

Winsor v. Winsor

Austin F. Winsor, Plaintiff and Avis Hyacinth Winsor, Defendant

Newfoundland Supreme Court (Trial Division)

Steele J.

Judgment: June 13, 1985

Docket: C.B. 404

Counsel: **David Day**, Esq., Q.C., for the plaintiff

Mrs. Maureen Dicks, for the defendant

Judgment of Steele, J.:

1 The plaintiff's action is pursuant to the provisions of The Matrimonial Property Act, Statutes of Newfoundland, 1979, c. 32 (the Act) and he seeks an order dividing the matrimonial assets of the parties. This action was heard with action 1982 Court No. 1001, Divorce Registry No. 05801, judgments in both actions to be filed simultaneously.

2 The Plaintiff (the husband) and the Defendant (the wife) were married July 2nd, 1960, and have lived in Springdale and Stephenville though mainly in Springdale where they ultimately established a home. The husband caused a petition for a divorce to be filed on the 12th day of April, 1982, alleging physical and mental cruelty. At the date of the commencement of the trial, the husband and wife were both residing in the same house. However, during a delay in the continuance of the trial an interim order was made permitting the wife exclusive possession of the home. At that time the husband moved out of the house.

3 One of the main problems in determining the division of assets are the circumstances of the husband's incorporated business. The plaintiff husband is a contractor for the installation and maintenance of extra - high voltage substations and equipment and in August of 1975 (as successor to a sole proprietorship) the husband caused to be incorporated as a private Newfoundland company, E.H.V. Construction Limited, (E.H.V.). At the date of incorporation the wife held a nominal one share but in 1982 the certificate was endorsed and transferred and at the date of the trial she held no shares in the company. One hundred shares are issued, the husband holding 98.

4 The husband operated E.H.V. from his home. The difficulties arise from the fact that not only was certain property allegedly owned by the company but he paid his domestic bills, including allowances to his wife and children, by cheques or cash from the company till. He managed his household affairs as if they were a company liability. Nevertheless the home and the business were two separate entities and the company was legitimate. The company was established mainly for tax purposes and other valid reasons on the recommendation of the husband's auditors and was not intended or contrived as a scheme to conceal or shelter what otherwise would be matrimonial assets. However, it did create the problem. It is in the light of these intricacies that I must determine what are matrimonial assets that are excluded from matrimonial assets and thus not subject to division.

5 Section 16 (1)(b) of the Act defines matrimonial assets:

16. (1) In this Part

(b) "matrimonial assets" includes all real and personal property acquired by either or both spouses during the marriage, with the exception of,

(i) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse and any appreciation in value of them during the marriage,

(ii) personal injury awards, except the portion of the award, if any, that represents compensation for economic loss,

(iii) personal effects,

(iv) business assets,

(v) property exempted under a marriage contract or separation agreement,

(vi) family heirlooms, and

(vii) real and personal property acquired after separation.

Business assets are not matrimonial assets and therefore not included in any division. Subsection (3) of section 16 is also relevant:

(3) Where before or after the coming into force of this Act property owned by a corporation would, if it were owned by a spouse, be a matrimonial asset, then shares in the corporation owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property are matrimonial assets.

6 Section 16 (1)(a) defines "business assets":

16. (1) In this Part

(a) "business assets" means property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose; and....

7 Section 17 entitles each spouse, in the first instance, to an equal division of matrimonial assets acquired during the marriage. Section 20, however, permits the Court to make an unequal division of matrimonial assets if that is necessary to avoid a grossly unjust or unconscionable result.

8 Section 27 of the Act authorizes the Court to recognize a contribution by one spouse to the accumulation and prosperity of the other spouse's business and business assets and to be reimbursed by way of an award commensurate with the contribution and effort. I shall discuss this section more fully later.

9 There are three parcels of real estate involved: the family residence at 6 Pine Street, Springdale; the cottage property near South Brook; and vacant land in a commercial area in Springdale. Section 4(1) defines "matrimonial home" as follows:

4. (1) In this Act the term "matrimonial home" means the dwelling and real property occupied by a person and his or her spouse as their family residence and owned by either or both of them.

Section 4(6) is relevant in relation to the cottage property:

4. (6) A person and his or her spouse may have more than one matrimonial home.

10 Clearly the residence at 6 Pine Street is a matrimonial home within the definition found in section 4(1).

11 The cottage near South Brook is registered in the company E.H.V. and the husband claims it as a business asset. With respect I disagree. Although the wife may not have been a frequent visitor to the cottage the children were. It was a family country retreat. The connection between the husband's business and the family cottage is obscure. The alleged use by the business is of very little consequence. Relying on section 4(6) and the consequences of section 16 (3) I conclude, in the result, that the cottage is a matrimonial asset. Although the cottage at South Brook may not have been substantially completed before any separation date or the filing of the divorce petition, the land/lease was acquired well before any date that might conceivably prevent its inclusion as a matrimonial asset.

12 In regard to the vacant land registered in the name of the company and located in a commercial area of Springdale, I accept the evidence of the husband that it was acquired and is held by the company solely for investment purposes. The wife knows little or nothing about it. I find it to be a business asset. The primary question, therefore, is the disposition of the two matrimonial homes, one at 6 Pine Street and the country cottage near South Brook.

13 The report of G.A. Brewer, a certified appraiser, states that the fee simple, market value, of the residence at 6 Pine Street is \$35,000.00 and the cottage \$27,000.00. The dwelling at 6 Pine was insulated with urea formaldehyde foam and it was estimated that the cost of removing the insulation

would be approximately \$10,500.00. It is apparent, therefore, that the existence of urea formaldehyde foam lessens the market value of the home at 6 Pine Street. Considering all the circumstances I am of opinion that it can be fairly said that both properties are more or less of equivalent value. I suspect that the cottage property will appreciate more quickly than the town dwelling.

14 Section 6(1) and (2) states that each spouse has a one-half interest in the matrimonial home creating a joint tenancy. I am satisfied that the most fair and equitable division of the two properties is for the wife to own the town residence at 6 Pine Street and the husband the cottage property. It is ordered, therefore, that the husband convey to the wife all his right, title and interest, that is to say, his one-half undivided interest in and to the property at 6 Pine Street. That includes the shed/garage/workshop situate at 6 Pine Street. The wife shall execute a conveyance in favour of the husband, or E.H.V. if the husband shall so direct, transferring all her right, title and interest, that is to say, all her one-half undivided interest in and to the cottage property near South Brook.

15 The furniture, appliances, household effects and contents of each dwelling shall remain with the house and cottage in which they are located. The intent is that the furniture, appliances, household effects and contents at 6 Pine Street shall become the property of the wife and the furniture, appliances, household effects and contents in the cottage shall become the property of the husband. There is one exception. Any office furniture, business equipment or other personal property ordinarily used by the husband in the operation of his business shall be the property of the husband and he is entitled to immediate possession.

16 By virtue of section 16 (1) (b) (iii) personal effects are not matrimonial assets. All personal effects, including any jewellery and the like shall remain the property of either the husband or wife as the case may be.

17 The two trucks registered in the name of E.H.V. are business assets and exempt from division.

18 The three motor cars, the three snowmobiles, the Honda bike and the aluminum boat are all registered in the name of E.H.V. and certain of these vehicles were depreciated for corporate income tax purposes. The husband does not claim all these items that he classified as "vehicles" as business assets. By reference to section 17 (1) (a), the definition of "business assets", it can be readily seen that any property primarily used or held for or in connection with commercial, business, investment or other income or profit producing purpose, is deemed to be business assets. (See also *Harding v. Harding*, 1982 No. F/82/355, Unified Family Court Division, unreported). That is the test to be applied in the distinction between business assets and matrimonial assets. It is very difficult to apply this test to certain vehicles, for example, the motor car used primarily by the husband. It was used by the husband but can it be said that he used it primarily in the business? Based on the evidence adduced I can only say that the husband has not established, on the balance of probabilities, that these vehicles were business assets as defined by the Act. In my opinion these vehicles are to be considered as matrimonial assets subject to division and the only question is the determination of the most equitable division.

19 I have come to the following conclusion with respect to the division of the eight items considered under the heading of "vehicles": the car used by the husband (1981 Pontiac station wagon) shall be the husband's and the car used mainly by the wife (the Chevy Nova) shall be the wife's; the 1976

snowmobile shall be the property of the husband and the wife shall have title to the snowmobile given to her by the husband as a gift. The third snowmobile and the aluminum boat shall be sold at fair market value and after deduction of any costs or expenses the proceeds remaining shall be divided equally between the parties. In the alternative the husband may pay one-half of the fair market value of the snowmobile and the aluminum boat to the wife representing her half interest. The Honda bike shall be transferred to the wife to be held by her in trust for the child, Rochelle. The parties agree that the Acadian motor vehicle has been in the possession and control of their daughter Lisa and she has been the operator and at all times regarded as the owner. I make no division or distribution in regard to the Acadian motor vehicle on the assumption that both the husband and wife agree that it will be considered the property of Lisa. The husband and wife shall execute all transferral slips, forms and documentation as required by law in order to more fully effectuate and carry out the transfer of interests in respect of the eight items listed above under the heading of "vehicles".

20 Breta Young, manager of the Springdale branch of the Bank of Montreal testified and gave evidence concerning the various term deposit certificates, bank accounts and bonds. The following are the exhibits tendered in evidence by Young:

BY #1 Term Deposit Receipt No. 9005.045 for \$ 50,000.00
 BY #2 Term Deposit Receipt No. 9005.088 for 150,000.00
 BY #3 Term Deposit Receipt No. 9004.966 for 25,000.00
 BY #4 Current Account No. 1002-392 Balance 14,528.32
 BY #5 Savings Account No. 5064-988 Balance 3,801.30
 BY #6 Application for the purchase of three Bonds:

1 x \$ 1,000.00
 1 x 5,000.00
 2 x 10,000.00

for a total of \$26,000.00. The date of purchase shown on the application is November 1, 1983.

21 The three term deposit certificates and the current account is in the name of E.H.V.; the savings account and bond application is in the name of the husband, Austin Winsor. Counsel for the husband in his brief (Volume 1 pages 44-46 paragraph 68) lists the following reasons for concluding that the three term deposit certificates are business assets:

- (a) are maintained by and solely for the business purposes of E.H.V., and in no other name, and for no other purpose,
- (b) comprise profits of E.H.V.'s business activity.
- (c) are the source of working capital of E.H.V. when the company's current chequing account goes into overdraft, pursuant to standing instructions of E.H.V. at Bank of Montreal, Springdale,
- (d) are readily negotiable for business purposes, to which end they are frequently rolled-over, particularly during E.H.V.'s business seasons (e.g. 14 times in the corporate E.H.V. year ended 1982, 15 times in the year ended 1983, and 19 times in the year ended 1984),
- (e) represent corporate equity disclosed to bonding companies for bonding purpose in E.H.V.'s bidding on tenders, and performing successfully-bid contracts (bearing in mind that a bidder's corporate equity must amount to 10% of all contracts both under bid or being performed),
- (f) are used to cover E.H.V.'s business losses, as in 1980 and 1984,
- (g) as they increase in value, enhance feasibility to qualify for bonding on ever larger contracts (the largest bid to date amounting to approximately \$300,000.00, with five tenders simultaneously under bid on at least one occasion),
- (h) are a supplementary source of E.H.V.'s business income (e.g. 17% of gross 1983-84 E.H.V. income), when the company secured only one contract (on which it suffered a loss),
- (i) represent a way to avoid borrowing (and its attendant cost), whereby E.H.V. has never required a line of credit, to operate its business activities,
- (j) have yielded income, in the view of Gordon Janes, eligible to be taxed at corporate (small business) tax rates which are lower than personal income tax tariffs,
- (k) are devoid of any evidence suggesting they have been purposely retained by E.H.V. to avoid the embrace of the M.P. Act (in which regard the practice began in 1975, some five years before the coming into force of the M.P. Act on 01 July 1980),
- (l) includes some \$147,676 working capital (i.e. current-minus fixed assets) earned from March, 1982 to 31 July 1984, all of which period was post-separation,
- (m) are used to like effect in conducting business in other companies of which E.H.V.'s auditors are aware.

have come to the conclusion that the three term deposits and the current account are all business assets. The mere fact that the term deposits are investments earning interest is not by itself decisive. One must view this asset in a broader context, that is, examination of its primary use and the nature or character of its connection to the commercial business operations of the husband. Where the dividing line between the husband's personal financial affairs and his company's affairs are so vague and inter-twined, as exists here, great caution must be taken to ensure that the "corporate veil" is not being used to unjustly shield the husband from legitimate claims to what are matrimonial assets. I accept the general thrust of the arguments by counsel for the husband that the term deposits are business assets within the definition found in section 16(1)(a). For these reasons I find that the term deposits are exempt from the division of matrimonial assets as between the parties.

23 The current account (No. 1002-392) is the operating account of E.H.V. and clearly is a business asset.

24 Savings account No. 5064-988 is a matrimonial asset and the husband acknowledges that fact. The balance in that account shall be divided equally between the husband and wife.

25 I am also satisfied that the bond or three bonds totalling \$26,000.00 as evidenced by the application - exhibit BY #6 - is a matrimonial asset. It is true that the bonds were acquired after the date of the filing of petitioner for divorce, 12th of April, 1982 or March 5, 1982, the date that counsel for the husband says was the date of separation but the money used to purchase the bond(s) were the monies of the petitioner and on either March the 5th or April 12th of 1982 these funds would have been considered a matrimonial asset. He simply converted the proceeds from a personal term deposit certificates (a matrimonial asset) into bond(s). The bond(s) therefore are matrimonial assets and the respondent is entitled to 50 percent of their value. The petitioner shall redeem the bond or bonds and pay 50 percent of the proceeds to the respondent, or in the alternative, with the consent of the respondent, pay to the respondent 50 percent of the proceeds upon maturity of the bond or bonds.

26 As stated earlier section 27 of the Act authorize the Court to recognize a spouses contribution to the business of the other spouse. Section 27 of the Act reads:

27. Where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order

(a) direct the other spouse to pay such an amount as the court orders to compensate the contributing spouse therefore; or

(b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,

and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

27 I am satisfied that the wife made no real contribution by way of work, money or monies worth in respect of the acquisition, management, maintenance, operation or improvement to the company owned by her husband or its assets. At very best her only contribution was the answering of the telephone on calls for her husband pertaining to his business but even that contention was disputed. Even if she did answer the telephone and take the occasional message the amount of time and work was insignificant. The evidence would indicate no other possible contribution or effort by the wife. Accordingly she is not entitled to compensation or an award of a share(s) in the company under this particular section.

28 I have already indicated my opinion that E.H.V. was duly incorporated for proper legal, financial and economic reasons on the advice of accountants; though the plaintiff may have permitted his business affairs to intrude into the home and family life it was never his intent or purpose to use the company or the corporate veil to shelter and secure property or assets that would otherwise be deemed matrimonial assets.

29 The respondent shall have one-half of her taxed bill of costs.

30 Judgment to be entered accordingly.

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