

77 Nfld. & P.E.I.R. 36

Murphy v. Murphy

Newfoundland Unified Family Court

Noonan U.F.C.J.

Judgment: June 23, 1989

Murphy v. Murphy

Violet Gloria Murphy, Plaintiff v. Lewis Joseph Murphy, Defendant

Murphy v. Murphy (No. 1.)

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Docket: Doc. F/85/367

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

Mr. James E. G. Vavasour , for the Defendant.

Noonan, J. (No. 1):

1 The issue in this case is the manner of division of matrimonial property pursuant to *The Matrimonial Property Act, Statutes of Newfoundland 1979, c.32* (the Act). This matter was consolidated with an application under *the Divorce Act* in respect of which a separate decision is being filed. To be resolved are issues of exclusive possession of the matrimonial home, a claim or occupational rent, compensation for business assets, the method of division of matrimonial assets and costs.

Background

2 Mr. and Mrs. Murphy were married on April 4, 1961. There were five sons born of the marriage - Lewis Joseph Jr., George Walter, Brian Hugh, William Daniel and Noel Gregory. The first three boys are independent; William Daniel is in an undergraduate programme at Memorial University of Newfoundland and Noel Gregory is attending school.

3 The Murphys have had unhappy differences which culminated in final separation on August 2, 1985. Mrs. Murphy left the matrimonial home with the children and sought alternate accommodation because of the marital conflict which she says she found intolerable. Since separation, three of the boys have resided continuously with their mother. In January, 1988 Lewis Joseph Jr. retained separate accommodation. William Daniel lived with his father for about six months from November, 1987 to May, 1988, and then returned to live with his mother. Mr. Murphy has continued to reside in the matrimonial home since separation.

4 During marriage Mr. Murphy was employed in various occupations. For the past number of years he has been self-employed as a mining promoter, explorer and prospector. Because of the nature of his work there was not a continual source of income. The household, in the main, operated on a credit line at the bank which was paid down from time to time with moneys received from Mr. Murphy's mining enterprises. Mrs. Murphy is a registered nurse and she worked outside the home for approximately ten years of the marriage. She was also a homemaker and primary child caregiver. Mr. Murphy's work necessitated considerable absence from the home during the marriage.

5 Mr. and Mrs. Murphy both have medical conditions which may impair their abilities to retain employment. Since separation Mrs. Murphy has had some periods of employment but she has been unable to secure a permanent job. Since the separation Mr. Murphy has continued in the mining field and has contributed to the support of the family.

Parties positions

6 Mrs. Murphy is seeking an order for exclusive possession of the matrimonial home. She is seeking occupational rent for the period Mr. Murphy occupied the home. She asks for compensation for business assets, an unequal division of matrimonial assets and costs.

7 Mr. Murphy, through his Counsel's brief, made an offer of settlement with respect to the division of assets. I am unable to consider that offer in the manner presented. In addition, Mr. Murphy resists Mrs. Murphy's claims for occupational rent, compensation for business assets, unequal division of matrimonial assets and costs.

Exclusive possession

8 Under section 13 of the Act, the court may make an order for exclusive possession of the matrimonial home. The order is discretionary and is possible in one of the two circumstances outlined in subsection (3). The text follows:

13(3) The court may only make an order for exclusive possession of the matrimonial home under subsection (1) or (2) where, in the opinion of the court

(a) other provision for shelter is not adequate in the circumstances; or

(b) it is in the best interests of a child to make the order.

9 The onus is on Mrs. Murphy to establish that one of the circumstances prescribed in the legislation exists. Once successful in meeting one of the conditions precedent, then it is for the trial justice to determine whether, in the exercise of discretion, an order for exclusive possession should be granted.

10 Central to the Act is the concept that marriage is a form of partnership. The Act provides

prima facie for an equal sharing of the fruits of the partnership. When a marriage ends the parties are entitled to apply for a division of the matrimonial assets. They are entitled to settle their affairs. The matrimonial home is a significant asset and frequently represents the only major asset of a married couple. It is unfair to deprive one party of the value of that property for a period unless there are compelling reasons.

11 In support of the application for exclusive possession Counsel for Mrs. Murphy submits at pages 43 and 44 of his Argument that:

(a) As to pre-requisite (a) - the wife submits she has established that "other provision for shelter is not adequate in the circumstances", having particular regard for her presently-inadequate living accommodation and the unreliability of support payments from the husband from which the wife could continue to pay for rented shelter. In place of the wife paying rent for leased quarters, as at present, she could reside in the unencumbered O'Regan Place matrimonial home and contribute to the expense of its operation from boarding either two mainstreaming persons under mental health care (the maximum she could board without a licence) or two college students.

(b) In the alternative, as to pre-requisite (b)-the wife submits she has established that "it is in the best interests of a child to make such an order", primarily on the basis of the contents of the parenting report. The parenting report is unequivocal in conveying the crucial importance of *repatriation* of Noel Gregory - *in* the wife's custody - *with* the O'Regan Place matrimonial home, to nurturing his presently-fragile emotional welfare (and all which that entails, as expressed in and implied by the report). The parties moved into the O'Regan Place matrimonial home when Noel Gregory was a year old.

(c) As to pre-requisite (c) - given the significance of Noel Gregory's re-occupation, the wife's custody, of the O'Regan Place matrimonial home, to serve the boy's "best interests", the wife submits that the trial Justice is warranted in exercising her residual discretion under s 13(3) of The M.P. Act to grant to the wife exclusive possession of that matrimonial home for the term of Noel Gregory's high school education (i.e., September 1988 to June 1992).

She is seeking an order for exclusive possession of the O'Regan Place matrimonial home until 30 June, 1992 provided she is the legal and physical guardian of Noel Gregory.

12 Mr. Murphy resists this application and his position is outlined at page 5 of his Argument:

The Husband maintains that since separation, the Wife has found and remains in adequate shelter. The evidence of the Wife with regard to shelter focused on lack of furniture (since remedied) as opposed to adequate shelter.

With regard to the best interest of Noel Gregory, the Husband advises that his visits to the area of late have been few and far between and few of Noel Gregory's friends reside in

the area.

Most importantly the Husband suggests that because of the bitterness between the parties and the relatively poor health of Mr. Murphy, it would be in everyone's best interest to make a final division of all matrimonial assets at this time. As well Mr. Murphy's offer to settle (supra) may alleviate any judicial decision on this topic.

13 I have carefully reviewed the evidence presented and the submissions of Counsel and am not satisfied that Mrs. Murphy has discharged her burden of proof. In my view she has not shown that other provision for shelter is inadequate nor has any compelling reason been given to indicate that such relief is in Noel Gregory's best interest. In any case, even if the burden of proof as to pre-requisites had been established, I believe it is essential in this case that any order under the Act be as final as possible. Accordingly Mrs. Murphy's application for exclusive possession of the matrimonial home at 5 O'Regan Place fails.

Occupational Rent

14 Mrs. Murphy is seeking compensation for her husband's occupancy of the matrimonial home since the date of separation, August 2, 1985. For the most part, Mr. Murphy had exclusive possession of the home as the children generally resided with Mrs. Murphy. The home is unencumbered. On the evidence it appears that during his exclusive period of possession Mr. Murphy effected some repairs and maintenance to the home and he said at trial that he intended to pay the outstanding municipal taxes.

15 Mr. Murphy disputes his wife's claim for occupational rent. On page 5 of his Counsel's Argument he says:

... that due to his ill health and lack of ability to cope with stress it was important for all concerned that he remain the the home on O'Regan Place to ensure that he could contribute as much as possible financially to the family's needs. To now award occupational rent to the Wife would be punitive to the Husband. If Mr. Murphy had not remained in the family home, his ability to assist his family would have been greatly diminished.

16 In her Reply to the position advanced by Mr. Murphy, Mrs. Murphy says at page 11:

... if the essence of the husband's submission in this regard (i.e., his capacity to support his family would have been diminished had he not occupied the matrimonial home,) is sustained, then any estranged spouse who occupies a matrimonial home but provides some level of support to his family living elsewhere can answer an occupational rent claim against him. Because granting of occupational rent is discretionary, each case turns on its particular facts.

I agree.

17 Madam Justice Cameron in *Reid v. Reid* (1984), 51 Nfld. & P.E.I.R. 12 at p. 17, (S.C. Nfld. U.F.C.) in considering the basis of a claim for occupational rent approves the reasoning of Krever, J. in *Diotallevi v. Diotallevi* (1982), 27 R.F.L. (2d) 400 and says:

I am satisfied that a finding of ejectment is no longer necessary for an award of occupational rent ... The Matrimonial Property Act directs a liberal construction of its provisions and I am satisfied that s. 24 permits an order for occupational rent ...

18 In *Cotton v. Cotton* (1981), 32 Nfld. & P.E.I.R. 30 at p.36, (S.C. P.E.I.) Mr. Justice MacDonald in discussing occupational rent observes that following the passage of the Family Law Reform Act:

...The traditional meaning attached to the term "occupational rent",... should have a wider meaning since the passage of the... Act. The spouse who has agreed to stay home may only have nominal expenses, if there is no mortgage, while the spouse who has agreed to seek other accommodations may have high expenses or the situation may be reversed. In the latter instances it is only equitable that any accounting between the spouses has a relationship to the reasonable expenses of both parties after the separation. If the reasonable expenses of one spouse exceed those of the other spouse, then the former spouse should be allowed a credit.

19 In the course of the trial of these matters Mr. Al Antle, Financial Counsellor was requested by the court to file a financial report of Mr. and Mrs. Murphy's relative financial circumstances. It is clear from his report that there was a considerable disparity in housing costs for Mr. and Mrs. Murphy. Mr. Murphy's housing expenses were determined to be \$293.00 per month, while Mrs. Murphy's were \$914.00 per month. In my opinion this is an appropriate case for the awarding of occupational rent. The question for me is the quantum of the award.

20 In *Elliott v. Elliott* (1985) 48 R.F.L. (2d) 407 at p. 409ff Madam Justice Cameron set out some of the ways in which occupational rent has been calculated.

When occupation rent is ordered, it has been calculated in a number of ways. In *Jarvis v. Jarvis* (1982), 32 R.F.L. (2d) 144 (B.C.S.C.) , 50 per cent of fair market value was ordered. In *Irrsack v. Irrsack* (1978), 22 O.R. (2d) 245, 93 D.L.R. (3d) 139 , affirmed 27 O.R. (2d) 478, 106 D.L.R. (3d) 705 (C.A.) , there was deducted from one half the rent the property would have attracted, one half the taxes and insurance paid by the occupying spouse. In *Cotton v. Cotton* (1981), 23 R.F.L. (2d) 78, 126 D.L.R. (3d) 548, 32 Nfld. & P.E.I.R. 30, 91 A.P.R. 30 (P.E.I.S.C.) , MacDonald J., in assessing occupation rent, used the cost of alternate accommodation for the spouse out of possession.

At common law, where the tenant in possession claimed for expenses such as taxes, mortgage interest, repairs and insurance, he would not be allowed such items unless he was prepared to pay occupation rent. A distinction is made between claims for non-capital expenditures and capital expenditures which might improve the value of the property to the benefit of the co-tenants or a reduction of principal owing on the

mortgage which would similarly increase the value to the absent tenant upon sale. Generally, allowances for reduction of principal or capital improvements to the property have been made whether or not there is an order for occupation rent: see *Briffett v. Briffett* (1985), 52 Nfld. & P.E.I.R. 147 (Nfld. T.D.) .

Judge Cameron ordered that Mrs. Elliott receive occupational rent based on a sum equal to one-half the rental value of the matrimonial home from the date of separation until the home was sold, minus one-half the cost paid by Mr. Elliott for the mortgage and insurance of the matrimonial home.

21 In this case I do not know the rental value of the matrimonial home. Mrs. Murphy suggests \$1,500.00 per month as realistic while Mr. Murphy suggests \$600.00. No independent evidence was offered. During his period of occupancy Mr. Murphy says he has effected some repairs to the home, done some painting and replaced some carpeting. No documentary proof was offered to support these expenses.

22 In *Baker v. Baker* (1976) [24 R.F.L. 145](#) (B.C.S.C.) at p. 154, Mr. Justice Craig asserted that occupational rent ...

... is not necessarily measured by either the rental value of the property or the rent which an ousted owner may have to pay for accommodation elsewhere. It is, simply, a form of compensation.

23 In *Smith v. Smith* (1988) [71 Nfld. & P.E.I.R. 181](#) (S.C. Nfld. T.D.) , Mr. Justice Cummings, in compensating Mrs. Smith for Mr. Smith's occupancy of the matrimonial home, awarded her interest at the rate of 9% per annum on her share of the matrimonial home. I believe that approach to be appropriate in the circumstance of this case.

24 Mr. and Mrs. Murphy agree that the value of the matrimonial home is \$110,000.00. Mrs. Murphy is entitled as compensation for Mr. Murphy's occupation of the home to interest at the rate of 9% per annum on the sum of \$55,000.00 minus one-half the municipal taxes and insurance paid on the property from the date of separation to date of disposal of the property.

Equal/Unequal Division

25 Mrs. Murphy is seeking an order of unequal division of the matrimonial assets. Specifically, she seeks a division of 60%-40% in her favour. Her position is that her contribution to the welfare of the family during marriage was superior to her husband's. For example, she says that because of the nature of Mr. Murphy's work during the marriage onerous demands were made on her with respect to child care and homemaking.

26 On the other hand, Mr. Murphy disputes Mrs. Murphy's claim of superior contribution. He says, in the alternative, that even if her contributions were superior to his, any disparity between their contributions does not reach the level where an equal division would be grossly unjust or unconscionable.

27 In *Wedgwood v. Wedgwood* (1987 No. F/87/114) S.C.Nfld. U.F.Ct.) (unreported) I reviewed this issue in some detail. The following excerpt beginning at page 22 of the decision, which I believe to be germane to this case, sets out my views as to the basic principles which apply:

The purpose of the Act is outlined in section 3:

3. The purpose of this Act is to reform the law with respect to matrimonial property in order to

a) recognize the contribution made by each spouse to a marriage;

b) give a one-half interest in the matrimonial home to each spouse;

c) provide for the deferred sharing of most other property acquired during a marriage; and

d) provide for judicial discretion in sharing business assets built up by a spouse during a marriage.

The legislative scheme provides for equal sharing of matrimonial assets. The division of assets is covered in Part 11 of the Act and section 17 outlines the general purpose of that Part.

17. The purpose of this Part is to recognize that child care, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by each of the spouses, financial and otherwise, that entitles each spouse to an equal division of the matrimonial assets acquired during the course of marriage.

The sharing of matrimonial assets is, therefore, based on each spouse's total contribution to the marriage. The general rule is to divide the matrimonial assets equally. However, the legislature has reserved to the court the right to address inequitable situations which might arise from the strict application of the equal sharing principle. The discretion is not broad and unfettered. Rather, a court must be guided by the precise criteria prescribed in section 20 of the Act.

20. The court may make a division of matrimonial assets that is not equal where the court is satisfied that a division of these assets in equal shares would be grossly unjust or unconscionable taking into account any of the following factors:

(a) the income, earning capacity, property and other financial resources that each of

the spouses has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities that each of the spouses has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the spouses before the breakdown of the marriage;

(d) the age of each party;

(e) the duration of the marriage;

(f) any physical or mental disability of either of the spouses;

(g) the contributions made by each of the spouses to the welfare of the family, including any contribution made by a spouse in looking after the matrimonial home or caring for the family;

(h) the loss of a potential benefit that a spouse loses by reason of a dissolution or annulment of the marriage;

(i) the unreasonable impoverishment or dissipation of matrimonial assets by either of the spouses;

(j) the length of time that the spouses have lived separate and apart from each other during the marriage; or

(k) the date of acquisition of each matrimonial asset.

As Morgan, J.A. stated in *Wade v. Wade* (1983) [44 Nfld. & P.E.I.R. 19](#) at p.20

The court is thus given a discretion but that discretion must be limited to circumstances enumerated in s.20. It is not for an individual judge to impose his or her own standards as to what is grossly unjust and unconscionable.

It is, I think, fair to conclude from the case law in Newfoundland which considered section 20 that the court is very reluctant to order an unequal sharing of matrimonial assets. Counsel for Mrs. Wedgwood referred to *Clouston v. Clouston* (1986), 60 Nfld. and P.E.I.R. 294 where Mr. Justice Morgan described the application of section 20 at page 297:

Undoubtedly, the language of s. 20 would appear to place a heavy burden on a party seeking an unequal distribution of property to satisfy the court that an equal division

of property in the circumstances obtaining would be grossly unjust or unconscionable. That burden, however, cannot be so great as to render an applicant's right to an unequal division of property illusory.

The Legislature clearly recognized that there may well be circumstances where a division of matrimonial assets in equal shares would be grossly unjust or unconscionable and in such circumstances the court is empowered to make a division that is not equal. The factors to be considered in determining what would be grossly unjust or unconscionable in any given circumstances are those prescribed in subss. (a) through (k) of s. 20 and these factors must be given such weight, either singly or collectively, as the circumstance warrants.

In cases where an unequal division has been granted under section 20 it has usually been because the marriage was of short duration and/or one of the spouses brought the principal asset into the marriage. (*Clouston v. Clouston* (1986), 60 Nfld. & P.E.I.R. 294 , *Wade v. Wade* (1983), 44 Nfld. & P.E.I.R. 19 , *Smith v. Smith* (1988) 71 Nfld. and P.E.I.R. 181, *Penney v. Penney* (1988) 71 Nfld. & P.E.I.R. 201 .)

Central to the issue in determining the method of sharing which should apply to the spouses is *contribution* . Goodridge, J. (as he then was), in *Briffett v. Briffett* (1985), 52 Nfld. & P.E.I.R. 147 at p. 153, paragraph 59 quotes a passage from *Arnold v. Arnold* (1982 No. C.B.226 (Nfld. T.D.) unreported) .

Marriage is not an exercise in bookkeeping. It is not to be expected that every contribution should be evaluated and that on the end of the marriage one party should pay the other an amount which would equalize the contributions. In a marriage, each party will contribute in a different way. The contributions will not always be equal. In fact, the parties will not be equal. One, blessed with greater competence than the other, will contribute more than the other.

The court must look carefully at the factors in section 20 and ask itself, in the circumstances of each individual case if it would be grossly unjust or unconscionable to divide the matrimonial assets equally. In the ordinary case equality is the rule. To depart from this rule it seems to me that there must be a real imbalance in contribution when one considers the roles adopted and the division of responsibilities between spouses in the particular marriage.

In an annotation to *LeBlanc v. LeBlanc* (1986) 1 R.F.L. (3d) 159 at 160 (N.B.C.A.) James G. McLeod observed that

The right to share results from the belief, that the spouses, operating as a team or unit, sort out the disparate family obligations and apportion responsibility between each other. The court should not second guess this apportionment so long as it is voluntarily entered into. Where, however, one of the spouses refuses to do his fair share or regularly fails to shoulder a fair share of the burden to the chagrin of the

other, the basic model does not hold and the basic division should be altered.

The decision in the *LeBlanc* case (*supra*) to which *Professor McLeod* wrote his annotation was subsequently appealed to the Supreme Court of Canada. Mr. Justice LaForest in *LeBlanc v. LeBlanc* (1988) 1 S.C.R. 217 at p. 222 described the philosophy and social policy underlining matrimonial property laws in the following way:

In common with similar provisions in other jurisdictions, s. 2 establishes the general principle that each spouse is entitled to an equal share of marital property. The principle is put into effect on the dissolution, nullity or breakdown of a marriage ... The principle must be respected. In applying that principle, courts are not permitted to engage in measurements of the relative contributions of spouses to a marriage. Nevertheless it should not be overlooked that the principle is expressly made subject to the equitable considerations recognized elsewhere in the Act.

28 In my opinion both Mr. and Mrs. Murphy contributed to the family. For her part, Mrs. Murphy provided household management, child care and financial resources from her work in the nursing profession. Mr. Murphy's main contribution was the provision of financial resources from his work.

29 I conclude, on the evidence before me, having considered the relevant legislative provisions and the submissions of counsel, that an equal division of matrimonial assets is appropriate. Such a division in my view is neither grossly unjust nor unconscionable.

Business Assets

30 The Act provides for the sharing of matrimonial assets and provides for the exemption of certain assets from sharing. "Matrimonial Assets" is defined in section 16 as follows:

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

(iv) business assets ...

31 Section 27 of the Act provides for an award of compensation for business assets in certain circumstances based on contribution. The text of section 27 is:

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

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

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

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

32 Mrs. Murphy is seeking compensation for her contribution to several companies which Mr. Murphy incorporated during the marriage in connection with his mining/prospecting enterprise. In each company she held shares - sometimes a qualifying share-and, in Murphy Corporation Limited, she was an officer of the company.

33 In support of her claim for compensation, at page 71 of her Argument, she says:

(a) First, the husband maintained his business office (from 1966, when Commodore was incorporated, to date) - at Military Road, then Argyle Street, now Elizabeth Avenue-apart from the various addresses at which the parties cohabited. However, commencing in 1966, he was frequently away from St. John's to pursue the location, delineation and staking of mining claims - the "stock-in-trade", if you will, of his mining business-or was intermittently shut-in at home or hospital due to illness. During such interludes, the wife received her husband's telephone messages at home, either from his office secretary or directly from his business contacts, and passed the messages along to the husband. In addition, she prepared correspondence from time to time (which the husband denied in trial evidence); occasionally attended business meetings as an officer of several of her husband's companies (the husband allowed, in trial evidence, that the wife attended one or two such meetings); and often entertained, in the parties' home, the husband's business contacts, that once involved a shindig for upwards of one hundred persons (which the husband discounted somewhat in trial evidence).

(b) Secondly, she joined, with the husband in two financial obligations to Royal Bank of Canada (in about 1971 and in about 1985) undertaken by the husband for business purposes; which the husband's businesses have since repaid.

(c) Thirdly, she "loaned" her husband monies for his businesses (on direct examination, 21 May 1986). On this point, the husband's evidence is that whatever monies the wife purportedly advanced to him were a portion of monies which he had earned in his businesses and had given to the wife to bank for family management or home acquisitions, or as a family nest egg. If that were so, re-transfer by wife to husband of a portion of such family monies for his business purposes, is evidence of a business contribution by the wife. For example, by note dated 15 November 1971, the husband acknowledged he owed the wife 15,000 shares of Commodore stock.

(d) Fourthly, (further to para. 111(a), *supra*), there was considerable mingling of

Murphy matrimonial funds and the husband's business funds; the extent of which, the financial report notwithstanding, may never be known, because of the husband's less than acute record-keeping. For example, of the proceeds of sale of 147 Topsail Road, occupied by the parties prior to 5 O'Regan Place, the wife testified that some \$5,000.00 was paid by her to Commodore Mining Company Limited (on cross-examination, 22 May 1986).

34 In contrast Mr. Murphy alleges at page 8 of his Argument:

22. The Husband denies that the Wife is entitled to any division of business assets. The Husband indicated at trial that during their marriage the Wife attended one company meeting and took a few message at home. This the Husband states is the extent of the Wife's contribution. The Husband denies that the Wife prepared correspondence and states that the entertaining at home that the Wife referred to consisted of a Christmas Party with neighbors and friends, including some of the Husband's geology acquaintances but not with business contacts.

23. The Husband denies receiving loans from his Wife. The Husband's evidence at trial was clear that the only monies the Wife had during the marriage were monies given by the Husband to the Wife to hold on to until he needed it. The money paid by the Wife to Commodore Mining Company was money that the Husband had asked the Wife to hold on to until I need it.

24. The Husband therefore submits that the Wife is not entitled to relief under Section 27 of the *Matrimonial Property Act* . In any event, the Husband says that there are no assets owned by the companies worth mentioning and the shares have no street value.

35 And in Reply Mrs. Murphy argues at page 14 of the document:

(a) [Para. 24]. Generally, as to the corporations that were embraced by the Court-authorized financial investigation, the husband's conclusion that "there are no assets ... worth mentioning and the shares have no street value" deserves particular attention. The wife submits that neither the information disclosed by the Court-authorized financial investigation nor the information adduced by the husband at trial is sufficient to warrant that conclusion or, in fact, any conclusion.

(b) The husband does not deny having given money sums to his wife. However, he says she held such money sums until he required them. He further says he had her, rather than a deposit institution, held such money sums out of concern for such considerations as creditors. In reply, bear in mind that the trial evidence indicates such money sums were given by husband to wife before 01 July 1980 when The Matrimonial Property Act (esp. s.29) came into force. Prior to that date, the common law rules respecting inter-spousal property transfers applied. Therefore, a transfer of money sum from husband to wife triggered the presumption of advancement, so that the husband bore the burden of proving that no gift to his wife was thereby intended.

If the husband discharged the burden, the wife held the money sum transferred to her on resulting trust for the husband. If, as the wife at Bar submits, the husband has not discharged that burden, the money sums the husband transferred to the wife belonged, outright, to her. And, the wife's transfer to the husband of such money sums triggered the presumption of resulting trust, whereby the husband held on resulting trust for the wife unless he discharged the burden of establishing that such transfers were gifts to him. Once again, the wife submits, the husband has not discharged that burden. Of particular importance in applying these rules is the question: is there probative trial evidence sufficient to displace the presumption of advancement in the wife's favor when the husband transferred money sums to the wife; and to displace the presumption of resulting trust in the wife's favor when the wife transferred money sums back to the husband? One would expect the husband to have adduced cogent trial evidence that, e.g., creditors were pressing or were likely to press for payment of debts in his name or payment of debts which he had guaranteed, or at least that he had undertaken or was about to undertake, *personally*, substantial financial liabilities from which he wanted to protect his family. Neither the husband nor the Court-authorized financial investigation disclosed evidence capable of displacing these presumptions.

36 The first point which must be determined is the question of entitlement to an award under the section. Once entitlement is established, the next question is which of the two remedies prescribed by the legislation is appropriate under the circumstances.

37 Entitlement is based on *contribution* to the acquisition, management, maintenance, operation or improvement of the business asset. The contribution may be direct or indirect. Madam Justice Cameron, in *Hart v. Hart* (No.2) 1985, [60 Nfld. & P.E.I.R. 280](#), dismissed a spouse's work in the home as a wife and mother as a contribution to a business asset under this section at p.284 citing *Leatherdale v. Leatherdale*, [\[1982\] 2 S.C.R. 743](#) that "I may not consider Mrs. Hart's work in the home as a wife and mother under this section". (see also *Neary v. Neary* (1981), [52 Nfld. & P.E.I.R. 263](#) (Nfld.) U.F.C.) and *Harding v. Harding* (1983), Nfld. U.F.C. No. F/82/355, unreported).

38 From the evidence, I conclude that during the marriage, Mrs. Murphy's contribution to her husband's various business assets included: a) her attendance at a single meeting of two of the companies; b) her taking of telephone messages from time to time; c) her signing a contract as "wife" on behalf of one company; d) her advancing a loan to one company which was subsequently repair; and e) the occasional entertaining of business clients. I am unable to determine the character of the money which apparently was transferred from Mrs. Murphy to Mr. Murphy early in the marriage and cannot conclude that it is a contribution to business assets.

39 In response to my questioning with respect to her contribution to business assets Mrs. Murphy said that she never actually worked for the companies or knew much about their operation. This is substantiated by Mr. Murphy who said that Mrs. Murphy had "no interest whatsoever" in the companies. It is clear on the evidence that Mrs. Murphy spent very little time at the companies' offices. She says in fact she was told to keep out of the business and away from

the office. I am left with the impression that Mrs. Murphy saw her contribution to the companies in an indirect fashion. She said the family was often without necessities and I believe she saw that by her and the children doing without the companies benefitted. She says sums of money were deflected from the family for the benefit of the companies.

40 Before ordering compensation under this section I must be satisfied that Mrs. Murphy has met the threshold test of contribution. I am not satisfied that Mrs. Murphy's contributions to Mr. Murphy's business asset justify an award under this section. Accordingly her claim for compensation under section 27 fails.

Matrimonial Assets to be Divided

41 Mr. and Mrs. Murphy agree as to the matrimonial assets which are subject to division with two exceptions. Mrs. Murphy claims that a house trailer with contents situated on undisputed matrimonial property at Bellevue, Newfoundland are matrimonial assets. Mr. Murphy says that the trailer is owned by Murphy Corporation Limited. It is clear that the trailer was used by the family for recreational purposes. It was also used in Mr. Murphy's business. From the evidence I conclude that the trailer had a mixed family/business use.

42 Section 4(1) of the Act defines "matrimonial home":

s.4(1)

(b) "matrimonial home" means the dwelling and real property occupied by a person and his or her spouse as their family residence and *owned* by either or both of them whether their occupation occurred before, on or after the commencement of this Act.

43 Section 16(1)(b) of the Act defines "Matrimonial assets":

s.16(1)

(b) "matrimonial assets" include all real and personal property *acquired by either or both spouses* during the marriage ...(emphasis added)

44 The burden of proof is on Mrs. Murphy to established that the house trailer and its contents are matrimonial assets subject to division under the Act. There was no evidence offered to establish ownership of these assets in either Mr. or Mrs. Murphy. Accordingly, I find that the house trailer and its contents situated at Bellevue are not subject to sharing under the Act.

45 Mrs. Murphy says that the separation date balance in her two bank accounts, at the date of separation, should not be subject to sharing because she says she used the funds for the support of the children and herself. Mr. Murphy's first contribution to the family's support was made by cheque on October 25, 1985 and was in the amount of \$1,200.00. I have reviewed the submissions made by Counsel in this regard and I conclude that it is inappropriate under the Act

to give Mrs. Murphy the relief she seeks with respect to these matrimonial assets. Accordingly, the sums contained in bank accounts held in Mrs. Murphy's name as of date of separation are subject to sharing.

46 I find that an order for division must be made with respect to the following matrimonial assets:

- a. land and dwelling at 5 O'Regan Place, St. John's,
- b. contents of 5 O'Regan Place,
- c. land and dwelling house at Pinchgut Lake,
- d. contents of Pinchgut Lake,
- e. land at Bellevue, Trinity Bay,
- f. land at Pancake Rock on the Southside of St. John's harbour,
- g. an easement on the Southside of St. John's harbour,
- h. a 1984 model Cougar motor vehicle,
- i. a 1981 model stationwagon,
- i. a 1981 model stationwagon,
- j. Mrs. Murphy's interest in a bank account at Royal Bank of Canada, Corner Brook, held jointly by her with her mother,
- k. a bank account held by Mrs. Murphy at St. John's,
- l. a bank account held by Mr. Murphy,
- m. a life insurance policy subscribed to by Mr. Murphy through Royal Life Insurance Company.

Costs

47 Mrs. Murphy is seeking an order for costs. The main thrust of her submission is the protracted time which these matters have taken to conclude. She points to delays which she believes were occasioned by her husband. It is most unfortunate that these matters have been on-going for so long but I believe it is inappropriate to place the major portion of the blame for delay on Mr. Murphy. There have been many problems throughout the process which are unique

to this case.

48 Mrs. Murphy has only partially succeeded in her claim for relief and in the exercise of my discretion I conclude that there shall be no order for costs.

49 *IT IS ORDERED THAT :*

1. Mrs. Murphy's application for exclusive possession of the matrimonial home at 5 O'Regan Place is denied.

2. Mrs. Murphy's claim for occupational rent is allowed. The compensation to be paid to her is calculated by applying a 9% simple interest rate to the sum of \$55,000.00 from the date of separation, August 2, 1985, until the property is disposed of in accordance with this order. There shall be deducted from the said sum one-half the municipal taxes and insurance attributable to the period for which occupational rent has been awarded. The payment of this compensation shall be satisfied from Mr. Murphy's share of the expropriation monies paid by Public Works (Canada) in respect of the Pancake Rock property referred to in paragraph 11 of this order. Payment shall be made within fifteen days of payment of the expropriation monies by Public Works (Canada).

3. Mrs. Murphy's application for an unequal division of matrimonial assets is denied.

4. Mrs. Murphy's claim for compensation for contribution to business assets is denied.

5.(a)(i) Mrs. Murphy has the option to buy out Mr. Murphy's share of 5 O'Regan Place on payment to him of \$55,000.00 within forty-five days of the filing of Formal Judgment. If Mrs. Murphy does not exercise her option within the time prescribed Mr. Murphy may exercise a similar option. If neither spouse purchases the interest of the other, the property shall be appraised and offered for sale at not less than 90% of its appraised value.

(ii) Mrs. Murphy shall have conduct of the appraisal and sale and may show prospective purchasers through the property.

(iii) Prior to the sale Mrs. Murphy shall effect such repairs, maintenance and cleaning of the O'Regan Place home as may, in her opinion, render the same more suitable for sale.

(iv) Upon sale, the proceeds, subject to the rights of persons not before the court, shall be applied to pay the following;

(1) Municipal and school taxes outstanding;

(2) The cost of work done under sub-paragraph (iii) for which acceptable vouchers

are provided;

(3) Real estate appraisal costs and commissions and legal expenses attendant upon the sale.

(v) The balance remaining after payment of the disbursements and costs outlined in paragraph (iv) shall be divided equally.

(b) Contents of the O'Regan Place matrimonial home are to be divided between the Murphys by agreement. If they are unable to agree, the contents, except those presently being used by the children of the marriage, are to be valued by a competent person and either party has the option to buy out the other's one-half interest within forty-five days of the valuation. Alternatively they shall be sold and the net proceeds divided equally.

6.(a)(i) The real property located at Pinchgut Lake is to be appraised by a competent real estate appraiser. Mrs. Murphy has the option of buying out Mr. Murphy's interest in the property on payment to him of one-half the appraised value within thirty days following receipt of the appraisal report. If Mrs. Murphy does not exercise her option within the time prescribed the property shall be offered for sale at not less than 90% of its appraised value.

(ii) Mrs. Murphy shall have conduct of the appraisal and sale of the Pinchgut Lake property and may show prospective purchasers through the property.

(iii) Prior to the sale Mrs. Murphy shall effect such repairs, maintenance and cleaning of the Pinchgut Lake house as may, in her opinion, render the same more suitable for sale.

(iv) Upon sale, the proceeds, subject to the rights of persons not before the court, shall be applied to pay the following;

(1) Municipal and school taxes outstanding;

(2) The cost of work done under sub-paragraph (iii) for which acceptable vouchers are provided;

(3) Real estate appraisal costs and commissions and legal expenses attendant upon the sale.

(v) The balance remaining after payment of the disbursements and costs outlined in paragraph (iv) shall be divided equally.

(b) Contents of the Pinchgut Lake home are to be divided between the Murphys by agreement. If they are unable to agree, the contents, except those presently being used by

the children of the marriage, are to be valued by a competent person and either party has the option to buy out the other's one-half interest within forty-five days of the valuation. Alternatively they shall be sold and the net proceeds divided equally.

7. (i) The real property situate at Bellevue is to be appraised by a competent real estate appraiser. Mrs. Murphy has the option of buying out Mr. Murphy's interest in the property on payment to him of one-half the appraised value within thirty days following receipt of the appraisal report. If Mrs. Murphy does not exercise her option within the time prescribed the property shall be offered for sale at not less than 90% of its appraised value.

(ii) Mr. Murphy shall have conduct of the appraisal and sale of the property situate at Bellevue and may show prospective purchasers the property.

(iii) Upon sale, the proceeds, subject to the rights of persons not before the court, shall be applied to pay the following;

(1) Municipal and school taxes outstanding;

(2) Real estate appraisal costs and commissions and legal expenses attendant upon the sale.

(iv) The balance remaining after payment of the disbursements and costs outlined in paragraph (iii) shall be divided equally.

8. If within four months from the filing of Formal Judgment the properties described in paragraphs 5(a)(i), 6(a)(i) and 7(i) have not been disposed of, the person who has the conduct of the particular sale may negotiate a price at less than 90% of the appraised value. All such sales are subject to the approval of both Mr. and Mrs. Murphy in writing. If they are unable to agree as to price, either of them may apply to the court for a determination of whether or not the sale at such price should be approved.

9. When a sale is negotiated with respect to each of the properties, both parties shall sign all instruments necessary for effectuating the agreement of sale and the conveyance and other documents or papers in writing that may be necessary in connection therewith.

10. If either party refuses to execute any such instrument or document, the other party may apply to the court for an order pursuant to Rule 26 of the *Judicature Act* .

11. Mrs. Murphy shall receive one-half the monies paid by Public Works (Canada) for the expropriated property known as Pancake Rock subject to the balancing payment prescribed in paragraph 14. After Mrs. Murphy's award for compensation for Mr. Murphy's occupation of 5 O'Regan Road is satisfied pursuant to paragraph 2, the balance

of monies paid by Public Works (Canada) goes to Mr. Murphy.

12. The easement on the Southside of St. John's has been resolved between the parties and no order is necessary.

13. The motor vehicles owned by Mr. and Mrs. Murphy at separation shall be appraised on a mutually agreed insurance book value basis. Costs of the appraisals are to be shared equally and a balancing payment will be made based on equal sharing.

14. Mrs. Murphy's two bank accounts valued at separation date at \$744.70 and \$2,500.00 shall be shared equally with Mrs. Murphy paying Mr. Murphy \$1,622.35 from the money she receives pursuant to paragraph 11.

15. There is no order with respect to Mr. Murphy's bank account as it was overdrawn at date of separation.

16. Mr. Murphy shall pay Mrs. Murphy one-half of the cash surrender value of his Royal Life Insurance Company policy valued as of separation date. The balancing payment is to be made within thirty days of the filing of Formal Judgment, from his share of the monies described in paragraph 11.

17. Either party has leave to apply for further directions.

18. Each party shall bear his or her own costs.

Order accordingly.

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