

77 Nfld. & P.E.I.R. 51

Murphy (Fifield) v. Murphy

Newfoundland United Family Court

Noonan U.F.C.J.

Judgment: June 23, 1989

Murphy (Fifield) v. Murphy

Violet Gloria Fifield-Murphy, Petitioner v. Lewis Joseph Murphy, Respondent

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Docket: Docs. 1002/87, Divorce Registry No. 86/2582

Counsel: Mr. **David C. Day**, Q.C. for the Petitioner.

Mr. James E. G. Vavasour for the Respondent.

Noonan, J. (No. 2):

1 This matter was heard with a companion action under *the Matrimonial Property Act*. Both decisions are being filed concurrently. The background of the Murphy marriage was outlined in *the Matrimonial Property Act* decision and I see no need to repeat it. I am satisfied that a Divorce Judgment be granted based on the separation specie of the marriage breakdown ground.

2 Potentially there are two children for whom support and parenting arrangements must be made. There is no doubt that Noel Gregory, born August 12, 1974 is a "child of the marriage" and a parenting plan for him has been mutually agreed. Mr. Murphy denies that William Daniel, who was born June 19, 1968, is a "child of the marriage". William Daniel, at the time of the filing of Mrs. Murphy's Reply, was a university student, employed part-time.

3 The principal issues which must be resolved are support for Mrs. Murphy and the children. I will deal first with the issue of spousal support.

Spousal Support

4 Mrs. Murphy was born on August 11, 1935 and is presently fifty-three years of age. Mr. Murphy was born on July 16, 1933 and is presently fifty-five years old. They were married on April 4, 1961 and lived together until August 2, 1985 when they separated permanently. During the marriage five children were born.

5 Prior to marriage Mrs. Murphy completed High School and two years post-secondary

education at Memorial University. She taught school for five years and, during the Summer recesses, attended University. After five years of teaching she entered a nursing school program at The General Hospital in St. John's and received her R.N. in 1960. During her marriage she worked for approximately ten years in various nursing positions. In addition, she was a homemaker and the primary childcare giver.

6 Since separation Mrs. Murphy has taken a course in Psychiatric and Mental Health Nursing at the School of Nursing, Memorial University of Newfoundland and, with her new qualification, she was employed for eighteen weeks until December 18, 1987 at The Waterford Hospital. Mrs. Murphy indicated that her last permanent full-time nursing job ended in 1982. Her registration qualification is current and she says she does not need to take a refresher course. If she were to pursue a Bachelor of Nursing degree, which may improve her employability, she would need to attend University for approximately two years. She did not indicate any specific plans in that regard and mentioned that she may wish to pursue a career in law.

7 The separation has been difficult for both Mr. and Mrs. Murphy. They are both suffering from a number of health problems. Some of their health problems have been of long-standing and they may impact negatively in their abilities to meet their own needs. There is no question that Mrs. Murphy is in need of support. The question for my determination is whether she is entitled to an order for support and, if so, what should be the amount and the term and conditions which attach.

8 Section 15 of *the Divorce Act* deals with the issue of support. The following subsections apply to spousal support:

15(2) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of

(a) the other spouse;

(4) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(5) In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including

(a) the length of time the spouses cohabited;

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

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

(6) In making an order under this section, the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

(7) An order made under this section that provides for the support of a 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 of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);

(c) relieve any economic hardship² 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.

9 The first question to be determined is whether or not Mrs. Murphy is entitled to an order for support. The trilogy cases-*Pelech v. Pelech*, [\[1987\] 1 S.C.R. 801](#), *Caron v. Caron*, [\[1987\] 1 S.C.R. 892](#) and *Richardson v. Richardson*, [\[1987\] 1 S.C.R. 857](#)-recently decided by the Supreme Court of Canada, have had a great impact on the issue of entitlement to an order for support. I believe public policy objectives espoused in those cases are relevant to this case.

10 Professor James McLeod in an annotation he wrote to the Pelech case - reported at p. 232 of 7 R.F.L. (3d) observed

The reasons are also likely to affect the granting of support in the absence of a settlement agreement. The reasons of Wilson, J. in *Pelech*, *Richardson*, and *Caron* confirm a basic support model. In order to obtain support, a claimant must prove:

(1) need;

(2) that the need arises for a legally acceptable reason; and

(3) that the need/inability is causally connected to the marriage.

11 Mrs. Murphy is unquestionably in need - she is unemployed. Despite her efforts she has not been able to obtain employment. She suffers from diabetes, hypertension and stress. It appears that these illnesses may, in part, be causally related to the marriage. In any case, Mr. Murphy has acknowledged her need for support and has made payments to her since separation. I find that Mrs. Murphy has established her entitlement to an order for support.

12 The next point to be determined is whether or not, in the exercise of my discretion, an order should be made. I am directed by subsection 5 of section 15 to consider the condition, means, needs and 'other circumstances' of each spouse. I must also consider the length of time the spouses cohabited and the functions which each performed during cohabitation.

13 In this case we have a marriage of 24.3 years. During the marriage Mr. Murphy was the principal financial provider while Mrs. Murphy was a homemaker and childcare giver who also supplemented the family income for about ten years of the marriage from her employment as a nurse. Because of the nature of his work the income provided by Mr. Murphy was not constantly available. The family seemed to be in a situation of "feast or famine". That situation still maintains and Mr. Murphy resists a formal order for periodic support and asks that he be allowed to pay support on a "best efforts" basis. He says that an order for periodic support will cause him stress and anxiety when he has no income and is unable to pay.

14 In making an order for support the court is given flexibility under subsections (2) and (4) of section 15. An order may be by way of lump sum or periodic and conditions may be attached to an order if the court determines them to be "fit and just".

15 Mrs. Murphy, in her Argument, sought an order for a global amount for support for herself and the children of \$1,500.00 per month - assuming she received the relief she sought under *the Matrimonial Property Act* action. In her Reply to Mr. Murphy's Argument she sought \$750.00 per month for the support of Noel Gregory; an order that Mr. Murphy pay the tuition, books, equipment and supplies for William Daniel for so long as he is in full-time attendance in university as a community college; and a lump sum support payment for herself equal to Mr. Murphy's equity in the matrimonial home - \$55,000.00

16 To assist in the resolution of the issue of support, Mr. Al Antle, Financial Counsellor prepared a report. He says at page 22

My opinion respecting Mr. Murphy's ability to pay maintenance is quite clear.

I believe the most practical approach would be to base a potential maintenance payment on a percentage of income payable annually.

... I believe, based on what I have seen of Mr. Murphy's income over the past years and my conversations with Mr. Pardy, monthly payment in any amount would be virtually impossible to determine.

With respect, I have difficulty on the facts of this case, accepting this suggestion as being particularly beneficial. Because of the sporadic nature of Mr. Murphy's income I believe there will be problems if I accept Mr. Antle's suggestion.

17 Any support order for a spouse is to be made against the backdrop of principles outlined in subsection (7) of section 15. I think it is desirable that there be a degree of finality in the relationship between divorced persons. The degree of finality which can be afforded to the

relationship is necessarily intertwined with the ability of the spouse in need of support to become economically self-sufficient. Each case is different and must be considered in light of its own particular circumstances. The *Divorce Act* directs the court to promote the economic self-sufficiency within a reasonable period of time "in so far as practicable". What does self-sufficiency mean? Surely it is a relative term. One must look at self-sufficiency against the economic climate of the marriage at the time of marriage breakdown.

18 Mrs. Murphy, at the time of separation was a qualified Registered Nurse who had been out of the work force for about four years. She was economically dependent at that time on her husband. She needs support in order to relieve the economic hardship she has suffered as a result of the breakdown of the marriage. She has a current nursing certificate but she should be given the opportunity to hone and upgrade her skills. Mr. Murphy must support her in order to promote her becoming economically self-sufficient in a reasonable period of time. In my opinion Mr. Murphy should contribute to Mrs. Murphy's support for twenty-four months.

19 I have grave doubts as to Mr. Murphy's ability to contribute support on a regular, periodic basis and believe the award of a lump sum is more appropriate. In *Carter v. Carter* (1978) [19 Nfld. & P.E.I.R. 411](#) Mr. Justice Goodridge (as he then was) at p. 418 offers a list of cases which illustrated circumstances when it is appropriate to order lump sum support:

1. Where the husband's assets are in liquid form and permit a painless separation of a lump sum (*Zelko v. Zelko* (1973), 11 R.F.L. 123);
2. Where the husband is of an advanced age (*idem*);
3. Where the wife has demonstrated an ability to deal with a lump sum property (*idem*);
4. Where the parties are anxious to bring their relationship to a complete end (*idem*);
5. Where the imposition of an obligation to pay periodic sums would create further conflict between the parties (*Hayre v. Hayre* (1973), 11 R.F.L. 188);
6. Where a lump sum is necessary to provide a home for the wife (*Carmichael v. Carmichael* (1976), 69 D.L.R. 93d 297);
7. Where the history of relations of the parties shows that the husband has failed to meet periodic payments and the only way to assure that the wife will be maintained is by a lump sum payment (*idem*);
8. To provide a nest egg against the contingencies of life (*Lazenby v. Lazenby* (1975), 18 R.F.L. 393); and
9. To recognize the contribution of the wife to the marriage (*Feldman v. Feldman*

(1971), 2 R.F.L. 173).

Having weighed the factors outlined by Mr. Justice Goodridge and having considered the order granted under *The Matrimonial Property Act* and the matter as a whole, I conclude that this is an appropriate case to order lump sum spousal support.

20 I have reviewed the financial statements filed in this matter including the most recent statement dated May 1, 1989. In determining Mr. Murphy's capacity to pay I am aware that Mrs. Murphy believes he is a man of considerable wealth - with hidden or sheltered assets. However, she was not able to establish this position at trial. In all the circumstances I conclude that it is appropriate that Mr. Murphy pay a lump sum of \$19,200.00 as support for Mrs. Murphy. This sum shall be paid to Mrs. Murphy when the property at 5 O'Regan Place is disposed of in accordance with my Order under *The Matrimonial Property Act*.

Child Support

21 Section 15 of the *Divorce Act* provides for child support. The relevant subsections are set out following:

15(2) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of

- (a) the other spouse;
- (b) any or all children of the marriage; or
- (c) the other spouse and any or all children of the marriage.

(4) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(5) In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by the spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of the spouse or child.

(6) In making an order under this section, the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

(8) An order made under this section that provides for the support of a child of the marriage should

(a) recognize that the spouses have a joint financial obligation to maintain the child; and

(b) apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation.

There is considerable flexibility in the ordering of child support.

22 As indicated earlier, there is a dispute between Mr. and Mrs. Murphy as to whether William Daniel, born June 19, 1968, is a "child of the marriage". He is a university student who also works part-time in a grocery store.

23 Subsection (1) of section 2 of the *Divorce Act* defines "child of the marriage":

2(1) ... means a child of two spouses or former spouses who, at the material time,

(a) is under the age of sixteen years, or

(b) is sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life ...

24 The governing principle in determining whether a maintenance order should be made for a child is reasonableness. "Child" should be interpreted in the ordinary sense. A parent should not be required to support a healthy able-bodied son or daughter. The headnote in *Strachan v. Strachan* (1986), 2 R.F.L. (3d) 316, at 317 (Ont. S.C.) describes a parent's obligation to support as ending "when the child chooses and completes a course of studies". (See also *Tapson v. Tapson*, [1970] 1 O.R. 521 (Ont. C.A.), *Jackson v. Jackson* (1972), 8 R.F.L. 172 (S.C.C.) and *Squires v. Squires* (1983) 42 Nfld. & P.E.I.R 148 (S.C. Nfld. T.D..) Each case turns on a proper appraisal of the circumstances. In my view, William Daniel is a "child of the marriage" while he continues in full-time attendance at the university. I am satisfied that, in her present circumstances, Mrs. Murphy is unable to contribute to his support. I note that Mr. Murphy has been supporting his education costs and my order for support continues this practice. Mr. Murphy shall pay the tuition and books costs for William Daniel on condition that he is in full-time attendance at a university pursuing his baccalaureate degree.

25 In determining what I believe to be an appropriate amount to meet Noel Gregory's needs adequately I have used the approach adopted by Goodridge, J. (as he then was) in *Allan v. Allan* (1983), Divorce Registry No. 83/1358 (Nfld. S.C.T.D.)(unreported) and the method applied by

Woolridge, J. in *Blanchard v. Blanchard* (1987) [64 Nfld. & P.E.I.R. 15](#) (Nfld. S.C.T.D.). I have been assisted as well by the Financial Assessment prepared by Mr. Al Antle. I conclude that approximately \$650.00 per month is needed to meet Noel Gregory's basic needs.

26 I appreciate that Mrs. Murphy would like child support to be paid on a periodic basis. However, I conclude on the evidence before me that it is very unlikely that Mr. Murphy can meet a monthly support payment for Noel Gregory given his present and past financial situation. I am also not prepared to accede to Mr. Murphy's request to meet child support on a "best efforts" basis. I believe the most appropriate way to deal with support for Noel Gregory is by way of lump sum payment.

27 Christine Davies in *Family Law In Canada*, 4th. Ed. at page 459 in discussing lump sum payments for a child:

There is no presumption against awarding a lump sum payment for the maintenance of a child. However, the purpose of an award is to provide for the maintenance of the child and care would be taken to see that it does not have the effect of establishing an estate for the child. In deciding whether a lump sum is appropriate the main consideration is the welfare of the child but the effect on the position of the parent should not be neglected. If the payment or securing of such a sum would be unduly prejudice the parent, the deprivation should be weighed against the requirements of the child. If depriving a parent of such a sum would harm the parent's power to earn a living, except in the most unusual circumstances, a lump sum should not be awarded.

28 I have given this matter anxious consideration and have concluded that an appropriate order for support for Noel Gregory for the next twenty-four months is that Mr. Murphy contribute the amount of \$15,600.00 by way of lump sum. This sum shall be paid by Mr. Murphy to Mrs. Murphy for Noel Gregory when the property at 5 O'Regan Place is disposed of in accordance with my Order under *The Matrimonial Property Act*.

Summary

29 IT IS HEREBY ORDERED THAT:

1. A Divorce Judgment is granted pursuant to section 8(2)(a) of *the Divorce Act* to take effect thirty-one days from the filing of this decision.
2. Custody of Noel Gregory is granted to Mrs. Murphy.
3. Reasonable, unlimited access to Noel Gregory is granted to Mr. Murphy.
4. Mr. Murphy has the right to make inquiries, and to be given information, as to the health, education and welfare of Noel Gregory.
5. There is no order for custody or access with respect to William Daniel.

6. Mr. Murphy will pay lump sum spousal support to Mrs. Murphy in the amount of \$19,200.00 when the matrimonial home at 5 O'Regan Place is disposed of in accordance with my Order under *The Matrimonial Property Act*.

7. Mr. Murphy shall pay Mrs. Murphy for Noel Gregory's support for the next twenty-four months the sum of \$15,600.00 when the matrimonial home at 5 O'Regan Place is disposed of in accordance with my Order under *The Matrimonial Property Act*.

8. Either party may apply for further directions.

9. There is no order for costs.

Order accordingly.

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