

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: deSwart v. deSwart, 2003 NSSC 013

Date: 03/01/21
Docket: S.K. 1204-002702
Registry: Kentville

Between:

Delle Melanie deSwart

Petitioner

v.

Jacobus Johannus Maria deSwart

Respondent

ADDENDUM TO DECISION 2002 NSSC 224 DATED OCTOBER 7, 2002

Judge: The Honourable Justice Allan P. Boudreau

Heard: At Kentville, Nova Scotia, on December 3, 2002.
Final written submissions received January 17, 2003

Counsel: Caroll Daniels, counsel for the petitioner
Siobhan Doyle, counsel for the respondent

By the Court:

INTRODUCTION:

[1] The divorce hearing in this matter was heard on September 23 - 27, 2002.

An oral decision was rendered on September 27, followed by a written decision on October 7, 2002. The main issue at trial was the division of property. The trial decision made a physical division of the parties' property and respective farming operations. That decision basically adopted the division proposed on trial Exhibit 19, except as varied by the written decision dated October 7, 2002. The parties were not able to agree on the form of the order. The main area of dispute was which tools and equipment were normally and habitually used in their respective horse breeding and fox farming operations. A hearing was held on December 3, 2002, at which time Ms. deSwart presented affidavit evidence and was cross-examined. Mr. deSwart did not present new evidence and he relied on the trial evidence and the cross-examination of Ms. deSwart.

ANALYSIS:

- [2] Upon reviewing my written decision of October 7, 2002, it became clear that an error had occurred on page 13, paragraph 28. The horse, Erina's filly "Madam" was not awarded to Ms. deSwart, but it had been awarded to Mr. deSwart as stated in paragraph 20 of my decision. Therefore, the adjustments to Ms. deSwart's assets should have been reduced by the \$5,000.00 value assigned to the horse "Madam". This would have meant an adjustment to her net total asset amount downward by \$5,500.00 and not \$500.00 as stated in that decision. This would have reduced her gross assets as shown in paragraph 28 and her net assets as shown in paragraph 29 by \$5,000.00. Therefore, this would have reduced any equalization payment required of Ms. deSwart to \$19,437.00.
- [3] My decision of October 7, 2002, clearly implied that the division of assets arrived at was the court's best approximation of an equal and just division as could be ascertained in the circumstances. It was not perfect and it rarely is in these circumstances, especially when there is a lack of evidence on the use and valuation of tools and equipment, as there was here. However, the court recognized that Ms. deSwart should have the tools, gear and equipment necessary to continue and carry on her operations.

[4] I was not favourably impressed by the position Ms. deSwart took on what tools and equipment should be awarded to her. For example; when asked why she should have both farm tractors, she replied, “He can buy himself a tractor”. Many of her arguments for claiming tools and equipment boiled down to the fact that she wanted them, regardless of the use which could be made by each of the parties’s farming operations. There is no question that she definitely requires some specific tools and equipment to carry on her operations and many of her requests were acceded to by Mr. deSwart.

CONCLUSIONS:

[5] Upon hearing the parties and considering the additional evidence submitted, Ms. deSwart shall be awarded the following tools, gear and equipment, in addition to the items listed on Exhibit 19 and to those specifically mentioned in my decision of October 7, 2002. The following are tools, gear and equipment necessary and habitually used in her horse breeding and wood lot operations:

1. the Zetor tractor (already on her list), with respective snow plow
2. the rock rake
3. the long grain auger (which I understand has been sold)
4. the hay baler
5. the hay bine
6. the wheel rake

7. the corn picker
8. one welder (Ms. deSwart to choose)
9. one mower (Mr. deSwart to choose)
10. two green steel cabinets with their contents
11. one half of the horse carts and wagons (Ms. deSwart to choose)
12. the 10' elevator
13. the head gate for cattle
14. one disc harrow (Mr. deSwart to choose)
15. the red dump trailer
16. three electric motors, including the one necessary to run the feed mixer, divided by horse power of motors as equally as possible (Ms. deSwart to choose)
17. the thirty (30) fox nest boxes purchased with a loan from Mr. Fairclough
18. the following originally listed as Mr. deSwart's separate property:
 - coins
 - one half of the photo albums (Ms. deSwart to choose)
 - antique box
 - old jugs
19. one half of the chains (log type) (Ms. deSwart to choose)
20. the electric fencers presently in Ms. deSwart's possession
21. the forks, shovels, hammers and tapes presently on the property awarded to Ms. deSwart
22. one 12 gauge pump action shotgun in working condition (Mr. deSwart to choose)
23. the table saw
24. one half of the wheelbarrows and rakes
25. the power saw
26. one propane heater (Mr. deSwart to choose)
27. all the furnishings in the matrimonial home
28. the fox tail saw
29. all the peavies and axes presently in Ms. deSwart's possession
30. one horse trailer (Ms. deSwart to choose)
31. one hog scale
32. the old manure spreader
33. weight scale for cattle
34. one level chain harrow
35. horse tack - presently in Ms. deSwart's possession

36. horse books - presently in Ms. deSwart's possession
37. shop vac
38. chain hoist which belongs to Ms. deSwart's father
39. the two furrow plow
40. Ms. deSwart's dog trophies
41. one of the two torch gears (Mr. deSwart to choose)
42. one half of all other tools and gear of which there are more than one; unless they are clearly habitually or normally used only in one of the parties' respective horse breeding, fox farming, or other operations.

[6] The above noted will serve to clarify my written decision of October 7, 2002. I find that the items awarded to Ms. deSwart in this decision and not previously accounted for in the earlier decision more than offset the error previously made with regard to the horse, Erina's filly, "Madam". While that error would have served to reduce any equalization payment required of Ms. deSwart, the additional items awarded to her in this decision more than offset the error with regard to the horse, "Madam". Nevertheless, I would not change my earlier conclusion by requiring any equalization payment on the part of Ms. deSwart. This addendum does not change the basic premise of my earlier decision in attempting to arrive at an equitable physical division of the parties' farming assets and debts. I understand Ms. deSwart's concern that Mr. deSwart's fox farming operation will probably be the first to generate some cash flow; however, that will end soon and it will not produce cash flow until approximately one year from now. On the other hand, Ms. deSwart's operations have the potential of producing cash flow

distributed more periodically throughout the year. I do not find that these considerations change the basic tenets of my earlier decision. There is no apparent alternative which would provide for a division of the parties' operations and permit them to go their separate ways. Anything else would be continued chaos and quite probably further litigation.

- [7] The issue of possible spousal support was raised during these proceedings for finalizing the form of the order. It is clear that a claim for spousal support was not advanced by either party at trial, presumably because both were and appear to continue to be in a survival mode with no apparent ability to pay support to the other. The order should therefore simply state that a claim for spousal support was not advanced by either party and none is ordered.
- [8] In view of the results on this hearing I am not going to award costs to any party.
- [9] I would ask counsel for Mr. deSwart to prepare a corollary relief judgment order incorporating this addendum and my previous decision and forward it to counsel for Ms. deSwart to consent as to form and I will then grant the order.

Boudreau, J.