SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Weese v. Weese*, 2014 NSSC 435

Date: 2014-12-09
Docket: *SFSNMPAY* No. 089592
Registry: Sydney

Between:

Claude Weese

Applicant

v.

Ronald Weese

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	October 16 and 21, 2014, in Sydney, Nova Scotia
Written Release:	December 9, 2014
Counsel:	Damien Barry for the Applicant Rejean Aucoin for the Respondent

By the Court:

[1] Claude and Ronald Weese were married in France on August 3, 1974 and separated October 31, 2007. They moved to Nova Scotia a year after they were married and lived in Edwardsville until 2003 when they moved back to France. Between 2003 and 2007 Mr. Weese split his residence between France and Canada, living six months in each country, for tax and other reasons. While in Canada he lived in the matrimonial home.

[2] After separation, Mr. Weese stayed in the matrimonial home in Edwardsville. Ms. Weese continued to occupy the home acquired by the parties in France.

[3] Mr. Weese sued for divorce in France on July 24, 2009. A preliminary appraiser's report dated May 30, 2014 was prepared for the French Court. It reveals that Mr. Weese initiated the appraisal process, but failed to provide all requested disclosure. The report was tendered as evidence in this trial by agreement.

[4] On January 23, 2014 Ms. Weese filed an application under section 12(1) of the *Matrimonial Property Act* in the Supreme Court of Nova Scotia (Family Division). She seeks a division of the matrimonial assets held in Nova Scotia.

[5] Mr. Weese takes the position that the matrimonial home should be divided unequally in his favour for work he completed there and at the school, in accordance with section 13 of the *Matrimonial Property Act*.

[6] At the commencement of trial, the parties agreed that division of any assets and debts outside of Nova Scotia will be addressed by the French court.

[7] Therefore, the remaining issues to be determined are:

- What is the appropriate division of assets ?
- What is the date of valuation for the divisible assets ?
- In the event of an equal division of the matrimonial home, should Mr. Weese be reimbursed for work he performed at the school belonging to Ms. Weese ?
- Should Mr. Weese be reimbursed for monies loaned to the business ?

- Should the court draw any adverse inference from Mr. Weese's failure to disclose all assets and values in advance of trial?
- Costs

ISSUE 1: WHAT IS THE APPROPRIATE DIVISION OF ASSETS ?

[8] The parties both filed statements of property. After much confusion at the outset of trial surrounding a purported agreement, the parties now agree that the following assets are matrimonial assets to be divided:

Matrimonial Asset	**Valuation of Mr. Weese**	**Valuation of Ms. Weese**
Matrimonial home in Point Edward	$67,100.00 (assessed value)	None provided
Husband's employment pension (B.M.O.)	$184,703.00 $162,364.00 $230,386.00	
TD RRSP's / Mutual Funds (Ms. Weese)		$95,755.59 (June 30, 2013)
Mr. Weese's BMO Investments (RIF)	$162,364.00 (Feb 12, 2014)	
Mr. Weese's Bank account (BOM)	$ 11,374.00 (Feb 12, 2014)	
Mr. Weese's Bank account (BOM)	$ 4,219.00 (Feb 12, 2014)	
Mr. Weese's Bank account (TD)	$ 1,929.00 (Feb 12, 2014)	

*values according to the Statements of Property filed by the parties

[9] Again, after much confusion at the outset of trial, the parties now agree that the following matrimonial assets are to be divided equally:

- Mr. Weese's employment pension: counsel initially confirmed the pension could be divided at source for the period of the marriage, though it became apparent after hearing the evidence this is not possible, as Mr. Weese transferred his pension funds to BMO several years ago. I will deal with the manner of division of this pension below;

- Mr. Weese's Canadian bank accounts, including a newly disclosed account at TD (GIA account) which as of October 31, 2007 was valued at $6,141.83, but exclusive of the PC Financial accounts;

- The RRSPs and Canadian investments held by each party, though the date of division is an issue.

[10] Mr. Weese conceded after the trial commenced that the school property is a business asset exempt from division.

[11] The parties agree that the following assets and debts are to be divided by the Court in France:

- Any valuables in a safety deposit box held by Mr. Weese in Switzerland. Though Mr. Weese denied to the French appraiser he had such items, he acknowledged in his evidence during this trial that he has cash and platinum in Switzerland;

- Any other assets held by the parties outside of Nova Scotia;

- Any debts owing to Mr. Weese from Ms. Weese for monies he says he paid on the Canadian mortgage which was used to purchase the home in France, as well as monies loaned to her to pay the mortgage in France and other debts.

[12] The parties agree that the following assets are either exempt from division or have already been divided to their satisfaction:

- Mr. Weese's Canadian investments which arise from an inheritance will not be divided in accordance with section 4(1)(a) of the *MPA*;

- The furnishings in Edwardsville and France: Mr. Weese will retain the furnishings in Canada and Ms. Weese will retain the furnishings in France;

- The truck and boat listed by Mr. Weese will not be divided, he will retain those without claim by Ms. Weese;

- Mr. Weese will retain his tax free savings account opened after separation.

[13] The parties do not agree on an equal division of the matrimonial home in Nova Scotia. Mr. Weese seeks an unequal division to compensate him for the work he claims he did at the French school, a property the parties have agreed is exempt from division. In the alternative he claims lump sum compensation for the work performed.

[14] Mr. Weese gave evidence that the school property is adjacent to the matrimonial home, and shares a circular driveway with it. The property on which the school sits is owned solely by Ms. Weese. This school was the source of Ms. Weese's income for 22 years of their marriage.

[15] Mr. Weese is now retired, but worked as a professor at the local university. He testified that when it snowed, he would shovel the driveway. He acknowledged on cross-examination that he usually only cleared enough to allow his vehicle to access the main road. He would then leave for work if classes weren't cancelled. He also testified that he did a lot of work around the school, such as mowing the lawn, building some furniture and toys for the children, and performed minor repairs, painting and seasonal maintenance of the plumbing and heating system.

[16] Ms. Weese denies that Mr. Weese contributed much to the school. She says he did very little snow removal, and that on storm days he would only clear enough to get his car out of the driveway and depart at 7:30 a.m. for work. She would complete the snow clearing before students arrived.

[17] Three witnesses testified on the issue of Mr. Weese's contribution to the school. They were parents or grandparents of children who attended the school. All denied ever seeing Mr. Weese clearing snow at the school. They confirmed seeing Mrs. Weese clear snow on a number of occasions.

[18] None of the witnesses could recall seeing Mr. Weese mowing the lawn at the school. Ms. Weese acknowledges he mowed the lawn at their home, but says she hired help to mow at the school next door. She did acknowledge that he helped her lift heavy items at the school on occasion, that he helped her paint the higher points on the school's exterior, that he made furniture and toys for the children, winterized the heating and plumbing systems on a seasonal basis, performed minor

repairs to the porch and basement in the school, and repaired the roof on one occasion.

[19] Ms. Weese acknowledges that these are business expenses she would ordinarily have paid from profits but for Mr. Weese's help. She says however, that she did not ask Mr. Weese to assist, rather he offered. She testified what little profit she earned from the school went back into the business. She drew a modest salary. There was no evidence presented on the savings to the business of Mr. Weese's contribution, nor of the cost incurred when Mr. Weese did not volunteer to help.

[20] The onus is on Mr. Weese to satisfy the burden of rebutting the presumption of an equal division of the value of the matrimonial home. Justice Forgeron in **Marshall v. Marshall** 2008 NSCC 11 addressed this onus at paragraph 44 where she stated:

> 44 As Ms. Marshall is seeking an unequal division, she bears the burden of proof. It is a heavy burden which requires proof of unfairness or unconscionability: ***Harwood v. Thomas*** (1981), 45 N.S.R. (2d) 414 (CA); ***Ritcey v. Ritcey*** (2002), 206 N.S.R. (2d) 75 (SCFD); ***Jenkins v. Jenkins*** (1991), 107 N.S.R. (2d) 18 (TD); ***Fisher v. Fisher*** (1994), 131 N.S.R. (2d) 367 (CA); and ***Jess v. Strong*** (1998), 169 N.S.R. (2d) 271 (SC).
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> 45 In ***Jenkins v. Jenkins***, supra, Richard J. reviewed the meaning of unfair and unconscionable as set out in s. 13 of the Matrimonial Property Act at para. 10:
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> > [10] I propose now to deal with the division of matrimonial assets in accordance with the law as set out in ***Donald***, supra, while remaining mindful of the comments of MacDonald, J.A., in ***Nolet*** [1985] N.S.J. No. 26. To support a finding that a division is "unfair and unconscionable" it seems that there must be something more than mere inconvenience. The Random House Dictionary defines "unconscionable" variously as "unreasonable", "unscrupulous", "excessive" and "extortionate". These are strong words, and when coupled with the requirement that "strong evidence" must be produced to support an unequal division the burden upon the party requesting an unequal division of matrimonial assets is somewhat onerous.

[21] In order to find that an equal division of the matrimonial home would be unfair and unconscionable, I must be satisfied that Mr. Weese has presented "strong evidence" which would support an unequal division. I find he has not. He assisted Ms. Weese in a number of ways with her business, but not to an "excessive" or "unreasonable" degree. I do not find there is an evidentiary basis to make an unequal division of the matrimonial home in the circumstances.

[22] In the alternative, Mr. Weese claims compensation for work he performed at the school. He compiled a list of work completed, which was tendered as Exhibit 13. In it, Mr. Weese attributes an hourly rate to his time for tasks such as

plumbing and building maintenance, and an annual fee for lawn mowing and snow shovelling. He acknowledged in his evidence that the hourly rate was purely arbitrary, chosen by him at a rate he felt was fair. He also acknowledges that he estimated his hours, as he kept no records. He acknowledged that Ms. Weese purchased supplies for the roof repairs, painting, toys and furniture.

[23] I find some of the tasks Mr. Weese completed for his own satisfaction, such as building furniture and toys for the children. Other tasks such as snow shovelling I find were related to his own use of the driveway, which is shared with the matrimonial home.

[24] Other items such as labour for the roof repairs, plumbing maintenance and painting saved Ms. Weese money and helped to preserve the business asset. For example, after the parties moved back to France in 2003 and the school was no longer in operation, Mr. Weese winterized the plumbing and heating systems each fall before returning to France. He also paid Keating Construction for roof repairs in 2005 in the amount of $2,480.00. He testified that invoice included work on both the home and the school, so he attributed half that cost to the school as both roofs are the same size.

[25] The amount claimed by Mr. Weese for labour is probably no more than what Ms. Weese would have paid hired help. However, the evidence is clear that Ms. Weese did not ask him to complete these tasks, nor did they ever discuss compensation for his work. The school property is assessed at $48,800.00 and as counsel for Ms. Weese points out, Mr. Weese's claim exceeds one quarter of that value. I find his claim as presented unreasonable in the circumstances.

[26] However, I do find Mr. Weese is entitled to some compensation. For his contribution to the preservation of the school property I assign a lump sum value of $1,000.00 which is to be set off against any amounts owing by him to Ms. Weese. In addition he shall be compensated $1,240.00 for the 2005 roof repairs on the school by Keating.

ISSUE 2: WHAT IS THE APPROPRIATE VALUATION DATE FOR THE DIVISIBLE ASSETS ?

[27] The parties disagree on the valuation date for the matrimonial home. Mr. Weese says the home should be valued as of the date of separation (October 31, 2007). He claims that any increase in value since then is attributable to the

improvements he made to the home, rather than growth in the market. Ms. Weese seeks division of the value as of the trial date.

[28] In his statement of property, Mr. Weese attributed a value of $67,100.00 to the home. The joint exhibit book contains documents showing that the home was purchased for $41,000.00 in 1981. No evidence was lead to show the value in 2007 when the parties separated. It is clear the home increased in value after it was purchased in 1981, but neither party lead evidence to show whether that increase occurred between 2007 and the trial.

[29] The work completed by Mr. Weese around the home amounts to routine maintenance, not major improvements which would account for such a significant increase in value. There was no evidence of any major improvements made by either party to the home after 2007. There is therefore no basis to find the home appreciated in value by $23,000.00 since 2007.

[30] Associate Chief Justice Robert Ferguson addressed the valuation date to be assigned to matrimonial assets in the case of **Thackeray v. Thackeray**, 2008 NSSC 223:

> 22 In ***Simmons v. Simmons***, [2001] N.S.J. No. 276, 2001 CanLII 4617 (N.S.S.F.), Justice Campbell stated:
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> > VALUATION DATE
> >
> > The ***Matrimonial Property Act***, S.N.S. 1980, c. 9 (the "Act") does not specify a date for valuation. This is left to the discretion of the trial judge. The case law in this province suggests that such discretion is a positive thing so that a fair and equitable result can be obtained on a case by case basis. The Act is based on the principle of fundamental fairness in the division of assets. In an unreported case of ***MacDonald v. MacDonald***, August 23, 1991, [1991] N.S.J. No. 639, Judge Daley of the Family Court in his capacity as a referee stated:
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> > > "The key in valuating the matrimonial property is an orderly and equitable settlement of the spousal affairs, and whatever the date has to be to accomplish this purpose, it is the proper date."
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> > The Nova Scotia Court of Appeal in the case of ***Lynk v. Lynk*** (1989), 92 N.S.R. (2d) 1 held that the date of commencement of the proceedings "which may be varied at trial in accord with the evidence" is the appropriate date for valuation.

> The court's position was further elaborated in the case of ***Reardon v. Smith*** (1999) 1 R.F.L. (5th) 83 at page 93:
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> > "The case law in Nova Scotia does not set a specific valuation date. The court decides what is fair and just (see ***Stoodley v. Stoodley*** (1997), 172 N.S.R. (2d) 101 (N.S.S.C.)). (For decisions on various valuation dates: **Mason v. Mason** (1981), 47 N.S.R. (2d) 435 (N.S. C.A.) says it is at the time of trial; **Lynk v. Lynk** (1989), 92 N.S.R. (2d) 1 (N.S.C.A.) and ***Tibbetts v. Tibbetts*** (1992), 119 N.S.R. (2d) 26 (N.S. C.A.) say it is at the commencement of the proceedings subject to variation according to the evidence and ***Ray v. Ray*** (1993), 121 N.S.R. (2d) 340 (N.S.S.C.) says it depends on the nature of the asset and it could be the date of the divorce.
> >
> > Although Ms. Reardon is not asking that the valuation chosen by the trial judge be overturned, she objects to choosing different dates for different assets without any indication of why. I know of no requirement in Nova Scotia to assign a single valuation date for all matrimonial assets."
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> Subject to some exceptions, there are some general guidelines which can be stated for the purpose, of offering counsel more specific guidance in applying these general statements of principle to the facts of a given case.
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> ...
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> In the case of **O'Hara v. O'Hara** (1991), 104 N.S.R. (2d) 426, Saunders J. (as he then was) made a distinction between depreciating assets and appreciating assets suggesting that the former should be valued at separation date and the latter at trial date.

[31] Justice Jollimore dealt with the same issue in the case of **Brandon v. Brandon**, 2010 NSSC 394. She referred to Justice Campbell's decision in **Simmons** (*supra*) which has been approved the Court of Appeal in the case of **Moore v. Moore**, 2003 NSCA 116, wherein Justice Hamilton described that decision as "a good review of the rationale behind the choice of valuation date".

[32] I have reviewed the parties' submissions and the case law on valuation dates, but find it is a moot point in this case. I find that it is appropriate and most fair in the circumstances of this case to value the matrimonial home as of the trial date. There is no evidence of a value at separation. The value to be divided is the 2014 assessed value of $67,100.00 less any secured debt, which shall be calculated as of the trial date.

[33] Mr. Weese resides in the home and is likely to continue to do so. Notional disposition costs will be deducted, including a real estate fee of 4%, legal costs of $500.00, plus HST on both sums. From her share, Ms. Weese will pay Mr. Weese the sum of $2,240.00 as outlined above.

[34] I direct that Mr. Weese shall pay any amounts owing to Ms. Weese for her share of the matrimonial home on or before April 30, 2015. This allows time for division of the remaining assets and debts in France, but sets a reasonable limit on how long Ms. Weese must wait for her share of the home. She shall execute and deliver a Quit Claim Deed to be held in escrow by her counsel pending receipt of the funds.

[35] Mr. Weese takes the position that the RRSPs should be valued as of the date of trial, so that both parties bear the brunt of any market fluctuations after separation. Ms. Weese argues there should be division as of the separation date, as Mr. Weese had exclusive control over these investments after separation and she had no input or way to safeguard their value. She also points out that Mr. Weese withdrew monies from these accounts after 2007.

[36] I accept the reasoning of Saunders, J. (as he then was) in **O'Hara** (supra) and find it is most appropriate to divide the investments as of the date of separation. These accounts fluctuated after 2007, withdrawals were made and accounts were merged, which makes accounting for their values difficult and a division as of the trial date unfair.

[37] Of particular note is the fact that Mr. Weese merged two previously undisclosed RRSPs in 2011 with his RRIF with the Bank of Montreal. The accounts merged with the RRIF were a TD RRSP valued on October 31, 2007 at $61,046.25 and a BMO RRSP valued as of October 31, 2007 at $110,919.85.

[38] The RRIF account was opened in December, 2010 from pension funds held by Mr. Weese with Cape Breton University. Those pension funds were previously held in a LIF with BMO valued as of October 31, 2007 at $236,317.77 and in a BMO Investorline account valued at $208,422.72 as of the same date.

[39] I direct that Mr. Weese shall transfer the following amounts from his RRIF to Ms. Weese by way of a spousal rollover under s.146 of the *Income Tax Act*, such that neither party shall be required to bear any tax consequences of the division until funds are withdrawn:

Investment	**Value Oct 31, 2007**	**Rollover value**
BMO Investorline	$208,422.72	$104,211.36

BMO LIF	$236,317.77	$118,158.88
BMO RRSP	$110,919.85	$55,459.92

[40] Using the same rollover mechanism, Ms. Weese shall transfer to Mr. Weese half the value of her TD RRSPs as of October 31, 2007. The only statements provided by her for this period show the value as of December 31, 2007, so I have determined the amount to be divided at $76,000.00.

[41] Both parties shall prepare and execute the appropriate CRA forms for immediate exchange. Failing exchange of the properly executed rollover forms within thirty days, the Sheriff shall be empowered and authorized as Trustee to execute the form on behalf of either party in accordance with s. 40 of the *Trustee Act*.

[42] Mr. Weese provided a value for the T.D. U.S. dollar account held at separation in the amount of $3,183.92. That account was transferred to a U.S. dollar BMO account. I direct that he shall pay Ms. Weese a lump sum of half that account ($1,591.96). The other three bank accounts disclosed held a combined total of $5,271.09 as of separation, so Mr. Weese shall pay Ms. Weese a further lump sum of $2,635.55. He shall also pay her half the value of the GIA account recently disclosed, which had a value at separation of $6,141.83 (half being $3,070.92). These monies shall be paid within thirty days.

ISSUE 4: SHOULD MR. WEESE BE REIMBURSED FOR MONIES LOANED TO THE BUSINESS ?

[43] Mr. Weese requests reimbursement for taxes he paid on behalf of Ms. Weese while the parties were married. She claimed certain deductions for her business that were later disallowed. The evidence shows that he paid $18,595.00 to Revenue Canada in 1992 on her behalf. There was no written agreement to repay the sum back, but Ms. Weese acknowledged in her evidence that she owes Mr. Weese this money. I therefore direct that she shall reimburse him the sum of $18,595.00 from her share of the matrimonial home.

ISSUE 5: SHOULD THE COURT DRAW ANY ADVERSE INFERENCE FROM MR. WEESE'S FAILURE TO DISCLOSE ALL ASSETS AND VALUES IN ADVANCE OF TRIAL ?

[44] Ms. Weese asks that this court draw an adverse inference from Mr. Weese's failure to disclose all assets and their values in a timely fashion. She does not specify what adverse inference she wishes the court to draw.

[45] The trial dates were assigned on June 4, 2014 at which time counsel agreed the hearing could be completed in one day. However, when the trial commenced over four months later, Mr. Weese had not made full disclosure of all necessary documentation to support his claims or to divide the matrimonial assets.

[46] He did make disclosure of some documentation shortly before the trial started and then, while the trial was adjourned for completion, he made further disclosure of bank and investment account information. This included a bank account which was not previously disclosed. The manner in which Mr. Weese made disclosure was haphazard and confusing, to say the least.

[47] The manner and timing of his disclosure necessitated a half day of extra trial time. Had Mr. Weese made timely and meaningful disclosure, the trial could have been expedited. It is not appropriate to come to court and when asked about current values, reply "I can get that". Parties must ensure that cases scheduled for trial are ready to proceed when scheduled, and they must be ready to present all relevant and necessary evidence to prove their case at that time.

[48] Mr. Weese made little effort to ensure his counsel, and therefore the Court and opposing counsel, had full disclosure of all assets and their values as of the date of separation and trial. Court resources are stretched thin and valuable court time is wasted when disclosure is incomplete. Lack of disclosure has been termed a "cancer" in family law disputes; it increases the time and expense of litigation and makes the trial process unfair. It also makes the Court's decision much more difficult, leading to longer wait times for decisions.

[49] However, much of the failure to disclose by Mr. Weese relates to assets or debts to be addressed by the court in France. In fact, even though the parties agreed the French Court would decide on the division of assets outside Nova Scotia, both parties presented evidence on issues not before the Court for determination.

[50] I decline to draw any adverse inference in the circumstances.

ISSUE 6: COSTS

[51] Ms. Weese requests costs. Her counsel was forced to deal with late disclosure, both immediately before trial and during the adjourned period of five days. Mr. Weese's haphazard approach to disclosure made the Court's determination of values more difficult and added to the length of the trial. In all of these circumstances, I direct that Mr. Weese shall pay costs of $1,500.00 to Ms. Weese. These costs shall be set off against any monies owing to Ms. Weese for the division of the home as ordered herein.

[52] Counsel for Ms. Weese will prepare the Order.

Lee Anne MacLeod-Archer, J.