

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Murphy v. Murphy*, 2018 NSSC 108

Date: 2018-06-01

Docket: Halifax No. 1201-067080; (086351)

Registry: Halifax

Between:

Donna Murphy

Applicant

v.

Gerald Murphy

Respondent

Judge: The Honourable Justice Legere Sers

Heard: March 27, 2018, in Halifax, Nova Scotia

Final Written
Submissions: March 13, 2018

Written Release: June 1, 2018

Counsel: Sarah Harris for the Applicant
Kelsey Hudson for the Respondent

By the Court:

[1] From the outset let me state clearly that Mr. Murphy's conduct after separation up to and after the Divorce hearing and Court Order was evidence of a deliberate and systematic plan to dissolve the Matrimonial Assets for his personal use.

[2] While the Applicant followed the court process for the resolution of matrimonial matters, Mr. Murphy diverted to his use most of the matrimonial assets making them unavailable for the ultimate division.

[3] The Respondent's conduct constitutes a flagrant disregard for due process and the Court Order. His actions not only significantly prejudiced the Applicant, they demonstrated a callous disregard for the Law.

[4] At the time, Mr. Murphy had access to legal advice and was represented throughout the divorce proceedings.

[5] His conduct, if permitted to go without remedy, would render meaningless due process for all parties.

[6] Having stated this, the authority of the Court is limited to the remedies available within the scope of the Application in the civil process followed.

Relief Sought

[7] The Applicant seeks enforcement through Nova Scotia *Civil Procedure Rule 80.02*, which provides as follows:

80.02 (1) An interlocutory or final order may be enforced by further order, including an order for any of the following:

- (a) seizure and protection of property;
- (b) putting a party in possession of property such as an order that provides for delivery of property to a party or that requires a sheriff, receiver, or other person to remove a person from land;
- (c) authorizing a person to do an act required to be done by a party under the order, such as executing a conveyance, making a direction for transfer of a license, or authorizing access to premises, documents, or electronic information;

- (d) receivership or an injunction;
- (e) an order under Rule 88 - Contempt.

(2) An enforcement order that authorizes a person to do an act required to be done by a party may provide that the party is bound by the action of the authorized person.

[8] On June 27, 2017, Ms. Donna Murphy, the Applicant, applied to enforce the provisions of the Corollary Relief Order granted by the Decision released on **February 10th, 2015**. (*Murphy v. Murphy* 2015 NSSC 41.)

[9] The Applicant has not received her equalization payment as ordered. She seeks relief pursuant to Civil Procedure Rules 80.02(1) and 80.02(2).

[10] The Applicant seeks payment of all amounts due to her pursuant to the two Execution Orders issued on June 4th, 2015, both orders relating to the Divorce Proceedings; one relating to the balance of the Applicant's equalization payment in the amount of \$191,397.66, together with registration expenses of \$76.00; the other costs of \$26,893.75 allowed by a previous court ruling.

[11] Mr. Murphy had contact with the Process Server, knew someone was attempting to serve him, yet avoided making himself easily available.

[12] An Order for Substituted Service was issued September 12, 2017. Mr. Murphy was served; allowing this proceeding to advance.

[13] I have issued an Interim Order to prohibit Mr. Murphy from liquidating selling, transferring or disposing of any current assets in his name or held on his behalf including those referred to herein.

Historic Judicial Findings of Fact

[14] The parties began cohabiting in the early to mid-1980's. They married in September 2001, when the Applicant was 38 years of age and the Respondent was 41 years old. They separated on **January 20, 2013**. There were no children of this union.

[15] In his Affidavit of February 26, 2018, the Respondent acknowledges that their relationship lasted over 30 years.

[16] The significant dates for the purposes of this decision are as follows:

January 20 th , 2013:	Date of separation
May 30 th , 2013:	The Petition for Divorce was filed.
September 22 & 23, 2014:	Divorce Hearing
February 10 th , 2015:	Decision release date
May 15, 2015:	A Costs Order was issued.
June 4, 2015:	The two Execution Orders were issued.

[17] No appeal has been advanced regarding this decision.

[18] A Contempt Application was filed in **August of 2016**. Settlement discussions following this contempt application resulted in the transfer of title to the couple's RV to Ms. Murphy with permission to sell the vehicle.

[19] The Sheriff has collected \$3,571.01 from Mr. Murphy's bank account.

[20] The Applicant has been unable to collect on the remainder.

The Equalization chart / Property Division: Excerpt from the Decision of Jollimore J.:

[90] Having concluded that the matrimonial assets are to be divided equally, it remains to address how to do that. I return to the chart outlining the Murphy's assets. Overall, the parties have tax-free assets **worth \$416,795.33 and tax-deferred assets (RRSP and RRIF contributions) worth almost 150,000.00.** The parties shall equalize the amounts in their RRSPs and RRIFs within thirty days of my decision. **(my emphasis)**

[91] Neither party has suggested that any further adjustment is required about the household contents once Ms. Murphy removes the items she seeks from the condominium. I accept their view that this effect a suitable division of household contents.

[92] In the chart below, I have itemized those assets which aren't being divided *in specie*. The chart does not reference the 2011 RV because it is to be sold. It doesn't mention the RRSPs and RRIFs because they will be equalized on their own. Similarly, the AIR MILES are being divided at source, so I don't mention them.

Item		Value
2010 Honda Accord		14,212.47
Royal Bank of Canada joint account 2044		8,024.24
Royal Bank of Canada US\$ account 9807		0.00
Royal Bank of Canada account 5399		110,409.01
Scotiabank account 1321		23.80
GVM Holdings	Royal Bank of Canada account	39,877.56
	London Life policy 4103-8	102,015.58
	Quadras investment	64,107.40
Hastey mortgage		22,250.00
Stewart/MacKay mortgage		55,875.27
RBC reward points		Value of 108,103 points

[97] Of the assets listed in the chart at paragraph 92, all shall remain in Mr. Murphy's possession. He shall pay Ms. Murphy one-half their **value (\$208,397.66) less the sum of \$17,000.00 within thirty days of my decision.** The \$17,000.00 figure recognizes that Ms. Murphy received \$7,000.00 from the joint account in the weeks following the separation, and Mr. Murphy provided her with a further \$10,000.00.

Where is the money?

Post Separation and Pre-Decision:

- (1) Prepaid Funeral Arrangements
- (2) GVM Investment Portfolio

(1) Prepaid Funeral Arrangements 2014 (Exhibit# 5, Tab#3, pgs.45-61)

[21] On **October 28th, 2014**, Mr. Murphy prepaid funeral arrangements for himself, Ms. Murphy and his brother Daniel Murphy in the amount of **\$14,570.50**. The certificate of entitlement with Arbor Memorial Inc. is dated January 2015. This occurred a little over one month after the completion of this Divorce Hearing but before the Decision;

[22] He paid \$8,766.48 on October 31st, 2014, for his brother Daniel.

[23] On January 22, 2015, the Respondent changed the terms of this contract and voided the cremation space for Ms. Murphy. The adjustment resulted in a credit to him of \$2,443.75. (p.46)

[24] On February 18, 2015, the Respondent paid a further \$274.27 towards Daniels Murphy's cemetery arrangements.

[25] Cancellation charges of 10% as well as applicable finance charges would apply if this agreement were to be cancelled.

(2) GVM Holdings

[26] GVM Holdings is an incorporated company in which each spouse owned shares. Donna Murphy was an officer of Cable One. She was its Secretary. She was also the Secretary of GVM Holdings whose address and office were those of the matrimonial home.

[27] The divorce decision set out the court's findings regarding this asset:

[6] GVM Holdings Limited was incorporated in May 2002. Mr. Murphy said that GVM Holdings was "set up at the same time we incorporated Cable One" and that GVM Holdings "was always intended to be a holding company."

[30] Mr. Murphy ... explained that his earnings at Cable One were split between GVM Holdings, himself, Donna Murphy and a portion that belonged jointly to him and his wife....

Jollimore J. identified one source of funds as follows:

[12] Mr. Murphy said that he decided to retire in October 2006, and he sold Cable One for \$235,000.00. Ms. Murphy thought the purchase price was \$300,000.00, but she acknowledged that she didn't know the sale price "for sure". Ms. Murphy said her husband controlled the couple's finances, so she would have less awareness of the company's sale price than he would.

[28] On separation (**January 20th, 2013**) GVM Holdings owned (1) a life insurance company, (2) a bank account and (3) an investment portfolio.

[29] At the time of the divorce hearing in September 2014 Jollimore J. recognized that *the investment portfolio* had been cashed in by the Respondent. She stated as follows:

[30] GVM Holdings currently owns a bank account and a life insurance policy. When the couple separated, GVM Holdings also owned an investment portfolio.

[32] Mr. Murphy provided copies of GVM Holdings' bank account statements for the five months prior to separation. There was no activity in the account beyond the monthly debit of \$6.00, the minimum monthly fee. The account did not even earn interest. **Mr. Murphy testified that he took almost all of the money out of this account in January 2013, shortly after the separation.** The balance left in the account was less than \$275.00.

[34] I was provided with two statements for the investment portfolio. One identified that \$50,000.00 was invested or transferred into the portfolio in June 2006, described as the "inception date" for the investment, and \$362.02 was reinvested. There were transfers out of the account or redemptions of approximately \$5,800.00 and, overall, the investment's value increased by almost \$19,600.00. From the summary of performance results, it appears that the funds have not be moved from their initial allocation among five different mutual funds. **Mr. Murphy liquidated the portfolio in May 2014 and kept the proceeds.** (my emphasis)

[30] The GVM account summary for **June 11, 2014 to July 11, 2014**, shows a June 23, 2014, ATM deposit of \$63,915.69, into this account. Mr. Murphy advises this was the RRSP with GVM he withdrew to avoid creditors obtaining access to it.

[31] On **August 6, 2014**, there was a branch to branch withdrawal of **\$30,000.00**, to an RBC branch account (branch number 1154). No account number was provided. This left \$33,079.00, in the GVM account.

[32] On November 17, 2014, approximately one month prior to the Divorce hearing, there were two branch to branch withdrawals of **\$15,000.00 and \$18,000.00** respectively again branch number 1554.

[33] Mr. Murphy advises he transferred these funds to his personal RBC account and then withdrew the funds in cash.

[34] He used this income to support his life style.

[35] Mr. Murphy believes he has about \$16,000.00 or \$20,000.00 left.

Post hearing and decision

[36] On June 5, 2015 Mr. Murphy retained counsel to open discussions about the implementation of the decision and settlement options or the commencement of an appeal.

[37] Nothing further was advanced.

The Insurance Funds with GVM

[38] Jollimore J. summarizes her reasoning in concluding that the assets in GVM were matrimonial in nature.

[44] Cable One was incorporated in 2002, as was GVM Holdings. This occurred a number of months after Donna and Gerald Murphy married. Mr. Murphy said that GVM Holdings “was always intended to be a holding company”, and that he followed the advice of a financial planner in attempting to obtain optimal tax treatment of the money he drew from Cable One. Mr. Murphy testified that GVM Holdings is “just a holding company” and that its holdings are currently restricted to the life insurance policy.

[45] The evidence shows that the assets themselves, a bank account, life insurance policy and investment portfolio, were passive once acquired. They did not generate income “in an entrepreneurial sense”, to borrow the words of Justice Wilson at page 814 in *Clarke*, 1990 CanLII 86 (SCC). These assets fit comfortably within the ambit of Justice Hart’s reasons in *Lawrence* (1981), 47

N.S.R. (2d) 100, which I've quoted at paragraph 42 and which were approved by the Supreme Court of Canada in *Clarke*, 1990 CanLII 86. The assets were financed by the diversion of otherwise family funds. Their ownership was structured to reduce income taxes. The bank account was a diminishing asset, depleted every month by a monthly fee and not even earning the most modest amount of interest. The assets would be used to support the couple when needed. There was little, if any, risk associated with them and Mr. Murphy gave no evidence of business decision-making in acquiring or managing these assets.

[46] The assets owned by GVM Holdings would be matrimonial if owned by either of the spouses. Mr. Murphy's evidence indicates that he structured GVM Holdings and the life insurance policy it owned to thwart the *Act*'s objectives by having a corporation own assets so they would not be matrimonial. Subsection 4(4) of the *Act* exists to prevent exactly this arrangement.

[39] Mr. Murphy no longer has this insurance.

[40] "Exhibit 7" is a summary page of a London life policy ...4103-8 as of June 25, 2014, with GMV as policy holder with a total cash surrender value of \$102,015.58. In the decision issued February 10th, 2015, at paragraph 33 Jollimore J. states:

[33] The insurance policy was funded with the proceeds from the sale of Cable One in 2006. Mr. Murphy is insured by the policy, and GVM Holdings is the policy's beneficiary. I was provided with statements for GVM Holdings' policy on Mr. Murphy's life for 2013 and 2014. Mr. Murphy testified that the policy's proceeds, even though GVM Holdings was the beneficiary, were intended to protect his partner: his will would designate the ultimate beneficiary. He said he did this on the advice of his financial advisor because he wasn't "one hundred percent sure", in 2002, that the marriage was going to survive.

[41] I conclude the court was under the impression the insurance policy was in existence at the time of the hearing. (Para. 31 of decision)

[42] This life insurance policy was represented as still in existence and is listed in the equalization chart as a GVM asset valued at \$102,015.58. This asset was not shared with Ms. Murphy.

[43] In his discovery, he testified he cashed it out in May 2014...15.?

[44] Mr. Murphy testified before me that he had advised the Court that he cashed in his insurance policy and received the cash surrender value of \$106,000, in **May 2014**, 4 months before his divorce hearing.

[45] He also suggested the insurance company might have given him cash. He cannot recall but believes he did not deposit this cash into an account. He testified he lived on the proceeds.

[46] Post hearing, further disclosure verified that the maturity date of this policy was September 2015. On April 22, 2015 Mr. Murphy signed a loan agreement in which he asked for the maximum loan to be deposited to his bank account. Subsequently on September 9, 2015, he applied to surrender the policy and gave instructions on both the loan application and the request to surrender the policy to send a certified cheque to RO#9890.

[47] A void GVM Holdings void cheque was attached to his loan request as requested.

[48] On the 15th and 20th of May 2015, \$65,207.00 and \$40,454.00 was deposited into GVM Holdings Limited for a total deposit of \$105,686.25. \$104,686.25 was transferred by Mr. Murphy by way of a branch to branch transaction.

[49] On full surrender of the policy in September 2015, he was issued a cheque in the amount of \$2,703.51; presumably the balance of the Cash Surrender Value after loan.

[50] The timing of this surrender is critical in determining Mr. Gerald Murphy's intentions.

[51] He testified he withdrew the cash and kept it in his apartment (para.83, February 26, 2018 affidavit).

[52] In direct contravention of the decision requiring Mr. Murphy to pay to Ms. Murphy her equalization he deliberately cashed in and used the proceeds of life insurance which would have been a significant partial payment towards Ms. Murphy's entitlement to an equal division of matrimonial assets.

[53] It becomes remarkably clear as the evidence unfolded, that Mr. Murphy had access to his share of the matrimonial property **and** to Ms. Murphy's share. This access allowed him to travel, purchase assets and maintain a life style that would ultimately crumble between 2015 and 2018.

The RV

[54] Regarding the RV, Jollimore J., concluded

[13] With Cable One sold, Mr. Murphy said, “we invested the funds” realized from the sale. Ms. Murphy said they retired from the work force, planning to invest the money “to live on and to travel.” Since 2006, neither spouse has been employed. They owned a recreational vehicle and used it for lengthy trips to the United States.

[14] In 2010, they bought a larger recreational vehicle which cost over **\$138,000.00.**

[55] In the Divorce decision, the court ordered as follows:

[96] Neither party asks to retain the RV. It shall be sold forthwith, and the net proceeds from its sale shall be divided equally between the parties.

[56] Mr. Murphy had ownership and use of this RV. No attempt was made to sell this until Mr. Murphy was forced to respond to contempt allegations.

[57] After the contempt proceedings were filed Mr. Murphy authorized Ms. Murphy to sell the RV. and keep his share of the proceeds as a set off against his debt to her.

[58] After disbursements, the net proceeds of sale were **\$61,983.42.** Ms. Murphy has kept these proceeds.

Set-Off Claim

[59] Mr. Murphy advanced a set off claim for storage fees, electricity to maintain the RV pending sale, transfer costs, insurance costs and other costs paid by him.

[60] In the post hearing brief, this claim was withdrawn. Therefore, I will not address the evidence regarding his request for disbursements.

RBC Statement and Reward Points

[61] Mr. Murphy was ordered to provide a statement from RBC as to the value of the RBC awards within 30 days from the February 10, 2015 decision, and to pay ½ of the points within 45 days. This was not completed.

[62] Ms. Murphy did not receive these until the resolution of the contempt hearing was achieved.

[63] His lawyer for the contempt application advised that Mr. Murphy redeemed 111,000 points on February 20, 2013, for which he received eighteen \$50.00 gas cards and one \$25.00 card.

[64] On January 15, 2016, as part of their settlement on the contempt proceedings his lawyer compensated Ms. Murphy by sending a cheque for one half the amount of the redemption i.e. \$462.50.

Household Contents

[65] The court ordered as follows:

[93] Mr. Murphy agreed that Ms. Murphy may retain the household contents listed in correspondence from her counsel to his, her journals and certain photographs. The contents list was filed at the court on September 19, 2014 and, for the ease of the parties, a copy of the list will be provided to each of them with this decision. The list will not be attached to the decision which is publicly released: it offers little to any other reader. I order that these items, including every copy of the photographs and her journals, be made available for Ms. Murphy to collect, by 5 p.m. on Monday, February 16, 2015.

[94] Mr. Murphy shall not copy or disseminate any portion of the journals or photographs in any way. If he has negatives or digital copies, all must be provided to Ms. Murphy when she collects the household contents.

[95] Ms. Murphy may be accompanied by one other person of her choice to collect the items from Gerald Murphy's residence. Mr. Murphy may be present.

[66] Following the resolution on the contempt hearing Ms. Murphy's original journal and a thumb drive with photos and some letters were returned through counsel on January 15, 2016.

[67] Following the contempt resolution Ms. Murphy receive an amount for RBC award points and \$1,000.00, to compensate for the personal and household items she did not receive in accordance with the Court Order.

The Vacation Plan of February 9, 2016

[68] **On February 9th, 2016**, while on vacation in Mexico Mr. Murphy invested in a vacation plan with Sirenis Premium Travelers International Inc. evidenced by a contract with a ‘contract life’ of twenty-five years. Mr. Murphy is the sole owner.

[69] This contract allows him to visit 800 different resorts around the world, staying for one week at a time for a total of 49 weeks.

[70] His credit card statement for February 2016, shows the cost of this plan was **\$18,530.52**, paid by credit card on February 10, 2016 and February 13, 2016. The USD cost was **\$12,935.00 USD**.

[71] His contract address is his current address with his current partner with whom he was travelling with when this purchase took place.

[72] In Mr. Murphy’s discovery evidence in May 11, 2016, he suggested this was a vacation plan between himself and his girlfriend Linda Hoglund. (pp.10-11)

[73] In his statement of property (November 2017) he indicates the vacation plan was purchased in 2016, with his partner for \$15,000.00 and has a current value of \$10,000.00.

[74] Mr. Murphy believed it was worth \$16,000.00 Canadian (pg. 11). He testified he paid cash he had on hand with his girlfriend. He added that both he and his girlfriend contributed. The cash he said came from the cash he kept from the assets he cashed in and keeps available for himself.

[75] In court, Mr. Murphy said his discovery evidence is not accurate. He corrected his testimony to say that his girlfriend did not pay any money towards the vacation plan, however she is the beneficiary.

[76] If Mr. Murphy dies Ms. Linda Hoglund gets the vacation plan. Then Mr. Murphy admitted Ms. Hoglund has no entitlement to it.

[77] Mr. Murphy admits that his various estimates may or may not be accurate. He testified that the values in both his statement of property duly sworn and his discovery were “off the cuff” responses.

[78] Ms. Hoglund testified she did not pay for this asset and was essentially a bystander when it was purchased.

[79] Clause R in the agreement sets out *a right to transfer membership* for a fee of \$599.00 USD providing the membership is paid in full.

Trips/Travel

[80] **In 2015**, Mr. Murphy vacationed with a friend in the Dominican Republic for a week to 10 days. He estimates this cost was \$800.00.

[81] Two weeks after that he visited Cuba for 7 days at his estimate at a cost of \$700.00.

[82] These trips he says were taken before the Corollary Relief Judgement was issued and booked two months in advance. He used the funds from the sale of the Matrimonial Home to finance the trips.

[83] He traveled to Mexico in February of 2016, paid for with cash from his life insurance policy (estimation: \$1,300.00 -\$1,400.00).

[84] It was on this trip that he purchased the vacation plan.

[85] In 2017, Mr. Murphy had an all-expense paid trip to Porto Vallarta, Mexico with his current partner. This was a trip he gained flowing from his purchase of the vacation plan.

[86] In his statement of property, he said he sold his furniture to Ms. Hoglund in exchange for the ticket. He admits later he did not sell all his furniture.

[87] Ms. Hoglund in her affidavit confirmed that Mr. Murphy sold some of his furniture to her (one chaise lounge, one coffee table, and two end tables for \$900.00), to put towards the purchase of a return airfare to Puerto Vallarta, Mexico in April 2017.

Health

[88] In his February 2018, affidavit Mr. Murphy said he was diagnosed with COPD, Emphysema and Mesothelioma.

[89] An amended diagnosis was made after Workman's Compensation requested a second opinion. The second diagnosis was said to be Asbestosis.

[90] Mr. Murphy was awarded \$15,676.77.00, in the 2014 tax year from Workman's Compensation because of the diagnosis of Asbestosis and in compensation for the asbestos claim which was based on the work he did in the industry that exposed him to Asbestos in the 1980's.

[91] He testified he spent this award.

[92] He does not expect to receive any other funds from Worker's Compensation.

[93] On June 25, 2014, Mr. Murphy received a letter from Worker's Compensation indicating they referred his name to a US law firm who are handling a class action law suit regarding persons affected by Asbestos.

[94] Mr. G. Murphy testified he has not received any correspondence from them; made no attempt to contact them since 2014 and could not remember the name of the law firm.

[95] Mr. Murphy testified he has COPD. Other than puffers he has no active treatment such as chemotherapy, radiation etc.

[96] No medical evidence was tendered to support his current state of health.

[97] Mr. Murphy justifies his expenditure on trips because he believed his diagnosis of Mesothelioma would shorten his life. In Mr. Murphy's February 26, 2018, affidavit he said at the time "he believed he had two years to live".

[98] The chronology of events confirms his admission that he was indeed knowingly spending Ms. Murphy's share of the division of assets.

Cash

[99] In (Paragraph 4) of the divorce decision the Court noted that Mr. Murphy on occasion kept large amounts of cash on hand.

[100] (Paragraph 81) of the divorce decision references Mr. Murphy's testimony wherein he admitted having \$60,000.00, in cash in the RV. With this he advised he paid off about \$50,000.00, in personal debts. The Court noted there was no evidence to verify these payments.

[101] At various times in this proceeding Mr. Murphy spoke about how much cash he kept on hand. He said in Discovery he had cash on hand (between \$10,000 and \$20,000) in the safe in his apartment.

[102] In Mr. Murphy's November 9, 2017, Statement of Property, he indicates there is \$10,000 left. In his February 26th, 2018 affidavit (Para 162) he says he has approximately \$8,000.00 left.

[103] There is no accurate evidence of how much cash Mr. Murphy retains.

Income

[104] Mr. Murphy claims his investments and income were very low at or around the time of his separation.

[105] In contrast, the court found the parties "have tax-free assets worth \$416,795.33 and tax-deferred assets (RRSP and RRIF contributions) worth almost \$150,000.00. "at the time of the Divorce Hearing.

[106] Mr. Murphy's November 9, 2017, Statement of Income prepared for this proceeding shows an annual income of \$11,172.00, coming from monthly payments of \$931.00 from the two mortgages listed in the equalization chart. He lists his expenses in November 2017 as \$1,430.00.

[107] Mr. Murphy, does not include in his income the cash he has in his possession.

[108] His expenses each month exceed his declared income.

Income Tax Statements

[109] Mr. Murphy's 2014 income tax return appears to be the last evidence we have of Mr. Murphy declaring income. His line 150 indicates an income of \$15,676.77. This *appears* to be from Workman's Compensation as the lump sum he received although he can't remember what it represented.

[110] Mr. Murphy's 2015 and 2016 income tax returns show no declared income in spite of the receipt of loan repayments.

Employment

[111] Mr. Murphy, advises he is not really looking for work; not out "beating the pavement", but he has talked to people close to him.

[112] He had a vague recollection of a conversation with someone over drinks. He had little information to shed light on his conversation with his cousin.

[113] Mr. Murphy spoke to no one else about a job.

Mortgage Lending Income Source

[114] Both before and during the marriage Mr. Murphy advanced money by way of second mortgages to commercial enterprises across Canada.

[115] Mr. Murphy testified he has some income because of commercial loans between 2005 to the current date he extended through a mortgage broker and currently, a licensed real estate agent, Sharon Kennedy.

[116] There is evidence of several commercial mortgages prior to separation. There is evidence of requests for a payout amount but no releases indicating actual payout.

[117] Mr. Murphy indicates that he no longer engages in this business and has only two mortgages in progress.

[118] As it relates to Ms. Kennedy's testimony, she is not aware of any other mortgages in existence other than the two mentioned here.

The Stewart Mortgage

[119] One such loan is to Gloria Stewart (a Commercial Hotel Property), Ms. Kennedy continues to administer the Stewart mortgage.

[120] Mr. Murphy loaned Ms. Stewart \$ 60,000.00.

[121] Mr. Murphy thought there was \$45,000.00, owing on this debt. His statement of property also places the balance owing at \$45,000.00.

[122] Ms. Kenney produced an amortization schedule which indicates that there is \$ **57,896.94**, as of March 1, 2018.

[123] I accept Ms. Kennedy's statement as the correct version as she administers the payments. Mr. Murphy's evidence on details has consistently been vague and unreliable.

[124] Ms. Stewart pays \$731.00 monthly; of that Mr. Murphy receives \$631.00 per month regularly. In 2010, he received \$5,848.00; in 2011 - \$8,772.00 and in 2012 - \$8,413.00 and in 2013 - \$6,309.00.

[125] Ms. Kennedy testified that Mr. Murphy called her in late 2017, enquiring whether this mortgage could be paid out. She advised him that the mortgagee was not likely in a financial position to pay this out at this time.

The Hastey Mortgage

[126] This second mortgage between the Hastey's and Mr. Murphy is dated February 15, 2005, secured against the property at 1 Nancy Street, Miramichi, New Brunswick.

[127] The principle amount was \$22,250.00, at 14.25% for a term of one year and a closing date of February 28, 2005. Sharan Kenny was the mortgage broker.

[128] The term of this agreement is open. Mr. G. Murphy received \$4,000.00, in early 2015 and very little since. He testified he rarely receives the \$300.00, from the Hastey mortgage. He indicates the mortgagee is chronically in default. He has not followed up for repayment.

[129] An extension agreement was entered into with a new maturity date of March 1, 2010, with an interest rate of 12.99%. The monthly payments are \$ 344.87, with a new total owing of \$23,418.81.

[130] In Mr. Murphy's Statement of Property, he indicates the balance is \$15,000.00.

[131] Ms. Kennedy no longer administers the HasteY mortgage. She was unsuccessful in obtaining regular payments. She gave Mr. Murphy the name of a New Brunswick lawyer to make application for power of sale to recover his money.

[132] Mr. Murphy took over and has all payments redirected directly to him. From 2010, to the present date the monthly payments are deposited to his account.

[133] These payments are now deposited into Mr. Murphy's brother's bank account. Mr. G. Murphy holds the card.

[134] The bank statements provided in evidence between March 2017, and September 2017 show consistent income from the Stewart mortgage of \$631.00, monthly with one payment of \$300.00 apparently from the HasteY mortgage.

RRSPS

[135] In the decision (para.19) the Court itemized four investments with London Life. Three of these are in Ms. Murphy's name; the fourth in Mr. G. Murphy's name.

[136] As of January 22, 2013, their total value was \$129,865.83. The one in Mr. G. Murphy's name was valued at \$29,551.17.

[137] No transfer or rollover occurred with any of the Investments.

Bank Accounts

Gerald Murphy's Accounts

[138] Mr. G. Murphy's banking privileges with Scotia Bank, were terminated by letter dated March 7th, 2016, his balance on the card was \$5,863.20.

[139] His various Scotia Bank credit card privileges were terminated as well as of April 1, 2016, his balance on his Visa was only \$235.87.

[140] His own RBC account was in arrears of \$18,287.00, as of March 5, 2016.

[141] Once his accounts became subject to the threat of creditors, including Revenue Canada, Mr. G. Murphy stopped using his own account. He now uses the account set up by his brother Daniel Murphy for himself into which the Haste and Stewart Mortgages are deposited.

[142] Mr. Gerald Murphy, the Respondent, admitted having his brother open an account in his brother Daniel's name for Mr. Gerald Murphy's benefit.

[143] The Respondent's brother, Mr. Daniel Murphy, testified he has two accounts. His CPP and other pension go into one of his accounts and Mr. Gerald Murphy's income is deposited into the other.

[144] Mr. Daniel Murphy testified he set up the account because he wished to assist his brother during the divorce to protect his money. He cannot remember when the account was opened.

[145] The bank records indicate an account existed in his name for his brother Gerald Murphy in at least March 2017, and continued into 2018.

[146] Mr. Daniel Murphy has a vague memory on some dates and details. He advised he had a stroke. He was shown the bank statements to assist to clarify his testimony.

[147] Mr. G. Murphy confirms a regular \$631.00, is a monthly payment from Ms. Stewart and regular payment against the RBC credit card and health premiums.

[148] Mr. D. Murphy indicates sometimes he transfers small amounts from one account to the other if he borrows from his brother Mr. G. Murphy. Mr. D. Murphy, identified almost all debit withdrawals and testified these all went to himself Daniel Murphy, not Gerald Murphy. This evidence was subsequently contradicted.

[149] The total credit card payments from this account from August 2017, to current date are \$3,931.47. Mr. Daniel Murphy testified that when Mr. Gerald Murphy wants money he comes to him.

[150] He later corrected this testimony to indicate that he gives Mr. G. Murphy permission to have the bank card and use it.

[151] He was unable to identify a \$300.00, deposit which Mr. G. Murphy later identified as coming from Mr. Hastey.

[152] Mr. Daniel Murphy testified he pays his own RBC credit card and (Gerald's) health insurance through this account. The credit card seems to be used for Mr. Gerald Murphy's purchases. He also led the court to believe he was responsible for all the debits and credits except for the loan payments.

[153] In January 2018, there is a cash withdrawal and Mr. D. Murphy, admitted some of it went to Mr. G. Murphy.

[154] Mr. Gerald Murphy has direct access to this account and at the time of the hearing possessed the card for this account.

[155] Mr. G. Murphy, the Respondent, testified that the deposits were from mortgage payments and the payments were made against a credit card held in Daniel's name for Mr. Gerald Murphy's benefit.

[156] Thus, payments on the insurance, health and credit card were made for the Respondent's benefit.

[157] In his affidavit evidence Mr. Murphy testified that his brother gives him cash from the loan payments after he had paid the cost of Mr. Murphy's medical insurance, however in his in-court testimony Mr. Murphy said he has access to the card and the account directly.

[158] At (paragraph 132) Mr. Murphy testified the RBC Visa currently held is in his brother's name is no longer in use. His in-court testimony contradicted this and indicated he uses the credit card and makes payments on it regularly.

[159] Mr. G. Murphy advised his money stays in this account and that no one else receives this money on his behalf, he has no credit cards although the bank account in his brother's name which contains the money he receives from the loans with Ms. Stewart and Mr. Hastey.

[160] This was an effective manner for Mr. Gerald Murphy to evade detection and to protect his funds from Ms. Murphy, and others.

[161] Mr. Daniel Murphy did not have any current or accurate information regarding his brother's health, finances or living arrangements, still erroneously believing his brother suffered from Mesothelioma.

Expenses

[162] During Discovery in May 2017, Mr. G. Murphy, testified he paid at least \$1000.00 monthly in food expenses eating at restaurants (Discovery: Pg., 46, line 25, pg. 47, Line 2). The balance he spent on food purchased for consumption at home. He paid his health care consistently, at that time, his apartment was \$1575.00 monthly. The lease was in his name. At that time, he testified he was still using the funds from his cashed in insurance policy.

[163] In his discovery evidence, he is unclear on his other expenses although he indicates he pays nothing towards tenant insurance, heat, electricity, water or cable.

[164] He moved into an apartment with his girlfriend in June 2017. Mr. Murphy gives her \$900.00 a month for rent.

[165] In his November 9th, 2017, Statement of Expenses his monthly expenses are shown as \$1,430.00. He gives Ms. Hoglund \$100.00 a month for food, pays \$82.00 for his cell phone; his drug costs are \$20.00 more than before. Mr. G. Murphy, also pays against a credit card as evidenced in Mr. Daniel Murphy's account and the medical insurance which he believes is coming out of his GVM account.

[166] Mr. G. Murphy, spends about \$300.00-\$400.00 a month on gas and \$150.00 on average a month on maintenance and repairs and another \$150.00 a month on licensing, registration and insurance and \$127.00 a month on his medical plan.

[167] Mr. G. Murphy, claims his income is generally \$621.00, a month with a rare payment of \$300.00, from Mr. Hasteley.

[168] He advises that his girlfriend pays all other bills.

Mr. Murphy's Partner

[169] Ms. Hoglund testified she is employed and living with Mr. Murphy since June of 2017. She provided financial disclosure. She confirmed she did not hold properties for Mr. Murphy or receive any transferred assets.

[170] She pays the cable, internet electricity and insurance expenses. She appeared unaware of his current state of health with accuracy, and also unaware of his financial situation or activities.

[171] I have no reason to disbelieve Ms. Hoglund. I cannot conclude she is involved with Mr. Murphy's duplicitous behavior.

Statement of Property

[172] Mr. Murphy's Statement of Property itemizes his assets to include the Honda, the two mortgage loans, a vacation plan and cash on hand which varies in amount depending on when you ask him.

[173] At Discovery, he testified he had between \$10,000.00-\$20,000.00 in a safe in his apartment; in his Statement of Property in November he claimed he had \$10,000.00.

[174] However, the Statement of Property indicates that there are no assets in this account.

[175] Mr. G. Murphy indicates his cash it is mostly spent.

[176] Mr. G. Murphy still pays for a cell phone, gas and insurance. He advises that he will not be able to get a new car until he clears up his debts. Yet, he's not looking for work.

Visas

[177] Mr. G. Murphy had a Scotia Bank Visa, an RBC Visa and an American Express, all of which he lost for non-payment.

Debts

[178] Mr. G. Murphy lists 2 debts, one to the Scotia Bank and the other Royal Bank. As of August 2016, he owed Scotia Bank \$ 6,718.00 and Royal Bank \$16,585.69.00 as of November 11, 2016. He is not paying these debts.

[179] Mr. G. Murphy testified he tried four different bankruptcy trustees to file for bankruptcy and has been unable to proceed.

Weighing Mr. Murphy's Intent to Abide by Court Order

[180] Mr. Murphy acknowledges he cashed in assets to protect them from his creditors (Paragraph: 235, of the February 2018, Affidavit).

[181] His brother Daniel Murphy testified he opened an account for his brother, the Respondent, to permit the Respondent to safely deposit his cash and specifically to avoid Ms. Murphy demands.

Contempt Proceedings

[182] Ms. Murphy commenced contempt proceedings and provided Affidavits dated August 31, and November 24, 2015 and August 5, 2015.

[183] She had conversations with Mr. Murphy in which he told her he was not going to pay her. After the Sheriff attached the \$3,571.01; she advises he said to her "good luck getting more".

[184] Mr. Murphy admits that between separation and the decisions he depleted his bank accounts, specifically the RBC account which held the proceeds of the sale of their matrimonial home. He testified the proceeds were \$110,409.11. He testified he spent these funds.

[185] Mr. Murphy had formal notice by the Petition for Divorce in May 2013 that Ms. Murphy was seeking a division of assets.

[186] At separation he started depleting the assets. He continued to deplete the assets even after the decision and after publication of the decision.

[187] Mr. G. Murphy withdrew the funds in cash and kept large sums in his apartment. He said he was concerned that Revenue Canada would attach the funds if they were left in the bank. He withdrew these funds in January 2013.

[188] Mr. G. Murphy cashed in his life insurance policy and spent the proceeds.

[189] Mr. G. Murphy did not share the proceeds with Ms. Murphy.

[190] He willingly and deliberately evaded sharing the proceeds of these assets or abiding by the Order of the Court. He kept the assets and enjoyed their benefits.

RRSPS

[191] The RRSP's in the name of both have not been transferred in accordance with the Decision of the Court.

[192] Ms. Murphy retained her RRSP's. I assume his RRSP was in Mr. Murphy's control and remained in his control.

[193] At the divorce hearing different values were identified for the September 2014, date with a total value of \$144,922.39. I cannot account for the difference of \$5,078.00, to bring this value to \$150,000.00(see Paragraph 90 of the Divorce decision and Paragraph 20 of this decision)

Employment Income as a Source of Recovery

[194] Mr. Murphy has been retired since 2006 (at 46 years of age) when he sold his business of Cable One Communications to Eastlink. GVM Holdings Ltd., was a holding company that he said lapsed when he sold his company.

[195] No medical records were tendered to support an inability to be gainfully employed.

[196] Mr. Murphy has, by his own admission, made little to no effort to find employment.

Conclusion

[197] The Divorce decision concluded that there were matrimonial assets of \$416,795.23.

[198] An equal division following the courts directions results in \$191,397.66 owing to Ms. Murphy. In addition, there is a costs award of \$26,969.75.

[199] The total of these orders is \$218,368.00, rounded plus registration fees of \$76.00.

[200] Mr. Murphy's non payment of Ms. Murphy's share of the division of assets did not result from hard times.

[201] By admission Mr. Murphy engaged in activities that were intentionally designed to cash in and convert his assets to hide them and make them unavailable to his creditors. He spent what he wanted to and preserved for himself and deliberately avoided his creditors including his wife of over 25 years.

[202] He willfully failed to abide by the Corollary Relief Order of May 2015. He testified he intentionally avoided creditors.

[203] I am satisfied on the totality of the evidence including the confirming evidence of Mr. Murphy, that since the separation he intentionally dissolved all Matrimonial Assets within his control to avoid any sharing or payment to Ms. Murphy or his creditors.

[204] I am satisfied he retained the benefit of these assets and spent them on himself and his lifestyle. His deliberate actions thwarted the Court Order.

[205] Between separation and pre-and post-divorce hearing to the settlement of the contempt proceedings, Mr. Murphy also kept for his own benefit the RV, (not valued in the chart) which was to be sold immediately. He retained and enjoyed the use of the Honda as permitted in the Judgement.

[206] He knowingly failed to pay the equalization payment to Ms. Murphy while at the same time spending some if not all the cash resulting from the sale and realization of the assets, and by his own conduct postponed and hindered his ability to comply with the court order regarding payment of the equalization payment.

[207] Until forced by contempt proceedings he failed to permit sale of the RV or transfer personal property or the RBC points as directed.

[208] The Respondent shut down his bank accounts.

[209] According to the evidence Mr. Murphy kept and used for his own benefit at least \$338,670.00, in assets as noted in the Courts equalization chart at (Paragraph 92).

[210] In June 2014, he cashed in the GVM Investment in the amount of \$64,091.25.

[211] In the 2014 tax year he also had the benefit of the Workman's Compensation cheque of \$15,676.77, to live on.

[212] In September 2017, he cashed in the GVM insurance investment, kept the proceeds for his use, the entire \$106,000.00.

[213] Mr. Murphy continued to receive and use the monthly payments on the two mortgages (such as they were).

[214] Mr. Murphy used his RRSP in the amount of \$29,551.17.

[215] In February 2015, Mr. Murphy prepaid funeral arrangements for himself, his brother and Ms. Murphy, without her consent, in the amount of \$14,570.00, with an additional \$274.27, although he amended the arrangements and reduced them for Ms. Murphy subsequently obtaining a credit for that which was paid.

[216] In February 2016, he bought a vacation plan for \$18,530.52 CAD.

[217] Mr. Murphy has cash on hand although he has been evasive about the exact amount remaining.

[218] Recently Mr. Murphy sought information to determine whether he could call in for payment of the Haste and Stewart outstanding mortgages.

Inability to Pay

[219] At the time the parties separated Mr. Murphy had the means to pay the equalization owing to Ms. Murphy.

[220] His inability to pay between the Separation and Divorce judgement if any arises from his own conduct.

[221] Mr. Murphy suggests that his income is so meagre now that he should be exempt from seizure to sustain himself.

[222] He has not accounted for all the assets including cash he converted. He has not provided any evidence to satisfy me that he is without means.

Credibility

[223] Mr. Gerald Murphy's testimony from the discovery and in court was vague. It conflicted with his girlfriend's and his brother's testimony.

[224] Mr. G. Murphy admits there are discrepancies between his discovery and his in-court statements. He said his answers at discovery were "off the top of his head".

[225] Mr. Murphy explained that when he was answering under oath at the Discovery, and in his sworn Statements of Income, Expenses and Property he was giving "ball park" answers not meant to be considered accurate.

[226] Mr. Murphy took neither his oath in this proceeding or at the discovery or on the various financial documents he had prepared for this proceeding seriously.

[227] Before allocating a value or drawing a conclusion about his testimony it would be deemed unreliable unless verified by evidence from other sources.

Remaining Assets

[228] If the remaining assets are not protected from Mr. Murphy's actions Ms. Murphy will never obtain her share.

[229] Her costs and efforts at collection have been considerable and lengthy.

[230] There may be other assets or cash that exists either in the hands of others for his benefit or in an undisclosed account. Hiding assets and cash would be entirely consistent with past admitted behavior.

[231] The evidence supports a conclusion that the probability of Mr. Murphy retaining assets pending resolution of this proceeding is minimal.

[232] Allowing Mr. Murphy to retain ownership may well result in a further dissolution or sale of assets without any payment to Ms. Murphy, and will irrevocably prejudice her and render realization of her entitlement impossible.

[233] Pursuant to Rule 80 of the Nova Scotia Civil Procedure Rules I therefore directly authorize The Sheriff for the Province of Nova Scotia to execute all

documents necessary as drafted by counsel for Ms. Murphy to forthwith effect the transfer of any remaining assets held in the name of Mr. Gerald Murphy or held in the name of another for his benefit and to transfer all his right, title and interest in such assets to the sole ownership and benefit of Ms. Murphy together with all the powers and privileges associated with the title of owner.

[234] This includes the matrimonial assets noted in the equalization chart i.e., the car (Honda), the assignment of the Hastey and Stewart mortgages and subsequently purchased assets including but not limited to the Prepaid Funeral Arrangements, the rights associated with ownership in the Vacation Plan and available cash in his apartment.

[235] In accordance with Rule 80.02 the Sheriff shall seize possession of the assets with all the powers inherent in sec 80.02, including the removal of the asset where possible and the physical transfer of the asset or legal title in the asset, where it cannot be physically transferred, to Ms. Murphy.

[236] The asset shall be valued by Ms. Murphy in a manner that can be verified in a subsequent accounting before the Court at a date that will be set by the Court Scheduler.

[237] The proceeds of the RV at \$61,983.42; and that which the Sheriff collected \$3,571.01 net of fees and disbursements shall be set off against the debt owed.

The Vacation Plan

[238] The vacation plan shall be transferred to Ms. Murphy and the value of the plan or refund if any shall be net of fees and cost of sale. The rights and entitlement of Mr. Murphy shall be transferred to Ms. Murphy by documentation provided by Ms. Murphy and that shall be served on the Vendor or Service Provider.

2010 Honda Accord

[239] The car remained in Mr. Murphy's possession since the separation. He uses it to drive himself and his brother to medical appointments. Although, he has indicated he has significant medical issues no Doctor's reports were filed and no evidence of extensive medical care required.

[240] At the Divorce hearing the value of the Honda was found to be \$14,212.47. There is no evidence before me that would allow me to calculate its current value. There is no loan with the vehicle (Discovery evidence page 29-line 23, Answer: page 30 line 2).

[241] The Applicant wishes to have the Honda sold and the proceeds after disbursements used to pay down Mr. Murphy's debt to her.

[242] The value of the car shall be the sale value. It shall be quantified and set off against the remaining indebtedness.

[243] The ownership in the Honda shall be transferred by the Sheriff to the Applicant for sale or disposition as she wishes.

[244] Ms. Murphy shall have an independent third party value the Honda for the subsequent accounting that shall take place. If she sells the car immediately to an arm's length buyer at a fair market price, the sale price shall be the determined value for set off. If she sells the car to a non-arm's length buyer (or retains the car) she will have to account for the sale price.

Prepaid Funeral Arrangements

[245] The Sheriff shall transfer ownership of and all rights, title and interest in the pre-paid funeral arrangements in the name of Mr. Murphy to Ms. Murphy. Valuation at the date of transfer shall be net of all fees and charges. This shall be set off against the remaining balance.

[246] In the event a portion of this asset is not easily transferrable such that any engraving has already taken place, Ms. Murphy shall have an option to receive and sell that portion or refuse to accept that portion in partial payment of the equalization payment and costs owing on this debt.

The Mortgages

[247] I designate and authorize the Sheriff to transfer and assign the right and entitlement of Mr. Murphy to Ms. Murphy and to ensure all acts are done to assign these mortgages to Ms. Murphy for collection as she determines appropriate. They

shall be valued at the date of transfer and assignment and that value set off against Mr. Murphy's indebtedness.

[248] Both the Hasteley and Stewart/McKay mortgages as referred to in the evidence, and shall be assigned by the Sheriff to Ms. Murphy for collection or as income as she decides.

[249] The value as decided by the evidence shall be what is realized by collection of the debt minus fees, charges and disbursements aiding collection.

[250] Ms. Murphy shall provide to the Sheriff all documents necessary to affect this assignment.

[251] If the evidence is correct, however accurate it may be, the Hasteley mortgage may be difficult to enforce. Ms. Murphy may waive entitlement to this asset. If so the value shall not be set off against the remaining debt.

[252] The monthly payments or net payout shall be credited against the equalization debt as payment is received.

RRSP's

[253] The RRSP's and RRIF's were to be equalized on their own.

[254] Any RRSP's or RRIF's in the name of Ms. Murphy which have not yet been transferred to Mr. Murray shall be and remain the sole property of the Applicant with Mr. Murphy's share of the total such assets identified in the Divorce Hearing applied to set off Mr. Murphy's indebtedness to Ms. Murphy.

[255] This shall include the London Life policies; the Spousal RRSP with policy number ending in ...6055-6 valued at \$61,941.73 as of January 22nd, 2013. the policy ending in 8485-2 with value of \$11,630.62, and policy with number ending in 3432-8 valued at \$26,742.31 as of January 22, 2013.

[256] If I use the values set out in the chart at (Paragraph 19 of the decision), one half of the value set by Jollimore J would be Mr. Murphy's share.

[257] Mr. Murphy retained his own RRSP which must be subtracted from his half. That figure shall be set off against Mr. Murphy's debt to Ms. Murphy.

[258] Any interest arising out of these investments that would otherwise be the property of Mr. Murphy, had they been transferred immediately after the divorce, shall remain the property of Ms. Murphy. The interest that accrued on Mr., Murphy's share shall be quantified and used to further set off Mr. Murphy's debt to Ms. Murphy.

[259] In addition, had the RRSP's been transferred as ordered, Ms. Murphy would not have been responsible for the tax on Mr. Murphy's share.

[260] She shall not bear responsibility for his share of the taxes now. Counsel will agree on a figure representing what he should have received and for which he would ultimately pay the tax. The value of what she keeps and receives will be net of that figure.

Cash

[261] Mr. Murphy indicated that he retains some cash of an unknown amount in his apartment. The Sheriff should be notified of this for execution purposes. The Sheriff shall have the authority to enter the premises rented by Mr. Murphy to search for the cash he testified he retained in his apartment.

Collection Fees and Disbursements

[262] I have no evidence to allow me to calculate cancellation fees, Sheriff's fees and other expenses associated with the transfer and liquidation of assets.

[263] I do not include these or any fees resulting from the execution of this order as a set off against what Mr. Murphy owes because they were caused by his conduct and within his control.

[264] When the assets are assigned or transferred to Ms. Murphy the value given will be net of these fees.

Class Action Suit

[265] Mr. Murphy offers to pay out Ms. Murphy's entitlement when he receives proceeds from a class action suit. This offer came from Mr. Murphy to compensate Ms. Murphy for her losses given he spent her share of the proceeds of the division of matrimonial assets.

[266] He provides no details of the class action.

[267] He testified he did not follow up on this letter and made no further enquiries. He can't remember the firm handling the claim.

[268] The class action recovery may not have been considered a matrimonial asset. However, he appears to offer her a share in this to compensate for her loss resulting from his spending her share of the matrimonial assets.

[269] The court accepts his agreement to pay the balance of any of the debt owed to Ms. Murphy out of the proceeds of settlement and a separate consent order attaching these proceeds shall be drafted by Ms. Harris to secure such payment.

[270] However, there is no evidence that suggests a hope of recovery, nor evidence supporting any movement on this claim.

[271] Mr. Murphy shall keep Ms. Murphy informed of any communication from counsel or any settlement due, as a result of his involvement if any in a class action suit until he has paid in full his debt to Ms. Murphy arising out of the decision of the court in his Divorce Hearing.

Accounting

[272] Once these funds have been collected they shall be accounted for and to the extent that Ms. Murphy continues to remain entitled they shall be paid over to her.

[273] The balance if any shall be held and the matter shall return to the court for an accounting of the proceeds.

[274] This matter shall return to the court for an accounting of the proceeds of assignment, sale and transfer of the assets named herein at a date to be set by scheduling together with the parties and their counsel if any.

[275] Two weeks in advance of the return date Ms. Murphy shall file with the court and Mr. Murphy an affidavit setting out the balance owing and detailing each asset, its value if sold or retained at the time of transfer.

[276] One week in advance of the hearing date Mr. Murphy shall provide his affidavit in response.

[277] In the failure to comply with this order or in the event, Mr. Murphy breaches this Order either by liquidating any of the assets mentioned herein or converting or hiding any remaining cash, he may be subject to Contempt Proceedings with all the Remedies Inherent in these Proceedings including Incarceration for deliberately breaching a Court Order, and converting the value of the Matrimonial Assets into cash for his own benefit.

Incarceration as a Remedy

[278] This is not a contempt proceeding. The burden of proof here is on the balance of probabilities.

[279] By his own admission, Mr. Murphy diverted matrimonial assets to avoid payment to Ms. Murphy. He engaged his brother to assist him in establishing an account and credit to permit him to access credit and his income after shutting down his back accounts.

[280] I am left in no doubt as to his intent to circumvent a court order and to dispose of the assets in dispute both after separation, during the proceeding and post-Divorce and Corollary Relief Order.

[281] It appears to be settled law that imprisonment for default of payment of a debt not relating to a support order does not permit incarceration of the defaulting party even though incarceration is contemplated by Rule 80 of the Civil Procedure Rules.

[282] However criminal contempt is available as a remedy once breach is established and the applicable burden of proof is satisfied.

[283] In *MacNeil v. MacNeil*, 1975 Carswell's NS 30 the court discussed criminal contempt as a remedy where the breach arises out of a default of payment of a debt set out to disregard the authority of the court.

26 Mr. MacNeil, in the argument which he presented in person, pointed out that the committal order recited that the court was satisfied that he had "been guilty of contempt of Court in that he did not pay the Fifty Thousand Dollar (\$50,000.00) lump sum ordered by the Trial Judge as maintenance and support for Marguerite Shirley MacNeil, forthwith"; and then ordered that "for his contempt" he "be committed to the County Jail in Sydney, County of Cape Breton and Province of Nova Scotia to be there imprisoned until the contempt has been purged or this

Court further orders". He emphasizes that this in terms is, in his submission, imprisonment for debt, which is prohibited except under The Collection Act, R.S.N.S. 1967, c.39. Section 3 (which has been in effect in essentially the same form since s. 1 of The Collection Act of 1894

— see Ritchie J. in *Loasby v. Egan* (1895), 40 N.S.R. 74 at 77) provides:

3 Subject to this Act, no person shall be arrested or imprisoned for default in payment of any judgment ordering or adjudging the payment of money.

27 The word "judgment" includes an order for maintenance by the old court for divorce and matrimonial causes, and is defined by s. 1(f):

(f) 'judgment' means any adjudication, order or decree directing the payment of money whether debt, damages, alimony, maintenance or costs obtained in any court in the Province including the Court for Divorce and Matrimonial Causes, or before a stipendiary magistrate or justice of the peace.

28 Contrary to views sometimes loosely expressed, imprisonment for disregard of a Collection Act order requiring payment of a debt by instalments is still possible, where the debtor is able to pay and fails to do so, subject to review by a County Court Judge: s. 30A (as enacted by 1969, c. 30, s. 1). Mr. MacNeil's point, however, is that The Collection Act procedure was not followed to imprison him and that s. 3 prohibits any other procedure and is not overridden by the Civil Procedure Rules.

29 This argument overlooks, however, that the contempt alleged and found by Hart J. to have been committed was not mere default in payment of an order for payment of money, but a defiance of the court by manipulating, concealing and removing assets from the jurisdiction so as to make execution impossible.

30 Hart J. in his decision of 23rd September 1975 had this to say about the securities [ante pp. 358-59, 360]:

The evidence reveals that on 5th December 1974, immediately after the decision of Jones J. had been rendered, Mr. MacNeil proceeded to the Canadian Imperial Bank of Commerce on Charlotte Street in Sydney and removed from the bank approximately \$65,000 worth of securities registered in his name. He subsequently took these securities to Newport News in the state of Virginia, United States of America, and placed them in the Bank of Virginia in what he says is a form of trust for his two younger children ...

At the hearing, Mr. MacNeil explained that all of the \$65,000 worth of securities formerly left for safekeeping at the Canadian Imperial Bank of Commerce in Sydney, with the exception of about \$2,000, was money that had been left to him by his father, in trust, to provide for the education of his two younger children. He felt that he was justified in removing these funds from the country because he had no way of establishing this trust, which was entirely verbal. I am satisfied, however, from the evidence as a whole that no such trust exists. There was

nothing in his father's will to reveal such an intention and there was no mention of a trust when the divorce proceeding took place before Jones J. It was only after it became apparent to Mr. MacNeil, who is a lawyer, that he was going to be faced with a judgment for \$50,000 for his wife's maintenance that the idea of a trust arose. In my opinion this was merely a trust of convenience in the mind of Mr. MacNeil, which would justify him in removing from the jurisdiction of the court assets which had been declared to be his during the trial. They were registered in his name and were mixed with some of his own personal funds. When they were removed quickly from the province no effort was made by Mr. MacNeil to separate what he now claims to be his personal funds from the alleged trust funds. In my opinion these funds remain the property of the petitioner, and there is nothing in his testimony which satisfies me that he does not still exercise control over them even though they have been deposited in an American bank. He claims there are no documents to establish the trust that he alleges he had set up in Virginia and, in my opinion, no such trust exists.

31 The learned judge referred to the probable difficulty in converting other assets quickly into cash, except by borrowing against them. Real estate was held by John MacNeil Limited, a holding company in which Mr. MacNeil, as of 4th December 1974, held one share and two of his older children held two shares. The judge pointed out that [ante p. 359]: On 7th December 1974, a company meeting was held and five additional shares of John MacNeil Limited were allotted to members of his family.

32 He concluded [ante p. 361]:

From all of the evidence I am satisfied that at the time the decree nisi was issued the petitioner was in a position to pay the \$50,000 lump sum award forthwith. I am further satisfied that he remains in that position today. I appreciate that his ability to meet the periodic payments of \$500 a month may have changed since the divorce as a result of the taking of his regular salary by the income tax authorities, leaving him with only the income from the mortgage on which to live. This has, however, in no way affected his ability to make the lump sum payment. **The court is normally reluctant to issue contempt orders for the enforcement of money judgments and does so usually as a last resort. The valid orders of the court must, however, be enforceable, and it has been shown here that other methods of enforcement have been fruitless because of the activities of Mr. MacNeil.... The things that he has done lead me to the unavoidable conclusion that he intends to avoid the effect of the court's order by any means at his disposal.**

35 The contempt committed was clearly criminal contempt and not civil contempt.

9 Hals. (4th) 3, para.

2, states:

Contempt of court may be classified either as (1) criminal contempt, consisting of words or acts obstructing, or tending to obstruct or interfere with, the administration of justice or (2) contempt in procedure, otherwise known as civil contempt, consisting of disobedience to the judgments, orders or other process of the court, and involving a private injury.

36 The act of removing the assets from the jurisdiction was an act "obstructing, or tending to obstruct or interfere with the administration of justice" and not just "disobedience to the judgments, orders or other process of the court". This is thus not just a private matter between Mr. and Mrs. MacNeil. It has become one which concerns the state, because an offence has been committed against the state itself in the administration of justice making a travesty of the court and its process.....(my emphasis added)

[284] I have already concluded as did Jollimore J. that Mr. Murphy had sufficient assets at the time of the Divorce hearing to pay the equalization payment.

[285] Mr. Murphy's lack of credibility in his sworn statements and in court testimony makes it impossible to know what if anything exists now to fully compensate Ms. Murphy.

[286] However, there are sufficient assets to partially compensate her.

[287] The balance outstanding will only be known at some point in the future once the remedies authorized herein are pursued.

[288] Should Mr. Murphy assume that once he has cashed in and used the remaining assets there is nothing that can be done he should be aware that there are remedies under the Criminal Code.

Section: CC: 127 (1), CC: 127. (1) states as follows:

Everyone who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding two years; ...

And Section 392

Disposal of property to defraud creditors

Everyone who,

(a) with intent to defraud his creditors,

(i) makes or causes to be made any gift, conveyance, assignment, sale, transfer or delivery of his property, or

(ii) removes, conceals or disposes of any of his property, or

(b) with intent that any one should defraud his creditors, receives any property by means of or in relation to which an offence has been committed under paragraph

(a), is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

R.S.C. 1970, c. C-34, s. 350.

[289] Ms. Murphy has gone to considerable lengths and no doubt expense to attempt to enforce the courts order.

[290] Should Mr. Murphy be found in Criminal Contempt of this Order or the Order of Jollimore J. arguably he could be incarcerated for subverting justice and defiance of an Order of the Court.

[291] I reserve for the parties the right to return to the Court for further directions, enforcement as well as costs.

Moira Legere Sers, J.