SUPREME COURT OF NOVA SCOTIA

Citation: *Rafuse v. Rafuse*, 2015 NSSC 374

Date: 20150610
Docket: SBWD No. 087570 (1203-003522)
Registry: Bridgewater

Between:

Terry O'Neil-Rafuse

Petitioner

v.

Gregory Rafuse

Respondent

Judge: The Honourable Justice A. David MacAdam

Heard: June 10, 2015, in Bridgewater, Nova Scotia

Written Decision: February 25, 2016

Counsel: Kenzie MacKinnon QC, for the Petitioner
Kim Johnson, for the Respondent

By the Court:

Introduction

[1] This is a decision on property division pursuant to the *Matrimonial Property Act*, R.S.N.S. 1989, c 275. I gave an oral decision in this matter on June 10, 2015, in which I reserved the right to supplement my reasons in a written decision.

[2] The parties were married on December 20, 1985, and separated on June 15, 2013. I am satisfied that the prerequisites for granting a divorce under the *Divorce Act*, RSC 1985, c 3 (2nd Supp) are met. It was a second marriage for each of them. Ms. O'Neil-Rafuse had two children from her previous marriage, and received $600 a month child support from their father. There were, in addition, two children of the marriage. All children have now graduated from University and are no longer children of the marriage.

[3] On separation, the matrimonial assets included a matrimonial home, a boat, household contents, two vehicles, a joint bank account and RRSP and TFSA accounts. The parties have agreed to divide these assets, or the net funds received from the sale of any of them, equally. The parties agree that there was only one debt, namely $1000.00 still owing on a pledge of $5000.00 to the Lunenburg County Lifestyle Centre. The parties have agreed to split responsibility for this debt.

[4] The parties own a whole life insurance policy with a cash surrender value of $11,897.00 as of separation. At present the cash surrender value is sufficient to pay the premiums and the parties have agreed to continue to maintain the policy on this basis. The beneficiaries are the two younger children of the parties. In the event the cash surrender value becomes inadequate to fund the premiums the parties have agreed to discuss whether to carry on with the policy or to cash it in.

[5] Mr. Rafuse receives a pension from his previous employment and the parties have agreed to have the pension divided at source with one-half being paid to each of them. However, he maintains that the value of the pension earned prior to the marriage should not be divided as a matrimonial asset and should be divided unequally pursuant to section 13 of the *Matrimonial Property Act*.

[6] Ms. O'Neil-Rafuse remained in the matrimonial home, after Mr. Rafuse left it, until January 2015. She tendered a number of expenses she incurred in respect

to the matrimonial home during this period and seeks reimbursement from Mr. Rafuse of one-half of these. Mr. Rafuse agrees, with the exception of power bills for the period between October 2013 and December 2014.

The petitioner's trust funds

[7] On the death of her mother the petitioner received two distributions. In 2001 she received life insurance proceeds of $273,215.00. These monies have now, apparently, been expended and do not form any part of the inheritances in dispute. The petitioner's mother established testamentary trusts for each of her children. The petitioner's trust received in November 2001, April 2002, and June 2003, the total of $259,375.00. Under the terms of this trust Ms. O'Neill has the absolute discretion to access the income and the principal of the fund for her own benefit. She is now both the legal and beneficial owner of the funds held in the trust. At separation the balance of this trust account was $319,133.42.

[8] Over the years it appears Ms. O'Neill withdrew from the trust fund in excess of $140,000.00 to fund vacations, home and family expenses, vehicle purchases and for other family purposes.

[9] The balance remaining at separation, together with the monies withdrawn, less the monies received from the estate of her mother, represents the monies earned in the trust. The trust funds were initially managed by Rob Merchant of Toronto Dominion and were later moved to RBC when Mr. Merchant moved there.

The respondent's margin account

[10] The respondent's margin account is somewhat more complicated, because he received his inheritance over a period of time and from three sources, his grandfather, his grandmother and his mother. Also, his inheritances included a combination of shares, investment certificates and cash. Mr. Rafuse developed a practice, where the option was available, to invest income earned from the shares he inherited by way of dividend reinvestment. As such, he increased his holdings in the shares he received from his family. His shareholdings also increased as a result of stock splits and corporate restructuring in respect to some of his investments. He cashed in some of the shares, and used other inheritances, together with proceeds from his interest in the sale of his former matrimonial home, to finance the construction of the home he was building for himself and the petitioner. His practice was essentially to reinvest the proceeds of his shares, although he occasionally made purchases of other shares as well. Initially Mr. Rafuse used the

financial management services of Nesbitt Burns. In the spring of 2002 he changed to Rob Merchant, then at TD investments. As with Ms. O'Neil-Rafuse, he followed Mr. Merchant when he left TD investments and moved to RBC. Also like Ms. O'Neil-Rafuse with her trust account, Mr. Rafuse, from time to time made withdrawals from his margin account. Between May 2000 and November 2008 he acknowledged withdrawing $78,978.00 and, after separation, a further $3000.00.

[11] Counsel for the petitioner, using figures generated by Mr. Rafuse, calculates the value of the shares he received from the Estates of his mother, in 1972 and 1973, at $3853.75, his grandfather, in 1981, at $18,431.75, and his grandmother, also in 1981, at $22,642.50. He then calculates that in building the matrimonial home in 1987 and 1988 Mr. Rafuse acknowledges selling $54,841.50 worth of his shareholdings. Counsel suggests that the shareholdings Mr. Rafuse received would therefore have been effectively substantially depleted and the value of his margin account, stated by his counsel to be $407,102.00, at separation and $462,103.02 as at April 30, 2014, is primarily the result of his acumen in investing, good luck, and fortuitous investments rather than the natural increase from the shareholdings he received from his mother and grandparents. Counsel repeatedly referred to the "smell test", suggesting that in this instance it fails, and that the present amount rather than being an inheritance is a matrimonial asset generated by Mr. Rafuse rather than the income to be expected from his depleted margin account, and is not therefore exempt under s. 4(1)(a).

Issue

[12] The issues include the question of whether Mr. Rafuse's margin account is a matrimonial asset; the treatment of pre-marriage pension earnings; and the treatment of expenses incurred by the petitioner in maintaining the matrimonial home after separation.

Law

[13] The *Matrimonial Property Act* provides, at s. 4(1)(a):

> 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…

[14] There are other exceptions to the general definition that are not relevant here.

[15] The scheme of the Act and the characterization of "matrimonial assets" have been addressed in the caselaw. In *Curren v. Curren* (1987), 81 N.S.R. (2d) 118 (S.C.(T.D.)), Davison J. discussed the characterization of assets; specifically, in that case, business versus matrimonial assets. He said:

> [35] The real contentious issue involves characterizing the two promissory notes or the proceeds therefrom. I use the word "characterizing" advisedly because it would be easy to fall into the trap of attempting to fit assets into one of two "pigeonholes" - matrimonial assets or business assets. It is my view, with respect, that one starts with the presumption that "all ... property acquired by either or both spouses before or during their marriage ..." are matrimonial assets and that it is incumbent on one who asserts that a particular asset is not a "matrimonial asset" to prove that the asset falls within the exceptions set forth in s. 4(1). As stated by Hart, J.A., in *Lawrence v. Lawrence* (*supra*) at 113:
>
> > "Unless property can be brought within one of the exclusions in s. 4, however, it remains a matrimonial asset no matter what its kind or use."
>
> It seems to me that those exceptions have one common characteristic in that all of the exceptions comtemplate [*sic*] assets which are unrelated to the marriage but are associated with one spouse to the exclusion of the other and to that extent could be termed "personal assets". [Emphasis added.]

[16] In *Kennedy-Dowell v. Dowell*, 2002 NSSF 13, [2002] N.S.J. No. 123, D. Campbell J. made the following comments about the *Matrimonial Property Act*:

> 35 The scheme of that Act is to define all assets as "matrimonial assets" unless they fall within one of the listed exceptions, whether or not they are acquired before or during the marriage and then to presume an equal division of them after excluding those assets that fit the exceptions. The court is then given with the discretion to divide those assets unequally or to divide assets that are non-matrimonial assets if the division of the matrimonial assets in equal shares would be unfair or unconscionable taking account of the exhaustive list of factors outlined in section 13.
>
> 36 Through this process, and except to the extent that they are used to benefit the spouses or children, gifts, inheritances and trusts represent one such listed exception, the impact of which is that such items are not presumptively shareable. The obvious rationale for this scheme is to recognize that the spoils of the joint

> venture of the couple, regardless of financial contributions during the marriage, should be presumptively shared equally and that the net worth derived from an extra-marital source attracted by the one spouse and not the other should be exempted from that presumption. There is an obvious logic to the equal sharing concept in regard to a net worth that was accumulated by the parties combined efforts in the family and marital life. It is equally illogical to provide for the presumptive sharing of net worth derived from gifts, inheritances or trusts of the one spouse. Common fairness dictates that a marriage certificate should not qualify a spouse to inherit, equally with the other spouse, such legacies as that spouse would, by blood relationship, have some expectation.

[17] Justice Campbell went on to comment on the inheritance exception, noting that it can capture assets purchased in place of the inherited assets:

> 47 Similarly, the word "inheritance" as used in that section could be given either a technical or a non-technical meaning. If the executor cashed the securities and transferred the proceeds to the beneficiary who in turn purchased securities, those securities were not technically "inherited". It was the proceeds of other securities that was in fact inherited and yet the legislature would have intended that money to be treated as an inheritance in exactly the same way as would have been the case if the executor had transferred the securities themselves in specie. It follows that the use of the word "trusts" in that subsection does not mean the equitable interest therein alone and instead refers to the corpus, and therefore the proceeds of the trust.

[18] The application of the inheritance exception to earnings generated by the asset inherited was discussed in *O'Toole v. O'Toole* (1999), 175 N.S.R. (2d) 131, [1999] N.S.J. No. 111, where MacLellan J. held that the portion of certain RRSPs that arose from contributions derived from an inheritance, including accruing interest, was exempt from division:

> 7`The only issue in dispute in regard to property division is the R.R.S.P. in the respondent's name at the Toronto-Dominion Bank. The evidence indicates its present value as of January 12th, 1999 is $15,763.00. This is made-up of the following contributions.

(1)	April 13th, 1989	$3,000.00
(2)	February 5th, 1990	$2,600.00
(3)	February 28th, 1992	$1,200.00
(4)	February 26th, 1993	$1,200.00
(5)	February 24th, 1994	$1,500.00
(6)	February 27, 1995	$1,300.00

> (7) February 28th, 1996 $1,300.00 withdrawn
>
> 8 It is agreed that of the present total value, $6,263.60 represents interest earned on the contributions.
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> 9 The contributions made in April 1989 and February 1990 were taken from the respondent's inheritance. The petitioner does not object to these amounts being exempted from the division, however, there is no agreement as to how the interest earned should be divided.
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> 10 I have not been provided with a breakdown of how the interest component of $6,263.00 has been earned.
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> 11 Because I am not able to ascribe the relative amounts of interests to the capital contributions, and since the initial contribution of $5,600.00 reflects about 60 percent of the total principal invested, and in light of the fact that it was invested earlier than the contributions made from the respondent's wages, I would ascribe 65 percent of the total interest earned to the original contributions made by the respondent from his inheritance. Therefore, $2,193.00 or 35 percent of the total interest earned is subject to division, this along with the contributions totaling $3,900.00 which were made in 1992, '93, and '94, will result in a total amount to be divided in the sum of $6,093.00.

[19] In *Tibbetts v. Tibbetts* (1992), 119 N.S.R.(2d) 26 (S.C. (A.D.)), the court held that neither Canada Savings Bonds, nor the accumulated interest was matrimonial property, as the bonds were purchased by the wife with funds she had inherited from her sister's estate. Hallet J.A. said:

> [38] 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; 92 A.P.R. 361 (T.D.) and *Lucas v. Lucas* (1990), 95 N.S.R.(2d) 45; 251 A.P.R. 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".
>
> [39] 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 (a gift from her husband) which should be classified as matrimonial assets.

[20] Although otherwise exempt assets and funds that are withdrawn may lose their exempt character by virtue of being used for family purposes, this does not affect the exemption accorded to the remainder of the fund. The fund itself is not "tainted". In this regard, Campbell J. said, in *Kennedy-Dowell*:

> 51 Counsel for the respondent husband argues that because the trust was "used" to produce income and, virtually all of that income was distributed and used by this family for its matrimonial and business needs, it follows that the "extent to which (it was) used for the benefit of both spouses (and their children)" was 100%. She argues that because its only available use was as an investment there is no greater extent to which it was capable of being used and that it therefore is not exempt from division under that subsection.
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> 52 Gifts, inheritances and trusts can only be "used" in one of three ways:
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> 1. Consumed, as for example for living expenses or travel, etc.;
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> 2. Substituted for other assets, such as purchasing a home or a vehicle; or
>
> 3. Preserved; as for example when inherited investments are preserved to produce income. When an inherited utility such as a cottage is preserved it is capable of being used for its utilitarian purpose.
>
> 53 When these types of assets are consumed, there is nothing left to divide. When they are substituted for other assets, their classification will depend upon their character as matrimonial assets, personal effects or business assets, for example. To the extent that they are used for the benefit of the family, they lose their exemption from presumptive equal division. When utilitarian assets are preserved, to the extent which they are used for the family, they lose their exemption. For example, if real estate was inherited and used for commercial purposes, it would lose its exemption as an inheritance but might gain an exemption as a business asset. If it was used extensively for family purposes, it would lose its exemption.
>
> 54 On the other hand, if a preserved asset was merely invested for the purpose of earning investment income spent for family purposes, it has not been "used" at all. Instead, what has been "used" is the proceeds of the inheritance or trust rather than the inheritance or trust itself. The use of an income from a trust or inheritance does not taint the fund itself. For reasons mentioned above, the scheme of the statute is to provide special status to net worth derived from extra-marital sources such as gifts and inheritances and trusts. The use of some or all of the income from such a fund is an event that can benefit the entire family and one which the drafters of the legislation must have taken into account when attempting to exempt these types of assets from division. On the facts of this case,

> the only extent to which the trust was used for the family was that the initial sum of $180,000.00 and the quarterly distributions referred to above were spent for both family purposes and the respondent's business purposes. All of those monies are gone and therefore there is nothing from them left to divide.
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> 55 Counsel for the respondent/husband urges me to calculate the total trust money spent by the family as a percentage of the original corpus in the fund, arguing that such a ratio would calculate the extent to which the original trust was spent for family purposes. I am then urged to divide the remaining balance of the fund in accordance with that percentage.
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> 56 With respect, I reject that approach because it is inconsistent with the scheme of the MPA for the reasons given above.
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> 57 If I had not reached the various conclusions mentioned above and instead had concluded that the trust was a matrimonial asset requiring a presumptive equal division, I would have made an unequal division of it, probably 100% in favour of the petitioner/wife, by virtue of section 13(d) and (e) of the MPA. These two subsections deal with the length of cohabitation during marriage and the date and manner of acquisition of the assets.

[21] Apart from using $6100.00 that would otherwise have been matrimonial assets, there is no evidence that any of the present margin account was created from other than Mr. Rafuse’s inheritance, or as a result of the use of matrimonial funds, and therefore matrimonial assets. Mr. Rafuse introduced detailed records and calculations, including records maintained at the time he received each of the various inheritances as well as the subsequent receipts of dividends that were reinvested, stock splits and corporate reorganizations that resulted in the increasing of his portfolio. The accuracy of his records was not challenged. He further testified that although he maintained detailed records, from the statements he received as to the earnings of each of his holdings he was not himself actively involved in online trading. Although admitting that he made some trades his portfolio primarily increased because of the decision to reinvest income and take advantage of any stock split or corporate reorganization to increase his portfolio. His counsel noted that petitioner also adopted the practice of reinvesting dividends in respect to her trust account holdings.

[22] The Petitioner acknowledged that when she and the respondent met with Mr. Merchant she indicated she was looking for a more conservative approach to investing than the aggressive approach that the respondent was willing to undertake. Nevertheless her trust account was controlled by her, while the margin account of the respondent was controlled by Mr. Rafuse. In respect to activity on her trust account, Mr. Merchant would require her approval and similarly in

respect to the margin account require the approval of Mr. Rafuse. The accounts were separate when they were initiated and continued as such until (and after) the parties separated.

[23] Counsel for the petitioner cited no authority to suggest that in the circumstances the two funds should be treated differently. He submitted that the Court has discretion to effect such a different treatment. I am satisfied that even if there is such a discretion this would not be an appropriate circumstance in which to treat the two funds differently. There may, of course, be occasions when unequal division or some other form of relief may be warranted, as, for example, where the party with the exempt inheritance uses their time and effort to increase the value of the exempt assets to the exclusion of contributing to the matrimonial assets by engaging in employment or by being underemployed. Neither is the situation with Mr. Rafuse, who throughout the marriage was fully employed as a lawyer with Nova Scotia Legal Aid.

[24] It appears that Mr. Rafuse was more successful in increasing his holdings and their value then was Ms. O'Neil-Rafuse. They both used Mr. Merchant as their financial advisor, and both apparently adopted the practice of dividend reinvestment. There is nothing that would justify a different approach because one of the parties was more successful than the other. Mr. Rafuse was more interested in following his stock portfolio then was Ms. O'Neil-Rafuse, and as a result he more actively participated in following the performance of his holdings. That circumstance does not justify treating their respective holdings differently.

Transfer of matrimonial assets to margin account

[25] Mr. Rafuse advanced $6100.00 from monies that were not part of his inheritance to purchase shares that were included in his margin account. Between the summer of 1985 and May 1989 he used $2000.00 to purchase shares in Northern Electric and Northern Telecom. In January 2000 he used $500.00 to purchase Bank of Montréal shares, and between January 2005 and May 2007, $150.00 per month from the joint account was deposited into his margin account. He acknowledges that these would not be exempt assets. Counsel suggests that since Mr. Rafuse withdrew substantially more than $6100.00 for family purposes, the court should treat these monies as having returned or repaid these advances. In the circumstances, I am not prepared to accept an offset between the monies withdrawn by Mr. Rafuse from his margin account for family purposes and the use of the $6100.00 in matrimonial funds. The withdrawals were never stated to be for

the purpose of reimbursement of these monies and, apart from the submission of counsel, they have been put forward by Mr. Rafuse as his use of his non-matrimonial funds to assist the family. As such, an accounting is required, much like Scanlan J., as he then was, dealt with in *Wagstaff v. Wagstaff*, 2002 NSSC 256, [2002] N.S.J. No. 527, affirmed at 2003 NSCA 143. There a bank account was primarily funded with inherited money, with the exception of three deposits. Justice Scanlan ordered one half of the amount of these deposits to be reimbursed while the remainder retained its nature as exempt assets. He said:

> 27 This account falls within the parameters as noted in *Fisher v. Fisher*, 2001 NSCA 18, as there is some money in the account which was not inherited money. In that sense this is not a pure inheritance. I am however satisfied the equities would require that I do consider that most of the money in account # 712-XXX-X is inheritance money and I treat it separate and apart from the other bank account. The entire balance of that account 712-XXX-X other than the $8,018.03 will remain the property of Mrs. Wagstaff. The $8,018.00 will be divided equally as between the parties requiring a payment of $4,008.00 from Mrs. Wagstaff to Mr. Wagstaff. Other than the $8,018.00 which came from the family account I accept that the majority of that account was the original inheritance and reinvestment of interest earned thereon.

[26] It does not appear that Justice Scanlan ordered anything other than the return of one half of the deposits that were not part of the inherited funds. I am satisfied that the petitioner is entitled not only to one-half of the funds used by Mr. Rafuse to increase his margin account but also to reasonable compensation for his use of these matrimonial monies. Having regard to the length of time since these investments were made, tracing by the performance of the assets purchased or calculating the interest is unrealistic. In assessing reasonable compensation, the court has the discretion to award what would be a reasonable amount having regard to all circumstances, without the necessity of requiring proof of the actual loss or benefit to which the recipient would be entitled. Although it was decided in the context of determining damages in a contract case, the reasons of Spence J. for the Supreme Court of Canada in *Penvidic Contracting Co. Limited and International Nickel Company of Canada, Limited*, [1976] S.C.R. 267 at pp. 279-280 are helpful:

> The difficulty in fixing an amount of damages was dealt with in the well known English case of *Chaplin v. Hicks*, which had been adopted in the Appellate Division of the Supreme Court of Ontario in *Wood v. Grand Valley Railway Company*, where at pp. 49-50, Meredith C.J.O. said:
>
> > There are, no doubt, cases in which it is impossible to say that there is any loss assessable as damages resulting from the breach of a contract, but the

> Courts have gone a long way in holding that difficulty in ascertaining the amount of the loss is no reason for not giving substantial damages, and perhaps the furthest they have gone in that direction is in *Chaplin v. Hicks*, [1911] 2 K.B. 786. In that case the plaintiff, owing, as was found by the jury, to a breach by the defendant of his contract, had lost the chance of being selected by him out of fifty young ladies as one of twelve to whom, if selected, he had promised to give engagements as actresses for a stated period and at stated wages, and the action was brought to recover damages for the breach of the contract, and the damages were assessed by the jury at £100. The defendant contended that the damages were too remote and that they were unassessable. The first contention was rejected by the Court as not arguable, and with regard to the second it was held that "where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case": per Fletcher Moulton, L.J. at p. 795.

When *Wood v. Grand Valley Railway Company*, *supra*, reached the Supreme Court of Canada, judgment was given by Davies J. and was reported in 51 S.C.R. 283, where the learned justice said at p. 289:

> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.

[27] Absent agreement by counsel as to a reasonable amount in lieu or interest or dividend earnings as a result the use of these monies I fix the sum of $3050.00 in addition to the $3050.00, for a total $6100.00.

Post-separation household expenses

[28] At trial the petitioner sought reimbursement of one-half of the expenses she incurred while living in the property following the separation in June 2013 until she moved into her own residence in January 2015. The respondent, in testifying, indicated agreement with the expenses claimed other than the power expenses for the period for which the petitioner remained in the home. The argument, as advanced by his counsel, was effectively that she had the benefit of occupying the matrimonial home while the respondent was required to pay ongoing expenses

with respect to his residence. In *Clair v. Clair*, 2007 NSSC 313, [2007] N.S.J. No. 454, Scaravelli J. said:

> 19 I do not allow the deduction of the sum of $8,600.00 for general maintenance and repairs claimed by the Respondent. She has had possession of the property for more than six years. She continues to reside in the home in a common-law relationship. Her partner contributes to household expenses. Under the circumstances, I am not satisfied that the expenses she incurred to maintain the home during her occupation outweigh the benefit of having had exclusive possession for a substantial period of time. Moreover, these expenses would offset the Petitioner's claim for occupancy rent.

[29] Like Scaravelli J. I am satisfied that power expenses incurred during the period of occupation by petitioner are outweighed by the benefit of having had exclusive possession of the matrimonial home for some eighteen months. The rest of the expenses claim for contribution has been agreed and will form part of the adjustment between the parents.

Pension division

[30] Pre-, as well as post-marriage, employment pension is to be divided equally: see *Curren*, *supra*, at para. 35. Any orders and directions necessary to effect this will be signed.

Alternative submissions of the respondent

[31] The respondent, alternatively, submits that if one of the funds is tainted by the use of some of the fund for family purposes, then both funds are so tainted. I disagree. For the reasons previously referred to I am satisfied that distribution of some of these funds does not alter, or "taint", the remainder of the fund as exempt assets.

[32] As further alternative, counsel says that if the petitioner is successful in defeating the exempt status claimed for the respondent's margin account, the court should apply an unequal division pursuant to s. 13(e) of the *Matrimonial Property Act*. I would have awarded an equal division for reasons similar to those of D. Campbell J. in *Kennedy-Dowell*, *supra*, at para 57.

MacAdam, J.