

SUPREME COURT OF NOVA SCOTIA

Citation: *Guptill v. Wilfred*, 2009 NSSC 44

Date: 20090209

Docket: 1204-004802

Registry: Kentville

Between:

Tara Naomi Guptill

Petitioner

v.

Romiel Wilfred

Respondent

Judge:

The Honourable Justice Gregory M. Warner

Heard and oral decision:

February 9, 2009, in Kentville, Nova Scotia

Written Decision:

February 16, 2009

Counsel:

Diana M. Musgrave, Counsel for the Petitioner/Wife
Thomas R. MacEwan, Counsel for the
Respondent/Husband

By the Court:

A. The Issue

[1] Who is a “spouse” for the purpose of property division?

[2] The Husband seeks an equal property division pursuant to Nova Scotia’s **Matrimonial Property Act** (“**Act**”). Whether the **Act** applies, depends upon whether each was a “spouse” as defined by section 2 (g) of the Act. It states that the term:

means *either of a man and woman who:*

- (i) are married to each other;
- (ii) were married to each other by a marriage that is voidable and has not been annulled by a declaration of nullity; or
- (iii) *have gone through a form of marriage with each other, in good faith, that is void* and are cohabiting or have cohabited within the proceeding year.

[3] The parties were married in Nova Scotia on September 29, 2001; unbeknownst to the Wife, the Husband had been previously married. The Husband says that he believed that on September 29, 2001, he had been divorced from his first wife. Most of the spouses’ assets are in the Wife’s name.

[4] The issues are:

- a) What does it mean to go through a void marriage “in good faith”?
- b) Did the Husband prove that he went through this marriage in good faith?

B. First Issue: What does it mean to go through a void marriage in good faith?

[5] There appears to be no reported Nova Scotia case law interpreting s. 2(g)(iii).

[6] Similar legislation in other Canadian jurisdictions provides some guidance in the sense that different phrasings of the definition of “spouse” reveal legislative responses to the question; however, even in other jurisdictions, there appears to be a paucity of case law.

[7] Alberta’s **Matrimonial Property Act** defines “spouse” as including “a former spouse and a party to a marriage notwithstanding that the marriage is void or voidable” but qualifies the definition in s. 2: “Nothing in this **Act** confers a right on a spouse who at the time of the marriage knew or had reason to believe that the marriage was void.”

[8] The only decision that I found that interpreted this provision is **Kaminski v. Kaminski**, 1982 CarswellAlta 334. The Court held that the plaintiff wife was entitled to relief under that Act because of its finding that she did not know of the husband’s earlier marriage which made their marriage void.

[9] British Columbia's **Family Relations Act** defines "spouse" for the purposes of Part 5 - matrimonial property, as a person who:

- a) is married to another person,
- ...
- c) applies for an order under this **Act** within 2 years of the making of an order
 - i) for dissolution of the person's marriage,
 - ii) for judicial separation, or
 - iii) declaring the person's marriage to be null or void

[10] The legislation appears to contain no "good faith" clause.

[11] Manitoba's **Family Property Act** defines "spouses" as "two persons who are married to each other". It specifies in s. 2(2) that a voidable marriage is, before its annulment, a subsisting marriage, and in s. 2(3) that the Act applies to the parties in a marriage "but applies only so long as the parties believe the marriage to be valid; and, if either party knows or has reason to believe when the marriage is solemnized that it is void, that party is not entitled to any benefit as a spouse under this **Act**."

[12] The Act appears to provide a different regime for property division for common-law partners.

[13] New Brunswick's **Marital Property Act** defines a spouse as a married person. Section 3(3) states that "a person whose marriage is declared a nullity shall be deemed to have been a spouse during the period between the purported solemnization of the marriage and the declaration of nullity."

[14] The Act appears to contain no "good faith" clause.

[15] Newfoundland's **Family Law Act** contains the same definition of "spouse" as is contained in Nova Scotia's **Act**.

[16] Ontario's **Family Law Act** defines "spouse" as:
either of two persons who,
a) are married to each other, or
b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

[17] Three reported decisions deal with the "good faith" issue.

[18] In **Harris v. Godkewitsch**, 1983 CarswellOnt 1329 (OCJ), the Court held that, when parties go through a religious ceremony knowing it does not comply with the legal requirements of a valid marriage, they have not gone through a marriage "in good faith".

[19] In **Debora v. Debora**, 1999 CarswellOnt 5, the Ontario Court of Appeal similarly held that a spouse could not be acting in good faith if he or she was aware that the marriage did not comply with the **Marriage Act**.

[20] In a similar factual matrix to the case at bar (the only one I could find), **Reaney v. Reaney**, 1990 Carswell Ont 279 (OS CJ), Justice Granger held that the plaintiff husband who was aware that he was still married to someone else and could not comply with the Ontario Act had not entered into a void marriage in good faith and was not a spouse and, therefore, could not seek an equalization of property under the **Family Law Act**.

[21] It appears from the Ontario case law that only the spouse who knew that the marriage was flawed was not a “spouse”.

[22] Saskatchewan’s **Family Property Act** contains a broader definition of “spouse”. It reads in part:

“spouse” means either of two persons who:

- a) at the time an application is made pursuant to this Act, is legally married to the other or is married to the other by a marriage that is voidable and has not been voided by a judgment of nullity;
 - b) has, in good faith, gone through a form of statutory marriage with the other that is void, where they are cohabiting or have cohabited within the two years preceding the making of an application pursuant to this Act; or
 - c) is cohabiting or has cohabited with the other person as spouses continuously for a period of not less than two years; . . .
- [the balance of the **Act** is not applicable]

[23] A strict or narrow reading of the Ontario decisions might suggest that going through a marriage “in good faith” simply means that the spouse intends to enter a marriage that complied with the **Marriage Act** (in Nova Scotia, the **Solemnization of Marriage Act**).

[24] Counsel for the Husband submits that such is the proper interpretation of s. 2(g)(iii) of the **Act**. He notes that s. 15 of the **Solemnization of Marriage Act** of Nova Scotia reads:

Conditions for valid marriage in Province

- 15 No marriage in the Province is valid unless
- a) it is solemnized by a person authorized by this Act to solemnize marriage; and
 - b) a license has been obtained for the solemnization of the marriage.

[25] He argues that, since the person who solemnized the marriage in Nova Scotia was authorized by that Act to do so, and a license to marry had been obtained, the marriage of September 29, 2001, was entered into in good faith. He submits that, applying the analysis in **Reaney**, **Harris** and **Debora**, the fact that the Husband was already married and did not have the capacity to marry on September 29, 2001, is not relevant.

[26] I am not certain that those decisions were intended to convey such a narrow construction of the concept of “in good faith”. If counsel’s interpretation is correct, I disagree with those decisions.

[27] To go through a marriage in good faith requires each spouse to believe, on reasonable grounds, that the marriage is valid and not simply a marriage that complies with the **Solemnization of Marriage Act**.

[28] Without restricting any other factual circumstance that may impact on the validity of a marriage (one of which is compliance with the **Solemnization of Marriage Act**), a marriage is not valid if the spouses were not, at the time of the marriage, capable of entering into a valid marriage.

[29] Capacity to marry presently means, except in those jurisdictions that recognize polygamist marriages, that each spouse is single or unmarried.

[30] In this case, the Husband had been married in 1997 in St. Lucia, and had never been divorced and was not a widower.

[31] The issue is not whether the Husband had the capacity to marry. He acknowledged and agreed in his pleadings with the Wife's request in her Petition for a declaration of nullity on the basis that the marriage was void.

[32] The issue is what the phrase "in good faith" means when one goes through a form of marriage that is void. The time when good faith is assessed is the time of the marriage.

[33] This Court addressed the meaning of good and bad faith in another context in **National Bank Financial v. Daniel Potter**, 2008 NSSC 135, at ¶¶ 128 to 161, and in particular ¶¶ 130 to 133:

[130] Is bad faith the absence of good faith, or does it require more? Is it dishonesty of belief or purpose? Or is it impossible to make a complete catalogue of types of bad faith (as stated in the *American Restatement (Second) of Contracts*, ¶ 125 [1979])?

[131] In *Phipson on Evidence*, Fourteenth Edition, by M. N. Howard *et al* (1990; Sweet & Maxwell; London), Chapter 16, the chapter on proof of state of mind, Part 6 and Part 9 are about good and bad faith. The authors provide important guidance as to relevant considerations for assessing whether NBFL's application is made in bad faith when they write:

"A party's good faith in doing an act may generally be inferred from any facts which would justify doing it. In such cases the state of his knowledge; or the advice, however erroneous, that he received; or the information, whether true or false, on which he acted, may often be relevant. So, **to show the bona fides of a party's belief as to any matter, it is admissible to show the state of his knowledge, and that he had reasonable grounds of belief** or that it was shared by the community or even by the individuals similarly situated to himself; while **the absence of reasonable grounds of belief in the existence of a fact (e.g. means of knowing the opposite) is evidence of want of honest belief.**"

[132] Gordon Hilliker, Q.C. has written texts on insurance law for several years. He suggests that the term "bad faith" may be a misnomer. In the context of contract law, he writes that it involves the breach of the duty of good faith and fair dealing, and forbids parties from concealing what they privately know, or, stated in the positive, impose a duty to disclose all material facts. It does not require malicious or high-handed behaviour.

[133] **Seldom does a party declare his or her bad faith. The Court is entitled to draw inferences from the totality of the circumstances surrounding the application** including: 1) the state of knowledge of the applicant, 2) the advice, however erroneous, it received, and 3) the information, whether true or false, upon which it acted, in determining the *good or bad faith* of a party

[34] Applying this guidance, the issue is whether the Husband knew or reasonably believed that he had been divorced from his first wife at the time he married - September 29, 2001.

C. Second Issue: Did the Husband prove he went through a form of marriage in good faith?

[35] Counsel for the Husband agrees that the onus is on the Husband to establish on the civil burden - a balance of probabilities, that he reasonably believed in his capacity to marry; that is, that his first wife had divorced him.

[36] The credibility of the Husband is an issue. No documentary or other independent corroborative evidence was tendered to support his evidence.

[37] I adopt the outline for assessing credibility set out in **Re Novak Estate**, 2008 NSSC 283, at ¶¶ 36 and 37:

[36] There are many tools for assessing credibility:

- a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.
- b) The ability to review independent evidence that confirms or contradicts the witness' testimony.
- c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in **Faryna v. Chorny**, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.
- d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution (**R. v. Mah**, 2002 NSCA 99 ¶¶ 70-75).
- e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. **R. v. J.H.** [2005] O.J. No.39 (OCA) ¶¶ 51-56).

[37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See **R. v. D.R.** [1966] 2 S.C.R. 291 at ¶ 93 and **R. v. J.H. supra**).

C.2 Evidence respecting good and bad faith

Wife's Evidence

[38] The Wife filed an affidavit and was examined orally. She met the Husband in St. Lucia in 2000. They fell in love. They discussed marriage. He never told her he had previously been married to Jasmine Daniel.

[39] The Husband did tell her that he once had a girlfriend named Jasmine, he had trouble with her, she had stabbed him, she was crazy, and she was gone. Neither he nor any members of his family ever said he had been married.

[40] The Wife's affidavit states:

4. When I met Wilfred he never indicated that he had been married before. We made plans to marry in 2001 and Wilfred made plans to move to Canada on a permanent basis.

5. We applied for a marriage license in August of 2001 and Wilfred indicated on the application that he had never been married before.

6. We were married in Kentville on September 29, 2001 and planned on returning to St. Lucia where we had been residing and operating a used clothing business.

7. When we returned to St. Lucia in October of 2001, I was asked by the woman who worked with us in our business, and resided with us as a housekeeper, whether I was aware that Wilfred had been married before.

8. I was totally confused and asked Wilfred when he returned home that day whether he had ever been married before. He told me he had not.

9. When I divulged what I had been told, and who had told me, he admitted he had been married before but indicated that a divorce had been obtained in St. Lucia.

10. He assured me that the documents were at his mother's house, but after several days of his failure to produce the proof of divorce I decided to return to Canada on the return portion of my plane ticket, which I had never intended to use, only two weeks following our arrival in St. Lucia, and a brief three weeks after our wedding.

11. I was stunned and concerned about the legitimacy of my own marriage as I had not been aware of Wilfred's prior marriage and I was aware that he had indicated to me that he had never been married before.

12. I contacted a lawyer in St. Lucia, prior to my departure in the hopes that he was divorced but not able to locate the documents to find the proof of marriage and divorce and I was informed by the lawyer that she was unable to find any proof of divorce, but did provide me with his Marriage Certificate from St. Lucia from his first marriage which is the attached Exhibit "A".

13. I returned to Halifax for nearly two months, and then I decided to go back to St. Lucia and try to repair our relationship. I still loved Wilfred and I wanted to be with him. After a month together in St. Lucia we decided to move to Canada and did so in January 2002.

...

16. Wilfred later tried to claim, when we returned to Canada, that his wife was dead and that there was not a problem.

17. I realized that our marriage was not valid and therefore I made the decision to treat our relationship as a common-law union given the difficulties of sorting out the issue of the lack of divorce in St. Lucia.

18. My family and friends were aware since 2001 of the fact that the marriage was not valid and they knew I was still involved in a relationship with Wilfred.

[41] Attached to her affidavit was the marriage certificate obtained by her St. Lucia lawyer, Natalie Augustin, on November 6, 2001. It establishes the marriage between the Husband and Jasmine Daniel on December 13, 1997.

[42] In oral evidence, she added that, after she returned from Dartmouth to St. Lucia about December 2001 she and the Husband attended upon Ms. Augustin for the purpose of the Husband commencing divorce proceedings from Ms. Daniel. Also attached to her Affidavit is an invoice for \$2,145.50 from Ms. Augustin to the Husband, dated 1/9/2002, for taking oral and written instructions from him to file a petition for divorce, drafting the requisite documentation, and for court appearances for application for leave to file the petition and for leave to serve it out of the jurisdiction.

[43] From subsequent inquiries of Ms. Augustin, she learned that the Husband never paid the bill, and the divorce proceeding went no further.

[44] She returned to Nova Scotia in about January 2002 to live and work, and it was their intention that the Husband would follow her. He did arrive about March 2002 but between January and March she made several efforts to contact him, all of which attempts were unsuccessful and it appeared as if he was avoiding her.

[45] With respect to the events of October 2001, when the housekeeper advised the Wife of the Husband's marriage which he first denied and then admitted, the Wife said that she asked the Husband to find something to show he was divorced. He stated to her, at various times, that Ms. Daniel had presented him with the divorce papers at a bus stop and he had signed them; that Ms. Daniel had remarried; that the papers were at his mother's home; that the papers were lost, or at the lawyers. At no time was he able to produce any divorce documents.

[46] Thereafter she treated her marriage to the Husband as a common-law marriage.

Lesley Muise's Evidence

[47] Ms. Muise testified by an affidavit upon which she was cross-examined.

[48] Ms. Muise has been a close friend with the Wife for about 15 years. She and the Wife lived together at various times before the Wife met the Husband; between October 2001 (when the Wife first left the Husband) and December 2001 (when they first reconciled), and from January to March

2002; and with the Wife and Husband, in Ms. Muise's apartment in Dartmouth before they were married, and for roughly five or six months between November 2004 and May 2005 in the parties' home in the Valley.

[49] Ms. Muise met the Husband in late 2000 or early 2001. She was the photographer at their wedding on September 29, 2001, and they stayed with her before they returned to live in St. Lucia.

[50] Ms. Muise's affidavit evidence was not altered by cross-examination. It includes:

10. In early October 2001, I received a phone call from Tara while she was living in St. Lucia to tell me that she just found out that Wilfred was married. She was in total shock and kept saying over and over how devastated she was and at times during the conversation I had to ask her to calm down as I couldn't understand what she was saying as she was crying uncontrollably.

...

12. In January of 2002 she came and lived with me and spent endless hours on my couch crying and at one point I thought that she might have to go to emergency to get some help as she was totally in shock and devastated that Wilfred was married and she kept saying "how could he do this to me, why did he do this to me, I love him."

13. Over countless telephone calls with Wilfred he decided to come to Canada and they would try and work things through as I had heard Wilfred tell Tara that he was divorced and that he would bring the divorce papers back with him.

14. At this point Tara got an apartment a block away from my place and waited for Wilfred to come back to Canada and assured me that Wilfred was divorced and he was bringing back his divorce papers with him.

15. When he got back to Canada he told Tara and me that the lawyer who did his divorce could not find his papers. He told Tara and I again that in fact he was divorced and he will get the papers next time he goes back to St. Lucia.

...

22. In early March of 2004 Wilfred was going to St. Lucia to take his mother back home as she was up here having treatments for cancer and I decided to go back with him for two weeks.

23. While I was there with Wilfred he had taken me to different places on the Island and one time we went to a Fish night where they close the streets down and music is playing and you can get any kind of fish there is to eat.

24. I remember Wilfred was eating lobster and he jumped up before finishing his lobster and in a panic said "we have to go". I asked "why" and he said "there is the women I married". I asked him "where, where" and he said "lets go" and I said "show me her", and he pointed her out as she walked by with two other women. During the drive he was shaken and was saying "that was close".

25. Every time Wilfred would go back to St. Lucia, Tara would remind him to get his divorce papers and he said he would.

26. Every time he would come back and he would have a different excuse and she would call me crying and I would ask Wilfred what's up, just bring your divorce papers back and he would say the lawyer couldn't find them, the lawyers office moved, every time it was a different excuse.

...

32. I moved back to Dartmouth into my own apartment in June 2005. On one occasion Wilfred and Tara had drove me back from the valley to my apartment and when he was leaving he stopped the van and rolled down the window and said "guess who died?" I said "who" and he said his "wife, now I can marry Tara legally".

...

36. At no time am I ever aware that Wilfred produced divorce papers or a death certificate for his wife in St. Lucia.

[51] On cross-examination she denied being told by the Husband that his ex-wife had remarried.

Husband's evidence

[52] The Husband was cross-examined on his affidavit. The relevant portions of his affidavit read:

2. Tara and I were married on September 29th, 2001 in Kentville, Nova Scotia.
3. At the time of my marriage to Tara, I believed that I was divorced from my previous spouse because I had signed the divorce documents that were presented to me by my former spouse and she had already re-married (by September 2001).
4. Given that I had signed the divorce documents and as my former spouse had remarried, I assumed that I was legally divorced from my former spouse and that I had the legal capacity to marry Tara Guptill.
5. After our marriage, we learned that my former spouse (who was deceased by this time) had not completed our divorce.
6. Tara's statement (at paragraph 17 of her affidavit) that she decided to treat our relationship as a common-law union is not correct.
7. Tara and I continued to act as if we were legally married and we continued to represent ourselves as married (and as spouses) up to the time of our separation.

[53] On cross-examination the Husband acknowledged his marriage to Jasmine Daniel on December 13, 1997; he said they separated six months later. When asked why he never told the Wife about his marriage, he said she never asked him, and he hated the person he married (Ms. Daniel) and did not want to bring the topic up.

[54] When asked why he referred to Ms. Daniel as his "girlfriend", he replied that at that time he did not want the Wife to know he had married a person like that.

[55] The Husband stated that a year after they separated, Ms. Daniel had brought him divorce papers to sign before she flew off to St. Martins.

[56] Before the Husband's marriage to the Wife, he acknowledged meeting with the minister in Dartmouth and a lady in Kentville respecting the marriage license, and acknowledged his signature on the marriage registration. He stated that he could not read. He did not recall being asked about the information on the marriage registration respecting his address, birthday and history and said the Wife already knew that information.

[57] The Husband denied telling his Wife or Ms. Muise that he had divorce papers, but rather only advised that he had signed divorce papers for Ms. Daniel.

[58] When asked why the Husband had put on the Marriage Registration that he was “never married” as opposed to “divorced”, he said that no one asked him, and then corrected himself and said that he did not recall anyone asking him.

[59] The Husband was asked when and how he learned Ms. Daniel was deceased. He said that he learned that she had died two or three years ago from his mother. When he returned home, he hoped to get a death certificate but learned she had died in Martinique and he did not look for one anymore.

[60] The Husband acknowledged that Jasmine Daniel was alive in 2004 when he and Ms. Muise were in St. Lucia, but disputes that Ms. Muise ever saw Ms. Daniel as she claimed in her affidavit.

[61] He learned that he was not divorced on the same date that the Wife learned it from the housekeeper and confronted him. He says that when the Wife told him what the housekeeper told her, he checked it out with friends of Ms. Daniel who confirmed it. He never said how he knew, or the basis of his belief, that she had remarried.

[62] He never completed the divorce process he started through Ms. Augustin in early 2002 because Ms. Daniel could not be found.

[63] When the Wife returned to live in Nova Scotia in early January 2002, he did not follow her to Nova Scotia nor response to her efforts to contact him for several months. He did not want to keep in touch with her because he wanted to get out of the mess he was in, caused by his first wife, and “wanted to stay away from both of his wives until it got fixed up”.

C.3 Analysis

[64] Applying the framework for assessing credibility from **Novak**, I conclude that the Husband was aware, on September 29, 2001, that he was not legally divorced from

Ms. Daniel and, therefore, he did not go through the marriage to the Wife in good faith.

[65] He clearly knew that he had been married and acknowledged that he did not disclose that to the Wife at any time.

[66] I listened carefully when the Husband said the reason he referred to Jasmine Daniel as his girlfriend, and not as his ex-wife, was that he was embarrassed. It would make logical sense if he was embarrassed by his relationship and short marriage to Ms. Daniel that he would not have discussed her at all with his Wife. If he was going to speak about Ms. Daniel, and was going to refer to his relationship with her, it makes no sense that, having made that disclosure, it would be less embarrassing to say that she was a former girlfriend as opposed to a former spouse. Applying **Farnya v. Chorny**, his evidence on this point was not plausible. His responses on cross-examination on this point were guarded, fluid, and simply not credible.

[67] I noted that the Wife and Ms. Muise made statements regarding what the Husband said about his relationship with Ms. Daniel. For the most part they were not cross-examined on that evidence, and, recognizing the dangers in relying on demeanor, there was no basis for doubting their evidence, which was detailed and consistent as between the two of them.

[68] The Husband's evidence as to the basis of his belief that Ms. Daniel had divorced him - that she had served him with papers about a year after their separation; in effect, on the street, before she flew off to St. Martins, also made no sense. His responses on cross-examination on the circumstances on how he came to be served with the papers, what he signed, and what he received and did not receive, were vague and inconsistent.

[69] I accept the Wife's detailed and compelling evidence about confronting him in early October 2001 about the advice she received from the housekeeper, and reject his vague and contradictory version. He first denied that he was previously married; then, when she described the source of her information, he admitted it but said that they were divorced and that the papers were at his mother's. He says that on the day that his Wife confronted him, he called friends of Ms. Daniel and learned that in fact he was not divorced. He says this was the first he knew that he was not divorced. He did not say what these friends of Ms. Daniels may have told him, that he did not know

before, that would have put him on notice, for the first time, that she had not divorced him.

[70] His evidence is illogical and internally inconsistent.

[71] The Husband's evidence conflicted with the evidence of the Wife and Ms. Muise on several particulars about disclosures he made about Ms. Daniel, about his attempt to avoid Ms. Daniel when he was in St. Lucia with Ms. Muise in March 2004 and about his discussions about straightening out his affairs in St. Lucia and making his marriage to the Wife legal. His answers were vague and shifting and contrasted with the clear and detailed evidence of the Wife and Ms. Muise, whose evidence I accept.

[72] Ms. Muise was not cross-examined about the March 2004 incident. Her evidence was clear that the Husband was in an urgent panic not to be seen by Ms. Daniel. If he married her in 1997 and separated from her six months later and was divorced from her within a year after that (as he says), and their paths crossed about six years later when their relationship was over and she had moved on, it makes no sense that he would be in such fear as described by Ms. Muise. I accept Ms. Muise's evidence about the incident. The incident is not consistent with the Husband's evidence that he believed that he had been divorced from Ms. Daniel many years before his marriage of September 29, 2001, or that he had tried to divorce her in early 2002 but could not because he could not find her to serve divorce papers.

[73] His retainer of Ms. Augustin to divorce him from Ms. Daniel in or about January 2002, his subsequent failure to follow through on this action, and his express ambivalence about returning to Canada with the Wife in January 2002, which led him to remain *in communicado* from her in St. Lucia for about three months, and his weak explanation as to his reason for avoiding any communication with the Wife, was illogical. It made no sense for a person who believed that he had been divorced before the marriage, or who declared an intention to remedy that problem by getting his own divorce, to act in the manner he did.

[74] I place less weight on his signature on the Marriage Registration, in which he declared that he had never been married before, because I accept that he had poor reading skills; however, I accept that he knew the difference between "never married" and being "divorced", and hid this fact from the Wife intentionally, and hoped that

the problem of his first marriage would never surface. He may be illiterate, but he is quite intelligent, worldly and is not naive.

[75] A commitment to marry is a commitment to enter into a relationship based on trust. The level of disclosure by the spouses is informed by the level of trust required of married spouses. The Husband, on cross-examination, acknowledged that he may have been asked with regards to his prior marital status but did not remember. The Court puts some weight on the fact that the marriage registration states that the Husband had never been married, as opposed to having been widowed or divorced, and that he signed it.

[76] The Husband's evidence is not corroborated in any respect. He, presumably, was in a better position to produce some evidence to the effect that Ms Daniel had divorced him, or why he could not complete his own divorce against her, or that she was deceased. It is somewhat disconcerting that he is unable to produce anything that would corroborate his description of events. He was in a better position to produce corroborative evidence than the Wife. The absence of any such evidence is a relevant factor in drawing inferences from the conflicting evidence.

D. Conclusion

[77] I find that the marriage was void on the basis that the Husband was still married to Ms. Daniel on September 29, 2001, and they were not divorced. I grant a declaration of nullity.

[78] The Husband did not go through the form of marriage with the Wife in good faith; therefore, he is not entitled to the benefit of the **Matrimonial Property Act** of Nova Scotia. I do not decide that a spouse who had no knowledge of the other spouse's legal incapacity to marry would be denied the benefit of the **Act**.

[79] Based on discussions during closing arguments, I permit the Husband to amend his Answer to claim unjust enrichment in respect of any contribution he may have made during their relationship to the assets of the Wife and Husband. Counsel have agreed that this amended application will be heard June 22nd and 23rd, 2009.

[80] The issue of costs is reserved until then.

J.