

NOVA SCOTIA COURT OF APPEAL

Citation: *Wong v. Wong*, 2008 NSCA 43

Date: 20080509

Docket: CA 286579

Registry: Halifax

Between:

Gene Douglas Wong

Appellant

v.

Celeste Marie Wong

Respondent

Revised decision:

The text of the original decision has been corrected according to the erratum dated October 14, 2011. The text of the erratum is appended to this decision.

Judge(s):

MacDonald, C.J.N.S.; Bateman & Hamilton, J.J.A.

Appeal Heard:

March 26, 2008, in Halifax, Nova Scotia

Held:

Appeal dismissed per reasons for judgment of Hamilton, J.A.; MacDonald, C.J.N.S. & Bateman, J.A. concurring

Counsel:

Michael K. Power, for the appellant
A. Franceen Romney, for the respondent

Reasons for judgment:

[1] The appellant, Gene Douglas Wong, appeals the November 5, 2007 order of Justice Margaret J. Stewart in which she divided the parties' matrimonial assets equally between them and ordered Mr. Wong to pay spousal support of \$300 per month to the respondent, Celeste Marie Wong, on an ongoing basis. The judge's decision is unreported.

[2] The parties had a ten year common-law relationship, followed by a brief two to three month separation and then married on October 6, 1990. The judge found they separated on November 30, 2005. Both continued to live in the matrimonial home until June 2006 when Mrs. Wong moved out. It was a second marriage for both and there are no children of the marriage.

[3] Mr. Wong was 59 at the time of trial and was retired from his job at Bowater Mersey. He was receiving the full income (\$35,232 per year) from his retirement pension that he had commenced contributing to in 1981, shortly after he began living with Mrs. Wong. He was a member of the Municipal Council earning \$13,846 per year, approximately one-third of which was tax free. His income in 2004, 2005, 2006 and 2007 was \$47,782.33, \$50,174.79 (including RRSP income), \$49,078.48 and \$49,078.00 respectively. He was sharing expenses with a new partner who was employed.

[4] Following an interim hearing in June 2006 Mr. Wong paid interim spousal support of \$1,000 per month to Mrs Wong. He paid the matrimonial debts and home related expenses from the time of separation until the matrimonial home was sold prior to trial in April 2007.

[5] Mrs. Wong was 63 at the time of trial. She had been a full-time hair dresser in the early 1980's but had reduced her working hours, eventually giving up her licence in 1992. She held other jobs from time to time such as helping out in Mr. Wong's family's restaurant, transporting persons to hospital appointments, bartending, working in a garden centre and taking care of Mr. Wong's parents and

her own mother. She received approximately \$35,000 prior to separation from the sale of her mother's house in April 2005 which the judge found she spent on travelling to Germany, paying her \$12,000 Visa account, purchasing a few items for her husband and paying for improvements to the matrimonial home so that she had little left at the date of separation. She was receiving unemployment insurance at the time of trial.

[6] The matrimonial assets included the matrimonial home that was held jointly by Mr. Wong and his mother until her death in 2002 when he became the sole owner. The home was encumbered by a mortgage at the time of separation. The other matrimonial assets were Mr. Wong's pension in pay, a 1999 Ford Taurus retained by Mrs. Wong and a 2004 Ford Explorer in Mr. Wong's possession. The parties agreed that the value of Mrs. Wong's car was \$5,000 at the time of separation. The judge found that the value of Mr. Wong's vehicle was \$28,500 at the date of separation and that it had a \$38,535 lien against it at that time. In addition, at the time of separation the parties owed \$13,324 on their line of credit at the Bank of Nova Scotia.

[7] The judge found that following separation Mr. Wong unilaterally and unbeknownst to Mrs. Wong borrowed at least an additional \$14,019 on their line of credit that he could not explain and rolled the increased line of credit and his car loan together. That combined debt and the house mortgage were paid out of the proceeds of the sale of the house in April 2007 leaving a balance of \$54,180.98 that was paid into Court in May 2007.

[8] The judge ordered that Mr. Wong's pension in pay be divided equally between the parties at source.

[9] In her reasons for judgment she indicated that \$46,308 of the \$54,180.98 paid into court be paid to Mrs. Wong, with the remainder to Mr. Wong. She explained that this division followed from her decision that an equal division of matrimonial property between the parties was appropriate. In calculating this equal division the judge took into account the fact that Mr. Wong's vehicle was worth \$28,500 as compared to the \$5,000 value of Mrs. Wong's car at the date of separation and the fact that he had incurred \$14,000 post separation debt that had been paid from the proceeds from the sale of the matrimonial home.

[10] The judge also ordered Mr. Wong to pay \$300 per month spousal support to Mrs. Wong on an ongoing basis. She noted Mr. Wong's agreement that Mrs. Wong was entitled to spousal support and was economically dependant on him. The judge concluded it was unlikely Mrs. Wong would be able to earn any significant income:

[27] Mrs. Wong is unemployed, having been let go from her recent employment as a kitchen staff person. She is able to collect Employment Insurance for 14 weeks. Given her health issues, the fact that she is 63 years old, their mutual decision that resulted in her being employed part time and then out of the work force for a number of years, a work history of minimal wage earning jobs, some with a concentration of physical labor, as well as Mr. Wong's own analysis of their circumstances, causes me to conclude it is unlikely and unreasonable to expect Mrs. Wong will be able to earn an income of any significance.

[11] She concluded Mrs. Wong had a need for spousal support and that Mr. Wong had the ability to pay.

[12] The standard of review we are to apply to appeals from a decision dividing matrimonial assets and awarding spousal support is set out in **Myatt v. Myatt**, (2005), 232 N.S.R. (2d) 201:

[10] The court applies the usual civil standard of review to appeals from the division of assets and calculation of support payments. Issues of fact, including inferences, and issues of mixed fact and law from which no error of law is extractable, are reviewed for palpable and overriding error. Issues of law, including points of law which are extractable from mixed questions of fact and law, are reviewed for correctness. **Housen v. Nikolaisen et al.**, [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask. R. 1; 272 W.A.C. 1, at ¶ 8, 10, 19-25, 31-36; **MacIsaac v. MacIsaac** (1996), 150 N.S.R. (2d) 321; 436 A.P.R. 321 (C.A.). An appeal is not a rehearing, and the Court of Appeal may not substitute its opinion for that of the trial judge whose discretion was exercised judicially in accordance with correct legal principles. **Young v. Young** (2003), 216 N.S.R. (2d) 94; 680 A.P.R. 94; 2003 NSCA 63 at ¶ 6-7.

[13] The main issue on appeal with respect to the division of assets, although not framed as such by Mr. Wong, is whether the judge erred in not exercising her

discretion to divide the matrimonial assets unequally in his favour pursuant to s.13 of the **Matrimonial Property Act**, S.N.S. 1980, c.9.

[14] The **Act** provides as follows:

4 (1) In this Act, "**matrimonial assets**" means the **matrimonial home or homes and all other real and personal property acquired** by either or both spouses **before or during their marriage, . . .**

. . .

12 (1) Where

(a) a petition for divorce is filed; . . .

either spouse is entitled to apply to the court **to have the matrimonial assets divided in equal shares**, notwithstanding the ownership of these assets, and the court may order such a division.

13 Upon an application pursuant to Section 12, **the court may make a division of matrimonial assets that is not equal** or may make a division of property that is not a matrimonial asset, **where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable** taking into account the following factors: . . .

(b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred; . . .

(d) the length of time that the spouses have cohabited with each other during their marriage;

(e) the date and manner of acquisition of the assets;

(f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset; . . .

(i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent; . . .

(Emphasis added)

[15] The **Act** provides that matrimonial assets include assets acquired **before and during** marriage and that an equal division of matrimonial assets will be ordered unless the judge determines that such a division is unfair or unconscionable taking into account the factors enumerated in section 13. The onus is on the party seeking an unequal division to show that an equal division is unfair or unconscionable; **Coxworthy v Coxworthy**, 2006 NSSC 205, ¶ 47.

[16] Mr. Wong argued before us that it was unfair and inequitable that the judge did not order an unequal division of matrimonial assets in his favour in light of the fact the matrimonial home was owned jointly by him and his mother until three years prior to separation, they separated for two to three months between their common law relationship and their marriage and he paid the house expenses and serviced the matrimonial debts post separation

[17] In her reasons the judge stated:

[11] Although Mr. Wong no longer claims the matrimonial home to be exempt from division under the inheritance provision of the **[Act]**, he claims an unequal division of the proceeds . . .

[18] This makes it clear she understood that Mr. Wong and his mother had owned the matrimonial home jointly until three years prior to separation because this was the basis of his initial claim that the matrimonial home should be exempt from division.

[19] Her reasons also make it clear the judge understood the nature of the parties' relationship over 25 years, including the two to three month separation:

[3] Prior to separating in November of 2005, [Mrs. Wong] and [Mr. Wong] had a 25 year relationship, having married on October 6, 1990 immediately following a brief two and one-half to three months separation period from their 10 year long common-law relationship. . . .

. . .

[26] . . . A two and a half to three month break in that relationship, in my opinion, is of no significance and bears no ramification.

[20] The judge dealt extensively with Mr. Wong's main argument before her as to why she should order an unequal division, namely; that he paid the house expenses and serviced the matrimonial debt post separation:

[11] Although Mr. Wong no longer claims the matrimonial home to be exempt from division under the inheritance provision of the [Act], ss. 4, he claims an unequal division of the proceeds arguing that he carried all the matrimonial debt (mortgage, car loan, credit line) and ongoing expenses (taxes, Nova Scotia Power, insurance, maintenance repairs (Exhibit 12), legal fees) for the 17 month period of November 30, 2005 until April 30, 2007; . . .

. . .

[17] I reject counsel's submission that equalization entails payment to Mr. Wong flowing from his payment of debts and expenses. . . .

. . .

[20] Here, for the first seven months of their separation, up until the end of June 2006, the parties continued to reside in the matrimonial home. Mrs. Wong contributed her entire share of the pension (\$1,468.00 per month) to the household debts and expenses, as had occurred when they were a family unit from the time of Mr. Wong's retirement. Mr. Wong had available his employment income of \$1,153.84 per month for payment towards his \$870.00 per month car loan....

[21] For the remaining 10 months, until the house was sold on April 30, 2007, Mr. Wong had the benefit of \$482.00 of Mrs. Wong's money, tax deduction on the \$1,000.00 per month payment of Mrs. Wong's pension money then designated under the interim support order as spousal support, no spousal support flowing from his \$13,846.00 per year employment income, as the interim spousal support had been set up so as to help fund the debts and expenses and he paid no occupational rent, although Mrs. Wong contributed to the expenses and had to pay rent.

[22] In summary, given the circumstances, I am prepared to find that no equalization adjustment relating to the expenses should occur and from the date of separation to April 30, 2007, no matrimonial gross pension monies is owing to Mrs. Wong. . . .

[21] While the judge did not specifically refer to each of the factors set out in s. 13 of the **Act**, her 23 pages of reasons makes it clear she considered those that were relevant in reaching her decision that an equal division was appropriate. As stated in **Young v. Young** 2003 NSCA 63, ¶ 15:

. . . The inquiry under s.13 is broader than a straight forward measuring of contribution. The predominant concept under the **Act** is the recognition of marriage as a partnership with each party contributing in different ways. A weighing of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Since the introduction of the **Act**, it has been repeatedly stressed by this Court, that matrimonial assets will be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable.

[22] Given the age of the parties, the length of their marriage, the fact both had contributed to the maintenance of the matrimonial home prior to separation, the extent of their matrimonial assets and debts and the fact Mr. Wong had been the main breadwinner by agreement throughout the marriage, it cannot be said that the judge did not exercise her discretion judicially or that she made a legal error when she declined to make an unequal division of the matrimonial assets in Mr. Wong's favour.

[23] Also in connection with the division of matrimonial assets, Mr. Wong argued that the judge erred by not ordering the sale of Mr. Wong's vehicle rather than attributing a value to it and allocating that value to him. There is no merit to this argument. The Court at the interim hearing on spousal support commented upon the fact that the sale of Mr. Wong's vehicle may be a consideration for him. As noted by the judge in her reasons for judgment, Mr. Wong chose not to sell. At trial the parties focussed on establishing the value of his vehicle at the time of separation. Mr. Wong raised the possibility of the judge ordering the sale of his vehicle rather than valuing it as part of the division process in his post trial brief. There he pointed out that the judge had the choice of either ordering its sale or placing a value on it. She chose the latter which was in her power to do. She did not err. In all likelihood the sale of Mr. Wong's vehicle, a depreciating asset, following trial in June 2007 would not have been a fair reflection of its value on the date of separation, November 2005.

[24] At times it appeared that Mr. Wong did not recognize that the judge had divided the matrimonial assets equally. He focussed on the fact Mrs. Wong received the majority of the money that was paid into court. The fact that Mrs. Wong received the majority of the money paid into court did not mean that she received an unequal division of the assets. The funds were divided in that way because Mr. Wong had already received a greater share of the matrimonial assets by retaining the higher valued vehicle and by receiving the benefit of the post separation debt he incurred without adequate explanation that had been previously paid from the proceeds of the sale of the home. As Mr. Wong had already benefited from the matrimonial assets to a greater extent than Mrs. Wong, Mrs. Wong was entitled to more of the money held in court to equalize her share.

[25] Mr. Wong's last argument was that the judge erred in ordering indefinite spousal support in the amount of \$300 per month. Mr. Wong argued before us that the judge should not have ordered him to pay any spousal support, or in the alternative, that it should only be paid for a limited period of time.

[26] Again, we are not to retry this issue or substitute our opinion for that of the judge if her discretion was exercised judicially in accordance with correct legal principles.

[27] As stated by the judge, Mr. Wong testified at trial that Mrs. Wong was entitled to spousal support; that she was dependant on him financially. The issue at trial was the amount. There was no dispute that Mr. Wong had an income of \$13,846 per year, one third of which was tax free, as a member of the Municipal Council. The judge found as a fact that it was unlikely Mrs. Wong could earn an income of any significance as noted in ¶ 27 of her reasons quoted in ¶ 10 above. The judge did not err in ordering the amount of support she did, one half of which was to cover Mrs. Wong's health insurance which Mr. Wong had agreed to pay.

[28] There was no suggestion in the pleadings or at trial that there should be a termination date for spousal support. It is difficult to assign error to the judge for failing to do that which was never requested.

[29] Accordingly, I would dismiss the appeal and order Mr. Wong to pay costs to Mrs. Wong of \$1,400, being 40% of the trial costs, plus disbursements.

Hamilton, J.A.

Concurred in:

MacDonald, C.J.N.S.

Bateman, J.A.

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Revised judgment: The text of the original judgment has been corrected according to this erratum dated October 14, 2011.

Judges: MacDonald, C.J.N.S.; Bateman & Hamilton, J.J.A.

Appeal Heard: March 26, 2008, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Hamilton, J.A.; MacDonald, C.J.N.S. & Bateman, J.A. concurring

Counsel: Michael K. Power, for the appellant
A. Franceen Romney, for the respondent

Erratum:

[30] The last sentence in paragraph 15 of the original decision should be amended as follows:

[15] ...The onus is on the party seeking an unequal division to show that an equal division is unfair or unconscionable; **Coxworthy v Coxworthy**, 2006 NSSC 205, ¶ 47.