

**IN THE SUPREME COURT OF NOVA SCOTIA**

**FAMILY DIVISION**

**Citation: *Melloy v. Melloy*, 2002 NSSF 24**

BETWEEN:

ANNE RENEE MELLOY,

-Petitioner

-and-

TERRY LEONARD MELLOY,

-Respondent

**DECISION**

BEFORE THE HONOURABLE JUSTICE R. JAMES WILLIAMS

PLACE OF HEARING: Halifax Nova Scotia

DATE OF HEARING: October 25 and November 1, 2001

LAST SUBMISSIONS: January 15, 2002

DATE OF DECISION: April 30, 2002

COUNSEL: Lynn Reiersen, counsel for the Applicant

Terry Melloy, self-represented

Anne Melloy (b. [...], 1962) and Terry Leonard Melloy (b. [...], 1959) are disputing a series of issues relating to the breakdown of their marriage - division

of property, custody, access and child support.

They married March 10, 1990. They separated June 29, 1999. Anne Melloy filed a Petition for Divorce July 2, 1999. There are three children of their marriage:

Christine Anne Melloy (b. [...], 1990)

John James Melloy (b. [...], 1992)

Steven Dennis Melloy (b. [...], 1994)

### **MARITAL BACKGROUND**

Anne and Terry Melloy met in the early 1980's at Acadia University. He graduated in 1982 and returned to take the same or almost the same courses that she did in 1982-1983. She graduated in 1983.

They both moved to Halifax and by the fall of 1983 were living together (for the first couple of years primarily off her income from a series of jobs).

Their wedding was initially planned for June of 1987. A number of arrangements had been made, and expenses incurred in preparation for the wedding. Terry Melloy unilaterally cancelled the wedding. He had impregnated another woman. His son, Joe, was born in January of 1988. After these events, Anne Melloy's parents developed an enduring antipathy for Terry Melloy.

In 1988 the couple moved to Shelburne, Nova Scotia, in part to be closer to Joe. Anne Melloy secured a job in the local school system that gave her summers off. Terry Melloy taught as a substitute for a number of years. They lived in an apartment at first.

In June of 1989 they purchased a home (336 Ohio Road, Lower Ohio) for approximately \$45,000.00. From 1987 through 1989 Anne Melloy earned \$18,000.00 to \$20,000.00 per year; Terry Melloy earned \$14,000.00 to \$16,500.00 per year. The down-payment on the house was some \$5,600.00 drawn from Anne Melloy's account.

The couple married March 10, 1990. Only a few friends were at the wedding. Anne Melloy's parents had had very limited contact with her from 1987 to 1990 - they were unhappy that she had maintained the relationship with Mr. Melloy after the events surrounding the cancellation of their wedding in 1987.

Christine, the couple's first child, was born November 12, 1990. Anne Melloy's relationship with her parents thawed after the marriage and Christine's birth. It is apparent that her parents did not want to be cut off from their grandchild(ren). In December of 1990 Dennis Covill (Anne Melloy's father) gave Anne some money. Mr. Covill testified that:

...the first gift of money was an amount of \$75,000.00 and this gift was to Anne, just to Anne. All of these gifts were just to Anne. Let me make that very clear. They were all issued as cheques just made out to Anne. The first amount which was intended or which was for the explicit purpose of buying a better home than the one she lived in. I had visited her home after her first child was born, and in my opinion it was a substandard home and I wanted - to see my grandchildren grow up in a better home than that.

I had previously...helped all my other children with purchasing their first homes....

Anne Melloy paid off the mortgage on the home (\$40,954.00), paid off Terry Melloy's student loan (some \$3,000.00) and the balance of these funds were invested (approximately \$31,000.00) or otherwise spent.

The Melloys had two more children. John James Melloy was born [...] 1992 and Steven Dennis Melloy was born [...], 1994.

In October 1993 the couple purchased a cottage in Laconia, Lunenburg County, for some \$30,000.00. Significant repairs were done to the cottage. The lot adjacent to the cottage was purchased for \$10,500.00. The cottage was purchased in part from Mr. Melloy's savings, in part from monies Anne Melloy had received from her father.

Between May 25, 1993 and June 10, 1995, Anne Melloy's father provided her with, gave her a series of monetary gifts to "supplement her income". They were as follows:

May 25, 1993	\$6,000.00
August 28, 1993	6,000.00
November 22, 1993	12,000.00
July 1, 1994	8,200.00
August 29, 1994	12,000.00
December 26, 1994	6,000.00
April 3, 1995	6,000.00
June 10, 1995	<u>12,000.00</u>
	\$68,200.00

On December 31, 1995, Janet Simpson (Anne Melloy's sister) gave Anne Melloy \$111,000.00 "for her long term security". In 1987 Mr. Covill had given Janet Simpson 60 shares in Nautical Electronics. Her siblings received fewer shares. Anne Melloy received none. Janet Simpson was told that she was getting more because, at the time, she was the only sibling with her own family. She was told by her father (at the time he gave them to her) not to sell the shares. In 1995, at her father's suggestion, she did sell the shares. Janet Simpson testified,

- Q. Who had the control over whether they were sold in 1995?  
A. I did.  
Q. Who made the arrangements for you to sell the shares once you decided to do it?  
A. My father did.  
Q. What did you do with the proceeds of sale of your shares in Nautel?  
A. After I had sold the shares, I invested half and I gave half to my sister, Anne, for her long-term security.  
Q. Why is it that you gave Anne half of the money from your shares?  
A. Well, she didn't have shares to start with and also I was concerned for her long-term security. At this point in time she was--she was married and she had three children and she appeared to be the chief breadwinner for most of the years of her marriage; and I was just worried about her

- future.
- Q. Who did you discuss giving half the money to Anne with?
- A. My father.
- Q. Did your father tell you to give half the money to Anne?
- A. No.
- Q. Did he agree with the decision?
- A. Yes.

The money given to Anne Melloy by her sister was placed by Anne Melloy in a Nesbitt Burns investment account. The account was/is placed in the joint names of Terry Melloy and Anne Melloy.

In 1997 the Covills (Anne Melloy's parents) conveyed a piece of land in Hackett's Cove (adjacent to the Covill family home) to Anne Melloy and her three siblings. The conveyance was part of the Covills' estate planning. Nothing has been done with this property beyond its occasional use for walks or a picnic.

In May 1998 the Melloys purchased a property, an older home, referred to as Falls Lane/Reids Hill. The purchase price was \$62,000.00. Extensive work was done at this property - most of it by Mr. Melloy.

The parties separated at the end of June 1999.

#### INCOMES DURING THE RELATIONSHIP

It was suggested, repeatedly, that Mr. Melloy "was under-employed" during the marriage, that Anne Melloy was "the breadwinner". The parties' tax returns were requested and filed post-trial. They disclose income (employment,

U.I.C, interest income) as follows:

<b>Year</b>	<b>Terry Melloy</b>	<b>Anne Melloy</b>
1982	\$3,559.00	\$1,478.00
1983	\$4,409.00	\$2,632.00
1984	\$5,041.00	\$11,234.00
1985	\$7,056.00	\$14,627.00
1986	\$12,593.00	\$15,933.00
1987	\$14,524.00	\$18,336.00
1988	\$16,402.00	\$20,881.00
1989	\$16,204.00	\$20,466.00
1990	\$17,394.00	\$16,662.00
1991	\$26,613.00	\$21,829.00
1992	\$25,057.00	\$21,038.00
1993	\$28,126.00	\$24,072.00
1994	\$23,405.00	\$19,085.00
1995	\$20,849.00	\$21,806.00

1996	\$31,988.00	\$23,113.00
1997	\$34,619.00	\$24,055.00
1998	\$35,241.00	\$24,436.00
1999 (separation yr.)	\$38,330.00	\$7,346.00
2000	\$40,651.00	\$24,000.00 + child tax credit

### POST-SEPARATION/COURT PROCEEDINGS

As stated, the parties separated June 29, 1999. The matter was in court immediately after their separation:

July 2, 1999 - Anne Melloy signed the Petition for Divorce; the grounds for divorce asserted that they will have lived separate and apart for at least one year. They have. The marriages and grounds for divorce have been proven. The divorce will be granted.

1. July 2, 1999 - Justice Stewart granted an "Interim Interim Order". It was an ex parte Order. It provided that Anne Melloy have sole custody of the children, that Mr. Melloy have no access.
2. August 19, 1999 - Justice Stewart granted an "Interim Consent Order"



providing that:

1. ...Anne Malloy will care for the three children from Wednesday at noon until Sunday at 9:00 a.m.
2. ...Terry Leonard Malloy will care for the three children from Sunday at 9:00 a.m. until Wednesday at noon.
3. Each parent shall have reasonable telephone access...
4. During the Mother's time with the children she shall be supervised during the evening and overnight hours by one of her parents.
5. During the Father's time with the children he shall be supervised during the evening and overnight hours by his mother.
- ...
9. Ongoing living expenses for the entire family will continue to be paid out of joint income.
10. Both parties agree not to dissipate and/or encumber marital assets without agreement.
4. September 2, 1999 - Justice Campbell granted an "Interim Consent Order" which provided:

1. The children of the marriage shall reside with the Petitioner, Anne Melloy, in Tantallon and will attend school in the Tantallon area.
2. There shall be no requirement for supervision when the children are in the Petitioner's care.
3. The Respondent shall have the children as follows:
  - a. On alternate weekends...
  - b. On intervening weekends...on Saturdays...
  - c. ...one evening per week for a three hour period...
  - d. The Respondent's access shall continue to be supervised...for a 30 day period...
4. Within 48 hours the Respondent shall provide the Petitioner's counsel with written authorization for Dr. Malcolm Bruce to speak freely with the Petitioner's counsel...
5. November 29, 2000 - Justice Gass granted an Interim Consent Order which provided:

1. The Respondent, Terry Melloy, shall have exclusive possession of the matrimonial home at 336 Ohio Road, Lower Shelburne... The Respondent shall be solely responsible for all expenses associated

with the matrimonial home, including...taxes, insurance, utilities, repairs and maintenance.

2. The property at 63 Fall's Lane, Shelburne...shall be immediately listed for sale...

6. October 3, 2001 - the trial commenced before Justice Campbell.

Evidence was called from Dennis Covill and Janet Simpson. Justice Campbell recused himself from the trial at this point. The matter proceeded to trial before this Court.

7. October 25 and November 1, 2001 - The trial was completed. A

transcript of the evidence heard before Justice Campbell was admitted and Mr. Melloy allowed to cross-examine each witness (Mr. Covill and Ms. Simpson) for a second time. Evidence was heard from Mr. Covill, Ms. Simpson, Anne Melloy and Terry Melloy. Mr. Melloy had at the outset indicated he wished to call his daughter, Christine, as a witness. Mr. Melloy withdrew the request at the conclusion of the hearing. He was advised that I would rule on this request/motion at the conclusion of the rest of the evidence.

## CUSTODY AND ACCESS

The *Divorce Act, 1985* provides:

### **Order for Custody**

16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

Joint custody or access

(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

### **Factors**

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

### **Past conduct**

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

### **Maximum contact**

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

A series of incidents and assertions are said by Anne Melloy to be relevant to the issue of custody.

1. Anne Melloy has suggested that Mr. Melloy was not financially responsible, had not done his share to financially support the family. The income tax records do not support this view.

2. Ms. Melloy's evidence was that between the two parents she was the more involved in the day to day care of the children. Mr. Melloy indicated he was involved to a greater degree than that for which Ms. Melloy gave him credit. Of the two, however, it is apparent that Ms. Melloy was more involved.

3. Ms. Melloy indicated that just before or at the time of separation Mr. Melloy had made a number of threats:

- in reference to a murder-suicide in the news, he said "that could be us";
- he suggested he would take the kids and she would not see them again;
- he stated "if you knew what was in my head..." in a manner that was intimidating (to Ms. Melloy);
- Ms. Melloy asserted that in the six months prior to separation he had fits of anger, yelling and even put a hole in the wall.

This evidence was largely unrefuted. I conclude that it is relevant to the ability of Mr. Melloy to act as a parent - both directly and in terms of his relationship with Anne Melloy - a relationship that is at the heart of his and her future parenting.

4. Shortly after the separation, Terry Melloy accused Anne Melloy of

having sexually abused their son, Johnny. Before their separation, Mr. Melloy had taped an occasion when Anne Melloy and Johnny were horsing around on the Melloy's bed, blowing "raspberries" (placing one's mouth against another's skin and blowing). There seems to have been no issue with the behaviour when it occurred. After separation, Mr. Melloy provided the tape to the child welfare agency to whom his complaint was made. It was apparently viewed by them as innocuous. There is no evidence before me that suggests sexual abuse occurred. This complaint led to Anne Melloy's contact with the children being "supervised" for a time (per the order of Justice Gass). Again, I conclude it is relevant as contemplated by s. 16(9) of the *Divorce Act, 1985*.

5. After the separation, Ms. Melloy lived with her parents for a time. One day Ms. Melloy put the children in the family van at her parents' home in Halifax County and went back into their house to check on something. Mr. Melloy (who was living in Shelburne) got in the van (while she had slipped back into the house). He drove off. As he was driving off, Anne Melloy came out of the house, ran after the van, yelling, grabbing at the van and so on. Mr. Melloy had been in the woods near the house. He kept the van after this incident. The children were eventually

returned to Anne Melloy. The incident is bizarre. It is again relevant.

6. The couple have disagreed over the needs or appropriateness of psychological interventions for the children.
7. Mr. Melloy has cancelled access to have time to himself and at times brought the children back early.
8. Ms. Melloy says that when Mr. Melloy had the children for Christmas 2000, he did nothing to celebrate, nor to decorate for the holiday. This was not contradicted.
9. Terry Melloy indicated he wanted to call the parties' daughter, Christine (born November 12, 1990 - age 11 at the time of trial) as a witness at the outset of the trial. I am not clear why he wished to do so. I indicated he could make a motion to do so at the close of the trial, at a point when I had more information about the parties and their issues. Mr. Melloy withdrew this request at the close of the trial.
10. Ms. Melloy states that while communication between she and Mr. Melloy, compared to what it was, has improved, it is still poor. Mr. Melloy, for his part, says:

1. They communicate much better now.
2. They did a lot of things “as a family” before the separation.
3. He has a close relationship with the children, and especially Christine.

The children have resided primarily with Anne Melloy since the separation. Mr. Melloy has not sought to change this.

Martin Whitzman, M. Sc., was consulted by Ms. Melloy. He saw the children. Mr. Melloy was given an opportunity to see him but chose not to. A report was filed from Mr. Whitzman. Because Mr. Melloy did not see Mr. Whitzman, the Whitzman report must be viewed with caution. The two older children reported enjoying and having positive interaction with Mr. Melloy. Mr. Whitzman concluded:

My observations and interviews with Anne and her children reveal a very strong attachment with positive interactions. Anne was viewed as an effective parent who possessed the necessary skills to parent her three children. Her ability to meet their physical, emotional and educational needs was considered above normal....

..The children were viewed as adjusting well to the changes in their lives without any abnormal coping mechanisms or strategies.

The parties disagree on the issues of the language of the order as it relates to the children and access.

Terry Melloy seeks an order of joint custody. Anne Melloy opposes this.

I have considered s. 16(10), the “maximum contact” provision of the



*Divorce Act, 1985.*

In *Hickey v. Hickey* (1994) N. S. J. No. 250 (at para. 24), Justice

Stewart described joint custody:

Joint custody is complex and there are many details of logistics, timing and notices to be discussed and worked out. It demands frequent contact and people who are flexible, accommodating, trusting and motivated to make it work. Although it can be judicially encouraged and endorsed, parental cooperation cannot be easily ordered. Common sense tells us that parental cooperation and ability to communicate is central to its success...

In *Stefanyk v. Stefanyk* (1996) 156 N. S. R. (2d) 161 (NSSC), Justice

Goodfellow spoke of the fact that post-separation, pre-trial child care or custody arrangements provide an opportunity “to observe the extent to which the parties have been able to adapt to their separation and, more importantly, conduct themselves towards each other and towards the children” (p. 171).

There has been significant post-separation conflict between this couple that has impacted directly upon the children. While there has been some improvement in the adult relationship, there is, in the shadow of this extreme conflict (sexual abuse allegation, unilateral removal of the children in the van), no evidence of a consistent established ability to communicate and constructively problem solve. If a consistent pattern of such interaction emerges over the next two to three years, it may well be appropriate to then adjust the order to a joint custody order. At this time, however, I am satisfied that a joint custody order would contribute

to, not reduce, conflict, and would be a source of instability to the children. It is in the children's best interests, at this time, to be in the custody of Anne Melloy.

The parties disagree also on the details of ongoing and holiday access. I have had an opportunity to review their submissions and conclude, considering the evidence, submissions and the provisions of the *Divorce Act, 1985*, that the appropriate order would be as follows:

1. Anne Melloy shall have custody of the three children,
  - Christine Anne Melloy (b. [...], 1990)
  - John James Melloy (b. [...], 1992)
  - Steven Dennis Melloy (b. [...], 1994)
  
2. Terry Melloy shall have care of the children as follows:
  - (a) From September through June, alternate weekends from Friday at 4:30 p.m. until Sunday at 4:30 p.m. Where statutory holidays or in-service school holidays fall on the Monday or Friday of Terry Melloy's weekend, the weekend will be extended except where otherwise provided by this order.
  - (b) One other Saturday or Sunday in September, October or November to be designated by Terry Melloy by August 31.

- (c) One other Saturday or Sunday in January, February, April or May to be designated by Anne Melloy by December 30.
  - (d) On 48-hours notice to Anne Melloy, three hours on a Monday-Thursday each second week (once each second week).
  - (e) Easter weekend 2003 from 4:30 p.m. Thursday to 7:00 p.m. Saturday. Easter weekend 2004 from 4:30 p.m. Saturday to 4:30 p.m. Monday. The Easter weekend will alternate in this fashion in subsequent years.
  - (f) One-half of March Break unless Anne Melloy or Terry Melloy plans to travel outside the province of Nova Scotia during the Break. Terry Melloy shall have the right to have the children with him for such a vacation in odd years, Anne Melloy in even years - provided written notice of an intent to do so is given the other parent by the December 31 prior to the Break in question.
  - (g) December 26 at 2:00 p.m. to December 31 at 3:00 p.m.
  - (h) The first two weeks of each July, the first two weeks of each August.
3. Terry Melloy shall give Anne Melloy 24-hours notice of any scheduled access time which he is unable to exercise. Anne Melloy shall give Terry Melloy 24-hours notice of any circumstances that prevent all or any of the

children from being in his care.

4. Each parent will have reasonable telephone access to the children while the children are in the care of the other parent.
5. The children will spend Mother's Day with Anne Melloy, and Father's Day with Terry Melloy.
6. Each parent will provide the other with a current address and phone number at all times.
7. Neither parent shall take the children outside the province of Nova Scotia without giving the other parent notice of their travel plans, return date and, where possible, travel itinerary and contact numbers.
8. Neither parent will apply to obtain a passport for any child without the written consent of the other, which consent will not be unreasonably withheld. Where a passport is obtained, it shall be held by Anne Melloy.
9. Neither parent will change the name of any of the children by common use or application under legislation.
10. Terry Melloy will have the right to request and receive information

concerning the health and education of the children. He will be provided with copies of school or professional reports relating to the children within two weeks of their receipt by Anne Melloy.

11. Terry Melloy shall have the right to consent to emergency medical care for the children when they are in his care.

### **THE MATRIMONIAL PROPERTY ACT**

The *Matrimonial Property Act*, R. S. N. S. 1989, c. 275, amended, S. N. S. 1995-1996, c. 13, s. 83, is the legislation governing the distribution of the parties' assets. Its relevant provisions include:

1. The Preamble:

WHEREAS it is desirable to encourage and strengthen the role of the family in society;

AND WHEREAS for that purpose it is necessary to recognize the contribution made to a marriage by each spouse;

AND WHEREAS in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship;

AND WHEREAS it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children;

AND WHEREAS it is desirable to recognize that child care, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets.

2. Definitions include:

- (a) s. 4(1) In this Act, “matrimonial assets” means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during the marriage, with the exception of
- (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
  - (b) an award or settlement of damages in court in favour of one spouse;
  - (c) money paid or payable to one spouse under an insurance policy;
  - (d) reasonable personal effects of one spouse;
  - (e) business assets;
  - (f) property exempted under a marriage contract or separation agreement;
  - (g) real or personal property acquired after separation unless the parties resume cohabitation.
- (b) s. 3(1) In this Act “matrimonial home” means the dwelling and real property occupied by a person and that person’s spouse as their family residence and which either or both of them have a property interest other than a leasehold interest.
- (2) Where property that includes a matrimonial home is used for other than residential purposes, the matrimonial home only includes that portion of the property that can reasonably be regarded as necessary for the use and enjoyment of the family.
- (4) A person and the person’s spouse may have more than one matrimonial home.

3. Remedial provisions include:

- (a) Equal division of matrimonial assets:
- s. 12(1) Where
- (a) a petition for divorce is filed,...either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares notwithstanding the ownership of these assets, and the court may order such a division.
- (b) Unequal division of matrimonial assets or division of property that is not a matrimonial asset:
- s. 13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that

the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors

- (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
- (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
- (c) a marriage contract or separation agreement between the parties;
- (d) the length of time that the spouses have cohabited with each other during their marriage;
- (e) the date and manner of acquisition of the assets;
- (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
- (g) the contribution by one spouse to the education or career potential of the other;
- (h) the needs of a child who has not attained the age of majority;
- (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution as a homemaker or parent;
- (j) whether the value of the assets substantially appreciated during the marriage;
- (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
- (l) the value of either spouse of any pension or other benefit which by reason of the termination of the marriage relationship that party will lose the chance of acquiring;
- (m) all taxation consequences of the division of matrimonial assets...

#### 4. Section 21 Presumption

##### **Presumption respecting ownership between spouses**

**21 (1)** The rule of law applying a presumption of advancement in questions of the ownership of property as between husband and wife is abolished and in place thereof the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if they were not married, except that

- (a) the fact that property is placed or taken in the name of spouses as joint tenants is *prima facie* proof that each spouse is intended to have on a severance of the joint tenancy a one-half beneficial interest in the property; and
- (b) money on deposit in a chartered bank, savings office, loan company, credit union, trust company or other similar institution in the name of both spouses shall be *prima facie* proof that the money is on deposit in the name of the spouses as joint tenants for the purposes of

clause (a).

**Application of subsection (1)**

(2) Subsection (1) applies notwithstanding that the event giving rise to the presumption occurred before the first day of October, 1980. R.S., c. 275, s. 21.

Valuation of specific property involves determining a method or manner of valuation (including consideration of debt) and a valuation date. The valuation date will be the date of commencement of proceedings subject to the discretion of the Trial Judge (*Clarke v. Clarke* (1990) 28 (3d) 113 (S.C.C.)). It may be, for example, date of separation (*Crouse v. Crouse* (1988) 88 N.S.R. (2d) 199 (N.S.S.C.)) and date of trial (*Lynk v. Lynk* (1989) 21 R.F.L. (3d) 337 (N.S.C.A.); *Tibbet v. Tibbet* (1992) 44 R.F.L. (3d) 281 (N.S.C.A.)) and need not be the same date for each asset.

Considering the foregoing, I would conclude that the regime arising from the *Matrimonial Property Act* requires that one:

1. Categorize assets (matrimonial, business, other),
2. Value the matrimonial assets individually and collectively considering:
  - date of valuation;
  - method of valuation;
  - matrimonial debt.
3. Presume an equal sharing.
4. Value the other assets considering:
  - date of valuation;
  - method of valuation;
  - applicable debt.



5. Consider s. 13 (including matrimonial and other debt):
  - has the person seeking an unequal division satisfied the Court that an equal division would be “unfair or unconscionable”? (The burden of proof is on the person making a s. 13 claim; *Covey v. Covey* (1981) 42 N.S.R. (2d) 612 (Hallet, J. at p. 619));
6. Consider any s. 18 claim.

### PROPERTY TO BE DIVIDED

The property to be divided here includes:

336 Ohio Road (home)  
63 Falls Lane (home)  
Cottage and lot Hackett’s Cove (1/5 interest)  
Grand Voyager Van  
Speedboat/trailer  
Investment - Nesbitt Burns – [...] -21  
Investment - Nesbitt Burns – [...] -23  
Investment - Nesbitt Burns - Children’s Account – [...] 73-16  
RRSP Scotiabank  
RRSP Nesbitt Burns  
Income from father  
Pensions

Property acquired after the parties’ separation is not subject to division.

The dispute concerning the Melloy’s division of property arises, primarily, from Ms. Melloy’s assertion that significant portions of the parties’ assets are either excluded from division (as gifts to her from her family) or should be subject to an unequal division pursuant to s. 13 of the *Matrimonial Property Act* (in particular sections 4(1)(a), 13(e) and 13(i) of the Act).

In *Fisher v. Fisher* (2001) 12 R. F. L. (5<sup>th</sup> 348) [2001 NSCA 18] the

N.S.C.A. considered s. 4(1)(a) of the *Matrimonial Property Act*. Cromwell, J. A. stated:

[44] According to the section, the inherited or gifted asset is not a matrimonial asset "...except to the extent to which [it is] used for the benefit of both spouses or their children". In my opinion, once it is established that there is use for the benefit of the spouses or children of an inherited property that would not otherwise be a matrimonial asset, the property should be found to be a matrimonial asset unless such use is trifling or insignificant. I will consider the extent of the classification later in my reasons...

[45] ...once there is use, the extent of which cannot be dismissed as trifling or insignificant, the asset is matrimonial.

### CLASSIFICATION/VALUATION OF PROPERTY

The starting point under this legislation is a presumption that property is a matrimonial asset. The onus of proof is clearly on a party putting forward a different view. I have had regard to this in coming to the conclusions that follow:

#### 1. Ohio Road

The Ohio Road property was a matrimonial home. It was bought in June 1989 - before their marriage. A portion of a gift of money to Anne Melloy from her father was used to pay off the mortgage in or around December 1990. Mr. Melloy did work on the matrimonial home over the years. The home was used by the family. The parties separated in June 1999. The home was sold July 27, 2001. The balance left after the sale and payment of disbursements was \$48,566.90. One of the disbursements was payment of tax "arrears" of \$1,389.95. The Order of Justice Gass of November 29, 2000 provided that Mr. Melloy would have exclusive possession of the home and be solely responsible for all expenses associated with it, including taxes and insurance. Ms. Melloy

apparently also paid insurance related to the property of \$671.66. A portion of this was related to the cottage - I do not have evidence that particularizes this but would conclude \$445.00 of it relates to Ohio Road. Similarly \$280.00 in power bills was paid by Ms. Melloy- I would conclude \$180.00 of this relates to the matrimonial home. The balance of the insurance and power bills should be shared ( $\$671.66 - \$445.00 = \$229.66$ ;  $\$280.00 - \$180.00 = \$100.00$ ).

The property is a matrimonial asset. It will be valued as of its sale date.

2. 63 Falls Lane

The parties purchased this property in May 1998. Monies were borrowed against a Nesbitt-Burns account to finance its purchase. It was never “occupied” by the parties. Mr. Melloy did extensive work to it. It sold July 6, 2001. A balance of \$62,850.99 was left in trust.

Disbursements included \$466.90 (taxes 2001, 2000) and \$3,968.00 to Ken Butler Electric. There is no real equity in this property - the “loan” from the Nesbitt Burns account was well in excess of the amount realized from the property. These monies should be paid back to that account. The loss results from their joint venture. There is nothing to be valued and divided.

3. Cottage and Lot

The Melloyes purchased the cottage in 1993 (for some \$30,000.00). A significant amount of work was done to the property. A lot adjacent to it was purchased for \$10,500.00. The property was used by the family. It is a matrimonial asset. The value of these two assets was suggested to be \$45,000.00

(Mr. Melloy's statement of property) and \$50,000.00 (Ms. Melloy's statement of property). Ms. Melloy's estimate is closer to their assessed values and I accept her suggested values.

4. Monies Advanced from Ms. Melloy's Family

There are three identifiable sets of monies that were advanced by Ms. Melloy's family. She asserts that they are gifts as defined by the *Matrimonial Property Act* and thus not matrimonial assets:

- (a) \$75,000.00 was given to Anne Melloy by her father in December 1990 to "buy a better home". This \$75,000.00 found two primary destinations (apart from the repayment of Terry Melloy's student loan):
  - (i) The mortgage on Ohio Road was paid off. This portion of these monies has been determined to be a matrimonial asset.
  - (ii) Some \$31,000.00 was invested in Nesbitt Burns Account #[...] - 21. This account is jointly held by Terry Melloy and Anne Melloy. Its value was \$75,1999.00 as of December 31, 2000 (\$73,966 as of July 31, 2001).

Ms. Melloy argues that this was a "gift" and should be excluded from treatment as a matrimonial asset. The placement of the account in joint names attracts, in my view, the operation of s. 21(1) of the *Matrimonial Property Act*. Were the account in

Anne Melloy's name alone, I would conclude that it was a gift as defined by s. 4(1). It was not. The default position with respect to classification of assets is that an asset is matrimonial asset if it is not something else defined in s. 4. This is a matrimonial asset. Anne Melloy's assertion that Mr. Melloy pressured, nagged, was persistent in efforts to have her place these monies and the other account (below (c)) in their joint names is relevant to s. 13 considerations.

- (b) A total of \$68,200.00 was given to Anne Melloy by her father (between May 1993 and June 1995) to "supplement her income". Some of this money was used to purchase the lot adjacent to the cottage. This money has not been maintained separately, cannot be considered as a separate identifiable asset. It is appropriately considered under s. 13.
  
- (c) \$111,000.00 was given to Anne Melloy by her sister on December 31, 1995 for Anne Melloy's "long term security". A portion of these monies was placed in Nesbitt Burns account(s) [...]23. The account is held in the names of Anne Melloy and Terry Melloy. Anne Melloy testified that he persistently "nagged" and pressured her into placing it in their joint names.

As with the other account, I do not conclude that this asset can be treated as a s. 4(1)(a) "gift" and defined "out" of the matrimonial asset pool. Again s. 21 of the Act operates, is triggered by the asset having been placed in their joint names.

A portion of this money was placed in Nesbitt Burns account [...]16 - the "children's" account, valued at \$24,098.87 as of July 31, 2001. Mr. Melloy agreed, at the end of his evidence that this account would be "the children's". As Ms. Melloy is the custodial parent, it will be placed in her name, she will be responsible for the management of the account.

She will advise Mr. Melloy annually of its value/status and of any withdrawal from the account. It is a matrimonial asset. It will not be valued, however, as part of the division, it being retained for the children.

5. Van

The van was/is a matrimonial asset. It was retained by Mr. Melloy. It will be valued at \$1,000.00.

6. Speedboat, Motor, Trailer

Again, these are matrimonial assets - retained by Mr. Melloy. They will be valued at \$1,000.00.

7. Hackett's Cove

Ms. Melloy was given a 1/5 interest in a property at Hackett's Cove adjacent to her parents' home. The gift was part of her parents' estate planning. I conclude its "use" by the Melloy family was insignificant. It is not a matrimonial asset.

8. R. R. S. P.

Anne Melloy has RRSPs at Scotiabank valued at \$39,896.84 (as of December 31, 2000). Mr. Melloy had an RRSP Nesbitt Burns account of approximately \$25,000.00 at the time of separation. These are matrimonial assets. Their value will be discounted 30% ( $\$39,896.84 \times .70 = \$27,927.78$ ;  $\$25,000.00 \times .70 = \$17,500.00$ ) to notionally consider income tax.

## 9. Pensions

The parties agree that each of their pensions will be shared in accordance with the length of their marriage/cohabitation. There is no need to value their pensions.

## SECTION 13

Ms. Melloy submits that a “division of matrimonial assets in equal shares would be unfair or unconscionable” taking into account the factors referred to in s. 13. Mr. Melloy seeks an equal division of these assets.

Ms. Melloy’s counsel argues, based on *Smith v. Smith* that Mr. Melloy should receive significantly less than one half a share of the matrimonial home. She argues:

...the Nova Scotia Supreme Court recognized the importance of family contributions to the acquisition of assets in the case of *Smith v. Smith* (1993), 127 N.S.R. (2d) 155 [a case which Ms. Melloy’s counsel lost at Trial]. The Court found that:

They had received valuable gifts from the wife’s parents which allowed them to live in a lifestyle significantly greater than they would otherwise have enjoyed. These gifts were generous enough to allow them to own without encumbrance a home of

the value I have stated above.

The Court said at paragraph 11:

A significantly greater part of the division will go to the wife because of her family's contribution to that asset and because she is the custodial parent.

Ms. Melloy submits that the following evidence is relevant to a s. 13 consideration:

- the source of the funds, i.e. the family money;
- her assertion that Mr. Melloy “badgered and nagged” her into placing the investments in their joint names;
- her assertion that Mr. Melloy contributed little income (compared to her and apart from the largesse of her family) - an assertion that is not borne out by the income tax returns;
- the repayment of Mr. Melloy's student loan (from the money from her family);
- the contributions of each party to the family;
- her assertion that Mr. Melloy's actions allowed the pipes to freeze in one of the properties - diminishing its value.

Mr. Melloy submits that the following is relevant:

- the appreciation of the assets during the marriage;
- his contribution to the marriage;
- his contribution to the “management” of the investments - I conclude that he made a contribution, though limited, recognizing that a broker appears to have been used and Mr. Covill's advice at times considered.



I have considered the evidence relating to the original transfers of money to Anne Melloy (from her family), and Anne Melloy’s evidence indicating they were subsequently placed in joint names as a result of Mr. Melloy’s “badgering”. I have considered the factors enumerated in s. 13. Section 21 creates a presumption that the Nesbitt Burns accounts in both names are jointly held and shared. This is subject to s. 13 considerations.

It would, in my view, unquestionably be unfair to award an equal division of the matrimonial assets. The source of a very significant portion of these assets is Anne Melloy’s family. A division that provided Mr. Melloy with 10% of the Nesbitt Burns accounts provides him with a reasonable share of the assets whose sole identifiable source was Ms. Melloy’s family. I would conclude, considering these factors, that the assets should be shared as follows

	<b>Asset</b>	<b>Value</b>	<b>Anne Melloy</b>	<b>Terry Melloy</b>
1	Proceeds of Ohio Road - shared due to time since purchase, work on home	\$48,566.90	\$24,283.45	\$24,283.45
2	Falls Lane proceeds - repay	-	-	-
3	Cottage and Lot - shared recognizing source of funds for purchase of lot, use	\$50,000.00	\$25,000.00	\$25,000.00
4	Nesbitt Burns Account [...] -21 approx. 90% Anne Melloy approx. 10% Terry Melloy recognizing source of the funds, growth during marriage, other factors	\$73,966.00	\$66,666.00 or balance	\$7,300.00

5	Nesbitt Burns Account [...]15 265-89674-23 approx. 90% Anne Melloy approx. 10% Terry Melloy recognizing source of the funds, mortgage venture, growth during, since marriage, other factors	\$127,857.30 <u>\$62,850.00</u> \$190,707.30	\$171,707.30 or balance	\$19,000.00
6	Nesbitt Burns Account [...] the children's account	\$24,098.87	-	-
7	Van - shared	\$1,000.00	\$500.00	\$500.00
8	Boat, Trailer, Motor - shared	\$1,000.00	\$500.00	\$500.00
9	Hackett's Cove - not a matrimonial asset	-	-	-
	<b>Asset</b>	<b>Value</b>	<b>Anne Melloy</b>	<b>Terry Melloy</b>
10	R.R.S.P.s (discounted 30%) - shared	\$27,927.79 (Anne's) 17,500.00	\$22,963.90	\$22,963.89

		(Terry's) \$45,427.79		
11	Pensions - statutory sharing			
	<b>TOTAL:</b>	<b>\$410,667.99</b> <b>(not including</b> <b>children's</b> <b>account)</b>	<b>\$311,620.65</b>	<b>\$99,547.34</b>

The matrimonial assets are shared:

76% Anne Melloy

24% Terry Melloy

If Terry Melloy retains the:

Cottage and lot	\$ 50,000.00	
Van	1,000.00	
Boat, trailer, motor		1,000.00
His R.R.S.P.s	<u>17,500.00</u>	
	\$ 69,500.00	

and Anne Melloy retains all the other assets referred to (including the proceeds from the sale of Ohio Road), she will owe him a transfer payment of:

$$\begin{array}{r} \$99,547.34 \\ - 69,500.00 \\ \hline \$30,047.34 \end{array}$$

I would order the property division accordingly.

ADJUSTMENTS

As previously indicated, Justice Gass' Order of November 29, 2000 provided that Terry Melloy have exclusive possession of 336 Ohio Road, the matrimonial home, and that he be solely responsible for all expenses associated with it:

...including without limiting the foregoing, taxes, insurance, utilities, repairs and maintenance

On the sale of Ohio Road, property taxes were paid/disbursed in the net amount of  $\$1,172.74 + \$217.21 = \$1,389.95$ . Half of this came off his share of

the property. She is, then, entitled to reimbursement of  $\$1,389.95 \div 2 = \$694.98$ .

In addition, Mr. Melloy shall reimburse Anne Melloy for payment of insurance (\$445.00) and power bills (\$180.00) related to the Ohio Road property.

Adjustments (payments by Terry Melloy to Anne Melloy) for Ohio Road then total:

\$694.98 taxes  
445.00 insurance (re Ohio Road)  
180.00 power (re Ohio Road)  
164.83 (2 balance of power, insurance bills paid by Anne Malloy)  
\$1,484.81\_

Anne Melloy indicated Terry Melloy charged \$555.00 to her MasterCard. This was largely uncontradicted. Terry Melloy will repay it.

Mr. Melloy then should pay Anne Melloy  $\$1,484.81 + \$555.00 = \$2,039.81$ .

### CHILD SUPPORT

The parties separated June 29, 1999. The Petition for Divorce was filed July 2, 1999. After/As the accusations that were referred to were dealt with, and more than the usual acute post-separation problems were worked through, the September 3, 1999 Consent Order for all intents established that the

children were in the primary care of Anne Melloy. They were with Anne Melloy for July, their care shared in August of 1999. The child support obligation of Mr. Melloy should be dealt with retroactively to July 1, 1999 as follows:

For 1999

Mr. Melloy paid no support for July or August 1999. Mr. Melloy paid \$703.00 per month for September and October. He paid \$656.00 per month for November and December. His income was \$38,330.00 (for 1999). For this income, the Child Support Guideline table amount for three children is \$703.00 per month. The shortfall is  $\$703.00 - \$656.00 = \$47.00 \times 2$  (November and December) =  $\$94.00 + \$703.00$  (July) =  $\$797.00$ .

For 2000

Mr. Melloy paid \$656.00 per month for the year. His income was \$40,651.00. For this income, the Child Support Guideline table amount for three child is \$740.00 per month. The shortfall is  $\$740.00 - \$656.00 = \$84.00 \times 12$  (months) =  $\$1,008.00$ .

For 2001

Mr. Melloy paid \$656.00 per month (to the time of trial). Anne Melloy

was prepared to treat his employment income as the same as 1999. The shortfall, assuming support was paid through and including December 2001 is, again, \$1,008.00.

The order will make these adjustments. In addition, the order will provide that Mr. Melloy paid child support of \$740.00 per month commencing the 15<sup>th</sup> day of January, 2002, continuing on the 15<sup>th</sup> day of each month thereafter until further order of the Court. He will provide Ms. Melloy with a copy of his 2001 income tax return within one week of the receipt of this decision. Subject to further order of the Court, the child support will be adjusted to the table amount for three children for his 2002 line 150 income effective May 15, 2002. Like disclosure and adjustment (in the absence of other order by the Court) will be made in each subsequent year.

Ms. Melloy claims \$75.00 per month in special expenses related to child care. I do not have current tax calculations for her. Her income is approximately \$28,900.00 (2001) a year. Mr. Melloy earns in the vicinity of \$40,000.00 per year. She is receiving by a significant portion the majority of the assets. Mr. Melloy shall pay her an additional \$37.00 per month as a contribution to child care effectively January 15, 2002.

CONCLUSION RE PROPERTY/SUPPORT

The property division results in Anne Melloy owing Terry Melloy a transfer payment of \$30,047.34.

He owes her:

\$2,039.81 adjustments  
797.00 1999 child support  
1,008.00 2000 child support  
1,008.00 2001 child support  
\$4,852.81 Total

These issues are resolved to January 1, 2002 by setting this sum off against the transfer payment owed Terry Melloy.

\$30,047.34  
- 4,852.81  
\$25,194.53

Subject to adjustment for 2002 maintenance payment and any order of costs, the order will recite that the parties execute documents to effect the transfers of ownership ordered, following which Anne Melloy will pay Terry Melloy \$25,194.53. The Divorce Judgment and Corollary Relief Judgment will be prepared and filed by Ms. Melloy's counsel.

Anne Melloy's counsel has asked to be heard on the matter of costs.

I will hear the parties on this issue on at 12:00 noon on Friday, May 24, 2002.

Any written submissions on costs should be submitted on behalf of Anne Melloy by noon on May 17, 2002, on behalf of Terry Melloy by noon, May 22, 2002.

J. S. C. (F. D.)

Halifax, Nova Scotia