Date: 20010118
Docket: 1201-53679

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Wakkary v. Wakkary, 2001NSSC10]

Between:

SRI WAKKARY

Petitioner

- and -

JAN ABEDNEGO WAKKARY

Respondent

D E C I S I O N

HEARD BEFORE: The Honourable Justice John M. Davison

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: November 22 - 24, 2000
Final Submissions received January 5, 2001

DECISION: January 18, 2001 WRITTEN RELEASE: January 18, 2001

COUNSEL: Cynthia L. Chewter
for the Petitioner

Jan Abednego Wakkary
Respondent representing self

DAVISON, J.:

[1] This is a divorce proceeding and the main issue advanced before the court is the division of property under s. 13 (a), (b) and (i) of the *Matrimonial Property Act*.

FACTS

[2] I have heard the evidence as to the possibility of reconciliation and determine that there is no such possibility. I am satisfied that all matters of jurisdiction have been fulfilled, the requirements of the *Divorce Act* have been complied with in all respects and the ground for divorce as alleged has been proved. The parties separated October 26, 1998 and a divorce judgment shall be granted on the grounds set forth in s. 8(2)(a) of the *Divorce Act* in that there has been a breakdown of the marriage and the spouses have lived separately and apart for more than a year immediately preceding the determination of the divorce proceeding and have been living separate and apart since the commencement of the proceedings.

[3] The parties were born in Indonesia and came to Canada as students. They married on March 25, 1961 in Ottawa, Ontario. They are Canadian citizens who came to live in Nova Scotia in 1981. The wife is 63 years of age and the husband is 66 years of age, and they have four grown children.

[4] The wife worked as a laboratory technologist with her last position being at the Victoria General Hospital in Halifax. She took early retirement on March 31, 1997 and receives a monthly superannuation allowance of $1,359.55 and also has CPP benefits of $513 per month.

[5] The husband received his BSc in 1961 and PhD in 1968. He has been a research scientist at McGill, Sherbrook and Dalhousie Universities. He left his position at Dalhousie in 1982 with a view to managing family investments and has not been paid for employment since that date. Since 1982 the only income from employment received by the parties was that of the wife.

[6] I find from the evidence that the wife was the party who adopted the responsibility of nurturing and raising the children. At this time the four children range in age from 33 to 39 and are self-supporting. She also did the household work. She described the cooking and cleaning as “mainly my job”.

[7] The wife testified the husband conducted a lot of research into the investment field. He assumed complete control over the family’s investments and the wife said she “did nothing” with respect to the investments. She signed a power of attorney to permit her husband to deal

with and invest the funds in her RRSP. She said she always trusted him with respect to the investments.

[8] When the husband retired from employment, he was 47 years of age. The two older children were in university and had student loans. One child was in high school and the youngest was in junior high school. The only employment income which came to the family was that earned by the wife.

[9] The wife understood the investment portfolio in 1982 was initiated from proceeds of the sale of the home in Montreal and the funds from the wife's pension from employment in Montreal.

[10] The husband conducted his investment business with T.D. Waterhouse which was a self-service brokerage. The petitioner called to the stand Walter Joseph Chow, an investment representative employed with that company which permits clients to do their own investment research and to submit orders to the company by telephone or electronic means. The duties of the investment representative is to determine if the investments ordered are in good standing and if so, to arrange to have execution of the investment. The company does not alert the client if the stock is increasing or decreasing in value.

[11] The witness was referred to documents which tabulate information including statements of the wife's RRSP account from November 1, 1997 to September 30, 1998. The market value of the account stood at $160,320 on November 30, 1997, and the book value was calculated to be $172,197. Included in the portfolio were 7000 shares of Bre-X Minerals Ltd. valued at $24,364, 12,600 shares of Gentia Inc. valued at $42,460 and 3400 shares of Apple Computer Inc. valued at $82,588.

[12] At September 30, 1998, about a month before the separation, the market value stood at $118,957 and the book value was $121,243. There was still Apple Computer Inc. in the portfolio with a value of $36,435, but the largest portion is entitled "foreign" and was valued at $49,046. By this date Bre-X had decreased in value to almost zero.

[13] For the month of February 1998 there were eight transactions marked "plan deregistration" each in the amount of $4500. This indicates the husband took funds from the wife's RRSP and placed the funds in direct trading account #231341E. This is a margin account. There is reference that amounts were withheld for taxes on these withdrawals. The balance in market value of the wife's RRSP account was reduced in the month of February 1998 from

$157,543 to $130,863. In May 1998 there were further amounts deregistered leaving a balance in the market value at the end of the month of $113,883.

[14] The wife moved her account from T.D. Waterhouse to T.D. Evergreen in April 1999, about six months after separation. She receives more investment advice from this new broker than that received from T.D. Waterhouse

[15] The debits from the wife's RRSP account are reflected in the husband's Canadian President's account # 231341E for the month of February 1998. The market value in cash began the month at $184,946 and ended the month at $246,778. The de-registrations are reflected in the monthly activities.

[16] In addition to Canadian President's account #231341, the husband was operating a President's account in United States dollars. These accounts were referred to by Mr. Chow as status accounts given to higher network clients who generate more commission for the broker. They are both margin accounts where a client can buy securities without paying the full amount for them but by borrowing from the investment company which determines what can be margined by the price and risk factors.

[17] In the account sheet for October 1998 in the Canadian marginal account #231341 there is a reference to "credit sell out". Mr. Chow testified that is

action by the credit department of T.D. Waterhouse to pay for a margin call on a debt.

[18] When these accounts enter a negative balance, there is interest to be paid every month. Since the beginning of 1996 to June 2000 the husband paid over $80,000 in interest. The interest for each period was as follows:

1996	$17,633
1997	21,761
1998	18,821
1999	15,278
2000	7,830

The wife testified she did not know of this accumulation of interest.

[19] The couple travelled to Jakarta in January 1998. The husband wants to retire in Indonesia and indicated one person could live there for about $660 a month. The wife wants to remain in Nova Scotia. The husband has made investments in Indonesia since 1995 and one reason for the trip was to check on these investments.

[20] The couple returned to Nova Scotia in May 1998 and went back to Indonesia in June 1998. Separation occurred in October 1998 and the wife lived with a son in New York and remained with him for a time when he moved to Vancouver. Subsequently the wife rented an apartment in Halifax.

[21] The couple received advice that the difference in the exchange rate would render a purchase of a home in Indonesia of benefit to them. In April 1998 they invested in a home in Jakarta and purchased furniture for that home. There is a difference of opinion as to the type of interest they have in that home.

[22] It is the position of the wife that the home was purchased for a down payment of $14,483 and the remainder was to be paid by twelve installments of $11,162 each. It is said four installments were made but the husband stopped payments in June 1998. The home was placed in the name of a niece of one of the parties, Jenny Setlight, because of a restriction on persons owning property who were not citizens of Indonesia.

[23] The husband says the house was “transacted with only a purchase agreement” and there was no deed received. He alleges the developer planned to seize the house on November 15, 2000. The evidence is unclear as to the interest the parties held in the house. The evidence does establish the husband has failed to make payments on the house after June 1998. He ascribes his reason for this failure by stating that when “they sold” the house, the developers stated that for six months they would replace items if they were not in order. He said there was something not in order, but the

evidence did not identify this deficiency. When no one came to fix the deficiency, the husband stopped making the payments and made no payments after June 1998.

[24] The husband was not represented by counsel. The court attempted to explain procedures to him, and on several occasions advised he had to argue from the evidence, but in his written brief he refers to matters which are not part of the evidence, including matters which took place after the trial. There was comment in his brief that “there is still probability of recovering these assets or some of it” if he could go to Indonesia “as soon as possible”. I cannot consider comments and argument on which there is no evidence and the husband was advised by the court on several occasions that court could only consider that which formed part of the evidence before the court.

ANALYSIS

[25] There arises legal problems, including the appropriate date for division of the assets. I refer to *Lynk v. Lynk* (1990), 92 N.S.R. (2d) 1 at p. 6 where Chipman J.A. states:

> It remains to determine the value of the asset. Generally, the date of valuation of the matrimonial assets is the date of the commencement of the proceedings, which may be varied at trial in accordance with the evidence.

The court found that the evidence was unclear as to the amount owing at the time of the petition for divorce and determined that the appropriate time to value the assets was the time of trial.

[26] The husband seeks valuation as of the date of separation - October 26, 1998. The wife takes the position assets purchased in Indonesia such as the home, furniture and car should be valued at the time of purchase. The reason advanced is that the purchase date was only eight months before the separation. The wife says assets which appreciated in value, certain investments, should be assessed as at the date of trial.

[27] Another issue to be considered is the extent to which the court in Nova Scotia can deal with immovable property in Indonesia. I considered this problem in *Hebert v. Hebert* (1989), 88 N.S.R. (2d) 107 at 115. Section 22 of the *Matrimonial Property Act* reads as follows:

Conflict of Laws

22 (1) The division of matrimonial assets and the ownership of moveable property as between spouses, wherever situated, are governed by the law of the place where both spouses had their last common habitual residence or, where there is no such residence, by the law of the province.

Law Governing Immoveable Property

(2) The ownership of immoveable property as between spouses is governed by the law of the place where that property is situated.

Other Property Considered

(3) Notwithstanding subsection (2), where the law of the province governs the division of assets, the value of the immoveable property wherever situated may be taken into consideration for the purposes of a division of assets.

[28] In the *Hebert* case I stated:

I conclude from this section (s. 22) that I can divide the assets, including the land in Prince Edward Island, under the law of Nova Scotia ... The jurisdiction was conferred in our court when the divorce petition was filed by reason of s. 12 of the *Act*. I cannot, under the *Matrimonial Property Act*, order the sale of the land in Prince Edward Island: (See *Cowan v. Cowan* (1983), 61 N.S.R. (2d) 248;)

[29] The wife submits that the assets in Indonesia should be granted to the husband who intends to retire in that country. The wife intends to remain in Nova Scotia. As I have certain limitations in jurisdiction with respect to assets in Indonesia, and for other reasons which I will enumerate, I accept

the submission of the wife that the assets in Indonesia should be awarded to the husband.

[30] The wife submits the assets should be divided on a basis other than on an equal basis pursuant to the terms of s. 13 of the *Matrimonial Property Act*.

[31] The burden on one who seeks an unequal division under Section 13 is a heavy one. In *Harwood v. Thomas* (1980), 45 N.S.R. (2d) 414 at 417 the Appeal Division of the Nova Scotia Supreme Court (as it then was) stated:

> Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the Act and prescribed by Section 12 should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be clearly unfair - not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his discretion concludes that equal division would be unfair is he called upon to determine exactly unequal division might be.

[32] In *Bennett v. Bennett* (1992), 112 N.S.R. (2d) 79 Chipman, J.A. stated that the use of "unfair and unconscionable" in the *Act* is a disjunctive use and a person seeking an unequal division need only prove an equal division would be either unfair or unconscionable. Chipman, J.A. also found a complete or substantially complete allocation to one party "would be rare".

[33] As stated by the Court of Appeal in *Fisher v. Fisher* (1994), 131 N.S.R. (2d) 367 and *Donald v. Donald* (1991), 103 N.S.R. (2d) 322 the onus on the

party seeking an unequal division is to produce strong evidence that there should be a finding other than an equal division. In order to exercise one's discretion and find an unequal division use must be made of one or more of the sub-paragraphs of Section 13.

POSITION OF PARTIES

[34] Counsel for the wife makes submissions with respect to the value of the assets in Indonesia by reference to funds taken to that country in a period before the couple journeyed to it in 1998, with particular reference to transmissions in December1995 when money was transmitted to purchase property, and by reference to moneys transferred to Indonesia in 1998. There is also reference to an amount which left Canada but no explanation for its use was given in the evidence.

[35] It is said the husband took approximately $50,000 in U.S. funds to Indonesia in December 1995. This is substantiated by the wife who counted the travellers cheques and supported by withdrawals from accounts in Canada. In December 1995 there is a withdrawal from the Canadian marginal account of $25,000 in Canadian funds and a withdrawal in United States funds of $30,000 from the U.S. marginal account. These two withdrawals

total approximately $50,000 in United States funds which had declined in value in October 1997 to $50,000 in Canadian funds.

[36] The parties agreed that $141,396.55 in Canadian funds was transferred to Indonesia between February and June 1998. This sum represents an amount of $100,971 in Canadian funds from a margin account and $40,424.48 from an RRSP fund and proceeds from the sale of a family motor vehicle.

[37] Counsel for the wife says there were a number of sums withdrawn or paid for which there is little explanation in the evidence. An amount of $16,111 was withdrawn from the RRSP account of the wife in 1997. The husband, who had the power of attorney, cannot remember what happened to this money. There was an amount of $10,432 withdrawn from the parties' bank account on January 6, 1997 which is unexplained. There was an amount of $12,525 which the husband says was loaned to a relative for her failing business. The wife had no knowledge of this and it is submitted the amount should be a receivable to the wife.

[38] The husband's position is that the court should "eliminate" from the list of matrimonial assets the home and furnishings in Indonesia because the status of this property is uncertain. The remaining assets should be divided equally. This request is made because it is said the developer of the house seeks to

remove the contents of the home and because the husband says he cannot sell the house as he received no deed. The fact that the husband is not receiving legal advice prohibits his understanding the court is required to deal with all of the assets at this time.

[39] To illustrate the difference between the parties I set out, from the written briefs, the division suggested by the parties.

[40] The wife submits the division should be as follows:

Wife		Husband	
Pension	$189,212.00	Indonesia assets	$191,931.00
		land at Manado	5,372.00
		receivable to wife's sister	12,525.00
Furniture in wife's possession	850.00	income tax refund	1,007.33
		RRSP	113,138.00
		January 6, 1997 withdrawal collapsed from RRSP and unaccounted for	10,432.00
Wife's receivable from son	42,203.00		
Wife's RRSP	72,909.99	1997 RRSP collapse	16,111.00
Sub-total	305,174.00	Sub-total	350,516.33
less ½ credit card debt	3,408.00	½ credit card debt	3,408.00
		margin account	3,812.00
		Revenue Canada tax consequences of debt payment from RRSPs (30% gross up)	43,903.00 15,336.00
Total	301,766.99	Total	284,057.33

[41] The husband submits the division should be as follows:

Category	Total	Petitioner	Respondent
Assets in Indonesia	5,372	2,686	2,286
Assets in Canada	239,043	119,521	119,521
Debts	(30,796)	(15,398)	(15,396)
Income	2,116	1,058	1,058

i. The Petitioner would keep her own RRSP investment account and so would the Respondent. Since the assets in Canada at the separation date were about equally divided according to the name to whom the investment was assigned to.

ii. Assets in Canada at separation date according to exhibit books:

Canadian bank accounts	485
Petitioner's RRSP (Greenline's Statement Oct 31,98)	121,943
Respondent's RRSP (Greenline's Statement Oct 31,98)	110,145
Respondent's Mrgn Acc (Greenline's Stmnt Oct 31,98)	5,620
Furniture in Canada	850

iii. The Petitioner and the Respondent, individually would be responsible to their portion of the debt.

iv. The Matrimonial income would be split equally, and income equalization should be made to the Respondent.

[42] The outstanding difficulty is ascribing a valuation to the assets in Indonesia. The husband wants the court to give no consideration "at this time" to those assets. The wife was unable to give any valuation to those assets. She said the husband told her that one-half of the assets of the parties were in Indonesia, but she does not know what the value of the assets were at the time of trial or at the time of separation. She listed the assets in Indonesia as the house, the furnishings in the house, a motor vehicle, three bank accounts and the land at Manado.

[43] She says the assets in Canada are her pension, the money owed to her by their son Ron, the account at T.D. Evergreen, some furniture and Greenline investments.

[44] The respondent in 1982 assumed control of the family assets and the investments for the benefit of the parties. Substantial funds were invested in Indonesia in the several years immediately before separation. The husband, not the wife, has the first-hand knowledge of the details of these investments. It is reasonable and fair to place a burden of proof on the husband with respect to proof of valuation of these assets.

[45] In most civil proceedings a party or parties have burdens of proof. If proof is not forthcoming, those with the burden fail to achieve a remedy. Section 12 of the *Matrimonial Property Act* directs the court to initially consider division of assets to be on an equal basis. This does not assist in determining where the burden of proof lies, but in the circumstance of this case, the burden to prove evaluation of assets in Indonesia must be on the husband.

[46] Since 1982 the husband has had control of the investments of the family. The wife said she "did nothing" with respect to investments. Around 1983 she signed a power of attorney giving the husband complete control over her RRSP funds. The husband effectively had no discussion with the wife with respect to risk or diversification of investments. The wife had very little information about the funds transferred to Indonesia. The value of the investments in Indonesia is solely within the knowledge of the husband. Only he could assert proof of proper valuation. He who asserts must prove.

DISPOSITION

(a) Section 13 of the *Matrimonial Property Act*

[47] I am prepared to make a division of property which is not equal pursuant to s. 13(a), (b) and (i) which reads:

> 13 Upon an application pursuant to Section 12, the court may make a division of matrimonial property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
>
> (a) the reasonable impoverishment by either spouse of the matrimonial assets;
>
> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
>
> (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

[48] I will direct an unequal division with respect to the property in Indonesia, the pension of the wife and the RRSP funds. Other assets and debts are to be divided in an equal fashion.

[49] The husband invested through margin accounts. Persons with these president's accounts trade more often in an aggressive fashion. Many persons lost money because of the drop in value of technical securities, but as stated by Mr. Chow, young persons take more risks and older persons look for security as they approach and are in their retirement years. It is the submission of Ms. Chewter the investments in this proceeding were to assure security in retirement.

[50] Secondly, the husband ceased making payments on the home in Jakarta because of some deficiency he required to be repaired. In my view, this was an unreasonable response. He endangered loss of an asset on which there had been expended a considerable amount of money. These defaults in payment endanger the parties interest in this home.

[51] The evidence indicates that large sums of money were transmitted from Canada to Indonesia. Indeed, the parties agree that $141,396 was transferred between February and June, 1998. It is now alleged by the husband the assets in Indonesia are worth $5,372 which only represents the value of the land in Manado. The wife agrees to the valuation of the land at that figure. There was no evidence of any substantial amounts being transferred from Indonesia to Canada.

[52] In my view, these incidents and the whole tenor of the husband's investment policy and the procedures adopted by him indicate an unreasonable impoverishment of matrimonial assets to the point it would be unfair to the wife, who substantially contributed to acquisition of these assets, to divide the matrimonial assets in an equal fashion. I make this determination pursuant to the factor referred to in s. 13(a) of the *Matrimonial Property Act*.

[53] When one considers s. 13(b) of the *Act*, the incurring by the husband of over $80,000. in interest on the marginal accounts within five years is a reflection of his investment strategy and an unreasonable expenditure which was not discussed with the wife.

[54] I also considered that the factor referred to in s. 13(i) is relevant. The wife worked until 1997. It was her salary and RRSP funds which substantially contributed to the investments made by the husband. She raised four children and the evidence indicates she was the major parent in the raising of the children. She had nearly complete responsibility for the household chores. The husband did not dispute any of these allegations of the wife.

[55] Accordingly, under the terms of s. 13(a), (b) and (i), I am satisfied that division of the matrimonial assets in equal shares would be both unfair and unconscionable to the wife.

(b) Valuation

[56] I find as a fact that there were considerable sums transferred to Indonesia from Canada between 1995 and 1998. Counsel for the wife places a figure on the Indonesia assets of $191,931 and seeks to have this figure used in the calculation of the division. In my opinion, that would be unfair to the husband.

[57] It is my opinion the assets should be valued at a date close to the separation date. There may be some variation from that date because the valuation on the separation date is unknown.

[58] The evidence does not assist me in determining the value of the assets in Indonesia at the date of separation. Indeed, the evidence in this regard is so weak I cannot place a value on those assets and, as stated, it is unfair to the husband to make use of sums transferred to Indonesia within a year before separation.

[59] It is my opinion that the assets in Indonesia are not equal to the value of the wife's pension. I ascribe the full value of the pension ($189,212) to the wife and the full value of the assets in Indonesia to the husband. This results in an unequal division of assets.

[60] But there are other reasons for granting the assets in Indonesia to the husband. The court would not have jurisdiction to divide any land in that country, nor could the court effectively enforce division of other assets in that country.

[61] There is also the factor that the husband had the burden or proof in the valuation of the assets in Indonesia. For similar reasons I found the burden of proof on the husband in *Johnson v. Johnson* (1998), 167 N.S.R. (2d) 201, which was affirmed by the Nova Scotia Court of Appeal: (see 173 N.S.R. (2d) 51 (C.A.)

[62] Counsel for the wife urges I accept the sum of $72,909 for the value of the wife's RRSP's. That was the value one year after separation and after the wife took control of her RRSP fund. The proper valuation is that of October 31, 1998 - $121,942.

[63] The RRSP fund of the husband is valued at $113,138 which is the valuation as at October 31, 1998. It is appropriate the two parties be left with their own RRSP accounts.

[64] There should be included in the assets of the husband amounts removed from the account of the wife's RRSP by the husband for which he could not

account at trial. These withdrawals, made in 1997, are $16,111 and $10,432 for a total of $26,543.

(c) Division of Assets

[65] The wife shall have the full value of her pension which was calculated by an actuary at $189,212. She should also retain her RRSP account valued at $121,942.

[66] The husband shall retain his RRSP funds valued at $113,138 and be awarded the assets in Indonesia, the value of which, except for the land at Manado, is unknown.

[67] The remaining assets and debts shall be divided equally. These assets are:

WIFE		HUSBAND	
Furniture	$850	Land at Manado	$5,372
Receivable from son	42,203	Receivable from sister-in-law	12,525
		Income tax refund	1,007
		Unexplained withdrawals from wife's RRSP	26,543
	$43,053		$45,447

[68] I accept the value of the debts advanced by Ms. Chewter as follows:

Wife’s MasterCard	6,532
Husband’s Margin Account	3,812
Revenue Canada	43,903

These debts, including Revenue Canada, will be divided equally between the parties. Each party is responsible for $27,266 in family debts. A balance of the assets would require the husband to pay the wife $1,197, but I direct this not be required by reason of the unequal balance of the assets.

(d) Costs

[69] In my view there should be no costs awarded to either party in this proceeding.

J.