IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Stutz v. Stutz, 2006 NSSC 228

Date: 20060719
Docket: 1201-059289
Registry: Halifax

Between:

Joanne Stutz

Applicant

v.

Charles Stutz

Respondent

Judge: The Honourable Justice Douglas C. Campbell

Heard: June 22, 23 & 28, 2006 in Halifax, Nova Scotia

Counsel: Judith Schoen, counsel for the applicant
Robyn Elliott, counsel for the respondent

By the Court:

[1] The matters in dispute in this divorce proceeding are child support, spousal support payable to the husband and the division of the parties' assets.

[2] I find that all procedural and jurisdictional matters have been proven and that the ground of marriage breakdown based on separation in excess of one year has been proven. The Divorce Judgement is granted.

[3] The parties were married in the Province of Quebec on April 2, 1983. There are two children of the marriage. The first daughter was born on October 24, 1983. The second was born on August 7, 1986. They are currently aged 22 and (almost) 20, respectively.

[4] The parties signed a marriage contract in Quebec.

[5] The family lived in Montreal in a house which had been owned by the husband for approximately three years prior to the marriage. In 1985, the family moved to Switzerland. For most of the period of cohabitation, both parties were

gainfully employed on a full time basis. The husband endured periods of unemployment between positions. The wife was off work briefly when each of the children were born.

[6] The husband had been a graduate of Dawson College in the information technology field and employed those skills in the various positions he held. In his final position in Switzerland he was earning more than 200,000 Swiss francs per year.

[7] The wife had various positions, most notably a good paying position with the United Nations in Switzerland.

[8] By the spring of 2002, the family made a decision to relocate to Nova Scotia. The oldest daughter was in university in Switzerland and she would stay there. The parties would fund her expenses to supplement her part-time work.

[9] There were three main reasons for this significant move. First, the husband's job had become redundant and he had been unemployed since 2001. Second, the parties were facing marital difficulties and it was thought that a move would be an

opportunity to recommit themselves to the marriage. Third, the younger daughter had become involved with drugs and alcohol and had been expelled from the public school system. The move was thought to be an opportunity for her to have a fresh start in a new environment.

[10] The plan was that neither of the parties would be employed in Nova Scotia for one year. During that time, the husband would look into starting a business to be described below and he would renovate the home that they had chosen to purchase. The wife would take a break from the work force and pursue matters of personal interest including studies. The family's living expenses would be funded mainly by liquidating the husband's entire pension plan in Switzerland. The wife had approximately $29,000 of savings available to the family as they were approaching the move. She testified that she had been told by her husband that his pension was sufficient to fund their plan.

[11] From a financial point of view, the move turned out to be a disaster. Assets in Switzerland that could not economically be moved to Nova Scotia were sold, various debts were paid off from the proceeds of the pension fund, including income tax. The new matrimonial home in Nova Scotia was purchased at a price of

just under $193,000. The family began its new life in Nova Scotia with roughly $86,000 in liquid assets plus the matrimonial home in Nova Scotia and the original matrimonial home in Montreal, one flat of which was rented to the husband's mother and the other to an arm's length tenant.

[12] Through a combination of expenses respecting the renovation of the matrimonial home (being done largely by the husband), and the living expenses of the family, the balance of the pension proceeds was soon consumed. The family continued to exist on borrowed funds drawn on a line of credit.

[13] By February 2003, the finances were approaching chaos. The wife had an opportunity to return to her work at the United Nations in Switzerland. Recognizing the costs of attempting to maintain the family in Nova Scotia and the older daughter in Switzerland along with the ongoing home renovations and with their savings having been exhausted, the wife accepted that employment and moved to Switzerland where she resided with her older daughter who was still in training. This prudent decision meant that she cut short her plan for a one year break from the workforce by about four months. The father remained in the matrimonial home in Nova Scotia with the younger daughter.

[14] By the spring of 2004, with the home renovations still incomplete and the line of credit rising, the husband realized that he must sell his Montreal home. The closing occurred in May 2004 and the net proceeds were approximately $176,000. From that sum, approximately $25,000 was forwarded to the wife to pay credit cards, and a debt owing to the daughter in her care. The line of credit was paid off and the final surplus of these proceeds was used by the husband for living expenses and further home renovations (which were declining in terms of annual outlay).

[15] There is some disagreement as to exactly when the parties could be said to have separated and it is clear that their finances in various ways at various times continued to be somewhat connected well beyond their now agreed separation date. They have chosen to use the date in February 2003 (being the date when the wife moved permanently to Switzerland) as their separation date.

[16] The wife commenced a petition for divorce on January 11, 2005, some two years later.

[17] The husband is romantically involved with a physician who works for a cruise ship line in the Caribbean. He has had the opportunity to accompany her on several cruises which have lasted from 30 days to 60 days in duration at no significant expense other than his airfare and incidentals.

[18] The younger daughter graduated from high school in Nova Scotia in 2005 at which time she moved to Switzerland to reside with her mother and sister. She decided to take a year off from school in order to be sure of her plan for further education. She has obtained part-time work for approximately three months during which she earned approximately 9,000 Swiss francs and she has been unsuccessful in finding additional employment. The evidence suggests that she has been active and diligent in seeking employment. She has enrolled in a course of study commencing in September 2006 to become a travel agent.

[19] Currently, all of the net proceeds from the liquidation of the pension fund and all of the proceeds from the Montreal house have been spent. The husband has drawn on his line of credit which has a substantial balance. Except for whatever assets the wife has acquired since separation (which would not be subject to division) all that remains for from the family's lifetime asset pool is the net worth of

the matrimonial home in Nova Scotia and the small portion of the wife's pension in Switzerland that existed at the time of separation and some minor miscellaneous assets. The husband argues for an accounting of some assets sold by the wife in Switzerland and the pay off of debts from proceeds of his Montreal home. There may be a government pension plan in Switzerland similar to the Canada Pension Plan. The husband's evidence was that he believes it can be divided at source in the event of divorce. The husband is without income and without the prospect of employment.

[20] By contrast, the wife has an income of approximately 141,000 Swiss francs which would roughly be equivalent to $127,000 (Canadian). Because of her employment with the United Nations, she does not pay income tax. However, she does pay approximately 36,000 Swiss francs by way of deduction from her pay for something called "staff assessment". She was not able to completely explain what this represents or why it is payable but it is clear from her pay stub that it is money spent and unavailable to her. This represents approximately 26% of her gross income. Therefore, it has the same impact on her finances as that which would occur if income tax in the same amount were payable. On the other hand, her ability to avoid income tax at Canadian rates more than offsets the staff assessment.

[21] Both parties have admitted in evidence that the cost of living in Switzerland is dramatically higher than it is in Nova Scotia. I did not have any expert opinion as to the extent of that difference. In attempting to convert the wife's Swiss franc income to a Canadian equivalent, it is not enough to convert her income according to the exchange rate, subtract the Canadian dollar equivalent of the staff assessment and add back an estimate of Canadian income tax. The wife's income once so converted to Canadian dollars must be further discounted for its reduced purchasing power as compared to Canadian living costs since the child support guidelines and spousal legal support principles are designed in Canadian dollars. None of the evidence that I was given allows me to be precise about that. For example, I was told that a so-called "Big Mac Meal" at MacDonald's Restaurant in Switzerland would cost $10.99 (Canadian). I was not told what it would cost here but, in any event, I am not likely to conclude that the "Golden Arches" offer a definitive economic measure of the difference in living costs. The husband testified that when he left his job in Canada at $65,000 per year and replaced it with a job in Switzerland at 100,000 Swiss francs per year, he found it to be very tight, implying that the latter salary had less purchasing power than the former.

[22] The husband was quoted from his discovery evidence in which he suggested $100,000 would last two months in Switzerland. The wife's testimony was that, at her annual salary in Switzerland of 141,000 Swiss francs, she found her living costs to be very tight. She testified that her husband frequently asked her to send money home to Nova Scotia and that she was rarely able to do so (having sent about $3,600 over the entire time she was located there). The husband was asked whether he accepted her contention that she could not afford to send money each time that she gave that answer to his request and he answered in the affirmative.

[23] Accordingly, I must be careful not to approach the wife's financial circumstances as being as comfortable as would be the case if she had the same income in Nova Scotia converted for exchange rate, staff assessment and income tax. My rough impression from the vague evidence is that her purchasing power would be roughly half that converted figure and possibly even less in Canadian dollar terms.

ISSUES:

[24] The issues before the court are as follows: (1) division of assets and debts of the parties; (2) entitlement to and quantification, if any, of spousal support payable

to the husband and; (3) child support claimed by both parents for one and eventually (in the case of the mother) both children including Section 7 expenses. The latter two claims include a retroactive component.

[25] Before dealing with the division of assets and debts, there is a preliminary question as to the effect of the Quebec marriage contract.

QUEBEC MARRIAGE CONTRACT:

[26] The parties signed a marriage contract on March 31, 1983, two days before their wedding. The wife did not obtain independent legal advice before signing it. The wife was 20 years old at the time and the husband was 31 years old.

[27] The contract came about by the unilateral initiative of the husband. In her evidence, the wife conceded that she believed that her husband's motive was to protect his prior owned Quebec property that would become their matrimonial home. This admission by the wife is not, in my view, reason for the court to conclude that it must interpret the marriage contract as having achieved that purpose, if it fails on legal grounds to do so.

[28] It is a very short (two operative paragraphs) contract. The original document is written in French. An affidavit from a French translator was tendered attaching an English translation of the document. The English translation of the agreement is as follows:

> "the future spouses adopt the regime of division of matrimonial property as described in Article 518 of the Quebec Civil Code; consequently each spouse shall fully manage, enjoy the use and freely dispose of movable and immovable property of his or her respective ownership and the future spouses shall not be responsible for the debts of each other, whether these debts have been incurred before or after the celebration of their marriage".

[29] There is considerable doubt in my mind as to whether a portion of that translation is contextually accurate. I am referring to the phrase "adopt the regime of division of matrimonial property...".

[30] The French version reads "Adoptent le regime de la separation de biens...". I did not have the benefit of further evidence from the translator or any other translator. I am left with the query as to whether or not a more contextual translation of those words would have been "adopt the regime of separation as to property" rather than "division of matrimonial property".

[31] Discussion between counsel and the court occurred during the trial about the translation and there was some thought given to calling the translator. Counsel for the wife conceded that she would accept the translation perhaps, in part, because I stated that I did not think much would turn on it in terms of my decision.

[32] My concern was simply that the phrase “division of matrimonial property” is a term of art as used in Nova Scotia’s *Matrimonial Property Act* while “separate as to property” is a term of art used in jurisdictions like Quebec where there is more than one property regime by which spouses can choose to live. Specifically, Section 518 of the Civil Code of Quebec (as it was numbered at the time of the subject marriage contract) states, in its English version: “The regime of conventional separation as to property is established by a simple declaration to this effect in the marriage contract.” This suggests to me that my preferred translation may be more contextually accurate in the subject contract.

[33] In my years of association with Family Law, I have seen many of these short, standard form marriage contracts made in Quebec both in English and in translated versions of the French. These have typically used the phrase “separate as to property” and I am unaware of any case, either as decided by a court or as

negotiated out of court whereby these contracts have been treated as marriage contracts for purposes of our *Matrimonial Property Act* in directing the division of assets.

[34] Certainly, the practice when I was a member of the Bar was to treat these contracts as having a specific purpose that did not include the governing of the division of assets in the event of marriage breakdown. The understanding was that pursuant to the Quebec Civil Code, parties could elect whether to be governed *during their marriage* by the regime of separate property or communal property. That election had various legal implications during the marriage. If separate as to property was not the choice made in the marriage contract the non-indebted spouse would be responsible for the other spouse's debts and her assets could be seized to satisfy those debts. The main purpose, therefore, of the contract was to protect the other spouse and his or her assets from creditors of the indebted spouse.

[35] Whether the best contextual translation of the French phrase is "separation as to property" as I believe it to be or "division of matrimonial property" as counsel have conceded it to be, the same outcome would prevail in my opinion because under either translation the purpose is to protect the other spouse from creditors. In

Nova Scotia, spouses are automatically separate as to property from the perspective of creditor claims. A contract or declaration is not needed to achieve that status.

[36] Whether or not such a provision would, in Quebec, also govern or at least impact asset division after marriage breakdown is unclear. There is no evidence before me to suggest that such is the case and there is nothing in the words of the agreement to suggest that outcome. Indeed, the contract makes no mention of asset division on marriage breakdown.

[37] In Nova Scotia, prior to the passage of the *Matrimonial Property Act*, S.N.S. 1980, c.9, ("the Act"), marriage contracts were void for public policy. Accordingly, that fact would be a reason to reject these Quebec marriage contracts as determining division of assets prior to the passage of the Act. The question is whether this marriage contract is a "marriage contract" within the meaning of the *Matrimonial Property Act*, supra. Section 23 of the Act states:

> "A man and a woman may enter into an agreement, to be known as a marriage contract, before their marriage or during their marriage while they are cohabiting in which they agree on their respective rights and obligations; (a) under the marriage; (b) upon separation; © upon annulment or dissolution of the marriage; (d) upon the death of either spouse."

[38] While the contract therefore can have an effect on rights and obligations during the marriage, Section 12 of the Act permits division of assets between spouses only when one of the listed triggering events occurs; namely, divorce, nullity, separation or death. It follows, that for this contract to be recognized under the Act for the purpose of division of assets, it must be an agreement which specifies their respective rights and obligations upon marriage breakdown or death. This contract does not expressly or impliedly do so and I would therefore conclude that it is not a marriage contract for purposes of the Act.

[39] There is a second rationale for reaching this conclusion. As stated above, at least one of the purposes of these contracts is to protect the non-indebted spouse against creditors because attack by creditors is automatic in Quebec unless the parties declare themselves to be separate as to property. The parties to a marriage enter these contracts because of the fact that Quebec law offers two regimes as to the ownership of property and consequential creditor rights. There is no analogous choice in Nova Scotia. There are no claims available to creditors here against spousal assets. For one of the subject spouses to protect his or her assets in Nova Scotia against creditors, a contract is not needed. Ownership of the assets and

signatory to the debt instrument dictate creditor rights. There are no regime choices to make that would empower or disempower creditors.

[40] The Prince Edward Island Supreme Court (Family Division) case of *Roome v. Roome,* (1985) 42 R.F.L.(2d) 337 is persuasive authority for that proposition. It relied on two Ontario decisions one of which was delivered by its Court of Appeal.

[41] The P.E.I. court quoted the Quebec marriage contract which stated that the parties "shall be separate as to property as provided in the Civil Code of the Province of Quebec and shall not be liable for each other's obligations". This is a wording which in my view for all practical purposes has identical effect (whether or not the English version of the subject contract is appropriately translated).

[42] At page 34 the court stated:

> "It is important to draw the necessary distinction between the property regime adopted by the parties in their contract and the provisions of the Family Law Reform Act of this province which are brought into play by virtue of the assumed residence in this province. Under the contract, the parties bound themselves to a regime of separate *ownership* as provided by the Quebec Civil Code. Under the latter ...[i.e. The P.E.I. Act]..., the parties subject themselves to a property regime which applies only upon the separation of the parties...should the marriage fail and the parties live separate and apart, the provisions of the Family Law Reform Act

> shall determine the basis upon which their accumulated possessions shall be divided; the basis of division does not reflect ownership but is determined on grounds of equity. In the case under consideration, the plaintiff relies upon equity, the husband, ownership."

[43] The *Matrimonial Property Act*, supra is effectively similar to the P.E.I. legislation. Under it, ownership is irrelevant for purposes of dividing matrimonial assets. Ownership is usually determinative for purposes of dividing non-matrimonial assets.

[44] The P.E.I. Supreme Court (Family Division), continues at page 344 as follows:

> "The question whether provisions similar in effect to those contained in the Family Law Reform Act are overridden by a domestic contract which, as here, simply adopts a separate property regime was considered in *Sinnett v. Sinnett*, (1980), 15 R.F.L. (2d) 115 (Ont. Co. Ct.) and *Kerr v. Kerr*, (1981), 22 R.F.L. (2d) 19 (C.A.) We are left from these cases with the general principle that the Family Law Reform Act confers upon the marriage partners substantive new rights and those new rights are to prevail over matrimonial contracts unless, expressly or by necessary implication, those rights are yielded or surrendered. The Ontario Court of Appeal refused to disturb the trial finding of Walsh, J. for the reason "no clear evidence was presented that...the Civil Code of Quebec makes provision for the determination of rights of the spouses by division of property or otherwise, in the event of their separation or divorce". Thus, the adoption of a separate property regime was not judged to be sufficiently expressed in its terms to oust the operation of the Family Law Reform Act in Ontario..."

[45] In my opinion, these comments apply to the *Matrimonial Property Act*, supra, such that it is not affected by the property regime choice contracts made in Quebec. In short, the phrase “separate as to property” in the then Section 518 of the Civil Code of Quebec (quoted above) is a term of art in Quebec which does not exist in Nova Scotia. It would be incongruous to conclude that these Quebec regime-choice contracts designed to dictate creditor rights could have any application whatsoever in Nova Scotia. Accordingly, the division of assets in this case will be approached without regard to the Quebec contract.

MATRIMONIAL ASSET DIVISION:

[46] It is not unusual that the task of dividing matrimonial assets is made more complicated by the passage of time after the separation. Things change over time. Values go up or down. Assets are traded for replacement assets or sold without an accounting. Post-separation contributions are made by one spouse to a financial asset that qualifies as a matrimonial asset that is subject to division. For the most

part, these moving targets can be dealt with arithmetically with some degree of precision.

[47] In the subject case the commingling of funds, the termination and recommencement of employment by one spouse, unjustified unemployment of the other spouse, the moving of the family from Switzerland to Canada with the older child remaining in Switzerland only to later be joined by her mother, the complete liquidation of a pension and ultimately a rental property at such a premature point in the long term financial planning of the family and the currency and purchasing power differences as between the separated families' countries of residence all serve to make for layers of complication that, in my opinion, demand a less mathematically driven analysis.

[48] Both parties cited three reasons, mentioned above, for the move to Nova Scotia. The desire to recommit themselves to their marriage and the desire to provide their troubled daughter with a fresh start were valid and commendable reasons. The husband's unemployment was not necessarily a valid factor since he had a history of periods of unemployment which in the past had always resulted in very lucrative job re-entry in Switzerland. He had no recent job history in Canada

and none in Nova Scotia. Not only did he not have a prospect for employment here, he did not have any financial plan that was viable. He had what could only be described as an undeveloped dream (after completing the home renovations) of becoming a distributor of a product that sold well in Switzerland. The extent of his evidence on that plan was that he approached the company and was told that they had their own plans for international expansion. The need to rehabilitate the marriage and the daughter's lifestyle could have been better addressed in ways that would not have involved the move and the dissipation of retirement assets.

[49] Pension funds and other savings are long-term investments designed to support the couple (even if they are later separated) at a point in time much later than age 50 and 39 respectively unless there is substantial wealth that could fund such a move. This couple had a mere 409,000 Swiss francs plus the wife's relatively minor savings and the Montreal house equity (which was not part of the original plan). After tax and moving expenses, the pension fund would be reduced to less than 350,000 Swiss francs or approximately $315,000 Canadian dollars, from which tens of thousands of dollars of debt was to be repaid.

[50] The parties' plan to purchase a Nova Scotia home for $193,000 that required tens of thousands of dollars of renovations and a withdrawal from the job market by both spouses for a year was absolutely not capable of being financed from the pension funds. It should have been retained, added to and growth invested for at least 15 more years.

[51] Sir Paul McCartney very eloquently observed in the opening line of the first song of his latest musical compact disc entitled (with some degree of analogy to the facts of this case) "*Chaos and Creation*":

> "There is a fine line between recklessness and courage".
>
> The song mirrors the husband's confusion between the creation that he thought he would achieve and the chaos that materialized from his plan.

[52] There is no question that it would take immense courage for the couple to decide to start a new chapter in their life by moving from Switzerland to a province in Canada where they had never lived before leaving one daughter behind in Switzerland in training. The desire to save their other daughter from troubled waters

and to mend their marriage is commendable. However, long before the suitcases were packed, the couple had crossed well over the fine line between courage and recklessness. When the one year absence by the husband from the workforce turned into four in addition to the fifth that had occurred in Switzerland, their financial plan moved from recklessness to fatality.

[53] Ordinarily, the court recognizes a clear line between the income and the capital sides of family finances. Capital issues (meaning the division of assets and debts) are resolved by reference to the principles of the *Matrimonial Property Act*. These “as of right” principles pay no attention to need or ability to pay. Those assets classified as “matrimonial” are divided, usually equally. Spousal support pays attention to need and ability to pay and attempts to balance those competing concerns. In this case, the line between these very different principles has been seriously blurred by the facts that developed after the ill-fated plan to live from the proceeds of immature retirement funds.

[54] The decision, largely designed by the husband in this case, to liquidate first the family’s main retirement asset and then the rental property in Montreal and to use the proceeds as if they were income completely changes the complexion of the

analysis needed to resolve this particular dispute. It is impossible to separate the capital principles from the income principles as a result. Admittedly, some of the capital went to the purchase of the matrimonial home and therefore still exists in the form of capital. The rest was commingled and untraceably directed to various destinations including capital payments such as house renovations and pre-marital and post-marital debt reduction, and to ordinary living expenses of the husband and one daughter for the most part.

[55] Counsel for the husband would have me attempt to sort out that commingled chain of events. For example, there were two motor vehicles left in Switzerland which had not been sold when the family moved to Nova Scotia but were subsequently sold. The wife was left with those proceeds. The husband looks for a credit. Both parties had substantial bank accounts at the time of the move and insignificant or overdrawn accounts at the time of the separation or at the time of trial. Both parties had post-separation and pre-separation credit card debts about which the husband seeks a financial accounting. Large amounts were borrowed by the husband on lines of credit for living and home renovation expenses. Normally, debts as of the date of separation would be shared and post-separation debts would be the responsibility of the debtor. But here, the separated family lived on these

debts as if their drawings were income and they did so, long after the agreed separation date as if they were a couple.

[56] Given my holding with respect to the Quebec marriage contract, the proceeds of the first matrimonial home and the proceeds of the husband's pension plan are being treated as matrimonial assets and therefore shareable. The husband cannot complain that he did not share in the proceeds of the sale of the Swiss motor vehicles or that he paid out the wife's credit card debts when he controlled the spending of her half of the proceeds of his pension and the Quebec property (except for the portion that was used to pay down her credit cards).

[57] The husband had been unemployed for one year in Switzerland before moving to Nova Scotia. Despite his plan to stay at home for what turned out to be four years to do house renovations and to help his daughter get settled and despite the fact that there were clearly insufficient liquid assets to make that happen, his decision to continue to be unemployed for what would turn out to be a total of five years is absolutely unjustified. That event coupled with his ill conceived plan to prematurely liquidate his retirement fund is the main cause of the family's financial predicament.

[58] The wife cannot escape some responsibility for the unfolding of those events and the disaster that followed because she acquiesced in the plan. I conclude that she believed there were sufficient funds to carry out the plan but she had a duty to enquire as to the amount of the pension funds available and what would be left after the Nova Scotia house was purchased. One does not need to have a financial planning diploma to conclude that their plan at their ages was irresponsible in the extreme. To her credit, however, some eight months after the extent of their predicament was clear, she did the right thing by returning to Switzerland where she was gainfully and somewhat comfortably employed. She could thereby look after the older daughter's expenses in training and in living and thereby minimize the husband's need to call on their available line of credit in desperation. The husband must bear substantial responsibility for his refusal to do as his wife did by finding work.

[59] I decline to attempt to rationalize the division of assets by reference to the usual "his and hers allocation" of assets and debts through this complicated web of reckless financial decision making.

THE NOVA SCOTIA MATRIMONIAL HOME:

[60] In his written report, the appraiser of the Nova Scotia matrimonial home in arriving at a value of $282,000, stated in the fourth page as follows:

> "The appraiser was asked to estimate the value of the subject property as of April 21, 2006 [i.e. the date of the appraisal itself] as if the enclosed improvements were not completed. In summary, it appears that the improvements generally consist of new kitchen cabinets, painting, trim and flooring. Not having inspected the property prior to the improvements, some judgement by the appraiser must be relied upon. Assuming the foregoing improvements were not completed it has been estimated that the current value as of April 21, 2006 would have been $265,000.00".

[61] The following four pages in the appraisal consist of a list of improvements that had in fact been done. In cross-examination, the appraiser's evidence was confusing in that he seemed to be saying that he was assuming the improvements had not in fact been done. If that had been his assumption, then the completion of the improvements would have resulted in a larger value than his appraised value. His written comment and the fact that his conclusion that these improvements would have dictated a smaller market value confirm to me that his evidence was intended to mean that, assuming the improvements had not been done, the value would have been $265,000. That is, the improvements added $17,000 value. This

may not represent a complete answer with respect to the value of the improvements. The appraisal lists four pages of improvements. The first two pages are crossed out with an abbreviation of the words “pre-separation” handwritten on them. The list of improvements mentioned by the appraiser and quoted above do not appear to include the improvements actually made and listed in those first two pages.

[62] The husband contends that the cost of the pre-separation improvements was $15,315 and that the post-separation improvements have cost of $26,034, not including any value for his labour. This is a total of $41,349.

[63] Ordinarily, post-separation improvements or additions to matrimonial assets by one spouse would be credited totally to that spouse because section 4 of the Act defines post-separation assets as being non-matrimonial assets. In this case, given that the improvements were paid for from the proceeds of matrimonial assets (being the Quebec property, the pension money and perhaps the wife’s savings) or from lines of credit ultimately paid off from those sources, it would have been reasonable for the wife to expect to share in the full trial date value. The improvements were paid for equally by the parties in the end. As for the husband’s labour, I know of no case where credit was given for that since the Act acknowledges both financial and

non-financial contributions to marriage. There might be an argument in favour of crediting him for the value of his post-separation labour. However, I do not have any evidence whatsoever as to what that would be . His own calculations show that the renovations tapered off as the years went by.

[64] In any event, the wife has conceded a willingness to share the matrimonial home value based on the appraiser's pre-improvement value of $265,000 and so I will abide by her concession.

[65] It is impossible for the court to conclude from the evidence how their joint matrimonial assets were allocated as between growing the value of their joint matrimonial home and paying for the husband's and the youngest daughter's living expenses. However, given that the wife only lived in that residence for eight months while the husband lived there for four years without income (his youngest daughter being with him for approximately three years of those four) it must follow logically that he received a greater than fifty percent share of those shareable assets that are now spent, very little of which was spent in 2004 and 2005 on home renovations. In addition there are items that he has purchased from that joint capital such as tools, a motorcycle and a motor vehicle.

[66] I have commented above that the marriage contract does not preclude the sharing of the value of the Montreal property and I have treated it as a matrimonial asset. Counsel for the husband argued as an alternative that the pre-marital value and should have resulted in an unequal division in favour of the husband if it is not protected by the marriage contract. I agree that Section 13(e) of the Act referring to the date and manner of acquisition of the assets can and often should result in an unequal division in favour of the owning spouse in respect of pre-marital assets. That section must be read in conjunction with its preceding subsection which refers to the length of the marriage. Here, it was 20 years. Section 13(a) permits the court to look to the unreasonable impoverishment of the matrimonial assets. I find here that the husband's malingering plan to remain unemployed has seriously impoverished the assets. Also, subsection (i) of Section 13 which speaks of the contribution made by each spouse to the marriage and to the welfare of the family operates against the husband's claim. Subsection (j) invites the court to consider whether the value of the assets substantially appreciated during the marriage. Here, they were substantially dissipated and I assign the lion's share of that responsibility to the husband. For all of these reasons, I would dismiss the husband's request for an unequal division of the value of the Montreal home.

[67] While I do not recall the following argument being made, I might well have considered that, despite the fact that the Montreal property was a matrimonial asset while it was being used as a matrimonial home for approximately three years, it should now be classified as a business asset. I am aware of some cases where rental properties have been held to be matrimonial assets. Given that the rental property has a commercial, investment or income producing or profit producing purpose, it would be easy to classify it as a business asset as those words are used in the Act. The Act speaks as of the date of the separation from the perspective available at trial. There is no concept in the Act that requires an asset once classified as a certain type to be so classified even when it's changed use at separation would have dictated an opposite classification.

[68] Had I been persuaded (as I could have been) to classify the Montreal rental property as a business asset, the outcome of my decision would not have been different. The factors listed above in relation to Section 13, the imprudence of the husband's employment attitude, the spending of the family pension plan and the lack of serious value added to the matrimonial home would all trigger the subsections of Section 13 above quoted with the result that I would be compelled to

make a division of that non-matrimonial asset (had I so classified it) in favour of the wife. Section 13 clearly provides for the division of both matrimonial and non-matrimonial assets when it is unfair and unconscionable to divide matrimonial assets equally taking into account the subsections listed. It is beyond unconscionability to allow a division of assets that ignores the dissipation of most of the family's assets brought about by the husband's malingering absence from the workforce and premature resort to the liquidation of immature retirement assets.

[69] I conclude that the only reasonable outcome for this case (made complicated by some very bad decisions, mostly on the part of the husband including his refusal to attempt to re-enter the workforce) especially given his history of having earned exceptionally high incomes, is as follows: the claims by the husband for an unequal division of the house equity or by way of credit for assets retained by the wife in Switzerland must be denied. If inequality of asset division were to be contemplated, that inequality would be in favour of the wife. I decline to do so. In my opinion, the parties should share the net value of the matrimonial home equally. All other assets held by each party respectively would be retained by that party with two exceptions: the husband has an investment in Barbados which he views as being an uncollectible receivable. In the event that the receivable is collected in

whole or in part, its net proceed shall be divided equally between the parties. Secondly, I have sketchy evidence about the possibility of a government funded pension plan in Switzerland owned by the husband. In the event that the laws of Switzerland allow for that pension to be divided either currently or at retirement age or at some other date, that pension would be divided between the parties according to whatever legal principles govern its division. If the laws of Switzerland allow for an equal division of that pension earned during the years of the marriage until the date of separation, I direct that the same shall occur.

[70] Given the husband's finances, it would seem impossible for him to purchase the wife's interest in the matrimonial home but I will give him a short-lived opportunity to do so. Recognizing that the wife has conceded a value of $265,000 in the face of an appraisal that suggests a value of $282,000, it is not workable to simply direct that the actual net proceeds of sale be divided. Accordingly, the following arrangements shall apply:

1. The husband shall have three weeks from the date of this decision to confirm in writing to the wife that he wishes to purchase her interest in the house and to confirm, verified by documentation, that he has the financing

available to do so. In that event, the net proceeds shall be determined by treating the property as having a selling price of $265,000. From that figure will be deducted the sales commission deemed to be 5% plus HST on that commission plus $1200 for legal fees including HST. The husband shall, within 30 days of confirming his intention to buy out the wife pay to her a sum equal to 50% of that deemed net proceeds figure.

2. In the event that the husband does not elect to purchase the wife's interests as above noted, he shall immediately take charge of the listing of the property by choosing a listing agent after consultation with the wife and he shall forward by the most expeditious way possible the listing agreement for the signature of the wife and he shall prepare the property for showing.

3. The husband shall be diligent in his effort to show the property and to keep it in showable condition.

4. The husband shall confirm to the wife documented evidence of any all offers to purchase.

5. The husband shall not make a counter offer or an acceptance of the purchase without the wife's agreement or, in the absence of agreement, the direction of this court, authority for which is hereby reserved.

6. In the event that the property sells for a purchase price equal to or greater than $265,000, for division purposes, the price shall be deemed to be $265,000 and the formula for the above noted buyout shall be followed.

7. In the event that the purchase price is less than $265,000, the actual net proceeds after deducting selling costs, HST, legal fees and closing adjustments (except fuel and property taxes) shall be divided equally.

8. In the event of any difficulty with respect to the implementation of the arrangement with respect to the sale or buyout of the matrimonial home, the court reserves jurisdiction to hear from either party and to give mandatory direction as an addendum to this decision.

SPOUSAL SUPPORT:

[71] The husband claims from the wife, spousal support retroactive to the first of March, 2003 at the rate of $2,000 per month for the months when the parties were separated through to the end of 2005 and $3,311 per month for the six months currently expired in 2006. This amounts to $87,866. His claim is based on various facts including the twenty year length of the marriage, the assumption of responsibility for the care of their youngest daughter while in Nova Scotia but most importantly based on the fact that he has been without income during that entire period while the wife has had an income. It is argued that if the gender roles were reversed and the wife had refrained from joining the workforce to care for a child, her entitlement would not be disputed and if the payor had an income equal to that of the wife, the quantities suggested would be reasonable.

[72] In my opinion, the facts surrounding this case make the analysis of spousal support entitlement unique and dramatically different from those which result in a successful claim.

[73] Although it is true that the husband was without income for those years, this was not by any means a necessary event. It was his choice. Further, he chose to

completely dissipate the capital resources of the family (in favour of modest equity in a matrimonial home) thereby destroying its hope for a comfortable future when normal retirement age is reached treating his capital (shareable with her) and some portion of his wife's capital (also shareable but with a much lesser value) as if it were income. He had a duty to promote his own self-sufficiency and failed completely in that duty.

[74] In my opinion, the husband cannot design an imprudent plan destined to self-destruct the family's security and then hide behind that chosen plan, claiming that his consequential lack of income entitles him to be supported by the spouse who saw the insanity of their situation and responded by taking herself back to her familiar job market in Switzerland to find gainful employment.

[75] The husband in this case clearly has not established any entitlement to support. If I am wrong in that conclusion, I would have otherwise concluded that by the wife's concession in accepting a reduced value on the matrimonial home for division purposes (thereby placing potentially whatever the husband nets from the $17,000 extra value in his hands) and by her acquiescence in the husband's

encroachment of her half of the other two major capital assets, she has more than sufficiently compensated the husband for any claim for spousal support.

[76] The wife has not sought spousal support. Accordingly, the order will contain the provision that neither spouse shall pay spousal support to the other.

CHILD SUPPORT:

[77] In June of 2005 after completion of her Grade twelve, the youngest daughter moved from the husband's home in Nova Scotia to the wife's home in Switzerland. At trial, the husband seeks retroactive child support for the years between the date of the separation in 2003 and her move to Switzerland in 2005. In his Answer, the husband failed to claim child support. I raised with counsel the procedural question as to how I could entertain his claim for child support when none was pleaded. Her argument was that because the wife had claimed child support, the issue is before the court and therefore his unpleaded claim can be entertained. With respect, I disagree. One of the purposes of legal pleadings is to ensure that the other party knows what relief is claimed so that a full defence can be offered. I would therefore deny the husband's claim for child support for the younger child.

[78] If this had not been my conclusion, I would have offered the following analysis: This is a situation where, from the date of separation in 2003 to June of 2005, the parties had split custody of the two children in different countries. The mother had full custody of the older child, the father had full custody of the younger child.

[79] In an ordinary case of split custody, the court would take account of the significant difference in incomes and make a table amount order setting off the table amount payable by the one spouse according to her income against the table amount payable by the other spouse according to his income. Indeed section 8 of the Child Support Guidelines makes that approach ordinarily mandatory.

[80] Since the husband has no income, this would result in a substantial table amount paid by the wife and nothing paid for by the husband. There are several reasons why that would be a patently unfair result in this case. First, although the husband had no actual income, he had unilateral access to most of the family's capital and chose to utilize it as if it were income and that includes the wife's equal portion of those assets. Second, the architects of the table amounts impliedly would have had paid attention to ability to pay the table amount at the various levels in the

table. There is undisputed evidence before me that the costs of living in Switzerland are dramatically higher than in Canada and yet I do not have reliable evidence as to the extent by which that would be true. Thirdly, to paraphrase the words of section 19(1)(a) of the Child Support Guidelines, the husband is intentionally unemployed and although he attributes that to the need to look after his adolescent child, I do not agree a child needs that degree of care in grades 10 through 12. I find it unnecessary to identify a figure for imputed income because I have no evidence as to what dollar amount would represent the same purchasing power in Canada to equate with the wife's purchasing power in Switzerland. I would simply say that for those years, I impute whatever figure would equalize their purchasing power. The setoff amounts net out to zero. I direct that no child support is payable by either parent to the other for the period ending June 2005.

[81] Approximately one year has passed since the younger daughter has joined her older sister to live with her mother in Switzerland. Starting with that date, the husband has had even less reason to decline to seek employment. He made vague and unconvincing overtures in his testimony to suggest that he is looking for employment. Because of his new-found romance with a physician who works on cruise ships in the Caribbean, he has been able to gain free passage on cruises that

have lasted from 30 days to 60 days at a time; some of which have occurred while he still had his younger daughter in his charge. He indicates that he wishes to take a new career path, having left the workforce at age 50 five years ago. He does not wish to work for the large companies that paid him in the 200,000 Swiss franc range. He made no suggestion of returning to Switzerland where his employment was once so welcome that at least two of his employers sought him out for the jobs that he came to accept.

[82] Given his romantic association with the cruise industry, he has thoughts of becoming a magician to entertain passengers on the cruises. He has bought some equipment and has learned some aspects of the trade. He has no idea how much it would pay and he is not sure who the employer would be. There is virtually no substance to this offering...it does not qualify as a financial plan.

[83] He testified that he has formed the habit of attending trade shows (because he is a good tradesman) with the hopes of finding a trade show exhibitor whose product would be of interest to him. When pressed, he could only give an example of one exhibitor who he approached for employment then only to find out that there were no openings.

[84] He has a keen interest in scuba diving and has given thought to opening a dive shop in Barbados, the third of his desired residential destinations in addition to Canada and Switzerland. He would like to spend one third of each year in those three locations. He has done nothing to set up such an operation and he clearly is without the finances or the credit to do so.

[85] He is aware from searching over the internet of an opening for an Information Technology Director at a university in the United States but has not yet had the time to apply. There were several other examples which he gave at trial of his pretense of intending to find work. He was completely insincere, in my opinion, in his stated, and I might add pathetic plans for employment, none of which have any hope or in my view, intention of producing self-sufficiency for him.

[86] I will provide him with a two month holiday for June and July, 2005 to recognize that it would have taken some time after his daughter left Nova Scotia for him to obtain employment. I will impute income to him of $50,000 per annum and order him to pay the two child amount of $679 per month. Accordingly, commencing with August 1st, 2005 and continuing on the 1st day of each and every

month thereafter until further order of the court the husband shall pay to the wife the sum of $679 for the support of the table amount for the two children of the marriage. Arrears shall be secured against his share of the proceeds of sale of the matrimonial home.

[87] In making this order I am cognizant of the fact that the youngest daughter was not in school while in her mother's care. She was able to find a contract job for three months and earned approximately 9,000 Swiss francs. I am satisfied that she has been making diligent effort to find employment both before and after those months and has been unable to do so. In effect, for the year that she has been with her mother, this amount of money roughly averages $675 (Canadian) per month. That is not self-sufficiency in Switzerland. I considered reducing the table amount after her age of majority but have declined to do so because of the lack of convincing evidence of the purchasing power of this money in Switzerland. I conclude that she continues to be a child of the marriage. Her plans to go to school in September and the payment of its registration fee is an indication that she is likely to continue to be a child of the marriage in the future.

[88] Sometime after the mother returned to Switzerland from Nova Scotia she applied for and obtained a “dependency allowance” from the Swiss government in relation to the youngest daughter. The husband argues that in addition to sending child support for the youngest daughter (which entitlement I have rejected), the mother should have forwarded the dependency allowance since it relates to the youngest daughter. I was not given any evidence as to whether or not the father similarly received a Child Tax Benefit from the Canadian government in respect of the youngest daughter. I presume, without knowing, that it was available to him. His Statement of Guidelines Income is blank as to that item.

[89] I was given no evidence as to the details of this child dependency allowance. Unless I had evidence to the contrary, I could not conclude that, in the case of a separation and split custody, the money must go to the child or to the custodial parent of that child. In the absence of that evidence, I must assume that it is money payable to the parent who applies for it and I would presume that such parent would have to be residing in Switzerland in order to qualify for it. Therefore, without better evidence, I must conclude that this is the mother’s money.

[90] In recognition of the high cost of living in Switzerland and in recognition that I will be declining to make any section 7 order in respect of the older child's training costs I reject the father's claim for a return of those monies.

[91] A further justification for this conclusion is my general finding that the husband has had the benefit of the lion's share of the matrimonial assets and may receive a top up from the price of the matrimonial home.

POST SECONDARY TRAINING COSTS:

[92] My decision to impute income to the husband to yield a setoff of table amount child support in recognition of the split custody that existed until June 2005 might logically suggest an equal sharing of the older daughter's educational costs. However, on the particular facts of this case, I will decline to award any section 7 contribution by the husband for various reasons. The daughter has a monthly fellowship of 400 Swiss francs and part-time income. Her tuition cost is extremely low. Her mother has the dependency allowance which entitlement relates to the other daughter for whom she faced no costs until June 2005. It was available to spend on the older daughter. Some of the family capital was used to set up the older

daughter in the beginning of her educational career. The pro-rating of these expenses is only a guiding principle. Considering the means and circumstances of these parties and the child, the table amount ordered represents a reasonable child support. If the younger daughter attends school in the future and if the husband has actual income, I order him to contribute on a pro-rated basis to those costs.

SUMMARY:

[93] In summary, the following conclusions have been reached:

1. The civil agreement made pursuant to the Quebec Civil Code and referred to by counsel as a “marriage contract” is not a “marriage contract” within the meaning of *The Matrimonial Property Act*, *supra;*
2. Subject to the collection of the Barbados receivable and the divisibility of the Switzerland government pension, the only other division of assets will be an equal division of the Nova Scotia matrimonial home based on a price of $265,000 on terms detailed above;

3. There shall be no spousal support payable by either spouse to the other;

4. For the time during which the parties had split custody of the children, there shall be no retroactive child support payable by either parent;

5. Commencing on August 1, 2005 and continuing on the first day of each month thereafter, there shall be retroactive and prospective child support payable by the husband in the two child amount of $679 per month until further order of the court.

6. There shall be no Section 7 contribution by the husband to the educational expenses of the older child retroactively or prospectively.

7. If the younger daughter attends school in the future, and if the husband has actual income, he shall contribute to those costs, pro-rata as to income.

8. Costs may be argued on application.

9. Jurisdiction on certain specified implementation details is reserved.

[94] In the event that I have, by inadvertence, failed to deal with any matters in issue before me, I reserve jurisdiction to do so on the application of either party.

COSTS:

[95] In the event that either party wishes to make submissions as to costs I would direct that party to contact the Scheduler within 30 days of the date of this decision and arrange for a subsequent ½ hour appearance on my docket. In the event that neither party has made such arrangement within those 30 days, I shall conclude that neither party seeks costs.

CAMPBELL, J.