

85 Nfld. & P.E.I.R. 45

Neary v. Neary

Newfoundland Unified Family Court

Noonan, U.F.C.J.

Judgment: July 20, 1990

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Valerie Jennifer Neary, Petitioner v. David Patrick Neary, Respondent

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Docket: Doc. 86/2580

Counsel: Mr. **David C. Day** Q.C. & Ms. Jean Dawe, for the Petitioner.

Mr. Ian Kelly, for the Respondent.

Noonan, J.:

1 The issue in this case is support for Mrs. Neary and David Christopher.

### **Background**

2 This divorce matter was heard in conjunction with a companion action under *the Matrimonial Property Act* (now *The Family Law Act*). On the evidence, I am satisfied that it is in order to grant a divorce judgment. A decision in the property matter was filed on October 25, 1989 and I expressed the following sentiments at that time:

*A decision in the divorce proceeding is not being filed concurrently, as is the usual practice. Counsel have been apprised that I have concluded that it is appropriate to deal with support for Mrs. Neary by way of lump sum payment. However, as there was no independent evidence before me with respect to the value of the matrimonial assets I am unable to know the relative financial positions of the parties.*

3 In March, 1990 I received copies of appraisal reports with respect to certain matrimonial and business assets and I find that I am now in a position to deal with the matter.

### **The Law**

4 The issue of support for spouses and children is governed by *section 15 of the Divorce Act*. The relevant subsections follow:

15(1) *In this section and section 16, "spouse" has the meaning assigned by subsection*

*2(1) and includes a former spouses.*

*(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.*

*(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 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.*

*(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.*

***a. Mrs. Neary***

5 I propose to deal first with the question of support for Mrs. Neary. Mrs. Neary is almost fifty-two years old. Her birthdate is August 13, 1938. At the time of her marriage on November 10, 1962 she was a qualified secretary. By agreement she opted to remain at home and adopt the traditional role of housewife and mother. Mr. Neary was the financial provider for the family and took care of the upkeep and maintenance of the home. There were three children of the marriage - two girls who are students in professional and post-graduate training and one boy, David Christopher who is fourteen. (He was born July 11, 1976).

6 Prior to separation Mrs. Neary attended Memorial University of Newfoundland and at the time the trial was heard she had accumulated twenty-six university credits. She said her initial game plan was to obtain a Bachelor of Arts degree so she could re-enter the work force. She said that she can complete a Bachelor of Arts and Bachelor of Social Work program in six semesters.

7 Since separation Mrs. Neary has upgraded her secretarial and technical skills. She has consulted career counsellors and participated in programs designed to assist women to re-enter the work force. She has applied for many jobs but at the time of trial she had been unsuccessful in securing employment. She is seeking a job commensurate with her qualifications.

8 Since the separation Mr. Neary has been supporting Mrs. Neary and David Christopher. His contribution averages \$1,465.00 per month. Counsel for Mrs. Neary suggested that if Mrs. Neary has to secure alternate accommodation her monthly expenses would probably be about \$2,250.00. Mr. Neary has proposed a time-limited support payment for Mrs. Neary.

9 I have reviewed the factors and objectives prescribed in *subsections (5) and (7) of the Divorce Act* and there is no doubt in my mind that Mrs. Neary is entitled to an order for spousal support. She has clearly suffered an economic disadvantage because of her marriage. She is however, well on her way to becoming economically self-sufficient. Mr. Neary has an obligation to assist her in becoming fully self-sufficient.

10 There is a discretion in the court in ordering support and a lump sum award is possible. In *Carter v. Carter (197.8) 19 Nfld. & P.E.I.R. 411 Mr. Justice Goodridge (as he then was) at p. 418* offers a list of cases which illustrate 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. Zelco (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 properly (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. (3d) 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. Lasenby (1975), 18 R.F.L. 393);*
9. *To recognize the contribution of the wife to the marriage (Feldman v. Feldman (1971), 2 R.F.L. 173).*

11 I have weighed the factors outlined in *Carter v. Carter* against the evidence before me. I believe a lump sum award for spousal support is appropriate in this case. Mr. Neary does not have the cash flow to sustain what I believe to be an appropriate sum to assist Mrs. Neary to become financially independent. Being aware of the value of the division of matrimonial assets I am satisfied that a lump sum award for spousal support can be easily accommodated under that regime. In my opinion, the payment of a lump sum settlement by Mr. Neary of \$20,000.00 to Mrs. Neary is appropriate in the circumstances. Payment shall be made on or before September 30, 1990 and is secured by Mr. Neary's interest in a vacant parcel of land on Bay Bulls Road.

***b. David Christopher Neary***

12 In addressing an appropriate sum for David Christopher, I am guided by the principles prescribed in *subsection (8) of section 15 of the Divorce Act*. In the short-term I am satisfied that Mrs. Neary may not have income from employment.

13 I note that the child's needs were being met by Mr. Neary's monthly contribution of approximately \$1,465.00 per month. If I use the guidelines established in the *Allan v. Allan (1983), Divorce Registry No. 83/1358 (Nfld. S.C.T.D.) (unreported)* and *Blanchard v. Blanchard*

(1987) 64 Nfld. & P.E.I.R. 15 (Nfld. S.C.T.D.) I conclude that at least \$500.00 per month can be attributed to David Christopher's support. Having reviewed Mr. Neary's financial circumstances I conclude that \$500.00 per month is an appropriate sum for Mr. Neary to contribute and I so order. The first periodic payment of \$500.00 per month for David Christopher's support is due on or before October 31, 1990. In the meantime, I order the *status quo* to continue with respect to Mrs. Neary and David Christopher's support until September 30, 1990 .

### **Access to David Christopher**

14 Mrs. Neary expressed her view that David Christopher should spend as much time as possible with his father and that the access be structured. Mr. Neary, because of his work schedule, preferred a flexible arrangement.

15 At the close of the trial I ordered a home assessment of appropriate parenting arrangements for David Christopher. Ms. Barbara Albert completed the study and filed her report with the court on July 25, 1989. She recommended that Mrs. Neary have custody and she prescribed guidelines for Mr. Neary's access. The following are her recommendations:

*Again, the following recommendations are based upon Christopher's developmental needs and stated preferences, confidence in Mr. Neary's capacity to find solutions to meet Christopher's needs and to support his statements of love and concern for his son, and certainty that Mrs. Neary will co-operate to make these opportunities available for her son.*

1. *THAT the child, Christopher, remain in the custody of his mother.*
2. *THAT the father, David Neary, maintain regular telephone contact with Christopher daily or as often as is desired and possible for Christopher.*
3. *THAT the father, David Neary, arrange to have weekend overnight access with Christopher every other weekend to begin on Friday evening beginning at 6:00 p.m. or earlier and to end on Sunday evening at 6:05 p.m. in order not to interfere with his schedule during the school year.*

*OR*

*In consideration of Mr. Neary's schedule at the present time and only during the summer months, weekend overnight access to begin on Saturday evening beginning at 6:00 p.m. or earlier and to end on Monday evening at 6:00 p.m..*

*These times to be changed only with the approval of Mrs. Neary and not to interfere with Christopher's schedule and needs and preferences.*

4. *THAT the father, David Neary, arrange to visit with Christopher on some regularly*

*agreed evenings between weekend overnight access but to begin no later than 7 p.m. and end no later than 12 p.m. during the summer months, altered to fit Christopher's schedule and needs during the school year. Any changes must be made in advance and with the approval of Christopher and Mrs. Neary.*

*5. THAT the father, Mr. Neary, make arrangements annually during the summer months to have access to Christopher for four weeks in 2 two-week periods, one chosen by Mr. Neary and one chosen by Mrs. Neary but with Christopher's preferences and schedule given highest consideration and not to interfere with his camp dates, etc.*

*6. THAT the father, Mr. Neary, be encouraged to request additional visitation time and given due consideration with Christopher's schedule and preferences as often as possible.*

*7. THAT the father, Mr. Neary, have access to Christopher for half of each holiday period around Christopher's activities and schedule and with the approval of Mrs. Neary.*

*8. THAT Christopher's wishes, needs and preferences be given the highest priority and consideration with flexibility and co-operation as necessary from both parents.*

*9. THAT the mother and father should promptly inform each other of any changes in address and/or living conditions which would affect the environment or Christopher.*

*10. THAT at the time of changing circumstances for the child (i.e. his preferences and interests change in developmental process to young adulthood) the access periods and arrangements be evaluated to accommodate the needs of the child and his parents.*

I am prepared to order "reasonable access" if Mr. and Mrs. Neary so agree. In the alternative, if they cannot agree, I am prepared to accept Ms. Albert's recommendations totally. The parties shall file an order reflecting the parenting option they prefer on or before September 30, 1990.

**In summary**

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1. A Divorce Judgment is granted to be effective in 31 days.
2. Custody of David Christopher Neary is granted to Valerie Jennifer Neary.
3. Mr. & Mrs. Neary have leave to file an order with respect to Mr. Neary's access to

David Christopher on or before September 30, 1990.

4. Mr. Neary shall pay the sum of \$20,000.00 to Mrs. Neary for her support on or before September 30, 1990. The lump sum payment is secured by Mr. Neary's interest in a vacant parcel of land on Bay Bulls Road.

5. Mr. Neary shall contribute the sum of \$500.00 per month for David Christopher's support on or before the last day of each month beginning October 31, 1990.

6. Mr. Neary shall continue the *status quo* arrangement with respect to support for Mrs. Neary and David Christopher until September 30, 1990.

7. There is no order for costs.

*Order accordingly*

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