SUPREME COURT OF NOVA SCOTIA
(TRIAL DIVISION)

Citation: *Roosdahl v. Roosdahl* (March 2, 1983), Halifax 1201-24203 (NSSC(TD))

1983 Carswell NS 185
[1983] W.D.F.L. 564
19 ACWS (2d) 395

Date: 1983-03-02
Docket: 1201-24203
Registry: Halifax

Between:

Helen Mae Roosdahl

Petitioner

v.

Kenneth Erling Roosdahl

Respondent

LIBRARY HEADING

Judge: The Honourable Justice J. Doane Hallett

Heard: March 2, 1983

Summary: Equal division of property after 16-year marriage with 2 children (from the wife's earlier marriage). They moved a number of times following the husband's business opportunities. The house is worth $64,000 and the wife would like to keep it. The wife's involvement in the husband's business is not such as to warrant consideration in dividing assets. The business, as a "one-man operation" is exempt from division.

Key words: Family, Matrimonial property, Equal division

Legislation: *Matrimonial Property Act*, S.N.S. 1980, c. 9

CASE NO. VOL. NO. PAGE NO.

HELEN MAE ROOSDAHL (Petitioner) v. KENNETH ERLING ROOSDAHL (Respondent)

1981 No. 1201-24203 HALIFAX, N.S. HALLETT, J.

MATRIMONIAL PROPERTY ACT
DIVORCE

Equal division. No extraordinary circumstances that would make it unfair or unconscionable to make other than an equal division of assets. No large lump sum award under the Divorce Act as the husband has little better security for the future than the wife. Lump sum award of $8,000.00, payable at the time the house is sold, and maintenance at $950.00 a month, giving each of the spouses annual income of approximately $15,000.

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1981 File No. 1201-24203

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

HELEN MAE ROOSDAHL,

Petitioner,

- and -

KENNETH ERLING ROOSDAHL,

Respondent.

HEARD at Halifax, Nova Scotia, before the Honourable Mr. Justice Doane Hallett, Trial Division, on February 9, 1983.

DECISION March 2, 1983.

COUNSEL M. Veniot, Esq., for the petitioner;

M. Ritch, Esq.,)
Ms. A. Paton,) for the respondent.

1981 File No. 1201-24203

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

HELEN MAE ROOSDAHL,

Petitioner,

- and -

KENNETH ERLING ROOSDAHL,

Respondent.

HALLETT, J.:

This case arises from a marriage breakdown. The wife petitioned for divorce and maintenance and joined in her petition an order for a division of assets under the Matrimonial Property Act.

The parties were married on February 17, 1962. They ceased to cohabit in 1978. At the time of the marriage, the petitioner was thirty-one years of age and she had two young children from a previous marriage. The children were in her custody and were brought up as children of the parties. She testified that during the first eleven years of the marriage she did not work and subsequent thereto has held four jobs for very short periods. The respondent throughout the marriage generally operated his own business which was

that of constructing and then renting to contractors chemical toilets for use at various job sites. Mainly because of economic conditions, the parties moved a number of times. They were married in Edmonton, Alberta, and he ran his business there until 1965, when they moved to Richmond, British Columbia. They purchased a home in Richmond and he worked with his brother there until 1968 when they sold the home and moved back to Edmonton where they remained until 1971 when they moved to Nova Scotia. At that time, the business which he had established in Edmonton was sold for $45,000.00. On moving to Nova Scotia, the respondent constructed the matrimonial home. Following the completion of the home, he established a toilet rental business in the Halifax-Dartmouth area. In 1976, the respondent decided he wished to go to British Columbia to buy a pool table rental business with the intention that his wife would move to British Columbia as well following the sale of the home in Nova Scotia. He sold his toilet rental business in the Halifax-Dartmouth area to the petitioner's brother for $53,000.00. He purchased the pool table rental business in British Columbia for $40,000.00. This business was unsuccessful; the matrimonial home in Nova Scotia had not sold and in May or June of 1977 the respondent returned to Nova Scotia with $28,000.00 from the sale of the pool table rental business. In October, he bought a business involving the construction of fireplaces which was unsuccessful. The parties agreed in

1978 that as the economic climate was better in the West, they would move to Winnipeg where the respondent would establish another toilet rental business. The respondent went on ahead to Winnipeg where he took rental accommodations and established business again. As it turned out, the petitioner never joined him in Winnipeg. Apart from Christmas visits to Nova Scotia by the respondent, the parties have lived separate and apart since the respondent's move to Winnipeg. Since separation, the respondent has sent approximately $800.00 a month to the petitioner for the maintenance of herself and to keep up the home. The home is unencumbered so there are no mortgage payments. The petitioner has had two short periods of employment in the Halifax-Dartmouth area since the parties separated but, due to the inflammatory arthritis in her joints and a varicose vein problem in her legs, she is unable to stand for any length of time and has been advised by Dr. Ian Chisholm that standing is not good for her legs. This poses a real problem for the petitioner in seeking employment in that she has only a Grade IX education and about the only type of work for which she would be suitable would be as a sales clerk, which usually involves standing. She had a three month course in typing but has never used it and, even if she did have competency in typing, because of the stiffness in her wrists and fingers, she is not able to type. There are therefore limited employment opportunities open to the

petitioner, particularly in view of the high unemployment rates existing in Canada at the present time. She testified that her hands and feet tend to swell from time to time and that she takes aspirin and tylenol for relief. This is consistent with Dr. Chisholm's report that her joint problems would continue to flare up from time to time. His report shows that she was on anti-inflammatory drugs, although I do not recall her testifying that she is on such drugs at the present time. I am satisfied she does have an arthritic condition that would make work difficult to obtain in the areas in which she has some capability. However, if she could find work such as a receptionist or even work as a sales clerk in a department where she could keep moving as opposed to standing more or less still, she has the capability and her health is sufficiently good that she could undertake such employment if it were available. At the present time, she does housework about three days a month for a neighbour and earns approximately $50.00 a month from this. She also does her own housework in the home, including minor repairs, grass cutting, etc. Although she has problems from her inflammatory arthritis and varicose veins, she can certainly function in the work force and a sedentary type of work that did not involve standing still for long periods of time would be within her range of physical capabilities.

The respondent, since going to Winnipeg, has

earned approximately $25,000.00 per year before income tax, out of which he has paid approximately $10,000.00 a year to his wife for her maintenance and the upkeep of the home, which is in their joint names. The home is located on Lake Major in an attractive setting; it contains three bedrooms, a combination living room - dining room, kitchen, television room and an attached garage. The petitioner lives there with her twenty-five year old daughter who is employed. The respondent is living in a one-bedroom apartment in Winnipeg for which he pays $212.00 a month. The apartment and its amenities are modest by any standard.

The petitioner has testified that the home is in some disrepair. It does not have a basement. There is apparently a water problem in the crawl space which has led to a certain amount of dampness in the home that has caused the nails in the drywall to crack and some of the tape in the drywall to peel. The house is in need of inside and outside painting, the eavestroughs need to be replaced and the fence repaired. Essentially the problems with the house are cosmetic as acknowledged by the petitioner.

The petitioner testified that she would like to have the home transferred to her and that her husband pay her maintenance sufficient to look after her monthly expenses of $1,224.00. The parties have agreed that the home has a value of $64,000.00. Her expenses are based on the assumption

she would continue to live in the home. She plans to obtain a mortgage if the property were conveyed to her, do renovations in the amount of $10,000.00 to $12,000.00 to divide the home into two suites, one of which she would rent to her son-in-law and other daughter. She feels she cannot find any accommodations in the Halifax-Dartmouth area that would be as cheap as this and that she needs security insofar as she has few skills and has the health problem which I have already described. She has not given any serious thought to living in an apartment because she does not like apartments and she feels the rents are too high. She testified that in 1980, in addition to providing the regular maintenance payments, her husband provided her with sufficient funds to buy a car so that in 1980 she received from him a total of $16,085.00. She testified that she could not continue to live on the $800.00 a month he is providing to her.

With respect to the operation of his business, she testified that when they were cohabiting she answered the telephone from time to time, typed invoices and kept track of the names of renters of chemical toilets and the terms of the rentals.

She values the furnishings in the home at $3,000.00 or $4,000.00.

On cross-examination, she testified that one of the major problems in the home is the high cost to heat it, approximately $2,500.00 a year, and that the house was poorly insulated.

The matrimonial furnishings are still in the home as when the respondent left to go to Winnipeg, all he took was his truck, clothes and his tools, plus his motor-cycle.

The petitioner acknowledged in cross-examination that at the time they received an offer in June of 1982 for the purchase of the house at $64,000.00, her husband offered to give her half of the proceeds. She was not prepared to sell at that price. In addition, she could not find what she would deem suitable alternative accommodations.

The respondent testified that he is now forty-eight years of age. He has a Grade VIII education. He was single when he married the petitioner in 1962. She was divorced with two small children. His evidence as to the various moves the family made out West confirmed that of his wife. The money from the sale of the different homes the parties owned went back into the purchase of a new home and the money from the sale of businesses generally went to re-establish a business, with the exception that when they moved to Nova Scotia, the moneys used to construct their home were made up in part from the sale of their

Edmonton home and in part from the sale at a good price of his business in Edmonton. He testified that his wife's involvement in his business when they were living together was minimal as he had an answering service at the time and there were very few calls made and very few records to be kept as his accountant prepared their financial statements; neither he nor his wife being capable of keeping a set of books. He testified that at the present time he has an answering service and has a lady who spends four or five hours a month doing invoices. I am satisfied from the evidence that the involvement by the petitioner in the respondent's business was not such as to warrant any particular consideration in determining a division of assets under the Matrimonial Property Act. Her involvement was very minimal. Essentially, his business was and is a one-man operation. He testified that he left Edmonton to move to Nova Scotia because he felt it was the only way to hold their marriage together as his wife was expressing a desire to go back to Nova Scotia where she was from. He worked on the house through the summer of 1971 with a contractor and in the fall he established the toilet rental business in Nova Scotia under the name of "Johnny-On-The-Spot." He testified that the best year he ever had in business was in 1976 when he earned $24,000.00 after taxes. However, he tired of this business and it was then that he decided to sell it and purchase the pool table rental business in British Columbia. This business was not successful. He did not feel he could re-establish the toilet

rental business in Halifax as it would be unfair to the purchaser who had acquired the business from him. It would appear from the evidence that the respondent knows the toilet rental business as, since going to Winnipeg, he has captured what toilet rental business there is in that city. He testified that when he arrived in Winnipeg, having looked at the situation in several cities in Canada, there were two hundred and fifty to three hundred rental toilets out on construction sites from time to time. This has dwindled to sixty-one, of which he has rented fifty-nine. He builds the portable toilets and then rents them.

He testified that when he had returned from British Columbia with some $22,000.00 to $28,000.00 in May of 1977, he spent about $8,000.00 to acquire the fireplace business, spent $4,400.00 or more in paving the driveway at the home and the balance went in the bank account. When he left Nova Scotia to go to Winnipeg a year or so later, he left his wife with $2,200.00 to look after her for several months and then began to send her regular payments of $800.00 a month.

He testified that he had a good relationship with his two stepdaughters when they were young, although the relationship with the younger of the two stepdaughters deteriorated somewhat when she was in her late teens as he felt she was not making sufficient effort to obtain

employment. This is not a particularly relevant matter. I am satisfied that over the years the respondent has been a very conscientious provider to his wife and to his two stepdaughters. He testified that he had hoped he and his wife might get back together even after they had agreed to separate but, as events turned out, they argued constantly when they did meet from time to time in the subsequent years.

He testified that the value of the furnishings in the matrimonial home of which his wife has the benefit is between $8,000.00 and $10,000.00, which contrasts with her value of $3,000.00 or $4,000.00. I fix the value at $6,000.00.

There was a dispute over the value of the 1977 Granada owned by the petitioner. She testified it is worth $500.00. In the respondent's view it is worth something in the order of $2,000.00. The car is apparently in poor condition. I expect its value would be in the order of $1,200.00.

The respondent is not optimistic with respect to the business outlook for 1983 based on the sales for January and February. Although he has indicated his income has declined in recent years, the decline has not been all that significant.

In 1982, he earned approximately $24,000.00 before taxes, which would give him a net of about $19,000.00, out of which he sent the petitioner $11,200.00 without the benefit of any income tax relief as there was no order of the Court or agreement between the parties that required the payments to be made. It must, of course, be remembered that these funds were not solely for her maintenance but also for the purpose of maintaining the home. Like the petitioner, the respondent has no training and if it were not for his capacity to operate the toilet rental business, his prospects would not be very encouraging. The only other work he has done was as helper in a welding shop. The business he has established in Edmonton since the parties separated is exempt from the definition of matrimonial assets as provided by Section 4(g) of the Matrimonial Property Act. However, it is my opinion it should have been shown on the Statement of Property as required by Section 14(1) of the Matrimonial Property Act, although in view of the disposition I propose to make of this case, it is purely an academic issue.

I am satisfied that the respondent's business is a one-man business that stands or falls on his continued ability to work. The business would have some value, being the amount of its receivables and the value of the inventory, being the rental units on hand, and something for good will. The respondent testified he had about eighty customers at

the present time and in 1982 he paid $908.00 for clerical work. His gross income has not varied significantly from 1979 to 1982, ranging from a low of approximately $52,000.00 to a high of $58,000.00. I have reviewed the respondent's Budget Statement for living expenses and it is reasonable. His before tax income is about $2,000.00 a month, out of which he has to pay his income tax and is paying his wife $800.00 a month. Unlike his wife, he has rent to pay; overall, the budget is reasonable, if not frugal. He has a truck which he uses for his business on which he owes $5,000.00 and pays $190.00 a month. This, of course, would be a business expense. He owes $3,000.00 on his motorcycle. He testified that he does not use his credit cards.

So much for the evidence. I shall now proceed to determine what division of property should be made under the Matrimonial Property Act and then whether maintenance should be awarded and whether a lump sum or periodic maintenance would be appropriate on the facts of this case.

The petitioner has not satisfied me that there should be other than an equal division of matrimonial assets. As stated by Chief Justice MacKeigan in Thomas v. Harwood (1981), 45 N.S.R. (2d) 414, equal division of matrimonial assets is the norm and should only be departed from when the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly unfair and unconscionable on a broad view of all

relevant factors. The evidence discloses that this was a traditional marriage in that the husband worked and his wife stayed at home looking after her children and looking after the normal duties of a homemaker. I have considered the thirteen factors set forth in Section 13 of the Matrimonial Property Act in determining if it would be unfair or unconscionable simply to make an equal division of matrimonial property. While it can be said that the marriage was of some twenty years, that fact alone is not sufficient reason to make an unequal division. There is absolutely nothing in the evidence that would justify other than an equal division of matrimonial assets in this case. The respondent was a very conscientious provider, both while living with the petitioner and while separated. He also took upon himself the responsibility of looking after the stepchildren and he worked diligently throughout the marriage. The contribution by the petitioner was not such that she should be elevated to a position that would require something other than an equal division. It is not to say that she did not make a fair contribution to the marriage; simply that there was nothing that she did that would take this case out of the ordinary, considering the various factors enumerated in Section 13 of the Matrimonial Property Act.

Therefore, there should be an equal division of the matrimonial assets. Those assets are the home and the

furnishings. If the parties cannot work out a rational solution for realizing and distributing these assets, on the application of either of them I will make an order for the sale of the same, either by a public auction or a private sale. One would hope this would not be necessary.

I shall order that the respondent transfer title to the 1977 Granada to the petitioner. The petitioner shall retain her Canada Savings Bond in the amount of $1,000.00. The respondent shall retain the $9,000.00 he has in a savings account. Those funds represent money generated from his business and to the extent of something in excess of $5,000.00 are earmarked for the payment of 1982 income tax.

With respect to maintenance, Section 11 of the Divorce Act provides:

> "11. (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:
>
> (a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either
>
> (i) the wife, and
> (ii) the children of the marriage;
>
> . . ."

Considering the condition, means and circumstances of the parties, it is obvious there will be a requirement for

payment of maintenance to the petitioner. The principal issue is whether it should be lump sum maintenance or periodic maintenance or both. I have decided that this is not a proper case for a large lump sum maintenance award as proposed by the petitioner. Unlike the case of Preston v. Preston (1981), 45 N.S.R. (2d) 496, or Bedgood v. Bedgood (1982), 52 N.S.R. (2d) 42, the respondent does not have any income security. In those cases, the husbands had very satisfactory pension entitlements and the wife, in middle age after a lengthy marriage, had nothing in the way of security. In this case, not only does the petitioning wife not have security, neither has the husband. So long as he can continue to work, it would appear that he will be able to earn a satisfactory living, out of which periodic maintenance can be paid to the petitioner. A large lump sum award would be unreasonable under these circumstances. The petitioner's fortunes were tied to those of her husband throughout the marriage and there is no reason why that situation should materially change. To make the order that she requests that his interest in the matrimonial home be transferred to her is not reasonable, considering the circumstances of the parties. It would mean that he would be stripped of the only real asset he has accumulated throughout the marriage and be left in a position that if his health failed, he would have virtually nothing as the survival of the business depends on his health. This is

not a case where one need be overly concerned that the husband would not make periodic maintenance payments. The evidence shows consistent and conscientious payment of maintenance by the respondent to the petitioner since the parties separated in 1978. There was nothing in the respondent's demeanour that would indicate to me he would not honour his obligations to make maintenance payments on a periodic basis to his wife so long as the same were within his means. There is no reason why the petitioner's fortunes should not be tied to the respondent's continued ability to earn after divorce as they were during their married lives. To do otherwise would be unfair to the respondent as his security position is little better than that of the respondent. There is a great difference between this case and the Preston and Bedgood cases to which I have referred.

I wish to emphasize it is not an appropriate case for a large lump sum maintenance award in view of the fact that the husband is only marginally more secure than the wife, with the possible exception that if the husband were to remarry, her ability to collect maintenance would likely decrease. While a husband's first responsibility is to comply with an existing order for maintenance, the realities of life are such that such amounts are sometimes difficult to collect. A husband should not be heard to say that by remarrying, he no longer has the ability to pay. However,

remarriage carries with it new responsibilities that are coupled with the old. Under the circumstances, it is reasonable to award to the petitioner lump sum maintenance of $8,000.00 to be paid without interest at the time the home is sold.

As to the quantum of periodic maintenance, it will be necessary that each live on the income available. For the time being, it appears that there is little likelihood of the petitioner earning any significant amounts of money. However, she should make every effort to obtain some training and eventual employment. I am satisfied that while she has some discomfort from her arthritis and varicose veins in her legs, there are forms of employment that could be undertaken.

The evidence indicates that the respondent will probably earn about $24,000.00 before taxes in 1983. Applying the criteria set forth in Section 11 of the Divorce Act, I shall order that the respondent pay to the petitioner the sum of $950.00 maintenance per month. She, of course, will have to pay income tax on this and he will obtain income tax relief which he has not had in the past. Unless the petitioner chooses to purchase a home, she will have the income on one-half of the proceeds of the sale of the home less real estate commission, being approximately $30,000.00, plus the $8,000.00 lump sum, for a total of $38,000.00. This is a conservative estimate. Invested in securities carrying

a ten per cent rate of interest would provide the petitioner with an additional $3,800.00 income per year, giving her before tax income of $15,200.00 per year. The respondent's before tax income would be approximately $14,800.00, consisting of investment income of $2,200.00 on $22,000.00, being his half of the house proceeds less the lump sum of $8,000.00, and income from his business, after maintenance payments, of $12,600.00. The parties' taxable income will be about the same. Living in rental accommodations, I am satisfied that each can live on a modest but reasonable standard. The future success of the respondent's business will determine whether this level of maintenance can be maintained or should be increased. On the facts of this case, in my opinion, this is the only reasonable resolution to the maintenance question.

The position taken by the petitioner that she have the full $64,000.00 equity in the matrimonial home while at the same time requiring maintenance in the amount of $1,200.00 a month from her husband was completely unreasonable under all the circumstances, even though she proposed to renovate the house and thus generate some income. Under all the circumstances, the only reasonable living accommodation for either of the parties is an apartment if they wish to live in or near a city. The amount of money available simply does not permit the luxury of an expensive home. When the petitioner says she can live in the home as cheaply as anywhere, she overlooks the fact

that the home is mortgage free and she has the benefit of her husband's interest in the matrimonial home. In addition, it is apparent that the costs of living in that home are high when one considers heat, maintenance, taxes, insurance, snow plowing, etc. I have to wonder how a party can be so far off the mark of reasonableness.

The divorce is granted on the grounds that the parties have been living separate and apart for a period in excess of three years and therefore there has been a breakdown of the marriage.

If the parties can agree on the manner that the assets shall be sold or divided, I will be pleased to sign a consent order. Otherwise, I shall hear such applications as may be necessary to make an order respecting the sale of the property.

In line with the comments made by Mr. Justice Hart in delivering the judgment of the Appeal Division of this Court in Lawrence v. Lawrence, this is an appropriate case where the parties shall bear their own costs.

J.

Halifax, Nova Scotia,
March 2, 1983.

1981 File No. 1201-25203

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

HELEN MAE ROOSDAHL)
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- and -) DECISION OF
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KENNETH ERLING ROOSDAHL) HALLETT, J.