

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: J. H. S. v. J. W. S, 2009 NSSC 101

Date: 20090327

Docket: 1201-059817, SFHD-040386

Registry: Halifax

Between:

J. H. S.

Petitioner

v.

J. W. S.

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: March 3 and 5, 2009, in Halifax, Nova Scotia

Written Decision: March 27, 2009

Counsel: Mary Jane McGinty, counsel for the Petitioner
J.W.S., self represented

By the Court:

[1] This is a divorce proceeding commenced by the wife on July 12, 2005. An amended petition was issued on July 19, 2005. The husband issued an answer and counter petition for divorce on September, 2005. Both parties request a divorce and a division of matrimonial property. The parties married on September 2, 2000. They had lived together since 1994. They separated on October 13, 2002.

[2] In 1983 the husband entered into an agreement with his father to purchase a 5 acre lot of land upon which the matrimonial home is located (the matrimonial home lot). The final payment was made in November, 1998. On July 24, 2008 the husband placed a mortgage on this property. To do so he signed an affidavit of status in which he declared he was not a “spouse”. The husband can read but he alleges when he explained his situation to the bank officers involved he was informed this was the manner in which he should sign the affidavit of status. While I am extremely doubtful he received this advice, I do know the mortgage was prepared through First Canadian Title for the Royal Bank of Canada in New Brunswick. In Nova Scotia spouses cannot mortgage the matrimonial home without the consent of the other spouse. [Matrimonial Property Act s. 8 (1)]. If this did occur, the mortgage lender may still have security against the matrimonial home if the lender provided “valuable consideration, in good faith and without notice that the property was a matrimonial home” [Matrimonial Property Act s. 8(2)]. Although the mortgage to the Royal Bank of Canada may constitute an enforceable debt registered against the matrimonial home, the mortgage is not debt for which the wife is responsible; it is not a matrimonial debt as that term has been defined in *Grant v. Grant*, 2001 NSSF 13 (N.S. S.C.) and as further discussed in *Larue v. Larue*, 2001 NSSF 23 (N.S.S.C.)

[3] By deed dated September 30, 1994 the husband’s parents conveyed approximately 20 acres of land to the wife (the building and wood lot). Both parties acknowledge this was a gift. The land was conveyed solely to the wife because the husband had filed for and was subject to a bankruptcy proceeding. Both parties agree this 20 acre lot is a matrimonial asset. On

November 14, 1995 the husband and the wife signed a Collateral Mortgage providing this lot as security for a promissory note given to the wife's adoptive father from whom the couple had borrowed \$15,000. This document was prepared by a lawyer and witnessed by staff in that lawyers office. The amount owed by the parties on this debt is now \$16,000.

[4] At some point during their relationship the husband inherited approximately 111 acres of land (the wood lot). This property was not used in any significant way for family purposes. The wife has not contested a finding that this wood lot may be excluded as a gift or inheritance pursuant to section 4(1)(a) of the Matrimonial Property Act although she includes it on an equalization statement she prepared and filed as Exhibit 13 in this proceeding. If this asset is excluded she does request a division of this asset pursuant to section 13 of the Matrimonial Property Act because she is responsible for paying the entire family debt. (*Ryan v. Ryan*, 2002 NSCA 51)

[5] During the parties relationship the husband lived and worked for a period of time in Prince Edward Island. At the time he was receiving a "living allowance" from the Workman's Compensation Board. He used this and other money available to him to purchase a lot of land upon which was located a small building. He lived on this property while he was in Prince Edward Island and later used it as a place to visit. The wife also was an occasional visitor to this property and I am satisfied that money they both earned or received paid to furnish the property and to do what was necessary to keep it habitable. Not long after the parties separation the building on this land was destroyed by fire. Because the property was insured the husband received the sum of \$20,000. At the time he received this money he was incarcerated but he did arranged pay some of the family debt and this has been reflected in the calculations contained in Exhibit 13. He has sold this lot of land and has suggested the purchase price was \$9,000.00. The wife understood he received \$10,000.00. I accept the wife's evidence about the value of this lot. Although this lot of land was situate in Prince Edward Island, I have jurisdiction to include it in a division of matrimonial assets. (Matrimonial Property Act s.22)

[6] When the husband met the wife she was self employed creating and selling leather products. She operated her business under the name Viking Leather Sewing and Repair. The husband was never directly employed as an employee of this business. The wife acknowledges he assisted her by renovating premises for this business, building display shelves, driving her to and from craft shows and promoting her products to friends and acquaintances. She accepts he had an interest in her business and has included its only value, the leather inventory, in Exhibit 13. I accept this value. The husband has provided no alternate value.

[7] During the parties relationship the husband provided a wide range of services for landowners including silva culture, tree harvesting, and land clearing. At some point the husband and the wife decided to incorporate a company to provide these services. The name of the company was Viking Wood Services Ltd. The wife was the sole director and shareholder of this company while the husband was an employee. I accept the wife's evidence that she considered this company to be owned by both she and her husband but to maximize income in their family he was not a shareholder or principal officer. This arrangement was also recommended because of the husband's previous bankruptcy and the impact that may have had on the ability of this company to obtain financing. The wife was the person with the clean credit record and indeed as their relationship progressed it was she who provided the vast majority of the money to operate both businesses and provide financial security for their family. This is not to suggest there was no contribution by the husband. He was a hard worker but the income generated by Viking Wood Services Ltd. and Viking Leather and Repair did not keep up with expenses, either for the companies or for the family unit. Both companies, but in particular Viking Wood Services Ltd., operated on debt. I accept the wife's evidence that frequently in order to pay staff employed by Viking Wood Services Ltd., including the husband, she would make withdrawals on her personal line of credit and on her credit cards. These expenditures would later be reflected on the books of the company as a debt owing to her as a shareholder. By the time this company was wound up the shareholders loan was in excess of \$72,000. The wife had also provided an inheritance of approximately \$10,000 she had received from her family to set

up and sustain this business. I reject the husband's suggestion that she did not properly compensate him for the work he performed for the company and that the company records were manipulated to her benefit.

[8] Shortly after the parties separated the husband was incarcerated. This and the husband's bitterness about the separation prevented any joint cooperative approach to the resolution of the property and debt issues they faced at separation. Because the wife was personally responsible for most of the debt that had been incurred during the marriage and in particular for Viking Wood Services Ltd., she had to formulate a plan to protect her credit rating and the land in which she and the husband had an ownership interest. Her plan was to windup Viking Wood Services Ltd. and liquidate its assets to pay off debt. She carried out this plan responsibly and she applied all the money she received to the debt. I am satisfied she obtained the best price she could for each asset she sold. It was in her best interest to do so since she had personally guaranteed the debt. The liquidation of company assets did not pay all the company debt. The wife has been paying this debt, and other matrimonial debt, since separation.

[9] Exhibit 13 does describe and value all of the assets owned by the husband and the wife and all of their debts to the date of their separation or within an appropriate time thereafter. I accept the values given to the assets by the wife. An equalization would require the husband to pay the wife the sum of \$48,495.55. However, I have excluded the building and wood lot as an inheritance. With this asset excluded the husband owes the wife \$32,495.50 to equalize assets and debts. (Table of Calculations attached) There is no matrimonial asset owned by the husband that can be transferred to the wife to satisfy this debt to her. He mortgaged the only matrimonial asset he owned in Nova Scotia, the matrimonial home lot. The husband is living in New Brunswick with limited income; a monetary judgment against him may be difficult to execute. Merely ordering him to pay this amount would not provide an "orderly and equitable settlement of the affairs of the spouses..." as is required by the recitals in the Matrimonial Property Act. The wife is responsible for personally paying the majority of the family debt relating both to the businesses they operated and to the maintenance of their

regular household expenses. An equal division of matrimonial assets under these circumstances is “unfair or unconscionable” as those terms have been defined by our courts. (*Voiculescu v. Voiculescu* 2003 CarswellNS 252; *Jenkins v. Jenkins* (1991), 107 N.S.R. (2d) 18 (T.D.) . The factors in section 13 of the Matrimonial Property Act important to this decision are:

- (a) the unreasonable impoverishment by either spouse of the matrimonial assets; (the husband should not have mortgaged the matrimonial home lot)
- (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;

[10] The wood lot has been appraised at \$32,000.00. The wife shall be the sole owner of the wood lot and the husband’s interest is conveyed to her by order of this court. The wife shall be the sole owner of the building and wood lot registered in her name and the husband’s interest is released. The wife has and shall continue to have an ownership interest in the matrimonial home lot until she has been paid the balance of the equalization claim (\$495.50), her costs, and interest from the date of this decision until payment at the rate contained in the Interest on Judgments Act, R.S.N.S 1989, c. 233 (5%). When the wife has been paid what she is owed her interest in this property shall be released and she shall sign and deliver to the husband any documents necessary to confirm this release.

[11] The wife is entitled to costs in this proceeding. No submissions about the amount of costs that should be awarded have been made. The wife is to file her written submissions about the amount requested with this court, and copy them to the husband, within 12 working days from the date this decision is mailed to her by this court. The husband shall file his written submissions with this court and copy them to the wife within 7 working days from the date the wife’s written submissions were mailed to him.

Beryl MacDonald, J.

DIVISION OF ASSETS		
DESCRIPTION	WIFE	HUSBAND
ASSETS		
Matrimonial Home Lot		18,000
Building & Wood Lot	35,000	
PEI Property Insurance		30,000
1989 Van		1,500
1979 Van		1,200
1989 Motorcycle		2,800
Suzuki ATV		3,000
Subaru Justi	400	
1979 Honda Motorcycle		1,000
Firewood		5,000
Biking Leather	2,000	
ASSET TOTAL	37,400	62,500
DEBT		
Promissory Note	16,000	
R.B. Line of Credit	10,000	
Citibank Gold Card	2,463	
Canadian Tire Mastercard	995	
Petro Canada	1,500	

Visa		2,800
Mastercard Canadian Tire		1,500
Bunrich		1,300
Farm Credit	14,320	
R.B.C. Overdraft	1,500	
Winding Up Expense	2,706	
N.G.I. Credit Union		3,993
DEBT TOTAL	49,484	9,593
NET EQUITY	- 12,084	52,907
EQUALIZATION PAYMENT	32,495.50	- 32,495.50
NET ASSETS	20,411.50	20,411.50
EQUALIZATION NET ASSETS		
Total Assets \$ 99,900.00 Total Debt \$ 59,077.00 Net Family Equity \$ 40,823.00 / 2 = Each Spouse to receive \$ 20,411.50		