

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Syms v. Syms*, 2017 NSSC 243

Date: 2017-09-18

Docket: *Sydney* No. 1206-6248

Registry: Sydney

Between:

Beverly Syms

Applicant

v.

Harvey Syms

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Theresa M. Forgeron

Heard: March 28, 29, and June 7, and September 18, 2017, in Sydney, Nova Scotia

Oral Decision: September 18, 2017

Written Decision: September 20, 2017

Subject: Family Law

Issues: Business Assets; Imputation of Income; Retroactive Support

Results Husband's property owned before marriage was a matrimonial asset where it was never used in the entrepreneurial sense, where the parties were both involved in its maintenance and renovation, and where the property was intended to be used to finance a summer home.

- Income imputed to the Husband where he was underemployed and involved in the cash economy and where he had an ability to earn more income than was shown on his income tax returns. Given Husband's lack of formal education, and other circumstances, \$22,000 a year was imputed prospectively and retroactively.

- Retroactive child support awarded for 84 months where Husband acted in a blameworthy fashion, the daughter lived in poverty circumstances, and where a retroactive award would be paid over time.

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Counsel: Alan Stanwick for the Applicant
Coline Morrow for the Respondent

By the Court:

Introduction

[1] Beverly and Harvey Syms lived together for over 22 years. Although of limited means, Mr. and Ms. Syms accomplished much during their years together. They developed two properties, built a business and had two children, one of whom is now attending a community college.

[2] Much good should have come from these accomplishments. Unfortunately, it did not. The separation was highly acrimonious. The business failed. Judgements were registered against the parties and their business. And of most concern, Ms. Syms was left to raise their daughter with minimal support from Mr. Syms.

[3] Within this backdrop, I have been asked to determine issues surrounding the classification, valuation and division of assets and debts; the imputation of income; and the establishment of child support on a prospective and retroactive basis.

Issues

[4] I will determine these issues by answering the following questions:

- Is the Atlantic Avenue property a business asset exempt from division?
- What is the value of the assets and balance of the debts?
- What is the appropriate division?
- Should income be imputed to Mr. Syms because he is underemployed?
- Should a retroactive child support order be granted?

[5] Before I examine each of these issues, I will present background information to provide context.

Background Information

[6] The Syms began to cohabit on January 13, 1987. Each party owned a home before cohabitation. Ms. Syms was living in her family home which she had inherited; Mr. Syms was living in his home situate on Atlantic Avenue. It was jointly decided that Mr. Syms would move in with Ms. Syms; the Atlantic Avenue property would be rented.

[7] Although neither party was employed at the time they began to live together, this soon changed. Before the parties developed their business, Ms. Syms worked as a waitress and a store clerk. For his part, Mr. Syms worked as a laborer and then in the garbage disposal business.

[8] In 1988, the parties' son was born and Ms. Syms became the primary care parent. Ten years later, the parties' daughter was born. Ms. Syms continued in her role as primary care parent.

[9] Over time, the matrimonial home was renovated, as was the Atlantic Avenue property. The parties planned to sell the Atlantic Avenue house and use the proceeds to buy a summer home in Framboise.

[10] By 2000, the parties decided to open their own garbage disposal business. They bought the business from Mr. Syms' former employer. Mr. Syms held 51% of the shares, while Ms. Syms held 49%. Mr. Syms oversaw the physical aspects of the operation. Ms. Syms was the book keeper. The business began to grow; the parties enjoyed a modest, but comfortable lifestyle.

[11] In 2001, the family experienced a significant personal tragedy with the death of the son.

[12] In March 2009, after returning from a Florida vacation, Mr. Syms left the marriage. Around this time, the business was experiencing financial difficulties for a variety of reasons, including the high tipping fees charged by the municipality.

[13] The separation was conflictual. Mr. Syms formed a new relationship; he continues in this relationship as of the date of trial. Ms. Syms was emotionally unable to cope. There was little cooperation between the parties on business or other related matters.

[14] After the separation, Mr. Syms managed and operated the business. Ms. Syms no longer took part. Mr. Syms froze the parties' bank accounts. He also transferred and mortgaged the Atlantic Avenue property without Ms. Syms' knowledge or consent. Property was acquired in Framboise. Ms. Syms believes that Mr. Syms and his girlfriend own the Framboise property together.

[15] After the failure of the family business, Mr. Syms found employment with another company. Mr. Syms states that even this employment has now ended and that he is without employment. Mr. Syms states that he has no ability to pay child support.

[16] In the face of this conflict, Ms. Syms filed a divorce petition on August 16, 2011. She sought relief under the **Matrimonial Property Act** and the **Divorce Act**, including a claim for child support. The trial was eventually scheduled before me on March 28, March 29 and June 7, 2017. The following people testified at the trial: Darren Penny, Raylene Doyle, Beverly Syms, John Campbell, Curtis MacPherson, and Harvey Syms. The parties provided both oral and written submissions. The oral decision was rendered on September 18, 2017.

Analysis

[17] **Is the Atlantic Avenue property a business asset exempt from division?**

[18] Mr. Syms states that the Atlantic Avenue property is an excluded asset because it was owned before the marriage, it was never used as the family home, and it is a business asset. Ms. Syms disagrees.

[19] I agree with Ms. Syms. I find that the Atlantic Avenue property is a matrimonial asset for the following reasons:

- Section 4 (1) of the **MPA** states that matrimonial assets include “the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage” unless the property falls within a specified exception. Thus, the fact that an asset was acquired before cohabitation has no bearing on its classification: **Morash v. Morash**, 2004 NSCA 20.
- All real and personal property acquired by either spouse is presumed to be a matrimonial asset which is subject to a presumptive equal division as noted in the **MPA**, in its preamble and in ss. 4, 12 and 13.
- The **Act** must be given a liberal interpretation in keeping with its remedial nature: **Clarke v. Clarke** [1990] S.C.J. No. 97.
- In **Tibbetts v. Tibbetts** [1992], N.S.J. No. 513 Hallet, J.A. held that the court must scrutinize its earlier decisions because of the binding authority of **Clarke v. Clarke**, supra. Hallet, J.A. also noted that the definition of business assets was confined to “assets that are truly of a business character”: para 18, and indicated that the asset must be working in the entrepreneurial sense: para 17.
- The Atlantic Avenue property was not working in the entrepreneurial sense. Indeed, the rent was never even reported to Canada Revenue Agency. The rent was used to pay the mortgage, taxes and insurance. There was little profit.

- Both parties shared in the renovation of the property. Although a carpenter had been employed to perform some of the work, both parties were nevertheless involved. Ms. Syms primarily cleaned and did errand work; Mr. Syms did more of the physical work. Mr. Syms had more time to devote to the renovations because he was freed from domestic responsibilities as these were assumed by Ms. Syms.
- The parties' intention was to eventually sell Atlantic Avenue and purchase a summer home in Framboise.
- In all of my findings, where there is a conflict in the evidence, I accept the evidence of Ms. Syms who I find credible. I do not find Mr. Syms credible.

[20] Because the Atlantic Avenue property is not a business assets within the meaning of the *MPA*, it must be included in the division to be effected.

[21] **What is the value of the assets and balance of the debts?**

Matrimonial Home

[22] The matrimonial home was appraised. Both parties accept the appraised value as representative of its value for division purposes. I therefore will use that figure, which is **\$48,000**.

Atlantic Avenue Home

[23] I accept the appraised value of **\$58,000** as representative of the value of the Atlantic Avenue home. I do not accept Mr. Syms' submission that this property was virtually gutted at the time of separation. I accept Ms. Syms' evidence when she stated that only a few repairs were outstanding as of separation. I do not find Mr. Syms credible.

[24] I further find that Mr. Syms took out a mortgage on the Atlantic Avenue property in 2010, without Ms. Sym's knowledge or consent, so that he could finance the purchase of property in Framboise, with Ms. Parsons Eldridge, his new partner.

[25] I will not discount the appraised value to account for the few renovations completed after separation given the passage of time, the lack of evidence as to the overall cost of the renovations and the post-separation conduct of Mr. Syms.

Trailer Property

[26] The parties did not perfect the purchase of the trailer property next door. In any event, I accept that the trailer was not maintained and neither party is in a financial position to seek enforcement of ownership. I do not include this property for division purposes.

Vehicles

[27] Mr. Syms retained the van after separation which was later involved in an accident. Mr. Syms received insurance money, which Ms. Syms accepts was in the amount of **\$2,100**. I assign this figure for division purposes.

[28] The parties owned a 1953 Buick which was purchased for \$3,000. Mr. Syms took the 1953 Buick from the matrimonial home after separation without Ms. Syms' knowledge or consent. He did so at a time when he knew Ms. Syms would not be home; he knew that Ms. Syms would be in court defending a peace bond application that he had filed against her. While Ms. Syms was in court, Mr. Syms went to her home and removed the Buick and other personal property from the garage.

[29] Mr. Syms states that he then transferred ownership of the car to his brother, again without the consent or knowledge of Ms. Syms.

[30] Mr. Syms states that the Buick was in poor shape. I do not accept his evidence. I find that the 1953 Buick was worth at least **\$3,000** for division purposes.

[31] Mr. Syms retained the 4-wheeler recreation vehicle. I assign **\$1,000** as its value.

Garage Contents

[32] Doing the best that I can with limited evidence, and given Mr. Syms' unsavory conduct in removing the garage contents in the manner that he did which complicated the valuation process, I assign **\$2,000** as their appropriate value for division purposes.

Other Chattels and Household Contents.

[33] Other property existed at separation, including a skidoo, boat and trailer. Each party denies having possession of these assets. It is more likely that Mr. Syms retained these assets, but I have limited evidence as to value. I find that the value of these assets is set off against the value of the household contents which Ms. Syms retained in keeping with the needs of the child. These assets will not be included in the equalization schedule.

[34] I further find that Ms. Syms does not have possession of the personal items sought by Mr. Syms, except that she does have the photos and videos.

Photos and Videos

[35] I will not order Ms. Syms to provide the family photos and videos to Mr. Syms so that he can copy them. Mr. Syms would not likely return the originals. When Mr. Syms provides Ms. Syms with the equalization payment and all outstanding maintenance, and the additional sum of \$500 to cover the cost of duplication, Ms. Syms will then duplicate the requested family photos and videos and provide Mr. Syms with a copy.

Business

[36] I have limited evidence of any current value. There are sizable judgements and debts outstanding. Both parties can retain their respective shares. No value is assigned for division purposes.

Debt

[37] Both parties state that they paid debts after separation. Neither supplied proof of the debt balances at separation, and I will thus not include such payments within the division. I note that both parties were told to supply such proof and no reasonable explanation was provided for their failure to do so.

[38] Two judgements are registered against the parties. Neither party has made any effort to pay. There does not appear to be a collection process in place. The Atlantic Avenue property is likely judgement proof. I will not include these judgements in the equalization schedule. In the event either party actually pays all or a portion of the judgement, then that party is entitled to a judgement from the other party of one-half of the actual payments made.

[39] **What is the appropriate division?**

[40] I am ordering an equal division of the matrimonial assets as follows:

<i>Assets</i>	<i>Value</i>	<i>Husband</i>	<i>Wife</i>
Matrimonial Home	\$48,000		\$48,000
Atlantic Avenue	\$58,000	\$58,000	

Van	\$2,100	\$2,100	
Buick	\$3,000	\$3,000	
Four-Wheeler	\$1,000	\$1,000	
Garage Contents	\$2,000	\$2,000	
Total	\$114,100	\$66,100	\$48,000

Equalization Transfer $\$66,100 - \$48,000 = \$18,100 / 2 = \$9,050.$

Mr. Syms must transfer \$9,050 to Ms. Syms within 30 days.

[41] **Should income be imputed to Mr. Syms because he is underemployed?**

[42] Ms. Syms seeks to impute income, prospectively and retroactively, to Mr. Syms for child support purposes. She states that his reported income does not represent his income earning capacity. She further states that Mr. Syms is engaged in the cash economy and that he underreports his income. She wants \$30,000 a year to be imputed to him.

[43] Mr. Syms strenuously objects. He denies the allegation that he works for cash. He denies underreporting income. He is adamant that his reported income represents both his actual income and his income earning capacity. In support of his submissions, he provided several reasons including the following:

- He has a modest background with few educational or employment opportunities.
- He did not graduate. He only has grade XI.
- His employment experience is limited to manual labor.
- His ability to work manual labor is compromised because of a deteriorating disc, bad spine, diabetes and an itchy skin condition.
- He has never refused work and does the best that he can with his limited skills.

[44] Given these submissions, I must now determine if income should be imputed to Mr. Syms.

[45] In **Smith v. Helppi**, 2011 NSCA 65 (N.S.C.A.), para 16, Oland J.A. approved the factors outlined by Dr. Julien D. Payne, in *Imputing Income, "Determination of Income; Disclosure of Income"*, *Child Support in Canada*, Danrab Inc., August 3, 1999 as quoted by Martinson, J. in **Hanson v. Hanson**, [1999] B.C.J. No. 2532 and by Wilson J. in **Gould v. Julian**, 2010 NSSC 123 (N.S.S.C.). These factors are as follows:

- There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (*V. (J.A.) v. V. (M.C.)* at para 30.)
- When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
- A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
- Persistence in unremunerative employment may entitle the court to impute income.
- A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
- As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[46] In **Parsons v. Parsons**, 2012 NSSC 239, paras 32 and 33, this court distilled other principles applicable to s. 19 imputation claims as follows:

- The discretionary authority found in s.19 must be exercised judicially, and in accordance with rules of reason and justice, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: **Coadic v. Coadic**, 2005 NSSC 291 (N.S.S.C.).
- The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: **Staples v. Callender**, 2010 NSCA 49 (N.S.C.A.).
- The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her income has been reduced or his/her income earning capacity is compromised by ill health: **MacDonald v. MacDonald**, 2010 NSCA 34 (N.S.C.A.); **MacGillivray v. Ross**, 2008 NSSC 339 (N.S.S.C.).
- The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances: **Smith v. Helppi**, 2011 NSCA 65 (N.S.C.A.); **Van Gool v. Van Gool** (1998), 113 B.C.A.C. 200 (B.C.C.A.); **Hanson v. Hanson**, [1999] B.C.J. No. 2532 (B.C.S.C.); **Saunders-Roberts v. Roberts**, 2002 NWTSC 11 (N.W.T.S.C.); and **Duffy v. Duffy**, 2009 NLCA 48 (N.L.C.A.).
- A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self-induced reduction in income: **Duffy v. Duffy, supra**; and **Marshall v. Marshall** (2007), 2008 NSSC 11 (N.S.S.C.).
- The test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.

[47] I have applied the law to the evidence presented at the hearing. In so doing, I impute an annual income of \$22,000 to Mr. Syms for the following reasons:

- Mr. Sym's income earning capacity exceeds what he reports to Canada Revenue Agency, and he likely earns income which is not reported. I find that he did so in the past and likely does so on an ongoing basis.
- Mr. Syms is not credible. His conduct following the divorce is one which focuses on his own needs and protecting his own interests, including transferring and encumbering matrimonial assets without Ms. Syms' knowledge or consent. Mr. Syms will say or do almost anything to protect his own interests.
- Mr. Syms' lifestyle is not in keeping with someone who earns what is reported on his tax returns.
- Mr. Syms has done little to find employment suitable to someone of his skills and years of experience.
- Mr. Syms provided little credible evidence of health issues that limit or prevent him from working. In the circumstances, more than Mr. Syms' self-reporting is required.
- Mr. Syms has an income earning capacity of at least \$11 an hour, which produces a modest annual income of about \$22,000, prospectively and retroactively. Such is fair and reasonable given Mr. Syms' skills, experience and circumstances.

[48] Mr. Syms' ongoing child support obligation equals \$162 per month commencing September 15, 2017 and continuing on the 15th of every month thereafter unless otherwise ordered.

[49] **Should a retroactive child support order be granted?**

[50] Ms. Syms seeks retroactive child support from the date of separation, March 2009 until present. She asks that the lump sum be payable forthwith. Mr. Syms denies an obligation to pay retroactive support, noting that he in fact voluntarily paid child support on a regular basis for a couple of years, and subsequently had and has no ability to pay.

[51] The test for a retroactive increase in child support is set out by the Supreme Court of Canada in **S. (D.B.) v. G. (S.R.)**, 2006 SCC 37. Bastarache J., for the majority, states as follows:

- Child support is the right of the child and such right survives the breakdown of the relationship of the child's parents [para 38].
- The child loses when one parent fails to pay the correct amount of child support [para 45].
- Parents have an obligation to support their child according to their income and this obligation exists independent of any statute or court order [para 54].
- The payment of a retroactive award is not an exceptional remedy [para 97].
- A retroactive maintenance award should be payable from the date the custodial parent gave effective notice to the non-custodial parent [para 118].
- It is generally inappropriate to make a retroactive award more than three years prior to the date when formal notice was provided to the non-custodial parent [para 123].
- The quantum of a retroactive award must be tailored to fit the circumstances of the case [para 128].
- The court must examine and balance four factors when determining the issue of retroactivity [para 99].
- The first factor concerns the reasonableness of the custodial parent's excuse for failing to make a timely application in the face of the nonpayment of child support, or in the face of an insufficient payment of child support [paras 101 and 104].
- The second factor relates to the conduct of the non-custodial parent. If the non-custodial parent engages in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. The determination of blameworthy conduct is a subjective one based on objective indicators [para 108] and the court should take an expansive view as to what constitutes blameworthy conduct in the face of the nonpayment or insufficient payment of child support [paras 106 and 107].

- The third factor to be balanced focuses on the circumstances, past and present [para 110] of the child, and not of the parent [para 113], and includes an examination of the child's standard of living [para 111].
- The fourth factor requires the court to examine the hardship which may accrue to the non-custodial parent because of the non-custodial parent's current financial circumstances and financial obligations [para 115], although hardship factors are less significant if the non-custodial parent engaged in blameworthy conduct [para 116].

[52] I find that Mr. Syms must pay a retroactive child support order for the period of 84 months. I make this finding for the following reasons:

- There was about a two-year delay in filing for child support in the face of the nonpayment of maintenance. I appreciate that Ms. Syms experienced some emotional difficulties at separation. I also find that Mr. Syms was difficult and manipulative. Despite these findings, I conclude that Ms. Syms should have filed a child support application more quickly than she did.
- Ms. Syms is not responsible for the lengthy delay in having this matter brought to trial.
- The parties' child lived at the poverty line, in part because Mr. Syms did not pay child support. I accept Ms. Syms evidence that she received little financial assistance over the years.
- Mr. Syms refused to pay child support despite his legal obligation to support his daughter. Instead, he kept his income tax refunds, bought property and lived a comfortable life – all at the expense of his dependent daughter.
- Mr. Syms has a greater income earning capacity than he reports. He has the ability to pay a retroactive award. In addition, any hardship factors are neutralized because Mr. Syms consistently engaged in blameworthy conduct when he continually placed his own interests ahead of the interests of his daughter.

[53] A lump sum award of \$13,608 is payable by Mr. Syms to Ms. Syms and at a rate of \$160 per month until paid in full.

Conclusion

[54] The following relief is granted:

- A divorce
- A change in Ms. Syms' surname to her maiden name of Sampson.
- An equal division of assets as stated, together with an equalization payment due from Mr. Syms to Ms. Syms in the amount of \$9,050.
- A retroactive child support order due from Mr. Syms to Ms. Syms in the amount of \$13,608 payable in monthly installments of \$160 commencing October 1, 2017 and continuing the 1st day of every month thereafter until the retroactive award is paid in full.
- Ongoing child support due from Mr. Syms to Ms. Syms in the amount of \$162 per month commencing September 15, 2017 and continuing on the 15th of every month thereafter while the child is dependent. Ms. Syms must notify Mr. Syms when the daughter finishes attending a post-secondary educational institution.

[55] If either party wishes to be heard on the issue of costs, written submissions are to be provided by October 15, 2017. Mr. Stanwick is to draft the divorce and corollary relief orders.

Forgeron, J.