No. 1204-002702

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: deSwart v. deSwart, 2002NSSC224]

BETWEEN:

DELLE MELANIE deSWART

PETITIONER

- and -

JACOBUS JOHANNUS MARIA deSWART

RESPONDENT

D E C I S I O N

HEARD: At Kentville, Nova Scotia, on Sept. 23 - 27, 2002.

BEFORE: The Honourable Justice Allan P. Boudreau.

DECISION: Orally, September 27, 2002.

WRITTEN RELEASE OF DECISION: October 7, 2002

COUNSEL: Delle deSwart - represented self.

Christopher Sabean, Esq.,
Counsel for the respondent.

Orally, Boudreau, J.

INTRODUCTION:

[1] In this divorce action the only issue is the division of assets.

FACTS:

[2] The parties were married in 1970 and separated in April, 2000. They met shortly after Mr. deSwart came to Canada from Holland in 1967 at the age of 21. Mr. deSwart's professional schooling was in agriculture. He had obtained some nine diplomas in agriculture by the time he came to Canada. He came to work for a Dutch company which owned and operated a large hog and dairy operation in the Middleton area. He met Ms. deSwart in 1968 or 1969 when he was invited to her parent's home. Her parents apparently owned a neighboring farm and were interested in some of the farm property on which Mr. deSwart worked. Mr. and Mrs. deSwart were married in 1970. Mr. deSwart had just acquired the first portion of their present farm property, the Chase property. This is the property on which the present matrimonial home is situated. The parties then acquired the Archibald property, then the Huntley property and later the Pierce property, which is located across the road from the Chase property. The Pierce property is the property on which the fox ranch is operated. The parties own five separate pieces of land, two of which constitute the Chase property. They have over 500 acres in total.

[3] The parties farmed together for the entire thirty years of their marriage. They first went into hog farming and built a large barn and manure tank on the Chase property. They later, in 1985, commenced a fox ranch on the Pierce property. Mr. deSwart researched the fox business and went to Holland to observe and consult on the various methods of fox farming. He also took a two week course at Truro. The deSwarts decided to establish a fox farm based on an adapted European model, which, as I understand it, uses more indoor fox housing than was previously done locally.

[4] In 1989 Ms. deSwart, who had always had a horse, was interested in looking at the possibility of establishing a horse breeding business. A friend of the family, Mr. Heinrich Mangels, was interested in investing in Arabian horses. In 1989, he provided approximately $10,000.00 of capital to buy the first five horses, pay for insurance and other initial costs. It was intended that Mr. Mangels and Ms. deSwart would have some sort of a partnership, but Mr. Mangels suffered a serious physical set back around 1990 and he never actually got involved in the horse business after that. He testified that he stepped out of the business because of his back fusion. He never participated in any way in the horse business after 1990, financially or otherwise. He never received any income from the operation, or lists of horses or proceeds of sales, even when the horse business was dwindled to one horse. He was not shown as having any interest in the horse breeding business on the initial financial statements prepared in 2000 and 2001 for the marriage breakup. He was not shown as having a proprietary interest in the horse business until the last financial statements for this divorce were prepared in 2002. Mr. Mangels testified, and I will discuss his testimony in my conclusions on Mandel Arabians later in my decision.

[5] By 1990 the farming operations, which had been operated as Koodel Farms, an equal partnership of Mr. and Mrs. deSwart, were all in difficult financial straits. The hog barn had collapsed and the farm was insolvent. The deSwarts avoided formal bankruptcy but a liquidation of sorts occurred and all debts were paid through government guarantees or reorganized through the Nova Scotia Farm Loan Board. This allowed the deSwarts to continue with the farm but a debt of some $20,932.00 to Shur Gain Feeds remained outstanding and has remained to this day. The farm has not generated any significant profits from 1990 to the present. The deSwarts just eked out a living with hard work and long hours put in by the parties and their son, Danny. Over the years, the parties farmed together but their interactions were apparently the subject of frequent discord and disagreements. I am however satisfied that the relationship was not one of physical violence, or abuse in that sense, but simply arguing and bickering on farming issues.

[6] During 1999 Ms. deSwart met a retired gentleman from the U.K., Michael Fairclough, at a horse event. In January, 2000, she went to visit Mr. Fairclough for a week and he came to visit Ms. deSwart in March, 2000. Ms. deSwart purchased a new mattress so she and Mr. Fairclough could sleep in the Pierce house located a little ways across the road from the matrimonial home. Needless to say Mr. deSwart was not entirely pleased with this arrangement but he was polite and civil about the whole thing. Shortly after Mr. Fairclough left Mr. deSwart went on a trip to Holland to visit an ailing Aunt. He left on April 3, 2000 and upon his return on April 12, 2000, he was met by his daughter at the airport and she informed him that he should not return to the matrimonial home. He was told Ms. deSwart did not want him back at the farm at that time. He talked to Ms. deSwart, I believe it was that evening, and she told him not to come around the place. He says he talked to her

the next morning and that she said that she wanted the horses and that he agreed, but there apparently was a disagreement about breeding rights and offsprings. He then, the next day I believe it was, found out the police were looking for him to serve him papers and he immediately contacted a lawyer. Ms. deSwart was in the process of applying for a peace bond and she eventually succeeded by the end of May, 2000. This effectively gave control of all the farm properties to Ms. deSwart as Mr. deSwart was not allowed on the farm without her consent. From what I have heard in this hearing I cannot see that there was any need for a peace bond as Mr. deSwart had not been violent towards Ms. deSwart or threatened her at any time. He had once in passing by expressed to her that she had "fucked up his life". In my view he had shown considerable restraint in the circumstances.

[7] I find that the most probable explanation for the peace bond is that it was simply a strategic move to gain control of the operation and assets of the farm. Ms. deSwart cannot now complain or take credit for the fact that she has managed or operated the farm from April, 2000 to the present without any assistance or involvement from Mr. deSwart. In the face of the peace bond Mr. deSwart consented to an interim order allowing Ms. deSwart to have exclusive possession of the properties and the farming operations until the matter could be settled or decided in Court. The matter was not settled and here we are almost two and one-half years later.

ANALYSIS:

[8] The parties have agreed that this is a case for an equal division of all assets and most liabilities. They do not differentiate between matrimonial and business or farming assets.

[9] One of the areas of dispute is the ownership of certain horses said to be part of a partnership or agreement between Ms. deSwart and Heinrich Mangels called Mandel Arabian Sales. This alleged partnership has never operated as such and, as I stated earlier, Mr. Mangels did not end up participating in the horse business in any meaningful way. A partnership was not registered with the Registrar of Joint Stock Companies until a short time before this hearing. Mr. Mangels testified that he simply wanted to be repaid his initial investment of $10,000.00 but feels that, by rights, he should have an equal amount by way of interest, an additional $10,000.00, because he says his money should have doubled by now. However, he has not asked to be repaid over the years and he has never claimed an interest in any of the horses on the farm or in any of the proceeds from the sale of the horses. I find that any continuing partnership between Ms. deSwart and Mr. Mangels has not been proven for calculation of the division of assets between the parties and I reject it. That is a matter which will remain between Ms. deSwart and Mr. Mangels except for the initial investment of $10,000.00 which will remain as a debt to Mr. Mangels, owed by the horse breeding operation.

[10] The second issue is the parties' son, Danny deSwart's, alleged claim for unpaid wages. The basis being that he worked for very little compensation or benefits because he was told over the years that he would one day inherit or take over the farm. Ms. deSwart states that if Mr. deSwart gets any portion of the farm, then Danny will not agree to stay and work on the farm and that his

claim should be considered in any division of assets between the parties. However, she says that if she gets the entire farm then the Court would not have to consider Danny's claim because she will deal with it, except that the equity in the farm and any resulting equalization payment by her to Mr. deSwart should be reduced accordingly. The claim advanced for unpaid wages to Danny is approximately $70,000.00 over seven years prior to separation.

[11] There is no doubt that Danny has worked long and hard on the farm over the years and for very little by way of regular wages. But so have his parents, especially since the early 1990s. Even if Danny was encouraged to work on the farm and stay on the farm on the basis that he would someday take over or inherit the farm - that it would someday be his - that would have been done on the basis that the family or the farm was still intact. That appears no longer possible. The same problem would have been the case if the farm had gone bankrupt or into liquidation again, which everyone knew was a definite possibility.

[12] This hearing is not to determine whether Danny has a valid or enforceable claim against the parties' farming operations or assets. That would require a separate proceeding in itself, with Danny as a party. In the end, I am not going to consider any possible claim by Danny in a division of assets between the parties and I must leave that as a matter between Danny and his parents.

[13] The third issue is Ms. deSwart's claim for management fees for having run the farm with little or no wages or pay from the farm since April of 2000. She claims some $25,000.00 per year for a total in excess of $60,000.00. Again, there is no doubt that she worked hard during this time

but there was never any agreement in place that she would be paid such a fee. She did live on the farm without having to pay rent or other expenses and she has not been requested to account for any benefits or profits that she received during that period. She was also apparently able to pay Danny for his labour during this time. She was the one who engineered the total control of the farm to her and she had the use of all the assets of the farm during this time. Mr. deSwart is not asking for any accounting for profits made during this period. In the final analysis I must reject this claim by Ms. deSwart.

[14] The fourth issue which I shall deal with is Ms. deSwart's claim to any Old Age Pension that Mr. deSwart may be entitled to from Holland when he reaches 65 years of age. Any such entitlement would appear to be based entirely on the number of years Mr. deSwart resided in Holland. This would all be prior to Mr. deSwart coming to Canada and prior to the parties marriage. The parties have never resided in Holland since their marriage. None of this entitlement would have been earned during the marriage. I find that any such entitlement is not a matrimonial asset and therefore not subject to division. It is not in any way connected to the marriage.

[15] The fifth issue pertains to Ms. deSwart's claim that Mr. deSwart had some sort of a root plant business or that he gave root plants or tulip bulbs to the owner of Oakhill Nursery and that this should be an asset valued at least $2,000.00, and that it should be shown as owned or retained by Mr. deSwart. Mr. deSwart has denied making any sort of business from root plants or tulip bulbs. And this is supported by the testimony of the owner of Oakhill Nursery. He admits planting and giving away many tulip bulbs as part of his hobby. I believe he said he planted some 15,000 bulbs

on the property in one year. He obviously had a great interest in gardening. He stated emphatically that he never made a commerce of it. The burden is on the person making the allegation to prove it on a balance of probabilities. I find the evidence in this case does not prove on a balance of probabilities that such a business existed or that valuable plants or tulip bulbs existed to be divided at the time of separation.

[16] I am left to decide how to divide the physical assets and debts of the parties. Ms. deSwart claims she is entitled to all the parties' assets subject to the debts without paying any compensation or equalization payment to Mr. deSwart. She says she is entitled to all the assets because she has worked so hard during the last two plus years to maintain and enhance the farming operations and that she deserves them for that reason and that she should not be required to pay Mr. deSwart any equalization payment.

[17] On the other hand Mr. deSwart states he was forced off the farm and had no choice in the matter; that he needs some portion of the farm to continue with his life; that he is fifty-six years of age and that he has farmed all his life. Ms. deSwart's claim for all the assets without anything but a nominal equalization payment is also based on her claims that her management work is worth some $60,000.00 and that it should be used to reduce Mr. deSwart's interest. She further claims that Danny's unpaid work should also be accounted for in reducing the value of the farm. As I said earlier, and for the reasons I stated, I have rejected those claims. In my opinion it would be most unfair and unjust to award all of the farm properties and farming operations and equipment to Ms. deSwart. Even if I were to do so I find that it would be highly improbable that Ms. deSwart could

raise the funds required to pay Mr. deSwart's interest within a reasonable time. It would appear that his interest or an equalization payment on that basis would be $80,000.00 or more in view of the claims of Ms. deSwart for management fees and Danny's wages, which total in excess of $100,000.00, both of which I have rejected.

CONCLUSION:

[18] In the final analysis I find that the only equitable way to settle this property dispute is to physically divide the assets between the parties. I am therefore awarding Mr. deSwart the Pierce and Archibald properties, subject to the secured debts associated with those properties, as well as the fox farming operation located on the Pierce property.

[19] I award Ms. deSwart the Chase and Huntley properties subject to the debts associated with those properties, as well as the horse breeding business located on those properties and of course, the horses, subject to the division of horses, by which I mean those horses which will be allocated or awarded to Mr. deSwart.

[20] Mr. deSwart shall have the following horses: "Ibn Valle", "Erina", Erina's filly "Madam", Erina's offsprings "Fiddler" and "Drummer", "Hovara", and Hovara's offspring, "Desert Storrn". These horses have the following values:

	HUSBAND'S VALUE	Ex. 1, Vol 2, Tab 13 WIFE'S VALUE
Ibn Valle	$ 5,000.00	$ 5,000.00
Erina	3,000.00	2,575.00
Madam	3,000.00	5,000.00

Fiddler	6,500.00	6,500.00
Drummer	5,500.00	5,500.00
Hovara	2,500.00	2,500.00
Dessert Storm	1,500.00	1,500.00
TOTALS	$ 27,000.00	$ 28,575.00

I accept the values placed on these horses by Ms. deSwart. Mr. deSwart in his accounting, Exhibit 19, shall be shown as having received horses valued at $28,575.00. He is initially shown on exhibit 19 as having received horses valued at $16,000.00 only. Therefore an adjustment of $12,575.00, being an increase on Mr. deSwart's side of the ledger, is warranted on this account. This also accounts for the fact Mr. deSwart had included the horses "Hovara" and "Desert Storrn" on his separate list of property and not in the equalization payment calculations on Exhibit 19. He had included the horse "Hovara's 2002 colt" on his separate list and that horse has now gone to Ms. deSwart; therefore, its value of $1,500.00 would have to be added to the property kept by Ms. deSwart as calculated on Exhibit 19.

[21] The parties shall split and bear equal responsibility for the debt to Shur Gain Feeds in the total amount of $20,932.00 or each an amount of $10,466.00 and each party shall endeavor and use their best efforts to have this accomplished and separate liabilities established with Shur Gain Feeds, if possible. This is the manner in which the debt to Shur Gain has already been accounted for on Exhibit 19.

[22] The parties will also split and share equally the loan of $5,000.00 to Mr. VanRostall, which is $2,500.00 each. This is based on my finding that each party will retain approximately one-half

of the equipment which is the subject of this loan. This loan is shown on Exhibit 19 as $2,900.00 and $2,100.00 being assumed by Ms. and Mr. deSwart respectively; therefore, $400.00 will be deducted from debts assumed by Ms. deSwart and added to debts assumed by Mr. deSwart.

[23] Mr. deSwart shall be responsible for the debt of $3,925.00 and the contract with Mr. Visser re the horse "Erina". Mr. deSwart has been awarded Erina and her offspring and he shall be liable for that debt and contract. This amount had been listed as a debt to Ms. deSwart on Exhibit 19 and it shall now be shown as a debt to Mr. deSwart.

[24] Except as provided above and in this paragraph the parties shall own the personal property and equipment on their respective lists as provided for in Exhibit 1, 2 and 19 with the following qualification and clarification. Ms. deSwart shall own the canoe and Mr. deSwart shall own the sawmill and he shall have a reasonable time to have the sawmill removed from the Chase property. The fleshing machine shall stay and belongs to the fox operation. Also each party shall own and retain the tools and equipment normally and habitually associated with their respective horse breeding and fox farming operations.

[25] It is ordered that this division take effect October 1, 2002 and that neither party shall be responsible to account to the other for the finances of their respective horse breeding or fox farming operations thereafter. In the event that Ms. deSwart does not assume the responsibility to feed and look after the foxes until October 1, then Mr. deSwart shall be allowed on the Pierce property for that purpose.

[26] I realize that Ms. deSwart has stated she will not stay on the Chase property or run her horse breeding operations on the adjacent properties under the arrangements I have proposed, however, I cannot come to any other solution which would come close to doing justice to both these parties. In these circumstances at least both parties will have some options open to them for the future course of their lives and their respective farm operations. I do not find that these parties are in any way a physical threat to each other. Quite the contrary. They have both impressed me as level headed people who can make the best of difficult circumstances.

[27] The remaining issue is whether one party owes an equalization payment to the other. I find that there is no equalization payment required from one party to the other. I say this for many reasons. First, the division of property as awarded represents as equal a division of assets as is possible in the circumstances. Both parties claimed payments from the other for different reasons. Exhibit 19 provides the best assistance for the accounting of the division of assets, being more consistent with the division of assets which I have awarded, and it is the one I have used in my calculations. In that scenario Mr. deSwart claimed an equalization payment of some $38,500.00. He claims some $19,000.00 on a division of assets and some $19,000.00 on adjustments to the books and accounts of Koodel Farms. The latter being primarily the reversal of $14,000.00 in legal fees paid by the farm on behalf of Ms. deSwart in this divorce proceeding.

[28] On the question of the division of assets I have awarded more horses to Mr. deSwart than are on his list for proposed distribution of assets, Exhibit 19, and some of the values are greater than listed on that list, as indicated in Ms. deSwart's presentation. Also the horses, Hovara, Desert Storm

and Hovara's 2002 colt are farm assets and not separate assets and should be on the accounting list. I have previously, in paragraph 20, decided on the following adjustments to Mr. deSwart's proposed division of assets and debts, Exhibit 19. Therefore the asset totals on Exhibit 19 shall be adjusted as follows:

ASSET	MS. deSWART	MR. deSWART
- Adjustment re: Horses to Mr. deSwart as per paragraph 20		+ $ 12,575.00
- Adjustment re: Horses to Ms. deSwart for the horses "Dragon Queen" and Erina's filly "Madam", initially shown as retained by Mr. deSwart.	+ $ 10,000.00	
- For the horse "Hovara's 2002 colt" initially shown as Mr. deSwart's separate property	+ $ 1,500.00	
- For the horses "Fiddler" and "Drummer" initially shown as Ms. deSwart's horses, now awarded to Mr. deSwart	- $ 12,000.00	.
Net Total Asset Adjustment For Horses	- $ 500.00	+ $ 12, 575.00

Therefore Ms. deSwart's retained assets as per Exhibit 19 shall be reduced by $500.00, whereas Mr. deSwart's assets would be increased by$12,575.00. This would leave gross assets to Ms. deSwart of $272,355.00 and to Mr. deSwart of $132,733.00.

[29] With regard to debts assumed by the parties, their respective totals would be adjusted according to paragraphs 9, 22 and 23 above. As I stated, I find that the only proven debt to Mr.

Mangels is his initial infusion of capital totaling $10,000.00. Therefore an adjustment on Exhibit 19 will have to be made accordingly. The adjustments to debts are therefore as follows:

DEBTS	MS. deSWART	MR. deSWART
Debt to Mr. VanRostall	- $ 400.00	+ $ 400.00
Debt to Mr. Visser	- $ 3,925.00	+ 3,925.00
Debt to Heiner Mangels	- $ 9,784.00	.
Total Adjustment	- $ 14,109.00	+ $ 4,325.00

Therefore Ms. deSwart's total assumed debts would be reduced by $14,109.00 for a net total debt of $146,202.22. Mr. deSwart's total assumed debts on the proposed division of debts, Exhibit 19, would be increased by $4,325.00 for a net total debt of $50,454.00. As per Exhibit 19, these adjustments would result in total net assets of $126,153.00 for Ms. deSwart and total net assets of $82,279.99 for Mr. deSwart. These totals would require an equalization payment of $21,937.00 from Ms. deSwart to Mr. deSwart.

[30] With regard to the adjustments claimed by Mr. deSwart on the winding up of Koodel Farms, I reject that the amounts he has proposed should be used to justify any equalization payment. In proposing his division of assets Mr. deSwart has renounced any accounting for profits or entitlement to profits of Koodel Farms; therefore, his proposal would not be affected by the payment of legal fees because he simply is not claiming any profits for that period. Therefore his interest cannot be affected by that payment. Moreover, he has claimed the future profits of the fox ranch as his compensation or *quid pro quo* for foregoing any profits earned by Ms. deSwart during the period April, 2000 to the present. I find that for these reasons he would be disentitled to any adjustment of any kind in the accounting records of Koodel Farms.

[31] With regard to Mr. deSwart's claim for a net return of some $8,000.00 used from his inheritance money, I am not satisfied that this was an enforceable loan to the farm and that it was meant that the funds be kept separate. Even though some refund cheques were paid to him at his request, these funds had become part of the farm operation and were not accounted for separately. They became part of the farm operation as far as they were used and to the extent they were used. In the end these funds were meshed in and became part of the overall farm as did the profits or the cash flow earned before and during the two and one-half years of separation.

[32] With regard to loans by Mr. Fairclough, it is clear that these advances are to Ms. deSwart personally and he has stated so in his testimony. Therefore, Ms. deSwart personally will have to deal with Mr. Fairclough on that issue and not Koodel Farms or Mr. deSwart. In fact, Koodel Farms is effectively dissolved, all effective October 1, 2002, which is the effective date of this decision, when all my rulings take effect.

[33] I indicated earlier that I concluded that an equalization payment was not warranted. I realize that there are disputes about the value and ownership of minor assets such as a pool table, snow shoes, gun collection, belly dancing outfit, scuba gear, etc., but in the absence of appraisals and clear evidence, I am relegated to leaving those items in the respective possession of the parties without any adjustment. There was also no appraisal evidence on the value of the foxes at their present stage of development and there was also no evidence of value of the foals born to the horse herd since the appraisal in evidence was performed. There were also a few horses which were not appraised when the appraisals were done because Ms. deSwart contested the ownership of those horses. I find that

it is not possible to make any adjustments on those accounts because there was no clear evidence presented to calculate any such adjustments.

[34] As I said earlier, it is not intended that Mr. deSwart retain and own all the tools and assets of the entire farm operation, but that each retain and own the tools normally and habitually used in their respective horse breeding and fox farm operations. I realize that may vary the accounting lists to some degree, but in view of the lack of clear evidence of value on the matter, I cannot find that any adjustment on that account would be very significant or warranted in the circumstances.

[35] As indicated previously, I have decided that I will not order any equalization payment from Ms. deSwart to Mr. deSwart on the basis of the calculation of net assets on Exhibit 19. As I mentioned earlier, the Exhibit 19 calculations would indicate that Ms. deSwart would owe Mr. deSwart an equalization payment of some $21,000.00. However, the property division does not provide any accounting of the anticipated profits of the fox ranch nor the investment in the foxes made by Ms. deSwart to date.

[36] Mr. deSwart testified that from now to the end of the year he anticipated a net revenue from the foxes of between $40,000.00 and $45,000.00, after further investment in the fox herd and after payment of operating expenses, including pelting expenses. Mr. deSwart has proposed keeping those profits, partly as a *quid pro quo* for not claiming an accounting from Ms. deSwart for the profits earned by her since separation. After one deducts the horse inventory recently included in

the accounting of Koodel Farms, any profit earned by Ms. deSwart during separation would be minimal, just a few thousand dollars.

[37] It is also apparent that the main profits and cash flow from the farming operations between now and the end of the year will come from the fox operation and not the horse breeding operation.

[38] In the final analysis I have concluded that Mr. deSwart shall keep all profits and cash flow from the fox operation; as opposed to splitting them with Ms. deSwart. Any interest she would have in the income from the foxes would, as best as can be calculated from the evidence, be offset by the equalization payment of some $21,000.00 otherwise required from her to Mr. deSwart. There will therefore be no equalization payment flowing from her to Mr. deSwart and there shall be no accounting by either party to the other regarding their respective farm operations from here on in. To attempt to do otherwise would be to continue down the road with further embroilment, controversy and, in all probability, further litigation.

[39] The assets and debts shall therefore be divided as provided in the preceding paragraphs of this decision with no equalization payment.

[40] There will be no costs awarded in this matter and each party shall bear their own costs.

[41] I will grant an order accordingly, prepared by counsel for the respondent and consented as to form by counsel for both parties, since it appears Ms. deSwart has retained counsel since the hearing.

Boudreau, J.