

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Dillon v. Dillon, 2004NSSC273

Date: 20041209

Docket: 1201-55171

Registry: Halifax

Between:

David Edmond Dillon

Petitioner

v.

Kelly Anne Elizabeth Dillon

Respondent

Judge:

The Honourable Justice Mona M. Lynch

Heard:

June 29 & 30, November 1 and December 9, 2004, in
Halifax, Nova Scotia

Written Decision:

June 16, 2005

Counsel:

Colleen J. Scheuer, for the Petitioner
Heather McNeill, for the Respondent

By the Court:

[1] This is the matter of David Edmond Dillon, who is the Petitioner in the matter, and Kelly Anne Elizabeth Dillon. They started living together in 1984 and were married on May 6, 1989 and separated in May 2000. It was a 16-year relationship and they have a 17 year old child, Curtis, who was born in July of 1987.

[2] During the relationship David Dillon was the primary bread-winner and Kelly Dillon worked part-time as a waitress throughout most of the marriage, but her money was not put into the household. Kelly Dillon bore the brunt of the parental responsibilities as David worked away at sea for seven and up to ten months of the year.

[3] The absence of David Dillon from the home caused difficulties in the marriage and Kelly Dillon admitted to David Dillon in 1993 that she had a gambling problem, and as a result of this David Dillon cut her off from access to bank accounts, etc. Eventually all the cards and debts were only in his name. He wrote cheques for household accounts and for bills while he was at sea and he had

virtual control over all of the household expenses and money from 1993 onward. He declared bankruptcy after the separation. I believe that was in 2001 and he was discharged in 2002.

[4] Curtis is presently 17 years old and is involved in ballet. In the past he has attended dance school out of the province but he is currently living back in Halifax and is currently taking courses, as I understand it, in dance instruction. He lives a month on/month off basis with each parent as Mr. Dillon is currently working 28 days at sea and 28 days at home. Curtis is with him while he is at home and with Kelly Dillon while he is away. There is currently no child support being paid and David Dillon is paying for all of the expenses associated with Curtis' dancing. Just as a note, Curtis' dancing expenses, as I understand from the evidence that was given, are much less than they have been in the past in that he is certainly not at the National Ballet School and his instruction currently is in dance instruction rather than in dancing.

[5] David filed the Petition on August 28, 2000 and the Answer/Counter Petition by Kelly Dillon were filed September 13, 2000. There are two Interim Consent Orders requiring David Dillon to pay for the expenses for Curtis while he

was away at the National Ballet School and third party payments in relation to the matrimonial home.

[6] There was a further hearing scheduled for a number of reasons, for child support and that did not happen as a result of Hurricane Juan in the Fall of 2003. Then the trial was scheduled in February 2004 - that did not take place as David Dillon was away at sea. The trial began on June 28, 2004. It didn't conclude in June and was concluded on November 1, 2004. The parties provided written submissions in relation to RRSPs and the \$10,000.00 that David Dillon received when he left his employment at Canada Steamship Lines.

[7] The custody and access agreement, as I indicate, is not in dispute. That is going to continue and the 28 days with each parent.

[8] The issues are the divorce. I find that certainly Kelly Dillon, the Respondent, is ordinarily resident in the Province of Nova Scotia for at least one year immediately preceding the commencement of the proceeding. There has been no collusion or other things that would bar the divorce. I find the parties have been living separate and apart since May of 2000, so for at least one year prior to

the hearing of the divorce and I grant a divorce to the Petitioner on the grounds of breakdown of the marriage and separation for one year.

[9] The next issue is child support and section 7 expenses. Kelly Dillon is seeking retroactive child support from July 1, 2001 until the date of the decision and on-going child support after that time. She is also seeking to be relieved of her obligation to pay the section 7 expenses for Curtis. David Dillon paid for all the dance expenses for Curtis during this time and the Interim Order from September 2001 ordered him to continue to do so in lieu of child support. However, this Order also required him to pay the mortgage, etc., which didn't have to be paid as the house was sold in 2000 and it also referred to Curtis being at the National Ballet School but he had been with Kelly since July 2001. As I have also noted, it also indicated that he was on unemployment insurance although he was employed at that time.

[10] In relation to the retroactive support, I consider the Nova Scotia Court of Appeal case of *Conrad v. Rafuse* which was referred to by both parties and I look at the factors. I find that there was a need on the part of Kelly Dillon. Evidence in the affidavit shows that she was struggling at that time. She made a request to Mr.

Dillon for child support which he did not provide. There was no delays in bringing the application. It would have already been heard except for the intervening circumstances which I've indicated which were the hurricane and other intervening events. Mr. Dillon certainly had notice that she was seeking child support. It was clear since 2000 when she filed her Answer and Counter Petition. I have to consider whether the order would cause unreasonable or unfailed burden to Mr. Dillon and I find that it will not. He was aware of the requests and I don't find it would be a redistribution of the wealth.

[11] I find that Mr. Dillon should have paid the child support for Curtis from July 1, 2001 to March 1, 2003 in the Table amount. Mr. Dillon's income for 2001 was comprised of \$15,405.12 from N.M. Patterson; \$17,233.74 from Oceanex and \$11,924.00 from E.I. for a total of \$44,562.00. Therefore, for the months of July 1 through to December 1, 2001 he should have paid \$371.00 a month to Kelly Dillon for the support of Curtis.

[12] For his income for 2002 that was more difficult as I didn't have an income tax return for him. I used the Statement of Financial Information which was filed on September 3, 2002 and the pay stubs in that Statement of Financial Information

show a year-to-date at the end of July 2002 to be \$35,660.00. Divide that by 7 and multiple by 12 and I get his income for 2002 to be \$61,231.00 and he should have paid \$503.00 a month for January through to December 2002.

[13] In 2003 his income was \$75,310.00 and for the months of January and February he should have paid \$604.00 per month. For March 1, 2003 to and including December 1, 2004 I have to consider section 9 of the Child Support Guidelines which requires me to consider the table amount for each spouse, the increased cost of shared custody and the conditions and needs of the spouses. Certainly in this case the table amount for David Dillon would be \$604.00 per month based on his 2003 income. Her income for 2003 is shown in her income tax return to be \$11,192.00. Based on the testimony that I have, I would add to this for the non-taxable nature of the tips she receives and impute more income to Kelly Dillon to make her income \$15,000.00 for the year 2003 and making the Table amount for her to be paid to be \$127.00 per month. And that would leave a difference of \$477.00 per month.

[14] Now there are cases certainly, such as *Dean v. Brown*, that use half of the difference and others such as *Contino* from the Ontario Court of Appeal which has

used other multipliers. In this case I consider that Kelly Dillon is in a much lower income bracket than Mr. Dillon and while Mr. Dillon pays for a lot of the extraordinary expenses, they have been much lower in recent times for dance. There are still everyday expenses for school, clothes and food that must be provided for Curtis when he is living with Ms. Dillon and in this case I find because of the vast difference in the incomes of the parties, I am going to order that Mr. Dillon pay \$477.00 a month in child support to Ms. Dillon for Curtis. This is an amount payable from March 1, 2003 through to and including December 1, 2004 and each and every month until further order of the court.

[15] I am going to order, as well, that the parties exchange income tax returns on or before June 15, 2005 as well as their Notices of Assessment by June 15th of each year thereafter.

[16] The section 7 expenses, the bulk of those, for Curtis have been in the past. David Dillon indicates that he's made costumes. Curtis is now in an instructing class rather than in competitive as I understand the evidence and I'm unclear as to what the present costs are. I understand that the current classes were paid by Mr. Dillon and they are paid up or it lasts until June of 2005. The current section 7's

were not clear and I won't make an order for section 7 expenses as it's not clear to me that Mr. Dillon was looking for Ms. Dillon to pay those expenses. And I do find, based on the interim orders that were made and the income differential, I'm not ordering any retroactive and I didn't understand that that was being sought by Mr. Dillon. If it was, again, I would look at the vast income differential and I would exempt Ms. Dillon from the section 7 expenses.

[17] I would provide in the order that Mr. Dillon continue to cover Curtis for the medical and dental as he has continued to do.

[18] In spousal support, the first thing I have to look at is entitlement. The parties were together for sixteen years. Everything in the family was arranged for Mr. Dillon's career. He was away from home for up to ten months a year and she was alone with Curtis. The evidence that I accept is that he didn't want her to work anymore because of the taxes. He took courses. She bore the brunt of the child caring and while she had opportunities to upgrade, the only one definitely clear is that she was looking to take a cosmetology course that was cancelled. She, at the present time, has no marketable skills except for the profession she is in, waitressing. I accept that the nature of that business is part-time and she has

asked for and received more hours. She has never worked full time while they were together. She was interested in the cosmetology course which was cancelled and she has not pursued that since. Mr. Dillon's counsel indicates she can get full time work where she is or other full time work as a waitress but that wasn't what I understood from the evidence from Ms. Dillon which is that there isn't any full time work. She asked for the extra hours and received them. She is working as much as possible in her current employment and full time work is difficult to find in waitressing. I find that sixteen years is a relatively long marriage. The functions during the marriage placed Kelly Dillon in a position of dependency. She suffered economic disadvantage from the marriage and the breakdown, however, she must recognize that she must, as far as practicable, make efforts to promote her self-sufficiency. I would not find she was disintitiled because she is living with Mr. Spencer but I will take that into consideration in considering the quantum as her expenses are less.

[19] I do find that she is entitled to spousal support. Looking back with regard to retroactive spousal support and I look back at the orders, the house was sold in 2000. Mr. Dillon went bankrupt. He paid for expenses for the home and the bills. He paid for Curtis' expenses and I, therefore, am not going to order retroactive

spousal support as he was covering a lot of the expenses and some of the interim orders were certainly in lieu of spousal support, the payments he was making. As I said, I am considering what he paid, as well, for Curtis' expenses. I will order on-going spousal support in the amount of \$500.00 per month and that should begin on the 15th of December and be on the 15th day of each month thereafter.

[20] There was some indication in the material before me that Mr. Dillon did not want the payments to be made directly to Kelly and that was the way it was set out in the interim orders. I do not find any evidence before me to make an order that it be paid other than to Kelly. I find that she has dealt with the gambling and there is no reason not to pay her directly. She is not, as the evidence indicated, in debt. She is not in overdraft in her bank account. There is no evidence that she continues to have a problem with gambling or with money and I order that the child support and spousal support be paid directly to Ms. Dillon.

[21] The other issue is the property division. Both parties assert that the other has unreasonably impoverished the matrimonial assets and basically, therefore, they should be entitled to an unequal division of the remaining assets. Mr. Dillon asserts that she spent \$75,000.00 - \$90,000.00 over the course of the marriage on

gambling. He agrees, however, that Curtis never went without, not without food, not without care while he was away and he was away for extended periods of time where Ms. Dillon would have been home alone with Curtis. She indicates that her estimate would be more like \$10,000.00 over the course of the marriage. She was forthright. She admitted to forging cheques and using Sears gift certificates and pawning two of the household items but not to the extent that he suggests. She says five cheques. She says she borrowed \$500.00 from his family and pawned the saxophone and the camera. She indicates she went for counselling and Mr. Dillon indicates that he attended with her. He couldn't really, you know, point to things in bank accounts or whatever that were as a result of Kelly Dillon's gambling. He took over control of the finances in 1993 and then she only had cheques for her and wrote cheques for the bills and she had no control over the assets or the bills from that time until time of separation. He set up two accounts, one for the household and one for which she had no access to and he used to pay the bills and she had access to another account to which he deposited money, a limited amount of money. Her bank account shows that she had a surplus in the account, not a deficit, and that is not consistent with her taking every penny and using it for gambling. I don't find that the evidence supports that the amount is close to what he asserts and I find it much closer to the \$10,000.00 put forward by

Ms. Dillon and over the sixteen year relationship I don't find that that would impoverish the assets. It really, over a twelve year period even, is less than \$100.00 a month and less than other people would spend on entertainment in a monthly amount.

[22] She points to his excessive spending. The bills were high. The management of the household finances were poorly done. There was cash advances on credit cards, advances on lines of credit to pay bills, purchases that could be described as extravagant. He's gone bankrupt on two occasions. Credit cards were way up; line of credit was way up and certainly Kelly Dillon had no access to those cards or line of credit.

[23] When I look at it all, I don't find that there is any basis for anything except an equal division of the property. Mr. Dillon bases his claim on her gambling and I don't find that that impoverished the assets to any extent. I don't find that an equal division would be unfair or unconscionable, taking in all of the factors and section 13 of the *Matrimonial Property Act*, either by unreasonable impoverishment or from the debts and liabilities. When I look at the gambling and

the poor financial management I find that it comes out to an equal division of property.

[24] When I look at the assets the first Statement of Property in 2000 included the house, the furniture, the pension with Canada Merchant Services of \$123,688.07 and an RRSP with Scotia Bank for \$47,815.33. The house has since been sold and the equity in the house has been divided. The furniture has been divided.

[25] Ms. Dillon asked me to find that she was taken advantage of in relation to the division of the property. There had been an appraisal done and Mr. Dillon offered to pay her, based on that appraisal. The onus was on her to establish that that was an unconscionable transaction and I don't have enough to establish that on the evidence before me and I, therefore, find that that property division stands as it is.

[26] The pension, I don't have the latest figures in relation to the pension and there was some confusion as to what the pension was. I think in the first Statement of Property it was labelled as a pension and in the second as an RRSP. I

understand from the questions that I asked, that it is a locked-in RRSP and the last Statement of Property from 2002 indicates a value of \$116,255.62. The evidence from Mr. Dillon was that it hasn't been touched since ... forever, it's always been locked in at that amount. So the present value is not clear but I find that the whole amount is a matrimonial asset.

[27] The RRSP in 2000 was \$47,815.33. He cashed in \$19,906.39 according to his 2000 income tax return, he indicates to live on, to pay the bills and the rest of it was lost in bankruptcy. He also, Mr. Dillon's testimony, was that there was a loan of \$29,000.00 owing on the RRSP to put the money into the RRSP and in effect the only amount that would be a matrimonial asset based on the amount that was in there and the amount owing on the loan was \$18,815.33. And if that was still intact, it could have been subject to a spousal roll-over. However, it's not based on what Mr. Dillon took out and the rest being lost in bankruptcy.

[28] The other matter I have to consider is the \$10,000.00 - either severance package or employment settlement which Mr. Dillon received when he left Canada Steamships. He indicated it was an agreement and indicated it was a confidential agreement. As a result there are no details as to the basis for which he was

provided the \$10,000.00. His employment ended about four months after the separation and based on the evidence I have heard, I am not clear on what the purpose of the \$10,000.00 was. It could have been based on years of service; it could have been for future earnings. The cases provided such as *Ross v. Ross* provide that it would have been up to David Dillon to establish that it falls under an exception under section 4 of the *Matrimonial Property Act* and as I said, I'm left still wondering whether it was for severance pay or for future income and not a matrimonial property. So, it being up to him to prove that it was excluded, I find he has not done that so I find the \$10,000.00 is a matrimonial asset.

[29] Based on what I have found, the pension should be divided equally with the exception of an additional \$14,407.66 to Kelly Dillon which represents half of what I found would have been left as a matrimonial asset in the RRSP had he not taken the money out which was \$9,407.66 and the \$5,000.00 from the severance. And I am giving her more of the pension because there is no other assets to provide to give for that, so the pension is equal except for the additional \$14,407.66. All other assets are to stay divided as they currently are.

[30] Now, I wasn't sure whether or not the payments that are to be made, whether or not Ms. Dillon is requesting them to be made through Maintenance Enforcement. I would order that the payments be made through the Maintenance Enforcement Program.

[31] Is there any other matters that I didn't deal with?

[32] Ms. McNeill: Can I just get you to run over the pension - I have it as an equal pension with the exception of an additional \$14,407.66 which would include the division of the RRSP, the \$18,000.00 or whatever it was, and the \$5,000.00 severance.

[33] Ms. Scheuer: Was that calculated net of tax, My Lady?

[34] No, it was not because the RRSP would have been able to be done with a spousal rollover had it been left intact but that wasn't done because he had taken it. Who is going to prepare the order?

[35] Ms. McNeill: I'll draft the order.

[36] Ms. Scheuer: Will you be issuing a written decision, My Lady?

[37] No, this is the decision. Thank you.

Lynch, J.