IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Andrews v. Andrews, 2006 NSSC 120

Date:20060420
Docket: 1206-014195
Registry: Halifax

Between:

Mary Ellen Andrews

Petitioner

v.

R. Sheldon Andrews

Respondent

Judge:	The Honourable Leslie J. Dellapinna
Heard:	September 9, 11, 2003, in Sydney, Nova Scotia
Counsel:	Elizabeth Cusack, for the Petitioner Robin Gogan, for the Respondent

By the Court:

[1] A two day divorce trial was held before the Honourable Justice J. Vernon MacDonald in September, 2003 during which he granted the Petitioner's application for a Divorce Judgement based on the fact that there had been a permanent breakdown of the parties' marriage and more specifically based on the fact that they had been living separate and apart for a period in excess of a year. The trial judge reserved on all corollary issues. It then became impossible for MacDonald, J. to continue acting in the proceeding and he subsequently retired.

[2] Pursuant subsection 34 (d) of the ***Judicature Act*** R.S.N.S. 1989, c.240 the presiding judge may reserve judgement until a future day, "not later than six months from the day of reserving judgement". Section 36 (1) provides that when a judge ceases to hold office he or she may at anytime within eight weeks after such event give judgement or grant an order in any proceeding previously tried or heard as if he/she had continued in office. Both time frames have elapsed. However, the parties, through their counsel, have agreed to have me decide on all corollary issues based on the transcript of the trial and the exhibits presented. I have also read counsel's pre-trial briefs and post-trial written submissions.

BACKGROUND

[3] The parties were married on June 5, 1976 when the Petitioner was twenty-three and the Respondent twenty-five.

[4] The parties separated on August 31, 2001 after approximately 25 years of marriage.

[5] The parties had four children namely, Shelley, Jennifer, Sara and Ashley who at the time of the trial were twenty-six, twenty-four, twenty-two and twenty-one respectively.

[6] Shelley completed her Bachelor of Education degree at St. Francis Xavier University the spring of 2001. She returned home for the summer before leaving again in August, 2001 to assume a teaching position in Toronto.

[7] Jennifer continued to live at home after the parties' separation until the summer of 2002 when she moved to Halifax where she obtained employment. She returned to the home of her mother just a couple of weeks prior to the trial as a result of what her mother described as "personal problems".

[8] Ashley, the youngest, lived at home with her mother from the date of the parties' separation through to the date of trial. During the school year 2001 to 2002 she was not going to school but worked full-time. In the school year 2002 to 2003 she continued to work full-time but also returned to school on a full-time basis at the University College of Cape Breton. According to Ashley's tax returns, she earned $13,588.00 in 2001 and $21,373.00 in 2002. Her mother testified that Ashley had enough resources to cover her expenses during the school year 2002 to 2003. In the school year commencing 2003 she continued to study full-time and work full-time at a call centre. In addition to her earnings she covered her expenses with the help of a student loan.

[9] The Petitioner is not seeking ongoing child support for Shelley, Jennifer or Ashley.

[10] In the year after separation Sara was going to school and studying hospitality and tourism. Her grades were poor. She then entered a Bachelor of Arts program in the school year 2002-2003 but again did not do well. Beginning in September, 2003, she was taking only one credit course plus a university preparation course in the hopes of improving her chances of success the following school year. She was also working on a part-time basis making minimum wage.

[11] At the time of the trial the Petitioner was fifty years of age and employed as a paediatric nurse at the Cape Breton Regional Hospital in Sydney. According to her most recent tax return and pay stub she earns in excess of $55,000.00 per year.

[12] The Respondent was fifty-one as of the date of the trial. He has a grade twelve education and worked the majority of his life for Sydney Steel Corporation. He was employed as a safety officer when Sydney Steel closed. He lost his job in February of 2001. After being laid off from Sydney Steel he obtained a contract position with Ernst and Young assisting in the sale and demolition of the assets of Sydney Steel. His contract began in June of 2001 and he was still at that position as of the date of trial. He was paid at more of less the same rate as he was at his

former position as a safety officer, approximately $60,000.00 a year. He also worked part-time at Sobey's earning between $400.00 and $600.00 per month and was receiving his pension from Sydney Steel which the parties acknowledged would be shared with his wife as a result of these divorce proceedings.

[13] Both parties are seeking an equal division of matrimonial assets and debts. The Petitioner also seeks nominal spousal support which might be varied in the future should she lose her employment due to ill health. She is also asking to keep Sara's entitlement to child support "alive" so that when she is a full-time student support may be available to her. Similarly the Respondent is asking for nominal spousal support or alternatively a decision stating that should circumstances change such that he is in need of support, it will be open to him to make an application to vary pursuant to section 17 of the ***Divorce Act*** R.S.C. 1985, c.3. On his behalf it was argued that his position with Ernst and Young is temporary and when it comes to an end his only income will be approximately one half of his employment pension and modest part-time earnings from Sobey's.

[14] The Respondent is also seeking occupation rent from the Petitioner.

THE ISSUES

[15] The issues therefore are as follows:

1. What is the appropriate division of assets and debts between the parties?
2. Is the Respondent entitled to occupation rent?
3. Should there be a child support provision in the Corollary Relief Judgement for Sara? and
4. Should the Corollary Relief Judgement include a provision for nominal spousal support for either or both of the parties?

DIVISION OF ASSETS AND DEBTS

[16] The parties agree that there should be an overall equal division of matrimonial assets and debts as of the date of their separation but have been unable to agree on how that is to be accomplished. The Respondent also seeks

reimbursement from the Petitioner of certain household expenses that he paid since the date of separation to the date of trial.

[17] The parties have agreed on most of the assets and debts and some of their values.

[18] The matrimonial assets and debts consist of the following:

1) The matrimonial home was located at 141 Curry Street in Sydney, Nova Scotia. It was appraised as having a value of $79,000.00. There was a mortgage securing that property in favour of the Royal Bank of Canada having a balance outstanding of $25,161.55 as of the date of the parties' separation. The parties agreed that the matrimonial home would be sold.

2) The parties owned various items of furniture, appliances and other household effects. The parties agreed that the household contents would be divided between them *in specie* with each alternately choosing what she or he wants to have. They have also agreed to exclude from that division the Respondent's tools and the Petitioner's jewelry.

3) At the time of their separation the Petitioner owned a 2000 Toyota Echo motor vehicle. Two different "expert" witnesses were called to speak to the value of that vehicle. Neither based his opinion on an actual inspection of the vehicle. Rather, one estimated the value as being $12,000.00 based on a similar vehicle that he sold a little over a year after the parties' separation and the other based his estimate ($14,145.00) on the average black book value for that year and model of vehicle as of January 1, 2003 (as opposed to August, 2001).

For the purpose of these proceedings I fix the value of the Echo motor vehicle at $13,000.00 as of the date of the parties' separation.

The Respondent owned a 1991 Hyundai motor vehicle which was sold after the parties separated. The parties agreed that for the purpose of these proceedings that car will be valued at $1,000.00 as of the date of their separation.

4) The Respondent owned a 1998 Honda motorcycle which the parties agreed had a value of $6,000.00.

5) As of the date of the parties' separation the Petitioner had approximately $11,000.00 in a Registered Retirement Savings Plan. The parties agree that the RRSP would be divided equally by way of a spousal roll-over. That division will exclude any post-separation contributions by the Petitioner.

6) When the Respondent was laid off from Sydney Steel he received a lump sum severance payment. The severance payment was taxable. The Respondent used the after-tax funds to pay down two VISA bills, a Sears' bill and a loan owed to the Credit Union. All those debts had been incurred by the parties during the marriage. As of the date of separation there was $2,393.03 remaining.

7) As of the date of separation the Petitioner had $2.86 in her bank account.

8) The Petitioner also had approximately $900.00 in Canada Savings Bonds.

9) In 2002 the Petitioner received a refund of income tax deducted from her salary in the year 2001. Her total refund in relation to the 2001 taxation year came to $2,237.80. Prorating that over the eight months that the parties were together in 2001, I find that $1,491.87 of her total refund is a matrimonial asset.

10) During the Respondent's employment with Sydney Steel he contributed to a pension plan. After he was laid off by Sydney Steel he began to receive his pension as of June 1, 2002. His total gross monthly pension benefit came to $2,683.81. The parties have agreed that of that sum $2,356.04 represents the pension benefit earned during the marriage. The parties also agreed to deduct from that gross figure approximately 34% representing income tax and also agreed that $778.02 per month represents the Petitioner's share of the Respondent's pension benefit earned during the marriage. They have also agreed that the Respondent is to pay the Petitioner her share of the pension benefits that he received from June, 2002 to the date of trial in September, 2003 (a total of $12,448.32).

11) In addition to the mortgage the parties were jointly responsible for a consolidation loan owed to the Steel Centre Credit Union having a balance outstanding of approximately $17,386.02 at the date of separation. Both parties have been paying on that loan since the date of separation. The Petitioner paid $140.00 bi-weekly and the Respondent $125.00 bi-weekly.

12) The Petitioner had a car loan owing against the Echo motor vehicle which the parties agree had a balance outstanding as of the date of separation of $20,355.71.

13) The Respondent had additional income tax payable in relation to the income he earned in 2001 (which included his severance pay) which was paid in 2002. Excluding interest that accrued on that debt as a result of the Respondent's failure to pay the debt on time (which interest will be paid by the Respondent), the total remaining tax payable for 2001 came to $2,382.61. Prorating that figure over the eight months the parties were together in 2001 the portion which I consider to be a matrimonial debt is fixed at $1,588.41.

14) The parties agree that the Respondent's VISA account having an outstanding balance of $1,971.17 as of the date of separation is matrimonial debt. The Petitioner argues that she too had a VISA account owing in the sum of $1,238.08. The Respondent's position was that her VISA debt was non-matrimonial in nature as he believed it related to a Mary Kay cosmetics business operated by his wife. Unlike assets which are presumed to be matrimonial unless the evidence indicates otherwise, there is no similar presumption with respect to debts. The party who alleges that a debt is matrimonial has the burden of proving that to be the case. The Petitioner has not met that onus and I am not prepared to include it as a matrimonial debt. The Petitioner also had a debt owing to the Steel Centre Credit Union in the sum of $2,391.39 which she agrees is not a matrimonial debt. She will be solely responsible for that credit union loan as well as her VISA account. She will also be the sole owner of the stock and trade associated with the Mary Kay cosmetics venture. The Petitioner also accepted sole responsibility for a debt owed to Jacobson's Ladies' Wear.

15) The Petitioner had an overdraft at her bank account at the Steel Centre Credit Union in the sum of $212.47 which she paid subsequent to the parties' separation. I am prepared to accept that as a matrimonial debt.

16) In addition to the debts owed by the parties, there were two lines of credit. One was owed by Jennifer and the other by Shelley. The parties guaranteed those debts. Their liability is therefore contingent upon the default of their daughters. The lines of credit remain the primary responsibility of Jennifer and Shelley.

Should either of them default on their payments and if either of the parties are called upon to make those payments, the payments will be shared equally by the parties.

[19] Subsequent to the parties' separation the Respondent continued to pay bills associated with the matrimonial home which was then occupied by the Petitioner. Those bills included phone bills, oil bills, home security invoices, internet costs, municipal taxes, cable bills, mortgage payments, power bills and house insurance bills. Excluding payments he made on the line of credit owed by their daughter, Jennifer, the total bill payments came to $16,062.76. These payments were paid at a time when the Petitioner was gainfully employed and occupying the home with one and sometimes two of the parties' daughters. No explanation was given as to why she did not pay the bills. At the same time, the Respondent was not paying any child support to the Petitioner.

[20] Subsequent to the trial the parties agreed that pending the Court's decision they would list the matrimonial home for sale and out of the sale proceeds would pay the mortgage, the consolidation loan and the Petitioner's car loan.

[21] Sections 12 and 13 of the ***Matrimonial Property Act*** R.S.N.S., 1989 c. 275 presume that there will be an equal division of matrimonial assets unless an equal division is considered unfair or unconscionable taking into account the factors listed in section 13 in which event the Court may divide the matrimonial assets unequally and may even divide non-matrimonial assets. Neither party is seriously suggesting an unequal division of assets and I have concluded that an equal division of matrimonial assets and debts would not be unfair or unconscionable. Therefore, the matrimonial will be sold as soon as possible and out of the gross sale proceeds the parties will pay any real estate commissions, legal fees, other expenses associated with the sale of the property as well as any applicable taxes. Also paid from the gross sale proceeds will be the then current balance of the mortgage securing the property and the then current balance of the consolidation loan. I am assuming that since the trial date the parties continued to make their respective payments on the consolidation loan and that the Petitioner paid the monthly mortgage payments.

[22] The remaining assets and debts will be divided as follows:

ASSETS/DEBTS		**PETITIONER**	**RESPONDENT**
Assets			
1.	Household contents	*in specie*	*in specie*
2.	Echo	$13,000.00	
3.	Hyundai		$1,000.00
4.	Motorcycle		6,000.00
5.	RRSP's	Divided equally	Divided equally
6.	Remainder of severance pay (Net of tax)		2,393.03
7.	Bank account balance	2.86	
8.	Canada Savings Bonds	900.00	
9.	Income tax refund	1,491.87	
Subtotal		**$15,394.73**	**$ 9,393.03**
Debts			
10.	Car loan	(20,355.71)	
11.	Income tax liability		(1,588.41)
12.	VISA		(1,971.17)
13.	Bank overdraft	(212.47)	
Net Matrimonial Assets		**($ 5,173.45)**	**$ 5,833.45**

[23] I have intentionally included the car loan balance as of the date of separation because the Petitioner had the use of that vehicle since the date of separation and paid the monthly payments on the loan.

[24] The remaining proceeds from the sale of the matrimonial home (after paying off the mortgage and the consolidation loan) will then be distributed between the parties in such a way as to effect an overall equal division between them. So, if for example there were $43,000.00 in net sale proceeds remaining, the Petitioner would receive $27,003.45 and the Respondent would receive $15,996.55. If the parties previously paid out the Petitioner's car loan using the balance as of the date of trial (or later) as opposed to the date of separation value, then the actual pay-out figure would have to be added back to the net sale proceeds in order to determine the amount to be distributed between the parties. The amount actually paid on the Petitioner's car loan would then come off her share.

[25] Out of the Respondent's share of the net sale proceeds he will pay to the Petitioner the agreed upon sum of $12,448.32 representing the Petitioner's share of the pension benefits received by the Respondent from June 2002 to September 2003.

[26] The parties have agreed that prospectively the Petitioner is entitled to an equal division of the pension benefits earned by the Respondent during the marriage up to the date of the parties' separation. If it is possible for that division to take place at source it shall be so ordered. However, by virtue of subsection 7(4) of the ***Sydney Steel Corporation Sale Act***, S.N.S. 2000, c.33 the assets and liabilities of the Respondent's pension plan were transferred to the Sydney Steel Corporation Superannuation Fund and by virtue of subsection 7(10) of the same statute, the ***Pension Benefits Act*** R.S.N.S., c. 340 does not apply to the fund. The ***Sydney Steel Corporation Sale Act*** contains no similar provisions to that which are in the ***Pension Benefits Act*** that allow for the division of pension benefits following a separation or divorce. In the event that the pension cannot be redistributed at source, then the Respondent shall pay an equivalent monthly amount to the Petitioner by way of spousal support. The gross amount (before tax) of that support payment (using the 2003 pension figures) would be $1,178.02.

[27] In the event that the Respondent receives any increase in his pension as a result of indexing, the same indexing will apply to the Petitioner's portion and the

order will be varied from time to time to reflect any such indexing. Aside from any possible variation as a result of indexing, the Corollary Relief Judgement will clearly state that there shall be no variation of this support payment for any reason whatsoever and it shall cease only in the event of the death of either party.

[28] When the Respondent retired he selected a joint and survivor pension naming the Petitioner as his survivor. If the Petitioner's share of the pension is to be paid to her in the form of spousal support, she shall continue to be named as the survivor of the Respondent's pension so that she will receive an annuity in the event that the Respondent predeceases her.

[29] The Respondent seeks reimbursement of expenses he paid subsequent to the parties' separation. According to him he is entitled to a reimbursement of $17,221.72 which includes the household expenses to which I referred earlier as well as payments made by him on Jennifer's line of credit. The payments on Jennifer's line of credit are a matter between the Respondent and his daughter. The remaining payments totalled, according to my calculations, $16,062.76. The Petitioner is opposed to repaying this money and it was argued on her behalf that the Respondent should be paying retroactive child support to her.

[30] From the date of the parties' separation to the date of the trial the Respondent paid no child or spousal support. Sara was living at home and during the school years 2001 to 2002 and 2002 to 2003 she was attending university. She was fortunate enough to obtain summer and part-time earnings. Her tax returns disclosed total income in 2001 of $9,412.00 and $6,754.00 in 2002. Her income in 2003 up to early June was approximately $2,300.00. With that income and a student loan, it appears that she was able to cover all of her university expenses and, as well, contribute to her clothing and other personal expenses. However, given the cost of her tuition ($2,034.27 in 2001 and $4,094.00 in 2002, according to her tax returns) and the likely cost of books and other expenses associated with her education, I do not believe that it can be said that she was capable of living independent of her parents. Indeed, she continued to rely on her mother for her shelter and some of her other living expenses. Sub-section 3(2) of the Child Support Guidelines states:

> Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[31] The presumption in sub-section 3(1) for a child under the age of majority is that the payor parent will pay the amount set out in the applicable table, according to the number of children and the payor's income as well as any amount, if any, determined under section 7. Section 7 provides that the Court may, in addition to the table amount payable pursuant to sub-section 3(1) (a) include in its child support order an additional amount representing the payor's proportionate share of certain additional expenses which expenses include expenses for post-secondary education, health-related expenses and others.

[32] Sara was at all material times over the age of majority. Given her earnings and her education expenses, I do not consider it appropriate to simply apply the *Guidelines* as if she was under 19 years of age.

[33] The Respondent's income, after adjusting for the pension payments that should have gone to the Petitioner and his union dues, was $108,279.61, $81,082.16 and $77,467.83 in the years 2001, 2002 and 2003 respectively. Based on those income figures he could have been required to pay $832.00 per month in 2001, $644.00 per month in 2002 and $612.00 per month in 2003. I find that in spite of her earnings, Sara was a "child of the marriage" as defined by the *Divorce Act* during the four months subsequent to the parties' separation in 2001, all of 2002 and at the very least up to and including May, 2003. The Petitioner's counsel seems to concede that after May, 2003 Sara stopped being a "child of the marriage'. Therefore, if the table amount was strictly applied the Respondent could have been ordered to pay a total of $14,116.00 in child support payments based on the Nova Scotia table and his level of income. Taking Sara's income into account and also her tuition, likely expenditures for books and other supplies I would reduce that figure to a total of $9,000.00 for the same time frame. I would off-set that sum against the Respondent's claim for reimbursement.

[34] Although the Petitioner did not press the issue of spousal support a request for spousal support was included in her Petition. Given her income in the years since separation ($45,445.00 in 2001, $55,828.00 in 2002 and an anticipated income in excess of $55,000.00 in 2003) there is reason to doubt whether she would have been successful in obtaining an award for spousal support had an interim application been made subsequent to the parties' separation. With the exception of support in lieu of a pension division, it is unlikely she would have been awarded any spousal support based on need. However spousal support under the ***Divorce Act*** can be awarded for reasons other than the applicant's impecuniosity. McLachlin, J. (as she then was) in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.) stated in paragraph 49:

> "...the statutes and the case law suggests three conceptual bases for entitlement to spousal support: (1) compensatory, (2) contractual, and (3) non-compensatory. Marriage, as this Court held in Moge (at p.870), is a "joint endeavour", a socio-economic partnership. That is the starting position. Support agreements are important (although not necessarily decisive), and so is the idea that spouses should be compensated on marriage breakdown for losses and hardships caused by the marriage. Indeed, a review of cases suggests that in most circumstances compensation now serves as the main reason for support."

[35] When the parties were first married the Petitioner was employed as a registered nurse working in paediatrics on a full-time basis. When the parties' third child was born the decision was made for her to stay home with the children. Subsequently they had a fourth child. From time to time she worked on a casual basis as a general staff nurse but the Respondent assumed the role as the family's chief financial provider. The Petitioner was primarily responsible for caring for the children and maintaining the parties' home.

[36] As a result of leaving her employment, the Petitioner received a refund of her pension contributions which was subsequently used to cover family related expenses.

[37] Beginning in 2000, the Petitioner obtained a permanent part-time position which eventually led to a full-time position in 2003.

[38] While I would be prepared to accept that the Petitioner's ability to stay home with the children was an advantage to her as a parent, it was not an economic advantage. Even after considering the division of the Respondent's

pension resulting from these divorce proceedings, I believe that a modest level of compensatory spousal support is due to the Petitioner for the career sacrifices that she made during the marriage. I would also off-set that award against the remaining reimbursement sought by the Respondent.

[39] Therefore, I am not prepared to grant the Respondent's request to require the Petitioner to reimburse him the money that he applied to the various household expenses. The $16,062.00 that she otherwise might have been required to pay him is at least off-set by the child support and potential compensatory spousal support that the Respondent would otherwise have been required to pay to her.

OCCUPATION RENT

[40] In addition to seeking reimbursement for expenses relating to the matrimonial home that he paid between the date of the parties' separation and the date of the trial the Respondent also seeks occupation rent from his wife in the sum of $300.00 per month for each month that she occupied the matrimonial home after he left.

[41] The concept of occupation rent is not to be found in the ***Matrimonial Property Act.*** It is a common-law remedy. "At common-law, all joint tenants have an equal right to the occupation of the whole of the premises, and neither has the right to exclude the other. In limited circumstances the Courts would recognize a right to occupation rent in favour of the joint tenant who was out of possession." See ***Kazmierczak v. Kazmierczak***, 2001 CarswellAlta 943 (Alberta Court of Q.B.) at para 88 (affirmed on appeal at 2003 CarswellAlta 1028 (C.A.). Slatter, J. in ***Kazmierszak*** (*supra*) referred to Professor B. Ziff's text *Principles of Property Law* (Scarsborough: Carswell, 1993) in which he summarized the law with respect to occupation rent. According to Professor Ziff whereas all co-tenants are inherently entitled to possession of each and every part of a jointly owned property, one co-owner could not exclude or "oust"another. If one party is locked out or forced to leave a property by the conduct of the other the remaining owner may be charged with an occupation rent. But, according to Professor Ziff, no occupation rent is normally payable simply because one owner has enjoyed exclusive possession. "However, where, on partition, the party in possession makes a claim for reimbursement for the payment of current expenses, a counterclaim for occupation rent may be entertained. The amount of rent ordered

is often based on an estimation of the market value of the property (divided by the number of co-owners), but sometimes it is pegged at the cost of current expenses." (See ***Kazmierczak*** (*supra*) at paragraph 88).

[42] After a review of the law respecting occupation rent Slatter, J. also listed a number of factors which he concluded should be considered when deciding whether occupation rent should be awarded with respect to a matrimonial home. Beginning at para 95 those factors are:

> (a) The spouse who is not in possession generally should not be entitled to occupation rent if the other spouse is occupying the premises with the children of the marriage, and is not making a claim for support or a contribution towards the expenses of the house.
>
> (b) Where the spouse in possession does make a claim for contribution towards the expenses of the house, that claim, the cross-claim for occupation rent, and any claim for spousal or child support should be considered together. The occupation rent would be a potential expense item in one party's budget, and a revenue item in the other party's budget.
>
> (c) In many cases it would be simpler just to eliminate the claim for occupation rent from the equation, and deal with child support and spousal support at large. However, given that the Federal Child Support Guidelines now mandate certain levels of support for children, it may be unfair not to include a notional occupation rent in the guideline income and budgets of the parties, at least when considering spousal support.
>
> (d) The spouse in occupation will generally not be entitled in the matrimonial property proceedings for any credit for the mortgage payments and taxes paid by him or her. Those payments should be a part of the support equation. The only possible exception is with respect to the portion of the mortgage payment that actually goes to reduce principal, as notionally one-half of that payment is made on behalf of the non-occupying spouse. See Balzar v. Balzar. However, if the party in occupation has not adequately maintained the property, and has essentially eroded its capital value, a set-off for the excessive wear and tear might be called for.
>
> (e) There will be cases, such as Scott v. Scott, where the family unit can no longer afford to maintain the previous matrimonial home. If one spouse insists in staying in occupation of the house, and is prepared to make the necessary financial

> sacrifices, then fairness may require that occupation rent be included in the overall equation.
>
> (f) Rarely, if ever, should one spouse be able to bank a claim for occupation rent, and present that claim in capitalized form years later as part of a matrimonial property action.

[43] The closest the ***Matrimonial Property Act*** comes to the concept of occupation rent is found in subsection 11(1)(b) which reads as follows:

> 11(1) Notwithstanding the ownership of a matrimonial home and its contents, the court may by order, on the application of a spouse,
>
> (a) direct that one spouse be given exclusive possession of a matrimonial home, or part thereof, for life or for such lesser period as the court directs and release any other property that is a matrimonial home from the application of this Act;
>
> (b) direct the spouse to whom exclusive possession is given under clause (a) to pay such periodic or other payments to the other spouse as is prescribed in the order;

Given that the legislature has seen fit to address the issue by including subsection 11(1)(b) in the ***Act*** the common-law remedy of occupation rent between spouses should rarely be relied upon if the property in question is the matrimonial home. I also agree with the caution expressed by Slatter, J. in ***Kazmierczak*** (*supra*) when he said at paragraph 90:

> "In my view, care must be taken in carrying forward the common-law concept of occupation rent into the family law context. Non-family joint tenants generally do not have mutual obligations of support for each other, and for children. In the family law context, such mutual obligations of support are general present, and would usually dominate and outweigh the common-law property rights associated with joint tenancy. Occupation rent should only be awarded in the family law context with great caution."

[44] Mr. Andrews left the matrimonial home on his own accord. There is no evidence that he was expelled or ousted by his wife in any way. There is no

evidence that her conduct made it necessary for him to leave the matrimonial home.

[45] At no time did the Petitioner obtain an order for exclusive possession under subsection 11(1)(a) of the ***Matrimonial Property Act***. The Respondent did not specifically plead subsection 11(1)(b) in his Answer or indicate in his pleadings that he was seeking occupation rent.

[46] The Petitioner was not the only person living in the matrimonial home after the Respondent left the property. Jennifer continued living in the matrimonial home until the summer of 2002 and Sara and Ashley continued living in the matrimonial home after the parties separated through to the date of trial.

[47] There is no evidence to convince me that the Respondent's suggestion that $300.00 per month would be an appropriate level of occupation rent.

[48] Ultimately, occupation rent is in the Court's discretion. In the circumstances of this case I am not prepared to grant the Respondent's request.

[49] If occupation rent or payments pursuant to subsection 11(1)(b) are to be ordered the best time to make that determination is early in the proceedings and preferably at the same time or immediately after the non-occupying spouse has left the premises. The Court can then make an assessment as to whether any payment should be made to the non-occupying spouse and if so how those payments might interact with an order for spousal or child support.

[50] Because occupation rent falls outside the scope of the ***Matrimonial Property Act,*** if it is to be sought, it should be specifically included in the pleadings.

PROSPECTIVE CHILD SUPPORT FOR SARA

[51] During the course of the trial the parties agreed that at no time subsequent to their separation was the Petitioner entitled to child support for Shelley, Jennifer or Ashley.

[52] With respect to Sara, counsel for the Petitioner in her post-trial brief stated:

> "My client is asking to keep Sara Andrews' entitlement to child support alive so that when she is a full-time student support may be available to her without the necessity of an application to the Court..."

The Petitioner seems to be conceding that as of the date of the trial Sara was not a "child of the marriage" and therefore child support for Sara was not then payable. It was anticipated that Sara may return to university the following year. There will be no provision for child support in the Corollary Relief Judgment for Sara at this time. However, should Sara return to university and the Petitioner is then able to satisfy the Court that Sara is a "child of the marriage", at that time it would be open to the Court to make an order for child support. An application to vary to the Corollary Relief Judgment will, however, be required based on Sara's new circumstances. It is not possible for the Court to predetermine the level of child support, if any. There are too many unknowns including the Respondent's future income, Sara's future income, Sara's university expenses and Sara's living arrangements.

SPOUSAL SUPPORT

[53] In 1988 the Petitioner was diagnosed with celiac disease which is a chronic bowel disorder. It is exasperated by stress. Her condition is controlled by way of a gluten free diet. Beyond that she is on B12 as well as other vitamins and a hormone replacement. At the time of trial she also was taking an antidepressant medication. It is her fear that in the future her ability to work may be disrupted or halted should her medical condition grow worst. For that reason she seeks nominal support of $1.00 per year.

[54] The Respondent argues that the Petitioner earns a significant income as a nurse and will be receiving approximately one half of his pension. He does not accept that she has any entitlement to spousal support. On the other hand he seeks spousal support of a nominal sum or alternatively "a recognition that he will have the right to apply in the future for spousal support, once there has been a change in circumstances" (Respondent's Pre-trial Brief). On his behalf it was argued that he has no job security. His position as of the date of trial was a contract position that would soon come to an end. His remaining portion of his pension and his income from Sobey's would be insufficient to meet his needs. He contends that he will

suffer a significant economic disadvantage arising from the breakdown of the marriage and may at a future date have the need for spousal support from the Petitioner.

[55] As of the date of the trial neither party was in need of spousal support. That may change in the future as the circumstances of the parties change. Until changes occur, one can only speculate. The Corollary Relief Judgment will therefore reflect that no spousal support shall be paid by either party to the other at this time but should there be a change in the "condition, means, needs or other circumstances" of either party then an application could be made to the Court at that time pursuant to subsection 17 (1) (a) of the ***Divorce Act*** and it will be open to the Court at that time to determine if either party has established a entitlement to spousal support and if so whether any spousal support should be ordered.

[56] The Court will prepare the Divorce Judgment. I direct that counsel for the Petitioner prepare the Corollary Relief Judgment.

J.