

108 Nfld. & P.E.I.R. 91

English v. English

Newfoundland Supreme Court (Trial Division)

Bartlett J.

Judgment: April 6, 1992

English v. English

Laura Anne English (plaintiff) v. Patrick John English (defendant)

Newfoundland Supreme Court (Trial Division)

Bartlett J.

Judgment: April 6, 1992

Docket: B196/88

Counsel: **David C. Day**, Q.C., for Plaintiff

Roland Brewer, William G. Morrow, Patrick John English in person, for defendant

Bartlett, J.:

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Order After Trial Without A Jury

2 These proceedings for division of matrimonial assets and matrimonial debts under the *Matrimonial Property Act* and for financial corollary relief under the *Divorce Act* having come on for trial before the Honourable Mr. Justice Rupert W. Bartlett at Brigus, Newfoundland, on the 28th day of February 1989, the 8th day of July 1991, and the 6th day of April 1992;

3 And evidence having been adduced and David C. Day, Q.C., of counsel for the plaintiff and petitioner ("the former wife"), and Mr. Roland Brewer of counsel for the defendant and respondent ("the former husband") on the 28th day of February 1989 only and Mr. William G. Morrow of counsel for the former husband for part of the 6th of April 1992 only, having been heard;

4 And Mr. Justice Bartlett having adopted the Trial Argument of David C. Day, Q.C., of counsel for the former wife ("Trial Argument"), attached, except for (a) the submission regarding quantum of financial support claimed for the four children of the marriage, due to reduction in the former husband's income between the second day of trial on the 8th of July 1991 and the third day of trial on the 6th of April 1992 as evidenced by the former husband's affidavit sworn to and, by consent, filed on the 6th of April 1992 in these proceedings and except for (b) the former wife's submission regarding costs (other than matrimonial property appraisal costs) which the former wife withdrew on the 6th of April 1992;

5 And Mr. Justice Bartlett having on the 6th of April 1992 considered the additional arguments made, orally, by David C. Day, Q.C., of counsel for the former wife;

6 And Mr. Justice Bartlett having on the 6th of April 1992 authorized this Order After Trial Without A Jury;

7 It is ordered as follows:

A. The Matrimonial Property Act

First Issue

1. (a) The matrimonial assets to be divided are stated in Table 1B at paragraph 21 [para. 34] of the Trial Argument;

1. (b) The matrimonial debts to be divided are stated in Table 2B at paragraph 21 [para. 34] of Trial Argument;

Second Issue

2. (a) Matrimonial assets shall be divided equally. (Trial Argument, paragraphs 11 to 25 [paras. 19 to 38]).

2. (b) Responsibility for matrimonial debts shall be divided unequally. (Trial Argument, paragraphs 11 to 25 [paras. 19 to 38]).

Third Issue

3. (a) The real property measuring approximately 166 feet by 100 feet by 64 feet by 94 feet by 56 feet by 60 feet and the dwelling house situate on the real property at Job's Cove, Conception Bay, Newfoundland (Exhibit L.E.4) comprises the matrimonial home of the former wife and former husband, of which the former wife and former husband are absolute owners as joint tenants.

3. (b) The former husband may, within 45 days immediately after the 6th of April 1992, which is to say on or before the 21st of May 1992, purchase the former wife's interest in the matrimonial home by paying to her \$15,000, being one-half the sum of the fair market value appraisal of the matrimonial home, immediately following receipt of which sum the former wife will deliver to the former husband an Indenture (of Conveyance) of her interest in the matrimonial home, in registrable form.

3. (c) In the event the former husband does not purchase the former wife's interest in the matrimonial home on or before the 21st of May 1992, the former husband shall on the 22nd of May 1992, and no later, vacate the matrimonial home and the matrimonial home shall, commencing on the 23rd of May 1992, be made saleworthy and sold by the former wife or by servants or agents of the former wife (including although not confined to the Sheriff of Newfoundland) which she is hereby authorized to employ or appoint, for a sum of not less than \$27,000 (being 10 percent below the amount of the fair market value appraisal of the matrimonial home), and the sum for which the matrimonial home is accordingly sold shall be disbursed in the manner and priority following, namely:

(c.1) payment of any municipal or other taxes and assessments owing on the matrimonial home as of the date of its sale;

(c.2) payment of any reasonable costs incurred by the former wife, her servants and agents, to make the matrimonial home saleworthy and (subject to subparagraph 3.(d)(d.4) of this Order) to insure the matrimonial home against fire and other insurable perils from the 6th of April 1992;

(c.3) payment of a real estate commission not exceeding six percent of the sale price of the matrimonial home if an agent, licensed under Newfoundland law to do so, is employed by the former wife to sell and sells the matrimonial home;

(c.4) payment of the reasonable fees and disbursements of the Sheriff of Newfoundland for attempting to sell or of selling the matrimonial home if appointed by the former wife to act as her agent to sell the matrimonial home;

(c.5) payment of the reasonable legal fees and disbursements of the former wife's solicitor who acts on the attempted sale or sale of the matrimonial home;

and

(c.6) payment of one-half of the balance of the price for which the matrimonial home is sold, then remaining, to the former wife and payment of the other one-half of the balance to the former husband after deducting therefrom sums payable by him in accordance with all other provisions of this Order;

3. (d) For purposes of subparagraph 3.(c) of this Order

(d.1) in the event the former husband neglects, refuses, or cannot be located, to execute or furnish an Indenture (of Conveyance) or any other document required to close the sale of the matrimonial home, the former wife may apply for an Order pursuant to rule 49.15 of the **Rules** of the Supreme Court, 1986, which, if granted, shall include a requirement the former husband pay to the former wife her taxed costs of the application and order;

(d.2) in the event the Sheriff of Newfoundland sells the matrimonial home, the Sheriff of Newfoundland shall execute a registrable Indenture (of Conveyance) of the matrimonial home to the purchaser(s) of the home which shall have the effect of conveying to the purchaser(s) all of the legal and beneficial interest of the former wife and of the former husband, jointly and severally, in and to the matrimonial home;

(d.3) if every reasonable effort to sell the matrimonial home for not less than \$27,000 is unsuccessful, the former wife may apply for an Order to sell the matrimonial home for a sum

below \$27,000 and on terms and conditions determined by the court;

(d.4) until the matrimonial home is sold the former husband shall continuously keep adequately insured, weather-tight and otherwise livable, secure, clean and cosmetically presentable, the matrimonial home, at his expense which, upon the sale of the matrimonial home, shall be reimbursed to him only to the extent of one-half the reasonable out-of-pocket cost to him of keeping the matrimonial home adequately insured during the period from the 6th of April 1992 to the date of sale provided, however, that in the event the former husband does not comply in any respect with this provision the former wife may, at the former husband's expense (expense which will be paid by the former wife and forthwith recovered by her from the former husband), employ another person to perform part or all of this provision as determined by the former wife in her discretion.

(Trial Argument, paragraph 30 [para. 43])

4. (a) The former wife and the former husband may, within 45 days immediately after the 6th of April 1992, which is to say up to and including the 21st day of May 1992, divide between them either in specie, or by one party buying the interest of the other party in, or partly in specie and partly by sale, the general household contents.

4. (b) In the event or to the extent the former wife and the former husband do not divide between them the household contents on or before the 21st day of May 1992, the household contents shall be sold by the former wife or by servants or agents of the former wife (including although not confined to the Sheriff of Newfoundland) which she is hereby authorized to employ or appoint, for whatever monetary sum she regards as being reasonable.

4. (c) If appointed by the former wife to attempt to sell and to sell the general household contents, the Sheriff of Newfoundland shall do so by public auction.

4. (d) Whether the general household contents are sold by the former wife or by her servants or agents (including although not confined to the Sheriff of Newfoundland), the proceeds of the sale shall be disbursed in the manner and priority following, namely:

(d.1) payment of the reasonable disbursements of promoting and otherwise preparing for sale and of sale;

(d.2) where sale is made by the Sheriff of Newfoundland or by an auctioneer licensed under Newfoundland law, payment of the reasonable fees and expenses of the Sheriff or of the licensed auctioneer as the case may be;

(d.3) payment of one-half of the balance of the price for which the general household contents are sold, then remaining, to the former wife and payment of the other one-half of the balance to the former husband after deducting therefrom sums payable by him in accordance with all other provisions of this Order;

4. (e) For purposes of subparagraph 4.(b) of this Order

(e.1) in the event the former husband neglects, refuses, or cannot be located, to execute or furnish any document required to close the sale of any of the general household contents, the former wife may apply for an Order pursuant to rule 49.15 of the **Rules** of the Supreme Court, 1986, which, if granted, shall include a requirement the former husband pay to the former wife her taxed costs of the application and order;

(e.2) in the event the Sheriff of Newfoundland sells any of the general house-hold contents, the Sheriff of Newfoundland shall execute a bill of sale of such of the general household contents that he has sold, to the purchaser(s) of such general household contents, which shall have the effect of conveying to the purchaser(s) all of the legal and beneficial interest of the former wife and of the former husband, jointly and severally, in and to such general household contents.

(Trial Argument, paragraph 31 [para. 47])

5. (a) To divide remaining matrimonial assets, the former husband shall pay to the former wife the sum of \$5,190.51; a sum determined as follows:

Owed by former wife to former husband	Asset: Division Value	Owed by former husband to former wife
\$1,654.73	former wife's registered pension plan contributions (and accrued interest): \$3,309.46	
	former husband's registered pension plan "in pay"; wife's share: 35.8% of \$833.84/month	\$2,388.00 (8 months to including November 1991 at \$298.50/month)
	former husband's severance pay; former wife's share: 35.8% of \$12,804.96	\$ 4,584.17
563.39	former wife's Canada Savings Bonds: \$1,126.78 (divisible portion of \$1,303.00)	
929.81	former wife's income tax rebate: \$1,859.62 (divisible portion of \$2,682.85)	
	former husband's income tax rebate: \$48.92 (divisible portion of \$70.57)	\$ 24.46
	occupation rent (September 1987 to November 1991)	6,532.33
\$3,147.93	: totals :	\$13,528.96
Balancing payment required by former husband to former wife:		\$5,190.51

5. (b) The former husband's obligation to pay to the former wife the sum of \$5,190.51 shall be satisfied in the manner following:

(b.1) by setting off against the former husband's obligation to the former wife what would otherwise be the amount of the former wife's obligation to the former husband to divide with him the matrimonial asset consisting of her R.R.S.P. (Trial Argument, paragraph 21 [para. 34], Table 1B) by rollover to the former husband of \$3,296.28, representing one-half the value of the former wife's R.R.S.P. (Trial Argument, paragraph 34 [para. 67]);

(b.2) by the payment of the remainder of the former husband's obligation to the former wife, namely ($\$5,190.51 - \$3,296.28 =$) the sum of \$1,894.23, being secured, until paid, against the former husband's interest in the matrimonial home; payment to be obtained by the former wife from the former husband by (i) adding \$1,894.23 to the sum that the former husband would otherwise pay to the former wife if he purchases her interest in the matrimonial home under subparagraph 3.(b) of this order or by (ii) deducting \$1,894.23 from the sum the former husband would otherwise receive under subparagraph 3.(c)(c.6) of this Order from the sale to a third party of his interest in the matrimonial home or by (iii) execution proceedings.

(Trial Argument, paragraphs 32 to 35, 37 to 39 [paras. 48 to 70, 74 to 77]).

5. (c) The former husband shall pay to the former wife, as occupation rent, for the period from the 1st of December 1991 to and including the 6th of April 1992, the sum of \$128.08 monthly, for a total of \$537.93; the payment of which sum shall be secured, until paid, against the former husband's interest in the matrimonial home; payment to be obtained by the former wife from the former husband by either of the methods prescribed in subparagraph 5.(b)(b.2) of this Order.

(Trial Argument, paragraph 39 [para. 77])

6. (a) The Province of Newfoundland, the former husband, or other legal entity required to do so shall, if and when possible, transfer to or cause to be transferred to the former wife 35.8 percent of all of the former husband's pension rights (including although not confined to any and all rights which crystallize upon the former husband's death); the percentage of 35.8 of all of the former husband's pension rights (including although not confined to any and all rights which crystallize upon the former husband's death) representing

(a.1) the former wife's interest in the former husband's pension rights as a matrimonial asset as defined by the **Matrimonial Property Act**, Statutes of Newfoundland 1979, Chapter 32 as amended

and

(a.2) the former wife's interest in the former husband's pension rights as contemplated by the **Public Service Pensions Act**, 1991, Statutes of Newfoundland 1991, Chapter 12, including section 32 of that **Act**, and as contemplated by predecessor legislation to that **Act**.

6. (b) In the event the Province of Newfoundland, the former husband, and/or other legal entity, as the case may be, declines on a valid legal basis to perform subparagraph 6.(a) of this Order, the former husband and the former husband's estate shall hereby be constituted trustees of the

former wife and the former wife's estate for and shall pay to the former wife or the former wife's estate, as the case may be, when and as payable, the share representing the entitlement of the former wife or the former wife's estate, as the case may be, from all amounts (including but not confined to any and all death benefits) payable on account of the former husband's pension rights in whatever form or circumstances such amounts are payable, for so long as the former husband or the former husband's estate is entitled to any such amounts, as follows:

(b.1) from the payments that would otherwise be made to the former husband in satisfaction of his pension rights from the Province of Newfoundland during and for each of the months of May 1992 and June 1992: the sum of \$298.50 semi-monthly

(b.2) from the payments that would otherwise be made to the former husband in satisfaction of his pension rights from the Province of Newfoundland during and for the month of July 1992: one sum of \$298.50 followed by one sum of \$149.25;

(b.3) from the payments that would otherwise be made to the former husband in satisfaction of his pension rights from the Province of Newfoundland during and for the month of August 1992 and during and for all months after August 1992 in which payments would otherwise be made to the former husband in satisfaction of his pension rights from the Province of Newfoundland: the sum of \$149.25 semi-monthly;

(b.4) 35.8 percent of any cost of living or other equivalent increment on account of the former husband's pension rights;

(b.5) 35.8 percent of any other amounts payable to the former husband on account of the former husband's pension rights;

and

(b.6) 35.8 percent of any amounts payable to the former husband's estate on account of the former husband's pension rights with the intent that (i) all sums payable to and received by the former wife and that all sums payable to and received by the former wife's estate pursuant to this paragraph (that is paragraph 6 of this Order) are net of any and all liability for income tax on the part of the former wife and the former wife's estate and (ii) to the extent sums payable pursuant to this paragraph are quantified in this paragraph, they have been quantified net of all income tax payable on such sums on the basis of the former husband having no taxable income other than on account of the former husband's pension rights from the Province of Newfoundland, whether or not in fact the former husband has any other taxable income, and (iii) to the extent sums payable pursuant to this paragraph are not quantified in this paragraph such sums shall be quantified, by the payer to the former wife of the payments provided for in this paragraph, net of all income tax payable on such sums on the basis of the former husband or the former husband's estate having no taxable income other than on account of the pension rights of the former husband and the former husband's estate from the Province of Newfoundland.

(Trial Argument, paragraph 33 [para. 58])

7. (a) The former wife and the former husband shall equally divide between them any payment on account of a receivable in the amount of \$1,500 owing them by a Job's Cove married couple, forthwith upon receipt of any such payment.

7. (b) The former wife and former husband shall be equally responsible for all reasonable fees and expenses of any proceeding either or both of them take(s) to attempt to recover part or all of the receivable.

(Trial Argument, paragraph 36 [para. 73])

8. The former husband shall pay to the former wife the sum of \$4,200 as reimbursement for matrimonial debts paid by her; the payment of which sum shall be secured, until paid, against the former husband's interest in the matrimonial home; payment to be obtained by the former wife from the former husband by either of the methods prescribed in subparagraph 5.(b)(b.2) of this Order.

(Trial Argument, paragraphs 40 to 45 [paras. 78 to 83])

B. Divorce Act

Fourth Issue

9. The former husband shall pay to the former wife as financial support for the four children of the marriage

(a) in future: monthly, in advance, on the first of each month commencing on the 1st of May 1992, the sum of \$550, varied in respect of future monthly financial support payments as follows:

(a.1) on the 31st of December in each year, the sum the former husband shall pay to the former wife as financial support for the four children of the marriage shall increase or decrease to reflect the then most recently published annual average Consumer Price Index for St. John's as of that date,

and

(a.2) in and for any month that the total of the former husband's gross income from all sources exceeds \$1,200 (which shall be determined by the former wife who is hereby entitled to copies of all salary and other income records of the former husband from any employer of the former husband or other payer of income to the former husband upon the written request of the former wife to the former husband's employer or to other payer of income to the former husband) the sum the former husband shall pay to the former wife

as financial support for the four children of the marriage shall increase by a sum equal to 67 percent of the difference between \$1,200 and the former husband's gross income in any month that exceeds \$1,200, until the increase in the sum paid by the former husband to the former wife as financial support for the four children of the marriage shall reach the sum of \$950 in and for any such month under this subparagraph (that is, subparagraph 9.(a)(a.2) of this Order);

(b) for the period from the 28th of February 1989 when a divorce judgment was granted to the former wife to the 1st of May 1992 when the former husband is obligated by paragraph 9.(a) of this Order to commence making monthly payments to the former wife as financial support for the four children of the marriage: the lump sum of \$4,000; the payment of which sum shall be secured, until paid, against the former husband's interest in the matrimonial home and be obtained by the former wife from the former husband by either of the methods prescribed in subparagraph 5.(b)(b.2) of this Order.

(Trial Argument, paragraphs 46 to 73 [paras. 46 to 126])

Fifth Issue

10. The former wife has leave to apply to have determined her entitlement to financial support for herself and, if she is then determined to be entitled, to have determined the quantum, terms and conditions of her financial support.

(Trial Argument, paragraphs 74 to 77 [paras. 127 to 130])

C. The Matrimonial Property Act/Divorce Act

Sixth Issue

11. The former husband shall pay to the former wife \$90 representing the former husband's contribution of one-half of the \$180 cost of the fair market and rental value appraisals of the matrimonial home paid by the former wife. Otherwise there shall be no order as to costs.

(Trial Argument, paragraphs 78 to 81 [paras. 131 to 134])

Dated at Brigus, Newfoundland, the 21st day of April, 1992.

Pauline Butler

Assistant Deputy Registrar

**Trial Argument By David C. Day, Q.C., Of Counsel For Plaintiff/Petitioner, The Former Wife,
Dated 30 November 1991 Part I - Concise Statement Of Facts**

A. Introduction

8 1. This Trial Argument ("Argument") on behalf of the petitioner and plaintiff, Laura Anne English ("the wife") addresses all issues generated by proceedings she caused to be commenced under the *Divorce Act* and the *Matrimonial Property Act* ("the *M.P. Act*") that have not been previously determined. These issues are (a) child and spousal support and costs in the *Divorce Act* proceeding and (b) division of property and costs (in other words, all issues) in the *M.P. Act* proceeding; founded on pleadings listed in Appendix A at the end of this Argument. (The *M.P. Act* governs the proceeding commenced under that *Act* even though supplanted 1 May 1989 by the *Family Law Act*.)

9 *References: Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.);

10 The *M.P. Act*, S.N. 1979, c. 32, as amended;

11 The *Family Law Act*, S.N. 1988, c. 60, s. 84(b)

B. Basic Facts

12 2. The wife, born 26 October 1953 at St. John's (present age: 38 years) and Patrick John English ("the husband") born 8 February 1949 at Job's Cove, Conception Bay (present age: 42 years) were married 7 June 1974 at Fox Harbour, Placentia Bay, the community where her parents' residence was and is situate. The marriage was the first for each of them.

13 3. They lived together in married cohabitation, first at Corner Brook, then at Black-head in Conception Bay and, from about 1979, at Job's Cove (a village of some 60 families about 12 kilometres south of Old Perlican) in a bungalow built on land then and now owned by the husband's father Richard, who resides in a dwelling on adjacent land with his wife, the husband's mother, Alice.

14 4. Born of the marriage are four children ("the four children"), namely:

(a) Madonna Elizabeth, on 9 December 1975 (present age: 15 years);

(b) Lori Andrea, on 8 August 1977 (14 years);

(c) Michael Richard, on 21 March 1982 (9 years); and

(d) Christopher Carl, on 10 October 1983 (8 years).

15 5. On 10 September 1987, following 13 years and three months cohabitation, the wife permanently separated from the husband ("separation date") when, in company with the four children, she moved from the Job's Cove home into the home of her mother (her husband is deceased) at Fox Harbour (about 24 kilometres north west of Dunville), where she and the four children have since resided. The husband has, since separation date, continued to reside in the Job's Cove home except for periodic stays with his neighbouring parents.

C. Legal Proceedings

16 6. On 31 October 1988 the wife caused *Divorce Act* and the *M.P. Act* proceedings ("the proceedings") to be commenced in this court.

17 7. The proceedings were tried together before Mr. Justice Rupert W. Bartlett ("trial justice") at Brigus on two dates. The dates were:

(a) 28 February 1989 (p.m.), during which he determined the **Divorce Act** issues

(i) of divorce (granted to the wife),

(ii) of legal and physical custody of the four children (granted to the wife),

(iii) of access (denied to the husband),

and

(b) 8 July 1991 (a.m.), following the conclusion of trial evidence on which date he granted to each of the wife and husband ("the parties") leave to file written trial argument.

18 8. A summary of trial of the proceedings is Appendix B at the end of this Argument.

Part II - List Of The Issues

19 9. The issues in the proceedings under the *M.P. Act* and under the *Divorce Act* are as follows:

A. The M.P. Act

(1st) What constitutes the matrimonial assets and debts of the parties?

(2nd) Whether division of matrimonial assets and debts of the parties should be equal or unequal?

(3rd) In what manner and on what terms should division of matrimonial assets and debts be achieved?

B. Divorce Act

(4th) Whether and, if so, what financial support should be paid to or for the four children by the husband?

(5th) Whether and, if so, what financial support should be paid to or for the wife by the husband?

C. The M.P. Act/Divorce Act

(6th) Costs.

20 10(a) Practicality dictates that the issues be considered and determined first under the *M.P. Act* and secondly under the *Divorce Act*. The merit of this approach, held *Fogel v. Fogel*, is that by first dividing marital property the further question of financial support may be more realistically decided taking account of each parties' net worth and income position in the wake of property division.

21 *References: Whelan v. Whelan* (1981), 29 Nfld. & P.E.I.R. 153, 82 A.P.R. 153; 21 R.F.L.(2d) 305 (Nfld. T.D.) per Goodridge, J. (as he then was), at 306 R.F.L.;

22 *Fogel v. Fogel* (1979), 9 R.F.L.(2d) 55 (Ont. C.A.)

23 (b) Specially as relates to periodic pension payments (that the husband in these proceedings is receiving), there have recently been incompatible decisions affecting whether such payments should be divided as property or left to be subsequently considered as income that is relevant to financial support. Pension payments were treated as property, by the Supreme Court of Ontario in *Marsham v. Marsham*; as income, by the Nova Scotia Supreme Court in *Bellemare v. Bellemare*, and as property (without directly considering the merit of characterizing pension payments as income), in *Clarke v. Clarke*, a decision of the Supreme Court of Canada. Moreover, the Ontario High Court decided in several cases, including *Butt v. Butt*, that if a pension was characterized, hence divided, as property, the pension should not be further considered in deciding financial support (in the sense a wife obtaining a share of her husband's pension by property division is precluded from seeking part (or all) of the remainder of the husband's pension retained by him from property division, for the purpose of her financial support).

24 *References: Marsham v. Marsham* (1987), 7 R.F.L.(3d) 1 (Ont. H.C.);

25 [Bellemare v. Bellemare](#) (1990), 98 N.S.R.(2d) 140; [263 A.P.R. 140](#); 28 R.F.L.(3d) 165 (T.D.); *Clarke v. Clarke*, [\[1990\] 2 S.C.R. 795, 113 N.R. 321](#); 101 N.S.R.(2d) 1; [275 A.P.R. 1](#); 28 R.F.L.(3d) 113; 73 D.L.R.(4th) 1;

26 *Butt v. Butt* (1989), 22 R.F.L.(3d) 415 (Ont. H.C.).

27 (c) Relying upon the principles expressed in *Whalen*, *Marsham*, and *Fogel*, the wife submits the only pragmatic approach (absent any extraordinary circumstances in this proceeding that may warrant alternative approaches to the question) is, to first of all (*Whalen*), divide the husband's pension receipts between him and his wife as property (*Marsham*), then consider the resulting pension shares of husband and wife in assessing financial support (*Fogel*).

Part III - Argument

A. The M.P. Act

First Issue

28 11. Stated: What constitutes the matrimonial assets and debts of the parties?

29 12. Law:

30 (a) The term "matrimonial assets", defined by the *M.P. Act*, includes property acquired by either or both spouses from date of marriage to date of separation, other than property that on one or another legal basis does not qualify as a matrimonial asset (for example, a gift to one spouse from a third party or the personal effects of either spouse).

31 *References:* Sections 5, 16(1)(b), 16(2), 16(3), 18(b), 18(c)

32 (b) "Matrimonial debts", although not expressly defined by the *M.P. Act*, are by virtue of judicial interpretation subject to division concurrently with matrimonial assets whether or not the matrimonial debts are attributable to particular matrimonial assets. As a general rule matrimonial debts are those incurred by either or both spouses from date of marriage to separation date subject to certain exceptions. For example, matrimonial debts do not ordinarily include debts related to a business interest of either spouse.

33 *References:* *Kieley v. Kieley* (1982), 38 Nfld. & P.E.I.R. 33, 108 A.P.R. 33 (Nfld. T.D.);

34 *Snook v. Snook*, Nfld. U.F.C. 1981, No. F/81/234, 31 March 1982

35 13. Evidence: The starting point for identification of matrimonial assets is the property owned by, or the interest in property other than ownership held by, either or both of the parties on separation date, listed in Table 1A next following.

Table 1A

Property Or Property Interests Of Either Or Both Of The Parties On 10 September 1987

Property	References in pleadings, exhibits
Land	
(a) one parcel real property with dwelling house, situate Job's Cove, Nf.	Wife's s. 22 statement, page 6 Wife's Brief For Trial Judge, page 12 Exhibit L.E.4
General household contents	
(b) in dwelling house, Job's Cove, Nf.	Wife's s. 22 statement, page 6 Wife's Brief For Trial Judge, page 13
Vehicles	
(c) 1984 Ford Bronco II	Wife's s. 22 statement, page 6 Wife's Brief For Trial Judge, page 13
(d) 1986 Ford Escort	Wife's s. 22 statement, page 6 Wife's Brief For Trial Judge, page 13
Savings and Saving Plans	
(e) Canada Pension Plans	

(e.1) wife	Wife's Brief For Trial Judge, page 14
(e.2) husband	Wife's Brief For Trial Judge, page 14
(f) Registered Pension Plans	
(f.1) wife	Wife's Brief For Trial Judge, page 14
(f.2) husband	Exhibit L.E.7 Wife's Brief For Trial Judge, page 15
(g) Registered Retirement Savings Plan	Wife's Brief For Trial Judge, page 14
(wife)	Exhibit L.E.8
Securities	
(h) Canada Savings Bonds (wife)	Wife's Brief For Trial Judge, page 16
Receivable	
(i) From James and Elizabeth Clarke, Job's Cove, Nf.	Wife's s. 22 statement, page 8 Wife's Brief For Trial Judge, page 17
Other	
(j) Chattels personal (personal effects)	
(j.1) wife	Wife's Brief For Trial Judge, page 18
(j.2) husband	Wife's Brief For Trial Judge, page 18
(k) Income tax refunds	
(k.1) wife	Wife's Brief For Trial Judge, page 18 Exhibit L.E.11
(k.2) husband	Wife's Brief For Trial Judge, page 18 Exhibit L.E.12
(j) Occupation rent (wife)	Wife's Brief For Trial Judge, page 18 Exhibit L.E.5

36 14. Debts owing on separation date that were incurred from date of marriage to separation date by either or both of the parties and not excluded on one or another basis are their matrimonial debts, listed in Table 2A next following.

Table 2A	
Debts Owning By Either Or Both Of The Parties On 10 September 1987	References in pleadings, exhibits
Debts	
Long-term	
(a) To Canadian Imperial Bank of Commerce Carbonear, Nf.	Wife's s. 22 statement, page 9 Wife's Brief For Trial Judge, page 19
(b) Ford Credit Canada Ltd.	Wife's s. 22 statement, page 9 Wife's Brief For Trial Judge, page 19
Short-term	
(c) Sears Canada Inc.	Wife's Brief For Trial Judge, page 19
(d) Woolco	Wife's Brief For Trial Judge, page 19

37 15. Argument: Regarding Table 1A:

38 (a) Certain property items are, by the parties' agreement as expressed in their trial testimony, withdrawn from the trial justice's consideration; namely:

(a.1) item (c), the 1984 Ford Bronco II and

(a.2) item (d), the 1986 Ford Escort;

39 *References*: If the unwritten mutual decision of the parties to exclude certain property from the trial justice's consideration in the *M.P. Act* proceeding is an agreement that must comply with s. 35 of the *M.P. Act* to be valid, the parties have not attacked the agreement's validity on the ground of noncompliance with s. 35 of the *Act*.

40 (b) Certain other property items do not qualify under the *M.P. Act* as matrimonial assets, namely:

(b.1) item (j.1), wife's chattels personal (personal effects), and

(b.2) item (j.2), husband's chattels personal (personal effects);

41 *Reference*: The *M.P. Act*, s. 16(1)(b)(iii)

42 (c) Certain other property items are, by operation of paramount federal legislation which affords a mechanism for their division between spouses and former spouses, excepted from consideration by the trial justice; namely:

(c.1) item (e.1) wife's Canada Pension Plan, and

(c.2) item (e.2) husband's Canada Pension Plan.

43 *Reference*: Canada Pension Plan, R.S.C. 1985, c. C-8, ss. 55, 55.1 and 55.2 (en. by: R.S.C. 1985 (2nd Supp.), c. 30, ss. 22 and 23)

44 (d) The remaining property items (in Table 1A), the wife submits, comprise the matrimonial assets to be divided between the parties; two of which here require specific attention; namely: property item (f.2), the husband's Registered Pension Plan, the statutory description of his pension plan in the *Income Tax Act* (Canada) (at paragraphs 16 to 19 [paras. 28 to 32] below) and property item (1), occupation rent (at paragraph 20 [para. 33] below).

45 16. Reference the husband's Registered Pension Plan, the husband was as of 1 April 1989 declared redundant by his employer, consequence of which his employment salary and collateral employment benefits (for example, health care assistance) were supplanted by pension payments and collateral retirement benefits. Due to this development property item (f.1), the husband's Registered Pension Plan, was replaced by (a) semi-monthly pension payments (pertinent to property division in the *M.P. Act* proceeding in this section of the Argument and to financial support in the *Divorce Act* proceeding addressed in section B of the Argument) and collateral retirement benefits as warranted (for example,

certain health care assistance) and (b) a one-time lump sum payment ("the lump sum") pertinent to the *M.P. Act* proceeding; the aspect of the husband's Registered Pension Plan that here requires attention.

46 17. The wife submits that the lump sum payment is a matrimonial asset. Whether that is so requires special attention because, the wife acknowledges, property of this nature, unlike the other property items she submits to be matrimonial assets in this proceeding, has in principle been taxed by some judicial controversy.

47 18. The law applicable to the controversy is, in the wife's view, correctly summarized by Professor James G. McLeod, Faculty of Law, University of Western Ontario (editor of Reports of Family Law):

Either a severance payment is true remuneration for future lost wages or it is remuneration for past efforts payable on termination of employment. In the former case, none of the severance payment should be shareable whereas in the latter a '**George**' [(1983), 35 R.F.L.(2d) 225 (Man. C.A.)] or '**Rutherford**' [(1980), 14 R.F.L.(2d) 41 (B.C.T.D.), affirmed (1981), 23 R.F.L.(2d) 337 with supplementary reasons (1981), 44 B.C.L.R. 279 (B.C.C.A.)] formulation should be adopted to determine the shareable proportion.

The nature and circumstances of the payment in a particular proceeding determines whether or not the payment is eligible for division as a matrimonial asset.

48 *Reference*: Annotation to *Jering v. Jering* (1987), 7 R.F.L.(3d) 42 (Man. Q.B. [Fam. Div.]) 43 at 44 and authorities mentioned in the Annotation;

49 see also: Pask, E. Diane and Hass, Cheryl A. *Division of Pensions* (Carswell, Toronto, 1990) at II-5 to II-18.

50 19.1 The wife submits, on strength of the two pertinent exhibits - L.E.9 and L.E.10, the lump sum payment received by the husband constitutes remuneration for past efforts rather than future loss of wages. Hence the lump sum payment is a matrimonial asset divisible between the parties to the extent the husband's past efforts took place during the period from the parties' date of marriage to separation date. The wife's reasons for this submission are twofold:

(a) First, the provision of paragraph 4 of the "Employment Priority Policy" (Exhibit L.E.9) that contemplates situations in which a person whose employment position was rendered redundant by virtue of the Province's economic retrenchment will qualify for "redundancy pay in lieu of notice", a form of remuneration for future lost wages, is inapplicable to the husband. This is because paragraph 4 of the same policy further provides that

[w]here an employee is eligible to receive severance pay, the notice period and/or the amount of pay in lieu of notice shall be reduced accordingly.

Moreover, the husband did not receive any redundancy pay and neither the testimony of Samuel King as an employee of the Trinity-Conception Regional Health Board that paid the husband's

salary when he was employed, nor the documentary exhibits tendered in evidence from Mr. King indicate any entitlement of the husband to redundancy pay. Rather, the husband was one of the employees that, as contemplated by paragraph 4 of the policy, was entitled to severance pay.

(b) Secondly, the husband qualified for severance pay because his job was rendered redundant after nine or more years employment; in fact (per Exhibit S.K.2, sixth page) the husband was employed for about fourteen-and-a-half years. The severance pay is, in such circumstances, authorized by the Nurses' Collective Agreement (Exhibit L.E.10, article 42.01 at page 67 of the Agreement) and is calculated on the basis of past service (one week's salary for each year of continuous employment). Furthermore, the Agreement provides, severance is payable to both living former employees and the estates of deceased former employees. The entitlement of estates of deceased former employees to severance pay compellingly indicates, in the wife's submission, that the pay is intended to remunerate for past service rather than future lost wages.

51 19.2 As to the supplementary issue whether a lump sum employment termination payment, although characterized as a matrimonial asset, is nonetheless exempt from division where, as in these proceedings, the payment was not owed and hence not made to the husband until some time (April 1991) after he and his wife permanently separated (September 1987), the decision of Bateman, L.J.S.C., in *Bellemare v. Bellemare* is apposite. Having first noted the fact the severance payment there under scrutiny "has actually been received by the husband and is not simply a contingent future right", she writes:

Counsel for the husband attempted to exclude the severance pay from consideration on the basis that it was received after the date of separation; however, I find that the entitlement of the severance pay was acquired during the marriage...

(Likewise germane to these proceedings is Bateman, L.J.S.C.'s, further point in *Bellemare* that "I do not attempt to determine the classification of a future [as opposed to a realized] entitlement to severance pay".)

52 *Reference: Bellemare v. Bellemare* (1990), 98 N.S.R.(2d) 140; 263 A.P.R. 140; 28 R.F.L.(3d) 165 (T.D.), at 172 R.F.L.:

53 20. Reference occupation rent that, in principle, the husband testified he was prepared to pay the wife, the *M.P. Act* in effect (although not expressly) contemplates exercise of judicial discretion to order one spouse (or former spouse, as the case may be) to pay the other a sum as occupation rent where circumstances obtain such as in *Elliott v. Elliott*, whether or not such relief is specifically pleaded. Occupation rent represents one-half the net-of-expenses (for example, taxes, insurance, repairs, mortgage instalments) rental value of a matrimonial home.

54 *References: As to circumstances justifying, and the formula for quantifying, occupation rent, see: Elliott v. Elliott* (1985), 56 Nfld. & P.E.I.R. 110, 168 A.P.R. 110; 48 R.F.L.(2d) 407 (Nfld. U.F.C.), per Cameron, J., at 409 to 411;

55 As to the exercise of jurisdiction to make an order for occupation rent where a claim for such rent

was not specifically pleaded, see: *Moss v. Moss* (1986), 5 R.F.L.(3d) 62 (Nfld. U.F.C.), per Cameron, J., at 68 to 69.

56 21. Submission: For purposes of the *M.P. Act* proceeding the wife therefore submits the parties' matrimonial assets are listed in Table 1B and their matrimonial debts are listed in Table 2B below.

57 [Tables set out on following page]

Second Issue

58 22. Stated: Whether division of matrimonial assets and debts of the parties should be equal or unequal?

59 23. Law: Division proceeds from the statutory presumption that matrimonial assets and debts are divided equally (reflecting section 17, the relevant purpose provision of

Table 1B Matrimonial Assets	Table 2B Matrimonial debts
Land	Long-term
(a) one parcel real property with dwelling house, situate Job's Cove, Nf.	(a) To Canadian Imperial Bank of Commerce, Carbonear, Nf.
General household contents	(b) Ford Credit Canada Ltd.
(b) in dwelling house, Job's Cove, Nf.	Short-term
Savings and Saving Plans	(c) Sears Canada Inc.
(f) Registered Pension Plans	(d) Woolco
(f.1) wife	
(f.2) husband	
(g) Registered Retirement Savings Plan (wife)	
Securities	
(h) Canada Savings Bonds (wife)	
Receivable	
(i) From James and Elizabeth Clarke, Job's Cove, Nf.	
Other	
(k) Income tax refunds	
(k.1) wife	
(k.2) husband	
(j) Occupation rent (wife)	

60 the *M.P. Act*) unless to divide equally, rather than unequally, "would be grossly unjust or unconscionable" taking into account one, some or all of the eleven groups of factors in section 20 of the *Act*.

61 *References*: The *M.P. Act*, ss. 19(1), 20;

62 *Harding v. Harding*, Nfld. U.F.C., 1982, No. F/82/355, 29 August 1983 (unreported)

63 24. Argument: Although there is some evidence probative of several of the groups of section 20

factors under the *M.P. Act*, the weight of that evidence is not such as justifies unequal division of matrimonial assets. For reasons stated in paragraph 45 [para. 83] below, however, the evidence supports unequal division of matrimonial debts.

64 25. Submission: Matrimonial assets should be equally divided and matrimonial debts unequally divided between wife and husband.

Third Issue

65 26. Stated: In what manner and on what terms should division of matrimonial assets and debts be achieved?

66 27. Law: Occurrence of one of four events - in this proceeding, the filing of a divorce petition - entitles either spouse to apply to have a Supreme Court justice divide the spouses' matrimonial assets (and/or debts) either equally under s. 19(1) of the *M.P. Act* or unequally under s. 20 of the *Act*. Section 24 of the *M.P. Act* affords the court structured discretion to determine the manner and terms of division.

67 28. Argument: The manner and terms of division of assets (and debts) will turn on the circumstances of the particular proceeding: such as the nature and location of the asset; spousal wishes, and income tax implications. Depending on the circumstances an order may, for example, be made that an asset be retained by one spouse or be divided in specie or that an asset be sold and its sale proceeds divided.

68 29. The wife's position on manner and terms of division follows in the order the assets are listed in Table 1B (paragraph 21 [para. 34], above).

69 30. Table 1B(a) Land - one parcel real property, with dwelling house, Job's Cove, Nf.:

70 (30.1) From about 1979 until separation date this was the parties' matrimonial home and is now their single most valuable material asset; the fair market value of the unencumbered home, based on a 26 April 1989 appraisal (Exhibit L.E.4), being \$30,000. Given the nature and locale of the home and the lethargic Newfoundland economy in recent years, particularly in some rural areas such as Job's Cove, the home is unlikely to have materially altered in value during the two-and-a-half years since appraisal.

71 (30.2) Choosing from the usual judicial resorts of ordering one spouse to buy out the other's half interest or of sale with equal division of net-of-sale expense proceeds is here complicated by the circumstance the dwelling house, the result of the efforts of both spouses, is situated on real property legally owned by the husband's parents when and since the house was built. According to the statement to the trial justice by the husband's counsel at commencement of the trial and the husband's trial testimony, not to mention the first page of his Exhibit P.J.E.2, (a) that parcel of real property was to have been conveyed to the husband and wife by the husband's parents in the expectation the property would become the marital residence of the husband, his wife and their children and (b) the omission to do so up to trial commencement would be rectified by the husband. The wife authorizes me as her solicitor to represent that the conveyance to husband and wife from the husband's parents of the parents' legal interest in the property has not to date (30 November 1991) materialized.

72 (30.3) Perhaps the most practical recourse in such circumstances is that prescribed by Mahoney, J. (as he then was), in *Smith v. Smith*. On facts similar to those here, *Smith v. Smith* decided that ownership by either (or both) spouses of the real property with dwelling house, one of the requirements under s. 4(1) of the *M.P. Act* of the definition of a matrimonial home (that in event of, for example, marital separation becomes a matrimonial asset), may be satisfied by either or both of the spouses having an interest in the property other than ownership evidenced by title deed. The decision does not define the legal standards which must be satisfied to qualify a spouse for an interest in the property other than that involving title by deed. However, the fact that one spouse (the defendant husband) in that case had contributed upwards of half the labour and some savings to construction of the dwelling house on his father's real property was regarded as sufficient to qualify him as owner of a one-half interest in the house and land (hence entitling his wife to a one-quarter interest). The contribution of industry and savings of both spouses in this proceeding warrants finding the interest of the wife and husband in the Job's Cove property, to be equally divided between them, is 100 percent of the appraised value of land and dwelling (namely, \$30,000). As the wife submitted above (paragraph 25 [para. 38]) that all matrimonial assets including the matrimonial home should be equally divided, there remains to be addressed, respecting the home, the manner and terms of its equal division.

73 Reference: *Smith v. Smith* (1982), 38 Nfld. & P.E.I.R. 75, 108 A.P.R. 75; 28 R.F.L.(2d) 263 (Nfld. T.D.)

74 (30.4) Having re-established, from Job's Cove to Fox Harbour, the place of residence of the four children of the marriage and herself, commencing September 1987, the wife authorizes me represent that she does not wish to purchase the husband's half interest in the home; however, is agreeable to an order that affords the husband an opportunity to purchase her interest (a recourse, he testified, he found attractive) and further provides, should the husband be unable or decline to purchase, that the home be sold. The provisions of such an order are stated at paragraph 84 below in Part IV of this Argument.

75 31. Table 1B(b) - General household contents - in dwelling house, Job's Cove, Nf.: The contents have remained in the matrimonial home from separation date to present. They are listed in Schedule "A" to the wife's statement under section 22 of the *M.P. Act*. As of the date of the statement - 21 October 1988 - she ascribed an estimated value to them of \$9,160. Their value, if reasonably accurate, is relevant only if the parties agree to equally divide the contents in specie, in which event value assists them ensure each receives specie of or approximately of equal value. Neither party testified to any desire to specie divide the contents. The wife therefore proposes an order that unless the parties agree as to contents division - in specie or by one purchasing the interest of the other or by a combination of both - the contents be sold. The provisions of such an order are stated at paragraph 85 below in Part IV of this Argument.

76 32. Table 1B(f.1) Registered Pension Plans (wife)

77 (32.1) A short resume of the wife's employment history is here pertinent to considering division of this matrimonial asset, and another: (g) Registered Retirement Pension Plan (wife) addressed below in paragraph 34 [para. 67].

78 (32.2) The wife's pensionable employment (that is, pensionable employment authorized by Newfoundland legislation) began 30 January 1984 (Exhibit L.E.7) at the Carbonear hospital, a hospital operating under the aegis of Trinity-Conception Regional Health Board. Permanent separation in September 1987, which prompted the wife and four children to move from Job's Cove to Fox Harbour, resulted in the wife resigning from the Carbonear hospital on 25 September 1987 and taking other, likewise pensionable, employment (under the same plan to which she contributed while employed at the Carbonear hospital) as follows:

October 1987 to May 1988	hospital in Clarenville as nursing supervisor (full-time) and, concurrently, senior citizen's home in Placentia as registered nurse (part-time)
May 1988 to April 1989	senior citizen's home in Placentia as registered nurse (part-time) and, concurrently, hospital in Placentia as registered nurse (part-time)
April 1989 to September 1990	hospital in Placentia as nursing supervisor (full-time)
October 1990 to date	Newhook Medical Clinic in Whitbourne as Director of Nursing (full-time) responsible for 40 full- or part-time staff, weekdays from about 8 a.m. to 6 p.m.

79 (32.3) One of the benefits of the wife's pensionable employment has been accumulating contributory pension entitlement under the Province-administered plan. The wife's entitlement under the plan as of separation date, being the date as of which matrimonial assets are identified for division, was not to a pension *in futuro* upon retirement (or early retirement) because for that the wife had not yet accumulated sufficient pensionable employment (that is, service) under the plan. Rather, she was entitled, as of separation date, 10 September 1987, to her contributions plus five percent compounded interest; a total of \$4,741.34, gross (Exhibit L.E.7).

80 (32.4) Whether this is the value of the wife's pension entitlement for division purposes depends upon resolution of the question: Should the gross value of the wife's pension entitlement be discounted for contingent income tax liability and, if so, by what amount? Exhibit L.E.7, which states the gross value of the wife's pension entitlement (that is, her contributions plus interest) to be \$4,741.34, further states "Less Income Tax @ 20 percent \$948.27". Revenue Canada requires 20 percent to be deducted from pension contributions refunded to her as an employee, irrespective of the income tax (more or less) for which the employee may in fact be ultimately liable. In the ordinary course, the refund of pension contributions (with or without accrued interest) would attract some income tax liability because the contributions when made were tax deductible.

81 (32.5) Had the wife obtained a refund of her pension contributions including interest, her precise income tax liability on the refund could be determined, namely the extra sum of income tax triggered by the wife's receipt of additional income consisting of the refund. That not having occurred, the trial justice is left to speculate as to what the wife will in future realize as a result of her contributions to the plan up to separation date and, hence, her future income tax liability on what she realizes.

82 (32.6) For example, should the wife, while eligible to do so in future, draw down her pension contributions, the rate (or rates) of her income tax exposure on that transaction will in all likelihood be greater than should her pension contributions become vested and locked in and thus ultimately be received by her as periodic pension payments. And in either event, the total of her other taxable income will also influence the rate (or rates) of income tax payable on her pension contributions or her periodic pension payments, as the case may be. Prediction of the rate (or rates) of income tax attracted by either event has been rendered less difficult since reduction of the tax brackets or bands from 10 to 3 (for 1988 and subsequent years). The future amount of the percentage in each bracket remains, however, uncertain (except to the extent that the percentages are likely to increase).

83 *Reference:* Pask, E. Diane and Hass, Cheryl F. *Division of Pensions* (Carswell, Toronto, 1990) at pages X-30, X-32

84 (32.7) Disparate have been judicial approaches throughout Canada to the questions of whether and, if so, the extent to which income tax influences the value of matrimonial assets.

85 *Reference:* See, for example, the comprehensive and exquisitely-summarized review of judicial approaches in: Pask, E. Diane and Hass, Cheryl F. *Division of Pensions* (Carswell, Toronto, 1990) at pages X-8 to X-10; X-18 to X-28

86 (32.8) Compounding the complexity of this question is the silence of the *M.P. Act* as to appropriate valuation date and methodology.

87 (32.9) Considering, however, that property acquired during marriage by either or both spouses up to separation date comprises (with certain exceptions) matrimonial assets subject to division, the value of the assets should, as a general rule, be determined as of separation date. The wife's pension contributions and accrued interest during the marriage until separation date in 1987 being \$4,741.34 (Exhibit L.E.7), the wife's income tax for her 1987 taxation year on her pension contributions and accrued interest if refunded to her and added to her other taxable income in that year, would have been 30.2210 percent (say 30.2%) on the entire amount of the refund, that is:

$$\$4,741.34 \times 30.2\% = \$1,431.88;$$

thereby reducing the value of the refund, for division purposes, from \$4,741.34 to \$3,309.46; one-half being \$1,654.73.

88 (32.10) The wife submits the trial justice should value her pension contributions in this manner

(admittedly an imperfect approach for division purposes) notwithstanding her present resolve to continue her pensionable employment rather than seek a refund of her pension contributions. The reason? Any other approach to valuation of this asset for division purposes would involve substantial speculation and a larger measure of arbitrariness than implicit in the approach to valuation here submitted by the wife. Thus, the wife should pay the husband, to equally divide her registered savings plan, the sum of \$1,654.73.

89 33. Table 1B(f.2) Registered Pension Plans - husband

90 (33.1) The husband had during the marriage contributed to the same type of pension plan as the wife. (There was, in fact, a period when both husband and wife were employed at the same place, the Carbonear hospital, and contributing to identical pension plans.) By the parties' separation date, however, the husband's pension plan was vested and locked in (although not yet "in pay" as the husband was not then yet eligible to "go to pension"). As his employment position was as of 31 March 1991, some three-and-one-half years after separation date, declared redundant he then

(a) began receiving a pension, payable semi-monthly for life (paragraphs (33.2) to (33.6) [paras. 59 to 65], below)

and

(b) received a one-time lump sum severance payment (paragraph (33.7) [para. 66], below).

91 (33.2) Regarding the husband's pension, granted there is case law in several Canadian provinces, including Newfoundland, that authorizes division of a spouse's pension entitlement by payment from owner to nonowner of pension entitlement of a lump sum by virtue of a complex capitalization process. Furthermore, Newfoundland courts and those of some other provinces have also offered the nonowner spouse a choice between receiving a capitalized sum representing his or her interest in the pension entitlement of the owner spouse or receiving his or her interest if and when (for example, semi-monthly) received. If however, at separation or, as here, by the date a trial justice is determining pension division sometime after separation, a spouse's pension is or is about to be "in pay" the only sensible manner of dividing the pension or portion of the pension that is an asset is when paid. That is the manner of division of the husband's pension that the wife here proposes.

92 *References: Yeo v. Yeo* (1986), 61 Nfld. & P.E.I.R. 313, 185 A.P.R. 313 (Nfld. U.F.C.);

93 *Grainger v. Grainger* (1985), 39 Sask. R. 294 (Q.B.), affd. 54 Sask.R. 10; 6 R.F.L.(3d) 175 (C.A.);

94 Pension to be paid if and when received: *Ridler v. Ridler* (1984), 51 Nfld. & P.E.I.R. 19, 150 A.P.R. 19 (Nfld. U.F.C.);

95 Pension to be paid either as capitalized or if and when received, at option of non-owner spouse; *Peckford v. Peckford* (No. 2) (1985), 54 Nfld. & P.E.I.R. 336, 160 A.P.R. 336 (Nfld. U.F.C.).

96 (33.3) Moreover, if and when the husband, the Province of Newfoundland or other legal entity

responsible for so doing is willing or legally compelled to do so, the legal entity should transfer credit for and pay directly to the wife the portion of the husband's pension to which the wife, by virtue of division, is entitled. In the event of the death of the husband or wife, an order in the terms made by Cameron, J., in *Hiscock v. Hiscock* is appropriate.

97 *References*: As to the legal authority for requiring the transfer of credit for and payment directly to the wife of her share of her husband's pension, see: The *Public Service Pensions Act*, 1991, S.N. 1991, c. 12 (yet to be proclaimed in force), espy. s. 32 and regulations referred to in s. 32(4) (yet to be promulgated). Pending proclamation of this *Act* and promulgation of regulations under the *Act*, the Province may, although is not obligated to, transfer credit for and pay directly to the wife the portion of the husband's pension to which the wife by virtue of division in these proceedings, becomes entitled.

98 *Hiscock v. Hiscock* (1985), 72 Nfld. & P.E.I.R. 40, 223 A.P.R. 40 (Nfld. U.F.C.) at para. 7.

99 (33.4) Although the husband's pension, in principle, is a matrimonial asset, only that portion earned from date of marriage to date of separation of the parties is ordinarily liable to be divided between them. The husband's pension entitlement was earned from 11 September 1972 to 31 March 1991 - a period of 18 years, 6 months. The portion of that period during which the parties were married up to separation date was from 7 June 1974 (date of marriage) to 10 September 1987 (separation date) - a period of 13 years, 3 months. Therefore the percentage share of the wife or of the wife's estate, as the case may be, of each of the husband's fortnightly pension payments is:

50% (13 years, 3 months)

(18 years, 6 months) = 35.8% of whatever the husband receives semi-monthly under his indexed pension plan (including increases due to indexing), commencing April 1991.

She should be entitled to a like percentage of any periodic or lump sums payable on account of the husband's pension plan in the event of his death.

100 *References*: Exhibit S.K.2, last page;

101 As to approach, see for example *Grainger v. Grainger* (1985), 39 Sask.R. 294 (Q.B.), affd. 54 Sask.R. 10; 6 R.F.L.(3d) 175 (C.A.).

102 (33.5) Because the semi-monthly pension payments received by the husband represent taxable income, income tax considerations again arise.

103 (a) First, the quantum of the wife's entitlement to the husband's pension is 35.8 percent of the net-of-income tax pension payments received by the husband. Based on a gross annual pension of \$13,487.78, "in pay" commencing April 1991 (Exhibit S.K.2, last page), his net-of-income tax payments, monthly, assuming no cost-of-living or other increment in calendar 1991, is calculated by the wife to be (using 1990 rates, the most recent available):

\$13,487.78 (pension benefit/year, gross)

- 1,218.73 (income tax credits)

= \$12,269.05 (taxable income, upon which
income tax payable);
= 2,085.00 (federal tax)
+ 104.00 (federal surtax)
+ 1,292.70 (Newfoundland tax)
3,481.70 (total income tax);
13,487.78 (pension benefits/year, gross)
- 3,481.70 (total income tax);

= 10,006.08 (pension benefits/year, net of
income tax);

or 416.92/semi-monthly to husband (net of income tax);

and 149.25/semi-monthly to wife (as her 35.8% share)

104 (b) Second, if in future the husband's earnings from occasional (as presently) or permanent post-redundancy employment when added to his pension income raise part of his total income from the lowest (17%) to one of the two higher (26% or 29%) income tax brackets, consideration is due the following question: should the divisible portion of the husband's pension income be liable to a higher income tax rate, thus reducing the amount of the wife's share of that income? The wife submits such should not occur. Her reason? Neither the wife nor any of the four children is presently receiving any benefit - such as periodic financial support - from the husband's occasional income. Until that happens the wife should not suffer reduction in the quantum of her share of the husband's pension income just because the husband is earning other income solely for his benefit. (In 1990, taxable income of \$28,275 or less attracted 17% federal income tax; beyond \$28,275 attracted 26%, and beyond \$56,550, attracted 29%.) On the other hand, should the husband commence paying periodic financial support and thus become eligible for income tax reducing deductions, perhaps increasing the after-tax portion of his pension benefit, that deserves consideration in Part B of this Argument respecting support.

105 (33.6) The total after-tax arrears owing from April 1991 to date (November 1991) by husband to wife for her share of the husband's fortnightly pension income (calculated as a monthly sum of \$298.50 for present purpose) is:

8 months x \$298.50/month = \$2,388.00.

106 (33.7) The other benefit triggered by the husband's employment being declared redundant, namely the one-time lump sum severance payment, is divisible in accordance with the same formula as the husband's fortnightly pension income (paragraph (33.4) [para. 61], above), without regard however for income tax (for the reasons submitted in paragraph 34 [para. 67] below). Therefore the amount of the wife's share of the husband's severance pay is:

50% (13 years, 3 months) x (18 years, 6 months) \$12,804.96 (Exhibit S.K.2, 6th page) = 35.8% x \$12,804.96 = \$4,584.17.

107 34. Table 1B(g) Registered Retirement Savings Plan - wife

108 (34.1) In 1987, when the wife, due to separation, moved from Job's Cove to Fox Harbour, and in process resigned her Carbonear hospital job in favour of other employment, she realized a one-time lump sum severance payment of \$6,592.56 (Exhibit L.E.8, first page). Unlike the husband, who opted for payment to him of his lump sum severance, immediately attracting income tax on the entirety, the wife directed her lump sum severance pay be rolled over into a Registered Retirement Savings Plan (R.R.S.P.) thereby postponing income tax liability on the entirety until (no later, by federal law, than the end of the year she reaches age 71) she withdraws the funds either from the Plan or from an annuity or registered retirement income fund into which she may roll over the proceeds of the Plan.

109 (34.2) Unlike her pension contributions (together with accrued interest) to separation date (paragraph 32 [para. 47], above), the valuation of the wife's R.R.S.P., a matrimonial asset, for division purposes does not attract income tax because of s. 146(16) of the *Income Tax Act*. That section authorizes transfer by a wife (or former wife) to an R.R.S.P. if established in the name of a husband (or former husband) of a portion of her R.R.S.P. where directed by judicial order of a tribunal such as this court (or where provided for in a written separation agreement). Thus, division of the wife's R.R.S.P. could be achieved by an order of the trial justice requiring the husband to set up an R.R.S.P. and requiring the wife to transfer from her R.R.S.P. into the husband's R.R.S.P. of \$3,296.28, being one-half the entire sum of \$6,592.56 in the wife's R.R.S.P. (because the entire sum was earned sometime during the period from marriage date to separation date).

110 *References: Income Tax Act*, s. 146(16), en. by: S.C. 1977-78, c. 32, s. 34(16) as amended to and including S.C. 1990, c. 35, s. 13(17)

111 (34.3) This submission regarding the wife's R.R.S.P. warrants revisiting, briefly, the husband's one-time lump sum severance payment of \$12,804.96 to explain why, in addressing that matrimonial asset, the wife submitted no income tax be deducted in valuing that payment for division purposes (paragraph 33.7 [para. 66]), above). The reason is that the husband, had he dealt with his severance pay in the same manner as the wife, would have (a) rolled over his severance pay into an R.R.S.P. and (b) from that Plan rolled over into the wife's Plan her share of his severance pay; both transactions capable of being accomplished without attracting any immediate income tax liability. Moreover, because there is no dispute between wife and husband that (a large portion of) the husband's severance pay constitutes a matrimonial asset divisible with the wife, the husband was unquestionably duty-bound to handle his severance pay in a manner conducive to maximizing income tax deferral, hence the benefit of that asset to the wife and, incidentally, to himself. For his failure to do so he offered no convincing explanation. The husband, having on 10 December 1988 been served with pleadings in the *M.P. Act* proceeding, retained a solicitor, who appeared with and for him as counsel at the first day of trial on 28 February 1989. By then, the wife submits, the husband knew or should have known of the probability his wife had a claim of one form or another under the *M.P. Act* proceeding upon his pension and severance entitlements whether vested, locked in, or "in pay". Nonetheless, the husband either consciously disregarded or was reckless as to the effects of handling his one time lump sum severance entitlement, in particular, as he did: without obtaining or by disregarding legal advice and without notice to or consultation with the wife or her solicitor; therefore exposing the entire sum of \$12,804.96 to income taxation and, if he is to be believed, spending the remainder save some \$500 from April to July 1991 upon undocumented debts and expenses.

112 35. Table 1B(h) Canada Savings Bonds (wife)

113 (35.1) The wife customarily purchased Canada Savings Bonds by regular payroll deductions from her wages. She estimates she paid by way of payroll deduction \$1,200 into Canada Savings Bonds (C.S.B.s) from 1 November 1986, when the bond or bonds would have been issued, to separation date in September 1987. In fact the summary of her 1987 income tax return (Exhibit L.E.11) states (at the first page) interest income of \$103. Given that C.S.B.s issued 1 November 1986 yielded (according to C.S.B. advertisements published in Canada in the autumn of 1986) compounded interest of 10.75 percent (only compounded interest C.S.B.s are issued to purchasers through payroll deduction) net interest income of \$103 would have been generated by C.S.B.s with a total face value of \$1,200. (\$1,200 @ 10.75 percent compounded interest for one year should generate gross interest income of \$121.42. However, C.S.B. purchases through payroll deduction result in effect from employers loaning employees the total principal amount required to purchase C.S.B.s and charging them interest on the loan; interest charges which are paid from the gross interest income earned on the matured bonds, leaving the employee with the remainder, that is, the net-of-borrowing cost interest, which here calculates as \$103.)

114 (35.2) The value of the wife's C.S.B.s, a matrimonial asset, for division purposes is, therefore, as follows:

(a) as to the face value of wife's C.S.B.s and the interest on face value to 10 September 1987:

(1 Nov. 1986 to 10 Sept. 1987) x

(1 Nov. 1986 to 31 Oct. 1987)

(\$1,200 (principal) + \$103 (interest)) = \$1,120.58;

(b) as to the interest on the divisible portion of wife's C.S.B.s, 11 September to 31 October 1987:

(11 Sept. 1987 to 31 Oct. 1987) x

(1 Nov. 1986 to 31 Oct. 1987) \$103 = \$6.20.

Hence, the value of the husband's share of the wife's C.S.B.s is one-half of (\$1,120.58 + \$6.20 ⇒) \$1,126.78; that is (\$560.29 + \$3.10 ⇒) \$563.39.

115 (35.3) By explanation, the calculation in subparagraph (35.2)(b), immediately preceding, reflects the judicially-developed rule that in addition to one-half the value of the divisible portion of an asset as of separation date, the nonowner spouse is, ordinarily (including here), entitled to one-half any increase in that asset portion's value post-separation. Accordingly the husband, submitted by the wife to have an interest in the C.S.B.s of \$560.29 to separation date, 10 September 1987, is acknowledged by her to have a valid claim to one-half (that is, \$3.10 of) the interest accrued on the sum of \$560.29 from 11 September until the C.S.B.s matured and were cashed on or shortly after 1 November 1987 (to pay for expenses of the wife and four children who by then were living apart from the husband). Thus arises the

issue whether this approach is applicable to other assets of the parties. Two, at least, come to mind. (a) One asset is the husband's lump sum severance payment which, the wife earlier submitted, could have been handled by the husband in a fiscally more responsible manner that would have eliminated the payment's immediate exposure to income tax. The wife here adds, that the husband's failure to handle the payment appropriately means that the payment will not generate interest from the date paid to the husband until the date of division; interest to which both parties would have had a claim in the same percentages as their respective claims to the payment itself. (b) The other asset is the wife's R.R.S.P. established about the time of permanent separation, of which the husband is entitled to one-half. That asset has since permanent separation generated interest that is continuing to date to be rolled over within the Plan. However, there being no information as to the interest lost by the husband's mismanagement of the more recently received and larger sum of his lump sum severance payment or as to interest accrued on the earlier received and lesser sum of the severance payment the wife converted into an R.R.S.P., the wife submits that these two considerations, which to some extent probably set off, be disregarded in the determination of the *M.P. Act* proceeding.

116 36. Table 1B(i) Receivable. The parties are agreed that while husband and wife and before separation date, they made a non-interest bearing loan to a married couple residing at Job's Cove upon which, at permanent separation date, \$1,500 was owing. Neither party is optimistic of recovering the receivable. The wife submits she and the husband are entitled in equal shares to all payments, if any, ever made by the borrowers and that if either wife or husband takes legal proceedings to recover some or all of the receivable the husband and wife should be equally responsible for all reasonable fees and expenses of the proceeding incurred by either of them.

117 37. Table 1B(k.1) Income tax refund (1987) - wife.

118 (37.1) Both wife (Exhibit L.E.11) and husband (Exhibit L.E.12) received income tax refunds for their respective calendar 1987 income tax years. The portion of each refund for the portion of 1987 to separation date, 10 September 1987, is a divisible matrimonial asset. The wife's refund comprises four elements: child tax credit: \$1,459.80; Canada Pension Plan overpayment: \$147.02; U.I.C. overpayment: \$57.09, and income tax overpayment: \$1,018.94, for a total of \$2,682.85.

119 (37.2) The value of the divisible portion of the wife's income tax rebate is:

1 January to 10 September 1987 x

1 January to 31 December 1987 \$2,682.85 = \$1,859.62,

of which one-half - \$929.81 - is the husband's share.

120 38. Table 1B(k.2) Income tax refund (1987) - husband. The value of the divisible portion of the husband's income tax refund, which totalled \$70.57 in income tax overpayment, is:

1 January to 10 September 1987 x

1 January to 31 December 1987 \$70.57 = \$48.92,

of which one-half - \$24.46 - is the wife's share.

121 39. Table 1B(1) Occupation rent (wife). The wife submits that the formula for determining the sum payable by husband to wife as occupation rent is that stated by Cameron, J., in *Elliott v. Elliott*, namely

50% ((rental value/month of matrimonial home
 -mortgage + house insurance + municipal taxes/month for matrimonial home) x
 number of months spouse claiming occupation rent is out of possession).

The rental value of the matrimonial home is about \$300 (Exhibit L.E.5). At all material times there was no mortgage of or municipal taxes assessed upon the home. Although there is no evidence of house insurance costs, the wife concedes these have at all times material to this calculation been paid by the husband who informally told the wife's solicitor on 25 October 1991 the premium (including taxes) was \$526/year; that is \$43.83/month. The wife has been out of possession of the home from 10 September 1987 to present date (November 1991); a period of 51 months. Therefore the value of the wife's entitlement to occupational rent is:

50% ((\$300.00 - \$43.83) x 51 months =) \$6,532.33 in arrears and \$128.08 monthly in future from December 1991 until decision of the **M.P. Act** proceeding.

122 *Reference: Elliott v. Elliott* (1985), 56 Nfld. & P.E.I.R. 110, 168 A.P.R. 110; 48 R.F.L.(2d) 407 (Nfld. U.F.C.), per Cameron, J., at 410 to 411 R.F.L.

123 40. Turning next to debts, the wife's position on the manner and terms of their division follows in the order they are listed in Table 2B (paragraph 21 [para. 34], above).

124 41. Table 2B(a) to (d). There were, as follows, four matrimonial debts that the wife acknowledged to have been in existence at permanent separation date, 10 September 1987:

(a) Canadian Imperial Bank of Commerce ("C.I.B.C.") (for 1984 Bronco II, an asset not submitted by the parties for division by the trial judge) \$7,286.43;

(b) Ford Credit Canada Limited (for 1986 Ford Escort, an asset not submitted by the parties for division by the trial justice) \$4,500.58;

(c) Sears Canada Inc. (household goods) \$900;

(d) Woolco (household goods) \$200.

125 *Reference: Brief For Trial Judge, 19*

126 42. The husband in testimony on 28 February 1989 mentioned additional creditors, namely: (a) Cohens Home Furnishings Ltd., (b) "C.I.B.C." Visa, (c) Household Finance Corp. of Canada, (d) his parents and (e) Avco Financial Services. Although he was not entirely certain on details of the credit or loans these creditors advanced him, his testimony is sufficiently specific to find, either directly or by inference, as follows:

(a) Cohens Home Furnishings Limited was a creditor for household furnishings acquired before permanent separation, the balance owing on which the husband retired post-separation (and which the wife concedes is another matrimonial debt);

(b) the husband, post-separation, paid the monthly

(c) instalments on the C.I.B.C. motor vehicle loan - one of the four matrimonial debts acknowledged by the wife - by borrowing on his C.I.B.C. Visa, then retired the motor vehicle loan by borrowing from Household Finance Corp. of Canada: borrowings which in effect replaced, post-separation, the C.I.B.C. motor vehicle loan;

(d) the husband, post-separation, retired the Sears Canada Inc. loan of \$900, possibly by borrowing that amount from his parents.

As for (e) the Avco Financial Services loan, the evidence is not conclusive, although tends to indicate that the husband obtained this loan post-separation for reasons unrelated to matrimonial debt.

127 43. In addition to the C.I.B.C. motor vehicle loan, mentioned in the previous paragraph, retirement of the other three liabilities the wife acknowledged as matrimonial debts at separation date occurred as follows:

(a) by the husband: Sears Canada Inc. - 100 percent - and Ford Credit Canada Limited - monthly payments to and including February 1988 (say \$500.58);

(b) by the wife: Ford Credit Canada Limited (say \$4,000) - by a number of monthly payments from March 1988, then a final lump sum payment, and Woolco - 100 percent.

128 44. Calculated approximately, the assumption by the parties, from separation date, of matrimonial debts is as follows in Table 3.

Table 3			
Assumption Of Matrimonial Debts By Wife And Husband			
	(a) wife		(b) husband
Ford Credit Canada Ltd.	\$4,000.00	C.I.B.C.	\$7,286.43
Woolco	200.00	Ford Credit Canada Ltd.	500.58
	-----	Sears Inc.	900.00
		Cohens Home Furnishings Ltd.	500.00

	\$4,200.00		\$9,187.01

(The C.I.B.C. matrimonial debt was replaced post-separation by the husband's C.I.B.C. Visa and Household Finance Corp. debts.)

129 To achieve equal division of matrimonial debts the wife should therefore pay the husband a balancing sum on account of matrimonial debts of approximately one-half the difference between \$4,200 and \$9,187; say \$2,495.

130 45. The wife submits, for two reasons, that judicial analysis of the parties' matrimonial debts to ensure responsibility for them is shared equally between the parties should not have been required.

(a) First, the husband who, on the basis of approximate calculations permitted by the evidence, has assumed responsibility for the larger share of matrimonial debt (Table 3 at paragraph 44 [para. 82], above), testified on 28 February 1989 that he did not want reimbursement for any of that debt.

(b) Secondly, the husband's assumption of a superior share of matrimonial debt is offset by his failure to pay any significant financial support to or for the wife or four children from separation date to 28 February 1989; a period of seventeen months, three weeks. (Although the husband has not since paid any financial support the court has jurisdiction to retroactively obligate the husband to pay support from 28 February 1989, the date on which the wife was granted a divorce judgment, if the court chooses to do so; a subject addressed below in Part B of this Argument.)

131 *Reference:* As to the court's jurisdiction to retroactively order payment of financial support from the date a divorce judgment is granted under the *Divorce Act*, see: *Benson v. Benson* (1985), 52 Nfld. & P.E.I.R. 346, 153 A.P.R. 346 (Nfld. C.A.), in which a decree nisi, equivalent of what since 1 June 1986 has been a divorce judgment, was granted.

132 By taking into account s. 20(b) of the *M.P. Act* and ordering unequal division of matrimonial debts in favour of the wife, the court could avert the unconscionableness of equal division of the debts that would result by requiring the wife to pay half of the matrimonial debt in addition to having shouldered, during the first seventeen months and three weeks post-separation, all financial needs and all financial obligations and responsibilities respecting the four children of the marriage. The wife proposes 100 percent unequal division of the matrimonial debts whereby the wife, instead of making a \$2,495 balancing payment to the husband (to achieve equal division of matrimonial debts), is recipient of a balancing payment of \$4,200 from the husband for the portion of the debt she assumed at separation date and has since retired. The result, apparently harsh for the husband, is not so in reality. The husband's assumption of the wife's share of matrimonial debt - namely one-half of (\$4,200 + \$9,187.01 =) \$13,387.01 which equals \$6,693.50 - has the effect of moving toward equality to the sharing by the parties of obligations and responsibility for financial support of the children from separation date to 31 October 1988. It represents the equivalent of income tax free assistance by the husband of \$377.09 monthly (\$6,693.50 divided by 17 months, 3 weeks) to the wife for her having, solely, undertaken support of the four children over that thirteen month and three week period. The result nonetheless will resemble a journey on an electronic treadmill for the wife. This is because the husband's continuing future obligations to repay C.I.B.C. Visa, Household Finance Corp. of Canada, and his parents the financing he obtained post-separation to retire separation-date matrimonial debts will impair his capacity

to pay financial support for some presently-indeterminable future time.

B. Divorce Act

Fourth Issue

133 46. Stated: Whether and, if so, what financial support should be paid to or for the four children by the husband?

134 47. Law:

135 (a) Under the *Divorce Act*, s. 15(2) affords a court jurisdiction to order and discretion in ordering one or both spouses to secure and/or pay such periodic and/or lump sum support as the court thinks reasonable for financial support of any or all children of a marriage.

136 (b) Factors a court shall take into consideration in making a child support order are stated in s. 15(5). A factor that a court shall not consider, by virtue of s. 15(6), is any misconduct of either spouse in relation to the marriage. The objectives of a child support order should be those stated in ss. 11(1)(b) and 15(8). The factors and objectives are couched in general terms and are not especially instructive.

137 (c) Neither section is definitive, whether stating factors (15(5)) or objectives (15(8)). Nor is either section specific as to whether one or another of the factors or objectives that are stated should receive priority.

138 (d) None of the sections clearly articulates whether they apply to only one or to both of the fundamental issues in determining financial support, namely, *if* support should be ordered (that is, the issue of entitlement) and *what* financial support should be ordered (that is, the issues of quantum, and under section 15(4), terms and conditions).

139 (e) The wife submits, respecting child support, that the scheme of the *Divorce Act* is as summarized below.

(e.1) entitlement: Section 15(2) affords a court unstructured discretion in determining if a child of the marriage is entitled to support, provided that the child's age and circumstances comport with the requirements of the definition, in sections 2(1) and 2(2), of "child of the marriage".

(e.2) quantum: If an order is made

(i) section 15(2) provides a court a choice of forms the order may take (for example, a periodic sum or a lump sum);

(ii) section 15(2) further provides a court discretion as to the quantum of the order: namely, such quantum as "the court thinks reasonable";

(iii) section 15(4) provides a court discretion as to the terms and conditions of the order,

including duration: namely, such terms and conditions as a court "thinks fit and just";

(iv) sections 11(1)(b) and 15(5) prescribe some of the factors to be considered (subject to section 15(6)) and section 15(8) prescribes some of the objectives to be achieved by a court in choosing the form, setting the quantum and specifying the terms and conditions (including duration) of a child support order.

(This scheme applies to child support orders under section 15(2) and interim child support orders under s. 15(3).)

140 (f) Generally, the present *Divorce Act* codifies, with regard to child support, some of the common law as well as past practice in applying the previous (first) *Divorce Act* in force from 2 July 1968 (that was supplanted on 1 June 1986 by the present *Act*, which applies to these proceedings).

141 *Reference: Divorce Act*, R.S.C. 1970, c. D-8

142 48. An examination of 110 of the judicial decisions from the provinces and territories of Canada under the *Divorce Act* respecting child support ("the Rogerson survey") supports the conclusion that courts, in determining child support, employ the formula expressed in the Ontario Court of Appeal's judgment in *Paras v. Paras*; a formula approved of in principle by the Supreme Court of Canada in *Richardson v. Richardson*.

143 *References: Paras v. Paras*, [1971] 1 O.R. 130, 2 R.F.L. 328 (C.A.);

144 *Richardson v. Richardson*, [\[1987\] 1 S.C.R. 857, 77 N.R. 1, 22 O.A.C. 1](#); 7 R.F.L.(3d) 304; 38 D.L.R.(4th) 699;

145 Rogerson, Carol J. *Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part II)* (1991), 7 C.F.L.Q. 72.

146 49. Assuming that a child fits the *Divorce Act's* definition of "child of a marriage", hence is entitled to support, the goal of an order providing for the child's support, per Kelly, J.A., in *Paras v. Paras*.

should be, as far as possible, to continue the availability to the children of the same standard of living as that which they would have enjoyed had the family breakup not occurred.

Ideally, the problem could be solved by arriving at a sum which would be adequate to care for, support and educate the children, dividing this sum in proportion to the respective incomes and resources of the parents and directing the payment of the appropriate proportion by the parent not having physical custody.

Generally speaking, such a formula would tend to preserve a higher standard of living in the home in which the children are supported at the expense of some lessening of the standard of living of the other parent, thus creating indirectly a benefit to the parent who continues to support

the children. This, however, may be the only manner in which the primary obligation of each parent to the children can be recognized and would be in keeping with the scheme of the **Act** to insure that on the break-up of the family the wishes and interests to be recognized are not solely those of the spouses. Nor should the possibility of such an indirect benefit be a reason for limiting the scale of the children's maintenance.

147 *Reference: Paras v. Paras* (1970), 2 R.F.L. 328 (Ont. C.A.), at 331 to 332.

148 50. Kelly, J.A.'s recognition of this indirect benefit to a custodial spouse of the fulfilment of the goals of financial support of a child or children of a marriage has prompted judicial efforts in subsequent child support decisions to preclude or limit such indirect benefits to the custodial spouse receiving child support. As summarized by the Rogerson survey:

Although in practical terms children and custodial parents form one household and share a joint standard of living, courts are committed to the practice of segregating the costs associated with maintaining children from the costs of maintaining the custodial parent/former spouse. This ... was endorsed by the Supreme Court of Canada in *Richardson v. Richardson* [(1987), 7 R.F.L.(3d) 304], decided under the 1968 **Divorce Act** [in the course of approving in principle the **Paras** formula for child support]:

Underlying this approach is a concern to prevent former spouses from being maintained at a higher standard than that to which they are entitled [bearing in mind that principles of spousal support differ from those of child support]. Children are entitled to the former [marriage's] standard of living, while former spouses are typically understood as entitled only to the standard of living their own [post-marriage] incomes will support;

a standard which is usually lower than during the marriage.

149 *Reference: Rogerson, Carol J. Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part II)* (1991), 7 C.F.L.Q. 271, at 276 to 277.

150 51. Judicial efforts to determine a

particular, segregated sum as being the costs attributable to the children and attempt to guarantee the appropriate standard of living to the child alone [...]

(emphasis added) has produced at least two problems:

Typically the sums awarded are underestimations of even the direct, segregable costs respecting the maintenance of the children. Second, it is in practice very difficult to provide a different standard of living for the custodial parent and children.

151 *Reference: Rogerson, Carol J. Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part II)* (1991), 7 C.F.L.Q. 271, at 279.

152 52. Realistically, therefore, courts setting the quantum of child support have two choices:

(1) provide sufficient funds to ... maintain the custodial parent at the higher standard of living (of the child: *Dickson v. Dickson* (1987), 11 R.F.L.(3d) 337 (B.C.C.A.), 357 to 358), or ... (2) keep the child support payments low to prevent the custodial parent from indirectly benefitting from child support (*McDonell v. McDonell* (1988), 16 R.F.L.(3d) 174 (B.C.S.C.), 184)

153 *Reference: Rogerson, Carol J. Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part II)* (1991), 7 C.F.L.Q. 271, at 279.

154 53. The wife's position, relying upon *Paras*, is that only the first choice - with the caveat: so far as attainable - will serve a child's financial best interests. Thus, she submits, the quantum of child support should preserve or so far as attainable approach the child's standard of living while his or her parents were living in married cohabitation (assuming, of course, that was an adequate standard). If in the result the custodial spouse's living standard is higher than may otherwise obtain (if she was not custodial parent in receipt of child support), so be it.

155 54. Furthermore, the wife submits, a factor not considered in *Paras* that deserves weight in assessing quantum of child support is the imputed child care cost, characterized in *Wagener v. Wagener* as the

added stress and the time commitment required

from the custodial parent (a) whether or (b) not (as in *Wagener*) the noncustodial parent exercises any access or otherwise spends time with a child of the marriage.

156 *Reference: Wagener v. Wagener* (1988), 55 Man.R.(2d) 91; 17 R.F.L.(3d) 308 (Q.B.), at 312 R.F.L.

157 55. (a) The court has jurisdiction to order support retroactively to the date of granting of a divorce judgment, 28 February 1989.

158 *Reference: Benson v. Benson* (1985), 52 Nfld. & P.E.I.R. 346, 153 A.P.R. 346 (Nfld. C.A.)

159 (b) Sums received by husband and wife in consequence of the division between them, as *matrimonial property*, of the husband's pension payments should be treated as income in determining quantum of child support under the *Divorce Act*.

160 *Reference: Fogel v. Fogel* (1979), 9 R.F.L.(2d) 55 (Ont. C.A.)

161 56. Evidence (Entitlement). The wife's solicitor represents that the four children of the marriage continue, at present date (November 1991), as was the situation when the trial evidence-taking ended, to be in full-time secondary school attendance while school is in session and that none of them is engaged

in any income-earning activity. Therefore, the wife submits, she is entitled to receive support for the four children.

162 57. Evidence (Quantum). Weighing pertinent factors to determine quantum that seeks to attain the objectives of child support involves and is not infrequently harnessed by the circumstances of the specific divorce proceeding; principally, the financial means and financial capacities of both custodial and noncustodial spouses.

163 58. (a) As of separation date, 10 September 1987, the husband was earning, on average, \$2,756.47 gross - \$2,084.96 net - per month as a registered nurse at the Carbonear hospital where he continued to be employed until 31 March 1991. (The net calculation does not factor in Canada Pension or unemployment insurance premium source deductions.)

164 *Reference:* Exhibit L.E.12, first page, line 101; fourth page, line 435

165 (b) From 1 April 1991 his position was declared redundant and he was pensioned; one of the results of which was that from 1 April 1991 to date (November 1991) he has received, on average, \$1,123.98 gross - which works out to \$833.84 net - per month (assuming no indexing increments) in pension payments: ($\$1,123.98 \text{ gross per month} \times 12 - (\$2,085 \text{ federal income tax} + \$104 \text{ federal surcharge} + \$1,292.70 \text{ provincial income tax}) \text{ divided by } 12$). Of the pension payments 35.8 percent (see paragraph 33.4 [para. 61] above) is payable to the wife in consequence of division of the pension payments as a matrimonial asset, thereby reducing the husband's present net income from that source by \$298.50 to \$535.34 ($\$833.84 - (35.8\% \times \$833.84)$).

166 *Reference:* Exhibit S.K.2, last page

167 (c) In addition to his pension income the husband has obtained part-time employment as a nurse at the cottage hospital in Old Perlican commencing 11 June 1991, from which he grossed \$1,834.04 for the fortnight ending 24 June 1991, and grossed about \$252, he testified, for the next fortnight (to 8 July 1991, the second day of trial) which computes to be \$2,259.87 gross, per month, which, the wife calculates, realizes the husband \$1,312.40 net, per month. Together with his share of each monthly pension payment, \$535.34, his net monthly income totals \$1,847.74 (assuming, of course, continuing part-time health care employment averaging, per month, what he earned in parts of June and July 1991).

168 *Reference:* Exhibit S.K.2, third page, col. 11.

169 59. (a) The wife, at separation date, 10 September 1987, was earning about 15 percent more than the husband in the same vocation, that of a registered nurse, at the same hospital; more specifically, an average \$3,113.41 gross, per month, in addition to receiving \$127.66 family allowance gross, monthly, increasing her average monthly gross to \$3,241.07. After allowing for income tax and other obligatory deductions, the burden of which was eased by several tax credits and deductions, and after adding miscellaneous income (C.S.B. interest) her net monthly income (salary, family allowance and miscellaneous income) was \$2,519.82.

170 *Reference:* Exhibit L.E.11

171 (b) Later in September 1987, in the wake of the parties' permanent separation, the wife and four children moved from Job's Cove to Fox Harbour. By 21 October 1988 when the wife deposed to her Financial Statement (filed ten days later with her Petition For Divorce to commence the divorce proceeding) she was employed part-time at a senior citizen's home and at a hospital, both in Placentia. By February 1989 when the trial commenced her gross monthly wages from these two continuing part-time employments as well as from partial unemployment insurance benefits for which she qualified (by virtue of only being employed part-time) were \$2,379.42. In addition she received \$128.68 gross, monthly, as family allowance, which increased her overall monthly gross to \$2,508.10; about \$1,945 net, monthly.

172 *Reference:* Exhibit L.E.2;

173 Paragraph 32.2, above.

174 (c) As of the second trial date she had secured full-time employment as Director of Nursing at the medical clinic in Whitbourne at a gross monthly salary of \$3,592.48 in addition to \$133.32 gross, monthly, in family allowance payments for a total gross monthly income of \$3,725.80; about \$2,890 net, monthly. To this must be added, in anticipation of her receiving it, the wife's share of her husband's monthly pension income, namely \$298.50 monthly (two semi-monthly payments of \$149.25) which would increase her net monthly income to \$3,188.50.

175 *Reference:* Exhibit L.E.3.

176 60. From the parties' incomes must be met, so far as feasible, the four children's financial needs; to the detriment of the standards of living and by the sacrifices of the parties.

177 61. Save for a modest contribution toward the cost of winter clothing last winter (that is, winter 1990 to 1991) for the four children and, the wife's solicitor represents, \$600 by payments of \$400 in August 1991 and \$200 in September 1991 directly to the children, the husband has not *contributed* to their support from separation date (10 September 1987) to date (November 1991). Moreover, he has not since March 1991 *assumed* any part of the cost of the children's support involved in access periods with them because, at that time the wife had lost what residual confidence she had to then repose in the husband's ability to responsibly use alcoholic beverages and terminated his access; no effort since having been made by the husband to resume access. Therefore, the wife submits that her most recent Financial Statement, deposed to on 8 July 1991, is the most accurate (and current) indicator of the cost of supporting the children.

178 *Reference:* Exhibit L.E.3.

179 62. That Financial Statement expresses monthly financial needs for wife *and* four children and does so both for actual *and* proposed expenses. To arrive at the monthly financial needs of the four children first involves calculation of the total sum claimed (in this instance by the wife) to be needed for child support and, secondly, involves identifying (a) what portion of the need claimed is essential, (b) what portion is desirable, whether or not required to preserve the children's pre-separation living

standard, and (c) what portion is wholly discretionary.

180 63. The first of these, namely the identification of what the wife claims to be needed to financially support the four children necessitates, in accordance with the *Paras* formula, determination of what portion of each of the expenses in the wife's most recent Financial Statement that she claims to pertain to child support would have been and will be incurred by her from month to month, whether (as here) or not she has legal and physical custody of the four children. For example, although the wife, as custodian of the four children, is likely to incur higher motor vehicle petrol and lubricant costs than the noncustodial husband, she may, whether or not custodian, have approximately the same long-term liability to repay by monthly instalments the borrowing for her present motor vehicle. (Granted, however, there are instances (not here) where a larger, more expensive vehicle is required by the custodian of a physically-challenged child.) Applying this consideration, the wife submits that the portion of the monthly budget in her most recent Financial Statement needed for financial support of the four children is listed in Table 4, next following.

Table 4 1.

List of monthly financial support needs of the four children of the marriage to the exclusion of the wife

1. electricity (50%)	\$75.00
2. fuel oil (50%)	55.00
3. groceries (75%)	487.50
4. meals outside home	108.33
5. toiletries and sundries (75%)	37.50
6. grooming	30.00
7. laundry, drycleaning (75%)	22.50
8. clothing	250.00
9. gasoline, oil (33%)	55.55
10. orthodontist or special dental care (75%)	21.75
11. drugs (75%)	5.20
12. books, supplies	25.00
13. gifts	100.00
14. children's allowances	100.00
15. children's activities	80.00

total	\$1,453.33

1. Where an item of expense in this Table is incurred by the wife and four children, the sum specified equals 33 percent, 50 percent or 75 percent of the total of the item of expense, depending upon the item (the percentage representing rough estimates).

181 64. The wife submits that of the total of \$1,453.33, per Table 4,

(a) items 1. through 12., totalling \$1,173.33 are essential and

(b) the remainder, items 13. through 15., totalling \$280 are highly desirable.

In so stating, the wife underscores the reasonableness of all of the items of expense (both as to nature and amount).

182 65. On this and related matters, in a paper entitled "Quantification Of Child Support", His Honour R. James Williams, Judge of the Family Court at Dartmouth, Nova Scotia, insightfully and pragmatically writes;

What is the cost of raising a child? Do we base the child's needs on minimum or substance needs? Does a child's share of housing amount to one-half, one-third, one-quarter of his custodial parent's housing costs? Can a child's expenses be extracted from household costs? How is a judge to determine the cost of a child?

There is no fixed cost. I do not have answers for most of these questions. People with higher income spend more on their children because they can afford to. A child's needs will, in part, be determined by reference to his parents' income [*Besky v. Besky* (1988), 13 R.F.L.(3d) 159 (B.C.C.A.)].

There is little judicial, statutory or other direction as to what should be included or excluded in calculating a child's needs...

The arbitrariness [of determining the quantum of child support] is not one born of ill will, lack of caring or ignorance. It is simply one that will inevitably result where there is broad discretion over a human issue with no right way or wrong way to go.

183 *Reference:* (1989), 18 R.F.L.(3d) 234 at 242, 244, 245.

184 66. Having calculated the four children's essential and desirable financial support needs, what next requires determination is the proportions in which responsibility for these needs should be distributed between the parties.

185 67. Proportionally, the ability of each party to contribute to financial support of their four children is as follows:

(a.1) wife's net income/month (approximate)	\$3,188.50
(a.2) husband's net income/month (approximate)	1,847.74

(a.3) total net income/month, wife + husband =	\$5,036.24.

Therefore:

(b.1) wife's net income/month as percentage of total of her and husband: 63 percent

(b.2) husband's net income/month as percentage of total of him and wife: 37 percent.

The wife's net monthly income, for this calculation, includes the share of the husband's pension to which she is entitled by operation of the *M.P. Act*. Although her share in the pension is part of her share of the

accumulated net worth of the marriage which should ensure to her present and future security, this is not a proceeding where her share of the pension should be excluded in determining her means under s. 15(4) of the *Divorce Act* for the purpose of calculation of what child support should be paid to her.

186 *References:* Paragraphs 58 and 59(c), above [paras. 103 and 108].

187 68. On the basis of these percentages, the wife and husband should share the responsibility of their children's support in the amounts following:

(a) wife: $63\% \times \$1,453.33 = \915.59 ;

(b) husband: $37\% \times \$1,453.33 = \537.74 , whereby the husband would, monthly, pay \$537.74 as his contribution to the four children's financial support.

188 69. (a) This should not, however, be the husband's total monthly child support payment, due to the influence of the *Income Tax Act* upon periodic (for example, monthly) support payments. In principle, where made pursuant to a provision of a judicial order or agreement as contemplated by the *Act*, periodic payments for support of children are tax deductible by the payor and taxable in the payee's hands.

189 *Reference:* *Income Tax Act*, S.C. 1970-71-72, c. 63, ss. 56(1)(b), (c), (c.1); 60(b), (c), (c.1), as amended

190 (b) Consequently the *Income Tax Act* will affect a monthly child support payment by husband to wife in the gross sum of \$537.74 as follows (using 1990 rates):

(b.1) approximate net cost to husband:

$\$537.74 - \198.96 (income tax saving on \$537.74 monthly payment) = \$338.78/month;

(b.2) approximate net receipt by wife:

$\$537.74 - \231.22 (additional income tax on \$537.74 monthly payment) = \$306.52.

191 (c) In order to net the wife \$537.74, monthly, as the husband's contribution to financial child support, the husband should be ordered to pay, monthly, the sum of \$943, a transaction upon which the *Income Tax Act* would affect as follows:

(c.1) approximate cost to husband:

$\$943.00 - \348.91 (income tax saving on \$943.00 monthly payment) = \$594.09;

(c.2) approximate net receipt by wife:

\$943.00 - \$405.49 (additional income tax on \$943.00 monthly payment) = \$537.51 (say \$537.74).

192 70. The court should exercise its jurisdiction, as a term or condition of the periodic (that is, monthly) support order to provide for indexing in reliance upon the Consumer Price Index to take account of cost of living increases.

193 *References: Kerr v. Kerr* (1989), 79 Sask.R. 52; 22 R.F.L.(3d) 321 (C.A.);

194 *Vogel v. Vogel* (1988), 18 R.F.L.(3d) 445 (Ont. H.C.).

195 71. Having dealt with the issue of periodic child support for the near future period there remains the further question, part and parcel of the child support issue, of whether the husband, who has not paid child support since permanent separation, should be obligated to pay to the wife an additional monthly sum for a time-limited duration or a lump sum as his contribution to his children's support for the period from separation date, 10 September 1987, to the date on which periodic child support payments respecting future support are ordered to commence. As pointed out about (paragraph 45(b) [para. 83]) the court does not have jurisdiction to make a support order for the period before 28 February 1989 when the wife was granted a divorce judgment; a period respecting which the wife has submitted above (paragraph 45 [para. 83]) she be relieved of her share of matrimonial debts, as compensation. The focus of this aspect of the child support issue is, therefore, the period 28 February 1989 until the date on which the trial justice requires the husband to commence periodic child support payments to the wife.

196 72. (a) During the period of 33 months from 28 February 1989 to date (November 1991) the husband's gross income has been as follows:

(a.1) salary	
- Mar. 1989 to Dec. 1989 (wages)	\$ 31,845.01
- calendar 1990 (wages)	39,567.92
- Jan. 1991 to Mar. 1991 (wages)	11,342.38
- Apr. 1991 to Oct. 1991 (pension)	7,867.87
- Apr. 1991 to Oct. 1991 (approximate wages)	18,078.96
(a.2) severance pay	12,804.96
(a.3) vacation pay	541.46
(a.4) uniform allowance	38.76

for a total of	\$122,087.32

in addition to the proceeds of a loan from Avco Financial Services (the amount of which the husband did not specify).

197 *References: Exhibit S.K.2, 6th, 7th and last pages;*

198 Paragraph 42 [para. 80], above;

199 Paragraph 58(c) [para. 105], above.

200 (b) Other than income tax and other legally-required deductions at source, the husband testified on 8 July 1991 that all this income (wages and otherwise), excepting about \$500 he then had on hand, was applied to debts and living expenses (including motor vehicle repairs). That some instalment payments on matrimonial debts were made by the husband post-separation is admitted by the wife. However, most of his contributions to those debts were either made before the period now under scrutiny or were financed by new borrowings by him. That the husband had certain necessary living expenses over the 33-month period under scrutiny is not questioned by the wife. However, he lived most of that period in a house unencumbered by mortgage and the remainder of the period (except for a short period in St. John's) with his neighbouring parents. His explanation for the disposition of his income during those 33 months is, at minimum, unconvincing. There is insufficient evidence on the trial record to enable a finding of fact be made as to the husband's overall stewardship of his income during that period; for example, whether he spent on extravagant personal consumption. Meantime, there are three uncontroverted facts: (1) \$122,087.32 of income received over 33 months, from March 1989 to 30 November 1991 has, solely under the control of the husband, diminished to about \$500; (2) the husband has precious little to show for those funds, and (3) the wife has nothing to show for the funds because she received none of them.

201 (c) The wife submits that the husband should be obligated to make a contribution to the support of his four children during the 33 months to November 1991 that, in light of his having inexplicably mismanaged his income over that period to the point of having only a nominal sum remaining, should be paid as a lump sum (that would not be subject to the *Income Tax Act*) rather than by a number of instalments. The lump sum should be secured against the husband's interest in the matrimonial home. The amount of the lump sum should be: 33 months at the rate of \$537.74, the net-of-income tax sum also proposed by the wife as the husband's future monthly contribution for his four children's support, for a total of \$17,745.42. This amount is clearly beyond the income means of the husband and beyond his proprietary means if (on the basis of considerations of compassion rather than law) he is to retain any significant share of property acquired by the parties during the marriage. For her part the wife appears, commendably, to have weathered the hardship of alone carrying the four children financially, without incurring significant debt during that period. Nonetheless, "what's past is past" would not be an appropriate answer from the husband to the wife's request for a contribution from the husband to the children's past support. Because no established formula obtains to resolve this issue, the wife submits a payment of, say, \$1,000 per child for a total of \$4,000, net of income tax (if any), paid to her by the husband as a lump sum, and until paid secured against the husband's interest in the matrimonial home, is within the husband's capacity, taking his capacity as the determinative factor in setting the amount.

202 73. Submission: Having regard to the child support factors and objectives, all be they vague in some respects and insufficiently instructive in most respects, the husband should be ordered to pay to the wife as financial support for the four children of the marriage

(a) in future: monthly, in advance, on the first of each month the sum of \$943, say \$950, varied

on 31 December in each year to reflect the most recently published annual average Consumer Price Index for S. John's as of that date;

(b) for the period 28 February 1989, when a divorce judgment was granted to the wife, to the date when payment of monthly child support is required to commence, the lump sum of \$4,000 secured, until paid by the husband, against his interest in the matrimonial home.

Fifth Issue

203 74. Stated: Whether and, if so, what financial support should be paid to or for the wife by the husband?

204 75. Law: The law applicable to this issue has largely been stated at the outset of the fourth issue (paragraph 47 [para. 86], above) which outlined the scheme of the *Divorce Act* pertaining to financial support of children except that here relevant are objectives of spousal support under s. 15(7) instead of child support under ss. 11(1)(b) and 15(8). The spousal support objectives, like those of child support could have been more helpfully expressed.

205 76. Evidence: By virtue of remarkable industry, commitment, sacrifice and patience, the wife has steadily graduated, both during marriage and post-separation (except for a short period of part-time employments post-separation) in career responsibility and, concomitantly, in salary remuneration; performed the manifold tasks of parenting four children largely on her own; single-handedly supported the four children and herself financially, and coped with the regrettable liquid substance abuse problems of the husband (that has evidently impaired his ability to share in child parenting or to make any financial contribution to his family who left him in September 1987 for that reason). For her part the wife, self-made, is self-sufficient. Although legal and physical custodian of four children, she does not presently require spousal support. So long as she parents any of the children (which she intends to do until they choose to withdraw from her shelter, succour and support), the possibility exists that she may require a contribution by her husband to her support. If, for example, while still custodian of any of the children of the marriage she became ill and exhausted employment sick leave benefits before she had been employed sufficiently long to qualify for long-term disability benefits, she would require a contribution from the husband to *her* living costs, over and above his contribution to child support which, itself, would have to be increased in such circumstances.

206 77. Submission: The wife therefore submits that an order should be made which unequivocally reserves her right to apply to establish her entitlement to and, if established, to have determined the quantum of, spousal support.

C. The M.P. Act/Divorce Act

Sixth Issue

207 78. Stated: Costs.

208 79. Law: Section 25(2)(d) of the *Divorce Act* in effect recognizes the authority of the Newfoundland Supreme Court to make rules regulating costs in divorce proceedings. The Divorce Rules of the Supreme Court of Newfoundland ("Divorce Rules") were published 23 May 1986 in the *Newfoundland Gazette*. Rule 26 of the Divorce Rules incorporates by reference the provisions of the *Judicature Act* respecting "the taxing of costs". In the *Act* the principal references to costs are in s. 53 and in s. 55(1)(k), pursuant to the latter of which rule 55 of the *Rules* of the Supreme Court, 1986 ("Supreme Court Rules") was made. Rule 55 is divided into four parts, the third of which provides the procedure for taxation of costs where costs (party in party or solicitor in client) have been ordered. Read literally, therefore, rule 26 contemplates only the application of the *Judicature Act* and its *Rules* to the process of *taxing*, although not to the *ordering* of costs. The wife will nonetheless assume that by virtue of rule 26 of the Divorce Rules, rule 55 of the Supreme Court Rules applies in totality (that is, as to both ordering and determining the amount of costs) to divorce proceedings.

209 80. Argument: The husband's liquid substance abuse and his failure to provide financial and other support post-separation ultimately gave the wife no alternative to commencing the divorce proceeding and her companion proceeding under the *M.P. Act* in the former of which she has succeeded to the extent determined to date and on the remaining issues of which, as well as on the issues in the *M.P. Act* proceeding, she submits she should succeed. Therefore an order of full party and party costs in favour of the wife would, ordinarily, be warranted. However, having regard for the overall financial and proprietary demands the determination of the issues in this Argument will visit upon the husband, should the wife succeed, the wife is requesting an order for one-half her party and party costs including one-half (that is, \$90) of the cost of the fair market value (\$150) and rental (\$30) value appraisals of the matrimonial home, which totalled \$180. Further, the wife maintains there is no factual or legal basis for making any order of costs against her.

210 *Reference*: Exhibit L.E.6.

211 81. Submission: The wife submits there be an order as to costs in the divorce and the *M.P. Act* proceedings that the husband pay her one-half of her taxed party and party costs including \$90, being one-half the cost of the fair market and rental value appraisals of the matrimonial home.

Appendix -- A

List of Pleadings in the Proceedings.

1. *Divorce Act* proceeding:

- (a) Notice Of Petition of wife attached to which are (b) through (e) below, namely
- (b) Petition,
- (c) Affidavit of wife verifying Petition,
- (d) Statement of Solicitor for wife, and

- (e) Financial Statement from wife;
- (f) Affidavit of Service of (a) through (e) above;
- (g) Appearance for husband;
- (h) Notice Of Motion from wife for trial;
- (i) Affidavit Of Service of (h) above, and
- (j) Record For Trial Judge.

2. The *M.P. Act* proceeding:

- (a) Statement Of Claim of wife endorsed upon which are (b) and (c) below, namely
- (b) Notice To Defendant, and
- (c) Affidavit Of Service of (a) and (b) above, by a deputy of the Sheriff of Newfoundland;
- (d) statement under section 22 of the **M.P. Act**, from the wife;
- (e) Notice Of Motion from wife for trial, and
- (f) Affidavit Of Service of (e) above.

Appendix -- B

Summary of Trial of Proceedings

1. Day 1: 28 February 1989 (p.m.)

D.C. Day, for wife R. Brewer, for husband

(a) Wife's case

(a.1) wife

ex'd. by D.C. Day

xx'd. by R. Brewer

ex'd. per curiam

(a.2) Samuel King

ex'd. by D.C. Day

exhibits: - S.K.1 (summary of husband's employment data)

xx'd. by R. Brewer

(a.3) wife (recalled)

ex'd. by D.C. Day

exhibits: - L.E.1 (Social Assistance Program brochure excerpt) - L.E.2 (summary of wife's salary data for January 1989)

xx'd. by R. Brewer

ex'd. per curiam

(b) Husband's case

(b.1) husband

ex'd. by R. Brewer

exhibits: - P.J.E.I. (husband's salary data for 1988 and for 1989 to 16 February and his monthly living expenses for 1991)

xx'd. by D.C. Day

ex'd. per curiam

(c) Per curiam: orders, directions and suggestions

(d) Adj. s.d.

2. Day 2: 8 July 1991 (a.m.)

D.C. Day for wife no one for husband (husband's counsel R. Brewer previously resigned from proceedings and retired from Bar; husband stated he elected to represent himself upon close questioning per curiam)

(a) Wife's case (resumed)

(a.1) Samuel King (recalled)

ex'd. by D.C. Day

exhibits: - S.K.2 husband's salary data for 1991 and his pension and severance pay data for 1991)

(a.2) husband

ex'd by D.C. Day

exhibits: - P.J.E.2 (summary of husband's pension and severance pay data for 1991, and his progress report on conveying real property on which matrimonial home built from his parents to him and the wife)

(a.3) wife (recalled, second time)

ex'd. by D.C. Day

exhibits: - L.E.3 (wife's Financial Statement as of 8 July 1991) - L.E.4 (report of residential appraisal of matrimonial home) - L.E.5 (report of rental value of matrimonial home) - L.E.6 (invoices for preparing reports exhibited as L.E.4 and 5) - L.E.7 (summary of wife's pension data) - L.E.8 (wife's severance pay, 1987)

L.E.9 (Government of Newfoundland Employment Policy, 1991) - L.E.10 (Nurses' Collective Agreement, 1990 to 1991) - L.E.11 (summary of wife's income tax return for 1987) - L.E.12 (husband's income tax return for 1987)

(b) Husband's case

(b.1) husband, from well of court in response to inquiries per curiam, states he does not wish to offer further evidence.

(c) Per curiam: directions (including leave to parties to file written argument) and suggestions.

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