

79 Nfld. & P.E.I.R. 12

Neary v. Neary

Newfoundland Unified Family Court

Noonan U.F.C.J.

Judgment: October 25, 1989

Neary v. Neary

Valerie Jennifer Neary, Plaintiff v. David Patrick Neary, Defendant

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Docket: Doc. F/87/296

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

Mr. Ian Kelly, for the Defendant.

Noonan, J.:

1 This is an application for equal division of matrimonial assets. The characterization of certain assets is in dispute and there is a claim for occupation rent to be resolved. This claim was heard concurrently with a petition for divorce.

2 A decision in the divorce proceeding is not being filed concurrently, as is the usual practice. Counsel have been apprised that I have concluded that it is appropriate to deal with support for Mrs. Neary by way of lump sum payment. However, as there was no independent evidence before me with respect to the value of the matrimonial assets I am unable to know the relative financial positions of the parties. Leave is granted to Mr. and Mrs. Neary to apply for further directions.

Background:

3 Mr. and Mrs. Neary were married on November 10, 1962. On May 24, 1986 the couple separated although they both continued to live in the matrimonial home for a time. In June, 1987 Mr. Neary moved out from the home but continued to visit daily. He left finally in December, 1987 when he rented a basement flat near St. John's. Mrs. Neary has continued to reside in the matrimonial home. Mr. Neary has paid the expenses of the home and has voluntarily provided financial support for the family.

4 During their marriage the Nearys had three children. Elizabeth Lynn, a medical student due to graduate in May, 1990 lives with her mother. Karen Marie is pursuing postgraduate studies in music in Brandon, Manitoba. She spends holiday time with her mother in St. John's. David Christopher, who was born July 11, 1976, attends a local junior high school, lives with his mother and spends time with his

father.

5 Mr. Neary runs a grocery retail and wholesale business which was originally his father's. When his father became ill Mr. Neary abandoned his university program at St. Francis Xavier University and returned to Newfoundland to assist in the business. Since his father's death Mr. Neary has been running the firm.

6 Mrs. Neary completed her high school program and business course and worked in secretarial positions before her marriage. By agreement, after the marriage, she opted to remain at home with the children. After all the children were in school she returned to university and obtained several University credits. Since separation she has obtained further University credits and has upgraded her secretarial skills by taking training in computers.

7 During the marriage the Nearys became involved in a company - Chateaux Limited - which purchased property for potential development in the long term. They also acquired a number of assets which they seek to have divided.

Assets subject to division:

a. Matrimonial Home

8 There is a matrimonial home situated at 10 Donegal Place which is unencumbered. There was no appraisal report offered in evidence. The couple speculate that the property is worth somewhere between \$100,000.00 - \$140,000.00. It is subject to equal division and Mrs. Neary has the option of purchasing Mr. Neary's interest within 45 days of filing of Formal Judgment.

9 Mr. Neary is asking for compensation by way of occupation rent for the time the property has been exclusively occupied by Mrs. Neary. An award for occupation rent is discretionary and can be made under the authority of *section 24(f) of The Matrimonial Property Act, Statutes of Newfoundland 1979, c.32 (the Act)*.

24. In an application made under section 19, the court may order...

(f) that one spouse pay to the other spouse such amount as is set out in the order in order to provide for the division of the property,

and may make such other orders or directions as are ancillary thereto.

10 I am satisfied on the evidence that this is an appropriate case for awarding a sum for occupation rent. A value for occupation rent is sometimes related to the rental value of the property being divided. In this case no independent evidence of value was offered. Mr. Neary says he thought the rental value might be between \$800.00 - \$1,000.00 per month. He says that Mrs. Neary's estimate of \$750.00 per month is not "too far out". In *Baker v. Baker, 24 R.F.L. 145 at p. 154* Mr. Justice Craig says occupation 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.

In the circumstances I believe it fair to apply the following formula to determine the amount of occupation rent:

| | | | | | |
|---|---|--------------------------|---|-----------------|--|
| Rental value | | (Taxes + Home Insurance) | | | |
| \$750.00 | - | (\$58.30 + \$27.25) | = | Occupation Rent | |
| <hr style="border-top: 1px dashed black;"/> | | | | | |
| | 2 | | | \$332.22/month | |

Mr. Neary is entitled to recover from Mrs. Neary's share of the matrimonial home \$332.22 per month from December 1, 1987 until the matrimonial home is acquired by Mrs. Neary or is otherwise sold.

b. Household Contents & Furniture

11 Mr. & Mrs. Neary have agreed to divide the household contents equally *in specie*. Should they be unable to agree, the contents are to be valued by a competent person and sold, with the net proceeds being divided equally.

c. Motor Vehicles

12 At the time of separation Mr. and Mrs. Neary had two motor vehicles - a 1980 Oldsmobile and a 1986 Caprice Estate Stationwagon. Both vehicles have since been replaced. The Nearys agree that the value of the Oldsmobile, which was used for family purposes, is \$2,000.00

13 Mr. Neary takes the position that the stationwagon is an asset of the grocery business in which Mrs. Neary claims no interest and is therefore exempt from sharing.

14 *Section 16(1)(a)* of the Act defines "business assets" in this way:

s.16.(1) In this part a) "business assets" means property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose...

15 Business assets are exempt from sharing by virtue of *section 16(1)(b)(iv)* of the Act but they are subject to a compensation claim as provided in *section 27* of the Act.

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.

16 Mr. Neary says the vehicle was used 80% for the business and 20% for personal use. In his business he used the vehicle to pick up and deliver supplies. He said it was used very little for the family. On the other hand Mrs. Neary is seeking compensation for the percentage of time the vehicle was used for family purposes.

17 In *Duff v. Duff (1982) 41 Nfld. & P.E.I.R. 315* Mr. Justice Fagan was asked to consider 50% of a vehicle as a matrimonial asset. In that case Judge Fagan concluded at p.318

The defendant has a truck which he used partly for domestic purposes. This is true of almost any vehicle being used in business and I cannot accept the plaintiff's argument that 50% of it should be considered a matrimonial asset.

I agree.

18 On the evidence before me I conclude that the 1986 Caprice Estate Stationwagon is a business asset and exempt from sharing. Mrs. Neary is to pay to Mr. Neary from her share of matrimonial assets the sum of \$1,000.00 to equalize the division of the 1980 Oldsmobile.

d. Registered Retirement Savings Plan

19 At the time of separation Mr. Neary had an RRSP with Canadian Imperial Bank of Commerce. The plan was collapsed on February 11, 1987 and the net sum realized was \$1,975.00. Mr. Neary is to pay to Mrs. Neary from his share of matrimonial assets the sum of \$987.75 to equalize the division of the RRSP.

e. Bank Accounts, Savings Bonds, Shares - First Maritime Mining

20 At the time of separation Mrs. Neary had Canada Saving Bonds valued at \$25,000.00 and a balance of \$145.65 in a bank account. The Nearys agree that these sums are Mrs. Neary's solely because they are derived from her inheritance from her mother's estate and are exempt from sharing by virtue of *section 16(1)(b)(i)* of the Act:

s.16(1)(b)(i) "matrimonial assets" include all real and personal property acquired by either or both spouses during the marriage, with the exception of,

(1) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse and any appreciation in value of them during the marriage.

21 Mrs. Neary has eight shares in First Maritime Mining which were a gift to her from her father-in-law. By virtue of *section 16(1)(b)(i)* these shares are exempt from sharing and are the property of Mrs. Neary.

f. Sum of \$5,000.00

22 There is a dispute with respect to the treatment to be afforded a sum of \$5,000.00 which Mrs. Neary advanced to Mr. Neary at his request in September, 1985.

23 In an affidavit filed March 6, 1989 Mrs. Neary, in paragraph 5(a) gives the history of the \$5,000.00 sum:

b)...I received, as a gift, the sum of \$5,000.00 from my brother, G. Murray Chaplin, in 1981. The sum of \$5,000.00 was a portion of the proceeds of my mother's life insurance policy under which my brother, G. Murray Chaplin, was named as sole beneficiary. I deposited the sum of \$5,000.00 on the 06th. day of January 1981, to my bank account numbered 5517761 ...

24 In an affidavit filed December 9, 1988 and further explained in *viva voce* evidence, Mrs. Neary detailed various transactions with respect to the \$5,000.00. The relevant portions of the document follow:

5. By example, on the 04th. day of January 1985, the said sum of \$5,000.00 was invested in a term deposit at C.I.B.C. No. 1 for a 30-day term, which matured on the 04th. day of February 1985, yielding interest in the sum of \$35.03 that was credited, together with the said sum of \$5,000.00, to Account No. 1. A copy of the receipt for the said term deposit is annexed, marked Exhibit "B" to this Affidavit.

6. By further example, on the 04th. day of February 1985, the said sum of \$5,000.00 was again invested in a term deposit at C.I.B.C. No. 1 for a further 30-day term, to mature on the 06th. day of March 1985. Prior to the 06th. day of March 1985, at the request of my husband, I loaned him the said sum of \$5,000.00 as a result of which no interest was earned on the said term deposit for the further 30-day term because the term deposit had been prematurely negotiated with my authority to be loaned to the Defendant. A copy of the receipt for the said term deposit is annexed, marked Exhibit "C" to this Affidavit.

7. During the summer of 1985, the Defendant repaid to me, and I resumed investing, the said sum of \$5,000.00 in a term deposit at C.I.B.C. No. 1, to mature on the 10th. day of September 1985. On the 10th. day of September 1985,

(a) the said term deposit matured yielding interest in the sum of \$64.73,

(b) the said sum of \$5,000.00 plus interest in the sum of \$64.73 was deposited to Account No. 1,

and

(c) I again loaned to my husband, at his request, the said sum of \$5,000.00, but I do not know, as a fact, what my husband did with the said sum of \$5,000.00

25 Mr. Neary says he borrowed a \$5,000.00 sum from Mrs. Neary on two occasions. He says he told his wife that he needed the funds to apply against indebtedness. However, he admitted that the real reason he asked for the \$5,000.00 was that the marriage was deteriorating; he was of the view that the account in Mrs. Neary's name contained \$10,000.00; in his opinion this was a "family account" and he wanted to retrieve his one-half.

26 He says he used the \$5,000.00 to finance the purchase of a recreation property at Ryan's Pond in December, 1985. The property is next to land owned by Mrs. Neary's brother with whom he was on good terms. He says he thought he would put a cabin or trailer on the property for Christopher and him to enjoy. His position is that since the sum found its way into a matrimonial asset, it has lost its character as exempt property.

27 Mrs. Neary says she has no knowledge as to the disposition of the \$5,000.00 sum. On the evidence I cannot find any agreement between the Nearys with respect to the purchase of the Ryan's Pond property. In fact the relationship between them was very strained at the time. Mr. Neary says they had not spoken to each other for about one year prior to the purchase and he could not recall whether or not he told her what he did with the \$5,000.00. Mr. Neary offered no documentary or other proof to support his position that the \$5,000.00 sum went into Ryan's Pond. At trial he abandoned his claim for a share of the "family bank account". He says his main objective in obtaining the \$5,000.00 was to get my share of "our money".

28 I conclude from the evidence that the sum of \$5,000.00 was not "family money". It was a gift to Mrs. Neary, advanced by way of loan to Mr. Neary, as she thought, for the purpose of helping him reduce business indebtedness. This was the second time she had advanced the \$5,000.00 sum. Under the Act its character is "exempt from sharing". Mr. Neary shall repay the sum of \$5,000.00 to Mrs. Neary from his share of the matrimonial assets.

g. Ryan's Pond property

29 This property is a matrimonial asset. It is to be appraised by a competent real estate appraiser unless the Nearys are able to agree on a value within 45 days of filing of Formal Judgment. The property shall be offered for sale and the net proceeds are to be divided equally.

Business Assets / Matrimonial Assets

30 During the marriage Mr. Neary acquired an interest in various parcels of land in addition to the matrimonial home and the Ryan's Pond property. At the date of separation he had an interest in the following:

a) Vacant land - Shoal Bay Road, Bay Bulls,

registered owner - Chateaux Ltd.

b) Vacant land - Bay Bulls Road,

registered owner - Chateaux Ltd.

c) Vacant land - Off Shoal Bay Road, The Goulds,

registered owner - Chateaux Ltd.

d) Vacant Land - Petty Harbour Road, The Goulds,

registered owner - Mr. Neary 50%, Dover Investments Ltd. 50%.

e) 18-20 Campbell Avenue, parcel of land St. John's and house rented.

registered owner - Mr. Neary

f) Kilbride - three parcels of vacant land.

registered owners: Mr. Neary 25%

City Investments Ltd. 25%

Dover Investments Ltd. 50%

a. Chateaux Limited

31 Chateaux Limited was incorporated on October 12, 1972. There were three shareholders - Mr. Edward Neary, Mr. David Neary and Mr. Cosmos Leonard. The objects for which the company was formed were broad, but the business in which the company actually engaged was the acquisition of land for development purposes. Between 1972 and 1974 it acquired various pieces of vacant land. The company also constructed two houses which were subsequently sold. Mr. Neary said the idea of the company came from his brother, Edward. He seized the opportunity to participate because he saw the company as an excellent way to help him augment his income from the grocery business. Mr. Edward Neary said in his evidence that the company had not been particularly successful. He said there was no profit in the company until 1976 when a small gain was realized. The partners soon decided that they would not construct any more houses and they determined to hold the assets in the company for the long term to await municipal servicing prior to development.

32 In 1978 Mr. Leonard wanted to sever his connection with the company and on March 22, 1978, Mrs. Neary bought his interest with funds which were in a savings account in her name. She acquired 17

shares and one-half a debt Mr. Leonard owed the company. Mr. Edward Neary indicated that there was a receivable owing to Mrs. Neary by Chateaux Limited in the amount of \$2,983.13 in 1988. Mrs. Neary was listed as an officer of the company - secretary - from 1978 - 1983.

33 In analyzing the character of the 17 shares I believe it important to look at the circumstances surrounding their acquisition. The Defendant said that when Mr. Leonard left the company, it required a third shareholder by statute. At the time the marriage was going well. He approached Mrs. Neary for money to buy out Mr. Leonard. He said he consulted with her saying he would like her to be included in the company. He says the acquisition of the shares by Mrs. Neary was a joint decision. Mrs. Neary said that she had the hope that Chateaux Limited could purchase real estate, speculate and invest for retirement purposes as Mr. Neary had no pension plan or life insurance.

34 From the evidence it is clear that Mrs. Neary had no involvement in the running of Chateaux Limited. The company was run by Edward and David Neary. She was nominally an officer of the company. It appears that no formal shareholders meetings were held and in fact there has been little or no activity in the company since 1980.

35 In all the circumstances, I conclude that the 17 shares, and account receivable in Chateaux Limited in Mrs. Neary's name, are her business asset and are exempt from sharing. Similarly, 33 shares and account receivable in Chateaux Limited in Mr. Neary's name are his business asset and are exempt from sharing. The properties held in the name of Chateaux Limited are, therefore business assets and, exempt from sharing under the Act.

b. Campbell Avenue Property

36 On October 25, 1967 Mr. Neary acquired property situated at 18-20 Campbell Avenue. The property is next to Neary's Grocery and Wholesale business. It is currently rented.

37 Mr. Neary described the history of the acquisition of the property. Mr. Neary's father and the next-door neighbor were long-term friends. Their driveways were adjacent to each other. The delivery doors to the grocery business are located in such a way that in order to off-load and pick-up items it is necessary to cross over the neighbor's parking area. When the property was listed for sale Mr. Neary believed it was in the best interest of the grocery business to acquire it. He has since maintained the property as a rental unit.

38 Mr. Neary says this property is a business asset, exempt from sharing while Mrs. Neary maintains it is a matrimonial asset.

39 It is often very difficult to characterize property acquired during a marriage as either matrimonial or business assets. In *Lawrence v. Lawrence* 25 R.F.L.(2d) 130 Mr. Justice Hart discussed the difficulty of discerning which assets are matrimonial and which are business. At page 142 of his decision he gave some direction on the appropriate approach to be used in assessing the appropriate classification. Mr. Justice Hart's analysis, which follows, was accepted by Mr. Justice Steele in *Harding v. Harding* 1982 No. F/82/355 (S.C. Nfld. U.F. Ct.)(unreported).

The most difficult problem in relation to the determination of the matrimonial assets of the parties is to decide what assets should be excluded as being business assets under the definition contained in s. 2. Too broad an interpretation of this section could result in removing virtually all assets from the classification of matrimonial assets except the matrimonial home. Too narrow an interpretation would result in almost all of the assets of the parties being classified as matrimonial assets. In the first case it would then be necessary to attack the business assets pursuant to s.13 for a division of them, or apply for an order under s. 18 based upon one's contribution to the development of the business assets. In the second case it would be necessary to apply for an unequal division of the matrimonial assets in order to attain the basic intention of the legislation, that is, a relatively equal division of matrimonial assets alone.

It seems to me therefore that the only assets that should be classified as business assets are ones that are purposely held or used for the production of income or profit. Thus an apartment house would be a business asset, whereas a piece of land held in the hope of gain would be a matrimonial asset. A car used in business would be a business asset, and a car used for family purposes would be a matrimonial asset. Money invested in savings certificates, stocks or bonds would be business, whereas money resting in current accounts or accounts used for household purposes would be matrimonial. Works of art would be matrimonial whereas an operating farm would be a business asset. It is not enough to say that some gain or benefit may accrue in the future from the asset, but rather it must be said that it is working in a commercial, business or investment way for the production of income or profit.

40 In *Duff v. Duff supra at p. 318* Mr. Justice Fagan said of the definition of business assets in the Act:

If strictly interpreted this definition would include money saved by a working spouse and invested. I take it, however, that the definition must be read in conjunction with the words defined and that assets invested for the purpose of producing income or profit are only business assets where such investment is the business or part of the business of the spouse.

41 In *Duff v. Duff (1983) 43 Nfld. & P.E.I.R. 151 at 156ff(Nfld. C.A.)* Mr. Justice Morgan discussed savings certificates. He said

At first glance it would appear that monies invested in bonds, guaranteed investment certificates or even those placed in a non-chequing savings account would constitute business assets. Such a broad interpretation could result in removing virtually all assets, other than the matrimonial home, from the classification of matrimonial assets. On the other hand, too narrow an interpretation of s.16(1)(a) could have the opposite result. Each case must be determined on its own particular facts.

42 Applying the above approach to the characterization to be given this property, I conclude that 18-20 Campbell Avenue was acquired in relation to Neary's Grocery and Wholesale and is a business asset of Mr. Neary.

43 The next consideration is whether or not Mrs. Neary is entitled to compensation under *section 27*.

44 On the evidence before me Mrs. Neary's only contribution to this business asset was a consultation she had with her husband when the property was acquired as to its possible use. Mr. Neary said he asked for her ideas. Mrs. Neary said she has had no involvement with the obtaining of tenants. In her view the property which was purchased early in the marriage was an investment for their retirement.

45 I conclude, on the balance of probabilities that the property situate at 18-20 Campbell Avenue is a business asset of Mr. Neary, is exempt from sharing and Mrs. Neary has no claim for compensation under *section 27*.

c. Petty Harbour Road & Kilbride properties.

46 Mr. Neary had a 50% interest in vacant real property at Petty Harbour Road Known as the Donovan's property. This property was originally purchased by Chateaux Limited on September 20, 1973 and was sold to Mr. Neary and Dover Investments Limited on April 29, 1976. On June 26, 1987 the property was sold for \$31,500.00 and Mr. Neary said he applied his share of the proceeds to reduce the grocery business debt to the bank. Mr. Neary also owns 25% of three parcels of vacant land at Kilbride known as the Murphy property. The other owners are City Investments Limited (25%) and Dover Investments Limited (50%). The property was acquired on August 28, 1975. Mr. Neary says his portion of the purchase price for the property acquisitions usually came from his business.

47 On the other hand, Mrs. Neary says she withdrew funds from her savings account on September 17, 1971 (\$5,000.00), September 12, 1974 (\$3,900.00) and July 2, 1976 (\$5,966.28) at her husband's request. She says her husband told her he wanted to purchase real estate as an investment for their retirement. Mr. Neary says he doesn't recall to what the \$5,000.00 and \$3,900.00 sums were applied. He said no property was acquired in 1971 and he doesn't think the \$3,900.00 sum was for property acquisition. He recalls that the sum of \$5,966.28 went to reduce bank indebtedness. Mr. Edward Neary's evidence was that this sum was David Neary's portion of an \$18,000.00 debt which he, Cosmos Leonard and David had after a property in Gregg Gardens was sold and the Donovan's property was purchased. This sum is shown on the books of Chateaux Limited as an account receivable by Mr. David Neary.

48 Mr. Neary says these properties are his business assets to which Mrs. Neary has not contributed and Mrs. Neary says they are matrimonial assets.

49 In approaching these properties as to a determination of whether they are matrimonial or business assets, I have applied the same approach as I did to the Campbell Avenue property.

50 Applying the reasoning in *Lawrence and Duff (supra)*, I conclude that these assets are matrimonial and Mr. Neary's interest in them is to be shared equally by Mrs. Neary.

Mortgage Account Receivable

51 In April 1974 Mr. Neary acquired a piece of property at the corner of Job Street and Hutchings Street, St. John's. He said he thought it might be a good location to establish a business. He subsequently sold the property and arranged for the purchasers' financing with a private mortgage company. The

mortgage payments fell into arrears and Mr. Neary borrowed funds to pay down the mortgage and he became the mortgagee. The mortgage is being repaid at the rate of \$400.00 per month.

52 Mr. Neary says that the mortgage receivable is a business asset and exempt from sharing. There was no evidence of any involvement by Mrs. Neary in this property acquisition.

53 Mrs. Neary's position is that the mortgage receivable is a matrimonial asset, subject to division.

54 In *Duff v. Duff supra*, Mr. Justice Morgan opined at p.157

Circumstances may arise where certain assets, that had been held as "business assets" were later converted into matrimonial assets by the sale thereof and the placing of the proceeds of sale into an account or securities for the purpose of use by the husband and wife... In this case a business asset had been sold and the net proceeds of sale invested in savings certificates. The appellant did not intend to reserve these monies for business purposes; instead, on his own evidence, the monies were invested to provide income for himself and his wife when he could no longer work. In the circumstances the trial judge was correct, in my view, in declaring these assets to be matrimonial assets.

55 Applying Mr. Justice Morgan's reasoning, I conclude that the mortgage account receivable is a matrimonial asset and is subject to equal sharing.

Conclusion

56 *IT IS ORDERED THAT:*

1. Mr. Neary's claim for occupation rent is allowed. Mrs. Neary shall pay to Mr. Neary from her share of the matrimonial assets the sum of \$332.22 for each month commencing December 1, 1987 and continuing until the matrimonial home is acquired by Mrs. Neary or otherwise disposed of in accordance with this order.

2(a)(i) Mrs. Neary has the option to buy our Mr. Neary's share of 10 Donegal Place on payment to him of one-half the value as agreed between them, within forty-five days of the filing of Formal Judgment. If they are unable to agree as to value, then the property is to be appraised by a qualified real estate appraiser mutually acceptable to both or appointed by the court on application. Upon receipt of the appraisal report Mrs. Neary has thirty days to exercise her option to purchase Mr. Neary's one-half interest by paying him a sum equal to one-half the appraised value. If Mrs. Neary does not exercise her option within the time prescribed Mr. Neary 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. Neary shall have conduct of the appraisal and sale of 10 Donegal Place and may show prospective purchasers through the property.

(iii) Prior to the sale Mrs. Neary shall effect such repairs, maintenance and cleaning of 10

Donegal Place 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 home at 10 Donegal Place are to be divided between the Nearys 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.

3. Mrs. Neary's claim for division with respect to a 1986 Caprice Estate Stationwagon is denied. She shall pay Mr. Neary from her share of the matrimonial assets the sum of \$1,000.00 to equalize the division of a 1980 Oldsmobile.

4. Mr. Neary shall pay Mrs. Neary the sum of \$1,975.00 to equalize the division of an R.R.S.P. held in his name at the time of separation.

5. Mrs. Neary's Canada Savings Bonds and bank account held at separation date are exempt from sharing. Mrs. Neary's eight shares in First Maritime Mining are exempt from sharing.

6. Mr. Neary shall repay to Mrs. Neary from his share of the matrimonial assets the sum of \$5,000.00 which I conclude was advanced to him by Mrs. Neary as a loan.

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

(ii) Mr. Neary shall have conduct of the appraisal and sale of the property situate at Ryan's Pond 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) 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. Mrs. Neary's 17 shares in Chateaux Limited and an account receivable in the company in her name are her business assets and are exempt from sharing.

9. Mr. Neary's 33 shares in Chateaux Limited and an account receivable in the company in his name are his business assets and are exempt from sharing.

10. The property located at 18-20 Campbell Avenue is a business asset of Mr. Neary and is exempt from sharing. There is no compensation to be paid Mrs. Neary under *section 27 of the Act* in respect of this asset.

11. Mr. Neary's interests in properties at Petty Harbour Road and Kilbride known as the Donovan's property and the Murphy property are characterized as matrimonial assets. His interest in the properties is to be shared equally with Mrs. Neary.

12. Mr. Neary's mortgage account receivable with respect to property located at the corner of Job Street and Hutchings Street, St. John's is a matrimonial asset and is subject to equal sharing with Mrs. Neary. The valuation date with respect to this account is May 24, 1986.

13. Either party may apply for further directions.

14. In the exercise of my discretion there is no order for costs.

Order accordingly.

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