must communicate by phone, but otherwise the App will be their primary means of communication.

CHILD SUPPORT

[51] In order to fix the appropriate amount of child support payable, I must first determine the incomes of the parties. CB is a member of a First Nations Band who works on reserve, so he doesn't pay income tax. His reported income must therefore be grossed up. He concedes this.

[52] AB also argues that CB receives monies from the Band throughout the year, which he denies. He says that he only received $200 per child at Christmas. AB advanced no proof of additional payments, so I accept that this is the extent of Band payments made to CB. I decline to impute these payments as income though, because the monies are for the benefit of the children. AB has received monies from the Band for medical travel expenses that are similarly for the benefit of the children.

[53] At a pretrial conference before the trial, counsel raised the question of whether CB is living common-law with his fiancé and whether her income should be disclosed. I advised counsel that I would hear the evidence and determine whether there's a common-law relationship first, before ordering CB to disclose his fiancé's income. If disclosure was to be ordered, I advised that I would bifurcate the hearing to address child support under **Contino v. Leonelli-Contino**, 2005 S.C.R. No. 65, and s.9 of the *Federal Child Support Guidelines*, SOR/97-175, s. 4 (*CSG*).

[54] After hearing the evidence, I find that:

- CB and Ms. M are engaged to marry;

- CB's travel trailer was parked on his fiancé's land through the winter, but he lived in it at a local RV park during the warmer months;
- CB may eventually move into Ms. M's home, but for now he continues to maintain separate accommodations for him and the children;
- CB and Ms. M are not sharing household expenses at present.

[55] Based on these findings, there's no obligation on CB to disclose his fiancé's income.

[56] Both counsel prepared income calculations for their closing submissions which I've reviewed. I accept the income figures presented by CB as most accurate, especially as it relates to EI income and the gross-up. I find the parties incomes are as follows:

	2022	2023
CB	$44,941	$49,886
AB	$38,916	$45,891

[57] Both counsel also presented calculations for child support payable on a set-off basis in the event no further income disclosure is ordered for CB's fiancé. Both argue that it's appropriate to order a straight set-off of child support under s.9 of the *CSG*. I accept that submission, because there's no evidence that the shared parenting arrangement increases costs for either parent and the means, need, and other circumstances of the children and parents don't demand a different amount.

[58] Using the 2023 income figures, I calculate the current set-off amount of child support payable by CB to AB at $50 per month. I direct that he pay that sum effective January 1, 2024 and continuing monthly until further order of the court.

[59] CB claims compensation for overpayment of child support since 2022. He paid support under the Final Consent Order on a set-off basis. The order shows a monthly payment of $158.53 but not the off-set table amounts. In 2022 based

on the incomes above, CB should have paid $653 and AB should have paid $574, meaning CB should have only paid a set-off amount of $79/month. He therefore overpaid child support in 2022 by $954.

[60] In 2023 the set-off is calculated as $716 - $666 = $50; CB paid $158.53/month so the overpayment was $1,302 for the year. The total overpayment for 2022 and 2023 amounts to $2,257. Assuming CB paid the same amount ($158.53/month) for the first three months of 2024, he's entitled to credit for those months as well, which adds $326.00 for a total owing of $2,583.00 to CB.

[61] AB claims a contribution to the children's s.7 expenses, namely after-school childcare since 2022. She relies on clauses 23 and 24 of the Final Consent Order to support her claim.

[62] Clauses 23 and 24 read:

> 23. The parties agree to equally share all section 7 expenses that are discussed and agreed upon in advance.
>
> 24. Both parties agree current section 7 expenses include the afterschool program for both children beginning September 2021.

[63] CB argues that clause 24 was directed at only the 2021-22 school year and that before he's required to contribute to other s.7 expenses, including childcare, clause 23 requires the parties to discuss and agree. He also says that he was available and willing to care for the children on storm or in-service days, but he says his offer was refused. AB says he told her they should each make their own arrangements. CB seeks first option to provide childcare if AB needs it in the future.

[64] AB says that she's willing to provide CB with first option to care for the children during the school week. The order will include that provision by consent. However, CB must recognize that if he doesn't respond in a timely way, AB must arrange childcare on her own and cannot be left scrambling at the last minute. To that end, I direct that in cases when there's an unexpected event that causes the children to miss school, such as illness or cancelation due to weather, CB must respond within an hour of being alerted by AB. Failing a response, or in the event he's not available, AB will be entitled to make her own arrangements. For scheduled dates when the children won't be in school, CB must respond within 24 hours of being offered the option.

[65] AB claims a retroactive contribution to childcare expenses. However, she argues that the subsidy she received while attending NSCC was for her benefit only, and that CB should pay his proportionate share of the full childcare expense. CB says that the subsidy should be deducted before any childcare expense is split between the parents. He notes that her argument fails to recognize s.7(3) of *CSG*, which requires the court to take into account such subsidies:

> **Special or extraordinary expenses**
>
> **7 (1)** In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
>
> **(a)** child care expenses incurred as a result of the employment, illness, disability or education or training for employment of the spouse who has the majority of parenting time;
>
> …
>
> **Subsidies, tax deductions, etc.**
>
> **(3)** Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

[66] In determining whether CB owes AB any monies for retroactive childcare expenses, I must consider his argument that clause 24 references childcare expenses for the 2021-22 school year only. He says that after-school childcare expenses in years after that are subject to clause 23 of the order.

[67] I find the most logical interpretation of clause 24 when read in conjunction with clause 23 is that the parties agreed that the only "current" s.7 expense was childcare. However, they recognized that other s.7 expenses could arise. Clause 23 provides a mechanism for addressing those new expenses, i.e. they will discuss and agree upon such expenses before requiring a contribution from the other parent.

[68] I conclude that CB therefore owes AB for childcare dating back to 2021. I have calculated the amount owing based on the net childcare expense after taking into account the subsidy AB received for childcare. The entire subsidy provided

by the province ($3,101) should be deducted, as it was paid for that express purpose.

[69] I have not included in my determination of childcare expense any monies AB claims to have paid her mother. The evidence doesn't satisfy me that those monies were actually paid, as she provided no records, dates, or daily figures, other than an estimated total. I have also considered the fact that CB offered to care for the children on days the children were sick or school was canceled.

[70] Nor have I included in my calculations the amount AB paid for camp, as she conceded that she didn't discuss that expense with CB in advance. Exhibit 18 confirms that. However, I accept that she paid $2,280 for after-school care during the 2021–2022 school year and $1,590 during the 2022–2023 school year. The total paid is $3,870 less $3,101 for a net of $769. CB must reimburse AB half of that sum ($384.50).

CONCLUSION

[71] The amounts due from AB to CB will be set off against the amounts he owes her. The net sum owing from AB to CB is therefore $1,047.50 plus the equalization payment shown on Schedule "A" if she buys his interest in the home. If she does not buy-out CB's interest, the amount she owes him must be deducted from his payment on closing if he buys her interest. In the event of a third party sale, her share of the proceeds will be adjusted accordingly.

[72] The parties have met with mixed success. Absent an offer I must consider, each party will bear their own costs of the litigation. If either party wishes me to consider the costs implications of a settlement offer, they must schedule an hour on the docket on notice to the other party.

[73] The Petitioner's counsel will prepare the orders.

MacLeod-Archer, J.

SCHEDULE "A"

DIVISION OF ASSETS						
		Comments		**Value**	**CB**	**AB**
MATRIMONIAL ASSETS						
Real Estate:						
1) Matrimonial Home				215,000.00		
Less: Mortgage				100,427.00		
Other Debt						
Commission 4%			0.04	9,890.00		
Legal Fees		incl HST		1,150.00		
Net Proceeds				**$103,533.00**		
Net Proceeds of Real Estate:						
1) Matrimonial Home				103,533.00		103,533.00
Pensions:						
CB pension divided at source						
Vehicles:						
travel trailer				28,000.00	28,000.00	
truck				45,000.00	45,000.00	
TOTAL MATRIMONIAL ASSETS				**$176,533.00**	**$73,000.00**	**$103,533.00**
LESS: **MATRIMONIAL DEBTS**						
Peoples		net of sale proceeds		3,574.00	3,574.00	
Home Depot		AB account		673.00		673.00
Home Depot		CB account		4,775.00	4,775.00	
BMO LOC				3,190.00		3,190.00
Fairstone				2,954.00	2,954.00	
trailer loan				30,484.00	30,484.00	
truck loan				58,034.00	58,034.00	
NET MATRIMONIAL ASSETS:				**$72,849.00**	**-$26,821.00**	**$99,670.00**
Equalization Payment:					63,245.50	-63,245.50
NET MATRIMONIAL ASSETS (AFTER DIVISION)					**$36,424.50**	**$36,424.50**