NOVA SCOTIA COURT OF APPEAL
Citation: ***Leigh v. Milne***, 2010 NSCA 36

Date: 20100428
Docket: CA 316833
Registry: Halifax

Between:

Gillian Mary Leigh

Appellant

v.

Robert Stephen Milne

Respondent

Judges:	MacDonald, C.J.N.S.; Bateman and Hamilton, JJ.A.
Appeal Heard:	March 18, 2010, in Halifax, Nova Scotia
Held:	Appeal allowed in part per reasons for judgment of Bateman, J.A.; MacDonald, C.J.N.S. and Hamilton, J.A. concurring.
Counsel:	appellant in person respondent not appearing

Reasons for judgment:

[1] Gillian Mary Leigh appeals from the divorce and corollary relief judgments granted by Justice M. Clare MacLellan of the Supreme Court of Nova Scotia, dated November 9, 2007. The unreported reasons for judgment were delivered orally on October 4, 2007, after a contested hearing which concluded on February 27, 2007. Ms. Leigh was self-represented on this appeal. Mr. Milne, also self-represented, did not appear at the appeal hearing but submitted a brief written factum. His written request for an adjournment was denied. Ms. Leigh is currently 67 years old while Mr. Milne is ten years younger.

BACKGROUND

[2] Ms. Leigh, representing herself, initiated the divorce and matrimonial property proceedings in the Supreme Court by filing her Petition for Divorce on February 14, 2003. The unfortunate fact that the litigation was not concluded until October, 2007 has caused much hardship for Ms. Leigh. It was not due to any delay on her part. In my view this proceeding is an aberration and not representative of the usual course of such matters.

[3] I will review the parties' backgrounds in brief and then summarize the progress of this proceeding, as drawn from events noted on the Court record.

[4] Ms. Leigh began her working life as a secretary in London, England in 1957, at the age of 18. After a year's employment in Austria, she spent eight years in a convent as a nun. During that time she completed her BSc in Psychology (1972). In 1973, having left the convent, she emigrated to Canada taking up employment as a research assistant at the University of Guelph. In 1975 she received her MA in Psychology and continued her work with the University. That same year she met Mr. Milne who was a student. They married in 1976. By 1980 each had achieved a PhD in their respective fields, hers in Psychology, his in Zoology.

[5] Ms. Leigh then commenced work as a research scientist with the Addictions Research Foundation in Toronto. Mr. Milne seemed unable to find or maintain employment. With a view to providing gainful work for Mr. Milne they rented accommodations in a rural area, so that Mr. Milne could work on an adjacent farm. Ms. Leigh hoped that, with his background, Mr. Milne would take an interest in

farming. Eventually they purchased a farm for Mr. Milne to work. Ms. Leigh maintained her outside employment. In 1981 their only child, a son, was born. Ms. Leigh was primarily responsible for childcare, arranging babysitters during her work hours. The farming business was not a success. Mr. Milne's interest and effort was minimal.

[6] When Ms. Leigh's employer downsized in 1985 she pursued contract and grant work, supporting the family with her income. Ms. Leigh could not find permanent work in her field. The farm they had purchased was losing money. The couple decided to move to Cape Breton, Nova Scotia, where Ms. Leigh had been offered a job with Mental Health Services. She hoped that Mr. Milne, with a specialty in fish physiology, would find employment in the fish farming industry. They rented, and eventually sold, the property in Ontario and purchased a farm in Cape Breton.

[7] Mr. Milne completed a Business Computer Programming Course and a Diploma in Business Administration after the move to Nova Scotia, but did not seriously pursue employment. He ran up a significant balance on a credit card and lost his driver's licence on account of alcohol abuse. His mother paid off his credit card bill.

[8] In 1994 the parties purchased a larger farm hoping to establish a wool and llama trekking operation. Eventually the smaller farm was sold at a loss, although the proceeds were sufficient to pay off the mortgage on the larger farm. Even though Ms. Leigh financed the purchase of wool-spinning equipment the wool/llama operation was still not making money.

[9] The years until the parties separation in 2001, continued in this fashion with Ms. Leigh providing the financial and domestic contribution and Mr. Milne doing little to contribute in money or kind.

[10] Finally, with the independence of the parties' son in 2001, Ms. Leigh left the marriage of 25 years. Mr. Milne remained in the matrimonial home. His mother had previously moved to live with the parties and had financed the building of her own quarters, attached to the their home. On separation, Mr. Milne retained the wool spinning equipment and undertook to make payments on the related loan but defaulted. The parties' finances further deteriorated.

[11] During 2002 and 2003 Ms. Leigh attempted to reach agreement with Mr. Milne on the division of assets. He would not negotiate save with respect to some minor possessions and the livestock. He refused to consider selling the matrimonial home.

[12] Unable to resolve the financial and property issues Ms. Leigh filed a petition for divorce with supporting documentation in February, 2003. Mr. Milne was served but did not respond. When Ms. Leigh inquired of the court about his lack of response, she was advised by staff that the 60 day response period was a guideline only.

[13] Meanwhile, Mr. Milne remained in possession of the family home, living mortgage-free while Ms. Leigh secured rental accommodation. She took possession of the spinning equipment, having been called upon to pay the related debt on Mr. Milne's default. Eventually she purchased another farm with a business partner, cashing a $36,000 RRSP to finance her share of that endeavour. Mr. Milne continued to ignore the divorce proceedings. The matrimonial home and farm property occupied by Mr. Milne fell into disrepair. Ms. Leigh was responsible for the related debts.

[14] Having heard nothing from Mr. Milne in response to her petition for divorce, Ms. Leigh initiated court-appointed mediation hoping to resolve the outstanding issues. The parties made no measurable progress. Mr. Milne refused to address the division of the property. He wanted to retain ownership of the matrimonial home. Finally, unable to reach any comprehensive agreement, Ms. Leigh applied for judgment in the divorce and property proceeding.

[15] In order to provide context to the issues which Ms. Leigh has raised on this appeal I will, in point form, outline the events in this proceeding as extracted from the record on appeal:

> **February 14, 2003**: Ms. Leigh filed a Petition for Divorce; Application and Intake Form; Notice to Disclose; Statement of Financial Information; Statement of Property; and proposed Separation Agreement. She was seeking a divorce, change of name and division of property.

February 18, 2003: Mr. Milne was served with the Petition for Divorce but did not file an Answer or otherwise respond.
March 18, 2004: Ms. Leigh filed an application for judgment with an updated Statement of Financial Information.
May 2004: Ms. Leigh's application for judgment was reviewed by Justice Simon MacDonald who determined that there must be a hearing on the division of property, absent Mr. Milne's consent. For unexplained reasons Ms. Leigh did not receive any communication about this from the court.
January 2005: Having heard nothing in response to her request to finalize the matter, Ms. Leigh applied, unsuccessfully, for Legal Aid.
February/March 2005: On the advice of duty counsel, Ms. Leigh submitted a request for a trial date, filing a certificate or readiness. On March 12 she received a settlement proposal from Legal Aid counsel, a Mr. Dinaut, on behalf of Mr. Milne.
April 5, 2005: The court conciliator, who had unsuccessfully attempted to mediate a resolution, recommended scheduling a trial to resolve the property issues.
April 8, 2005: Ms. Leigh contacted the court regarding assignment of a trial date. A pre-trial conference was scheduled for June 15, 2005. (Ms. Leigh had continued to initiate regular contacts with the court up to this time.)
May 6, 2005: Ms. Leigh again filed an application for judgment.
May 26, 2005: Ms. Leigh filed information for the pre-trial conference, in addition to her Statement of Financial Information.
June 15, 2005: The parties appeared before Justice MacLellan for a pre-trial. Ms. Leigh was self-represented. Mr. Dinaut represented Mr. Milne. Ms. Leigh advised that she would be asking for a divorce and unequal division. Mr. Dinaut said Mr. Milne was seeking a division of pensions and other property and spousal support. Justice MacLellan asked them to value/quantify their property before the trial
August 15-18, 2005: A pre- trial brief and answer and counter-petition for divorce and statement of property were filed by Mr. Dinaut, on behalf of Mr. Milne.
August 31, 2005: A pre-trial brief was filed by Mr. Daniel Burman, who had been retained by Ms. Leigh.

September 2, 2005: The parties and their counsel appeared before Justice MacLellan. The Court was advised that they had reached a full settlement consistent with the terms set out in Mr. Burman's August 31, 2005 pre-trial brief. The settlement agreement was read into the record and ordered effective immediately. It reflected a 60/40 division in favour of Ms. Leigh and included sale of the matrimonial home and lands, division of Ms. Leigh's teacher's pension and her LIF (which is a retirement financial investment). Ms. Leigh would retain full ownership of her UK pension. The parties agreed that there would be no spousal support now or in the future. The real property was to be sold immediately. After questioning the parties on the prospect of reconciliation, the judge orally granted the divorce and change of name for Ms. Leigh. Ms. Leigh understood that she was then divorced and matters were resolved.

September 27, 2005: Draft minutes of settlement, a corollary relief judgement (CRJ) and divorce judgment were sent by Ms. Leigh's counsel to Mr. Dinaut. Mr. Milne refused to execute the documents.

March 3, 2006: Ms. Leigh filed a notice of intention to act in person. Mr. Milne was still represented by Mr. Dinaut. Mr. Milne remained in occupation of the matrimonial real property.

April 20, 2006: Draft minutes of settlement were again sent by Ms. Leigh to Mr. Dinaut. Mr. Milne still would not honor the agreement.

June 2, 2006: Ms. Leigh requested the issuance of the CRJ by the court. In response, the court issued a notice to appear for a Chambers hearing before Justice MacLellan. Ms. Leigh filed a detailed brief outlining the course of events, and addressing, in particular, the deterioration of the real property and Mr. Milne's refusal to co-operate in its sale.

June 26, 2006: The parties appeared before Justice MacLellan in Chambers. Both were self-represented. Mr. Milne expressed his dissatisfaction with the settlement. Justice MacLellan confirmed that the orders were effective as of the date read into Court (September 2, 2005) and directed Ms. Leigh to draw up a CRJ. She advised Mr. Milne that if he did not execute the agreements within two weeks she would issue the CRJ, regardless. The court issued an order authorizing Ms. Leigh to finance ($15,000) and arrange repairs to the

property. The hearing was adjourned to September 27, 2006 for a status update on the sale of the property.

September 27, 2006: The parties again appeared before Justice MacLellan. Ms. Leigh had retained a Mr. Rodgers for that appearance and Mr. Dinaut continued to represent Mr. Milne. Inexplicably, given the events of September 2, 2005 recounted above, a full hearing of the corollary relief issues commenced. The judge again granted the divorce and name change. The hearing was adjourned to October 31, 2006 to hear Mr. Milne's claim for spousal support and for summations by counsel.

October 31, 2006: The hearing resumed with additional evidence. The judge adjourned for an additional month directing Ms. Leigh to provide evidence of pension valuations.

February 27, 2007: Justice MacLellan brought the matter back on her own motion with a direction that post-trial submissions be filed within 30 days.

March 27, 2007: Post-trial submissions were filed.

October 4, 2007: Counsel appeared. Ms. Leigh had been advised by her counsel she need not be present. The judge delivered an oral decision.

November 9, 2007: The divorce and CRJs were signed by Justice MacLellan.

ISSUES ON APPEAL

[16] Ms. Leigh lists the following grounds of appeal:

1) Failure of the Court to make a decision on Application for Judgment or to order Corollary Relief in March 2004, pursuant to Section 8(2) of the *Divorce Act*.

2) Failure of Justice Simon J. MacDonald to make a decision on Application for Judgment or to order Corollary Relief in May 2004, pursuant to Section 8(2) of the *Divorce Act*.

3) Failure of Justice M. Clare MacLellan to enforce on 26 June 2006 the Minutes of Settlement of 2 September 2005; she did not issue Corollary Relief as sought by the Petitioner (Appellant) on 26 June 2006.

4) The decision of Justice M. Clare MacLellan to grant a second divorce between Mr. Milne and Ms. Leigh on 27 September 2006, which was not possible pursuant to Section 2(1) of the *Divorce Act*.

5) The decision of Justice M. Clare MacLellan to proceed to a full trial on division of property for the Respondent on 27 September 2006, when the Respondent had not made any application, nor did Section 12(1) of the *Matrimonial Property Act* any longer apply, since they were no longer spouses. The originating action was misrepresented to the Court by Respondent's counsel, Mr. Alfred Dinaut, as a Petition for Divorce. He also erroneously stated that no agreement had been reached when it had on 2 September 2005; his client frustrated and abused the process.

6) The decision of Justice M. Clare MacLellan to proceed to a further full trial on spousal support on 31 October 2006 when no application had been made on the part of the Respondent and when no genuine issue for trial existed. It was cited by Justice MacLellan by oral decision on 4 October 2007 that Mr. Milne was not a candidate for spousal support and that his state of impecuniosity was not associated with the marriage.

7) The decision of Justice M. Clare MacLellan to allow further proceedings on 27 February 2007 to ascertain pension valuations when they had already been entered on the Court record several times and in prior financial statements; these were cited as "small pensions" by Justice M. Clare MacLellan on 27 September 2006.

8) The oral decision for Corollary Relief Judgment made by Justice M. Clare MacLallan on 4 October 2007 contained errors of fact, law, and principle. It was cited that Ms. Leigh was a candidate for unequal division pursuant to Section 13(a) (b) (g) (i), yet this was not ordered. An RRSP which was deemed by Justice MacLellan to have been rightly used by Ms. Leigh to obtain living accommodation was later ordered in the same oral decision to be divided. Justice MacLellan also failed to consider Section 13(e) where monies earned prior to the marriage were contributed to the acquisition (cumulatively) of the matrimonial homes and would not be possible had the Petitioner not made these sole contributions; (f) where the Petitioner continuously funded the family business so that the Respondent could develop it, thereby enabling her to leave her work and join the family business; (j) where the value of the assets were depreciated by the Respondent over 23 years and the responsibility laid on the Petitioner to maintain appreciation of the assets.

Ms. Leigh's Old Age Pension in the UK was ordered to be divided, but this decision is *ultra vires* legislation both in Canada and the UK. Due to errors of fact, the *Pension Benefits Division Act* was misapplied. "Small pensions" were repeatedly inflated as an asset by Respondent's counsel and the small income was treated as an inflated asset and divided.

Justice MacLellan failed also to consider the Partnership Agreement as transferrable when it was acknowledged to be so by the Respondent. The Corollary Relief Judgment put the Petitioner in a state of financial destitution as a result of these errors of fact, law, and principle.

9) The failure of Justice M. Clare MacLellan to award costs for protracted and unnecessary hearings, as cited by her throughout proceedings.

10) The decision of Justice M. Clare MacLellan to include the UK State Pension in the Corollary Relief Order of October 2007 has put the Appellant in jeopardy before the Court. She has been ordered to respond to a contempt hearing on 2 November 2009. The UK State pension is administered by the *Social Security Contributions and Benefits Act, 1992* and is equivalent to the Old Age Security in Canada.

For the purposes of this judgment I would distill and then paraphrase the issues by asking, did the judge err in:

1. Denying Ms. Leigh an unequal division of the matrimonial assets?

2. Dividing Ms. Leigh's UK pension?

3. Not enforcing the parties's Partnership agreement for the Ontario Farm?

4. Not giving effect to the September, 2005 divorce.

5. Not awarding costs to Ms. Leigh?

STANDARD OF REVIEW

[17] Before turning to the issues, I will first address the standard upon which the judge's decision should be reviewed. It is difficult to express that standard in terms accessible to a lay person. At the risk of oversimplifying: an appeal to this Court is not an opportunity for three judges to retry the case on the basis of a written transcript. Our principal role is to ensure that the trial judge applied the correct legal principles in reaching a result. If the judge applied the wrong legal principles then a legal error is committed entitling this Court to intervene. Where the question involved is a purely factual matter, significant respect is given to the findings of the trial judge who had the advantage of hearing and seeing the witnesses. Appellate intervention on questions of fact is permitted only if the trial judge is shown to have made a "palpable and overriding error" - a clear factual error that has materially affected the result. For a fuller and more refined expression of this standard see **McPhee v. Canadian Union of Public Employees**, 2008 NSCA 104, per Cromwell J.A. (as he then was) at paras. 16 through 24.

[18] Here many of Ms. Leigh's concerns relate to matters of process involving the trial court's exercise of its discretion. Wide latitude is given to the judge in such matters, provided a party is not denied a fair hearing and a miscarriage of justice does not result.

ANALYSIS

The Process

[19] At the outset, let me address Ms. Leigh's concern about the process, culminating in the order under appeal. This proceeding on appeal is a graphic example of how difficult it is for a self-represented litigant to effectively navigate through the legal system. While the Courts struggle to adapt to the ever-increasing numbers of self-represented litigants, the legal system remains a process which works most effectively for litigants who are represented by lawyers. Judges expect that lawyers will police one another in order to keep a case moving forward at an acceptable pace and, when necessary, seek the assistance of the court to do so. Unfortunately, this leaves proceedings where one and, especially, where both of the litigants are unrepresented, susceptible to being unreasonably delayed by the party who does not want the matter to proceed. This is what occurred here.

[20] As is evident from the chronology above, Mr. Milne and Ms. Leigh, with the assistance of counsel, ultimately arrived at a settlement. Both parties and their counsel were present on September 2, 2005 when it was committed to the court record. The property and liabilities in the hands of each party were identified. The property division was 60/40 in Ms. Leigh's favour. The matrimonial home, which Mr. Milne had unilaterally occupied since the separation in 2001, was to be sold immediately and the proceeds divided so as to effect the 60/40 division. Ms. Leigh's small pension accrued before marriage, while she was in England, was to remain her property and not subject to division. The remaining retirement instruments were in pay and to be divided at source. The commencement of the source division of Ms. Leigh's monthly teacher's pension was postponed until December 1, 2005 in recognition that the property sale would likely not occur until that time. That settlement was within the range of reasonable outcomes.

[21] At that same hearing both parties were questioned on the prospect of reconciliation. The Petition and Certificate of Marriage were entered as exhibits. The judge granted the divorce as well as Ms. Leigh's request to legally revert to the use of her maiden name. Ms. Leigh is rightly perplexed by the fact that Mr. Milne was not required to honour the terms of this settlement.

[22] On September 27, 2005 Ms. Leigh's counsel forwarded draft minutes of settlement to Mr. Milne's counsel for signature. Although the minutes reflected the terms which had been read into Court, Mr. Milne refused to execute them. Ms. Leigh, despite continuing efforts, was unable to conclude the matter.

[23] At the June 26, 2006 Court appearance, referenced above, Ms. Leigh, who was no longer represented by counsel, filed a brief detailing the efforts she had made to finalize matters since the last appearance in September 2005. The parties had signed a listing agreement for the sale of the real property but Mr. Milne refused to consent to showings. The property, occupied exclusively by Mr. Milne since separation, had been allowed to fall into disrepair. Ms. Leigh learned that the taxes had been unpaid since 2004 and the insurance had lapsed. He would not permit her entry to the property.

[24] As outlined above, at that hearing the judge confirmed that the settlement was effective as of the date entered into court and directed Ms. Leigh to prepare the CRJ, which, the judge advised, would be signed within two weeks, with or without

Mr. Milne's participation. September 27, 2006 was set as the date for the parties' return to court in order to update the status of the property sale. Both the divorce judgment and the CRJ had been prepared by Ms. Leigh and were already in the court file. Two weeks passed but the judgments were not issued.

[25] The parties returned to Court on September 27, 2006. The house was not yet sold. Mr. Milne, who was again represented by his former counsel, Mr. Dinaut, had not signed the minutes of settlement. Ms. Leigh retained new counsel, Mr. Adam Rodgers, for that appearance, in hopes of concluding the matter.

[26] As is set out above, a full hearing on all issues commenced on that date as if the settlement had not occurred and the divorce and name change had not already been granted.

[27] In her oral decision delivered on October 4, 2007 the judge ordered the following corollary relief:

> Neither party would pay to the other spousal support.
>
> Equal division of the house proceeds subject to the following offsets:
>
> – Ms. Leigh was to be reimbursed for one half of certain amounts of house insurance paid by her
>
> – Mr. Milne was to be responsible for unpaid property taxes
>
> – Mr. Milne was to pay the line of credit plus accrued interest needed to repair the home for sale
>
> – Mr. Milne was to receive a $12,833 credit for the after tax value of the RRSPs which had been held by Ms. Leigh but cashed after separation to purchase her share of a property.
>
> – the parties would equally share the ACOA liability ($17,314) and the line of credit ($11,762) related to the wool-spinning equipment.

> The LIF was to be divided equally between the parties, valued as of November 1, 2007
>
> Ms. Leigh's Nova Scotia Teachers' pension credits and UK pension credits were to be divided equally at source, effective November 1, 2007

[28] That is the disposition from which Ms. Leigh appeals. It differs from the agreed settlement in a number of respects. Of particular significance to Ms. Leigh are (1) the equal division of the Teachers' pension and the LIF (rather than the agreed 60/40); (2) the inclusion of the UK pension as an asset to be equally divided; and (3) the division of the net proceeds of the RRSP (gross $36,000) that she had collapsed in order to purchase accommodation.

The Claim for Unequal Division

[29] The judge made a number of important factual findings throughout her reasons which are relevant to this issue. I will summarize them in point form:

> Despite his PhD in Zoology and additional courses, Mr. Milne made minimal contribution to the upkeep of the matrimonial and business assets and refused to use his talents to earn income;
>
> He made inadequate efforts to find employment over the course of the marriage;
>
> He did not undertake the most fundamental of chores around the home and farm, even those that required little skill;
>
> He was intentionally unproductive in the farm business and family operation;
>
> He did not use the additional training opportunities undertaken during the marriage to any productive advantage;
>
> He hid unpaid bills from Ms. Leigh which put the couple in financial jeopardy;

Unknown to Ms. Leigh, Mr. Milne left the property taxes unpaid and the house uninsured during his occupation. Ms. Leigh assumed these financial responsibilities when she learned they were unpaid.

If Mr. Milne had acquiesced in the sale of the property at separation or within a reasonable time thereafter monies would not have been spent on taxes and insurance.

His persistent non-contribution caused the diminution of the matrimonial assets with Ms. Leigh, at least three times during the co-habitation, de-registering her RRSPs to purchase the farm/home properties;

Mr. Milne's lack of income was in no way attributable to the assumption of responsibilities during the marriage;

His own unwillingness to work inside or outside the family business led to his current state of impecuniosity;

Mr. Milne was not a house husband and was not primarily responsible for the care of the parties' child. Ms. Leigh arranged and paid for child care while she was working;

Although Mr. Milne retained the spinning equipment and agreed to be responsible for the related debt payments he defaulted on the loans, which were in joint names, causing Ms. Leigh to disproportionately shoulder those obligations;

Mr. Milne unilaterally occupied the matrimonial home and farm from October 2001 to September 2007 (the date of trial) and allowed the property to fall into gross disrepair to such an extent that it was unsalable.

Mr. Milne allowed his dog to inhabit the house alone, for days, causing significant damage to the property;

> Mr. Milne had carpentry skills but refused to use them to maintain the property, apart from constructing some outbuildings on the property;
>
> Ms. Leigh had to seek the assistance of the court in 2006 to put the house in saleable condition. She spent in excess of $10,000 doing so. It took the workmen five weeks to effect the repairs. The expenditure of this money would not have been necessary if Mr. Milne had attended to the maintenance of the house after separation;
>
> Mr. Milne has been in receipt of social assistance for some years since the parties' separation.
>
> Mr. Milne's mother assisted the parties in paying off a mortgage on the Ontario farm and had built her own living quarters attached to the matrimonial home in Cape Breton, which increased its value. These contributions along with Mr. Milne's construction of some outbuildings on the property were recognized by the judge to be "some contribution" to the matrimonial assets to the credit of Mr. Milne.

[30] In my view these facts which are supported by the record, cry out for an unequal division of matrimonial assets (as was reflected in the parties' September 2005 "agreement"). In fact, the judge, in the context of her entire decision, appeared to recognize the injustice that would result from an equal division. Yet, in her efforts to prevent this potential injustice, the judge allowed only two minor adjustments which, in my respectful view, fall far short of what was necessary. Let me elaborate.

[31] Firstly, the judge divided the pensions equally from November 1, 2007 forward, finding that Ms. Leigh had not made out a sufficient case for unequal division. However, the judge declined to order Ms. Leigh to account to Mr. Milne for one half of the pension income stream which she had received while awaiting the finalization of the divorce and property issues. In declining to order Ms. Leigh to make back payments the judge referred to Mr. Milne's delay of the proceedings; his allowing the property to go to "ruin" after Ms. Leigh left; his refusal to permit

the sale of the home and the fact that he left Ms. Leigh responsible for essentially all of the debt during separation.

[32] Secondly, the judge held that Ms. Leigh was entitled to occupation rent for the period of separation (2001-2007) on account of Mr. Milne's lengthy rent-free occupation of the matrimonial home.

[33] In my respectful view, these two minor benefits fall far short of recognizing the disparity that, according to the judge, existed in this relationship. In saying this, I acknowledge the discretionary nature of the judge's decision and its corresponding right to deference. However, based on the judge's own facts more must be done to prevent an injustice. I say this for the following reasons.

[34] Mr. Milne occupied the home, rent free, while Ms. Leigh serviced all of the debt and assumed responsibility for the property taxes and insurance. A significant portion of her relatively modest pension income went to, what would otherwise be, his share of the debt service. Ms. Leigh effectively made these expenditures on Mr. Milne's behalf, diverting what would otherwise be his share of the pension income to do so. The prospective division of the pension income did no more than recognize that reality. Had he honoured the original settlement and not forestalled sale of the house, the debts would have been retired much sooner, eliminating the carrying charges. Mr. Milne alone was responsible for the delay. Consequently, the fact that the judge declined to divide the pension retroactively provided no tangible benefit to Ms. Leigh, but simply recognized the financial reality of the situation created by Mr. Milne's refusal to engage in the process.

[35] Further, as for the occupational rent, the only offsetting accommodation ordered by the judge was to direct that Mr. Milne bear the full amount of the unpaid property tax bill ($4,125.92) for the period of his occupation. In the circumstances of this case, this amounts to, at best, a nominal award of occupation rent.

[36] In summary, the facts found by the trial judge would overwhelmingly support an unequal division of the assets in Ms. Leigh's favour. This was unlike a traditional marriage where a spouse, most commonly the wife, foregoes a career to remain at home to care for the children. In that circumstance her entitlement to an equal division of assets is recognized, despite the lack of direct financial

contribution. Here, as found by the judge, Mr. Milne had contributed minimally and, in many respects, had caused the assets to decline in value.

[37] Mr. Milne was in receipt of social assistance and residing in subsidized housing. However, the judge had found that his financial circumstances were a result of his own lack of initiative and not attributable to any role he assumed in the marriage. Yet, in declining to make a meaningful unequal division of the assets the judge cited the length of the marriage and the fact that Mr. Milne "needed" the pension income.

[38] Finally, I will briefly address the parties' wool-spinning equipment which they purchased in 1997/8 hoping it would be used in their farm business. The related liabilities are included in the disposition ordered by the judge. Without providing the full saga of this venture, as I have discussed above, Mr. Milne retained the equipment on separation and agreed to pay the related financing costs. The equipment did not function as expected. He did not make the payments on the loan or contact the equipment manufacturer about its failure. Ms. Leigh ultimately assumed responsibility for the related loan which she serviced for three years before the final determination. She had also invested $12,500 in attempting to repair the equipment. Under the October, 2007 disposition, Ms. Leigh retained the useless equipment and the judge divided the liabilities, using the balances that existed in 2004 when Ms. Leigh assumed payment of these debts, which were then in arrears. The judge acknowledged that Ms. Leigh had maintained payments on those loans between 2004 and 2007 and did not receive any credit for that in the division. The judge accepted Ms. Leigh's uncontradicted evidence that she had serviced these debts over the three years at a cost of approximately $1000 monthly. While using the 2004 balances would reimburse Ms. Leigh for the amounts by which she had reduced the principal of the debt, she was not given credit for the interest portion of those payments. This is simply another example of the inequity in the property division ordered by the judge.

[39] In short, the judge erred in principle by failing to give effect to her own findings that Mr. Milne had squandered his opportunities to be gainfully employed or otherwise contribute to the accumulation of assets and, indeed, had caused a decline in the value of the asset pool. I would, therefore, direct an unequal division based on the factors set out in the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 (**MPA)**.

[40] For example, of the many factors enumerated in s. 13 of the **MPA**, the following are particularly relevant here:

> 13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
>
> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
>
> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
>
> ...
>
> (d) the length of time that the spouses have cohabited with each other during their marriage;
>
> (e) the date and manner of acquisition of the assets;
>
> (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
>
> (g) the contribution by one spouse to the education or career potential of the other spouse;
>
> ...
>
> (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
>
> (j) whether the value of the assets substantially appreciated during the marriage;
>
> ...

> (l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;
>
> ...

[41] On the facts as found by the judge, all but (d) and (l) above would weigh in in Ms. Leigh's favour. With respect to (d), the **MPA** assumes a marriage of reasonable duration as was the case here. The length of the marriage, as a factor relevant to unequal division, is more commonly considered where the marriage is of unusually short duration. The lost opportunity to acquire a pension benefit, factor (l), is generally directed at offsetting one party's potential loss of a non-quantifiable pension benefit by unequally dividing the remaining assets to compensate. Neither apply to Mr. Milne's circumstances. In my respectful view, had the judge applied the above criteria to the facts as she found them to be, she would have concluded that a meaningful unequal division in Ms. Leigh's favour was warranted. I will now attempt to do this.

[42] At this stage, it is impossible to redress with any precision what I would find to be the disconnect between the factual findings of the judge and the final division of the assets. Two and one half years have elapsed since the October 2007 decision with Ms. Leigh waiting until October 8, 2009 to file her notice of appeal. The house has been sold and the proceeds divided in accordance with the judge's reasons. The LIF and the Teachers' pension have been divided.

[43] I would set aside the order equally dividing the LIF and the Teachers' pension and substitute an order that they be divided 60% in Ms. Leigh's favour and 40% to Mr. Milne, retroactive to the date they were divided in accordance with the order under appeal. In so doing I recognize that it may not be possible for Ms. Leigh to recover from Mr. Milne the monthly over-payment of each pension that he has received in the intervening period since division. That said, if the administrators of the pension/fund are capable of giving effect to such reimbursement by diverting a portion of the ongoing monies due to Mr. Milne, I would direct that such be done.

[44] The house proceeds have been divided. For practical reasons I would not disturb that division.

The UK Pension

[45] Ms. Leigh says the judge erred in dividing the UK pension. The uncontradicted evidence was that it was a government pension akin to Canada's Old Age Security and not divisible at source. The entitlement had been fully accumulated by Ms. Leigh, in another country, well before the marriage; was unrelated to her employment and was not divisible at source. It, too, was a pension in pay at the rate of $226 monthly. The parties had agreed in the September 2005 settlement that it would not be subject to division. In her reasons for judgment, the judge wrongly described this as Ms. Leigh's UK "teacher's pension". With respect, that was incorrect.

[46] Pursuant to the **MPA**, "matrimonial assets" include all assets acquired before or during the marriage (s. 4) with certain exceptions. Generally pensions are captured even where accumulated pre-marriage. The issue of division of Old Age Security rarely arises because both parties usually have individual, roughly equal entitlement in Canada. In the provinces where there has been a dispute on division of Old Age Security, the law is divided (see, for example, **Young v. Young**, [1987] W.D.F.L. 264; 1986 CarswellBC 797 (C.A.), **Lattey v. Lattey** (1989), 21 R.F.L (3d) 229 (B.C.S.C.), **Daly v. Daly**, [1991] B.C.J. No. 297 (Q.L.)(S.C.) and **Tumaitis v. Tumaitis**, [1992] B.C.J. No. 300 (Q.L.)(S.C.), **O'Bryan v. O'Bryan**, [1997] B.C.J. No. 2161 (Q.L.)(C.A.) and contrast with **Podemski v. Podemski** (1994), 158 A.R. 126 (Q.B.)).

[47] Here, the judge says in her reasons for judgment:

> She also receives $435 Old Age Pension, which, of course, is not divisible, and her CPP is $410 and it has already been divided [with Mr. Milne].
> (Emphasis added)

[48] The judge does not cite authority for her statement that Old Age Security is not divisible. However, in view of these comments, I would conclude that, but for her mistake about the character of the UK pension, she would not have ordered its division. In any event, given the evidence of the manner in which this pension was accumulated; the fact that it is not part of a continuing stream of credits earned both before and during the marriage; the fact that it was in no way created by a diversion of assets from the marriage; the judge's findings of Mr. Milne's relative lack of contribution to the marriage and in view of the judge's statement of intent

regarding pensions of this character, I would set aside the order dividing the UK pension. This pension shall remain the sole property of Ms. Leigh. (Mr. Milne has initiated contempt proceedings in relation to the division of this pension. Those proceedings are currently stayed. With this determination that the pension is the property of Ms. Leigh and not subject to claim by Mr. Milne it is my expectation that the contempt proceeding will be dismissed.)

The Partnership Agreement

[49] While operating the farm in Ontario the parties entered into an agreement pursuant to the **Partnership Act** (Ontario) which recognized that Ms. Leigh had an 80% ownership of the associated property and Mr. Milne a 20% ownership. Ms. Leigh says the judge erred in not following that agreement in the division of the Nova Scotia properties. The judge considered that agreement and concluded that it expired with the disposition of the Ontario property and was never intended to govern the parties' respective ownership of the Nova Scotia properties. In so deciding I am not persuaded that she erred.

The September, 2005 Divorce

[50] I would declare that Ms. Leigh was entitled to consider herself divorced effective September 2, 2005 when the divorce and change of name were first pronounced, notwithstanding the orders later issued.

Costs

[51] Ms. Leigh submits that the judge erred in failing to award her costs at the conclusion of the 2007 trial. The judge declined to order costs to either party.

[52] A highly deferential standard is applied on a review of a costs award. An appellate court will not interfere with a judge's exercise of discretion unless wrong principles of law have been applied or the decision is so clearly wrong as to amount to an injustice (**Binder v. Royal Bank of Canada** 2005 NSCA 94; **Crewe v. Crewe** 2008 NSCA 115).

[53] In **Crewe**, **supra**, Roscoe J.A. addressed the purpose of costs awards and the entitlement of self-represented litigants to costs:

> 16 Our rules of court and jurisprudence recognize that costs are generally intended to provide successful litigants partial indemnification, and that the court is entitled to take into account the conduct of the parties which may have complicated or delayed the proceeding, both matters considered by Justice MacDonald. See for example: **L & B Electric Ltd. v. Oickle**, [2004] N.S.J. No. 108, 2004 NSCA 42 and Rule 63.04.
>
> 17 . . . I agree with and adopt the following statements by Sharpe J.A. in **Fong** [**Fong v. Chan** (1999), 46 O.R. (3d) 330 (C.A.)]:
>
> > [24] A rule precluding recovery of costs, in whole or in part, by self-represented litigants would deprive the court of a potentially useful tool to encourage settlements and to discourage or sanction inappropriate behaviour. For example, an opposite party should not be able to ignore the reasonable settlement offer of a self-represented litigant with impunity from the usual costs consequences. Nor, in my view, is it desirable to immunize such a party from costs awards designed to sanction inappropriate behaviour simply because the other party is a self-represented litigant.
> >
> > [25] I would add that nothing in these reasons is meant to suggest that a self-represented litigant has an automatic right to recover costs. The matter remains fully within the discretion of the trial judge, and as Ellen Macdonald J. observed in Fellowes, McNeil v. Kansa, [1997] O.J. No. 5130 supra, there are undoubtedly cases where it is inappropriate for a lawyer to appear in person, and there will be cases where the self-represented litigant's conduct of the proceedings is inappropriate. The trial judge maintains a discretion to make the appropriate costs award, including denial of costs.
> >
> > [26] I would also add that self-represented litigants, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. As the Chorley case, supra, recognized, all litigants suffer a loss of time through their involvement in the legal process. The self-represented litigant should not recover costs for the time and effort that any litigant would have to devote to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to

> conduct the litigation and that, as a result, they incurred an opportunity cost by forgoing remunerative activity. As the early Chancery rule recognized, a self-represented lay litigant should receive only a "moderate" or "reasonable" allowance for the loss of time devoted to preparing and presenting the case. This excludes routine awards on a per diem basis to litigants who would ordinarily be in attendance at court in any event. The trial judge is particularly well-placed to assess the appropriate allowance, if any, for a self-represented litigant, and accordingly, the trial judge should either fix the costs when making such an award or provide clear guidelines to the Assessment Officer as to the manner in which the costs are to be assessed.

(Emphasis added)

[54] While the judge here did not deny costs because the parties were, at times, self-represented, I find the above discussion instructive on the importance of a costs award as a tool to encourage settlement and sanction obstructive behaviour, and, of course, to indemnify successful litigants. These goals are arguably even more important when parties are self-represented and do not face the reality of ongoing exposure to legal fees. Here Mr. Milne, with free legal representation, could and did obstruct the proceedings with impunity.

[55] Hallett, J., as he then was, in **Bennett v. Bennett**, [1981] N.S.J. No. 10 (Q.L.) (S.C.) rejecting a referee's determination of costs in a matrimonial proceeding, thoroughly reviewed the law of costs and said:

> 9 Costs are a discretionary matter. It is normal practice that a successful party is entitled to costs and should not be deprived of the costs except for a very good reason. Reasons for depriving a party of costs are misconduct of the parties, miscarriage in the procedure, oppressive and vexatious conduct of the proceedings or where the questions involved are questions not previously decided by a court or arising out of the interpretation of a new or ambiguous statute.
>
> . . .
>
> 19 There is no doubt that a well behaved successful party to a law suit in Nova Scotia is generally awarded costs. I would refer to *Spencer et al. v. Benjamin* (1975), 11 N.S.R. (2d) 123, and *MacLean et al. v. Canadian Kawasaki Motors Limited et al.*, 45 N.S.R. (2d) 569. In both these cases, the Appeal Division reversed the trial judge's decision not to award costs to the successful party.

> 20 There is no evidence that Mrs. Bennett's behaviour was such as might disentitle her to an award of costs.

[56] In **Kennedy-Dowell v. Dowell**, 2002 NSSF 50; 209 N.S.J. No. 499 (Q.L.) Campbell, J., a judge well-experienced in family law matters, provided an insightful discussion of costs in the context of family law litigation. He wrote:

> 9 Costs in matrimonial proceedings, are authorized by *Civil Procedure Rule* 57.27 and 63.02. Despite some occasional comments in the cases to the contrary and recognizing that in family matters costs need not always follow the event, the case law seems relatively clear that the successful party in a matrimonial cause is no less entitled to costs than in any other type of proceedings. See for example *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173. There is a recognized difficulty in assessing costs in family matters because of the fact that they often involve a large number of issues including those not capable of being quantified in money.
>
> 10 One of the purposes of awarding costs is to provide an incentive for the parties to earnestly pursue settlement. To say it another way, costs can provide a disincentive to a party who might otherwise take an unreasonable bargaining position prior to or at trial. It follows that the reasonableness of the bargaining position of the parties is a major factor in the court's exercise of discretion to award costs.
>
> 11 In *Kapoor v. Kapoor*, [1999] N.S.J. No. 246, (SFH 1201-52376/142792), Justice Hood recognized the reality that some degree of success is likely for both parties to a matrimonial asset dispute noting at page 9 that when both parties claim for an unequal division of assets, it is highly unlikely that either party would receive 100%. Although 100% of the matrimonial assets are in dispute she noted that the best either party in that case could hope for was approximately a 75/25% split.
>
> 12 In my opinion, the reasonableness of both the trial position and the bargaining position (including the timing of concessions made) is a very important factor in deciding whether an order for costs should be made. This is especially true in family law matters because the parties are often of limited resources and can often face legal fees after a trial which make the process uneconomical and devastating to the family including children. Family law disputes are capable of out of court resolution in many cases and the policy of the court regarding costs should promote compromise and reasonableness in the negotiating process. For that reason, the court should measure each party's bargaining position against the court's adjudication to measure the reasonableness of each position. It is also relevant to compare the court's award against each

> party's position at trial (which is often significantly different from their pre-trial bargaining position).

[57] Here, the judge's reasons on costs at the conclusion of the final appearance were brief:

> In relation to costs, this matter was needlessly protracted, in my opinion, due to the lack of proper resource documents. I recognize the parties were acting for themselves at the beginning, that there was an attempt for settle [sic], that there were settlement documents. However, securing accurate data from the time of separation to now has been protracted and most difficult, requiring post-trial submissions and uncovering the best we could the debts and assets of the parties so that there would be some basis for the calculations I have just put forward. Both parties have been somewhat successful and not. However, given the protracted nature of securing basic documents, I am not prepared to grant an order of costs.

[58] It is my respectful view that the judge's determination on costs is, as the test prescribes, so clearly wrong as to amount to an injustice. In focussing exclusively on the document production issues that arose during the final hearing the judge failed to take into account troublesome history of this proceeding.

[59] From the outset, Mr. Milne ignored the process. The excessive delay from the filing of the petition in February 2003 to final resolution over four years later was entirely attributable to his intransigence. He refused to follow through with the settlement, notwithstanding the judge's admonition that he was bound to do so. No consequences followed. The settlement was not enforced.

[60] Ms. Leigh took every reasonable step to bring the matter to closure, twice hiring counsel at considerable expense. In the answer and courter-petition, which was not filed for some 2.5 years, Mr. Milne did not claim spousal support. In the settlement agreement placed on the record he was not entitled to spousal support. Yet he was permitted to advance that claim at the final hearing, causing additional delay and expense.

[61] Indeed, in the many appearances leading up to the final hearing the judge threatened to order costs. While her remarks are ostensibly neutral as between the parties, it is clear from the record that she is addressing Mr. Milne's chronic delay.

During the September 2, 2005 hearing, after counsel for the parties read the settlement agreement into Court, she said:

> Well this is prime selling time so it's, if you are going to sell it, let's get a move on it. If you have any problem getting a sale, or someone's getting in the way of selling it, come right back. I'll hear you any lunch time and I'll impose costs. Okay?

[62] By June 26, 2006, both parties now self-represented and Mr. Milne refusing to follow through with the sale of the house, Ms. Leigh returned to Court to force the sale and for authorization to effect repairs. The judge said, in speaking to Mr. Milne:

> . . . I can order you to sell it as it is or you can agree on splitting the $15,000 to get it marketable. What's it going to be? Because if one of you delays this and I come back and I hear it in the Fall and we lost the market, I am going to order costs against that person.

[63] And again, at that same hearing, after confirming that the September agreement was still operative, that she was enforcing the order for sale and admonishing Mr. Milne for his obstruction, the judge said:

> And I was concerned when I saw it and I was concerned about the market, but this is the best we can do. And if either one of you messes it up, you'll pay costs in the Fall. So there is a financial responsibility for whoever gets in the way of getting this place on the market. Do you understand?
>
> . . .
>
> Yeah, So don't . . . You, you've made a deal. Now we've made a sub-deal to get the, the place on the market. The deal you've made on September 2nd is still the deal. ..

[64] In the face of these unfulfilled threats, Mr. Milne would rightly conclude that his obstruction of the proceedings was without consequence. Meanwhile the asset pool was shrinking and the value of the matrimonial home deteriorating, while he lived rent-free enjoying the benefit of state-funded legal counsel.

[65] At the September 27, 2006 hearing Ms. Leigh's counsel objected to the court adding additional court time to hear Mr. Milne's late claim for spousal support:

> . . . I'll hear you on the issue of costs for the necessity to come back. . . .

[66] In my respectful view, the judge's disposition on costs failed to take into account the larger picture of Mr. Milne's conduct over the whole course of the proceedings.

[67] I would set aside the judge's determination on costs and fix costs payable by Mr. Milne to Ms. Leigh for the proceedings in the court below at $5000, inclusive of disbursements.

DISPOSITION

[68] I would allow the appeal to the extent set out above and order that Mr. Milne pay to Ms. Leigh costs of the appeal which I would fix at $3000 inclusive of disbursements. For clarity, these costs are in addition to the trial costs ordered above.

[69] It is not without concern that I order these costs amounts to be paid by Mr. Milne. We are told that he is living in assisted housing. He has likely spent his share of the house sale proceeds. He has never disclosed what, if any, inheritance he received on his mother's death. While it is unlikely that Ms. Leigh will be able to collect these monies from him it is important that her entitlement be recognized.

Bateman, J.A.

Concurred in:

MacDonald. C.J.N.S.

Hamilton, J.A.