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IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Cite as: Tibbetts v. Tibbetts, 1992 NSCA 17

Jones, Hallett and Freeman, JJ.A.

BETWEEN:

THEODORE ELLERSON TIBBETTS Appellant - and - MARY SYLVIA TIBBETTS Respondent	)	Leslie J. Dellapinna for the appellant David J. Bright, Q.C. and Pamela D. Coughlan for the respondent Appeal Heard: September 28, 1992 Judgment Delivered: December 10, 1992

THE COURT: Appeal and cross-appeal allowed in part per reasons for judgment of Hallett, J.A.; Jones and Freeman, JJ.A. concurring.

HALLETT, J.A.

This is an appeal and cross-appeal from a decision in a divorce proceeding. There are some twenty-five issues raised. Both parties are dissatisfied with the trial judge's division of assets

under the **Matrimonial Property Act**, R.S.N.S. 1980, c. 9, and the order for support made pursuant to the **Divorce Act**, R.S.C. 1985. Needless to say their points of view are poles apart. However, there is no disagreement on the general facts. The appellant, hereinafter called the husband, and the respondent, hereinafter called the wife, were married in Nova Scotia, on September 1, 1973. The husband was then 45 years of age and the wife was then 38. It was the first marriage for the wife and the second for the husband. The parties have one child, Theodore Alexander Tibbetts, born September 30th, 1977; at the date of the trial, June, 1991, he was in Grade 9 in Ellenvale Junior High School, Dartmouth, Nova Scotia. He is in good health and prior to trial the parties had agreed that the wife would have custody of their son subject to the husband's reasonable access.

At the date of trial the husband was a retired civil servant. He had been a research scientist with the Federal Government, latterly employed with the National Research Council. He had retired in May of 1986. His income as of the date of trial consisted of his public service superannuation pension in the gross amount of $3,565.22 per month; Canada pension of $434.64 per month; as well as interest and dividends from his savings and investments.

The wife had been employed prior to marriage, principally with the Federal government from 1955 until July of 1973. She left her employment a few months prior to her marriage. She testified she resigned her employment because her husband wished her to be free to travel with him as his employment required him to travel to some extent. She
is entitled to a deferred pension beginning at age 60 in the amount of $211.52 per month plus whatever indexing may then be applicable.

At the time of the trial she was taking courses in office administration at Mount St. Vincent University as a part time student. She stated that the purpose of attending university was for relaxation and because she wished to have a goal to work towards which she felt would have a stabilizing effect on her life. She has not stated goals for the use of a degree after graduation. At

the time of the trial she was 56 years of age and felt that because of her age she was unemployable.

The parties separated on or about August 17th, 1990, although the husband did not physically move from the matrimonial home until November of 1990. In December, 1990, the wife petitioned the husband for divorce. The husband filed an answer and counter petition. By consent the husband agreed to pay the wife interim support in the amount of $1,300.00 per month commencing the 1st day of December, 1990. These monthly payments were made. The trial was held on June 6th and 7th and July 18th, 1991; the decision was rendered August 23, 1991 and the Order filed February 27, 1992

The Trial Judge's Decision

The learned trial judge identified, classified and valued the assets owned by the spouses. He concluded that they had matrimonial assets totalling $458,793.00. He found that certain assets were not matrimonial assets.

The learned trial judge then considered the husband's contention that the matrimonial assets should be divided unequally. The learned trial judge decided after considering ss. 12 and 13 of the **Matrimonial Property Act** and the case law that he would divide the matrimonial assets 53% to the husband and 47% to the wife. He identified the matrimonial assets owned by them respectively and set them out with the values he had assigned to them in the following paragraph:

"

Asset	Wife	Husband
Wards Brook Property		3,800
Stocks & Mutual Funds		77,685
Guaranteed Investment Certificates	3,000	
Matrimonial Home	71,500	71,500
Furniture	13,562	5,552
Wards Brook contents		3,250
Computer	1,800	
Chrysler New Yorker		12,275
Plymouth Omni	1,000	
Chevrolet Truck		400

Lionel camper trailer		1,000
Bank Accounts	2,237	255
R.R.S.P.s		174,885
Bonds 4,000	11,000	
Aeroplan Points	1	1
Totals:	$97,100	$361,603

The learned trial judge calculated that the husband would have to pay his wife $118,443.00 to effect this division. He then stated that in order to effect the payment the husband would be required to:

" (a) convey to the wife his one-half (1/2) interest in the matrimonial home free of encumbrances; $71,000

(b) roll over to the wife, free from income tax, a portion of his Registered Retirement Savings Plans in the amount of $32,000

(c) transfer to the wife a portion of his stocks and mutual fund shares valued at $15,442

(d) transfer to the wife 66, 115 Air Canada Aeroplan points having a nominal value of 1

Total: $118,443"

The learned trial judge noted that in addition to the matrimonial assets the husband would have non-matrimonial assets which he had valued at $34,200.00 and the wife would continue to hold non-matrimonial assets which he valued at $14,200.00. Whether these assets were properly classified as non-matrimonial assets is an issue raised on the appeal.

The learned trial judge then addressed the issue of support the husband would be required to pay for the support of the wife and their 13 year old son. He determined that the husband's monthly income from pensions and investments was about $4,000.00 and his expenses $2,263.00

before income tax of $616.00. The wife's income, apart from the support being paid under the interim order, was $117.00 a month. Her expenses were $2,438.00. The learned trial judge concluded that after the division of assets she would earn $62.00 a month on her investments; she would receive $668.48 a month as her share of her husband's employment pension earned during the marriage. As a result the learned trial judge ordered the husband to pay support in the amount of $1,200.00 a month. This would give the wife a total monthly income of $2,047.00. He suggested as there was a shortfall, she would have to decrease her expenditures or find a source of income if she wished to retain the matrimonial home.

The learned trial judge refused the husband's request to put a cutoff date on the requirement of the husband to pay support; he felt that issue could better be determined at a future date. The learned trial judge also ordered the husband to pay $2,500.00 "arrears of maintenance" apparently to reimburse the wife for money she had spent on living expenses prior to the consent interim maintenance order that commenced December 1st, 1990. He ordered the parties to pay their own costs and share in certain disbursements.

The husband raises sixteen issues on appeal and the wife nine. Some of the issues relate to questions of fact; others involve the exercise of the trial judge's discretion and are not questions of law while several issues have serious financial implications for the parties and some of those have merit. I will first address this latter category.

The husband asserts the learned trial judge erred in finding that the husband's stocks and mutual funds were matrimonial assets. With respect I do not agree with this argument. Since the decision of the Supreme Court of Canada in **Clarke v. Clarke**, (1991) 101 N.S.R. (2d) 1 it is only assets used for the generation of income in an "entrepreneurial sense" that are to be classified as business assets. Business assets are defined in the **Act** as follows:

> " 2(a) "business assets" means real or personal property primarily used or held for or in connection with a commercial, business, investment or

> other income-producing or profit-producing purpose, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;"

Business assets are exempted from the definition of matrimonial assets in the **Act**.

In **Clarke v. Clarke** the Supreme Court of Canada was attempting to determine if a pension was a matrimonial asset or a business asset. After referring to the definition of business assets Wilson, J. for the court stated at paragraphs 39 and 40 as follows:

> " Hart, J.A., for the court, considered this section in **Lawrence** and concluded that pensions were not "business assets". He noted that too broad an interpretation of s. 2(a) could result in removing virtually all assets from the classification of matrimonial assets except the matrimonial home. He concluded that the only assets which fall within the definition of business assets are those that are purposely held or used for the production of income or profit. Pensions in their ordinary form and use would not fit that description. He stated at pp. 142-143 R.F.L.:
>
> > '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.
> >
> > 'In my opinion entitlements to insurance, pension and other similar benefits pursuant to contractual arrangements would not fall within the definition of business assets contained in the **Act**. They are not primarily held for the purpose of producing income or profit. They are in reality schemes for saving which divert present income to future use in times of peril or when the ability to earn income has passed.
> >
> > 'Nor would schemes, such as registered retirement savings plans be business assets under the **Act**. Their primary purpose is to save funds and lessen the income tax which would otherwise be payable on those funds.' (Emphasis added)
>
> I agree with Hart, J.A., that pensions are not business assets. It seems to me that business assets are assets which have as their purpose the generation of income in an entrepreneurial sense. A pension is not such

> an asset. Pensions may tangentially generate income through interest but essentially they are funds comprising income diverted from the date on which it was earned. Pensions are more analogous to savings accounts than to business assets and thus cannot be excluded from the definition of matrimonial assets under s. 4(1)(e). The fact that the pensions benefits in this case are being paid on a monthly basis does not, in my view, affect the essential nature of the pension. Its purpose remains the same."

It would appear that the legal distinction between capital property (commonly referred to as assets in accounting terminology) and income has been discarded by the Supreme Court of Canada in classifying pension income as a matrimonial asset following marriage breakdown. Madam Justice Wilson agreed with Mr. Justice Hart that pensions are "funds comprising income diverted from the date on which it was earned". In **Lawrence v. Lawrence**, (1981), 47 N.S.R. (2d) 100 (A.D.) Mr. Justice Hart had stated that money invested in savings certificates, stocks or bonds would be business assets. The evidence in this case would indicate that the stocks and mutual funds held by the husband were acquired from earnings from his employment and thus were, in a sense, funds comprising income diverted from other family uses.

Notwithstanding the broad scope of the words used in the definition of business assets in the **Act** and the decision of Mr. Justice Hart in **Lawrence v. Lawrence**, supra, generally speaking, an investment portfolio of stocks, bonds, GICs, mutual funds or the like does not involve the employment of capital for the purpose of generating income in an "entrepreneurial sense". An entrepreneur is defined in the Concise Oxford Dictionary as a "person in effective control of commercial undertaking"; one who "undertakes a business or enterprise, with chance of profit or loss". Holding a stock portfolio does not normally equate with operating a business.

The earlier decisions in this Province, such as **Lawrence v. Lawrence**, supra, must be read in light of this binding statement of the Supreme Court of Canada in **Clarke v. Clarke**, supra, with respect to the interpretation of the term "business assets" as defined in the **Act**. Considering

that the definition of matrimonial assets includes all property of the spouses, unless exempted from the definition, the term "business assets" has been fairly confined by the Supreme Court of Canada to assets that are truly of a business character. An investment portfolio is not a business asset in the true sense of that word as interpreted by the Supreme Court of Canada notwithstanding its purpose is to earn income. The husband's investment portfolio was accumulated from earnings surplus to his family's needs and although one of the purposes of investing was to earn money, the primary purpose was to secure a reasonable level of retirement income for the family therefore these funds were properly classified as matrimonial assets by the trial judge; he applied the decision of the Supreme Court of Canada in **Clarke v. Clarke**, supra.

The wife asserts that there ought to have been an equal division of matrimonial assets as this was a so-called traditional marriage; that is, the wife staying at home raising a family and foregoing employment and the retirement security employment generally provides. The parties were married 17 years. The wife terminated her secure employment just before marriage; she was 38 at the time.

The assets accumulated by the husband were, for the most part, acquired from his employment earnings or severances earned during the marriage. The intention of the **Matrimonial Property Act** is that there be an equal sharing of matrimonial assets on marriage breakdown provided it would not be unconscionable to make such a division.

The husband asserts that at a minimum, considering the date of acquisition of certain assets, the very least the trial judge should have done was order a 60/40 split of matrimonial assets in his favour. With respect, I disagree with his position. This was not a short marriage. The acquisition of his substantial investment portfolio and RRSPs occurred during the marriage. Apart from the matrimonial home and his pension, these are the main assets. The substantial increase in the value of the home and the husband's pension occurred during the marriage. There is nothing that

takes this case out of the application of the usual rule that matrimonial assets should be divided equally. There is nothing unconscionable in so doing. I am of the opinion that the learned trial judge in arriving at a 53/47 split failed to give due consideration to the overriding principle that matrimonial assets are to be divided equally unless it would be unconscionable to do so. To make an award of 53% of the value of matrimonial assets rather than the 50% does not seem to fit into the concept of unconscionability. I would order a 50/50 split of the matrimonial assets in this not unusual fact situation.

The wife asserts that Wards Brook cottage property valued at $38,000.00 should have been classified as a matrimonial asset. The definition of matrimonial asset as contained in the **Act** is as follows:

> " 4 (1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of
>
> > (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
> >
> > (b) an award or settlement of damages in court in favour of one spouse;
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> > (c) money paid or payable to one spouse under an insurance policy;
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> > (d) reasonable personal effects of one spouse;
> >
> > (e) business assets;
> >
> > (f) property exempted under a marriage contract or separation agreement;
> >
> > (g) real and personal property acquired after separation unless the spouses resume co-habitation."

The Wards Brook property had been inherited by the husband from his family in 1958,

some 15 years prior to the marriage. The learned trial judge found that during the marriage the cottage was used infrequently - "a few days once every year or two". The learned trial judge found it to be an inheritance pursuant to s. 4(1)(a) of the **Act**, therefore not a matrimonial asset. The learned trial judge assigned a 10% value ($3,800.00) to the husband as one of the husband's matrimonial assets, presumably to reflect the fact that there was some family use of the cottage.

The learned trial judge's finding that the cottage was used infrequently is, of course, a finding of fact. However, the learned trial judge makes no reference to the wife's evidence that from $20,000.00 to $30,000.00 of matrimonial funds were used to do extensive renovations to the cottage so that the value of the cottage ($38,000.00) is due, to a large extent, from work done by the parties on the cottage and by the employment of funds earned during the marriage. The husband's evidence is that he used $21,000.00 he received in 1986 as vacation credits at the time of his retirement to pay for the renovations.

This is not the same situation that would exist if during the marriage a cottage was inherited, not used during the marriage and no marital funds spent on it. The 1990 value of this cottage was due to the expenditure of substantial funds earned during the marriage. The wife's evidence was vague as to how she calculated the renovation cost at $30,000.00. There is clear evidence that the renovations cost at least $21,000.00. There is an air of unreality to considering this asset as inherited to the extent of 90% of its value as found by the learned trial judge. What was inherited was obviously something of substantially less value than that which existed at the date of separation. The amount spent on renovations is about 55% of the value assigned to the Wards Brook property.

Applying the definition in the **Act** and the concept that money earned by the working spouse in a traditional marriage is family money there is no equity in allowing the income earner, using that money, to enhance an asset owned by him that is excepted from the definition of matrimonial assets. The learned trial judge found the family's casual use of the property should

result in 10% of the value of the Wards Brook property being included as a matrimonial asset. However, he overlooked the evidence respecting the $21,000.00 in renovations. Insofar as $21,000.00 spent on the cottage was derived from vacation credits, this fact should have been recognized by the learned trial judge. He made a palpable and overriding error in failing to consider this evidence. I would therefore classify 65% of the value of the Wards Brook property as a matrimonial asset. I would round this figure to $25,000.00. The use of family income to renovate the cottage falls within the provisions of the **Act** that an inherited property "to the extent that it is used by the family" is within the definition of matrimonial assets.

I agree with the husband's counsel that RRSPs should not be valued as if a dollar in an RRSP has as great a value as a dollar in a home, a bank account, stocks and bonds or other hard assets. RRSP funds have limited use; they are intended to be used to purchase an annuity after a person has reached the age of 65. An annuity purchased with RRSP funds is usually paid monthly and is taxable in full whereas a standard annuity payment does not attract income tax on the portion of the annuity that is a return of capital. If the funds are withdrawn from the RRSP prior to the purchase of an annuity they are fully taxable as income in the hands of the registrant. With the exception of capital gains other capital investments are not subject to income tax on disposition. Similarly the proceeds from the sale of a matrimonial home are not subject to income tax. The reality, as is well known, is that placing income in RRSPs is, to a great extent, a matter of tax deferral. The dollars in an RRSP account have a greater contingent tax liability than dollars in other investments. It is a certainty that one day the tax liability will come to rest on the registrant, his spouse (in the event of a rollover) or his estate on his death. Because of this there is an inequality between the value of RRSPs and other types of investments or property. Unless the values of RRSPs are discounted to recognize the existence of the contingent tax liability, the only fair way to divide RRSPs on marriage breakdown is to divide them equally between the spouses so that each spouse

is credited for a real as opposed to an apparent equal value when totalling the value of the assets acquired by each as a result of a court ordered division of property. In this case the learned trial judge ordered the husband to transfer $32,000.00 of RRSPs to his wife; the husband was left with $142,885.00 in RRSPs. The learned trial judge did not discount the value of the RRSPs to recognize the tax implications associated with them. This was unfair to the husband and resulted in an erroneous division of assets because a large portion of the assets the husband was left with after the judge's decision consisted of RRSPs. The husband's assets were, to a greater extent than the wife's, subject to contingent tax liability. With respect, I do not agree with the opinion expressed by the Ontario Court of Appeal in **Starkman v. Starkman** (1990), 28 R.F.L. (3d) 208 that a reduction in value of RRSPs should only be made when there is evidence that the court's decision will result in a sale or disposition that attracts income tax consequences. The reality is that funds in RRSPs will inevitably be subject to income tax whether or not an immediate disposition results from the court's division of property.

If, as in this case, the wife gets the matrimonial home as decided by the learned trial judge the dollars in the matrimonial home are not taxable on realization whereas the dollars in the RRSPs are inevitably taxable. This tax fact should be recognized by the court.

In determining what would be an appropriate discount rate for RRSPs there would be a number of factors to consider. Among them, the tax bracket of the registrant; the age of the registrant; the years away from retirement; the fact that in all likelihood the level of income of the registrant at retirement will, as a general rule, be less than at the time of trial and therefore his income will attract tax at a lower rate than his income at the date of trial. These are factors that warrant a discount; there are probably other factors which could arise in a particular case. On the other hand, the funds in the RRSP are earning income which is sheltered from tax until an annuity is purchased or the funds withdrawn from the RRSP. It is obvious and recognized by most courts

that if there is an intention to withdraw the funds then, of course, the tax factor is considered. In this case the husband is presently retired; he is almost 65. It would be highly unlikely that he would collapse the RRSPs. There are admittedly difficulties in arriving at a proper discount rate and some evidence is required on the issue but the exercise is no more imprecise than discounting awards for contingency in fatal injuries claims and the courts do this constantly. I hope I am not encouraging the retention of actuaries to determine an appropriate discount rate in future cases. That would be an expense that, in most cases, considering the amount in RRSPs, would be unwarranted.

It is necessary to say a word about **Durling v. Durling** (1988), 86 N.S.R. (2d) 58. In that case the trial judge had discounted RRSPs by 33 1/3% recognizing that if the plans were collapsed the tax that would have to be paid by the registrant would warrant such a reduction on a division of property.

On Appeal this court stated:

> " While Dr. Durling wanted to discount the principal sum of these plans, his evidence was that he had no intention of collapsing them for the purpose of paying their one-half share to his wife under the distribution. Instead, he elected to continue these funds in their protected state for his own future gain.
>
> In these circumstances, it is our opinion that to apply a discount factor to the principal sum is artificial and unfair to the appellant Sharon Durling and fails to give account to the evidence. This is especially so where the division being made by the court is under s. 12 and not s. 13 where, in the latter case, concern would be had for subclause (m).
>
> It is our unanimous opinion that, in the circumstances of this case, no discount rate should be applied to the two registered retirement savings plans and that they should be treated as a matrimonial asset having a cumulative value of $80,524.60, rather than $53,683.00.
>
> Accordingly, the appeal is allowed and the value of the matrimonial assets, as determined by the trial judge, shall be varied upward by assigning the sum of $80,524.60 to the two registered retirement savings plans and the respondent Ronald Durling is directed to arrange a tax-free rollover of $40,262.30 to the appellant Sharon Durling. The appellant shall have her costs on this appeal."

In the **Durling** case there was no intention to collapse the plan. This court divided the RRSP equally; therefore there were no tax consequences. The remarks of the court that in these circumstances to apply a discount rate would be unfair to Mrs. Durling must be read bearing in mind the RRSPs were divided equally between the spouses.

In the case we now have under consideration, the RRSPs will be converted into an income stream within a few years and tax will have to be paid on the full amount of the annuity received in any given year which, of course, includes a return of the capital of the fund which had been accumulated in the plan and which was sheltered from income tax as a result.

In my opinion the husband was short changed by the trial judge because the dollars in the RRSP are subject to income tax and are, therefore, not worth as much as dollars in the matrimonial home. The husband was left with the bulk of the RRSPs; the wife was awarded the matrimonial home. This was unfair. There is nothing speculative whatever about the reality that tax will be paid on RRSPs one way or another. It is somewhat difficult to arrive at just what tax rate will be applied to the annuity income because there are so many factors to consider and the evidence did not address this issue in any detail.

Rather than somewhat arbitrarily discount the value of the RRSPs I propose to divide them equally between the spouses so as to correct the inequality and unfairness to the husband that resulted from the method used by the trial judge in dividing assets and in valuing the RRSPs on a dollar for dollar basis with other assets which, of necessity, led to the husband being required to make a capital payment to the wife that was greater than warranted.

I will turn now to the lesser issues raised by the parties respecting the division of property.

Husband - Issues (b) and (m)

> " (b) Did the Learned Trial Judge err in law and in fact by miscalculating the value of the wife's Canada Savings

Bond holdings and by excluding a portion of the wife's Canada Savings Bonds holdings by defining the excluded portion as an inheritance as contemplated by Section 4(1)(a) of the *Matrimonial Property Act*?

(m) Did the Learned Trial Judge err in law in failing to include in the calculation of the wife's matrimonial assets her Nova Scotia Power Corporation bonds having a value of five thousand dollars ($5,000.00)?"

The husband contends that the learned trial judge erred in excluding from matrimonial assets certain bonds acquired from funds inherited by the wife from her sister's estate. The evidence respecting this issue is confusing to say the least. The learned trial judge stated :

" As will be described later, the wife inherited $7,500 worth of bonds upon the death of her sister in 1987, none of which was used by her family or for her home, and she received some $4,000 worth of bonds as a gift from the husband. I find that the former amount is excepted from matrimonial assets pursuant to s. 4(1)(a) of the Act, but the latter amount is not. Although the inherited bonds are now worth $9,200, I find that only the amount actually received by way of inheritance can be excepted."

Later in the decision he concluded his findings with respect to bonds held by the parties with the following statement:

" Bonds

The husband has disclosed ownership of Canada Savings Bonds having a face value of $11,000. He testified that all but $1,000 have been liquidated subsequent to separation in order to pay his living expenses. In addition, the husband disclosed Nova Scotia Power Corporation bonds having a face value of $10,000.

The wife introduced into evidence particulars of bonds which she obtained from envelopes resting in the parties' joint safety deposit box. The husband testified that some of those bonds were the $12,000 worth of bonds owned by their son, others were the bonds which he had disclosed, others were non-existent. I accept his evidence on this point.

The wife has disclosed that she owns Nova Scotia Power Corporation bonds having a face value of $5,000, and Canada Savings Bonds having a total face value of $6,500. As previously indicated, only $4,000. worth of bonds is a matrimonial asset."

The learned trial judge did not include the appreciation of $1,700.00 in the value of the bonds purchased with the inheritance as part of the wife's matrimonial assets.

The wife's Statement of Property showed her bonds to have a value of $11,500.00; so there was evidence to support the values assigned to the wife's bonds by the learned trial judge The learned trial judge apparently ended up excluding the appreciated value of the bonds acquired with funds inherited from the wife's sister and included as matrimonial assets only the $4,000.00 as the balance of the bonds remaining from the gift from her husband.

Counsel for the husband argues that the bonds are a matrimonial asset; not an inheritance as it was money that was inherited and not bonds. He argues from certain statements that were made in **Archibald v. Archibald** (1981), 48 N.S.R. (2d) 361 (T.D.) and **Lucas v. Lucas** (1990), 95 N.S.R. (2d) 45 (T.D.) that the source of funds is not relevant in the classification of property as either a matrimonial asset or a business asset. With respect, he has taken the statements in these cases too far. Acquiring investments with funds inherited is very different than putting those funds into the matrimonial home or a motor vehicle or a yacht used by the family, all of which would be matrimonial assets used by the family. The intention of the Legislature, as expressed in the Section, seems to have been to exclude inheritances from the definition of matrimonial assets except "to the extent to which they are used for the benefit of those spouses or their children".

The bonds were purchased with inherited money and are *prima facie* excluded from the marital asset pool. The evidence discloses that the income from the wife's bonds was not used for the benefit of the husband or the child. Therefore, the bonds acquired with money from the wife's sister and the appreciation in them are not matrimonial assets and were properly excluded by the learned trial judge. I would not disturb the learned trial judge's finding that the wife had bonds in the amount of $4,000.00 (a gift from her husband) which should be classified as matrimonial assets.

Husband's Issue (e)

> " Did the Learned Trial Judge err in law and in fact by miscalculating the relevant value of the husband's mutual funds by failing to give recognition to the reduction in the value of the husband's mutual funds at the time of trial as a result of normal fluctuations in stock market conditions?"

A review of the transcript shows that there was no satisfactory evidence as to the value of the mutual funds as of the June, 1991 date of trial. Therefore, the trial judge cannot be faulted for not recognizing a reduction in value.

There was evidence that as of December 31st, 1990, the husband's mutual funds had a value of $18,373.48. It would appear the learned trial judge used a value of $19,502.00, being the value in September, 1990. The divorce proceedings were commenced in December of 1990. As a general rule assets are to be valued as of the commencement of proceedings with adjustments to be made to date of trial if evidence of variation in value is presented and an adjustment warranted. The learned trial judge was apparently in error as he over valued the mutual funds by $1,129.00 by using the September 1990 date rather than the date of commencement of proceedings for valuation purposes. The proper valuation for stocks and mutual funds of the husband was $76,556.00 rather than the sum of $77,685.00 as calculated by the learned trial judge.

Husband's Issue (f)

> " Did the Learned Trial Judge err in law by excluding from the calculation of the wife's matrimonial assets certain guaranteed investment certificates held by the wife at the date of separation but liquidated by the wife since the date of separation and prior to the date of trial?"

The evidence disclosed that the wife cashed certain investment certificates prior to the parties separation (in the period September 1 through December, 1990) while the husband was still living in the house but the parties were not co-habiting so to speak and the husband was not providing the wife with sufficient funds needed to run the household.

The wife's Statement of Property prepared in January of 1991 showed that she had guaranteed investment certificates in the amount of $11,115.00. The learned trial judge stated:

> " The statement of property filed on behalf of the wife discloses GICs having a total face value of $11,115.84. She testified that she cashed all but one around the time of separation and used the proceeds to pay her living expenses. She has retained the remaining certificate which was issued by Royal Trust Company in the face amount of $3,000.00."

The learned trial judge found she had GICs in the amount of $3,000.00.

Both parties liquidated some investments prior to trial to cover living expenses and legal fees. Neither party liquidated excessive amounts. The learned trial judge did not err in excluding from the computation of matrimonial assets held by the wife those GICs that were liquidated. Each case poses different problems for a trial judge. The amounts liquidated by the parties to cover necessary expenses were not unreasonable given the circumstances. Neither party liquidated assets to such an extent that it would be unfair to exclude the assets. Neither went out and bought a Porsche or went on an expensive trip. Their expenditures were justified and the trial judge could properly disregard the respective asset liquidation; this was not a legal error. Both parties had to deal with the reality of the expenses arising out of their separation. Counsel for the wife calculated that she liquidated GICs and bonds in the total amount of $15,342.00 and the husband liquidated bonds in the amount of $21,000.00. The evidence does not support the latter assertion; the husband liquidated $10,000.00. The $15,342.00 which the wife's counsel says she liquidated includes a $2,327.00 bank account. The learned trial judge included this bank account as a matrimonial asset. Therefore, the learned trial judge found the amount liquidated by the wife for living expenses and legal fees was $13,015.00. While the general rule is that all assets held by the parties at the date of the commencement of the proceedings should be included in their Statement of Property, in this case the learned trial judge, generally, disregarded assets liquidated by the parties for living expenses and legal fees. I would not be inclined to disturb this finding as the amounts were somewhat equivalent.

While the wife's liquidations were higher they were reasonable as she had the child in her custody.

Wife's Issue

> " Did the Learned Trial Judge err in finding that the wife had a bank account at the Canadian Imperial Bank of Commerce having a balance of two thousand three hundred twenty-seven dollars $2,327.00)?"

As noted, the learned trial judge included this amount as a matrimonial asset of the wife. The wife asserts that he was in error in this regard. Her Statement of Property disclosed that she had this sum in her bank account. It cannot be said that the learned trial judge erred in finding this was a matrimonial asset.

Parties to divorce proceedings must realize that a trial judge, particularly in the face of conflicting and confusing evidence, cannot value and divide assets to the exact penny, far from it. He can only attempt to look at the assets held by the parties; attempt to classify them in accordance with the law; calculate the value of those assets as best he can based on the evidence before him and in the final analysis make a division that is reasonable under all the circumstances. There will be minor errors as perceived by the respective parties. I would note that, leaving aside the value of pension, the assets have a value in excess of $450,000.00. Minor mistakes in valuation make very little difference in the overall result.

Husband Issue (j)

> " Did the Learned Trial Judge err in law by failing to include in the calculation of the wife's matrimonial assets all of the wife's savings, by failing, among other things, to include the balance of the wife's bank account at the Bank of Montreal of approximately two hundred dollars ($200.00)?"

The husband notes that this bank account in the amount of $200.00, was shown on the wife's Statement of Property and should have been included as a matrimonial asset. For the reasons set out in the preceding paragraph the omission of this $200.00 asset from the wife's side of the ledger is of little consequence.

Husband's Issue (h)

> " Did the Learned Trial Judge err in law and in fact by miscalculating the value of the matrimonial home by deducting three thousand dollars ($3,000.00) from the appraised value of the property to allow "for necessary repairs" when such "necessary repairs" and the condition of the property generally was recognized and taken into account by the appraiser in arriving at the fair market value of the property?"

In my opinion an appropriate division of the property in this case requires the sale of the matrimonial home. Therefore, whether or not the learned trial judge erred by not accepting the appraisal of $146,000.00 becomes irrelevant. I am of the opinion that the only way to effect a fair division of assets is to require a sale of the matrimonial home with the net proceeds divided equally between the spouses. That way they will equally share in whatever the home brings on the market. While maintaining the home for the wife would be ideal the parties cannot afford it.

Husband Issue (i)

> " Did the Learned Trial Judge err in law and in fact in valuing the Chrysler New Yorker motor vehicle at twelve thousand two hundred seventy-five dollars ($12,275.00) in the absence of evidence to support such a finding and when the only appraisal presented to the Court with respect to the value of the aforementioned motor vehicle indicated a market value of ten thousand nine hundred fifty dollars ($10,950.00)?"

This again is one of those issues that has little impact on the overall division of the property but the learned trial judge did err in accepting the wife's guesstimate of $12,275.00 in face of an expert appraisal of $10,950.00.

Husband's Issue (k)

> " Did the Learned Trial Judge err in law in failing to recognize adequately or at all the after-tax value of the husband's Registered Retirement Savings Plans, the consequence of which resulted in the Learned Trial Judge granting to the Respondent a greater than equal share of the matrimonial assets which result was not intended?"

I have already dealt with this issue.

Husband's Issue (l)

> " Did the Learned Trial Judge err in law in ordering the husband to transfer to the wife one-half (1/2) of his Air Canada Aeroplan points?"

I reject the view of the husband's counsel that the points were a gift from Air Canada and, therefore, should not be classified as a matrimonial asset. There is no evidence to support the view that the points were a gift. The points are based on mileage and therefore directly related to the cost of a ticket. The points were acquired during the marriage. I am satisfied the learned trial judge was correct in classifying them as matrimonial assets and (assuming Air Canada allows such a transfer) in ordering an equal division of them.

Husband's issues (n), (o) and (p)

These issues deal with the husband's assertion that there should have been an unequal division of assets in his favour. I have dealt with the issues.

Husband Issue (q)

> " Did the Learned Trial Judge err in law in ordering that the pension benefits to be paid by the husband to the wife be impressed with a trust for the benefit of both the wife and child of the marriage?"

The learned trial judge appears to have erred when he decided that the pension benefits to be paid by the husband to the wife be impressed with a trust for the benefit of both the wife and the child of the marriage. However, the Order taken out to give effect to his decision, provided that the benefits be impressed with a trust for the wife only. The issue is therefore moot.

Wife's Issue (tt)

> " Did the learned Trial Judge err with respect to the PSSA pension of the husband by not ordering that the wife have an equal share of the husband's pension plus indexation?"

The wife asserts that the learned trial judge erred in only awarding her a share of the pension accumulated during the period of the marriage. The wife claims that the entire pension was

matrimonial property; that she had foregone a career in the Federal Civil Service and that the learned trial judge should have ordered the entire pension be divided equally. Counsel for the wife on the appeal was not the same counsel who represented her at the trial. The husband's counsel has quite properly pointed out that the parties had agreed, prior to trial, that the wife would share on a monthly basis one-half of the husband's monthly pension income earned during the marriage. At trial counsel for the wife stated that the wife was seeking one-half of $1,336.00 each month as her portion of the husband's pension. The learned trial judge dealt with the matter as follows:

> " The husband receives a pension under the Public Service Superannuation Plan. The present value of his pension entitlement has been calculated with respect to the total pension and with respect to the portion earned during marriage. Both counsel request that the Court look at the monthly pension payments rather than the capitalized value. Since such a joint request is in accord with the spirit of the observations of Wilson, J. in Clarke v. Clarke, (supra), at pp. 370-1 of 113 N.R., I exercise my discretion so as to meet counsel's request in this regard.
>
> Counsel have also agreed that, contrary to the definition of matrimonial assets in s. 4(1) of the Matrimonial Property Act, (supra), which includes property acquired before marriage, only such portion of a pension as was earned during marriage is includable. In such case, the quantum of the husband's monthly pension payments and the wife's deferred pension will be limited to amounts earned during the marriage."

With respect to the matter of the division of the pension the learned trial judge when considering the quantum of spousal and child support stated:

> " The second factor is the pension which the husband is receiving. As previously stated, both counsel expect the monthly payments to be divided between the parties. Whatever amount the wife receives will increase her income and will decrease the income of the husband.
>
> The amount of the monthly pension prior to age 65 which was earned during the marriage is agreed upon at $1,337. After age 65, due to offset of the Canada Pension Plan, the amount will be $1,159. These figures reflect the amounts that both parties want to be divided between them.
>
> Neither party has made a submission with regard to the method or proportions of the division. In the circumstances, a proper division should be 50% for each party. Thus, each will receive $668.48 until the husband reaches age 65, after which each will receive $579.54."

The position of the husband is that the wife, having obtained from the court a division of the pension earned during the marriage which had been agreed to by counsel cannot now request a division of the husband's entire pension. I agree; she is entitled to 50% of the pension "earned during the marriage".

The indexation issue is somewhat more troublesome. The wife asserts that under the **Supplementary Retirement Benefits Act**, R.S. c. 43 all pension recipients get automatic annual pension increases every January 1st to offset the cost of living increases. That is true. It is argued on behalf of the wife that because the learned trial judge stated that a proper division of the pension "should be 50% for each party" and since the pension is automatically indexed it follows she should have the benefit of the indexation. The Order does not include any reference to indexation. Paragraph 9 of the Order provides:

> " 9. The Respondent shall pay to the Petitioner, upon receipt, one-half (1/2) of his pension benefit earned during the marriage under the *Public Service Superannuation Act*. By consent, until the Respondent attains the age of sixty-five (65), the portion of the Respondent's pension benefit to be conveyed by the Respondent, upon receipt, to the Petitioner, shall be six hundred sixty-eight dollars forty-eight cents ($668.48) per month. Upon attaining the age of sixty-five (65), the Respondent shall convey to the Petitioner the sum of five hundred seventy-nine dollars fifty-four cents ($579.54). The Petitioner's portion of the Respondent's pension benefit earned during the marriage shall be considered to be held by the Respondent in trust for the Petitioner during her lifetime, until transferred to the Petitioner."

The position of the husband is that indexing was not requested by the wife at the time of the trial nor was the same ordered by the learned trial judge. Furthermore, the Order set out a specific amount and, therefore, there is no appealable error of law.

It is clear from reading the judgment and the Order (which is ambiguous) that the intention of the trial judge was that the wife would receive 50% of the pension earned during the

marriage. This was quantified in the amount of $668.48 a month until the husband reached age 65. In my opinion the consent of counsel related simply to the fact that at the time of trial 50% of the pension was $668.48 a month and based on the calculations as of trial date it would be reduced to $579.54 when the husband becomes 65. The ambiguity in the Order arises because the last sentence in the Order provides that the wife's portion of the husband's pension benefits earned during the marriage shall be considered to be held by him in trust for her during her lifetime until transferred to the wife. The benefit earned during the marriage would include any increases due to indexation. Indexation is automatic under the **Supplementary Retirement Benefits Act**. In my opinion, the intent of the decision and the Order was that the wife was to receive 50% of the pension earned during the marriage. The **Supplementary Retirement Benefits Act** applies to persons in receipt of pensions pursuant to the **Public Service Superannuation Act**. It is my opinion that the wife should receive the benefit of any automatic increases due to indexation. I would vary the Order accordingly.

Wife's Issue (UU)

> " Did the learned Trial Judge err in not awarding a share of the interest of the various securities, mutual funds and RRSPs from the date of separation to the date of transfer to the wife?"

The position of the wife is set out in her factum as follows:

> " 64. It is common ground that the RRSPs of the husband appreciated in value from the date of the separation to the date of Order. The husband alleges that the securities and mutual funds did not but brought forward no evidence to that effect.
>
> 65. From the date of separation the RRSPs have been earning compound interest which is paid semi-annually on June 30th and December 31st. The bank statements entered as exhibits indicated that the value of the RRSPs was not up to date and the outstanding interest payable on these accounts was not included in the matrimonial assets.
>
> 66. It is respectfully submitted therefore that the learned Trial Judge erred in not including the outstanding interest payable on these accounts

as part of the matrimonial property.

67. Further, with respect to the RRSPs the husband has transferred or attempted to transfer to the wife an RRSP having a rate of interest of 7%. It is respectfully submitted that the husband has other RRSPs which provide for a higher rate of return. It is respectfully submitted that it would be appropriate for the wife to be given an RRSP in an amount set by the learned Trial Judge at a fair and reasonable interest rate.

68. The wife further suggests that it would be appropriate and that the learned Trial Judge erred in not showing that she received a share of the interest on the various securities from the date of separation being September 1, 1990, until the date of divorce or date of transfer of investments, whichever is later.

69. It is respectfully submitted that the learned Trial Judge erred in not having this increased value form part of the matrimonial assets.

70. The husband is arguing that the decline in certain of his securities should have been taken into consideration.

71. The wife submits that it would be equitable therefore to grant the husband's relief with respect to a decrease in certain investment vehicles provided that the increase in others is brought forward and forms part of the matrimonial property."

I have set these arguments out to show the impossible position a trial judge can be placed in when attempting to divide assets between the spouses and likewise the position of an appeal court. The division of assets is at best a less than perfect exercise in most cases of any complexity. Very often the trial judge has valuations with respect to different assets as of different dates. To make the sorts of adjustments that counsel proposes in this case is an impossible task. A review of paragraphs 64 to 71 of the wife's factum shows a number of interesting issues but no suggestion as to how to resolve them and no suggestion as to where the evidence is that would permit the resolution of these issues by the Court. The position of the husband set out in his Reply to the wife's argument is contained in the following paragraphs of the husband's reply:

" 17. It has been submitted on behalf of the wife that the Learned Trial Judge erred in not ordering a division of the husband's RRSPs as of the date of separation and she alleges that she somehow lost out on interest earned by the RRSP as a result. The request by the wife is a new request

that was not made at the time of trial. (Reference Ms. Reierson's submissions page 448 of the Appeal Book). The value considered by the Learned Trial Judge was the most recent value available at the time of trial. The value for the husband's Bank of Montreal RRSP was as of January 11, 1991. The value for his Bank of Nova Scotia RRSP was as of December 31, 1990. The wife therefore shared in any interest or other income earned by the funds as of those dates.

18. It is submitted that the Learned Trial Judge made no palpable error by relying on the evidence presented by both parties with respect to the value of the RRSP and it is further submitted that the wife cannot now seek additional relief that she did not seek at trial.

19. It is worth noting that the husband received no credit for interest earned by the wife's GICs, savings accounts, bonds, etc. or interest that could have been earned had the wife not liquidated or spent a portion of those assets prior to trial. The wife did not propose including such interest as part of her list of assets.

20. The Learned Trial Judge ordered the husband to roll over to the name of the wife a portion of his RRSPs in the amount of $32,000.00.

21. It is now being argued on behalf of the wife that she is entitled to choose which RRSPs to accept, depending on their interest rate. The Learned Trial Judge did not give the wife that option. Once transferred to the wife, the wife will be free to invest her holdings in whatever manner she chooses.

22. The wife further submits that the Learned Trial Judge erred in not awarding her a share of the husband's securities and mutual funds as of the date of the parties' separation. Again the wife's request is for relief not sought at trial and is therefore inappropriate and should be dismissed. The wife apparently seeks a portion of the husband's investments based on their higher value before they decline in value as a result of normal market conditions. The change in value of the husband's securities and mutual funds resulted from normal market changes and not as a result of any action taken by the husband. Neither party has been prejudiced by the Court's decision on the timing of the transfer and the husband has not profited at the expense of the wife as a result."

In my opinion the learned trial judge acted upon the evidence that was before him in valuing the assets of the respective parties as of the dates of the financial statements provided to him. I cannot see that he made a palpable error that would warrant a change.

Wife's Issue (VV)

" Did the learned Trial Judge err in not requiring the husband to accept the Dodge Omni motor vehicle and compensate the wife for its value?"

The wife has abandoned this ground of appeal.

Wife's Issue (WW)

" Did the learned Trial Judge err in not awarding a portion of the Canada Pension Plan payments received by the husband to the wife until such time as the wife would be eligible to make application and receive her share of Canada Pension Plan benefits?"

The wife submits that a portion of her husband's Canada Pension Plan payments should be awarded to the wife until she becomes eligible to receive Canada Pension payments. I agree with the position taken by the husband that Canada Pension Plan credits and benefits are governed by federal legislation and should not be divided under matrimonial property legislation. (**Payne v. Payne**, (1988) 16 R.F.L. (3d) 8; **Czemeres v. Czemeres** (1991), 92 Sask. R. 1) The husband also submits that the wife made no request for a division of Canada Pension Plan credits or benefits at trial. I agree with the views expressed by Morgan, J.A. in **Canadiana Towers Ltd. v. Faucett** (1978), 21 O.R. 545 (C.A.) that a point not taken at trial but taken for the first time in the Court of Appeal ought to be most jealously scrutinized. In setting the quantum of spousal and child support the learned trial judge assumed the husband's Canada Pension credits would not be divided at this time. Of course it can be subject to an application by the wife pursuant to the **Canada Pension Plan Act** at a later date. The learned trial judge did not err in not awarding the wife a portion of her husband's Canada Pension Plan benefits.

Wife's Issue (XX)

" Did the learned Trial Judge err in not confirming that the wife was to be maintained as the beneficiary of the husband's supplementary death benefit pursuant to part II of the Public Service Superannuation Act?"

The husband had indicated at trial that he wished to name the parties son as the

beneficiary of his supplementary death benefit. Even if the learned trial judge had jurisdiction to make such an order it is a matter within his discretion. His unwillingness to accede to the wife's request is not an error in law.

Wife's Issue (YY)

> " Did the learned Trial Judge err in not ordering the wife's portion of the pension plan paid as of the date of separation and not as of the date of trial?"

The wife asserts that it would have been appropriate and equitable that her share of her husband's pension be paid to her from the date of separation and that the learned trial judge failed to do so. With respect, I disagree. It is clear that since the decision of **Clarke v. Clarke**, (1990) 20 A.R.F.L. (3d) 113 that all pension benefits received by a husband from the date of separation up to the date of trial are matrimonial assets available for distribution between the parties. While it is open to a court to divide pensions as of the date of separation that is clearly not the only method available to a court. In **Clarke v. Clarke**, supra, Wilson J. stated at paragraph 91:

> " Courts, generally speaking, employ two methods of dividing pensions. The first is to award lump sum compensation to the non-recipient spouse either by way of a money payment or a transfer of assets. The second is to preserve the jurisdiction of the court until the pension matures either by ordering periodic payments to be made to the non-recipient spouse or impressing the pension with a trust. When selecting the appropriate method of distribution it is important to bear in mind that the primary goal of the legislation is to effect the adjustment of property in an equitable manner. Of equal importance in some cases is the desire to sever the financial ties between the parties. These two goals may occasionally come into conflict. A fair distribution in some cases may require the parties to wait until the pension matures before it is subject to division. This will necessitate a continuing financial association between the parties. Capitalizing the pension for an immediate accounting may succeed in severing the financial ties between the parties but result in hardship to one of them if, for example, there are no other substantial assets to be divided. The preferable result in any given case will obviously depend upon a number of factors and it is my view that appellate courts should not lightly interfere with the discretion of the trial judge in this regard."

In this case the husband, as a result of a consent order, had been paying the wife $1,300.00 on a monthly basis since the date the husband left the matrimonial home. It is obvious that the learned trial judge considered this factor in deciding not to order a division of pension payments received by the husband prior to the date of trial. The learned trial judge exercised his discretion in attempting to work out a fair division of matrimonial assets between the parties. Had he chosen to divide the pension retroactively back to the date of separation then he, no doubt, would have made adjustments somewhere else. It was due to the fact that the husband was in receipt of the pension that he was capable of paying support in the amount of $1,300.00 a month. To now accede to the wife's request would be unfair. I would not interfere with the trial judge's decision on this issue.

Wife's Issue (YY)

> " That the learned trial judge erred in not finding that the husband had hidden assets that he had failed to disclose."

The wife asserts:

> " 10. During a period of years the husband accumulated certain Canada Savings Bonds. These were enumerated in the letter from the Bank of Canada introduced into evidence.
>
> 11. During the hearing, the husband gave evidence that he had a bond or bonds in the S37 series totalling $11,000.00 (Case on appeal p. 367, 1.6-22 and p. 368, 1. 1-3). As well Exhibit 16 was entered which was an Income Tax slip representing interest on bonds. Further evidence indicated that the maturity date of these bonds (S37 series) totalling $11,000.00 was November 1, 1989. This is found in the husband's evidence at p. 314, 1. 6-20 and Exhibit 18 found at p. 382, 1.29.
>
> 12. It is respectfully submitted that the learned Trial Judge failed to comprehend this evidence which admittedly was rather rambling at the time of trial and as a consequence did not pick up on the failure of the husband to account for this $11,000.00."

The husband denies he had any assets that he did not disclose, and in particular that he had $11,000.00 in Canada Savings Bonds that he did not disclose.

There is no merit to this ground of appeal. The husband's counsel submits that the wife appears to be seeking to divide both the Chrysler motor vehicle and the funds that had been used to purchase it thus seeking to split two assets when, in fact, there existed only one. I would therefore decline to award to the wife half of the sum of $18,943.00 that the husband used in 1989 to pay off the loan on his Chrysler. The wife has failed to satisfy me that the learned trial judge erred in not finding there were assets owned by the husband that were not disclosed.

Husband's Issue (s)

> " Did the Learned Trial Judge err in law in ordering arrears of maintenance of two thousand five hundred dollars ($2,500.00) when the evidence established that the husband had honoured the Consent Interim Maintenance Order requiring him to pay interim maintenance of one thousand three hundred dollars ($1,300.00) per month and that there were no arrears pursuant to the interim order?"

The learned trial judge stated in his decision:

> " Retroactive maintenance was refused. But the husband cannot be free of any obligation which he unilaterally decided not to fulfil. He should pay an amount to the wife so that the issue will be determined with finality. Such payment can be considered as accumulated arrears. The amount is set at $2,500. The husband will pay that amount to the wife in full by lump sum or instalments within six months after the date of this decision."

The husband asserts that there was no obligation which the husband had unilaterally decided not to fulfil. He argues that the finding of the learned trial judge is perverse and that the trial judge made an overriding error which apparently affected his assessment of the facts. The wife's position is that the learned trial judge made the award for $2,500.00 to compensate her for expenses she had to meet arising out of the failure of the husband to pay for the support of the family prior to the consent order that came into effect on December 1, 1990. The wife asserts that during the period prior to December 1, 1990, while the husband was still residing in the matrimonial home, he had stopped paying accounts in the wife's name, specifically, that he had cut off her use of credit cards

and was making minimal deposits to the couple's joint chequing account. The wife's evidence was that as a result she had to use the family allowance account in the amount of $1,729.00 and had to cash, prior to maturity, a Central Trust GIC which realized $2,015.00. However, it is to be remembered that the learned trial judge did not include as assets on the wife's side of the ledger certain funds the wife used to cover living expenses in the period before the interim support payments started.

There was no basis to award an amount for "accumulated arrears" when there were none. The learned trial judge erred; the $2,500.00 will have to be repaid by the wife.

As a result of having adjusted the classification and value of certain assets the following matrimonial assets with the values as indicated are owned by the parties:

	Wife	Husband
Wards Brook Property		$25,000.00
Stocks & Mutual Funds		$76,556.00
GICs	$3,000.00	
Matrimonial Home $71,500.00	$71,500.00	
Furniture	$13,562.00	$5552.00
Wards Brook Contents		$3,250.00
Computer $1,800.00		
Chrysler New Yorker		$10,950.00
Plymouth Omni	$1,000.00	
Chev Truck	$400.00	
Lionel Camper		$1,000.00
Bank Accounts	$2,237.00	$255.00
RRSPs		$174,885.00
Bonds	$4,000.00	$11,000.00
Aeroplan Points	1.00	1.00
	$97,100.00	$380,349.00

In addition to these matrimonial assets the husband is receiving a pension from former employment plus Canada Pension Benefits. The wife has certain deferred pension benefits from her employment with the Federal Government Each of the parties has approximately equivalent amounts in non-matrimonial assets.

To effect an equal division of matrimonial assets I would order:

(i) that the house be sold forthwith and the net proceeds of the sale divided equally between the parties;

(ii) that the husband transfer to the wife one-half (1/2) of his RRSPs held as of December, 1990; and

(iii) the husband transfer to the wife one-half (1/2) of his Aeroplan points held as of December, 1990.

(iv) To finalize the equal division of the matrimonial assets the husband shall be required to pay his wife an equalization payment of $54,182.00. The net proceeds of the sale of the matrimonial home should be enough to allow the husband to meet this payment if the appraisal is reasonably accurate. The payment shall be due on the closing date. If the parties cannot agree on a method of selling the property or if an offer to purchase is not accepted by one of the parties either can apply to the trial judge who can determine how the property is to be sold or if an offer has been received which one of the parties will not accept whether or not the offer should be accepted.

The Support Issue

The husband asserts that the learned trial judge erred in ordering him to pay support for the wife and child in the amount of $1,200.00 a month. The husband submits that the payment of $1,200.00 per month be set aside retroactively and that the husband be required to pay the wife support for the wife and the child in the amount of $450.00 per month in addition to the pension benefit payment of $668.00 per month and that the wife's name be removed from the order within two years from the date of the trial subject to the discretion of the court pursuant to **s. 17(10)** of the **Divorce Act,** 1985. The husband asserts that such an order would more accurately reflect the condition, means and needs and other circumstances of the parties and would meet the objectives

of **s. 15(7)** of the **Divorce Act** by promoting the economic self sufficiency of the wife.

The wife generally agrees with the findings of the learned trial judge on the support issue. It must be remembered that the husband's position on appeal was that his investments and the Wards Brook property were not matrimonial assets and the wife's position assumed she would own the house. The conclusions I have reached upset these assumptions by the parties. It is therefore necessary to decide under all the circumstances considering the respective means and needs of the parties what is a reasonable level of support to be paid by the husband. One can assume that whatever I conclude is a reasonable level it will be too high in the eyes of the husband and too low in the eyes of the wife.

As a result of my decision the wife will have approximately $140,000.00 to invest once the house is sold. I calculate this as follows:

(i) estimate of net proceeds from the sale of her share of the matrimonial home - $65,000.00 plus or minus;

(ii) equalization payment from the husband - $59,087.00;

(iii) her own GICs, bank account and bonds (including non-matrimonial assets) - $15,500.00 plus or minus;

Total available for investment, approximately $140,000.00. Invested in bonds returning 7% she will have investment income of approximately $815.00 a month. She will also have her share of her husband's employment pension indexed which would be approximately $700.00 a month and family allowance of $33.00 for a monthly income of approximately $1,550.00.

Her expenses as shown in her financial statements were based on her remaining in the home. She estimated her monthly expenses at $2,438.00. A review of those expenses shows that the monthly expenses relating to the matrimonial home without anything for routine maintenance were $547.00 exclusive of water and electricity. The expense of obtaining a suitable apartment

should not significantly exceed this amount (based on the rent being paid by her husband). In the long term the more modest accommodations will be less expensive than maintaining a home.

The wife's monthly expenses of $2,438.00 before income tax are a little on the high side considering the means and needs of the parties. Her deficit will be approximately $900.00 a month before taxes and before support payments.

As a result of my decision the husband will have approximately $87,500.00 to invest. I calculate this as follows:

Stocks & Mutual Funds	$76,500.00
Bonds	$11,000.00
Total:	$87,500.00

His monthly income from investments based on the same criteria as that applied to the wife would be approximately $500.00.

He would also have his employment pension of approximately $2,900.00 ($3,565.00 less wife's share - $668.00) plus his net Canada Pension of $434.00. His approximate monthly income before taxes after giving affect to the division of property will be $3,850.00. His expenses of $2,330.00 before income tax and support payments are slightly on the high side. He has a monthly surplus before calculation of income tax and support payments of about $1,500.00.

In summary, considering the respective means and needs of the parties, each have projected expenses beyond their means to finance. The wife's expenses before tax for the maintenance of herself and the child of the marriage are $2,438.00. The husband's before tax and support payments are $2,330.00. She has a deficit before support payments and income tax of about $900.00 a month. He has a surplus of about $1,500.00 a month before income tax and support payments. What is a reasonable sum for monthly support? I have concluded that the learned trial judge's decision to fix support at $1,200.00 was reasonable. Although I have dealt with the division of assets somewhat differently than did the learned trial judge I am of the opinion that the level of

support that the wife requires at the present and that the husband has the means to provide remains at $1,200.00 a month. Each will have to trim their expenses. Eventually each will have additional income from annuities purchased with RRSP funds.

I agree with the trial judge that there should not be a cut off date on the support payments. However, the wife must make every effort to find work that is compatible with her responsibilities to the couples teenage son that is in her custody. The **Divorce Act** requires her to attempt to become self-sufficient. There are obvious difficulties for a person of her age in doing so. However, I would think that within two years she should be in a position to meet her responsibilities to at least reasonably assist in financing the living expenses of herself and the parties' son.

It is quite apparent that the financial circumstances of these parties is going to change from time to time over the next 10 years. One would hope that variations in the level of support can be made without the need to commence variation proceedings. Obviously, if the wife seeks part of her husband's Canada Pension the $1,200.00 a month support payment should be reduced correspondingly. As the husband's employment pension reduces at age 65 there should be, barring other unforeseen circumstances, a corresponding reduction in the support payments. Adjustments will have to be considered when RRSPs are converted to annuities. As the wife begins to collect on her pension entitlements the level of support paid by the husband should be reduced unless there are reasons that would warrant otherwise. There may come a time when the wife, if she does not work, will have to consider the purchase of an annuity with her capital funds; she cannot expect to draw a large support payment from her husband indefinitely unless there is a sound reason why this would be necessary.

Costs

The results of the appeal and cross-appeal are mixed. I would order the parties bear their own costs. We will hear the parties on the form of order to give effect to this decision if they cannot agree on its terms.

J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.

S.C.A. No. 02639

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

BETWEEN:

THEODORE ELLERSON TIBBETTS	)	
	)	
Appellant	)	REASONS FOR
	)	JUDGMENT BY:
- and -	)	
	)	HALLETT, J.A.
MARY SYLVIA TIBBETTS	)	
	)	
Respondent	)	
	)	
	)	
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