

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Wayne Kirk Whalen v. Linda Jean Whalen, 2004 NSSF 020

**Date:** 20040309

**Docket:** 1201-57536

**Registry:** Halifax

**Between:**

Wayne Kirk Whalen

Petitioner

v.

Linda Jean Whalen

Respondent

**Judge:**

The Honourable Justice Leslie J. Dellapinna

**Heard:**

March 8 and 9, 2004, in Halifax, Nova Scotia

**Written Decision:** March 11, 2004

**Counsel:**

June Rudderham, for the Petitioner

Krista Forbes, for the Respondent

**By the Court:**

[1] This is a divorce proceeding.

[2] The petitioner, Wayne Whalen, is 61 years of age. The respondent, Linda Whalen, is 56. They began cohabiting in 1989 soon after meeting. They were married on October 19, 1990. It was the third marriage for both. There are no children of the marriage. Mr. and Ms. Whalen separated on November 14, 2002.

**THE DIVORCE**

[3] I am satisfied there is no possibility of a reconciliation and I am satisfied too that there has been a permanent breakdown in the parties' marriage as evidenced by the fact that they have been living separate and apart since November 14, 2002 and have not cohabited since that time. A Divorce Judgment will therefore issue.

**BACKGROUND**

[4] When the parties first began living together, Mr. Whalen was not working. He considered himself retired. He was in receipt of a pension stemming from his previous employment with the Canadian Armed Forces. He brought to the relationship two parcels of real estate which were located side by side in Hebbville near Bridgewater, Nova Scotia. Beyond those two properties and his pension entitlement, Mr. Whalen's possessions were modest.

[5] Prior to her cohabitation with Mr. Whalen, Ms. Whalen was never what one might call self-sufficient. Her employment history includes having worked for a daycare service, being a part-time house sitter and being a nanny. Throughout most of her adult life, she depended on additional support from her previous husbands, her father and then Mr. Whalen. She brought very little to the marriage by way of assets. Her contribution was primarily that of a few items of furniture and a used vehicle that had to be replaced soon after the parties began living together.

[6] After the parties were married, Mr. Whalen returned to work. For approximately 11 years he worked as an industrial electrician for Bowater Mersey retiring for the final time in April, 2000.

[7] Ms. Whalen did not work outside of the home during the marriage. Her role was that of a homemaker.

[8] Commencing approximately five years ago, the parties invested some of their disposable income in mutual funds and stocks. According to Mr. Whalen, they experienced considerable success for a period of time so much so that he mortgaged one of his properties in order to invest additional funds into the stock market. However their good fortune came to an end and their savings plummeted to next to nothing. The property which the parties did not occupy was sold in 2001.

[9] In the Spring of 2002, the parties sold the house in Hebbville in which they lived and purchased a lot located at 88 Londonberry Drive in Hammonds Plains, Nova Scotia. There Mr. Whalen began to build a home. Although they took up residence in the house, it still has not yet been fully completed.

[10] The parties separated for brief periods of time on three previous occasions before finally separating in November, 2002.

[11] At the time of their separation, their assets consisted essentially of the following:

- (a) The matrimonial home located at 88 Londonberry Drive. The property was appraised on November 14, 2003 as having a value of \$134,000.00. There is apparently no mortgage nor any other encumbrance securing that property;
- (b) various items of furniture, appliances and household effects;
- (c) a 1993 Dodge Shadow motor vehicle which was registered in the name of Ms. Whalen and which she took with her after the parties separated. According to Ms. Whalen's Statement of Property, she estimated that vehicle as having a value of \$3,500.00. Mr. Whalen gave no evidence to contradict that figure;
- (d) Mr. Whalen had a motorcycle which he sold subsequent to the parties' separation for \$800.00;

- (e) when it was apparent to Mr. Whalen that the parties' separation was eminent he withdrew from the Investorline account two sums totalling \$14,400.00. From that money he withdrew \$1,000.00 cash of which he gave \$700.00 to Ms. Whalen intended to assist her with her living expenses after she moved from the matrimonial home. A further \$859.55 was transferred to a joint chequing account to cover an overdraft so that that account could be closed. Mr. Whalen subsequently used a further \$9,200.00 of the funds to purchase a motor vehicle. Of the remaining funds, he testified that approximately \$1,500.00 was used to pay for expenses associated with the ongoing process of completing the matrimonial home. He kept the balance of the funds and used them for car related expenses as well as his own personal living expenses;
- (f) there still remains between \$25,000.00 and \$26,000.00 in an Investorline account at the Bank of Montreal in Mr. Whalen's name which he acknowledges is a matrimonial asset; and
- (g) Mr. Whalen's pensions with the Canadian Armed Forces, Bowater Mersey and his Canada Pension Plan credits.

[12] After the parties separated, Mr. Whalen continued to live in the matrimonial home. Ms. Whalen is currently residing with her sister and is taking a course through the Options program, in computers. Her plans include moving from her sister's home to her own residence and obtaining employment. When and where she might move depends in part on the outcome of these proceedings and her success in the future in obtaining employment. Her only income at this time is social assistance of \$350.00 a month plus a further \$50.00 a week while she is in training.

[13] Mr. Whalen's income is comprised of the following:

- (a) His Bowater Mersey pension of \$359.38 per month;
- (b) his Canada Pension of \$537.10 per month; and
- (c) his Canadian Armed Forces pension of \$1,195.67 per month.

His armed forces pension is indexed to the cost of living. He testified that at age 65, his Canadian Armed Forces pension will reduce by approximately \$300.00 per month but had nothing to prove the amount or any other details.

[14] Prior to trial, the parties were able to agree on a number of issues. They agreed as follows:

- (a) The matrimonial home will be sold and the net proceeds will be divided equally between the parties after Ms. Whalen has been reimbursed \$250.00 for the cost of the appraisal previously referred to;
- (b) the balance of the Investorline account of between \$25,000.00 and \$26,000.00 will be divided equally between the parties;
- (c) Ms. Whalen will retain the 1993 Shadow motor vehicle. Mr. Whalen will retain the motor vehicle which he purchased subsequent to the parties' separation;
- (d) Mr. Whalen will retain the \$800.00 which he realized from the sale of his motorcycle;
- (e) the household contents of the matrimonial home have been divided;
- (f) the Canada Pension Plan credits earned by Mr. Whalen during the parties' marriage will be divided equally but Ms. Whalen has agreed not to apply for a division of those credits until she attains the age of 60 in approximately four years time;
- (g) Mr. Whalen's entire Bowater Mersey pension, which was entirely earned during the marriage, will be divided equally at source pursuant to the Pension Benefits Act; and
- (h) Mr. Whalen will retain his entire Canadian Armed Forces pension.

[15] In addition to the asset division that the parties have agreed upon, Ms. Whalen is seeking a further equalization payment from Mr. Whalen being a figure approximately equal to one half the value of the proceeds which he took from the

Investorline account and which he used to purchase his vehicle and pay for his personal living expenses. She also seeks spousal support. Mr. Whalen is opposed to a further equalization payment. He argues that although he did use the money to purchase a vehicle and did use some of the money for his own personal living expenses subsequent to the parties' separation, the funds he used are more than offset by an unequal division of the household contents in Ms. Whalen's favor and in any event, he should be entitled to an unequal division of some kind pursuant to s. 13 of the *Matrimonial Property Act* because he brought to the marriage significantly more assets than did Ms. Whalen. He is also opposed to paying any spousal support. Alternatively, if ordered to pay spousal support, he argues that he can only pay \$200.00 per month and he requests that the court fix the period over which that support will be paid.

### **ISSUES**

- (1) Is Ms. Whalen entitled to a further equalization payment pursuant to the *Matrimonial Property Act*?
- (2) Should Mr. Whalen pay any spousal support to Ms. Whalen and if so how much and for how long?

### **DISCUSSION**

- (1) Property  
**Is Ms. Whalen entitled to a further equalization payment pursuant to the *Matrimonial Property Act*?**

[16] The relevant legislation is found at ss.12(1) and 13 of the *Matrimonial Property Act* which read as follows:

12 (1) Where

- (a) a petition for divorce is filed;
- (b) an application is filed for a declaration of nullity;
- (c) the spouses have been living separate and apart and there is no reasonable prospect of the resumption of cohabitation; or
- (d) one of the spouses has died,

either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

13. Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of 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 unreasonable 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;
- (c) a marriage contract or separation agreement between the spouses;
- (d) the length of time that the spouses have cohabited with each other during their marriage;
- (e) the date and manner of acquisition of the assets;
- (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
- (g) the contribution by one spouse to the education or career potential of the other spouse;
- (h) the needs of a child who has not attained the age of majority;
- (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;
- (j) whether the value of the assets substantially appreciated during the marriage;
- (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
- (l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;
- (m) all taxation consequences of the division of matrimonial assets.

[17] There is no dispute that shortly before the parties physically separated, Mr. Whalen removed funds from the Investorline account which both parties acknowledged to be a matrimonial asset. Of the \$14,400.00 that he withdrew from the Investorline account \$700.00 was given to Ms. Whalen, \$859.55 was used to retire the joint account overdraft and therefore could be said to have benefited both of the parties, approximately \$1,500.00 was apparently used to further complete the matrimonial home and therefore could also be said to have benefited both of the parties (and they will both realize that benefit once the matrimonial home has been sold) but the remainder of the funds, i.e., \$11,340.45 was kept by Mr. Whalen and used for his benefit for living expenses, the purchase of a car and car related expenses.

[18] Ms. Whalen, on the other hand, retained the Shadow motor vehicle which she valued at \$3,500.00 and, of course, the \$700.00 which Mr. Whalen gave to her for post-separation living expenses.

[19] Whereas Mr. Whalen gave no other spousal support to Ms. Whalen since their separation over one year four months ago, I consider the \$700.00 payment to Ms. Whalen to be but a token lump sum spousal support payment and I am not prepared to require Ms. Whalen to divide that with her husband. If the money retained by Mr. Whalen and the motor vehicle retained by Ms. Whalen were subject to an equal division, Mr. Whalen would have to pay to Ms. Whalen a further equalization payment of \$3,920.23 ( $\$11,340.45 - \$3,500.00 = \$7,840.45 \div 2 = \$3,920.23$ ). The issue is whether the court should order an equalizing of the value of these assets or decline Ms. Whalen's request on account of the value of the assets each brought to the marriage and/or the division of household furnishings between the parties.

[20] There is a presumption in s.12 that matrimonial assets, upon division, will be divided equally. The court, however, has the ability to order an unequal division if the party seeking the unequal division proves that an equal division would be unfair or unconscionable taking into account the factors listed in s.13. The party seeking a greater than equal share must produce strong evidence showing that in all of the circumstances equal division would be clearly unfair or unconscionable on a broad review of all relevant factors (see *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414). As stated by Bateman, J.A. in *Young v. Young*, 2003 NSCA 63 beginning at paragraph 15:



... the division of matrimonial assets is *prima facie* equal, with unequal division permitted only in limited circumstances. The inquiry under s. 13 is broader than a straight forward measuring of contribution. The predominant concept under the **Act** is the recognition of marriage as a partnership with each party contributing in different ways. A weighing of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Since the introduction of the **Act**, it has been repeatedly stressed by this Court, that matrimonial assets will be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable.

And further, at paragraph 18:

... It is not sufficient, for an unequal division of matrimonial assets, that one of the s. 13 factors be present. The judge must make the additional determination that an equal division would be unfair or unconscionable.

And paragraph 19:

As directed in **Harwood v. Thomas**, supra, the judge must look at all of the circumstances, not simply weigh the respective material contributions of the parties.

[21] *Young*, supra, emphasizes that the mere fact that one party brought more in the way of assets to the marriage than the other is not in itself a reason for an unequal division. In paragraph 20 Bateman, J.A. stated:

Section 4(1) of the **Act** expressly includes as a matrimonial asset (subject to the enumerated exceptions) all real and personal property acquired by either or both spouses before or during their marriage. Thus the mere fact of prior acquisition does not remove the asset from *prima facie* equal division. Section 13(e) entitles the judge to take into account “the date and manner of acquisition of the assets” when considering whether an equal division would be unfair or unconscionable. Under the s.13 analysis the significance of the prior acquisition must be looked at taking into account factors such as the timing of the contribution of the particular asset to the marriage; the parties’ use of the asset; the length of the marriage; the significance of

the asset relative to the entire pool of matrimonial assets; and the age and stage of the parties at separation. This is not an exhaustive list.

[22] While it is true that Mr. Whalen brought more to the marriage by way of assets than did Ms. Whalen, that alone does not entitle him to an unequal division. The two properties in Hebbville that were brought into the marriage were sold, one to pay off investment losses. The existing matrimonial home was built during the marriage. Mr. Whalen's Armed Forces pension is not being divided. Most of the house contents, all of the remaining savings and the Shadow motor vehicle were acquired during the marriage. Other than the bare fact that Mr. Whalen brought more assets to the marriage, no other reason has been given to the court to order an unequal division. I am therefore unconvinced that an equal division would be unfair or unconscionable.

[23] The other argument presented by Mr. Whalen is that the household contents were divided unequally in Ms. Whalen's favour. There was little by way of evidence to support that argument. There was no formal appraisal of the household contents and according to Ms. Whalen, prior to the parties' separation Mr. Whalen categorized most of what the parties owned by way of furnishings and other household contents as "junk". That evidence was not disputed by Mr. Whalen. Again, I am unconvinced that the manner by which the parties divided the household contents justifies an unequal division of the remaining assets. I therefore order that Mr. Whalen pay to Ms. Whalen an equalization payment of \$3,920.23 to be paid out of his one-half share of the matrimonial home proceeds.

(2) Spousal Support

Should Mr. Whalen pay any spousal support to Ms. Whalen and if so how much and for how long?

Legislation

The most relevant sections of the *Divorce Act* are as follows:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or

pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[24] Ms. Whalen is seeking an order of spousal support from her husband. At the present time she is relying on social assistance and her sister for financial support.

She has enrolled in a computer program in the hopes that computer skills will improve her chances of obtaining employment. She has made a number of job applications but thus far without any success. She is 56 years of age and she did not work outside of the home at any time during the approximate 13 years that the parties were together. She at no time had a career nor for that matter any employment paying her a meaningful level of income. I am satisfied given her limited training, limited experience in the workforce and her age that she is making reasonable efforts to enhance her marketability in order to obtain employment in the future.

[25] Mr. Whalen is asking the court to deny his wife's application for spousal support or in the alternative if her application is granted, he asks that the amount of spousal support be no more than \$200.00 per month and that the court fix a termination date. Specifically, he asks the court to order that her spousal support cease when she obtains the age of 60 years or when she becomes economically self sufficient, whichever event occurs first.

[26] It is his position that Ms. Whalen was advantaged by the marriage and was not, in any way, disadvantaged from its breakdown. He believes that she is capable of re-entering the workforce now and that on his modest income he is not able to provide her with meaningful support particularly after his Bowater Mersey pension is divided.

[27] All of the statutory objectives and factors listed in section 15.2 are to be considered. As stated by Cromwell, J.A. in *Fisher v. Fisher* 2001 N.S.C.A. 18 at paragraph 82:

The fundamental principles in spousal support cases are balance and fairness. ... The goal is an order that is equitable having regard to all of the relevant considerations. As was stated in Bracklow, [[1999] 1 S.C.R. 420] at [paragraph]36:

...

... There is no hard and fast rule. The judge must look at all the factors in light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.

[28] Mr. and Ms. Whalen are a couple of modest means. While together they complemented and were dependent upon each other. His primary role was that of the bread winner. Her primary role was that of the homemaker. Both were apparently satisfied with the role of the other. Ms. Whalen needed Mr. Whalen's financial support. Mr. Whalen needed Ms. Whalen's contribution as a homemaker. Indeed he testified that he is unable to cook any meals for himself and he has included a figure of \$800.00 a month in his budget for food and meals out because now that they are separated he eats all of his meals outside of the home.

[29] While their marriage may not have been lengthy it was certainly not short. They were together a period of approximately 13 years.

[30] They were both advantaged by their marriage relationship. Similarly they were both disadvantaged by its breakdown. Mr. Whalen is having difficulty caring for himself without his wife's contribution and Ms. Whalen is unable to financially support herself without her husband's financial assistance.

[31] I find that Ms. Whalen is entitled to non-compensatory support. I also find that Mr. Whalen has the ability to contribute to her support although, as is so often the case, her financial need far exceeds the amount that he can reasonably afford to contribute.

[32] I have reviewed both of their budgets. However, they are of limited assistance. Both anticipate a change in their living arrangements in the near future. Mr. Whalen will be moving from the matrimonial home after it has been sold. Ms. Whalen also anticipates moving but is not sure when because much depends on when she will be able to enter the workforce. Once the matrimonial home has been sold and the investments have been divided, both parties will have approximately \$70,000.00 to invest. Once Mr. Whalen's pension has been divided pursuant to the *Pension Benefits Act* his total income will decrease and Ms. Whalen's will increase.

[33] Mr. Whalen will experience a slight tax benefit as a result of a spousal support order. Because of Ms. Whalen's extremely low income, she will not incur any additional tax liability, at least not until she obtains employment.

[34] Taking all these factors into account, I order that Mr. Whalen pay to Ms. Whalen spousal support in the sum of \$300.00 per month commencing the 1<sup>st</sup> day

of April, 2004 and continuing on the 1<sup>st</sup> day of each month thereafter until otherwise ordered.

[35] Ms. Whalen has an obligation to attempt to support herself. There is no way of knowing when she might be self-sufficient. Under the circumstances, I am not prepared to order spousal support for a fixed period of time. I do, however, order that the spousal support payable by Mr. Whalen to Ms. Whalen may be reviewed upon application by either party any time after September 20, 2007 which is when Ms. Whalen will attain the age of 60 years. This will give her four years to train and hopefully enter the workforce. When she turns age 60, she will apply for a division of the Canada Pension Plan credits earned by Mr. Whalen during their marriage and hopefully prior to any review application the parties will know the effect of that division. Hopefully too, Mr. Whalen will have a better idea of how his military pension will be effected when he attains the age of 65 the following February.

[36] The review provision in no way limits the right of either party to apply for a variation of this order pursuant to s. 17 of the *Divorce Act* in the event of a change in circumstance as contemplated by ss.17(4). Ms. Whalen obtaining employment would be one such change. As a term of the Order, Ms. Whalen is also ordered to notify Mr. Whalen, in writing, of any employment she does obtain together with the particulars of that employment. Both parties will be required to provide to the other a copy of their respective income tax returns and Notices of Assessment each year commencing with their income tax returns and Notices of Assessment for the year 2003. The exchange of tax returns and Notices of Assessment will take place no later than June 1 of each year commencing June 1, 2004.

J.