

2000

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Phinney v. Phinney, 2000 NSSC 68

BETWEEN:

CARL S. PHINNEY

PETITIONER/RESPONDENT BY COUNTER-CLAIM

- and -

ELIZABETH D. PHINNEY

RESPONDENT/PETITIONER BY COUNTER-PETITION

D E C I S I O N

HEARD: at Truro, Nova Scotia, before the Honourable
Justice Hilroy S. Nathanson on November 7, 2000

DECISION: December 5, 2000

COUNSEL: Ms. Peggy Power, solicitor for the Petitioner
Ms. Anne MacL. Malick, Q.C., solicitor for the Respondent

NATHANSON, J.:

- [1] At a hearing on November 7, 2000, this Court disposed of issues concerning custody and access, division of matrimonial property, the quantum of child maintenance, and entitlement to spousal support. The Court reserved decision with respect to the quantum and duration of spousal support.
- [2] The Court awarded joint custody with primary care to the wife, and specific access to the husband. The Court ordered an equal division of the matrimonial property. The Court set the husband's income at \$41,000.00 per year and, in accordance with the federal guidelines, ordered child support for the two children of the marriage in the amount of \$567.00 per month, commencing December 15, 2000.

ISSUE

- [3] The Court decided that the wife was entitled to spousal support. The sole issue remaining is the appropriate quantum and duration of that support.

FACTS

[4] The parties were married in 1987. Both were employed at the time. The wife continued to work until 1992. Because of complications of pregnancy, she was advised to take time off. The first child, Aaron, was born on February 22, 1993, and the second child, Ashley, was born on June 29, 1994. The parties agreed that the wife would remain at home with the children until they started to attend school. They considered that there was no financial benefit for her to work while they paid the expenses of daycare. She was out of the work force for approximately four years. During that period, she also provided child care in her home for children of neighbours. Aaron is now seven years of age, and in Grade II. Ashley is six years of age, in Grade I. Both of the parties are now 35 years old.

[5] On account of the husband's employment, they moved several times. The wife was able to obtain employment in each location while she was in the workforce and, when she was not, she provided child care in their home. After Ashley entered school, the wife started a one year teachers' assistant program at the Institute for Early Childhood Development Services at Truro. The parties separated in January, 2000. The wife did not attempt to obtain part-time employment or summer employment. She had previously trained and worked

as a hair stylist; she testified that she no longer liked hairdressing. She had also worked as a waitress, and had training in the banking and financial field.

[6] From January to October, 2000, the wife lived in the matrimonial home with the children. The husband paid all of the associated bills, including mortgage payments, totalling approximately \$1,200.00 per month, plus \$250.00 per month as child support. The wife did not contribute towards the living expenses of herself or the children. In order to carry the burden of the expenses, the husband lived with his brother for a while, sold some personal items, and borrowed money to meet his obligations.

[7] In October, the wife moved out of the matrimonial home to Salt Springs, Pictou County, where she thought that she would be more likely to secure employment as a substitute teacher after she completed her studies. The husband continued to pay the expenses of the matrimonial home. He paid spousal support for 11 months after the separation, and is also paying one-half of the wife's re-training expenses by agreeing to pay one-half of an RRSP loan borrowed for her education. She testified that she has graduated and was being interviewed for placement on the substitute teachers' list, but employment as a substitute teacher is not assured. The matrimonial home is in the process of being sold.

- [8] The husband has lived with a girlfriend in a common law relationship subsequent to the date of separation. His financial information reflects expenses for both of them. He testified that she does not contribute significantly to the household finances. Nor does she work, although she has started to upgrade with high school courses. He testified that she was going through a divorce and was stressed.
- [9] The wife is optimistic that she will be called to work as a substitute after her name is placed on the list. Whether she will indeed be called will depend on circumstances beyond her control. She testified that, as a substitute, she could be able to work 15 hours a week to a maximum of 25 hours, if she is needed and called. She believes her income would then be \$11.86 per hour. If she could secure a permanent position, it would likely be for a total of 25 hours per week. She did not know when permanent positions might be open or the likelihood of her being able to secure one. She will need a vehicle for work; her van needs repairs. She will also require child care for the children when she works. She hopes to be able to take a two year sign language course in the future.
- [10] He has gross income of \$3,450.00 per month; and claims monthly expenses of \$3,078.00, for a deficit after income tax of \$230.00 per month. Her declared

income, not counting his child support payments, is \$165.00 per month, and she expects to start receiving in December an unknown amount by way of GST rebate; her declared expenses are \$2,261.00 per month, for a deficit of \$2,096.00 per month. Counsel for the husband has indicated in her brief that the wife is receiving the child tax benefit of \$408.00 per month, and the GST payment will amount to approximately \$30.00 per month. If and when she is employed as a substitute teacher, she hopes to earn approximately \$1,200.00 per month, which would still leave her with a deficit.

[11] The husband also needs a vehicle for work. His truck is paid off, but is six years old. He estimates that it will cost approximately \$16,000.00 to replace.

LAW

[12] The jurisdiction and duty of the Court with respect to awarding spousal support is set out in s. 15.2 of the **Divorce Act (1985)**:

15.2(1) **Spousal support order** - A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sum, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

(3) **Terms and conditions** - The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions, or restrictions in connection with the order as it thinks fit and just.

(4) **Factors** - In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation;

and

(c) any order, agreement or arrangement relating to support of either spouse.

(6) **Objectives of spousal support Order** - an Order made under subsection (1) or an interim order under subsection (2) that provides for the support of the spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child off the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage;
and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

CONCLUSION

[13] I have tried to take into consideration all the factors in s. 15.2(4) of the Act and have tried to keep in mind the objectives set out in ss. (6). However, it is extremely difficult, if not impossible, to properly consider the condition, means

and needs of the spouses in their present circumstances. A good deal of the financial and employment information supplied to the Court is vague or uncertain. This is especially so in regards to the circumstances of the wife which are, and for some time to come may be, in a state of flux. I consider it desirable to base a decision upon the known, proven facts rather than upon assumptions which may turn out to be too optimistic or excessively pessimistic.

[14] The Court orders that the husband shall pay to the wife the sum of \$750.00 per month by way of spousal support.

[15] The Court further orders that such amount shall be paid until after the wife receives a third pay cheque from employment as a substitute teacher. Thereafter, the amount shall be reduced by \$1.00 for every \$4.00 of gross income which the wife earns from her employment. This should give some hope that the wife may in due course become economically self-sufficient, and should not be a disincentive for her to work.

[16] Whether or not the wife secures employment as she presently expects , approximately one year from the date of this decision the matter of quantum and duration of spousal support should be judicially reviewed. Either party is at liberty to make a summary application before the end of the year 2001 for

such review of by a judge of the Family Court, of the Family Division of the Supreme Court, or of the Supreme Court, as may be appropriate.

[17] Any matter raised in the present application which may not have been dealt with in this decision may be brought to the attention of the Court at the time an Order for Judgment is taken out.

J.