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NOVA SCOTIA COURT OF APPEAL

[Cite as: Ross v. Ross, 1999 NSCA 162]

Pugsley, Flinn and Cromwell, JJ.A.

BETWEEN:

JOSEPH ALBERT SYLVAIN ROSS Appellant	)	Steven Zatzman for the appellant
- and -	)	
JEANE RITA ROSS Respondent	)	Samira Zayid for the respondent
	)	Appeal heard: November 10, 1999
	)	Judgment delivered: December 22, 1999

THE COURT: Appeal allowed in part per reasons for judgment of Cromwell, J.A.; Pugsley and Flinn, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction:

[1] Joseph Ross appeals a corollary relief judgment granted by Oland, J. The judgment awarded Jeane Ross custody of the two children of the marriage (with reasonable access to Mr. Ross), ordered Mr. Ross to pay child support of $175.00 per month for the two children of the marriage, ordered Mr. Ross to pay Mrs. Ross $23,049.47 representing her equal share on division of matrimonial assets and awarded Mrs. Ross one-half of Mr. Ross's Canadian Forces Superannuation Plan pension.

[2] Four errors respecting the division of assets are raised on appeal:

(i) the sum of $14,547.20 was, in effect, double counted in a division of matrimonial assets;

(ii) the division ordered by the trial judge did not adequately take into account that the amounts received by way of severance and pursuant to the Forces Reduction Program and on account of vacation pay had, in fact, been paid out to the respondent since the day of separation;

(iii) amounts received as vacation pay and pursuant to the Canadian Forces Reduction Program were wrongly included as matrimonial assets; and

(iv) that the division failed to take account of the tax consequences arising from the liquidation of these assets.

II. The Facts:

[3] Mr. and Mrs. Ross were married in 1978 and separated in October of 1994. There are two children, Jennifer born in September of 1978 and Nicholas born in December of 1983. Following separation, the children continued to live with their mother.

[4] Mr. Ross spent his career in the Armed Forces, joining the Navy not long before he and Mrs. Ross began living together and retiring in April of 1995, roughly six months after the separation.

[5] Mrs. Ross commenced divorce proceedings in April of 1996 seeking divorce, custody, spousal and child support and a division of assets and pension. At the same time, Mrs. Ross issued a notice to file financial information directed to her husband. Mr. Ross did not file an Answer, but did file a statement of financial information and statement of property sworn on August 28th, 1996. This was the only financial information provided by Mr. Ross until the date of the trial in May, 1999.

[6] An amended Petition was filed on behalf of Mrs. Ross in May of 1998 setting out the specifics of her claim to division of matrimonial assets and of the respondent's pension. At the same time, she issued a notice to file guideline information directed to Mr. Ross.

[7] Mr. Ross filed an Answer dated June 29, 1998. So far as relevant to this

appeal, it stated:

> A division of assets and debts recognizes the matrimonial debt payment, made by the respondent [Mr. Ross] until his declaration of bankruptcy. The respondent disputes the petitioner's claim for a lump sum payment of $25,137.50 in full and final settlement of all claims pursuant to the **Matrimonial Property Act**. The respondent states that he retained few assets after separation and that he used the majority of his Canadian Armed Forces Severance Package to attempt to pay down matrimonial debts. In November 1997 the respondent declared personal bankruptcy and he remains undischarged. [emphasis added]

[8] Mrs. Ross's statement of property, sworn in July of 1996, indicated as assets superannuation and vacation pay which had been paid to Mr. Ross of approximately $36,000.00.

[9] Mr. Ross's statement of property sworn in August of 1996 showed entries for a superannuation payment and vacation pay of $11,000.00 and severance pay of $25,000.00 and indicated that both had been expended. Mr. Ross's statement of financial information, which included an income tax return for 1995 and various other related documents, showed employment income of $16,520.00, income from a registered retirement savings plan of $14,547.00 and other revenue totalling $44,377.00. In an annex to the income tax return, this total of other revenue is indicated to be a retiring allowance of $36,762.00 and other payments of $7,615.00. The attached T- 4 slip indicates a payment made in 1995 from an RRSP with the M.R.S. Trust Company, Contract No. 23579907 in the amount of $14,547.20. An attached T-4A slip shows a payment from the Canadian Forces of $36,261.67 indicated to be a retiring allowance and a further T- 4A shows pension income of $7,615.66. Also attached are receipts issued by the M.R.S. Trust Company dated 12 January, 1996,

relating to plan no. 2356990-7 for contributions transferred pursuant to s. 60(j) of the **Income Tax Act** of amounts totalling $25,000.00 . In addition, there is a receipt for administration fees paid by Mr. Ross to the M.R.S. Trust Company for account no. 2357990-7 for 1995 in the amount of $32.10.

[10] In November of 1996, counsel for Mrs. Ross wrote to Quebec counsel for Mr. Ross requesting, among other things, clarification of the nature of the $14,547.00 shown as having been received in 1995. Mrs. Ross's counsel wrote:

> Firstly, with regard to the amount Mr. Ross received by way of a severance package and superannuation, we note that the figure reflected in his property and his income tax return is the figure of $36,762.00. However, in addition to that figure is an amount received of $14,547.00. This amount is not reflected in Mr. Ross's property statement; however, it appears to be an additional lump sum amount that he received upon retirement. Please clarify what this figure is. [emphasis added]

[11] So far as the record discloses, no response to this inquiry was received although such response was requested on behalf of Mrs. Ross twice more.

[12] The matter came on for hearing before Justice Oland on May 14th, 1999. Mr. Ross appeared without counsel. At the opening of the trial, Mr. Ross filed additional income tax returns and material from the Department of National Defence concerning his pension "and all that".

[13] In addition to the material which had been filed with the parties' statements of property and financial information, the following evidence emerged during the trial.

[14] Mrs. Ross, during her evidence, was referred to Mr. Ross's 1995 income tax return and to attached documents. Based on that documentation, she testified that she believed that the $14,547.20 was "money that he withdrew from an RRSP that he had put in there from the settlement he received". Also based on that documentation she indicated that the amount of "the settlement that he got when he left the Navy" was $36,761.67.

[15] Mr. Ross filed a letter from the Department of National Defence dated 31 December, 1997 and addressed to his Quebec solicitor. Mr. Ross translated this letter from the original French into English for the trial judge and stated that the letter indicated that he received $8,822.00 in severance pay [d'indemnité de départ], 270 days paid leave pursuant to the Forces Reduction Program for a gross amount of $28,359.00 [270 jours de congé PRF] plus one day's paid leave of $144.94 for a total of $37,326.74. Mr. Ross initially testified that the $37,326.74 was the total amount he had received and that some of it was transferred into RRSPs and some of it was taken in cash. He then testified:

> ..... That's where I think it gets confusing. Because in one of the papers that Ms. Zayid [counsel for Mrs. Ross] showed the benefits that I had gotten was 36,000 and then another one for 14,000 and something.
>
> I may be wrong, but 14,494 and $144.94, it seems to me like it could be a mistake made somewhere. And that money, I did receive. I never said that I didn't get it. I'm not fighting that argument, Your Honour. It's just that I used that money to help Mrs. Ross support the kids when I left, and I have receipts for the monies that I gave her, receipts and bank notes, all the money that I had given her, which comes out to approximately $27,000. And that's a clear amount. That's not the gross amount. I was paying the income tax on that. That's why on my income tax report it shows that I have such a high revenue. ..... [emphasis added]

[16] The trial judge asked Mr. Ross whether what he had received in total was the $37, 300.00 figure set out in the letter from the Department of National Defence. Mr. Ross responded that he thought so. He then said:

> Like I said, this money, I used it for -- first of all, when I moved back to Montreal, I had to live somewhere, so I took some of that money to live and pay my ex-wife every month for the kids. And also to come down here to visit the kids whenever I could. I can account for $27,000 of that money that money that I had given to Mrs. Ross. But $20,000 clear, not gross. So $27,000 clear would amount to probably around 50,000, I would imagine. Yeah, you're right. I must have gotten more than that. [emphasis added]

[17] Mr. Ross further testified that the $14,500.00 amount did not come from a pre-existing RRSP but was money that he rolled into an RRSP from his military money and then cashed it in. He also confirmed that he spent that money providing support for his wife and children.

[18] It is common ground on the appeal that, in fact, the amount of support for which Mr. Ross could account having paid to Mrs. Ross between November of 1994 and April of 1998 was between $18,600.00 and $19,250.00.

[19] There was virtually no evidence about how Mr. Ross's entitlement arose to the funds received from the military upon his retirement. It is agreed that the $8,827.80 severance benefit is a matrimonial asset. In dispute, however, is the $28,359.00 received under the Forces Reduction Program and $144.94 representing one day's paid leave. The only evidence relevant to the proper characterization of the disputed amounts is as follows:

1. the amounts were paid after separation;

2. the $28,359.00 figure was calculated at the rate of 270 days of leave pursuant to the Forces Reduction Program and the $144.94 represented one day's annual leave;
3. Mr. Ross's decision to retire before having served 20 years led to a 15% reduction in his pension between the retirement date and his attaining 65 years of age;
4. Mr. Ross agreed that the money received constituted "a package" as a result of ending his involvement in the military early and that it was a "lump sum payment" he received when he left the military.

[20] In closing submissions to the trial judge, counsel for Mrs. Ross was clear that she claimed the $14,547.00 RRSP amount in addition to the $36,761.00 received from the military. Counsel also made it clear that she sought a division of the entire amount on the basis that it would appear that the benefit accrued during the course of the marriage given that Mr. Ross had entered the Navy shortly before the parties started residing together and left the military shortly after they separated. Mr. Ross made closing submissions on his own behalf and did not specifically deal with the amount that should be subject to division of matrimonial assets. He was asked by the trial judge about the RRSP figure and he responded:

> All these figures, your honour, were money that was transferred from the military to RRSP establishment and the other lump sum was also coming from the military. I did cash them in, yes. I had to cash them in order to sustain the payments that I was making to her [i.e., Mrs. Ross] at that time. .....

[21] Other than the income tax returns and the documents already referred to,

there was no evidence before the trial judge dealing with the tax treatment of the funds received from the military.

III. Analysis:

A. Issues 1 and 2

[22] Two of the issues raised on appeal were raised and addressed at the hearing before Oland, J. I will deal with them first.

(i) Was the $14,547.20 of RRSP income double counted in the division of matrimonial assets?

[23] Counsel for Mr. Ross submits that it is clear on the record that the $14,547.20 of RRSP income shown on Mr. Ross's 1995 tax return was, in fact, money withdrawn from an RRSP created from funds received upon retirement from the military. In my opinion, while that conclusion may be a reasonable inference from the evidence before the trial judge, it is not the only reasonable inference. On this issue the learned trial judge found as follows:

> As to the RRSP. Mr. Ross was not entirely clear as to the origin of the RRSP funds of $14,547.20 reported in his income tax return, but his evidence was that it was a payment received from or through the Forces Reduction Program. There was no indication from Mr. Ross that the entry of the RRSP funds as income was done erroneously on that tax return and that an amended tax return was filed, for example if the RRSP had actually been part of the original severance payment of $37,000.00. The RRSP is not mentioned in the DND letter, but that in itself I do not find to be determinative. Having in mind that the origin of the RRSP is apparently through the Forces, as Mr. Ross has testified that he had no private RRSP, if I may use that term I find that that also is a matrimonial asset. Ordinarily, the Court would order that Ms. Ross is entitled to 50% of the evaluation of the RRSP at the date of the roll over. Since the evidence before the Court was that the money has been spent, the Order will provide that Ms. Ross is entitled to one-half of the amount of the RRSP, as set out in the tax return.

[24] I read this passage as expressing a conclusion that the 1995 income tax return should be taken at face value given Mr. Ross's lack of clarity about the origin of the RRSP funds of $14,547.20. Mr. Ross had every opportunity over the preceding 2½ years to clarify this matter. His counsel was specifically asked about it in November of 1996 and no response on this point was received. Mr. Ross's evidence on this issue was confused and confusing.

[25] As has been said many times, a Court of Appeal will only intervene on questions of fact if the trial judge has made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence or drawn erroneous conclusion from it. In my respectful view the trial judge did not make any reversible error in reaching the conclusion she did on the record before her and in light of Mr. Ross's failure to clarify the matter.

(ii) Should the amount payable to Mrs. Ross upon equal division be reduced because of the respondent's payment of support?

[26] Both at trial and on appeal, it has been submitted on behalf of Mr. Ross that the funds he received from the Canadian Armed Forces on termination no longer exist because those funds had been used since the time of separation to provide support for the respondent and the children up to April of 1998. The trial judge refused to give effect to this argument holding that "support payments are separate from the division of the severance and RRSP money". While the precise amount is not agreed upon, it is

common ground that the amount paid by Mr. Ross between separation in October of 1994 up until the time of the divorce trial in June of 1999 was somewhere between $18,300.00 and $19,250.00.

[27] Mr. Ross had been the primary bread winner throughout the 16 years of marriage. After separation, Mrs. Ross obtained two part-time jobs and had day to day care and custody of the two children. Although there was no order or agreement relating to the support payments, I accept that there was a clear obligation on Mr. Ross to pay support in these circumstances. He did not dispute the obligation and both he and Mrs. Ross referred to the amounts paid by Mr. Ross between separation and trial as support payments.

[28] It is helpful in considering Mr. Ross's argument that Mrs. Ross's share of the matrimonial assets was paid to her by way of support to translate the payments made into monthly amounts. The funds advanced by Mr. Ross between separation and the time of the divorce hearing were not paid at a steady rate or amount. Accepting Mr. Ross's figure of $19,250.00 and considering this as support over the period of four years and seven months from the date of separation to the date of the divorce trial, these payments constitute just under $350.00 per month.

[29] This is not a case in which the payments made significantly exceed a proper amount for support or in which it is clear that no other income was available to pay support; neither is it a case in which there was no obligation to pay support. In essence,

Mr. Ross argues that he had no other income to respond to his obligation to pay support so that he was required to expend the matrimonial assets to do so. This argument, however, lacks an evidentiary foundation. In these circumstances, the trial judge did not err in holding the payments made by Mr. Ross between separation and trial as payments on account of support as both parties referred to them and not as advances of Mrs. Ross' share of the matrimonial property.

B. Issues 3 and 4

(iii) Did the trial judge err in finding that the amount paid pursuant to the Forces Reduction Program and in lieu of annual leave constituted matrimonial assets?

(iv) Did the trial judge err in failing to use the value net of tax of funds received from the Canadian Armed Forces on retirement for the purposes of division?

[30] These issues were not raised in the pleadings or at trial.

[31] While Mr. Ross represented himself at the time of filing his Answer and at the time of trial, it is clear from the record that he consulted counsel, both in Nova Scotia and Quebec, and that there was an exchange of correspondence between counsel for Mr. and Mrs. Ross. So far as the record discloses, at no time did Mr. Ross, or anyone acting on his behalf, take the position that the sums received upon retirement were not matrimonial assets. Mr. Ross did not take that position at the trial. There was virtually no evidence before the trial judge as to the nature of these payments or how entitlement to them arose.

[32] As for the submission concerning reduction of the value of assets on account of tax liability, this issue was not squarely raised before the trial judge. Although the evidence showed that tax was paid by Mr. Ross on the amounts he received upon retirement, it was obvious on the evidence that the tax consequences could have been substantially mitigated by rolling over the RRSPs instead of liquidating them. It is conceded that Mrs. Ross had no input into the decision concerning how these assets were dealt with from a tax perspective and there was no agreement between the parties on this issue. In essence, Mr. Ross's position is that he needed the money to pay support and to help him relocate to Montreal.

[33] On both of these issues, Mrs. Ross submits that this Court should not consider these new arguments because the record does not enable us to address them appropriately and justly. I agree with this submission.

[34] The general principle concerning arguments raised for the first time on appeal is that they should only be entertained if the Court of Appeal is persuaded that all the facts necessary to address the point are before the Court as fully as if the issue had been raised at trial. The rationale of the principle is that it is unfair to permit a new argument on appeal in relation to which evidence might have been led at trial had it been known the issue would be raised: see e.g., **The Tasmania**, (1890) 15 App. Cas. 223 (H.L.) at 225; **S-Marque Inc. v. Homburg** (1999), 176 N.S.R. (2d) 218 (C.A.); **O'Bryan v. O'Bryan** (1997), 97 B.C.A.C. 62 (C.A.).

[35] With respect to the argument that the funds received by Mr. Ross were not matrimonial assets, there was, as noted, virtually no evidence before the trial judge relevant to this submission. In my view, it is not proper to consider this issue for the first time on appeal given the state of the evidence at trial. But that is not all. It is conceded that Mr. Ross had the burden of proof on this issue. Even if it were appropriate to consider the issue on appeal, Mr. Ross could not succeed on this record because he did not produce evidence at trial that discharged this burden of proof.

[36] On this issue the trial judge said:

> The other aspect of division of matrimonial assets deals with the severance pay that Mr. Ross received when he left the navy. The case authorities are clear that severance pay and superannuation received post-separation is a matrimonial asset, subject to division, when the benefits accrued during the marriage. I refer to the **Ronald John Yaschuk v. Patricia Veronica Logan** (1992), 39 R.F.L. (3d) 417 case. This is the situation in this case before the Court. The parties have been together since 1977. Mr. Ross joined the Navy a year later and he left the Navy a few months following their separation. As to the amount, I am using the amount set forward in Exhibit 6, being the letter from DND, which Mr. Ross presented to the Court. That amount is $37,326.74 as a severance payment. Mr. Ross is entitled to half that amount.

[37] The relevant provision of the **Matrimonial Property Act** is s. 4(1)(g) which provides as follows:

> 4 (1) In this Act, “matrimonial assets” means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of
> .....
>
> > (g) real and personal property acquired after separation unless the spouses resume cohabitation.

[38] In **Yaschuk v. Logan** (1992), 39 R.F.L. (3d) 417 (N.S.C.A.) referred to by the trial judge, Chipman, J.A. for this Court, said as follows:

> The issue must in all cases be whether the asset was *acquired* before or after separation. Merely because a sum was paid after separation is not conclusive of when it was acquired within the meaning of the Act. Acquisition is to be determined upon an analysis of the circumstances in each case. A helpful discussion of this issue is found in the decision of Bateman L.J.S.C. in *Bellemare v. Bellemare* (1990), 28 R.F.L. (3d) 165, 98 N.S.R. (2d) 140, 263 A.P.R. 140 (T.D.), at pp. 143-144 [N.S.R.]. Bateman L.J.S.C. rightly points out, at p.144, that the burden of proof that an asset is not a matrimonial asset by reason of the exceptions set out in s. 4 falls upon a spouse who makes that assertion. Bateman L.J.S.C. was dealing with severance pay of a member of the armed forces paid to him on voluntary retirement after the parties separated. She concluded that, on the evidence, the husband had failed to satisfy her that the exception applied. There, as here, and unlike the situation in *Tkach*, supra, the pay had actually been received prior to the time of the trial. It was not simply a contingent future right, and it was not shown that *entitlement* to the severance pay was not acquired during the marriage as a result of the husband's years of service. The court was not presented with adequate evidence as to the proportion of the severance attributable to the period after separation. The entire severance pay was caught within the definition. [emphasis added]

[39] As noted, counsel for Mr. Ross agreed that the onus was on him to show that the payments were not matrimonial assets.

[40] Having regard to the virtual absence of evidence on the nature of this benefit, the fact that it arose upon retirement shortly after separation from the occupation in which Mr. Ross had been engaged throughout the marriage and the burden of proof as outlined by Chipman, J.A. in **Yaschuk**, I conclude that even if we considered this issue on its merits, the trial judge could not be shown to have erred on the evidence before her in concluding that the funds received upon retirement by Mr. Ross were matrimonial assets.

[41] With respect to the taxation issue, there was evidence that tax was paid by Mr. Ross, but the issue of reduction of the value of the assets as a result was not squarely placed before the trial judge. If it had been, a number of related questions,

and evidence relating to them, might well have been considered at trial. For example, there could easily have been evidence about how the tax implications could have been mitigated, whether failure to take such steps constituted an unreasonable impoverishment of the assets within the meaning of s. 13(a) and potentially the question of whether an unequal division should be ordered might have arisen. The record is wholly inadequate to consider the argument now advanced. To do so would risk substantial injustice which due diligence and proper disclosure on the part of Mr. Ross at trial could have avoided. Mr. Ross should not be rewarded on appeal for his own lack of diligence and disclosure at trial.

[42] Moreover, even if it were appropriate to address this issue, I am far from persuaded that, on this record, the trial judge erred. The trial judge reasoned, in essence, that Mrs. Ross' share should not be reduced because Mr. Ross unilaterally chose to cash in these funds incurring onerous tax consequences as a result. No serious issue was taken on appeal with the proposition that significant tax savings could have been achieved by rolling over Mrs. Ross' share of the RRSPs but this was not done. That being so and given that Mrs. Ross was not consulted on the issue and certainly did not urge or consent to liquidation, I would not disturb the trial judge's order on this ground.

[43] It appears, however, that there is a clerical error in the judge's Order. She clearly intended that the RRSP's be valued as if they had been rolled over to Mrs. Ross, thereby avoiding the tax consequences of liquidation. The RRSP amounts were

$25,000.00 and $14,547.20. The balance of the Retiring Allowance (i.e., $37,326.74 - $25,000.00 = $12,326.74) was not placed in an RRSP and, therefore, could not be rolled over. It does not appear that the learned trial judge intended to ignore the tax consequences relating to the liquidation of this amount. Counsel for Mr. Ross suggested that a 20% allowance would be reasonable. I agree. Therefore, to give effect to what I think were the trial judge's intentions, I would reduce the value of the assets subject to division by 20% of $12,326.74, that is by $2,465.34.

[44] In the result, I would allow the appeal only to that extent. The equalization payment should be reduced to $21,816.80 and paragraph 8(a) of the Corollary Relief Judgment will be amended accordingly. Mrs. Ross, while substantially successful on appeal, did not press for costs and, in all of the circumstances, I would award none.

Cromwell, J.A.

Concurred in:

Flinn, J.A.

Pugsley, J.A.