

Chaffey v. Chaffey

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Newfoundland Trial Division

Goodridge J.

Heard: November 30, 1976

Judgment: February 11, 1977

Docket: None given.

Counsel: Paul Althouse, for Petitioner

David Day, for Respondent

Goodridge, J.:

1 The parties were married on September 26, 1960. There are two children of the marriage, Sean, born April 2, 1961, and Ian, born August 11, 1964. Both of them are now in the custody of the petitioner.

2 On March 23, 1973, the parties entered into a separation agreement. Their actual separation occurred sometime before that date.

3 Prior to that time a divorce proceeding had been commenced by the respondent against the petitioner in which she sought a divorce on the ground of the petitioner's cruelty. The petition in that proceeding was dismissed.

4 The separation agreement provided inter alia as follows:

(a) that the petitioner should pay to the respondent the sum of \$200.00 per month from July, 1973;

(b) the parties were to have joint custody of the children (the idea apparently being that the children should divide their time between the petitioner and the respondent);

(c) the personal belongings of the parties were to be divided between them with the provision that if any were sold the cash proceeds would be paid to the wife; and

(d) the petitioner was to establish a trailer home for the respondent and make the payments on the same amounting to \$201.00 a month, and when the trailer was paid for it was to become the property of the respondent.

5 Paragraph 11 of the agreement reads as follows:

This agreement shall continue from the execution of these presents until a decree absolute is granted in the Supreme Court of Newfoundland absolutely divorcing the wife from the husband.

6 By petition dated May 26, 1976, filed on June 10, 1976, the petitioner commenced proceedings against the respondent for a divorce on the grounds that there has been a permanent breakdown of their marriage by reason of their having been living separate and apart for a period of not less than three years, and for custody of the children.

7 The petition for divorce is not resisted by the respondent. She has filed an answer seeking access to the children and lump sum and periodic maintenance.

8 The evidence discloses that there has been a separation of the parties for more than three years and on this basis the petitioner is entitled to a divorce on the ground that there has been a permanent breakdown of the marriage.

9 By virtue of Sections 11 and 12 of the *Divorce Act*, the court may, having regard to the conduct of the parties and the condition means and other circumstances of each of them, make an order requiring the petitioner to secure or to pay such lump sum or periodic sums as it thinks reasonable for the maintenance of the respondent and providing for the custody, care and upbringing of the children of the marriage, and, in doing so, may impose such terms conditions or restrictions as it thinks fit and just.

10 It appears to be settled law now that under Section 11 of the *Divorce Act* the court may make one or more of the following orders:

- (a) that a lump sum be secured;
- (b) that a lump sum be paid;
- (c) that periodic sums be secured; and
- (d) that periodic sums be paid;

but it may not order that a lump sum or periodic sum that is ordered to be paid be also secured.

11 Because I am required by the pleadings to make an adjudication on the matter of access and maintenance, it is necessary for me to examine the conduct of the parties and their condition, means and other circumstances.

12 The respondent was not quite 15 when she was married and had had her second child before she was 19.

13 The couple lived at St. Fintan's and later at St. David's, Newfoundland, during the early years of their marriage. The petitioner had an interest in a family business at St. David's known as Chaffey Brothers.

14 He sold this interest in 1968 and he in company with Mr. Leo Hammond bought the shares of a company known as C. & H. Hotel Limited, which owned and operated an enterprise known as Chignic Lodge at Doyles, Newfoundland.

15 The petitioner thereafter lived at or near Chignic Lodge. His wife remained at St. David's but joined him on weekends. Subsequently, she too took up permanent residence with her husband at Doyles.

16 The operations include a motel, restaurant, lounge, cabins, gasoline bar, and hunting facilities.

17 Mr. Hammond concentrated on the operations of the gasoline bar and the hunting facilities while Mr. Chaffey dealt with the other operations.

18 In connection with the operation of the motel, restaurant, and lounge, Mrs. Chaffey played an active part. She worked as receptionist, chamber maid, bar maid and waitress from time to time. She also organized some receptions and private parties.

19 For her part in the operation of the business Mrs. Chaffey received no salary. As frequently happens in such circumstances, she was assisting her husband in making a success of the undertaking.

20 In 1970 or 1971 the marriage began to deteriorate. Mrs. Chaffey's suspected her husband of adultery and according to her he taunted her with admissions of such behaviour and with the fact that she would never be able to prove it.

21 There is evidence that Mr. Chaffey struck his wife on occasions, and that, in fact, on one such occasion, she required medical attention. She was also treated by a psychiatrist during the turbulent years of the marriage.

22 While the petitioner admits striking his wife on one occasion, I am satisfied that his physical abuse of his wife is more extensive than his admission would indicate.

23 Although there may not have been cruelty of such a kind as to render continued cohabitation of the parties intolerable, it appears to me that the husband was by far the greater contributor to the circumstance which led to the separation and the statutory marriage breakdown.

24 Following the separation which occurred in 1972, the petitioner acquired a trailer home and established it at St. David's for the respondent and the two boys. In 1974 the respondent left for Toronto, leaving the two boys with her parents. In January of the following year the petitioner took custody of the

two boys and removed the trailer to a site near the Chignic Lodge where it remains, unoccupied.

25 In establishing the net worth of the petitioner the court was provided with some evidence as to the assets of C. & H. Hotel Limited. No financial statement or balance sheet was put into evidence. Counsel for both parties in argument submitted by brief attempted to reconstruct the balance sheet from the evidence.

26 Rather than consider these submissions, however, I prefer to have reference to the evidence of Mr. Howard Warren, a chartered accountant who audits the books of the Company. He testified that based on the financial information available to him, the Company on liquidation would have a deficiency of approximately \$24,000. This figure was arrived at on the assumption that the improvements constituting the major assets of the Company were valued at \$119,177.00 (which was in fact their book value).

27 Mr. Chaffey in his evidence testified that these improvements would have a value of between \$175,000 and \$200,000. Taking an average of these two figures I calculate the value of the improvements to be \$187,500.00 and if we round out the book value of the same improvements to \$120,000 we find an improvement in the actual financial position of the Company over the book position of \$67,500.

28 Deducting from this the \$24,000 deficit on liquidation we find that the shareholders equity has the probable value of \$43,500.

29 This does not include a figure for goodwill which counsel for the respondent places at \$21,500 and counsel for the petitioner places at nil.

30 The earning position of the Company is not so great as to suggest to me that there is any significant value for good-will in it. Conceding however that some allowance should be made for goodwill, I find that the shareholders equity may be fixed at \$50,000.

31 If I am to determine the petitioner's worth by reference to the liquidation value of the Company, I must allow for expenses arising on liquidation. For practical purposes therefore I cannot consider the shareholders' equity to be more than \$40,000.

32 Half of this figure represents the value of shares owned by Mr. Chaffey and amounts to \$20,000. In addition to this amount, the Company owes him \$32,796. The petitioner also owns a cabin which is valued at \$2,000. The respondent suggests that it is worth at least twice this but there is not evidence of that.

33 The petitioner also has life insurance policies having a value of \$3,510.

34 Putting all these figures together we get some idea of the worth of the petitioner:

Shares of C. & H. Hotel Limited	\$20,000
Due to him by C. & H. Hotel Limited	32,796
Cabin	2,000
Life Insurance	3,510

\$58,806

35 Let us round out the petitioner's worth therefore at \$60,000.

36 The petitioner's income varies apparently according to the fortunes of the Company. It was \$14,000 in 1973, \$17,000 in 1974, but only between \$5,000 and \$6,000 in other recent years. He indicated that he drew approximately \$500.00 per month from the Company, and expected to earn in 1976 a total of \$8,500. This would include of course his drawings plus the amounts charged to him for room and board for himself and the children enjoyed at the expense of the Company.

37 Of the money drawn \$201.00 is paid on account of the mortgage on the trailer home. Under the separation agreement the petitioner was to pay for the trailer home and, when the payments were complete, it was to become the property of the respondent.

38 This appears to be an arrangement which benefits neither. In fact according to the evidence there is more owed on the trailer than it is now worth. It will be several years before it is paid off by which time it presumably will be worth considerably less than it is now.

39 The petitioner's income is not substantial and the expenses which he lists appear to be reasonable. Taking into consideration the fact that he is paying \$201.00 per month to the bank, there is little room in his income to allow for payments to the respondent.

40 The Company's position is not good. It has low working capital and needs improvements. There is increased competition in the area. I do not foresee much improvement in the petitioner's income in the near future.

41 The respondent herself is living in London, Ontario, where she shares an apartment with a male friend, living as husband and wife. They share expenses.

42 She lists her share of the expenses as \$370.00 a month which includes one-half of the cost of long distances calls to her children each month amounting to \$30.00.

43 She has no particular training for work and did not go beyond grade 9 in school. Her capacity therefore to provide for herself is somewhat limited. She has held various positions since she left Newfoundland, including office cleaning, cashier, clerical work and postal work. At the time she gave evidence in early December, 1976, she had the prospect of a job with the post office which she anticipated would terminate after Christmas.

44 Where a marriage is dissolved by divorce, it is frequently desirable to award lump sum maintenance. In determining the amount of such lump sum, reference should be had to the amount by which the wealth of the couple has increased over and above what it was at the time of marriage, excluding increases attributable to extraneous factors such as inheritance.

45 Assuming each party contributed to the marriage in his or her own way, generally with the husband working and the wife keeping the home, but frequently with a mix of these functions with both

working and both helping to keep house, or a reverse of these functions with the wife working and the husband keeping house, then the wife upon divorce ought not be less well off than if her husband died when statutory rights to provide economic advantage to her.

46 There are a great many factors which would have a positive or negative effect upon the results of using this philosophy. I do not propose to attempt to list them here.

47 I do not think that marital fault is necessarily one of the factors having a negative value, even though under the *Intestate Succession Act*, a wife living in adultery may not inherit.

48 The point is that where a couple as husband and wife share their fruitful year each should have a share of the fruit. The fact that the husband's contribution can be measured in a material sense and assets acquired will frequently be in his name does not alter this philosophy.

49 Following the Supreme Court decision in the *Murdoch v. Murdoch*, [1975] 1 S.C.R. 437, it is correct to state that in the absence of legislation, a wife has no interest in the assets of her husband unless she has made a financial contribution to those assets or the husband has established a resulting implied or constructive trust in favour of his wife.

50 There is in this province no provincial legislation empowering the court to make a property settlement in favour of the wife upon dissolution of marriage. This is a 'circumstance' to be taken into consideration under section 11 of the *Divorce Act*. If there were such power the 'means' of the wife might be considered to be greater and therefore the maintenance order would be less.

51 Because there is no such legislation, the wife's means in this case are less than they might otherwise be and the maintenance should therefore be greater.

52 The wealth accumulated during marriage is a useful gauge for this purpose. A lump sum order is a useful device to place some of this wealth in the wife's hands for her maintenance.

53 There has been objection to this being done on the grounds that the wife may remarry. The answer to this is two-fold - first, the remarriage of the wife, as I hereinafter point out, does not legally disentitle her to maintenance, and secondly, and more importantly, this is a type of maintenance that recognizes the contribution of the wife to the marriage, a type of maintenance that she would receive if her husband died, or if there were laws providing for distribution of property on the dissolution of a marriage and of which she should not be deprived. If she had remained single and saved, her savings would provide her with maintenance. When she marries and wealth is accumulated, because of her part in the marriage endeavours a share of this wealth ought in most circumstances be made available to her for her maintenance.

54 In the case of *Thistle v. Thistle* [\(1976\), 9 Nfld. & P.E.I.R. 549, 12 A.P.R. 549](#), I allowed a lump sum payment to the wife of \$30,000 representing approximately 30% of the wealth accumulated during marriage. In that case the divorce was awarded against the respondent on the grounds of her cruelty.

55 In the case of *Gallant v. Gallant* [\(1976\), 9 Nfld. & P.E.I.R. 409, 12 A.P.R. 409](#), I awarded a lump

sum of \$40,000 representing approximately 35% of the wealth accumulated during marriage.

56 I think this case is very similar to the *Gallant* case but I must give some credit to the petitioner for the somewhat nebulous capital benefits that have been bestowed on the respondent under the separation agreement. This consists of the proceeds of the sale of chattels, when sold, and the trailer when paid for.

57 I find the lump sum I would otherwise order at \$21,000 and arbitrarily attribute a capital value to the separation agreement of \$4,000, to produce a net lump sum of \$17,000 payable as hereafter stated.

58 Turning now to the question of periodic maintenance counsel for the respondent urges me not to consider the fact that the respondent is living with another as a bar to her right to periodic maintenance. In the case *Hodder v. Hodder* [\(1976\), 10 Nfld. & P.E.I.R. 82, 7 A.P.R. 82](#), I made the following comment

While I recognize that acts of adultery will not necessarily disqualify a wife from an order for periodic maintenance, I feel that where she choose to share her life her home and her body with another man on a permanent or semi-permanent basis she forfeits her right to periodic maintenance to the same extent as if she remarried.

59 In the English case of *Hyman v. Hyman*, [\[1929\] A.C. 601](#), it was said that a wife cannot barter her right to future maintenance away. It is a matter of public concern.

60 In *Richards v. Richards* [\(1972\), 7 R.F.L. 101](#), the Chief Justice of Ontario said this:

..., we have no power to engraft on the *Divorce Act* additions founded upon public policy. The federal Parliament, by not enacting a provision to the effect that orders for maintenance terminate with remarriage of the wife, has, to that extent, proclaimed public policy. It should be noted that for some years in England remarriage did not automatically terminate a maintenance order.

61 In the case of *Neal v. Neal* (1973), 29 D.L.R.(3d) 754, County Court Judge Tyrwhitt-Drake wrote as follows:

Despite those provisions of s.11 of the *Divorce Act* which put divorced spouses on an equal footing so far as the right to apply for maintenance is concerned, I do not think that society has rejected the custom that, under normal circumstances, a husband is generally expected to support his wife. If this is so, it does indeed seem wrong to saddle a man with the responsibility of maintaining his former wife after she has contracted another marriage. Quite apart from any obligation the second husband might have to support his wife, the notion of the first husband's obligation, which arises only out of a judgment, continuing to operate in these changed circumstances, is repugnant not only to the concept of the finality of divorce, but to the fact that the second marriage has put yet another barrier between the two original spouses. Suppose a woman divorces and marries a series of men: must they all contribute to her support? To ask such a question is to answer it - no hard and fast rule can be laid down. By the same token, to hold that, as a matter of principle, a second marriage must necessarily bring maintenance to an

end, is to import a *dum sola vixerit* provision into the statute, and also strain the ambit of the doctrine of election beyond reasonable bounds: for doing which I have no warrant.

62 The tenor of the cases is that a wife does not forfeit her right to maintenance by remarriage but whether maintenance is to continue after remarriage is, as in all cases, a question of conduct, condition, means and other circumstances.

63 The case of *MacDonald v. Lee* (1972), 2 N.S.R.(2d) 301, referred to me by counsel relates to maintenance for the children of the marriage after the remarriage of their mother and is not applicable to the present circumstances.

64 Accepting as I must that a spouse who remarries is not disentitled to maintenance by that fact, it cannot be argued that this is not conduct to be considered before determining whether to make or vary a maintenance order. As a matter of principle I consider it repugnant to all accepted social principles that a spouse should be required to maintain or contribute to the maintenance of a former spouse who has remarried or entered into an economic or other relationship resembling marriage with a person of the opposite sex. I do not think it necessary to justify these feelings, but I think I can point out that in the case of remarriage the remarried spouse accept in substitution for the obligations of his or her former spouse the obligations of his or her new spouse and in the case of a union which is not a marriage, while the remarried spouse acquires no substituted legal rights, the unrestrained recognition by the courts of his or her rights to maintenance would in effect sanctify common law relationships.

65 While common law relationships may be an increasing feature of our society, the strength of the fabric of society still rests in the family unit. While I cannot doubt that some persons living 'common law', as some say, or 'in sin', as others say, may maintain a strong family unit, common law relationships are generally repugnant to the family unit. To foster, endorse or encourage common law relationships is to diminish the presence of the family unit in our society and anything which diminishes that presence diminishes our society.

66 To impose upon a man an obligation to provide periodic maintenance to his former wife who is living with another man is to make a mockery of basis social principles. While I acknowledge the jurisdiction of the court to make such an imposition, I will not exercise that jurisdiction except in remarkable circumstances.

67 I distinguish between lump sum maintenance and periodic maintenance in this respect because the former is maintenance that the wife has earned by her contribution to the marriage (as mentioned above) while the latter is not.

68 Notwithstanding all that, I would in normal circumstances have been prepared to order periodic maintenance in lieu of interest on the portions or the lump sum from time to time outstanding. In this case, I am making no such order as the petitioner is paying \$201.00 a month for the trailer and the respondent has an implied right to the use and occupation of the same terminating ultimately in her contractual right to ownership.

69 In so far as access is concerned, the respondent asked for access by letter and telephone in addition

to personal access. I do not think it necessary to make any order on the matter of communication by letter or telephone. As evidence relating to access is seldom offered in contested divorce actions or in divorce actions where custody is contested, a judge is left to make a decision on access without being fully aware of what is convenient for the parties. As the parties are living in different provinces, a re-hearing in connection with access is not convenient. I urge the parties therefore to negotiate with each other in good faith through their solicitors with a view to making an access arrangement which is reasonable.

70 Unless and until such an access arrangement is agreed upon the access order which I make hereafter will stand providing for reasonable access including not less than one month in summer.

71 I grant therefore a decree nisi and the following corollary relief

(a) the petitioner shall pay to the respondent the lump sum of \$17,000 as follows:

(i) \$500.00 on or before June 30, 1977;

(ii) \$250.00 on or before the last day of each quarter thereafter upto and including June 30, 1982;

(iii) the balance on or before September 30, 1982; and

(iv) on default of an instalment above, or on the death of the petitioner, on demand;

(b) the petitioner shall have custody of the children of the marriage;

(c) the respondent shall have reasonable access to the children of the marriage away from the residence of the petitioner but not outside of Canada without the consent in writing of the petitioner, including the month of July of each year;

(d) the petitioner shall pay to the respondent for the maintenance of the children of the marriage during July in each year the sum of \$150.00 plus an amount equal to the cost of the children travelling from Stephenville to a point not west of London, Ontario, and, as a condition under section 12(b) of the act, the petitioner may discharge the obligation to pay the amount last mentioned by providing to the children the necessary tickets and pocket money for travelling.

(e) the petitioner shall pay the respondent her costs in this matter to be taxed.

72 In conclusion, I would like to suggest to the parties that

(a) the trailer be sold and the proceeds used to discharge the petitioner's obligation to the bank;

(b) that the lump sum be increased by \$3,000.00; and

(c) that interest be paid on the lump sum as periodic maintenance at the rate of $\frac{3}{4}$ of 1% per month.

73 This will reduce slightly the monthly obligation of the petitioner and increase his ultimate obligation by \$3,000.00. This would provide economic advantage to both parties. Had it been in my power to do so, I would have made such an order.

Petition granted.

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