IN THE SUPREME COURT OF NOVA SCOTIA
[Citation: Wagstaff v. Wagstaff, 2002 NSSC 256]

Date: 20021128
Docket: 1207-002098
Registry: Truro

Between:

Douglas Wagstaff

Petitioner

v.

Margaret Wagstaff

Respondent

DECISION

Judge:	The Honourable Justice J. E. Scanlan
Heard:	September 18 & 19 and November 27 & 28, 2002
Oral Decision:	November 28, 2002
Written Decision:	December 11, 2002
Counsel:	Mrs. Karen Killawee, Solicitor for the Petitioner Mr. Michael Power, Solicitor for the Respondent

By the Court:

Background

[1] This is a divorce proceeding as between Douglas Ian Wagstaff, as the Petitioner, and Margaret June Wagstaff, as the Respondent. The parties were married November 20, 1968. Co-habitation ceased on January 1, 1999. There were several children of the marriage. There remains one child of the marriage as defined by the **Divorce Act**, Lindsay Nora Jillian Wagstaff, born January 31, 1988.

[2] As regards the divorce itself I have already ruled there is no possibility of reconciliation. I am satisfied as to the jurisdictional matters. I am satisfied the grounds for the divorce have been proven. The parties have been living separate and apart since January 1, 1999 and they have not resumed cohabitation since that time. It is appropriate the divorce be granted.

[3] The main issues in this divorce involve access in relation to the remaining child of the marriage, spousal support, child support and division of matrimonial property and assets.

[4] I begin my decision by noting in relation to issues of child support, spousal support and division of matrimonial property that I am satisfied beyond any

doubt that Mrs. Wagstaff has either lied to herself, lied to the children, lied to the Court, or to all of the above. She does not recognize the situation as it is and for what it is. She has repeatedly throughout these proceedings referred to, for example having no money at this point in time, referring to herself as being destitute when she has been, and is anything but destitute. At one point she was showing letters to her daughter referencing a request by Mr. Wagstaff not to charge any more pet food to his account. She says she was feeding grass to the pets because she could not afford or did not have the resources to pay for pet food. In another instance said she did not have the money to pay for gas, that she was destitute throughout. I am satisfied this is but a couple of examples of her attempt to portray Mr. Wagstaff as an unworthy provider so as to gain favour with her daughter in the ongoing dispute. At the same time Mrs. Wagstaff was pleading poverty and embroiling her daughter in that ruse Mrs. Wagstaff was sitting on nearly a quarter of a million dollars in cash. This was a lie that was perpetuated not just post separation but it continued throughout the marriage. Mrs. Wagstaff never disclosed the extent of her or the family savings at times when Mr. Wagstaff was desperate in his attempts to maintain the family.

[5] I am dealing with a divorce in which I am asked to resolve the issues as between the parties based on a marriage which one assumed would have been or should have been a partnership wherein they were in it for better or for worse from the beginning. I can say to you Mrs. Wagstaff you were not in it as a partnership from the beginning. Mr. Wagstaff worked day in and day out to provide for you and his family. For better or worse, richer or poorer he tried with everything that he had about him to do that. He is a man who has a grade 12 education, nothing more and a couple of accounting courses with an employer at different points in time. He made a living the best he could. It was not a great living but it was the best he could. He thought you were saving money throughout the marriage from things like GST refunds, child tax credits or family allowances to help out with things such as childrens educations. You even said in your own evidence that you were meeting other family needs in terms of education expenses, trips and other expenses from these family allowance cheques. As I review the records, starting in 1995 it is clear to the Court that you were doing no such thing. Those monies were going into an account. You had three children go through university and you said you were using that money for university funds. I no more believe that you helped the children out of those funds

with their university expenses than I believe that you are going to help Lindsay in the future out of those funds. Those children were left to fend for themselves with the help that Mr. Wagstaff could muster out of his own or the family resources of which he did retain control. If he had money when they asked for help he gave it. Since 1995 it certainly did not come from the family allowance accounts that you were saying you were putting the cheques into. That is very clear from a review of the bank documents.

[6] Mrs. Wagstaff, I am satisfied that right from the beginning you did just about everything you could possibly do to make this Court proceeding as difficult as possible. It was only in the middle of the proceeding that a Court order, requiring bank documents to be produced, even allowed Mr. Wagstaff to see what this family had. Had he known throughout the marriage one can only imagine that he would have taken appropriate steps earlier to access some of the funds for this family.

[7] While he was sinking in debt, family debt Mrs. Wagstaff, you let him sink. These were not his debts, these were family debts. You let him sink and, right up to today, you would let him drown. That is and was not a partnership Mrs. Wagstaff.

[8] Mr. Wagstaff mentioned in his evidence that he had no idea that a person whom he thought he had a partnership with, a marriage contract with, would let him down that way. He just could not believe it.

[9] When I review this family and the family needs and reasonable expectations Mrs. Wagstaff, I have no idea where your priorities are. I cannot see them as having been with your family. Your priority as far as I can tell was with you and your money, forget everybody else in the family in terms of what their needs and expectations were. As I said Mrs. Wagstaff, if you believe half of what you said here in Court, I am satisfied that you have lied not only to the Court, Mr. Wagstaff and your family but you are lying to yourself. I might point out to you Mrs. Wagstaff, I do not recall ever having rendered a decision using the terminology that I am using here today. Never before have I felt it justified. What you did in terms of money in this family was and is unacceptable. That is even more so when you hear the rest of my decision based on whose money that was because I can tell you Mrs. Wagstaff I am clearly satisfied it was not all your money and I am satisfied it did not all come from an inheritance as you allege. That, too, is a lie.

[10] No wonder Mr. Wagstaff's older children turned against him. No wonder Lindsay has turned against him. They have been lead to believe, based on what I have heard that he has, without justification, left you destitute. You allege that he has not pulled his fair share with the kids or with you. You say he is living a playboy life with friends, drinking and pornography. I do not know what else you have told them. If they hear that side of the story only it does not wear too well on him.

[11] If the children were given all the evidence truthfully and looked at it objectively they would see who has let them down through all these years Mrs. Wagstaff. I suspect the shoe would be on the other foot. Yes Mrs. Wagstaff while you said you could not afford to buy gas for your car, pet food or many other things, you were sitting on almost a quarter of a million dollars. It was just as much a lie then as it is now.

[12] This Court does not believe, even for a moment, that it is no longer your money. I do not accept that the money has somehow been turned over to your brother and you do not own it anymore. Mrs. Wagstaff I would urge you to get your head out of the sand. That is not your brother's money and this Court, one way or another, will make sure the money that belongs to Mr. Wagstaff is returned.

Division of Property

[13] I turn now to the division of property because much will flow from the division of property. I first deal with the matrimonial home. There was a quit claim deed of the matrimonial home from Mr. Wagstaff to Mrs. Wagstaff. It was signed as part of an attempt to negotiate a settlement as between the parties. It was also signed in the context of Mr. Wagstaff knowing that he was being forced into bankruptcy and he thought that it was a possible way of protecting that asset from his creditors for the benefit of the family. The separation agreement never was signed and even if it were signed, I am satisfied that it would have been an unconscionable agreement because Mr. Wagstaff had no idea what the true extent of this families assets were. It was not signed so I am not dealing with setting aside a signed separation agreement.

[14] The fact that he declared bankruptcy and removed the debt burden from the family is a benefit to the family it is not in fact a loss for the family. I do not know how the Respondent could now say that action on his behalf somehow jeopardized the family assets. If anything it only jeopardized his own personal future given the nature of his work where he is trusted by

people to do accounting work for them. No doubt his bankruptcy together with his other actions post-separation have indeed put him in a very difficult position. In that regard I am referencing the theft of $5,000.00 from one of his employers.

[15] I might say counsel when I read the briefs, and we do not make up our minds based on briefs, but when I read the briefs I thought the Court would be dealing with a wholly untrustworthy petitioner, Mr. Wagstaff. My initial impression, again based solely on the briefs was that the Court would see a very credible respondent who is there simply trying to protect herself and protect her child. I can tell you unequivocally, after having heard all of the evidence that I accept completely the credibility of Mr. Wagstaff's evidence without any reservation. I include in that his reference to the $5,000.00 he stole from Mr. Upham. He did that at a time when he was in a desperate situation financially and emotionally. It does not justify it in any way, shape, or form, Mr. Wagstaff. It was theft, it was theft, it was theft. He has admitted it to Mr. Upham. Aside from that, as I go through his evidence, I am satisfied that it is trustworthy and I accept his evidence. Certainly in any situation where there was a divergence as between what his version of the facts was and that of Mrs. Wagstaff, I have no hesitation in

saying I accept Mr. Wagstaff's evidence. Indeed much of the evidence that Mrs. Wagstaff gave just does not conform with the reality and I include her evidence about the bank account statements, etc. Even where Mr. Wagstaff did not have enough knowledge to contradict her the other evidence in many ways contradicts hers. She is just not believable in just about every instance where it counts.

[16] I am still dealing with the division of the matrimonial property, specifically the home. I am satisfied this was a matrimonial asset. The conveyance to protect it from creditors may well have accomplished that. I am satisfied it was not a fraudulent intent, it was a desperate attempt to see what he could do to help his family. It did not result in a signed separation agreement. I am satisfied that it should in fact be divided equally. The respondent in her statement of property indicated it was worth $68,000.00. Mr. Wagstaff accepted that valuation. No doubt the property could be improved upon if there were substantial expenditures but I accept that the value of $68,000.00 was indeed a fair market value as indicated by the respondent in her evidence and accepted by the petitioner. It shall be divided one-half each deducting $4,000.00 in disposition costs. Counsel, I note that you could probably list it for less than six percent if it was to be

listed and then there would be legal fees added on. I have simply deducted approximately six percent so it is $4,000.00. There is also to be deducted from that $68,000.00 price the mortgage which was $20,700.00 at the time of separation according to the evidence.

[17] I would note that Mr. Power's suggestion that Mrs. Wagstaff's efforts in taking out a mortgage to protect the house when Mr. Wagstaff was going into bankruptcy was a laudable endeavour, considering the assets she had. The fact is she protected not only his asset but she protected her own interest. In saying this I keep in mind the fact that at the end of the day I am satisfied that many of the assets that are in Mrs. Wagstaff's possession, and her brother's possession for the time being, were indeed Mr. Wagstaff's. If he were able to gain access to his share of assets earlier he probably could have staved off bankruptcy. He would then have been in a position to earn an awful lot more money and perhaps not be forced into a situation where he felt desperate and had to steal money from Mr. Upham. Over the longer term, the damage to his reputation will negatively impact his ability to contribute not only to his own support but ultimately to that of his daughter and yes, even the Respondent. All of those things could have been avoided. Who do we blame? Well I certainly blame Mr. Wagstaff for the theft but

Mrs. Wagstaff shares a very substantial portion of the blame as well in relation to the forced bankruptcy.

[18] I now turn to the other division of assets. There was reference to a number of hummel figurines. Many of these were gifts to Mrs. Wagstaff from people other than Mr. Wagstaff and I am satisfied that she should be able to keep those ones. Mr. Wagstaff did, however, indicate that he gave her four hummels. I am not satisfied that the Court can necessarily separate those gifts out from any other gifts that they gave back and forth which are included in the larger pool of assets. At the end of the day there is a certain amount of property in the matrimonial home and it should be divided. Mr. Wagstaff does not agree with the value that Mrs. Wagstaff put on the hummels. She can do one of two things. She can either give him one-half of the value that he attributes to those four humbles and I understand him to have given a range of values. She can either give him one-half of the $500.00, because he said $500.00 to $1,000.00, or she can give him two hummels. He can pick them. She should let him know as soon as possible.

[19] There was an agreement between the parties as to the value of the other contents in the matrimonial home, $2,500.00. I am satisfied there should be an equal division of those assets.

[20] There was also a vehicle that he had in his name at the time of separation worth $1,500.00 and hers worth $6,500.00. The difference is $4,000.00 so there is a $2,000.00 payment from her to him to take into account the equalization on the vehicles.

[21] There was debt at the time of separation, including $4,500.00 he paid for her car, $2,000.00 of that she paid. Also a debt of $5,242.00 for his vehicle. That should be divided equally, in other words $5,871.00 each. She has already paid $2,000.00 of it so there is another equalization payment of $3,871.00 that she will have to pay to him in that regard.

[22] I have already indicated that in relation to the house and the cars and the debts that there should be an equal division of property. I am not satisfied that any of the arguments put forth by Mr. Power in relation to justification for an unequal division of matrimonial property have any validity whatsoever. Much of his argument was based on the fact Mr. Wagstaff is not paying maintenance, either spousal or child to the extent required for a reasonable standard of living. Mr. Power argued that the Respondent has a right to stability of income or resources somehow figured into an unequal division. I will deal with the merits of spousal support and child support as a separate issue. I am satisfied that Mr. Wagstaff should be paying a

reasonable amount based on all the factors that relate to spousal and child support and I will deal with them thereunder. There is nothing in terms of what he has done or what I am going to require him to do which would somehow require an unequal division. All of the factors that are mentioned in the **Matrimonial Property Act** that would affect a division of the assets do not justify an unequal division in her favour. I refer to things such as the contribution to the acquisition of those assets. Certainly Mr. Wagstaff, as I have indicated, put everything he had in terms of income earning ability into this family throughout the thirty some odd years of marriage. He cashed life insurances, he cashed RRSP's, all of his savings. Everything he had in terms of assets and income went into this family and to the creditors that existed as a result of his inability to earn more money. The liabilities he had incurred were family debts. In his business he just could not earn any more money. I refer again to the length of the marriage. Nothing about the length of the marriage would justify an unequal division of the assets I have referred to. In terms of the date and manner of acquisition of the assets, they acquired the matrimonial home, the cars and even the debts as a result of joint efforts and they all enjoyed the fruits of his labour and the fruits of her labour. Again, there is nothing in terms of those issues that

would suggest that I should make an unequal division. I will return to the issue of the manner of acquisition of assets again later as I discuss monies inherited by Mrs. Wagstaff from her father and the issue of whether they should be included in the division of matrimonial assets.

[23] In many cases I would be prepared to defer a division of the equity in the matrimonial home. In this case I am satisfied that Mrs. Wagstaff does not need Mr. Wagstaff's share of the matrimonial home so as to make adequate provision for the one remaining child of the marriage, Lindsay. Mrs. Wagstaff has ample resources to give Mr. Wagstaff his share of the matrimonial home at this time. He then can afford a life whereby he can make reasonable arrangements to do things with Lindsay. It is important that the Court not deprive him of his financial ability to do that which he is responsible for as well. That is, to look after Lindsay and to be able to afford a lifestyle that she might partake in and enjoy as well.

[24] In summary, parenting roles and responsibilities and all the other factors that I must consider under the **Matrimonial Property Act**, do not justify an unequal division nor do they, in the unique circumstances of this case, justify a delay in the division.

Bank Accounts

[25] I want to turn now to the bank accounts. I have already referred to the fact that Mrs. Wagstaff had, at the time of the marriage breakdown, and still has between $216,000.00 and $234,000.00. I referred to it earlier as being close to a quarter of a million dollars. The parties now agree that at the time of separation in the bank accounts that she had there was cash or cash availability of $216.000.00. Mrs. Wagstaff's position is that all of that money is hers and that Mr. Wagstaff is not entitled to any of it. She says the reason for this is that it was acquired as a result of an inheritance from her father and should, therefore, be exempt from division in accordance with the provisions of the **Matrimonial Property Act**.

[26] I refer firstly to **Fisher v. Fisher,** 2001 NSCA 18, and would say that based on that case and my reading of other cases dealing with the definition of matrimonial assets, I am not satisfied that all of these monies or all of these accounts were maintained in such a way as to retain the identity of being inherited property to be excluded from the division of matrimonial property. In this regard I refer to the mixing of the inheritance monies with the family monies. I also keep in mind **Kennedy v. Dale** a decision of Justice Campbell of the Nova Scotia Supreme Court (Family Division) dated March

14, 2002, 203 N.S.R. (2d) p. 130. His comments therein really relates more to one of the accounts than the others. There is an account, I am going to identify it as being an inheritance account, it is account number 712-178-3. It would appear, based on the evidence of Mrs. Wagstaff that certainly from 1995 on she retained those monies almost completely separate and apart from any other contributions or indeed withdrawals from other family monies. I say this noting there were three exceptions. On May 17, 1996, there was $2,000.00 put into that account, on October 23rd there was $200.00 put into the account and on December 3, 1998 there was $5,818.03 put into that account. I am certainly satisfied the $5,800.00 came from an account which maintains a different character. As for the $2,000.00 and $200.00, it is not clear where that came from but it certainly did not come out of the 712-178-3 account which I have referred to as the inheritance account. I am satisfied I must treat all three amounts as being separated from the main part of that account. I am satisfied that as regards the 712-178-3 account it does retain the characteristics of an inheritance which was kept separate and apart from the rest of the family assets. I reference the **Kennedy v. Dale** case which I have already cited and note in referencing paragraph 56:

> the account was a preserved asset. It was merely invested for the purpose of earning investment income spent for family purposes and not been used at all instead what has been used is the proceeds of the inheritance or trust rather than the inheritance or trust itself. The use of an income from a trust or inheritance does not taint the fund itself.

Well in this case even the income from that account was not used for the family so we do not even get into the distinction that Justice Campbell made in relation to the tainting of the account principle versus interest. In this case it clearly is more of a pure inheritance than was the case in the **Kennedy v. Dell** situation. I say that except for the $200.00 amount, the $2,000.00 amount and the $5,800.00 amount. Certainly the $5,800.00 amount I am satisfied came out of the 713-578-3 account and it is clearly tainted in the sense that it has not been maintained separately as inherited money. For the $200.00 and $2,000.00, there is no explanation based on the records before me as to where that money came from. There is a burden on Mrs. Wagstaff to show that it is inherited money and she has not satisfied me as to that burden. Clearly she was not earning an income other than interest and it would appear all of the money came from sources other than the inheritance account.

[27] This account falls within the parameters as noted in **Fisher v. Fisher**, 2001 NSCA 18, as there is some money in the account which was not inherited

money. In that sense this is not a pure inheritance. I am however satisfied the equities would require that I do consider that most of the money in account # 712- 178-3 is inheritance money and I treat it separate and apart from the other bank account. The entire balance of that account 712-178-3 other than the $8,018.03 will remain the property of Mrs. Wagstaff. The $8,018.00 will be divided equally as between the parties requiring a payment of $4,008.00 from Mrs. Wagstaff to Mr. Wagstaff. Other than the $8,018.00 which came from the family account I accept that the majority of that account was the original inheritance and reinvestment of interest earned thereon.

[28] The easiest of the accounts to deal with is the "bank machine account" Mrs. Wagstaff referred to. It is account number 700078-9. She referred to that as being her bank machine account where she would take money out of it as she needed it and put money into it as she needed it to meet the family requirements. I am satisfied that clearly is a matrimonial asset and there shall be an equal division of that account. There was a balance of $896.60 on January 4, 1999. I am satisfied that amount should be divided equally as between the parties. That is $448.32 each.

[29] There was one issue and it related to a cash withdrawal from that account on December 3, 1998 in the amount of $6,100.00. It showed up on December 3rd in the 712-178-3 account as a deposit of $5,000.00. As I have indicated that came from the700078 account and has already been divided. So there has already been an accounting for that.

[30] The most difficult account to deal with is the 713-578-3 account. Mrs. Wagstaff urges the Court to accept that the source of that account was indeed mostly inheritance money. She argues that I should exempt that from division based on the same considerations that I would have exempted the 712 account. She suggests that, in terms of the monies that she was saving from the family assets those monies were spent on things like trips, college educations and meeting other family needs. I am satisfied on the evidence, that is, at best, a mistruth.

[31] There were three children who went through university. Mr. Wagstaff's evidence is that they worked very hard in putting themselves through university. They managed through a combination of student loans, bursaries, and employment to the extent that one of the children was working double shifts at McDonald's. He worked until one in the morning, going back to work at seven in the morning in some cases. I am satisfied that is indeed

the case. There is no evidence to support Mrs. Wagstaff's suggestion that she was making contributions from this account which was funded through family allowance, child tax credits, etc. I have bank records starting September 29, 1995. For all intents and purposes there was absolutely no withdrawal from that account save and except January 17, 1997, $100.00 and March 5, 1997, $200.00. Aside from that there is no evidence that any of the money was withdrawn to help the children through their university from that account. There was reference to a withdrawal on September 11, 1997 of $5,000.00 and another on October 6, 1998 of $6,000.00 withdrawn from that account. Mrs. Wagstaff suggests portions of those larger withdrawals went to pay for family trips but I am satisfied that was not the case. The $5,000.00 and the $6,000.00 was not used to pay for a trip and it was not used to help the children. The money went into the 712-178-3 account at a later date and it did nothing to help the children. I have already directed a portion of that transferred money to be divided between the parties.

[32] The balance in September of 1995 was $57,451.00. Mr. Wagstaff said that he had been giving money to Mrs. Wagstaff in terms of the family allowance cheques, etc., and always understood that it was there for the family, there for the children's education. Even Mrs. Wagstaff in her evidence said, it was

"our money for our future" at one point in her evidence. She now says it was "her money for her future" and forget it Mr. Wagstaff you are not getting any of it. Reviewing the deposit records from 1995 through to the time of the separation, it is clear the only monies being deposited into that account for the most part were the interest amounts and the family allowance, etc. There was Canada Savings bond monies put into that account, but again there is no evidence before me to indicate that was anything other than a rollover of that same account money being put back in. Clearly this account is tainted in the sense that it falls outside the definition of pure inheritance monies. I am satisfied that it is indeed money which should be considered as a matrimonial asset for purposes of division.

[33] In relation to the bank account 713-578-3 which I said was a family asset or a matrimonial asset, in support of that determination I think it important that I refer to the fact that, throughout the marriage, as the interest accumulated on that account, the parties declared that income as income attributable to the children. It was not set up in a pure trust fashion. Both Mr. and Mrs. Wagstaff were aware of that apportionment of interest to the children. It was a recognition of the family interest in the proceeds of the account. As I have indicated Mrs. Wagstaff never did, and I do not think she ever does intend to

give any of that money over to the children. The fact the children declared the interest on that account contradicts any suggestion by Mrs. Wagstaff that it was money that was derived from an inheritance. I am satisfied that it supports the finding that I made that it was a matrimonial asset.

[34] The fact they set it up in that separate account vaguely defined as an education account should not deny the parties the right to now access that money on their own behalf. Mrs. Wagstaff still would have her share of that asset available to her if she wants to help Lindsay with her education. Mr. Wagstaff, now that I've given him his fair share, may well decide that he can help her as well in the future. As between the parties Mr. Wagstaff's actions are more suggestive of him being the parent more prepared to help Lindsay. To suggest that somehow the parties have lost the right to access that money for themselves is not supported by the evidence. I said indeed the actions of Mrs. Wagstaff confirm to me beyond any question that she never used and did not intend to use the money for the children for their education. This is evidenced by the older children's struggle through university. If those truths were known to all of those children I do not doubt they would perhaps have a little more respect for Mr. Wagstaff and a lot less respect for Mrs. Wagstaff. It is about time you come clean Mrs.

Wagstaff. The question then becomes, in terms of the equities as between the parties, how should this money be divided. Should there be an unequal division.

[35] As I have indicated already, the vast majority of the deposits in terms of the monthly deposits came from accumulated interest and/or family allowance deposits that were going into the account and nothing was coming out for the children or the family. As I have indicated, the Canada Savings bonds that were deposited were simply a roll over and I am referencing the November 2, 1998 deposit of $40,988.20 from a Canada Savings bond and then November 2, 1998 a payment out of $41,000.00. So it shows the roll over trend that occurred in that account. I am satisfied the account was indeed a matrimonial asset in the purest of sense. All or a substantial portion of the account was an accumulation of savings that this family had, even if there was some portion of that account which was accumulated as a result of inheritance monies in the first instance. I can no longer ascertain what that inheritance account was and the factors I must take into account pursuant to the **Matrimonial Property Act** would convince me that nothing short of an equal division is justified.

[36] In determining an appropriate division of the proceeds of that account I consider a number of factors including the duration of the marriage, source of account funds, child care responsibilities, the respective asset and income positions of both parties, income earning capacity, the needs of the remaining child of the marriage, contributions to the marriage by the respective parties and the other factors as enumerated by section 13 of the **Matrimonial Property Act**, R.S.N.S., c.275 as amended.

[37] This is a 34 years odd marriage. Mr. Wagstaff, as I have indicated, contributed just about everything he had and could muster to this marriage. That included consenting to a deposit of family allowances and child tax credits and other monies into this account. If there was a mixing of inheritance with the family monies the distinction has been lost. It would appear based on the number of deposits and the volume of the deposits made from 1995 onward that certainly there was a very substantial portion in this account that was purely family monies. Looking at many of the months, there was close to $300.00 being deposited on a very regular basis, including reinvestment of interest. The balance increased for a long, long time. There is nothing about the equity as between these parties that would suggest to me that I should do anything other than make an equal division of that account.

The amount in the account as of the date of separation was $66,293.89. In addition, there was a $41,000.00 Canada Savings bond that was taken out of that account. I indicated it was rolled over on November 2, 1998.

[38] I refer again to the onus on Mrs. Wagstaff to show the source of Canada Savings Bond. There is no evidence to indicate to me that it was anything other than again the continuing roll over from that account. That bond will be subject to an equal division. I am assuming the value of $41,000.00 as of the date of separation. I would note that prior to that Canada Savings bond being acquired in November of 1998 the account balance was $106.687.00 but it was reduced by the Canada Savings bond withdrawal.

SPOUSAL SUPPORT

[39] I want to deal with the issue of spousal support. I begin by first nothing that there was a payment of maintenance in the 2000 and 2001 tax year. Mr. Wagstaff said he paid it on the understanding that a substantial portion of the total support payment was indeed spousal support. He has been unable to get Revenue Canada to recognize that these were spousal support payments paid on a monthly basis. He says that there is no tax consequence for Mrs. Wagstaff if she is to claim those amounts but he has been penalized by

Revenue Canada by not being able to get the deduction. I am satisfied that there were substantial spousal support payments in the year 2000 and 2001. Specifically in 2000 there was a spousal support payment paid on a periodic basis totalling $7,294.00. As I have indicated they were monthly support payments and should be deductible for tax purposes and should be declared in Mrs. Wagstaff's income. In the year 2001 there was spousal support in the amount of $4,214.00 and again that is deductible by Mr. Wagstaff and claimable in Mrs. Wagstaff's hands. I would note that if there is any tax consequences for Mrs. Wagstaff in declaring the spousal support as part of her income, Mr. Wagstaff will be liable for the income tax consequences related thereto. Any tax payment would be a lump sum payment as opposed to a monthly deduction.

[40] On the issue of spousal support I have already declared the amounts that are taxable and deductible in terms of support already paid. I now deal with Mr. Wagstaff's ability to pay spousal support in the future. For just a minute I do not concentrate on the needs of Mrs. Wagstaff. Mr. Wagstaff, as a result of this marriage breakdown, as a result of the marriage, the role that he assumed throughout the marriage and the position he now finds himself in, is not in any position to contribute to the spousal support of Mrs. Wagstaff. I am

satisfied, as I indicated earlier, that Mr. Wagstaff with his grade 12 education and the few courses that he took in accounting does not have substantial marketable skills at this point in time. He is not in the best of health as is referenced by Ms. Killawee in her submissions and as supported by the evidence. He has problems with his blood pressure. He has problems with depression. I also consider his age in terms of employment prospects, all of those things are against him. Add to that the fact that when he did work at Truro Toyota, four relatively good years in terms of income, he basically lost that job because he could not do it. This was not because he was dishonest. I accept Mr. Wagstaff's position in that regard. He tried really hard to help his employer but his employer saw fit not to keep him on.

[41] After Toyota Mr. Wagstaff went to Mr. Upham's. As a result of a Court Order, and I am going to speak to the Family Court Order in a minute if I can, he tried really hard to pay maintenance but he found himself in a desperate situation in terms of money and in terms of emotion. He ended up stealing $5,000.00. As I said, in terms of his ability to earn income especially considering the job skills he has, the fact that he stole $5,000.00 from an employer certainly puts a damper on his ability to earn income in that or any other job for which he is qualified.

[42] Mr. Wagstaff says at this point in time he earns approximately $11,000.00. There will be at the end of the day an obligation on him to pay child support. In terms of his ability to pay spousal support, I am satisfied that he does not have that ability at this point in time. In saying that I recognize that there are a number of considerations beyond ability to pay which impact the issue of whether or not spousal support should be ordered.

[43] If I can return for a moment to the Family Court Order, I indicated that it was not appealed. I have limited jurisdiction dealing with that Family Court Order. I have jurisdiction from the date the petition for divorce was issued starting June 28, 2001. I can only say to you that even though I cannot speak to the Family Court Order or decision, if I were the Family Court Judge, knowing what I know now, looking at the situation back at the time of the Family Court Order, I would be hard pressed even then to make a decision which would have awarded Mrs. Wagstaff the spousal support that she got. I say that because I am satisfied that Mr. Wagstaff's income was not $30,000.00 or anything close to it at the time of the Family Court Order. The limited income Mr. Wagstaff earned was not as a result of any intentional under earning on his behalf and he was not somehow hiding income.

Certainly from the time of the petition for divorce I am satisfied his real income is what he said it was.

[44] I am satisfied, based on the materials that I have before me, that Mrs. Wagstaff was completely untruthful to the Family Court in disclosing her true situation when she referenced her needs and her savings. The records show that she suggested she *might* have enough money in savings to pay the mortgage for maybe two years or so. In fact, as I said, she was sitting on close to a quarter of a million dollars. I cannot imagine for a moment in terms of the needs aspect of that assessment the Family Court Judge would have made the decision that he did if he knew the whole truth. It was not appealed though. I cannot and will not interfere with that part of the decision.

[45] I will intervene from June 25, 2001 onward. I am satisfied there should be no spousal support payable whatsoever from that date forward to this date. For any amounts that were accumulated by way of arrears in relation to spousal support from that time forward they will be removed from the calculations as amounts owing. That is separate from the issue of child support. I will deal with that issue separately.

[46] Counsel for Mr. Wagstaff has asked me to declare all of the arrears as not payable. Like I said, I am not about to interfere with the Family Court aspect

of it but from June, 2001 forward there are no spousal support arrears accumulating.

[47] I return momentarily to the issue of spousal support. The case of **Moge v. Moge**, [1992] 2 S.C.R. 813 at 864, the **Divorce Act**, and **Bracklow v. Bracklow**, [1999] 1 S.C.R. 420 p. 41, all refer to the things that I must consider in determining entitlement to spousal support. I have no doubt that Mrs. Wagstaff made a very substantial contribution to this family in terms of being a stay at home mom. For the most part she had forgone much of her career. She was trained as a teacher and did not teach much throughout her career. We can only guess as to what her situation would be now in terms of disability pensions or her work situation had she continued teaching. Spousal support is not denied based on a lack of contribution. It is not for lack of need.

[48] Mrs. Wagstaff indicates that she has a post polio syndrome that is now affecting her health. She has qualified for Canada Pension disability benefits. Certainly all things being equal she would be entitled to spousal support. I do not doubt that for a moment Mrs. Wagstaff. I have already indicated through no fault of his own Mr. Wagstaff finds himself in a situation whereby he can barely maintain himself and meet his obligations to your child let alone

contribute to you. I note that child support is a primary obligation even before the obligation to pay spousal support.

[49] Mr. Power suggested throughout submissions that I should not require Mrs. Wagstaff to deplete her capital assets so as to maintain herself if in fact there is an obligation on Mr. Wagstaff to maintain her. I accept that Mr. Power. The argument goes the other way as well though. Now that I have made the equal division should I look at Mr. Wagstaff's asset position and say to him, now that you have your share of the matrimonial assets I should require you to deplete your capital assets so as to pay support that you cannot otherwise afford? The answer is no. If we look at the equation in terms of the respective position of the parties post division of matrimonial assets we still see that Mrs. Wagstaff has a very substantial advantage in terms of capital assets over and above what Mr. Wagstaff has. I reference the account 712-178-3 which, for the most part, was retained by her and there was a cheque for $110,000.00 written to her brother out of that account. So there is a fairly substantial advantage on her part even after I have made the division in terms of capital assets. In addition, in terms of the income position of the respective parties, we have Mr. Wagstaff who is going to have a child maintenance obligation. As I mentioned the **Divorce Act** says that I must

consider child support as a primary obligation over and above spousal support obligations. The respective income positions of the two parties is not much different. Mr. Wagstaff has perhaps $10,000.00 or $11,000.00 per year. Maybe he can increase his income in the near future but his present income as compared to the income of Mrs. Wagstaff, which is around $7,900.00 per year from Canada Pension disability benefits, is not much different. That ignores the fact that she has rather substantial interest or investment income as well. Through no fault of Mr. Wagstaff's I do not have any clarity in terms of Mrs. Wagstaff's actual investment income position at this point in time. She has chosen to leave that money with her brother and has not called any evidence whatsoever to substantiate how much investment income she is making or if she is indeed losing. In that regard the evidence was very vague at best. The only suggestion that I have in terms of evidence is that it went from $216,000.00 to $234,000.00 at one point in time. Again, the lack of evidence in that regard is through no fault of Mr. Wagstaff and I am not going to hold it against him.

[50] Mrs. Wagstaff you are not poor now and you certainly were not poor before. Your family was poor because they did not know what you had. You have money, you have needs in terms of support but Mr. Wagstaff does not have

the ability at this point in time to pay. That does not mean that support is a closed issue. I referenced your polio or post polio syndrome already and I can appreciate the fact that you are in a very difficult position. Certainly if Mr. Wagstaff's position improves substantially down the road it may be that the Court will revisit the issue. For the time being I am not satisfied that there is any spousal support payable.

Child Support

[51] I deal now with the issue of child support. I indicated earlier on that I accept the evidence of Mr. Wagstaff completely as regards his income situation. He suggests that he makes $10,000.00 or $11,000.00 per year. That is reflected in his Income Tax Returns. Mr. Power commented on Mr. Wagstaff's lack of expertise in the accounting field. I can only say that he was expert enough to support his family for many, many years Mr. Power. Any deficiencies that he might have in terms of his interpretation or understanding of the **Income Tax Act** do not in any way alter what his actual income situation is. If Mrs. Wagstaff or anybody else wants to try and force him out of the accounting business for his lack of knowledge and understanding of the **Income Tax Act,** they only aim to pound this man further into the ground. It will do

nothing for Mrs. Wagstaff, it will do nothing for the family, it will do nothing for his clients and it does nothing for him. I would hope that everybody leaves him alone in that regard. I simply say he is as good as he is and that is all he is. That applies to the rest of us; we are as good as we are and that is all we are. His income is, like I say, between $10,000.00 and $11,000.00 per year. He is prepared, through his counsel, to concede that child support should be based on the $11,000.00 per annum. The table amount is $111.00 per month. That amount is payable continuing from the date of the divorce petition commencing July 1, 2001. I am not sure what the situation is in terms of payment since that time as regards child support.

[52] If there are any arrears that have accumulated the order suspending enforcement through Maintenance Enforcement continues until such time as he is in receipt of his share of the matrimonial assets. In other words, he has some money coming Mr. Power. It just happens to be coming from Mrs. Wagstaff. Once he gets it, he has to hand her back $111.00 per month through to and including today and for each month forward.

[53] I do not want Maintenance Enforcement going out and garnishing monies he has coming from his accounting clients in the meantime because I am sure clients do not feel too comfortable when Maintenance Enforcement does that.

It does nothing to help his business and will do nothing to help his child and will do nothing to help Mrs. Wagstaff.

[54] The order will be $111.00 commencing July 1, 2001 and continuing for the foreseeable future.

[55] Mr. Wagstaff you are going to be ordered to provide Mrs. Wagstaff with a copy of your Income Tax Return together with a Notice of Assessment each year no later than June 1st commencing 2003. Mrs. Wagstaff can then decide whether or not she wishes to apply for an increase in maintenance. If your income goes down you may well decide that you want to reduce child support. I would hope the parties can simply look at the tables, say yes his income justifies an increase of "x" number of dollars or it justifies a decrease of "x" number of dollars and submit a consent order to the Court. To do otherwise will require appearances before the Court.

[56] From what I have seen so far in these proceedings the biggest expenditure of assets from this family in the last two years, perhaps even in the last 30 years, has been to pay legal fees. I cannot imagine how the expenditures that were probably incurred by Mrs. Wagstaff could be justified. Much of what I have seen in terms of her position is completely untenable. I would not want to see you spend any more money wasting it fighting about an increase or a

decrease of $5.00 or $50.00 a month in maintenance. Just look at the tables, look at the income and see what you can do.

[57] In the future the issue of spousal support might be a little more complex and it assumes that if Mr. Wagstaff's income goes up substantially then that is a more difficult issue to determine. Certainly for the time being we know what his obligation is.

[58] I also want to reference a comment made by Mr. Power during his submissions. He described Mr. Wagstaff as a "dead beat dad". Mr. Wagstaff I can say to you without any reservation, I am satisfied that those comments were wholly unjustified. From what I have seen you contributed to the fullest possible extent, beyond that which anybody could be expected to contribute. "Dead beat dad" does not in any way fit you in terms of description. The comment was entirely inappropriate. The Family Court Order would have required payments in excess of your total income. It is not unreasonable to expect anyone in that position would be unable to make such payments.

Access

[59] I now turn to an issue which I think is of the utmost importance, that is Lindsay. I have discussed money for Lindsay but I have not discussed

Lindsay. Money comes and money goes. Some people have it and some people don't. Children are much more precious than money. I do not care how much money you are talking about. Just about every parent that I know in the world, *just about every parent I know in the world*, would give up all of their money for their children's well being. There is no other way to say it.

[60] It is cruel that parents break up. It something that is beyond the control of these precious beings who are the offspring of parents. In this day and age it seems like that cannot be helped. It happens more and more. That is the reality.

[61] The **Divorce Act** says we do not even consider who is at fault in terms of marriage break up and we do not. There is good reason for that. I do not think any child benefits from one parent blaming the other. It might make the person who is casting blame feel better if they can somehow marshal the children against the other parent in asserting blame. That is not done for the benefit of the child. That is done for the parent who is trying to gain allies, have people take sides. Like I said the cruel fact is that this marriage broke down. What flows from that is largely within the control of the parents.

[62] Mrs. Wagstaff what you have been doing with Lindsay is every bit as cruel as the marriage break down itself. You did not have to let Lindsay see the

letter where her father asked you not to charge any more pet food to his account. You had enough money sitting in the bank whereby you probably could have gone out and bought all the pet food that every rabbit in Nova Scotia would consume. You did not do that. Lindsay went to her room thinking her dad was being unfair.

[63] You described Lindsay as loving her father, having a great relationship. Before the separation they fished, she went with him as he visited houses, visited clients. She loved him without condition. He loved her without condition. It was the type of unconditional love that exists between a parent and a child. Just as your love for her and her love for you is unconditional. No matter what you do wrong Mrs. Wagstaff, Lindsay will still love you. I suggest to you as well that no matter what her father has done wrong she still loves him too. Get out of the way of that love and stay out of it. Stop interfering with it.

[64] Mrs. Wagstaff some day Lindsay is going to find out and figure it out for herself, just as your other children will. They will figure things out if they read this decision sometime and figure out what the situation really was throughout the marriage, who was contributing and who was hiding and who was not giving their support to these children. They may well have some

very serious questions too for you. Like I said, stop interfering in the relationship that Lindsay had, has and will have with her father. You have interfered with it, you have interfered with it in a very substantial and meaningful way. This includes your intentional hiding away with Lindsay for an entire summer while Mr. Wagstaff was trying to have summer access. He could not even leave phone messages because you blocked his calls or were not even there for extended periods of time.

[65] Mrs. Wagstaff, Lindsay was doing fine in terms of Mr. Wagstaff post separation so long as he was able to come to your house and prepare the meals and spend time with you. She already knew then that he left the relationship, that he had left the marriage and that he was not living with you. Things were still going okay. It is only when he decided that he could not keep coming to the house that you interfered with the parent/child relationship.

[66] Post marriage break down is a very tough time for anybody, Mr. Wagstaff, you and Lindsay were going through a very tough time but doing okay. The reason for the post separation blow up is now irrelevant. He referred to tax returns and receipts. The relationship as between Mr. Wagstaff and Lindsay should have been allowed to continue. There has been a lot of damage done

there Mrs. Wagstaff. I urge you, beyond all else, to do your utmost to repair that situation. Set the money issue aside.

[67] You may be very upset with me in terms of my determinations or rulings in relation to the money. As I have said, you can be mad at me, you can be mad at Mr. Wagstaff, but do not bring Lindsay into that, it is a totally separate issue. I suggest very strongly as well, even though the other children are somewhat older, that it would be appropriate that you not try and drive any further wedge between them and their father either. Maybe sometime they will understand that what this Court has tried to do is attempt to be fair as between the parties based on the evidence, and that Mr. Wagstaff is not taking your money. Mr. Wagstaff is sharing only in the family money which he in part contributed to.

[68] There is a suggestion by Mr. Power that perhaps things have gone a little bit better with Lindsay since recent Court intervention. I can tell you Mrs. Wagstaff access is not a right which you are entitled to interfere with. Access is a right of a child to see their parent. The **Divorce Act** says that I must make a decision which takes into account, primarily the best interests of the child but encourages as much access as is reasonably possible considering the best interests of the child. I consider all of those things that I must consider in

accordance with the **Divorce Act**. I am satisfied that there should not be joint custody. There should be primary care and custody with Mrs. Wagstaff in relation to Lindsay but there will be periods of exclusive custody for Mr. Wagstaff. During those times it is not Mrs. Wagstaff who has the right to determine as to whether or not Lindsay will be going to see Mr. Wagstaff. It is within Mr. Wagstaff's control.

[69] I am concerned with the interference, the manipulation, the cruelty of manipulation as evidence by Mrs. Wagstaff to-date. I am satisfied the only way to cure that interference is to define it as periods of exclusive custody, not access. Mr. Wagstaff will be entitled to see Lindsay and he alone can decide things like whether he is taking Lindsay to his house or elsewhere. It is totally inappropriate that Mrs. Wagstaff would at any time set conditions on where Lindsay could go. In view of the fact that I have given him periods of exclusive custody, I am also saying he can determine who else is going to be around him when he has Lindsay. Mrs. Wagstaff cannot dictate whether Mr. Wagstaff has girlfriends, friends or anybody else present. Certainly what Mr. Wagstaff has done in terms of past behaviour would suggest to me he is fully capable of deciding who is appropriate to have Lindsay around and who is not appropriate. Mrs. Wagstaff has no business interfering in that. As I have

said, it may make you feel good in terms of interfering and in terms of trying to gain alliances or allegiances as between your children and have them line up with you against Mr. Wagstaff. It does not do your children any good Mrs. Wagstaff.

[70] Mr. Wagstaff will be entitled to have periods of exclusive custody which includes the following; every second weekend from Saturday at 9:00 a.m. through to Sunday at 8:00 p.m. In addition, he will be entitled to have Lindsay with him at his house or wherever he chooses for one evening per week as a minimum. He will be entitled to have Lindsay with him for one-half of each of the following holiday periods; Christmas, Easter and March break. In addition, he will be entitled to exclusive custody of Lindsay for two weeks each year in the summer vacation period with an entitlement to an additional one week per year starting the summer after 2003.

[71] I say to you Mr. Wagstaff in terms of my assigning specific times to you in terms of exclusive custody, that you must acknowledge the damage that has been done in relation to Lindsay. Understand this is not necessarily going to be an overnight accomplishment where you get all the custody I have indicated. What I suggest to you Mr. Wagstaff is you make things like phone calls, Christmas cards, birthday cards, other special times for Lindsay

important to you as well. If things are not going well you at least do those things for her so she knows you still care no matter how tough things get for her. I have already indicated there should be no blocks on your phone calls to Lindsay's home. You should be able to be in touch with her. That will be part of the order.

[72] As regards the times that I have assigned for exclusive custody, I would urge you to take Lindsay's feelings into account and allow her to deal with the phase-in part of the adjustment. I encourage you to work with the minister who has facilitated, or assisted in arranging access to date. He can continue to participate in those arrangements. That helps Lindsay in terms of counselling to deal with the adjustment. It will be you, not Mrs. Wagstaff, who has the final say. You have the right to say I am the custodial parent and I have decided that you are coming with me on this weekend. I am removing the right to make that decision from Mrs. Wagstaff for those periods only.

[73] Mrs. Wagstaff sets rules for Lindsay as well when Lindsay is in her home. She can say things like no Lindsay, you cannot be out beyond such and such an hour or you have to be in my home, or no Lindsay you cannot go here with these people. Mrs. Wagstaff you make those decisions every day. We are simply saying that for some of the periods Mr. Wagstaff will now be

making those same decisions. It may be Mr. Wagstaff that you decide that Lindsay is just not ready to go with you for an extended period at Christmas, maybe she is, I do not know yet. Work through your preacher or anyone else who may assist and make that decision. Keep in mind at the end of the day it is the best interest of Lindsay that has to be a priority, not just what you would like. I truly hope that it can be repaired.

[74] I have given much of the empowerment over to you, Mr. Wagstaff, for those periods. Counsel, I have not picked the nights through the weeks. I would urge the parties to say these are important nights for Lindsay to be at her mother's or some place else and tell Mr. Wagstaff, Tuesdays or Thursdays or Wednesdays or Fridays, whatever night it is that best fits with Lindsay's priorities. She would say and then Mr. Wagstaff could pick from the remaining days. It will be the one night per week.

[75] Counsel I have not dealt with the issue of costs and I have not heard from you on the issue of costs. I would simply end up by saying this has been a tough proceeding on both sides and it has no doubt been tough for the children as well. The marriage is over. The Court has decided who is entitled to which assets. You still have a child to raise. She is always going to be your child Mrs. Wagstaff and she is always going to be yours Mr. Wagstaff. Try and put

as much of this behind you as you can. Like I said, for the most part it is only money. Without those who are important around you, money is worthless. So concentrate on them. Put as much of this behind you as possible. I wish you both well. I wish Lindsay and all the other children well.

(Submissions from Counsel on Costs)

DECISION COSTS

[76] Counsel in many, many cases I urge and in fact determine that costs are to be borne by the respective parties in matrimonial disputes. Case law suggests that the rules as regards costs in family law cases should not be different than any other case but traditionally we have bent that rule a fair bit. Costs are an important aspect of Court management in the sense that people have to understand there are alternative ways to resolve issues if reasonable proposals are coming from one side to the other. I do not understand there to have been a formal proposal in this case resolving the issues. I understand from submissions and from the evidence that what Mr. Wagstaff was looking for was nowhere near what he achieved. In that regard I understand he recovered much more than he expected. That would appear to

be because the Respondent was anything but forthright in terms of disclosure. Mr. Wagstaff did not know the source or the extent of the assets and therefore his demands were unreasonably low.

[77] The Court depends upon full disclosure and it depends upon reasonable negotiations based on full disclosure. If it were not for those disclosure mechanisms and reasonable settlements the Court would be bogged down beyond any manageable case load. We just simply could not deal with it. In many cases the parties are not ordered to pay costs because so much of the matrimonial litigation is tied up in emotion issues not just dollars and cents. That is part of the rationale for not ordering costs in many cases. We also look at things like undue hardship as a reason why we do not necessarily impose costs on one side or the other.

[78] In this case the question becomes case management and a proper inducement to settle. At the end of the day in terms of equities as between the parties, and I have already referred to the fact that Mrs. Wagstaff has substantially more in terms of assets at the end of the day than Mr. Wagstaff. Why should I require him to deplete his assets so as to get that which he was entitled to. The final result should have been achievable in a much simpler form had there been proper disclosure. This case would likely have been

unnecessary had there not been the trickery and the connivance and the attempt to deceive the Court by saying I have no assets, I am impoverished, I just handed close to a quarter of a million dollars over to my brother and I do not have anything left any more. All those things, all those things suggest to me that the normal rules should not apply.

[79] This is approaching the type of case which would justify solicitor/client costs. It is not quite there. The Court of Appeal in this Province has suggested that it is a very rare case that entitles a party to solicitor/client costs. Mrs. Wagstaff was totally unreasonable in her position. Her position is almost totally unsupported in the law. For whatever reason she chose to take the position she did only she knows. It has cost Mr. Wagstaff an awful lot of money. It has cost him an awful lot in terms of an emotional toll.

[80] I am satisfied this is a case which would justify a very substantial contribution in terms of costs. We have been here three days in Court on these proceedings. I am satisfied it is appropriate to award costs to Mr. Wagstaff in the amount of

$3,500.00. That is all inclusive. That will be paid by Mrs. Wagstaff to Mr. Wagstaff over and above the amounts that I have otherwise ordered payable.

J.

12/11/02