IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Falkenham v. Falkenham, 2003 NSSC 163

Date: 20030728
Docket: SP. No. 1205-002098
Registry: Halifax

Between:

Mary Eileen Falkenham
Petitioner

v.

Terry Guy Falkenham
Respondent

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: January 17, 2003, in Pictou, Nova Scotia

Final Written Submissions: January 31, 2003

Counsel: Sheila A. McDougall, for the Petitioner
Edward J. McNeill, for the Respondent

Introduction

[1] Mary Eileen Falkenham seeks a dissolution of her marriage to Terry Guy Falkenham. She seeks spousal support and a division of the assets under the *Matrimonial Property Act*. In her petition for divorce, she also sought joint custody of the children of the marriage and child support, as well as exclusive possession of the matrimonial home. In his answer, Mr. Falkenham sought custody and exclusive possession of the matrimonial

home. Prior to the hearing, the parties agreed that they would have joint custody of the children with primary care being with Mr. Falkenham. Neither party seeks child support.

Divorce

[2] I am satisfied that the parties have been living separate and apart for one year prior to the date of this decision. I am also satisfied that there is no possibility of reconciliation. Therefore, the divorce is granted under Section 8 of the *Divorce Act*.

Facts

[3] The petitioner, Mary Falkenham, married the respondent, Terry Falkenham, on July 7, 1984. There are two children of the marriage, Emmy Joan Falkenham, born September 13, 1985, and Eric Mason Falkenham, born July 12, 1989.

[4] Mrs. Falkenham is 48 years of age. Before her marriage to Mr. Falkenham, she was employed as a secretary with Underwriters Adjustment Bureau Limited. She worked until she became pregnant. After their first child, Emmy, was born, Mrs. Falkenham was largely a stay at home mother,

working only sporadically. In recent years, she has been working as a part-time secretary for Robert Morton Financial Services (Robert Morton). In addition, she has acted as a temporary secretary for Underwriters Adjustment Bureau Limited (UAB).

[5] Mr. Falkenham is 50 years of age. He graduated from Lunenburg High School and attended St. Mary's University for two years before entering the work force. He has been employed by Sobeys Limited since 1978, and is now at the middle management level. Before that he was employed with Dominion Stores Limited. He recalls meeting Mrs. Falkenham at a dinner party in early 1984. After a short courtship, they married and moved to Fox Brook, Pictou County, where Mr. Falkenham had a house that he had bought several years before the marriage.

[6] Mr. Falkenham formed the intention of marrying Mrs. Falkenham primarily because he wanted to have children. He testified that he hoped that he would have at least four children. However, Mrs. Falkenham refused to have any more children after Eric was born and underwent a tubal ligation procedure.

[7] The marriage was a happy one for several years, though Mrs. Falkenham's refusal to participate in conjugal relations with Mr. Falkenham after Emmy was born, caused a certain strain between them. Conjugal relations were

non-existent after her birth, except on two occasions that Mr. Falkenham recalled. As a result of one of these, Mrs. Falkenham became pregnant with Eric. Since 1985 the parties have not shared a bedroom. Until the petition for divorce was filed, the parties performed the ongoing responsibilities of parents, and to the outside world appeared to be a happily married couple.

[8] Mrs. Falkenham performed most of the household chores and duties. It is not disputed that Mr. Falkenham purchased the weekly groceries for the family, however. He was of the view that Mrs. Falkenham was not a careful shopper and he thought the family budget would have suffered greatly had Mrs. Falkenham done the grocery shopping. He was also responsible for the financial aspects of the marriage. Since Mrs. Falkenham filed the petition for divorce, he testified, her attention to household chores has greatly decreased. She said the children are now much older and more independent. They provide for their own breakfast and she no longer has family suppers or dinners as the children decide what they wish to have for these meals. Mr. Falkenham states that he watches television and walks a great deal for his health.

[9] Mrs. Falkenham said she did not believe she was obligated to spend any time with the children after school as they are in the course of preparing their

homework for the following day, and spends most of her time at her mother's house.

[10] Mrs. Falkenham's evidence is that he has had to devote more time to doing household chores on an incremental basis in recent years. He claims that Mrs. Falkenham spends a great deal of time at her mother's home, more so now than in the past. Her need to be close to her mother is apparent from the fact that this was the primary reason they moved from Fox Brook to their current location. Mr. Falkenham said it cost almost as much to operate a second vehicle from Fox Brook as to purchase of a residence in the town of New Glasgow.

[11] The parties have had their own bank accounts throughout the marriage.

Custody

[12] It is clear that both parties love the children and wish to see them. During the marriage they set aside the child welfare benefits, such as the Child Tax Credit and Family Allowance, in an account for the children's education. Both children appear to be well adjusted and have decided that they wish to spend their time with their father. As a result, the parties have agreed that they will have joint custody of the children, with Mr. Falkenham having primary care and Mrs. Falkenham having liberal access. He has no difficulty with her being at his house to visit the children, as long as they are not bothered by her.

[13] I am satisfied that it is in the best interests of the children that Mr. and Mrs. Falkenham should have joint custody of the children of the marriage similar to that described by Goodfellow J. in *Farnell v. Farnell*, [2002] N.S.J. No. 491 (S.C.). Mr. Falkenham shall have day-to-day care and control of the children, who will live at his home. He shall make every reasonable effort to consider Mrs. Falkenham's views on the parenting of the children, but will have the final determination on aspects of parenting, such as residence, education, discipline, medical care and extracurricular activities. Mrs. Falkenham shall have liberal access to the children on reasonable notice.

Child Support

[14] Mrs. Falkenham had worked sporadically over the years and when she was not working during the marriage, Mr. Falkenham paid her a weekly allowance. Over the years she has done some babysitting, and worked part time for Morton and UAB. She works sparingly at UAB and works on average two days each week at Morton, earning $10.00 per hour. She is earning less than the Child Support Guideline minimum and consequently is not in a position to pay child support. Furthermore, I am satisfied that Mr. Falkenham is earning sufficient income with which to cover the cost associated with maintaining the children.

Matrimonial Assets

[15] The parties own a house on Shelburne Street in New Glasgow. It has a market value of $75,000 and a net disposition value of $69,500, subject to a mortgage of $25,700. The parties agree on the value of the household contents, $10,000. They disagree on the value of the automobile, a 1998 Chevrolet Malibu. Mr. Falkenham values it at $8,000, while Mrs. Falkenham says it is worth $12,000. Given the age of the vehicle I accept Mr. Falkenham's valuation of $8,000.

[16] The house contains several paintings by Joseph Purcell that Mr. Falkenham bought before the marriage. The parties agree that the paintings should be valued at $5,000. However, Mr. Falkenham claims they are not matrimonial assets. Mrs. Falkenham says the paintings have always been used to decorate the matrimonial home, except during the Christmas period, and they should not be excluded from the matrimonial assets merely because Mr. Falkenham bought them before the parties were married. I agree. The paintings are matrimonial assets.

[17] Mr. Falkenham claims sole ownership of a vacant parcel of land at Middle Cornwall, Nova Scotia, worth $12,000. Mrs. Falkenham does not dispute this exclusion. Mr. Falkenham also claims additional assets, including a canoe ($1,000), kayak ($500.00) and computer equipment ($1,500). He says these items belong to him or the children. Mrs. Falkenham does not appear to dispute the exclusion of the canoe and kayak, but she says the computer equipment is a matrimonial asset worth $2,100. With the exception of the computer equipment, I conclude that these items are not matrimonial assets. I conclude that the computer is a matrimonial asset based on the evidence that Mrs. Falkenham used it extensively. I accept the value as $1,500.

[18] Mr. Falkenham also claims that he and Mrs. Falkenham owe the children's fund $9,000 that was used to renovate the home. He explained this expenditure as a means by which renovations to the kitchens were carried out without resorting to a bank loan. However, these funds were being saved for the children's university education. Mr. Falkenham maintains that such a repayment is both morally and legally required so as to restore the amount of money the children would have earned for their university education. Mrs. Falkenham does not view this as a binding debt and argues that it should not be taken into account. This does not appear to be a legally enforceable debt, although the parties intended to replace the money with interest. I find it not to be a matrimonial debt, although I would urge the parties to replenish the funds.

[19] Mr. Falkenham has RRSPs of $113,830.82 and $11,504.83, for a total of $125,334.65 at the time of the hearing. Mrs. Falkenham's RRSPs are worth $16,731.67. Adding her GICs of $25,398.47 gives a total of $42,130.14. Mr. Falkenham's pension had a current value of $466,456.97 as of November 30, 2002. This includes a deferred profit sharing plan of $19,854.62.

[20] Mr. Falkenham argued that more than 50% of the current value of his RRSPs results from contributions made prior to his marriage. The issue to be

determined is whether the contributions made to Mr. Falkenham's pension and RRSP prior to marriage are subject to equal division.

[21] Pensions and RRSPs are matrimonial assets within the definition in s. 4(1) of the *Matrimonial Property Act*:

> 4(1) In this Act, "matrimonial assets" means the matrimonial home or homes and <u>all other real and personal property acquired by either or both spouses before or during their marriage</u>, with the exception of:
>
> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse, except to the extent to which they are used for the benefit of both spouses or their children;
>
> (b) an award or settlement of damages in court in favour of one spouse;
>
> (c) money paid or payable to one spouse under an insurance policy;
>
> (d) reasonable personal effects of one spouse;
>
> (e) business assets;
>
> (f) property exempted under a marriage contract or separation agreement;
>
> (g) real and personal property acquired after separation unless the spouses resume cohabitation. [Emphasis added].

[22] It is my view that Section 4(1) includes the pension and RRSP contributions made by Mr. Falkenham prior to marriage. The *Act* provides that the assets to be divided equally are those assets acquired <u>before or during</u> the marriage. As Goodfellow J. said in *Adie v. Adie* (1994), 134 N.S.R. (2d) 60 (S.C.) at

para. 13, "all assets are matrimonial assets unless the party maintaining otherwise satisfies the court on a balance of probabilities that the disputed asset falls within one of the exceptions to the definition contained in s.4(1) of the *Matrimonial Property Act*." [Emphasis in original.]

[23] In *Clarke v. Clarke*, [1990] 2 S.C.R. 795, Wilson J., writing for the court, said at 807:

> Thus the Act supports the equality of both parties to a marriage and recognizes the joint contribution of the spouses, be it financial or otherwise, to that enterprise. The Act goes further and asserts that, due to this joint contribution, both parties are entitled to share equally in the benefits that flow from the union – the assets of the marriage. The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by a woman to the economic survival and growth of the family was not recognized. In interpreting the provisions of the Act, the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction, which will give effect to that purpose.

[24] In *Adie* the husband argued that a UK pension earned entirely prior to the marriage was excluded under s.4(1) of the *Matrimonial Property Act*. Goodfellow J. found that the pension contributions made prior to the marriage were a matrimonial asset. He went on to exclude it under section 13 of the *Act* on the basis that an equal division of this asset would be inequitable and unconscionable.

[25] In *Tibbetts v. Tibbetts* (1991), 106 N.S.R. (2d) 255 (S.C.) the issue was whether the husband's pension and RRSP contributions made prior to marriage should give rise to an unequal division. At trial, the parties did not advance a claim for a share in the pension contributed to prior to the marriage. Nathanson J. said he would likely have included the pre-marital contributions to the pension as matrimonial assets by virtue of s.4(1). However, he agreed to divide some of the assets unequally because of the fact that some of pre-marital contributions, including RRSPs. He concluded that the matrimonial assets should be divided 53/47 in favour of the husband, given his larger contribution to these assets.

[26] On appeal, however, the Court concluded that these assets had been largely contributed or increased in value during the marriage (see 119 N.S.R. (2d) 26). As a result, the court saw no basis to grant the husband an unequal division in the assets and divided the pension and RRSPs equally. Hallett J.A., speaking for the court, stated at para. 21:

> The husband asserts that at a minimum, considering the date of acquisition of certain assets, the very least the trial judge should have done was order a 60/40 split of matrimonial assets in his favour. With respect, I disagree with his position. This was not a short marriage. The acquisition of his substantial investment portfolio and RRSPs occurred during the marriage. Apart from the matrimonial home and his pension, these are the main assets. <u>The substantial increase in the value of the home and the husband's pension occurred during the marriage. There is nothing that takes</u>

> this case out of the application of the usual rule that matrimonial assets should be divided equally. There is nothing unconscionable in so doing. I am of the opinion that the learned trial in arriving at a 53/47 split failed to give due consideration to the overriding principle that matrimonial assets are to be divided equally unless it would be unconscionable to do so. To make an award of 53% of the value of the matrimonial assets rather than 50% does not seem to fit into the concept of unconscionability. I would order a 50/50 split of the matrimonial assets in this not unusual fact situation.
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> [Emphasis added.]

[27] In *Connolly v. Connolly* (1999), 172 N.S.R. (2d) 382 (C.A.) the parties had lived together for ten years and were married for eight of those years. They separated in 1988. The husband had a Federal Government pension that he had contributed to for 33 years, 16 of which were prior to the cohabitation of the parties and seven years after their separation. He therefore had contributed to the pension for ten years while the parties cohabited. The wife sought half of the pension benefits for the entire period of the contribution until separation, a total of 26 years. The trial judge credited her with only 50% of the value of the pension benefits earned during the cohabitation. At the time of the hearing the husband was receiving a monthly pension of $2,200 and the wife was receiving $312 of this amount. The wife was employed as a Provincial Civil Servant, earning $25,000 per year, and had contributed to a pension since 1988. The cash value of her pension earned prior to the cohabitation of the parties had been converted to their

joint use when they purchased a matrimonial home. Although the trial judge had found that pre-marital contributions were matrimonial assets, she made an unequal division and excluded the pre-marital pension contributions or pre-cohabitation pension benefits. She found that the wife had made an unequal contribution to the marriage due to her alcoholism.

[28] Roscoe J.A. referred to *Adie*, *supra*, *Dort v. Dort* (1994),130 N.S.R. (2d) 108 (S.C.) and *Frost v. Frost* (1996), 154 N.S.R. (2d) 341 (S.C.), all cases where the issue arose whether pre-marital pension or RRSP contributions should be divided equally. She said, at paras. 15-16:

> **[15]** These three cases share several features with the case under appeal. In all these instances, the marriages were second marriages for both spouses. The marriages and/or periods of cohabitation were of short to medium length, five years in *Frost*, 10 years in *Dort* and this case, and 15 years in *Adie*. In none of these cases were there any children born to the parties during the relationship. In *Dort* and *Adie*, the entire pension contributions were made prior to cohabitation and in *Frost* all but six months were pre-marriage contributions. In *Dort, Adie* and *Frost* the trial judges relied, either partially or entirely, on the date and manner of acquisition of the assets, (s.13(e)) as the rationale for an unequal division and awarding 100 percent of the pension to the contributor. That is perfectly consistent with the decision under appeal where 100 percent of the precohabitation contributions were not shared with the other spouse.
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> **[16]** As noted in *Adie, supra*, at page 64, another consideration for this disposition of the pension asset, in some of the cases, is that the portion of the pension not divided with the present spouse was not accumulated by the diversion of family income:
>
> "... The result is that it was acquired exclusively by him before he had even met his present wife, and it was acquired by him without

> any contribution by the present Mrs. Adie whatsoever. She did not have a relationship with Mr. Adie during the contributing phase of several years, so as to be able to point to a reduction in availability of income resulting in a standard of living during the contributing years which reduction was in essence being set aside for future security enjoyment."

[29] The Appeal Court concluded that the result in this case is consistent with other recent cases with similar circumstances, and that it was not an error in law or in fact, for the trial judge to rely on s.13(d)(e) in dealing with the pension division issue on the facts of the marriage.

[30] I have also considered *Grude v. Grude*, [1994] N.S.J. No. 242 (S.C.), where Tidman J. permitted an unequal division of matrimonial assets in favour of the wife on the basis that she had brought more significant assets into the marriage than had the husband, and *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (S.C.) where Goodfellow J. made an unequal division of matrimonial assets where the wife, a doctor, entered the marriage with over $300,000 of assets and an annual income of $140,000, while the husband earning up to $90,000 entered the marriage in bankruptcy. The wife had RRSPs accumulated partially prior to marriage.

[31] As of November 30, 2002, Mr. Falkenham's pension had a current value of $466,456.97, including the deferred profit sharing plan. He testified that approximately $125,000 results from contributions made prior to the

marriage (i.e., the current value of pre-marital contributions). Obviously, the amount of $125,000 represents the original contribution as well as the increase in the value. It appears to me that the pension is largely an amount similar to that dealt with in *Tibbetts*, *supra*, that is, the current value is due to growth which occurred while the parties were married. I am satisfied that the value of $125,000 does not represent merely contributions made by the respondent or by the company. I am also mindful that the pension value has increased to November 30, 2003 to an amount of $466,457.97, which includes a deferred profit sharing plan of $19,854.62. I am treating the deferred profit sharing plan as a matrimonial asset, as it was earned entirely during the period of the marriage.

[32] It is evident from *Connolly, supra*, and the cases that preceded it that where the case involves a second marriage of short duration, where there are no children of the second marriage, and where most of the contributions were made prior to the second marriage, there is indeed a proper basis to make an unequal division of pension or RRSPs. This is not such a case. This was a first marriage, and it was not short. There were two children of the marriage, and the majority of the value of the assets was accumulated during the marriage. Accordingly, the pension and RRSPs shall be divided equally.

This equal division shall take into account any increase or decrease in the value of the funds between the time of the valuations used at trial and the date of judgment.

Section 13

[33] Section 13 of the *Act* permits the court to make an unequal division of matrimonial assets or to divide property that is not a matrimonial asset in circumstances "where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable".

[34] Davison J. of this Court summarized the guiding principles in applying section 13 in *Wakkary v. Wakkary* (2001), 190 N.S.R. (2d) 287 at paras. 31-33. He stated that the "burden on one who seeks an unequal division under Section 13 is a heavy one." He quoted *Hardwood v. Thomas* (1980), 45 N.S.R. (2d) 414 (S.C.A.D.) at 417:

> Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the *Act* and prescribed by s. 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 what unequal division might be made.

[35] Justice Davison went on to point out that the phrase "unfair and unconscionable" has been treated as a disjunctive one, and thus the party seeking an unequal division need only prove that an equal division would be

unfair or unconscionable (see *Bennett v. Bennett* (1992), 112 N.S.R. (2d) 79 (S.C.A.D.) at 84). Finally, he said, a court deciding whether to exercise its discretion to permit an unequal division must consider the sub-paragraphs of section 13.

[36] I will consider the factors set out in section 13, paragraphs (a) - (m). The parties have not raised issues pertinent to paragraphs (a) ("the unreasonable impoverishment by either spouse of the matrimonial assets"); (c) ("a marriage contract or separation agreement between the spouses"); (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); (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"); and (m) ("all taxation consequences of the division of matrimonial assets"). The matters in controversy chiefly involve the classification and division of certain assets that Mr. Falkenham acquired before the marriage.

[37] 13(b): *the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred*. The parties disagree on the

treatment that should be accorded to the money removed from the children's education account to pay for renovations. I have found that it is not an enforceable debt.

[38] 13(d): *the length of time the spouses have cohabited with each other during their marriage*. Mr. Falkenham says the parties have effectively lived separate and apart since at least the time of the conception of their second child, about five years into the marriage. He says an equal division would be appropriate only if the 18-year marriage "was for the most part satisfactory or fulfilling" and says it "was essentially over after the first five or six years". He goes on to argue that "the length of the marriage ... ought to be tempered by the realization and evidence of both parties that the marriage was in essence over for a long time." The petitioner says there would be no need for a divorce if the marriage had been fulfilling for the parties, and that Mr. Falkenham cannot simply turn back the clock and say the marriage was over after five years, notwithstanding that the parties remained married for 18 years.

[39] The respondent cites a number of cases where unequal divisions were ordered despite relatively long marriages. In *Wakkery*, for instance, the parties had been married 37 years, yet an unequal division was ordered. I

note, however, that the conclusion in *Wakkary* rested mainly on the husband's "unreasonable impoverishment" of matrimonial assets, to which the wife had substantially contributed, through a series of high-risk investments. Thus the major considerations were ss. 13(a) and (b). It was also relevant that the wife had been predominately responsible for raising the children and doing household chores. Both parties had professional careers, the wife as a laboratory technologist and the husband as a research scientist. *Wakkary* provides little guidance on the facts of this matter. There is no suggestion that Mrs. Falkenham squandered assets, and she did not have an independent career during the marriage.

[40] Similarly, the respondent cites *Bennett* (11 years), *Adie* (15 years), *Grude* (nine years) and *Urquhart*. Unequal divisions were ordered in each of these cases. I have already considered these cases with respect to RRSP and pension contributions, and I find them equally inapplicable in the context of s. 13(d).

[41] This was not a marriage in which the parties lived entirely independent lives and merely shared a house for convenience. They continued to function as a family for all public purposes, and they remained a single economic unit. To find that the marriage was "over" more than a decade ago would amount to

"turning back the clock". I do not think the happiness or unhappiness of the marriage in this case supports a claim that an equal division would be "unfair and unconscionable".

[42] 13(e): *the date and manner of acquisition of the assets*. Mr. Falkenham says he made significant RRSP contributions and bought and furnished the Foxbrook house before he met Mrs. Falkenham. The equity in his house went toward the purchase of the matrimonial home. He cites *Adie*, where the husband's pension was not divided because the entitlement was earned entirely before the marriage, and thus the wife could not "point to a reduction in availability of income resulting in a standard of living during the contribution years which reduction was in essence being set aside for a future security enjoyment." As I noted earlier, *Adie* involved a 15-year second marriage (for both parties) with no children of the marriage. Goodfellow J. also pointed out (at para. 21) that Mrs. Adie had made "absolutely no contribution to the career potential realized by Mr. Adie", which had "crystallized" in the form of his pension. He was, in fact, already retired when they married.

[43] In *Norrie v. Norrie*, [1986] N.S.J. No. 183 (S.C.A.D.) in this regard the parties had been married for about 8 years. The wife had made a contribution to the purchase of the matrimonial home, and her income was sustaining the family in the last years of the marriage, when the husband did not work outside the home. The trial judge found that the husband had "the necessary educational and professional qualifications and experience to earn a livelihood, if he chose to do so." Once again, the facts do not resemble the present case.

[44] 13(g): *the contribution by one spouse to the education or career potential of the other spouse*. It is clear from the evidence of both parties that Mrs. Falkenham left full-time work in order to look after the children. It is also clear that one of the reasons she did not eventually return to full-time work was because of the effect her additional income would have on Mr. Falkenham's income taxes. One of the reasons for Mr. Falkenham's career progress was the fact that Mrs. Falkenham left the full-time work force in order to care for the children full-time, and concern for his income was one of the reasons she did not re-enter the full-time work force when the children were older.

[45] 13(h): *the needs of a child who has not attained the age of majority*. Mr. Falkenham points out that he will bear sole responsibility for the needs of the children. He is not seeking child support.

[46] 13(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*. Mr. Falkenham says "welfare of the family" includes financial welfare, and states that "it is not contested that Mr. Falkenham was the backbone behind the family's economic welfare for the duration of the marriage". However, Mrs. Falkenham was a homemaker in the traditional sense and advanced the interests and welfare of the children over her own career.

[47] 13(j): *whether the value of the assets substantially appreciated during the marriage*. As I have pointed out, the majority of the growth in the value of the assets – particularly the RRSPs, as well as Mr. Falkenham's pension and deferred profit sharing plan – occurred during the marriage.

[48] 13(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.* As a result of the breakdown of the marriage, Mrs.

Falkenham will lose the benefit of future increases in the value of Mr. Falkenham's pension and RRSPs.

[49] After an analysis of the factors in section 13, I do not consider this to be a situation where it would be "unfair and unconscionable" to follow the statutory presumption and divide the matrimonial assets equally. I conclude that the matrimonial assets should be divided equally.

[50] The cashable assets amount to the following:

Asset	Value	Mrs. Falkenham (Petitioner)	Mr. Falkenham (Respondent)
Matrimonial home (Net disposition value)	$69,500.00		$69,500.00
Automobile	$8,000.00		$8,000.00
Household contents	$10,000.00	$5,000.00	$5,000.00
Computer equipment	$1,500.00		$1,500.00
Purcell paintings	$5,000.00		$5,000.00
TOTAL	**$94,000.00**	**$5,000.00**	**$89,000.00**

[51] Mr. Falkenham has agreed to assume the matrimonial debts, namely the mortgage balance of $25,766.85 and a line of credit balance of $13,934.19. Subtracting the debts leaves him with cashable assets of $49,298.96. This leaves a difference of $44,298.96 between the parties' respective cashable assets. In order to equalize the cashable assets, I direct a rollover of

$63,284.23 from Mr. Falkenham to Mrs. Falkenham. This number is grossed up to account for income tax of 30 percent; the result will be to leave the parties each with cashable assets of $49,298.96.

[52] After the rollover of a portion of the value of Mr. Falkenham's RRSPs, the remaining RRSPs will amount to $42,130.14 (Mrs. Falkenham) and $62,051.42 (Mr. Falkenham). There will be a further rollover from Mr. Falkenham's RRSPs of $9,960.64 in order to equalize the value of the RRSPs retained by each party at $52,090.78.

[53] The pension (at its November 2002 value of $446,602.35) and the deferred profit sharing plan (at a value of $19,854.62) shall also be divided equally at source.

[54] The resulting division of assets is as follows, with any adjustments necessary to reflect changes in value of assets (such as RRSPs and the pension) between the time of the last statements and the date of judgment:

Asset	**Total**	**Mrs. Falkenham**	**Mr. Falkenham**
Matrimonial home	$69,500.00		$69,500.00
Automobile	$8,000.00		$8,000.00
Household contents	$10,000.00	$5,000.00	$5,000.00
Computer equipment	$1,500.00		$1,500

Purcell paintings	$5,000.00		$5,000.00
Matrimonial debts	($39,701.04)		(39,701.04)
Rollover (Cashable assets)	$44,298.96 (After tax)	$44,298.96 (After tax)	
RRSPs/GICs (After rollover)	$104,181.56	$52,090.78	$52,090.78
Pension	$446,602.35	$223,301.17	$223,301.17
Deferred Profit sharing plan	$19,854.62	$9,927.31	$9,927.31
TOTAL	**$669,236.45**	**$334,618.22**	**$334,618.22**

SPOUSAL SUPPORT

[55] Mrs. Falkenham finished grade 11 and completed a two year secretarial course at the Vocational School in Pictou County in 1976. Prior to the marriage, she worked full time for seven years for Underwriters Adjustment Bureau Limited (UAB). After the parties were married she worked an additional eight months. When Emmy was born, the parties considered whether she should return to work, but due to the cost of daycare and additional income tax, they decided that she would stay at home with Emmy. Both parties preferred that result. Mrs. Falkenham eventually returned to work part-time, worked full-time for one year and then returned to working a two days per week. She said she is an excellent typist and that she has been

upgrading her skills at Mortons by taking on additional training. She also fills in for vacations.

[56] Mrs. Falkenham has been somewhat reluctant to aggressively seek employment, although she stated that she wants full-time work. She said at trial that she hoped get an idea of to what the spousal support order would be before undertaking an intensive effort to obtain full-time employment. She has an application on file with the congregation of Notre Dame. She attempted to obtain employment through the Internet on one occasion, but received no response. UAB has offered her additional training to make her more employable. She intended to apply at the Aberdeen Hospital and she had looked at want ads in the newspaper. She had not applied with the Human Resources and Development Canada employment office but planned to do so. She also requested full-time employment with UAB, but they had nothing available. Mrs. Falkenham performed babysitting services in 2002. While she was doing primarily housekeeping duties, she volunteered at school and went on class trips.

[57] Mrs. Falkenham claimed that she needs additional income to defray the expenses which she will incur in maintaining her own residence. To date, she is still living in the matrimonial home. She acknowledges with extra

training, it would be possible to obtain additional income. Although she underwent heart surgery in 1971, and is required to take antibiotic medication, there is no evidence that this impairs her ability to obtain full-time employment. Otherwise, she is a healthy person, likely capable of retraining or acquiring additional skills which would be of benefit to her. I believe with a modicum of effort, Mrs. Falkenham will be able to increase her employment income. I do not believe that she has made a significant effort to date.

[58] Mrs. Falkenham seeks monthly spousal support of $1,500 with no termination date. She is now earning $7,000 or $8,000 a year and there is indeed a shortfall between the amount she is now earning and her total monthly expenditures. I have reviewed her budget and it appears to be reasonable, with the exception of a need to acquire a new vehicle. She might be able to reduce her monthly expenses for rent by choosing less costly accommodations, although that is uncertain, as well as by acquiring a used vehicle rather than a new one.

[59] Mr. Falkenham is a long term employee of Sobeys. He earns approximately $67,500 (gross) per year. He pays into a pension plan and a deferred profit sharing plan. He maintains that he has about $500 of surplus funds available

on a monthly basis after payment of all the expenses. There appears to be little contest as to Mr. Falkenham's monthly expenses. It is a common problem that when spouses divorce and live separate and apart the cost of operating two households is greater than the cost of operating only one. Obviously, there is not a great deal more that Mr. Falkenham can do on his budget than to pay the surplus that he currently has. He is required to maintain a home, provide for the children, operate a motor vehicle, pay for groceries, taxes and the like.

[60] The question is whether Mr. Falkenham should operate with a deficit in order to assist Mrs. Falkenham. While it is wrong, on a principled approach, to simply base an award for spousal support upon the payor's ability to pay, it appears that this is a factor which may be considered along with the capital position of the parties after the division of assets: *MacIsaac v. MacIsaac*, [1996] N.S.J. No. 185 (C.A.). While I cannot order spousal support beyond Mr. Falkenham's ability to pay, particularly in view of the fact that he will be entirely responsible for supporting the children, he may need to reorganize his affairs in order to meet his support obligations. I note that he will receive a tax benefit from paying spousal support (see *Duncan v.*

Duncan (1992), 40 R.F.L. (3d) 358 (Alta. Q.B.) at 368 and *Goodman v. Goodman* (1993), 50 R.F.L. (3d) 14 (Ont. Ct. (Gen. Div.)) at 20-21).

[61] Given Mr. Falkenham's current financial circumstances, he should pay no more than $700 per month. He will likely have to reorganize this sometime in the near future. There is no evidence to determine when the debt repayment would have been fully retired, considering each party's position after the division of assets.

[62] In paying the amount of $700 per month to Mrs. Falkenham, I understand that Mr. Falkenham will have to reduce expenditures but I believe in the circumstances that it is a fair and reasonable amount.

[63] With respect to Mrs. Falkenham's estimate of monthly expenses, I believe that she will have to forego some of the expenditures she had planned to make, such as a new motor vehicle. She will also have to moderate her expenditures. I note as well that she claims to need $166.67 per month for gifts and events, which I believe to be excessive in the circumstances. I also understand that she allocates $100 per month for entertainment. Given her financial circumstances and the limited amount of funds available, I believe that this expenditure can be curtailed or reduced.

Disposition

[64] Accordingly, I dispose of this matter as follows:

(A) The parties shall have joint custody of the children of the marriage, with primary care to Mr. Falkenham and liberal access to Mrs. Falkenham.

(B) The matrimonial assets shall be divided equally in the manner set out above. Mrs. Falkenham shall execute a quit-claim deed to the house in favour of Mr. Falkenham, subject to any encumbrances on the property.

(C) Mr. Falkenham shall pay spousal support of $700.00, reviewable at his motion in four years. During this period, Mrs. Falkenham is to make efforts to retrain and obtain full-time employment.

Costs

[65] There will be no costs payable to either party.

J.