

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Boutilier -Stonehouse v. Stonehouse, 2008 NSSC 74

Date: March 20, 2008

Docket: 1206-5267

Registry: Sydney

Between:

Stacy Boutilier Stonehouse

Applicant

v.

Mark Stonehouse

Respondent

DECISION

Judge: The Honourable Justice Theresa M. Forgeron

Heard: December 3, 2007, and February 8 and March 6, 2008 in Sydney, Nova Scotia

Written Decision: March 25, 2008

Counsel: Mr. Nash Brogan, counsel for Ms. Stacy Boutilier Stonehouse
Mr. Alan Stanwick, counsel for Mark Stonehouse

By the Court:

I. Introduction

[1] After a brief marriage, Mark Stonehouse and Stacy Boutilier Stonehouse separated. The vast majority of the assets, including the matrimonial home, were owned by Mr. Stonehouse before the marriage. In addition, each party held debt in his/her name at the time of marriage.

[2] There were no children born of the union, although Ms. Boutilier Stonehouse had a son from a previous relationship, whom the parties agree is not a child of the marriage for the purposes of this proceeding.

[3] On May 25, 2006, a fire destroyed the matrimonial home. The home was insured. The insurance proceeds were paid out to Mr. Stonehouse as the home and insurance policy were held in his name.

[4] Although agreement was reached on maintenance issues, the parties could not resolve the property issues. The parties were the only witnesses

during the trial heard on December 3, 2007, and February 8 and March 6, 2008.

II. Issues

[5] The court must decide the following four issues:

- a) What is the date of separation?
- b) Should disposition costs be deducted from the value of the matrimonial home?
- c) What assets and debts are subject to division?
- d) Should an unequal division be granted?

III. Analysis

[6] **What is the date of separation?**

[7] The parties do not agree on the separation date. Ms. Boutilier Stonehouse states that separation occurred on September 12, 2006. Mr. Stonehouse placed the date of separation in July 2006.

[8] Not much turns on this finding. I have applied s.8 of the *Divorce Act* and the law as summarized in **Dupere v. Dupere** (1974), 9 N.B.R. (2d) 554 (QB) as affirmed by the Court of Appeal in 10 N.B.R. (2d) 148 (CA); **French v. French** (1997), 162 N.S.R.(2d) 104 (SC); **T.H. v. W.H.** (2007), 250 N.S.R. (2d) 334 (SC); **J.E.M. v. L.G.M.** (2007), 252 N.S.R. (2d) 61 (SC); **Blue v. Blue** (2006), 249 N.S.R. (2d) 330 (SC); and **Gardner v. Gardner** (2005), 232 N.S.R. (2d) 68 (SC).

[9] I have determined that on a balance of probabilities, the separation date is July 31, 2006 for the following reasons:

- a) When the parties moved to the hotel, they initially shared the same room. This later changed such that by July 2006, Ms. Boutilier Stonehouse and her son occupied one room in the hotel, while Mr. Boutilier occupied a different room;
- b) Sexual intimacy terminated after the fire destroyed the matrimonial home in May 2006;
- c) Ms. Boutilier Stonehouse and her son moved into her mother's home in mid-July 2006, while Mr. Boutilier moved to his parent's home at the end of July 2006. The parties did not resume living together after July 31, 2006;
- d) Although the parties maintained some communication, such as attending a family wedding and a birthday party, they did not resume

cohabitation. They were living lives that were separate and apart from each other as of July 31, 2006;

e) As of July 31, 2006, Mr. Stonehouse did not have an intention to return to the matrimonial consortium because there was a complete breakdown in the matrimonial relationship;

f) Mr. Stonehouse developed a relationship with another woman after July 31, 2006; and

g) By July 31, 2006, Mr. Stonehouse led a "life of withdrawal" from the joint matrimonial relationship.

[10] **Should disposition costs be deducted from the value of the matrimonial home?**

[11] I have reviewed the case law presented by Mr. Brogan on behalf of Ms. Boutilier Stonehouse. I have also reviewed the leading cases in this area, notably **Gomez-Morales v. Gomez-Morales** (1990), 100 N.S.R.(2d) 137 (CA), and **Prince v. Prince** [1997] N.S.J. 433 (CA). There is overwhelming authority that disposition costs should be deducted to establish the equity in a home. I agree with the comments of Goodfellow J. in **Robski v. Robski** [1997] N.S.J. No. 444 (SC), wherein he stated that

except in unusual cases, disposition costs should routinely be deducted from the value of a home for division purposes.

[12] The parties agree, based upon the appraisal, that the market value of the home is \$182,000. From this amount, disposition costs of \$13,018 (sales commission, legal fees, and GST) will be deducted, leaving a net value of \$168,982 for division purposes.

[13] **What assets and debts are subject to division?**

[14] The parties reached agreement on some of the valuation and classification issues relating to the division of the assets and debts. The parties, however, hotly contested the classification of certain insurance proceeds and certain debt. The agreements reached and the contested issues are discussed below.

[15] Agreements Relating to Certain Assets and Debts:

[16] **Insurance Proceeds and Mr. Stonehouse's Vehicle:** Although the matrimonial home and contents were destroyed by fire before separation, the parties acknowledge that the insurance proceeds are nonetheless matrimonial by virtue of s.4(2) of the *Matrimonial Property Act*. The parties therefore agree that the home and contents purchased from the insurance proceeds are matrimonial. The vehicle of Mr. Stonehouse is also matrimonial and subject to division.

[17] **Vehicles, Appliances and Associated Debt:** The parties also confirm that Ms. Boutilier Stonehouse will retain her vehicle, the Home Depot appliances, and the associated debt. Mr. Stonehouse will retain his snow mobiles and associated debt. There will be no equalization payment connected with these vehicles, appliances and debt.

[18] **Student Loans:** The parties recognize that the student loans of Ms. Boutilier Stonehouse will not be subject to division as these loans were incurred prior to the parties' relationship.

[19] **Demolition Expenses:** The parties agree that the uninsured demolition expenses are subject to division. These expenses equal \$8,630.

[20] *Contested Assets and Debts*

[21] ***Insurance Proceeds of \$7,000 for Living Expenses:*** Ms. Boutilier Stonehouse seeks to include \$7,000 worth of the insurance proceeds paid to Mr. Stonehouse at the end of July 2006 as a matrimonial asset. This lump sum was transferred to Mr. Stonehouse in exchange for the parties leaving the motel and not seeking further compensation for living expenses while the home was being constructed.

[22] Mr. Stonehouse states that he used \$5,000 of the insurance proceeds to pay off the outstanding balance owed on the \$12,500 wedding loan. The wedding loan represented funds which Mr. Stonehouse borrowed from family in connection with the parties' October 2005 wedding.

[23] Mr. Stonehouse states that he used the remaining \$2,000 of the insurance money for his living expenses.

[24] I find that \$2,000 of the \$7,000 insurance payment is a matrimonial asset. I accept that the other \$5,000 was used to pay the wedding loan balance. Although no documentation was tendered to confirm the outstanding amount, I accept the evidence of Mr. Stonehouse. I accept that the wedding loan was capable of legal enforcement and that it was incurred for the benefit of the parties. In so doing, I note that Ms. Boutilier Stonehouse acknowledged that the wedding cost in excess of \$10,000 and that she did not pay for the wedding. Mr. Stonehouse paid off more than half of the wedding loan in less than a year. It is more than probable, in the circumstances, that \$5,000 was outstanding on the wedding loan. The remaining \$2,000 of the insurance proceeds is, however, properly classified as a matrimonial asset pursuant to section 4 of the *Matrimonial Property Act*.

[25] **\$31,794 of the Mortgage Balance:** The mortgage has a balance of \$130,500. The mortgage is composed of money which was borrowed to

build the home and money which was borrowed to pay out the consolidation loans previously held in Mr. Stonehouse's name. Ms. Boutilier Stonehouse seeks to exclude that portion of the mortgage, \$31,794, which was borrowed to pay Mr. Stonehouse's consolidation loans. She states that the consolidation loans were not matrimonial debt.

[26] Although the term matrimonial debt is not found in the *Matrimonial Property Act*, case law supports the use of such terminology: **Jovcic v Jovcic** 2005CarswellNS 305 (SCFD); **Larue v. Larue** (2001), 195 N.S.R. (2d) 336 (SCFD); and **Grant v. Grant** (2001), 192 N.S.R. (2d) 302 (SCFD).

[27] The party who seeks to include a debt in the equalization schedule bears the burden of proof in two respects. First, the party must show that the debt was incurred for family or matrimonial purposes. Second, the party must show that the debt is capable of legal enforcement: **Jovcic v Jovcic**, supra; **Rossiter-Forrest v. Forrest** (1994), 129 N.S.R. (2d) 130 (SC); **Walker v. Walker** (1990), 92 N.S.R. (2d) 127 (TD); and **Abbott v. Abbott**, 2002CarswellNS 395 (SCFD).

[28] I find that Mr. Stonehouse has proven on a balance of probabilities that some of the consolidated loan balance was matrimonial debt, while another portion is exempt because it relates to the snow mobiles. As noted in para 17, the parties previously agreed that the snow mobile loan was exempt for division purposes. The loan used to buy Mr. Stonehouse's vehicle and the engagement ring is a matrimonial debt as the vehicle and ring were used for the benefit of the parties. This loan had a balance of \$11,163 plus a proportionate share (44%) of the cost of borrowing which equals \$2,652 for a total of \$13,815 as matrimonial debt. The portion of the mortgage thus subject to division is \$112,521.

[29] *Liability for the Cellular Phones and Satellite dish:* Mr.

Stonehouse seeks to include the contractual expense associated with the cellular phones and satellite dish as a matrimonial debt. Although I find that this debt was incurred for the family unit and is capable of legal enforcement, I nonetheless decline to include this debt in the division for the following reasons:

- a) Mr. Stonehouse had the continued use of the cell phones after separation and Ms. Boutilier Stonehouse did not;

b) Mr. Stonehouse had the continued use of the satellite dish for the greater portion of the contractual term;

c) Mr. Stonehouse could have returned to the matrimonial home earlier if he opted to have the home renovated rather than a new home constructed. Ms. Boutilier Stonehouse received no benefit from this decision; and

d) Mr. Stonehouse earns more money than Ms. Boutilier Stonehouse and is in a better financial position to carry this debt.

[30] ***Additional Storage Expense:*** Mr. Stonehouse seeks to include the costs of materials in the amount of \$2,195 as matrimonial debt. He acquired the materials to enlarge the garage for additional storage while the home was being constructed for security against theft. I decline to include this expense as a debt because it was paid off on July 21, 2006 - ten days before separation.

[31] ***Cost of the Appraisal:*** I will include the cost of the appraisal as a shareable debt. Both parties relied upon the home appraisal for court purposes. The appraisal expense is \$336.

[32] ***Visa:*** Mr. Stonehouse seeks to exclude Ms. Boutilier Stonehouse's Visa from division as he argues such is not matrimonial and no proof of the

separation balance was submitted. I find that Ms. Boutilier Stonehouse has proven on a balance of probabilities that \$5,000 of her Visa balance is a matrimonial debt. Although it is preferable to have documentary proof, such is not always possible. I accept the viva voce evidence of Ms. Boutilier Stonehouse. I find that given Ms. Boutilier Stonehouse's financial circumstances, she had a low credit limit before the parties cohabited. I also find that Ms. Boutilier Stonehouse increased the spending limit on her Visa after the parties relationship began to pay for a trip, incidentals and esthetic services. These were incurred after the common law union began and with the knowledge of Mr. Stonehouse. These expenses are matrimonial.

[33] The following table represents the assets and debts of the parties:

ASSET	VALUE	HUSBAND	WIFE
Home	\$168,982	\$168,982	Nil
Contents	\$ 69,570	\$ 42,102	\$27,468
Husband's Car	\$ 1,500	\$ 1,500	Nil
Insurance	\$ 2,000	\$ 2,000	Nil
TOTAL	\$242,052	\$214,584	\$27,468

DEBT	BALANCE	HUSBAND	WIFE
Mortgage	\$112,521	\$112,521	Nil
Visa	\$ 5,000	Nil	\$5,000
Appraisal Costs	\$ 336	\$ 336	Nil
TOTAL	\$117,857	\$112,857	\$ 5,000

EQUITY OF HUSBAND	
Assets	\$214,584
Debt	\$112,857
Net Equity	\$101,727

EQUITY OF WIFE	
Assets	\$27,468
Debt	\$ 5,000
Net Equity	\$22,468

[34] **Should an unequal division be ordered?**

[35] Position of Mr. Stonehouse

[36] Mr. Stonehouse seeks an unequal division of the matrimonial assets and debts for the following reasons:

- a) the marriage lasted less than one year;
- b) Ms. Boutilier Stonehouse made no contribution to the home, insurance or other assets held in his name after cohabitation;
- c) Mr. Stonehouse owned the majority of the assets before the marriage and ownership continued in his name after the marriage; and
- d) Mr. Stonehouse owned the home prior to the marriage and paid all expenses, including the home insurance bill, without any contribution from Ms. Boutilier Stonehouse during the marriage.

[37] Mr. Stonehouse proposes that each retain the assets held in his/her respective names and each be responsible for the payment of any debt for which he/she is legally liable without any equalization payment being ordered.

[38] *Position of Ms. Boutilier Stonehouse*

[39] Ms. Boutilier Stonehouse seeks an equal division of the matrimonial assets for the following reasons:

- a) the *Matrimonial Property Act* contains a strong presumption in favour of an equal division;

b) Ms. Boutilier Stonehouse had a fully furnished home prior to the relationship. She sold some the household contents which she owned when she and her son moved in with Mr. Stonehouse. She did so because they no longer had a need for the contents which were sold. Now that the marriage has broken down, Ms. Boutilier Stonehouse is without the contents she had prior to the marriage and a limited ability to replace these assets;

c) Mr. Stonehouse promised to take care of Ms. Boutilier Stonehouse upon marriage and she has relied to her detriment upon Mr. Stonehouse's promises;

d) The assets appreciated during the marriage and she should have the benefit of the appreciation which occurred as a result of a fire and not for any reason connected to Mr. Stonehouse's actions;

e) Ms. Boutilier Stonehouse did pay some of the household expenses. Further Mr. Stonehouse refused to take money from her to pay for some of the other expenses;

f) Mr. Stonehouse was able to receive additional insurance proceeds because of Ms. Boutilier Stonehouse's actions. Mr. Stonehouse required Ms. Boutilier Stonehouse's signature on the mortgage as she had an interest in the matrimonial home. Had Ms. Boutilier Stonehouse not consented, then Mr. Stonehouse would be limited to the replacement value of the insurance proceeds;

g) Mr. Stonehouse was difficult and uncooperative in his dealings with Ms. Boutilier Stonehouse post separation. Ms. Boutilier Stonehouse was required to make a court application to receive the insurance proceeds to replace the personal and household items which she brought into the relationship; and

h) If fire insurance proceeds were meant to be exempt from division, the legislation would have been phrased accordingly.

[40] Ms. Boutilier Stonehouse proposes an equal division based upon two scenarios. In the first scenario, an equal division would result in Mr. Stonehouse paying her \$60,184. In the second scenario, an equal division would result in Mr. Stonehouse paying her \$44,458.

[41] *Legislation and Caselaw*

[42] Ms. Boutilier Stonehouse seeks relief pursuant to section 12(1)(a) of the *Matrimonial Property Act*. Section 12 presumes an equal division of the matrimonial assets. Mr. Stonehouse seeks relief pursuant to s. 13 (b), (d), and (e) of the *Matrimonial Property Act* which states as follows:

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;

...

[43] As Mr. Stonehouse is seeking an unequal division, he carries the burden of proof. It is a heavy burden which requires proof of unfairness or unconscionability: **Harwood v. Thomas** (1981), 45 N.S.R. (2d) 414 (CA); **Ritcey v. Ritcey** (2002), 206 N.S.R.(2d)75(SCFD); **Jenkins v. Jenkins** (1991), 107 N.S.R. (2d) 18 (TD); **Fisher v. Fisher** (1994), 131 N.S.R. (2d) 367 (CA); and **Jess v. Strong** (1998), 169 N.S.R.(2d)271(SC).

[44] In **Jenkins v. Jenkins**, supra, Richard J. reviewed the meaning of unfair and unconscionable at para 10:

[10] I propose now to deal with the division of matrimonial assets in accordance with the law as set out in Donald, supra, while remaining mindful of the comments of MacDonald, J.A., in Nolet. To support a finding that a division is "unfair and unconscionable" it seems that there must be something more than mere inconvenience. The Random House Dictionary defines "unconscionable" variously as "unreasonable", "unscrupulous", "excessive" and "extortionate". These are strong words, and when coupled with the requirement that "strong evidence" must be produced to support an unequal division the burden upon the party requesting an unequal division of matrimonial assets is somewhat onerous.

[45] In **Maclsaac v. Maclsaac** (1996), 150 N.S.R. (2d) 321 (C.A.), Bateman J.A. reviewed the meaning of discretionary authority. She held that discretionary authority must be exercised judicially, not arbitrarily, but rather

in accordance with rules of reason and justice as found in case law, yet subject to the unique circumstances of the case.

[46] In **Goyetche v. Goyetche** (2007), 252 N.S.R. (2d) 24 (CA), Bateman J.A. affirmed a trial decision which granted an unequal division where the marriage was of short duration [three years, with an 18-month separation] and one party owned the majority of the assets prior to the marriage.

[47] In **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 27 (CA), Bateman J.A. stated that the trial judge erred when he awarded the wife a one-third interest in the matrimonial assets. The Court of Appeal reduced the wife's share from \$100,000 to \$24,000. The parties had only been married for one year prior to separation and the husband owned the vast majority of the assets prior to the marriage. The court limited the wife to one-half of the value of the matrimonial assets accumulated during the marriage.

[48] In **Gossen v. Gossen** (2003), 213 N.S.R. (2d) 217 (SC), Smith J., as she then was, refused to equally divide the husband's pre-marriage RRSPs because of the short duration of the marriage and because the husband

brought the vast majority of the assets into the marriage. It should be noted, however, that in **Gossen**, the husband offered to equally divide all other matrimonial assets.

[49] In **MacLeod v. MacLeod** (1994), 135 N.S.R. (2d) 49 (SC), MacDonald J. unequally divided the assets where the marriage was less than four years and where the wife made no specific contribution to the acquisition or growth of the assets.

[50] In **Adams v. French** 2007 CarswellNS 97 (SC) Wilson J. granted an unequal division of the matrimonial assets to the husband where the marriage lasted approximately four years and where the husband owned the vast majority of the assets prior to the marriage. Wilson J. also refused to divide any of the RRSPs owned by the husband prior to the marriage, nor any of the substantial increases in the value of the RRSPs during the marriage, as the wife made no contribution to the acquisition or growth of the RRSPs.

[51] Decision

[52] I have reviewed the evidence, legislation, case law and the submissions of the parties. I find that Mr. Stonehouse has dislodged the heavy burden which is upon him; he has proven that an equal division would result in unfairness or unconscionability. I make this finding for the following reasons:

- a) Mr. Stonehouse owned most of the assets before the marriage. Ms. Boutilier Stonehouse brought little into the marriage other than some miscellaneous household items;
- b) Ms. Boutilier Stonehouse made minimal contribution to the acquisition and growth of the matrimonial assets. She did keep the home clean and pay some household bills. However, Mr. Stonehouse paid the vast majority of the household bills and also performed some housekeeping tasks and maintained the property;
- c) The marriage was of brief duration. The parties began to cohabit in August 2004, were married in October 2005, and separated on July 31, 2006;
- d) The home was owned by Mr. Stonehouse before the marriage. Mr. Stonehouse was solely responsible for the payment of the mortgage before and after the marriage, taxes, and insurance with no contribution from Ms. Stonehouse; and
- e) An equal division would result in the redistribution of capital and a financial windfall to Ms. Boutilier Stonehouse.

[53] Although the court agrees that an unequal division is appropriate, the unequal division will not be to the extent proposed by Mr. Stonehouse. Mr. Stonehouse will pay Ms. Stonehouse the sum of \$2,332.00 which represents the equalization of the Visa and appraisal debt. This debt was incurred by the parties after the relationship began and before the divorce and thus should be equally shared. Mr. Stonehouse will also pay Ms. Boutilier Stonehouse \$1,000 for her share of the living expenses from the \$7,000 insurance payment which he received. In addition, Mr. Stonehouse will pay Ms. Stonehouse a further \$5,000 to assist her in the acquisition of used furniture to replace that which she sold at the commencement of the common-law union. The equalization payment of \$8,332 will be made no later than April 25, 2008.

[54] No further equalization payment is required. Mr. Stonehouse will continue to own the home, vehicles and personal property in his possession. Mr. Stonehouse will continue to be solely liable for the mortgage and demolition costs associated with the home, together with any other debt held in his name. Ms. Boutilier Stonehouse will continue to own all personal property, inclusive of her car and the household chattels in her possession

and will be responsible for the debt held in her name without further equalization payment to Mr. Stonehouse.

IV. Conclusion

[55] The following relief is ordered:

- a) a divorce based upon the breakdown of the marriage as established by the one year separation, and the finding that there is no possibility of reconciliation;
- b) an order that the petitioner's name will be changed to Boutilier upon the issuance of the Certificate of Divorce;
- c) a finding that the separation occurred on July 31, 2006;
- d) an unequal division of the assets such that Ms. Boutilier Stonehouse will retain the assets in her possession and will be responsible for the debts held in her name; and Mr. Stonehouse will retain the home and personal property in his possession and will be responsible for the debts held in his name; and
- e) an order requiring Mr. Stonehouse to pay Ms. Boutilier Stonehouse the sum of \$8,332 as an equalization payment by April 25, 2008.

[56] Mr. Stanwick is to draft the order and forward it to Mr. Brogan for his signature as to form. If difficulty arises in relation to the settling of the form

of the order, then each party is to provide written submissions as to his/her position and a brief chamber's appearance will be scheduled.

[57] If either party seeks costs, written submissions are to be filed within 14 days, and the response filed 14 days after the first submission is received.

[58] I thank counsel for their briefs and their professional conduct shown during the course of the trial.

Justice Theresa M. Forgeron