NOVA SCOTIA COURT OF APPEAL
Citation: *Young v. Young*, 2003 NSCA 63

Date: 20030611
Docket: CA 180904
Registry: Halifax

Between:

Joan M. Young

Appellant

v.

David H. Young

Respondent

Judges:	Roscoe, Bateman and Oland, JJ.A.
Appeal Heard:	May 23, 2003, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Bateman, J.A.; Roscoe and Oland, JJ.A. concurring.
Counsel:	Michael Owen, for the appellant Celia Melanson, for the respondent

Reasons for judgment:

[1] This is an appeal by Joan M. Young from an order of Justice Suzanne Hood of the Supreme Court dividing the parties' assets ancillary to divorce.

Background:

[2] The background is set out in the decision of the trial judge (reported as **Young v. Young** (2002), 205 N.S.R. (2d) 64; N.S.J. No. 234 (QL)(S.C.)):

> **[2]** David Young and Joan Young married on October 30, 1975 after having cohabited beginning in 1974. This was a second marriage for both. At the time of the marriage, Joan was thirty-three years old and David was forty-seven years old.
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> **[3]** Between 1968 and 1973 Joan had taught at Paul Smith College in the Adirondacks but left her teaching position upon her divorce. Her ex-husband was still teaching at the College. She went to Florida to live with her parents and, while there, worked and took university courses. She testified that the college president told her he would keep her job open for her.
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> **[4]** David had farmed since 1950, first on a small farm in Long Island, NY, which he inherited, then on a larger seed potato farm in the Adirondacks. When David and Joan first cohabited, they lived in a rented house while David continued to farm. After his divorce, his ex-wife moved from the farm and David and Joan moved there in 1975. They lived there until the farm was sold in 1984. At that time, they retired to Nova Scotia where they built a home in Little Harbour, Shelburne County on land which had been purchased in 1978. At the time of retirement, David was fifty-five and Joan was forty-one years old.
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> **[5]** They later bought land in Newburne, Lunenburg County and built a cottage on it. The couple separated in December 2000. Joan has since then resided in the cottage property and David has remained in the matrimonial home.
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> **[6]** The proceeds from the sale of the farm were invested and were used for the couple's living expenses. In addition, David has a social security pension from the United States of approximately $16,000.00 per year. As well, he inherited money and personal property on his mother's death.
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> **[7]** The couple enjoyed a very comfortable if not lavish lifestyle in Nova Scotia. They built an architecturally designed home in Little Harbour which was paid for in cash. They took trips on the 34 foot sailboat which they had purchased before retirement. They later paid cash for the cottage lot and for the small but

> well constructed Dow and Duggan log cottage. They entertained and travelled to visit family and for bird watching.
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> **[8]** Approximately five years before the couple separated, Joan developed osteoarthritis which she testified curtailed her activities. Before that, after her arrival in Nova Scotia, Joan, who was then only in her early 40's, taught some GED courses, did some consulting work in education and later became involved in rug hooking. She eventually became extensively involved in rug hooking including teaching rug hooking courses and writing articles about rug hooking.
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> **[9]** At the date of separation, David was seventy-two and Joan was fifty-eight. The principal assets at issue are the proceeds from the sale of the farm, the matrimonial home and the cottage.

[3] The judge ordered that all assets of the parties be divided equally with the exception of two investment accounts which represented the remaining balance of the proceeds from the sale of the farm (the "funds"). Excluding those funds, this resulted in each spouse receiving assets valued at approximately $191,000, most of this value being in non-cash property (the matrimonial home worth $210,000 and the cottage worth $120,000), together with I.R.A. accounts valued at about $70,000 US each.

[4] At the time of the separation, the funds consisted of two accounts: the Scotia Portfolio valued at about $293,000 Cdn and the Charles Scwabb account valued at about $236,000 US. Those amounts are approximate only, the day to day value fluctuating with market conditions. The judge ordered that the funds be divided, 2/3 to David Young and 1/3 to Joan Young.

Issues:

[5] Ms. Young says that the judge erred in failing to divide the funds equally.

Analysis:

[6] The standard of appellate review on an appeal from a division of assets is the usual deferential civil standard. This Court is entitled to intervene only where it is demonstrated that the trial judge has erred at law; applied incorrect principles; made a palpable and overriding error of fact or the result is so clearly wrong as to amount to an injustice. (See **MacLennan v. MacLennan** (2003), 212 N.S.R. (2d) 116; N.S.J. No. 15 (Q.L.) (C.A.)).

[7] An appeal from a division of matrimonial assets is not a rehearing. We are not permitted to simply substitute our opinion of the appropriate division for that of the trial judge. In dividing matrimonial assets the judge is exercising

a discretion. That discretion must be exercised judicially, in accordance with correct legal principles. (**Heinemann v. Heinemann** (1989), 91 N.S.R. (2d) 136; N.S.J. No. 231 (Q.L.) (A.D.)). Discretion exercised on wrong considerations or wrong grounds, or ignoring the right considerations is an error of law. (See **Grimshaw v. Dunbar**, [1953] 1 All E.R. 350 (C.A.), at p.353, per Jenkins, L.R. and **Elsom v. Elsom**, [1989] 1 S.C.R. 1367; S.C.J. No. 48 (Q.L.))

[8] It was Mr. Young's position at trial that the "farm proceeds funds" should be considered a business asset, thus exempt from the *prima facie* equal division of matrimonial assets mandated by s. 12 of the **Matrimonial Property Act,** R.S.N.S. 1989, c. 275 as amended. Under the scheme of the **Act**, all assets of the parties, whenever acquired, are "matrimonial assets" and subject to *prima facie* equal division unless falling within certain narrow exceptions, one being business assets:

> **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
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> (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;
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> (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;
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> (g) real and personal property acquired after separation unless the spouses resume cohabitation.
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> (2) Notwithstanding clauses (b) and (c) of subsection (1), an award or settlement of damages in court or money being paid or payable under an insurance policy is a matrimonial asset to the extent that it is made, paid or payable in respect of a matrimonial asset.
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> ...
>
> (Emphasis added)

[9] A business asset is defined in s. 2 of the **Act**:

> **2** In this Act,
>
> (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;

[10] After a thorough review of the circumstances of the parties, the judge correctly rejected Mr. Young's argument that the funds were a business asset. That finding is not on appeal. She said:

> **[48]** Firstly, I have concluded above that Joan Young was entitled to a share of the business asset, the farm, during the time the parties resided there. She contributed work to the farm, including household work, as well as her work in the vegetable garden and her efforts during planting, harvesting and grading times. When the farm was sold, the agreement of sale was in both names. Furthermore, the property sold also contained the matrimonial home. Accordingly, the sale proceeds of the business to which she contributed belong, in part, to Joan.

[49] Secondly, following **Hargraft**, I conclude that the intent of the parties and their conduct for 16 years after retirement shows that the sale proceeds were for the "common usage and benefit" of both parties. David had only a modest income from U.S. Social Security which did not fully support the parties. He testified that it is approximately $16,000 per year. In addition, he receives a small income from a trust fund. Joan had no such income. The income they had apart from the sale proceeds was not sufficient to support their lifestyle.

[50] An architecturally designed house, in which both resided, was built and paid for in cash from the sale proceeds. A cottage lot was purchased and a Dow and Duggan cottage constructed on it. These were also paid for in cash from the sale proceeds, although part may have come from the sale of the sailboat, a matrimonial asset. The parties travelled for birdwatching and other purposes and entertained in their home. Travel and entertainment expenses were paid from the sale proceeds. Vehicles, which both drove, were purchased from the sale proceeds.

[51] It was not only David Young who retired; Joan did too. She had no independent means and depended upon David for her support. How then can it be said that the sale proceeds were not to be used for her benefit as well as David's? If she were closer to his age, there would be no question that she too retired. In my view, it is not for David to say: "I'm 14 years your senior and I have retired but now you must find a paying job." There is no evidence that he did say that until after separation. By then Joan was 58 and has been out of the paid work force for 25 years.

[52] Thirdly, I accept the submission that the sale proceeds should be treated like a pension. The purpose of the sale of the farm was to provide an income for the parties' retirement. They contributed only a modest amount to IRA's, the American equivalent to an RRSP. The sale proceeds were in fact used to fund the couple's retirement. Not only was a house built and other capital expenditures made, but withdrawals were made for regular living expenses, just as one would use a pension or an RRSP for regular living expenses.

[53] Fourthly, based upon the definition of "business assets" in the **Matrimonial Property Act**, I am not satisfied that David Young was engaged in a business when he invested and managed the sale proceeds. As I have stated above, the sale proceeds were used for many purposes relating to the household and the transportation, social and recreational expenses of the parties. The evidence of David Young is clear that the capital was encroached upon. Capital expenditures for motor vehicles and buildings were made from the sale proceeds. As well, it is clear that there was insufficient income from other

> sources to fund the parties' ordinary living expenses. For that reason, these funds are no more a business asset than a self-directed RRSP would be.
> (Emphasis added)

[11] Having determined that the funds were a matrimonial asset, the judge considered whether they should be divided unequally in Mr. Young's favour. An unequal division of a matrimonial asset is permitted where an equal division would be unfair or unconscionable taking into account designated factors:

> **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:
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> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
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> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
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> (c) a marriage contract or separation agreement between the spouses;
>
> (d) the length of time that the spouses have cohabited with each other during their marriage;
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> (e) the date and manner of acquisition of the assets;
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> (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;

> (h) the needs of a child who has not attained the age of majority;
>
> (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;
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> (j) whether the value of the assets substantially appreciated during the marriage;
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> (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
>
> (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;
>
> (m) all taxation consequences of the division of matrimonial assets. R.S., c. 275, s. 13;
>
> (Emphasis added)

[12] The farm proceeds at time of sale in 1984 amounted to $500,000 U.S. The farm had roughly doubled in value during the marriage. It was the judge's view that, because the farm had significant value at the time of the commencement of the parties relationship, a division in Mr. Young's favour was warranted. She said:

> **[59]** Because the asset was worth $261,499.99 at the date the parties began to cohabit, I conclude that it would be unfair to include all of its sale proceeds as a matrimonial asset.

[13] In determining that the funds were a matrimonial asset, the judge had conducted a thorough review of the history of the farming operation and the parties respective contributions and had considered the use of the funds in the 16 years since the sale of the farm. For sound reasons she concluded that the funds were not a business asset. However, it is my view that the judge erred in principle by applying the wrong test when dividing the matrimonial assets.

[14] Sections 13 and 18 of the **Act** are conceptually distinct. Section 13 permits, in limited circumstances, an unequal division of matrimonial assets or a division of an asset which is not matrimonial (see ¶ 11 above). Section 18 reflects a different approach to the division of business assets:

> **18** Where one spouse has contributed work, money or moneys worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order
>
> > (a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefor; or
> >
> > (b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,
>
> and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances. (Emphasis added)

[15] There is no presumption that business assets be divided equally, or at all. Under s. 18, the division of a business asset is made solely in accordance with the contribution of the non-owning spouse to the business asset, ignoring the relationship of the parties. In contrast, the division of matrimonial assets is *prima facie* equal, with unequal division permitted only in limited circumstances. The inquiry under s. 13 is broader than a straight forward measuring of contribution. The predominant concept under the **Act** is the recognition of marriage as a partnership with each party contributing in different ways. A weighing of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Since the introduction of the **Act**, it has been repeatedly stressed by this Court, that matrimonial assets will be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable. MacKeigan, C.J.N.S. wrote, for the court, in **Harwood v. Thomas** (1981), 45 N.S.R. (2d) 414;

N.S.J. No. 6 (Q.L.) (A.D.), one of the first cases in which the **Matrimonial Property Act** was considered:

> 7 Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the *Act* and prescribed by s. 12 should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be clearly unfair - not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his discretion concludes that equal division would be unfair is he called upon to determine exactly what unequal division might be made.
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> (Emphasis added)

[16] See also **Donald v. Donald** (1991), 103 N.S.R. (2d) 322; N.S.J. No. 214 (Q.L.)(A.D.) at pp. 327-328 per Chipman, J.A.

[17] The judge appears to have assumed that Ms. Young's entitlement to an interest in the farm, viewing it as a business asset and when it was in operation, was representative of her appropriate share of the funds, notwithstanding that she found the funds to be a matrimonial asset. It is in this way that she erred. This approach is revealed in the following passages from her judgment:

> [46] Two provisions of the **Matrimonial Property Act** apply. These are s. 13 which deals with an unequal division of assets and s. 18 which provides for orders with respect to business assets. I have concluded above that Joan is entitled to a share of David's business asset, the farm.
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> [47] I therefore also conclude that Joan Young is entitled to a share of the sale proceeds of the farm. I so conclude for four reasons: firstly, Joan was entitled to a share of the farm pursuant to s. 18 of the **Matrimonial Property Act**; secondly, the intent and conduct of the parties shows that these sale proceeds were to be used for the benefit of both on their retirement; thirdly, the sale proceeds are in the nature of a pension; and fourthly, I am not satisfied that the sale proceeds are business assets.
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> (Emphasis added)

[18] As set out above, substantially different considerations are applied to a division of matrimonial assets than the basic contribution assessment applied to the division of business assets. It is not sufficient, for an unequal division of matrimonial assets, that one of the s. 13 factors be present. The judge must make the additional determination that an equal division would be unfair or unconscionable. The terms "unfair" and "unconscionable" do not have precise meaning. Lambert, J. A. wrote in **Girard v. Girard**, (1983), 33 R.F.L. (2d) 79; B.C.J. No. 4 (Q.L.) (B.C.C.A.) supra, at p. 86:

> I come then to the legislative purpose expressed in the word “unfair”. That word evokes ethical considerations and not merely legal ones. It is not a lawyer's word. The section does not give a judge a broad discretion to divide property in accordance with his own conscience. There can be no doubt about that. There must be uniformity and predictability of judgment. The question of unfairness must therefore be measured by an objective standard. The standard is that of a fair and reasonable person whose values reflect those generally held in contemporary British Columbia. Such a person, while not insisting that everyone adopt his or her behaviour preferences, can recognize unfairness in the form of a marked departure from current community values.

[19] As directed in **Harwood v. Thomas**, supra, the judge must look at all of the circumstances, not simply weigh the respective material contributions of the parties. In **S.B.M. v. N.M.**, [2003] B.C.J. No. 1142 (Q.L.)(C.A.), a recent decision of the British Columbia Court of Appeal, the court was asked to review the trial judge’s unequal division of family assets. The **Family Relations Act**, R.S.B.C. 1996, c. 128, s. 65(1) permits a deviation from the *prima facie* unequal division of family assets, where an equal division would be “unfair”. I would endorse the approach to the question of unfairness outlined by Donald, J.A., for the court. It is consistent with the direction in **Harwood**, supra and the cases in this province which have followed:

> ¶ 23 . . . The question is not whether an unequal division would be fair; that is not the obverse of the test in s. 65(1). The Legislature created a presumption of equality - a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of s. 65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair, a

> reapportionment could be ordered on the basis that it is more fair, and that, in my opinion, is not what the statute intends.
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> (Emphasis added)

[20] Section 4(1) of the **Act** expressly includes as a matrimonial asset (subject to the enumerated exceptions) all real and personal property acquired by either or both spouses before or during their marriage. Thus the mere fact of prior acquisition does not remove the asset from *prima facie* equal division. Section 13(e) entitles the judge to take into account "the date and manner of acquisition of the assets" when considering whether an equal division would be unfair or unconscionable. Under the s. 13 analysis the significance of the prior acquisition must be looked at taking into account factors such as the timing of the contribution of the particular asset to the marriage; the parties' use of the asset; the length of the marriage; the significance of the asset relative to the entire pool of matrimonial assets; and the age and stage of the parties at separation. This is not an exhaustive list. The judge failed to conduct a contextual assessment of the significance of Mr. Young's prior ownership of the farm.

[21] The following facts, as found by the judge in the process of determining that the funds were a matrimonial asset, are particularly relevant to the s. 13 assessment:

> Although a second marriage for both parties, this was one of meaningful duration. The parties were married for 25 years before separation;
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> The farm property no longer existed as such, having been converted to a capital fund;
>
> The funds were invested and used for the parties living expenses over an extended period of time;
>
> Ms. Young's contribution to the farm operation and assumption of household duties over the 10 years that the parties owned the farm;

Ms. Young’s assumption of all household duties freed Mr. Young to devote all of his efforts to the farm business;

The purpose of the sale of the farm was to provide an income for the parties’ retirement;

For their 16 years of retirement the parties used the funds for common benefit and encroached upon capital;

The parties relied on the funds as their principal retirement fund, neither having an independent means of support;

The funds represented the significant cash asset of the parties, being almost half of the total value of the matrimonial assets;

[22] In dividing the assets unequally the judge relied upon and cited **Adie v. Adie** (1994), 134 N.S.R. (2d) 60; N.S.J. No. 395 (Q.L.) (S.C.), N.S.J. No. 395 (Q.L.) (S.C.). There the parties were married for 15 years. It was a second marriage for both. At the time of entry into the marriage, the respondent husband was a retired police officer and had a United Kingdom pension and other assets of approximately $30,000. The pension was earned entirely prior to the marriage and during the period of the respondent's first marriage. At separation, the wife had accumulated assets totalling $81,200 while the husband’s total assets were in the sum of $124,700. The wife contended that the pension was a matrimonial asset which was subject to equal division between the parties. The judge concluded that, although the pension was a matrimonial asset, it would be unfair or unconscionable for the wife to receive a share. He cited, as persuasive, the facts that the pension had been fully acquired before the parties entered into a relationship; and that the wife did not contribute to the husband’s career potential since he was retired at the time of their marriage. That decision was not appealed to this Court. I am satisfied that the circumstances in **Adie** were materially different from those here. I would refer to the several factors I have set out in ¶ 23 above.

[23] In these circumstances there was an absence of compelling evidence that an equal division would be unfair or unconscionable. The judge relied solely upon the fact that Mr. Young had brought the farm into the marriage in

stating her conclusion that an unequal division would be unfair or unconscionable. The **Act** expressly includes, as matrimonial assets, those acquired both before and after the marriage. It cannot have been intended that matrimonial assets be routinely divided unequally in favour of the contributing spouse.

[24] I would contrast the circumstances of the Young's marriage to those in **MacIssac v. MacIssac** (1996), 150 N.S.R. (2d) 321; N.S.J. No. 185 (Q.L.)(C.A.). There, unequal division was warranted when one party had injected substantial "non-matrimonial" cash or assets into the marriage shortly before separation.

[25] The decision in **LeBlanc v. LeBlanc**, [1988] 1 S.C.R. 217; S.C.J. No. 6 (Q.L.) reflects a situation where the complete failure of one party to contribute to the marriage resulted in an unequal division. There, the husband appealed an order of the trial judge dividing the family assets in favour of the wife. The trial judge had found that the husband made no contribution to the care of the seven children, the household management or financial contribution to the family. The applicable statutory criteria differed somewhat from that set out in our **Act**, with unequal division requiring a finding that equal division would be "inequitable". The decision was reversed on appeal to the New Brunswick Court of Appeal. On further appeal to the Supreme Court of Canada, the judgment of the trial court was restored. La Forest, J., wrote for the court at pp. 223 - 224:

> . . . The question here is whether, on the facts such as those in this case, the circumstances are such as to permit a court to exercise its discretion under s. 7(f) to depart from the general rule.
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> ... He clearly found, as a matter of fact, that the acquisition, preservation and improvement of the marital property resulted almost exclusively from the wife's efforts and that there was no significant contribution by the husband in child care, household management or financial provision. This, in his view, constituted sufficient grounds for the exercise of his discretion to depart from the usual rule of equal division. . . . It is sufficient for me to say that in the circumstances the trial judge was entitled to exercise his discretion under s. 7(f) and that he made no error in exercising it as he did.

[26] Mr. Young's ownership of the farm at the time of marriage does not, in my view, equate to the unique circumstances warranting unequal division as

exemplified in **MacIssac** and **LeBlanc**. As was determined by the judge, the parties had organized their retirement in reliance on these funds as their principle income source. At the time of divorce they were each, for age or health reasons, beyond a point where re-employment was an option. It is my view that an equal division would, in all of the circumstances, not be unfair or unconscionable.

DISPOSITION:

[27] I would allow the appeal and order that the Scotia Portfolio and the Charles Schwabb account be divided equally. This is to be accomplished through a transfer of half of each shareholding. We are advised that the funds have remained intact while the parties awaited this appeal.

[28] No costs were awarded at trial. As Ms. Young has succeeded on this appeal, she shall have her costs which I would fix at $2500 plus disbursements as taxed or agreed.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

Oland, J.A.