NOVA SCOTIA COURT OF APPEAL
Citation: *Cox v. Cox*, 2024 NSCA 34

Date: 20240321
Docket: CA 524926
Registry: Halifax

Between:

Jenna Dawn Cox

Appellant

v.

Matthew Cyril Cox

Respondent

Judge:	The Honourable Justice J. Edward (Ted) Scanlan
Appeal Heard:	February 13, 2024, in Halifax, Nova Scotia
Subject:	Division of Matrimonial Property and Assets
Summary:	The parties entered their relationship owning assets. The trial judge ordered all assets be divided equally, but he did not include a portion of a pension earned by the respondent prior to the start of cohabitation. The respondent gambled and lost substantial sums during the marriage. The appellant did not learn of this until the breakdown of the marriage. She sought an unequal division of matrimonial assets to reflect the gambling losses. The respondent's evidence was that he had paid for his gambling with lines of credit and loans that were not financed with matrimonial funds. He paid the balance of his gambling debts from a VAC settlement he received from DND. The parties agreed this settlement was exempt from division. Those DVA monies were exempt from division under the Matrimonial Property Act. This meant matrimonial assets were not impacted by the gambling.

There were a number of other assets where the appellant challenged the judge's division of those assets. They were divided equally.

Issues:

(1) Did the judge err in not dividing the respondent's pre-cohabitation pension?

(2) Did the judge err in not making an unequal division of assets based upon the respondent's gambling expense?

(3) Did the judge err in not excluding a rental property the appellant owned prior to marriage from division. Should it have been declared a business asset exempt from division?

(4) Did the judge err in dividing other assets?

Result:

On the division of pension benefits earned prior to cohabitation the trial judge failed to follow *Morash v. Morash*, 2004 NSCA 20. That asset was *prima facie* a matrimonial asset and the record did not disclose any juristic reason to exclude it from division. The respondent was ordered to pay the appellant $35,000 representing one-half the value of that asset.

The property owned by the appellant prior to the marriage was not a business asset. Both parties were involved in the rental operations dealing with that property during the marriage and it was subject to division.

The trial judge found there was no evidence the gambling debts were paid out of the matrimonial account. The gambling expenses were paid by the respondent through lines of credit and personal loans not serviced by matrimonial funds. The balance of the gambling debts were paid by the respondent from his VAC settlement, which was exempt from division.

All other grounds of appeal were dismissed.

There was divided success on the appeal and no costs were awarded.

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Between:

Jenna Dawn Cox

Appellant

v.

Matthew Cyril Cox

Respondent

Judges:	Wood, C.J.N.S., Scanlan, Derrick, JJ.A.
Appeal Heard:	February 12, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed in part, per reasons of Scanlan, J.A.; Wood, C.J.N.S. and Derrick, J.A. concurring.
Counsel:	Judith Schoen, for the appellant Vanja Mitrovic, for the respondent

Reasons for judgment:

[1] The parties were divorced on March 2, 2023. Justice Paul Morris rendered an oral decision on that date dealing with corollary matters, including division of matrimonial property and matrimonial assets. It is that part of the decision which is the subject of this appeal. The appellant argues the judge erred:

- In declaring a residential property, 53 Contessa Court, was a matrimonial asset.
- In not dividing the respondent's pension earned pre-cohabitation.
- In denying the appellant's claim in the amount of $45,000, identified as an increase in home insurance premiums resulting from the respondent's failure to pay expenses related to the matrimonial home post separation.
- In not awarding an unequal division based upon the respondent's gambling activities.
- In ordering the appellant to pay to the respondent half the monies refunded in relation to a cancelled vacation.

[2] For the reasons below I am satisfied that all grounds of appeal should be dismissed except the issue of the division of pension benefits earned by the respondent prior to the beginning of co-habitation.

Background

[3] The parties began cohabiting in June of 2010, married in August 2013 and separated January 2021. A son born January 2011 is the only child of the relationship.

[4] The parties both entered the relationship with assets; the appellant had some investments and owned a property at 53 Contessa Court in Halifax. That property had been owned by the appellant's mother and was purchased for $140,000 by the appellant in June of 2008, approximately two years prior to the parties cohabiting. There was a $20,000 gift given by the appellant's parents at the time of purchase and her father assisted in repairs valued at approximately $9,000 immediately after purchase. The property is registered in the appellant's name and it was operated as

a rental home starting when the parties began cohabitation. The property has appreciated in value since acquisition.

[5] The respondent owned a home at Brentwood Avenue. The appellant moved into the Brentwood home once cohabitation began. During the marriage they sold the Brentwood home and purchased the matrimonial home at 118 Riverwood Drive in Timberlea.

[6] The respondent, in the Canadian military beginning in 2006, was deployed to Africa. While there he sustained injuries - both physical and mental. In 2019, prior to separation, he received a lump sum award for pain and suffering from Veterans Affairs Canada (VAC) (approximately $205,000).

[7] The respondent also had a Department of National Defence (DND) pension, having contributed to the plan, beginning in 2006.

[8] The respondent gambled extensively during the marriage and for 8 to 10 years prior to the trial he obtained a series of loans or lines of credit. These loans and lines of credit were used to either finance his gambling, or to service earlier debts incurred in relation to his gambling. He did not advise the appellant of any of the gambling or gambling debts. Nor did he advise the appellant as to the amount he received in the VAC settlement.

[9] The appellant says the trial judge found there was insufficient evidence to warrant the unequal division she was seeking, and equally divided all of her assets, including the ones acquired pre-cohabitation. She claims the judge then exempted the respondent's pre-owned asset (the pension contribution). The appellant acknowledges the VAC settlement is an exempt asset pursuant to s. 4 of the *Matrimonial Property Act.*

[10] The appellant had RRSPs valued at $11,051.00 from pre-cohabitation. The respondent was awarded 50% of the value of that asset.

[11] Finally the appellant had received a refund in relation to a vacation that was paid for during the marriage. The money was refunded to her credit card. She did not share it with the respondent. The judge held the respondent was entitled to 50% of that amount.

[12] The judge did not award the appellant monies related to expenses she alleged she would incur in the future as a result of the respondent defaulting on payment of house related expenses post-separation / pre-divorce.

Standard of Review

[13] The parties agree the applicable standard of review was set out in *Wolfson v. Wolfson*, 2023 NSCA 57:

> *Classification and division of property*
>
> [39] A judge's exercise of discretion in the classification and division of property will not be interfered with by this Court unless the judge has erred at law, applied incorrect principles, made a palpable and overriding error of fact or the result is so clearly wrong as to amount to an injustice. (See *Saunders v Saunders*, 2011 NSCA 81 at para. 18, *Cunningham v. Cunningham*, 2018 NSCA 63 at para.15 and *Moore v. Darlington*, 2017 NSCA 67 at para. 40.)
>
> [40] Issues of fact, including inferences, and issues of mixed fact and law from which no error of law is extractable, are reviewed for palpable and overriding error. Issues of law, including points of law which are extractable from mixed questions of fact and law, are reviewed for correctness. (See *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8 and 27).

[14] Appellate courts should not interfere with trial court decisions simply because they would have re-weighed the evidence and balanced factors differently (See *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12).

Analysis

[15] The appellant frames the issues as follows:

1. Did the trial judge err in law and/or fact in determining an unequal division of assets in favour of the respondent was warranted and in not considering the legislative intent of the *Matrimonial Property Act*;
2. Did the trial judge err in law and/or fact by assuming facts not in evidence related to:
    a. The matrimonial home and the rental property.

b. A vacation refund.

3. Did the trial judge err in law and/or fact in not giving any, or sufficient consideration of factors as legislated by the *Matrimonial Property Act* including, but not limited to, sections 13 (a), (b), (e) and (l) when considering the appellant's claim to an unequal division was not justified?

[16] I intend to deal with the issues as framed above in a slightly different way. I will reference the various assets the appellant now claims should have been divided differently. I do this because in this case, the source, circumstances, and nature of the assets matter.

Gambling expenses and the respondent's Veterans Affairs Settlement

[17] I start with the gambling expenses. There was evidence showing the respondent had gambled substantial sums of monies away during the marriage. While he had not gambled continually throughout the marriage his losses were considerable. He financed his gambling through a series of loans/personal lines of credit. He was concerned that if the appellant discovered the extent of his gambling debts, the marriage would have ended earlier than it did. He hid the gambling expenses and the existence of the lines of credit from the appellant throughout the marriage. The appellant now argues the lines of credit were serviced using family income, hence reducing the amounts available for division. She argues that the respondent's gambling impacted the assets available for distribution or division and the amounts attributable to gambling should reduce the respondent's share.

[18] During the marriage the appellant was meticulous in recording the income and expenditures of the parties. The respondent deposited his paycheque into accounts monitored by the appellant. The gambling expenses and or debt servicing for that expense did not show up in the parties' budget. The evidence supports the judge's finding that the appellant would have noticed if any monies from the parties' accounts were used for gambling or servicing the gambling related debts.

[19] The fact the appellant did not notice any gambling expense is consistent with there having been no money taken from the matrimonial accounts for the purpose of gambling. That is consistent with the respondent's assertion, and judge's finding the expense and the servicing of the debt was paid during the marriage through a series of ever increasing lines of credit and personal loans. As the respondent testified, he was robbing 'Peter to pay Paul'.

[20] When the respondent received his VAC settlement, he did not tell the appellant how much he received. As I noted above, the appellant concedes those monies were exempt from division. The respondent paid off the remaining gambling loans and lines of credit out of the exempt settlement amount. There is no doubt the respondent's gambling impoverished him, but the judge was satisfied there was no evidence the matrimonial assets were impoverished by the respondent's gambling. I would defer to the judge's finding on that issue. Based on that finding the appellant has failed to establish the gambling justifies the unequal division she sought.

[21] Some of the VAC monies were used for family purposes and the respondent has not claimed those monies back. The judge said:

> … he did use some of these funds that were not matrimonial to help purchase … contribute towards purchasing a car of $10,000. Apparently, there was another 13,000 deposited into the family bank account, and there was an acknowledgement by Ms. Cox in her rebuttal affidavit at paragraph 39 that, approximately, $30,000 of items were purchased for the matrimonial home from this non-matrimonial Veterans Affairs lump sum payment.
>
> So the evidence, in fact, was that this non-matrimonial amount, in fact, did increase the value of the matrimonial assets. …

[22] Once the appellant used those monies for family purposes he was not entitled to claim the amounts back. The appellant has the benefit of sharing in the division of assets the respondent contributed to using VAC monies.

Contessa Court

[23] I deal first with a claim for $29,000 the appellant says she received as a gift in relation to real property located at 29 Contessa Court. As noted, the appellant owned the property prior to the parties' co-habitation and marriage. She obtained that property using a mortgage of $120,000, a gift of $20,000 from her mother and her father contributed $9,000 to repairs.

[24] The judge found Contessa Court to be a matrimonial asset. The appellant argued that property, which was rented after she moved out, was a business asset, exempt from division pursuant to s. 4(e) of the *Act.*

[25] The judge determined that even though it was retained in the appellant's name it was not held as a business asset, referring to *Pirie v. Pirie*, 2020 NSSC 206

(transcribed as *Perry v. Perry*). *Pirie* discusses who has the burden of proving an asset is not a matrimonial asset - the person making that assertion. It also references the hallmarks of business assets. The primary purpose of the asset is the generation of income in an entrepreneurial sense; an asset purposely held or used for profit, working in a commercial sense for the production of income. An asset held for immediate gain not as a nest egg or security for retirement. The parties' intention is very significant in the determination as to whether it is a matrimonial or business asset. Is it worked in an entrepreneurial way? Is there risk or does it involve low financial risk? Generally, an asset is more likely to be considered a business asset if it wasn't acquired from funds diverted from family uses, wasn't primarily intended to be used for the party's retirement or was an asset held for income as opposed to capital gain.

[26] The fact that the Contessa Court property was used as a source of income, used in the household budgeting, was due in part to the efforts of the respondent. Both parties were involved in the management. Mr. Cox attended Residential Tenancy Board hearings. He did unpaid work on the property and purchases made for the property were made using matrimonial funds.

[27] The value of that asset is now, in large part, due to its appreciation in value. And there was no indication it was held for anything but the benefit of both parties. They used minimal profits from the rental for family purposes. The conversion to a rental unit coincided with the parties pooling their assets, living in one house and renting the other. Then later selling what was the respondent's house and purchasing the matrimonial home. This was a pooling of assets.

[28] The record supports the judge's finding that Contessa Court was a matrimonial asset, not a business asset.

Vacation refund

[29] The parties booked a trip to Mexico for March 2020. That trip was cancelled due to COVID. Eventually the appellant received a refund of approximately $4,000 on her credit card. I am satisfied the trial judge was well within his discretion to include that amount in the division of assets. The monies to pay for the vacation were paid out of matrimonial funds. There was no juristic reason not to divide the refund.

Division of pre-cohabitation pension

[30] The parties had agreed to a division of the respondent's pension earned during the period of cohabitation up to the date of separation. A review of the transcript suggests the judge was initially of the understanding the parties had agreed on division of pre-cohabitation part of the DND pension as well. The lack of agreement on that point only became apparent late in the proceedings. The judge did not divide the portion of the pension earned prior to the cohabitation. This resulted in an unequal division in favor of the respondent. Did this amount to a legal error?

[31] In *Morash v. Morash,* 2004 NSCA 20 Justice Bateman, writing for the Court said:

> [16] Under the scheme of the **Matrimonial Property Act,** R.S.N.S. 1989, c. 275, all assets of the parties, whether acquired before or during the marriage, are "matrimonial assets" and subject to *prima facie* equal division, unless falling within certain narrow exceptions:
>
> > 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 …

[32] Pensions acquired pre-cohabitation are matrimonial assets *prima facie* available for division. For the respondent, the issue would have been whether an unequal division would be justified under s. 13 of the *Matrimonial Property Act.*

[33] The judge said:

> … as I understand, [*Gagnon v. Gagnon*] confirms that the law is that where a spouse is seeking an equal division of the premarital value of a pension, that you would have to demonstrate a contribution to the acquisition or maintenance of the premarital pension benefit.
>
> From the Court's perspective, it lines up with the *Gagnon v. Gagnon* case, that the pre-cohabitation pension benefits did not involve a diversion of funds from the family, or from any of the matrimonial assets. That this is not one where spousal support or financial dependents. (sic) It's, in fact, Ms. Cox is of the view that there's no spousal support that should flow to Mr. Cox, certainly putting forward that there is not a financial dependence between the parties.
>
> And so from the Court's view, the premarital pension benefits should not be included and should be excluded from the division of property.

[34] I find the judge erred when he said a spouse seeking division of a premarital pension would have to demonstrate a contribution to, or maintenance of the premarital pension benefit. The starting point is a presumption of divisibility.

[35] In *Morash* Justice Bateman said:

> [22] … As a matrimonial asset subject to *prima facie* equal division, … pension benefits earned before and during the marriage may only be divided other than equally in accordance with s. 13 of the **Matrimonial Property Act**. …

[36] Section 13 of the *Act* permits an unequal division in circumstances where dividing the assets equally would be unfair or unconscionable, taking into account relevant enumerated factors:

> 13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
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> …
>
> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
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> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
>
> (c) …
>
> (d) the length of time that the spouses have cohabited with each other during their marriage;
>
> (e) the date and manner of acquisition of the assets;
>
> …

[37] As I noted in paragraph 33 the judge referenced *Gagnon v. Gagnon*, 2011 NSSC 486, where the court determined an unequal division of the father's pension was not appropriate. The judge's decision could have been more detailed but I am satisfied his reference to *Gagnon* and to dependence issues, reveals that he followed *Gagnon* because the facts aligned.

[38] The comments the judge made about no diversion of funds from the family or from any matrimonial assets would hold true for most marriages in relation to

pre-cohabitation pension contributions. He then speaks of dependence and support, without making a link in terms of how those factors affect the presumption of equal division of pension benefits acquired both before and during the marriage. Simply put, this pension is *prima facie* a matrimonial asset. The issue remains whether the evidence as a whole justifies an unequal division in favour of the respondent.

[39] The judge erred in law by placing the burden on the appellant to justify an equal division. That error resulted in the judge never addressing the issue as to whether the respondent rebutted the *prima facie* presumption of equal division.

[40] There is nothing in the record that would justify an unequal division in favor of the respondent, for the DND pension earned prior to cohabitation. That portion of the pension shall be divided equally. The respondent shall make a lump sum equalization payment of $35,000 to the appellant, as requested in the appellant's factum. This represents her share of the DND pension.

Conclusion

[41] I would dismiss all grounds of appeal except the issue of division of the respondent's pension earned pre-cohabitation.

Costs

[42] The parties have had divided success and each shall bear their own costs on this appeal.

Scanlan, J.A.

Concurred in:

Wood, C.J.N.S.

Derrick, J.A.