

SUPREME COURT OF NOVA SCOTIA

Citation: *Pirie v. Pirie*, 2020 NSSC 206

Date: 2020-07-27

Docket: 1201-069697

Registry: Halifax

Between:

Susan Irene Pirie

Petitioner

v.

Edward Alexander Pirie

Respondent

LIBRARY HEADING

Judge: The Honourable Justice R. Lester Jesudason

Heard: March 19, 2019 in Halifax, Nova Scotia

Written Decision: July 27, 2020

Subject: Matrimonial property; business assets, unequal division, s. 13 of the *Matrimonial Property Act*, s. 18 of the *Matrimonial Property Act*

Summary: The parties started dating when they were 15 and married when they were 23. After a marriage which lasted over 26 years, they separated.
The wife is a physiotherapist. The husband is a dentist.
While the parties' divorce proceeding raised several issues, the sole issue they ask be determined now is what interest, if any, the wife has in the net proceeds from the sale of the husband's former dental practice.

Result: The wife was awarded 40% of the net proceeds of sale of the husband's former dental practice.

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FAMILY DIVISION

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The wife is a physiotherapist. The husband is a dentist. While the parties' divorce proceeding raised several issues, the sole issue they ask be determined now is what interest, if any, the wife has in the net proceeds from the sale of the husband's former dental practice.

Counsel Judith A. Schoen for the Petitioner
Mark T. Knox, Q.C., and Michael J. Potter for the Respondent

By the Court:

OVERVIEW

[1] The parties litigated several issues during their divorce trial. However, when last before me on March 19, 2020, they asked me to defer deciding all of the issues except the single issue of what interest, if any, the wife has in the net proceeds from the sale of the husband's former dental practice. They hope that, after receiving my decision on this issue, they will be able to resolve some or all of the other issues.

BACKGROUND

[2] Susan Pirie (the "Wife") and Edward Pirie (the "Husband") are both 54 years old. She's a physiotherapist. He's a dentist.

[3] The parties have helpfully submitted an Agreed Statement of Facts which includes charts summarizing the history of their relationship, their respective work careers, and a timeline with respect to the Husband's former dental practice.

[4] Based on their Agreed Statement of Facts, and other evidence presented to me, I begin by summarizing some of the relevant background.

a) The Parties' Relationship and Work Careers

[5] The parties began dating in Grade 10, when both were 15 years old. In 1989, at age 23, they married. The Husband had recently graduated from Dalhousie University with a B.Ed. and a B.Sc. The Wife had been working as a full-time physiotherapist at the Nova Scotia Rehabilitation Centre at the QEII Hospital for about a year.

[6] The parties moved to Ontario as the Husband secured a full-time teaching position there. The Wife also obtained a full-time physiotherapist. They returned to Nova Scotia in 1991 when the Husband obtained a full-time teaching position initially in the HRM, and then in Truro. The Wife returned to her previous job as a full-time physiotherapist at the QEII.

[7] In 1993, the Husband decided to end his teaching career. He became a pharmaceutical company sales representative and continued to do this until 1996. The Wife continued working as a physiotherapist.

[8] In 1997, with the Wife's support, the Husband decided to change careers again. He embarked on a four-year commitment of full-time studies at Dalhousie University's Faculty of Dentistry.

[9] During these years, the Wife assumed financial responsibility for the parties' expenses and eventually for their daughter who was born in 1999. She also paid various expenses associated with the Husband's attendance at dental school.

[10] In January 2000, after a six-month maternity leave, the Wife returned to work as a physiotherapist. The parties' daughter began full-time daycare paid for by the Wife.

[11] During the Husband's first two years of dental school, the parties lived rent-free in the Husband's parents' home in an "in-law suite". In the Fall of 2000, they purchased the matrimonial home and moved into it.

[12] In 2001, the Husband completed dental school. In June, he began working at the Windsor Dental Centre as an associate dentist. That same year, he incorporated two companies: a dental corporation (Dr. E. A. Pirie, D.D.S. Inc. – "D.D.S. Inc.") and a holding company for his dental corporation (3058273 Nova Scotia Limited – "N.S. Ltd."). He also created the Dr. E.A. Pirie Family Trust ("the Family Trust").

[13] In 2002, the Husband purchased the Windsor Dental Centre through D.D.S. Inc. The parties don't agree as to how this purchase was financed. The Husband says it was financed by a CIBC business loan, and a \$100,000 loan from his parents. The Wife thought that the CIBC business loan was initially secured by the matrimonial home but acknowledged that she had no documentation to contradict what the Husband says. Regardless, the Husband continued to operate his dental practice as the Windsor Dental Centre.

[14] The parties' son was born in 2002. The Wife took a one-year maternity leave and then returned to work in 2003 at the QEII in a 50% position. The children were enrolled in daycare and after-school programs. The Wife continued to work in a 50% position for several more years so she could focus more of her time on childcare responsibilities.

[15] In August 2005, the parties opened a joint personal line of credit with CIBC with a credit limit of \$342,000. The line of credit was secured against the matrimonial home.

[16] In 2006, the Husband purchased a commercial building in Windsor, Nova Scotia, through N.S. Ltd. The Husband moved his dental practice into one of the

units in the building. Another unit held the dental practice of Dr. Rick Rutledge who became a tenant of N.S. Ltd.

[17] In 2009, after the parties' son entered Grade 3, the wife returned to work full-time. During this same year, the Husband purchased Dr. Rutledge's practice through D.D.S. Inc. for approximately \$200,000. The purchase was financed using the CIBC personal line of credit. At the time, the personal line of credit had a zero balance. The withdrawn funds of \$200,000 were repaid within two years by D.D.S. Inc., returning the line of credit balance to zero.

[18] The Husband continued to work and operate the Windsor Dental Clinic. Each day, he would travel back and forth between Halifax and Windsor.

[19] In September 2015, the Wife reduced her work hours to a 0.9 position to accommodate the son's schedule because he was too old for the after-school program.

b) Discussions about potential move to Florida

[20] At various points during their marriage, the parties had discussions about the family moving to Florida. The Husband felt that it offered better employment opportunities for him as a dentist and would be a good move for the entire family. While the parties disagree as to how concrete of a plan this was at various stages during their relationship, at a minimum, it appears the following isn't disputed:

- In 2000, the Husband wrote the American National Board exams which were forwarded to the Florida dental regulatory body.
- In February 2004, during a trip to Disney World, the Wife says the Husband started talking a lot about the possibility of moving to Florida. She says she opposed the move then.
- The Wife agrees that the Husband continued to talk frequently about moving to Florida until 2007, when the U.S. housing crisis and recession happened. She says the Husband began talking about the move again in 2008 and signed up with multiple realtors looking for houses in Florida. Nothing materialized from the parties' discussions, however.
- In December 2012, the parties again had discussions about moving the family to Florida, with the intention becoming more serious in 2013/2014.
- In early 2014, the Husband took steps to list the sale of his dental practice with a broker. The market listing expired after a year. The Husband didn't

renew it, as a graduate from the Dalhousie dental school had expressed interest in purchasing his practice.

- In March 2014, during a family vacation to Florida, the parties looked at potential schools for the children and attended some open houses.
- In June 2014, the parties listed their matrimonial home for sale but received no offers. They then took it off the market.
- In 2014/2015, both parties took steps to obtain the necessary credentials to work in Florida in their respective professions. The Wife took courses in 2014 and 2015. The Husband wrote a series of licensing exams in July 2014 and passed all the components except one which he rewrote successfully in July 2015.
- In September 2015, the Husband signed a contract to work with Aspen Dental in Maine as a temporary employee, which he believed would help him meet Florida's regulatory requirements and reduce the likelihood of delays in the licensing process. For various reasons, the proposed arrangement didn't occur.
- In October 2015, the Wife made it clear that she was no longer supportive of moving to Florida.

c) Separation, Sale of Dental Practice, and Husband's and Children's Move to Florida

[21] The parties separated on February 7, 2016. Unbeknownst to the Wife, the Husband had planned the separation for several weeks. He rented another home in Halifax and informed the children of his plan before telling the Wife. She was away from February 4-7th with the son at his cross-country skiing competition in Ottawa. During that time, the Husband moved the daughter, who was 17, into his rental home. On February 7th, he picked the Wife and son up at the airport and drove them to the matrimonial home. The Wife testified that the Husband asked the son to help him move something from the backyard and that, after some time elapsed, she received a call from the Husband stating, "We are separated and I have the kids this week and you have them next week".

[22] The Husband testified that he made the decision to move out of the matrimonial home with the children without the Wife's knowledge because he felt it would be the smoothest, least disruptive approach, and would be best for the children.

[23] The Husband also testified that, around the same time as the separation, he and the purchaser for his dental practice reached an agreement in writing as to the purchase price.

[24] In July 2016, the Husband sold his dental practice, consisting of all the shares in both D.D.S. Inc. and N.S. Ltd. as well as the commercial building which housed the Windsor Dental Centre. The net proceeds were \$773,672.

[25] In August 2016, the Husband and the daughter moved to Florida. The son followed in 2017. Both children now live with the Husband. They are currently 20 and 18 and are pursuing post-secondary studies.

[26] The Husband started working as a dentist in Florida shortly after moving there. From August 2016 to March 2017, he worked as a dentist at Coast Dental. In March 2017, he started working with his current employer, Project Health.

[27] In 2017, after the son moved to Florida, the Wife increased her work hours from a 0.9 position to a full-time position at the QEII. She continues to work in this position.

ISSUE:

[28] The sole issue I must determine is what interest, if any, the Wife has in the net proceeds from the sale of the Husband's former dental practice.

[29] The Wife says that the net proceeds from the sale of the Husband's former dental practice are a matrimonial asset and that she is entitled to 50% of same. In the alternative, she says that if the net proceeds are a business asset, she is entitled to 50% of same under either section 18 or section 13 of the *Matrimonial Property Act* ("MPA"). She also initially claimed 9% interest on the amount owing but withdrew this claim after the trial.

[30] The Husband says that the net proceeds from the sale of his former dental practice are a business asset and are therefore exempt from division. In the alternative, he says that any claim the Wife may have in relation to same is limited and has been exceeded in light of the parties' respective financial contributions since separation.

[31] To analyze the Wife's claims, I must first decide if the net proceeds from the sale of the former dental practice are a matrimonial or a business asset. If they are a matrimonial asset, I must decide how they should be divided. If they are a business asset, I must consider whether the Wife has established any claim against them under sections 18 or 13 of the *MPA*.

[32] For simplicity, I've divided this analysis into 5 sub-issues:

Sub-Issue 1: Are the net proceeds from the Husband's former dental practice a matrimonial asset or a business asset?

Sub-Issue 2: If the net proceeds are a matrimonial asset, how should they be divided?

Sub-Issue 3: If the net proceeds are a business asset, has the Wife established a claim to same under s. 18 of the *MPA*?

Sub-Issue 4: If the net proceeds are a business asset, has the Wife established a claim to same under s. 13 of the *MPA*?

Sub-Issue 5: If the Wife has established a claim under either s. 18 or s. 13 of the *MPA*, what interest or amount should she be given?

ANALYSIS:

a) The Husband's Former Dental Practice

[33] I was provided with various corporate information relating to the Husband's former dental practice including a joint chart entitled, "Organization and Structure of Dental Business and Family Trust". No accountant testified but the Husband's evidence included:

- D.D.S Inc. was his professional practice so that anything related to the practice itself was within that company. The Wife never had any shares in D.D.S. Inc.
- N.S. Ltd. was a holding company initially set up by his original accountants to hold, invest, and distribute proceeds from D.D.S. Inc. To achieve this, the Wife was given 49 Class B Common Shares in N.S. Ltd. out of 100 common shares, so that both parties could receive dividends. This occurred for the first year or so, but changed the following year after the Husband switched accountants. After then, money from D.D.S. Inc. moved to the Family Trust and was distributed. All four family members were named beneficiaries of the Family Trust. N.S. Ltd. received rental income initially from D.D.S. Inc. and, as of 2009, from both D.D.S. Inc. and Dr. Rutledge.

- When he decided to purchase the commercial building in Windsor in 2006, he did so through N.S. Ltd. based on the advice of his accountants.

[34] While the Husband said he reached an agreement as to the purchase price with the graduating dentist around the time of the parties' separation, the actual closing date wasn't until the end of July 2016. The final share purchase agreement was signed that month with an effective date of July 22, 2016. The purchasing dentist incorporated two companies for the purchase and bought all the issued and outstanding shares of both D.D.S. Inc. and N.S. Ltd., along with the commercial building owned by N.S. Ltd.

[35] The total purchase price was \$1,050,000, with the net proceeds from the sale being \$773,672. These funds were initially held in trust pending a resolution of the parties' financial affairs. It was later agreed that the Husband could withdraw half of those funds for his own use, given that the Wife was only claiming a 50% interest in same. Notwithstanding this agreement, the Husband later withdrew all the remaining funds. The Husband says he did so based on an understanding he had from another judge who presided at a settlement conference attended by the parties and their counsel. The Wife disputed that there was any such understanding and, through her counsel, voiced her objection to the Husband taking out the remaining funds. The funds have never been returned and the Husband has been able to use the funds to assist him in purchasing a new home in Florida.

Sub-Issue 1: Are the net proceeds from the Husband's former dental Practice a matrimonial asset or a business asset?

The Law

a) Definitions

[36] Subject to specified exceptions, matrimonial assets are defined to include "the matrimonial home...and all other real and person property acquired by either or both spouses before or during their marriage": s. 4(1) of the *MPA*.

[37] Business assets are one of the specified exceptions. They are "real or personal property primarily used or held for or in connection with a commercial, business, investment or other income-producing or profit-producing purpose...": s. 2(a) of the *MPA*.

b) General Principles from Case Law

[38] The *MPA* came into force in 1980. Since then, courts have sometimes struggled as to where to draw the line when distinguishing between matrimonial

assets (presumptively divisible) and business assets (presumptively exempt from division). The following general principles, however, have emerged:

1. The burden of proving that an asset is not matrimonial by reason of being a business asset is on the party making that assertion: *Volcko, v. Volcko*, 2015 NSCA 11, para. 23 (leave to appeal to SCC refused, [2015] S.C.C.A. No. 141); *Cashin*, 2010 NSCA 51, para 8;
2. The hallmark of business assets is that they have, as their primary purpose, the generation of income in an entrepreneurial sense: *Clarke v. Clarke*, [1990] 2 S.C.R. 795 at p. 814; *Volcko*, para. 25;
3. Generally, the only assets that should be classified as business assets are ones that are purposely held or used for the production of income or profit. It isn't enough to say that some gain or benefit may accrue in the future from the asset. Rather, it must be said that the asset is being worked in a commercial, business or investment way for the production of income or profit: *Lawrence v. Lawrence*, (1981), 47 N.S.R. (2d) 100, [1981] N.S.J. No. 12 (A.D.), para. 24;
4. A business asset is generally one which is used for relatively immediate gain as opposed to one that is merely held for the purpose of future security or as a "nest egg" or security for retirement: *Hebb v. Hebb*, (1991), 103 N.S.R. (2d) 147, 1991 CarswellNS 49 (A.D.), para. 17;
5. The parties' intention is very significant as to whether an asset is a matrimonial or business asset: *Hebb*, para. 17;
6. While intention is very significant, one can also consider whether an asset is working or being worked in an entrepreneurial way. Two important indicators of entrepreneurial activity are risk and management activity. There is a distinction between assets that are static (i.e. involve little financial risk and insignificant management) versus those that are financially risky to own, and require attention and management to ensure profitability: *J.W.L. v. C.B.M.*, 2008 NSSC 215, para. 17; and
7. Generally, an asset is more likely to be considered a business asset if it wasn't acquired from funds diverted from family uses (*Tibbets v. Tibbets*, (1992), 119 N.S.R. (2d) 26 (A.D.)), wasn't primarily intended to be used for the parties' retirement (*Hebb*), or was an asset held for income as opposed to capital gain (*Best v. Best*, (1991), 102 N.S.R. (2d) 61).

c) Professional Practices

[39] Generally, it has been widely accepted in Nova Scotia that interests in a professional practice and its management company are business assets. The following are examples:

1. In *Solomon v. Solomon*, (1990), 100 N.S.R. (2d) 73, 1990 CarswellNS 91 (S.C. T.D.), aff'd (1991) 106 N.S.R. (2d) 28 (A.D.), the husband was a veterinarian who owned a 25% partnership interest in a veterinary clinic. Justice Nathanson concluded in para. 8: "I find that this asset, unlike the other assets enumerated, is a business asset, and is not a matrimonial asset".

2. In *French v. French*, (1997), 162 N.S.R. (2d) 104, [1997] N.S.J. No. 287 (S.C.), the husband was a chartered accountant who operated a professional practice. Justice Hood stated in para. 120:

"Applying the test from Hebb to Robert French's professional practice, I conclude that it is a business asset operating in the entrepreneurial sense and for the immediate production of income and not for future security or gain. I therefore conclude that the professional practice is an exempt asset."

3. In *Gibson v. Montgomerie*, (1999), 177 N.S.R. (2d) 255, [1999] N.S.J. No. 223 (S.C.), Justice Davison determined that the husband's 25% interest in a medical practice was a business asset. In doing so, he stated:

66 The Elmsdale Medical Centre is only engaged in the practise of medicine. It is a business asset. The 25% of Elmsdale Medical Centre owned by Dr. Montgomerie is a business asset as defined by s. 2(a) of the *Matrimonial Property Act*...

67 As stated by Wilson, J. in *Clarke v. Clarke*, [1990] 2 S.C.R. 795 "business assets are assets which have as their purpose the generation of income in an entrepreneurial sense".

68 As further stated by Roscoe J.A. in *Johnson v. Johnson* (1999), 173 N.S.R. (2d) 51 at 53:

"Generally an interest in a law firm and the management company should be classified as business assets..."

There are no circumstances to remove the medical practise from the classification of a business asset.

4. In *Kalkman v. Beveridge*, 2018 NSSC 122, the wife was a massage therapist and the husband was an orthopaedic surgeon. The parties agreed that the wife's

massage therapy business and the husband's professional assets were business assets and exempt from division.

[40] A notable exception to the above cases is the Court of Appeal's decision in *Johnson, supra*, (1999 NSCA 25, [1999] N.S.J. No. 36 (C.A.)). In that case, a husband's interest in a law firm was found to be a matrimonial asset. The facts included:

- The year the parties married, the husband began law school in Ontario while the wife worked as a registered nurse;
- After the husband graduated from law school, the wife's father, the senior partner at the law firm of Waterbury, Newton and Johnson, invited the husband to join the law firm, which he did;
- The husband was found to be reckless with his spending and to have hidden ensuing financial problems from the wife;
- In July 1996, the husband began a relationship with another woman. He left the marital home in September 1996 and was subsequently expelled from the law firm in October 1996; and
- At the time of trial, the husband and the firm were negotiating the amount owed to him for his partnership interest and his interest in W.F.H., a holding company turned operating company incorporated by the law firm's partners.

[41] At the trial level, Justice Davison concluded that the husband's interests in the law firm and W.F.H. were matrimonial assets. He stated in paras. 64 and 67:

64 The interest in the law firm accrued through the husband's employment with the firm. He has left the firm and the "purpose" of the funds in the firm is not "to generate income in an entrepreneurial sense". This asset would have been one the parties would have intended to use when he left the firm as a family asset. It consists of money which should be used by both spouses, and by reason of the husband's early departure from the firm, would have been brought home except for the failure in negotiations between the firm and the husband. The interest in the law firm is a matrimonial asset.

67 The interest of the husband in W.F.H. was incorporated in the offer given to the husband by the law firm. The husband admitted that he now has preference shares and can no longer participate in the growth of the company. Now that the husband has left the law firm, he acquired the right to take his

interest in W.F.H. That interest, which could have been received by the parties, no longer has the purpose of generating income in the entrepreneurial sense. The parties' receipt of the interest in W.F.H. has been delayed because of the lack of agreement with the law firm. The interest in W.F.H. is a matrimonial asset, [Emphasis added]

[42] The husband appealed the trial judge's decision. Justice Roscoe, for a unanimous Court of Appeal, stated:

3 After considering the record and the written and oral argument by counsel, it is our unanimous opinion that the appeal should be dismissed. Generally an interest in a law firm and its management company should be classified as business assets, as they have as their purpose the generation of income in an entrepreneurial sense. (See *Clarke v. Clarke*, [1990] 2 S.C.R. 795). However, in the unique circumstances of this case, we are not persuaded that the trial judge erred in determining they were matrimonial assets. If the trial judge had classified these assets as business assets, we are of the opinion that this would have been an appropriate case in which to divide property other than matrimonial assets, in accordance with s. 13 of the Act...[Emphasis added].

[43] Thus, the Court of Appeal's decision in *Johnson* supports a conclusion that an interest in a professional practice and its management company should generally be classified as a business asset. The fact that they were classified as matrimonial assets in *Johnson* was due to the "unique circumstances" of the case. It is also noteworthy that Justice Roscoe stated that if the trial judge has otherwise determined that the interests were business assets, it would have been appropriate to divide them under s. 13 of the *MPA*. In other words, an equal division of the assets was appropriate, regardless of how they were classified.

d) Conclusion on classification of the net proceeds from the sale of the Husband's former dental practice

[44] D.D.S. Inc. and N.S. Ltd. operated as the Husband's professional dental practice and management company, respectively. His practice was housed in the building owned by N.S. Ltd. The dental practice was fully operating at the time of separation and continued to operate for a few months after separation until the shares in both D.D.S. Inc. and N.S. Ltd. were sold, along with the building. There is no suggestion that the value of the dental practice increased in the few months following separation – to the contrary, the Husband testified that the purchase price was agreed to around the time of separation.

[45] When I consider the evidence and the principles from the case law, I conclude that the net proceeds from the sale of the husband's dental practice are a business asset. I conclude this largely for the following 6 reasons:

- By any objective measure, the primary purpose of the dental practice was to produce income or profit;
- The dental practice was being worked in an entrepreneurial sense. It wasn't being held or operated in a passive way. The dental practice took out several business loans to finance its operations. These loans were entirely repaid with funds generated by the business;
- There was risk involved in the running of the dental practice. The Husband was actively managing it to generate income, as opposed to holding it in a static way for possible future security or gain;
- Money was regularly taken out of the dental practice to be used, as opposed to simply leaving it within the practice to grow; and
- While there are references to the dental practice being used to fund the parties' retirement at some point in the future, this wasn't its primary purpose. Rather, the primary purpose or intention of the dental practice was to generate income for relative immediate gain. Indeed, at the time the dental practice was sold, the parties were under 50 years old and both have continued to work in their respective professions without any firm retirement date.

Sub-Issue 2: If the net proceeds from the sale of the Husband's former dental practice are a matrimonial asset, how should they be divided?

[46] Because I've concluded the net proceeds aren't a matrimonial asset, I don't need to address this issue.

Sub-Issue 3: If the net proceeds from the sale of the Husband's former dental practice are a business asset, has the Wife established a claim to same under s. 18 of the *MPA*?

a) **The Law**

[47] Section 18 of the *MPA* allows me to award an amount to be paid as compensation or a share of the interest in a business asset where the claiming spouse “has contributed work, money or money worth in respect of the acquisition, management, maintenance operation or improvement of a business asset of the other spouse”.

[48] Section 18 of the *MPA* deals with direct contributions to a business asset. Indirect contributions shouldn't be considered under this section but can be considered under s. 13 of the *MPA*: *Young v. Young*, 2003 NSCA 63 and *Ryan v. Ryan*, 2010 NSCA 2.

b) The Wife's Claim under s. 18 of the *MPA*

[49] The Husband argues that the Wife didn't make any significant direct contribution to the dental practice and says her involvement with same was minimal. Specifically, he says the Wife acknowledged that:

- She had no direct involvement in the running of the dental practice;
- Except for some minimal painting on one occasion in 2006, she never did any paid or unpaid work for the dental practice; and
- She didn't sign any personal guarantees in relation to the financing of the dental companies.

[50] While I accept these points, I nevertheless conclude that the Wife has established a valid s. 18 claim, primarily for the following two reasons:

1. The matrimonial home, and possibly other matrimonial assets, were used as security for the dental practice

[51] In 2002, the matrimonial home was put solely in the Wife's name. It was subsequently used as security to help finance the dental practice. While the parties dispute the extent to which it was used, at a minimum, they agree that in 2009 the Husband purchased, through N.S. Ltd., Dr. Rutledge's dental practice for approximately \$200,000, using the CIBC personal line of credit. This line of credit was secured against the matrimonial home. The Husband's dental practice repaid the withdrawn funds in about two years, returning the line of credit balance to zero.

[52] The Husband also testified about a number of business loans he obtained to finance his dental practice. While these were corporate loans, he agreed that he had to give personal guarantees in relation to these loans, which included pledging any

assets registered in his name. Presumably, this may have included assets in his name in which the Wife may have had a matrimonial interest.

[53] In many cases where matrimonial assets have been pledged as security to help finance one spouse's business, the other spouse has been awarded a share of the business' value. The amounts awarded for the risk created have generally been under 15% of the value of the business. The following are examples:

i) *Thomas v. Thomas*, 2012 NSSC 440 - The wife made a s. 18 claim against the husband's fishing business. The fishing licenses, boat and gear were purchased using a mortgage placed on the matrimonial home. The wife was awarded a 7% share of the business on account of the risk to the matrimonial asset.

ii) *Cole v. Luckman*, 2012 NSSC 118 - The husband operated a farming and farrier business. The wife was a co-mortgagor of the property on which the farm was located. She was awarded a 15% share of the farming business and a 10% share of the farrier business. Part of the award appeared to relate to the direct contribution of work she gave to the businesses. Most of the award, however, appeared to relate to the risk incurred by the wife as a co-mortgagor because the trial judge described her work contribution as "minimal."

iii) *Mood v. Mood*, [1997] N.S.J. No. 531 (S.C.) - The husband owned a fish wholesale business. The matrimonial home and the family cottage were pledged as security for the business. Justice Goodfellow said this risk clearly contributed to the business and assessed the value of the contribution to be 7.5% of the value of the business.

iv) *Campbell v. Campbell*, (1986) 74 N.S.R. (2d) 25, [1986] N.S.J. No. 591 (S.C.) - The wife co-signed loans for the husband's excavating business. Justice Nathanson said "the importance of co-signing the loans should not be underestimated" and determined that, without the loans, likely some or all of the business assets would not have come into existence: para. 23. The wife was found to be entitled to 10% of the value of the business.

[54] In the somewhat outlier case of *Lynk v. Lynk*, [1989] N.S.J. No. 265 (C.A.), the wife was awarded a one-third interest in a business. The husband and wife signed a guarantee on a loan to help their son obtain a Burger King franchise. The son put 48% of the shares of the business into the husband's name, and the husband helped the son with the business by exercising influence and attending meetings with bankers and the Burger King Company. The Court of Appeal classified the husband's shares as business assets but awarded the wife a one-third interest, concluding that her contribution was substantial because she signed the guarantee, and the couple's home was pledged as security.

[55] In the present case, I am satisfied that by allowing the parties' personal line of credit, secured by the matrimonial home solely in her name, to be used to purchase Dr. Rutledge's practice, the Wife made a direct contribution to the Husband's dental practice which gives rise to a valid claim under s. 18 of the *MPA*. Furthermore, to the extent the Husband also gave unlimited personal guarantees for any business loans, and was required to provide updated personal net worth statements in order to obtain the necessary corporate financing to expand the dental practice (e.g. Exhibit 2, Page 221), this arguably created additional risk for personal assets in his name in which the Wife may have had a matrimonial interest. For example, in his Sworn Statement of Property dated February 3, 2018, he indicates that assets solely in his name as of the date of separation included an RRSP, a TSFA and the 2008 Subaru Tribeca. All these items appear to be acknowledged as being matrimonial assets.

2. Transfer of her shares in N.S. Ltd. to the Husband.

[56] When N.S. Ltd. was incorporated, the Husband was issued 51 Class B common shares, while the Wife was issued 49 Class B common shares.

[57] After reaching agreement on the purchase price of his dental practice with the purchasing dentist, the Husband asked the Wife to release her interest in N.S. Ltd. by transferring her shares to him, so that the net value of the proceeds from the sale would be increased. Specifically, on May 16, 2016, the Husband's lawyer sent a letter to the Wife's lawyer stating:

"Mr. Pirie has an offer on his practice ("the dental company" and the company that owns his practice's building ("the holding company"). The buyer is prepared to pay \$500,000 for the holding company, and the sale of the holding company can be structured in two ways (share sale or asset sale).

From a taxation perspective, a share sale is much more economical than an asset sale. If the share sale is to proceed, Ms. Pirie will need to sign over her shares to Mr. Pirie...Mr. Pirie can "unilaterally" decide to sell the building as an asset without Ms. Pirie's cooperation, in accordance with the holding company's terms of incorporation, etc. Due to the significant tax burden associated with this manner of sale, Mr. Pirie considers an asset sale a "last resort".

My client has agreed to hold the proceeds of the sale until the parties' financial settlement is finalized. Can we have Ms. Pirie's cooperation this week to sign these shares back to the company? Otherwise an asset sale will be Mr. Pirie's only option." [Emphasis added].

[58] Next, on May 24, 2016, the Husband sent the Wife an email which stated:

“I would like you to answer the question given to Judy [Schoen] about signing off your shares. This creates a share sale which is tax free. If you do not it will become an asset sale which is taxable. Paying taxes unnecessarily benefits neither of us. If we both have less then this is of no benefit to the kids. As you have not responded, I am going to have to tell the buyers that it will go through as taxable asset sale. If you do not know the difference, phone Davis Yuill the company’s accountant. He estimated that the tax owing would be approximately \$100,000. I will pay for your call to David. You having money helps the kids. Me having money helps the kids. Please do what is best for all.” [Emphasis added].

[59] The Wife eventually agreed to the Husband’s request to transfer her shares to him. The final paperwork effecting this was a share transfer agreement dated July 19, 2016, under which the Wife transferred her 49 Class B common shares to the Husband for the nominal sum of \$1.00. By agreeing to this transfer, the Husband acknowledged that the Wife prevented a significant tax liability. Specifically, during his cross-examination, the following exchange occurred:

- Q. Okay. Now you sold the business in 2016, correct?
- A. Correct, yeah.
- Q. And that transaction occurred -- finalized in August, would that be correct?
- A. I think it was the last day of July.
- Q. Okay. And there were two ways that sale could have been effected, correct?
- A. Correct.
- Q. And one was a sale of shares as it pertained to the numbered company, correct?
- A. Correct.
- Q. Or it could have been a sale of assets, correct?
- A. Correct.

- Q. Okay. And you preferred a sale of shares, correct?
- A. The accountant recommended it because there was lower taxes to be paid with a share sale.
- Q. Okay. And approximately \$100,000 lower, correct?
- A. That seems to be my memory of what was – what was told to me.
- Q. Okay. And in order to affect the sale of shares Ms. Pirie was required to sign documentation to affect that, correct?
- A. Correct.
- Q. And she agreed to do so, correct?
- A. Correct.
- Q. And at the time you were having discussions with Sue with respect to these options did you indicate to Sue that she would receive a portion of those sale proceeds?
- A. No, I did not.
- Q. Okay. Do you recall indicating to her that she would benefit from the money?
- A. I think -- if I remember and I think it's actually in the evidence that I said it would be beneficial to the family if we didn't lose \$100,000.
- Q. Okay. And what did you mean by that?
- A. Well, obviously if we have expenses to pay for the kids like tuition and stuff like that, having additional cash would be beneficial to the kids and the family as a whole.

[60] In my view, by agreeing to transfer her shares in N.S. Ltd. to the Husband essentially for nothing so he could increase the net proceeds from the sale by avoiding a significant tax liability, the Wife made a direct contribution to the improvement of the business asset which gives rise to a claim under s. 18 of the *MPA*. Even if I am wrong about this, I conclude it results in a valid claim under s. 13 of the *MPA*. I will therefore turn to my analysis of the Wife's s. 13 claim now.

Sub-Issue 4: If the net proceeds from the sale of the Husband’s former dental practice are a business asset, has the Wife established any claim to same under s. 13 of the *MPA*?

a) The Law

[61] Section 13 of the *MPA* allows me to divide a business asset where I’m satisfied that an equal division of matrimonial assets would be “unfair and unconscionable”, taking into account the factors listed in that section.

[62] In *Bennett v. Bennett*, (1992) 112 N.S.R. (2d) 79, 1992 CarswellNS 65 (C.A.), Justice D. Chipman clarified that it must be shown that an equal division of matrimonial assets would be unfair or unconscionable, not necessarily both: para. 23.

[63] A party advancing a claim under s. 13 of the *MPA* must produce strong evidence that, in all the circumstances, an equal division of matrimonial assets would be unfair or unconscionable: *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414 (A.D.), at para. 7.

[64] In *Cunningham v. Cunningham*, 2018 NSCA 63, the Court of Appeal upheld the trial judge’s refusal to unequally divide the husband’s RRSPs acquired before marriage. In doing so, it cited with approval the trial judge’s overview of the principles involved when considering a division under s. 13 of the *MPA*. Specifically, Justice Derrick, for a unanimous Court of Appeal, stated:

[13] In her reasoning, the trial judge placed considerable emphasis on the principles she extracted from *Young v. Young*, 2003 NSCA 63 including that:

- The “predominant concept” under the *Matrimonial Property Act* “is the recognition of marriage as a partnership with each party contributing in different ways”.
- The “mere fact” of an asset being acquired prior to marriage does not remove it from being presumptively subject to equal division.
- “Convincing evidence” is required to establish that an equal division would be unfair or unconscionable.
- The words “unfair” or “unconscionable” which have no “precise meaning”, evoke “ethical considerations and not merely legal ones.”

- The court is to consider all the circumstances and not merely the material contributions of each party.
- In assessing an unequal division claim, the court must look at “the timing of the contribution”, “the parties’ use of the asset”, “the length of the marriage”, “the significance of the asset relative to the entire pool of matrimonial assets” and “the age and stage of the parties at separation”.

b) The Wife’s Claim under s. 13 of the *MPA*

[65] The Husband disputes that the Wife has any valid claim under s. 13 of the *MPA*. In the alternative, he argues that if she had any such claim, it is limited or exceeded in light of the parties’ respective financial contributions since separation.

[66] With respect, I disagree. To the contrary, I find that the Wife has established a significant claim under s. 13 in relation to the net proceeds from the sale of the Husband’s former dental practice. I have considered the evidence in relation to all the relevant factors but highlight the evidence in relation to the following factors which strongly support this conclusion:

Subsection 13(e) - “the date and manner of acquisition of the assets”

[67] It is noteworthy that:

- The parties were married during the entire time that the dental practice was operational.
- The Husband was able to expand his dental practice in 2009 when he purchased Dr. Rutledge’s dental practice using the personal line of credit secured by the matrimonial home. While I have already considered this in relation to s. 18 of the *MPA*, I am of the view that it can also be considered under s. 13 which requires me to consider “all the circumstances”.
- As noted earlier, at the Husband’s request, the Wife gave up all her shares in N.S. Ltd. by transferring them to him for nothing, thereby increasing the net value of the sale proceeds. Had she not done this, she may have had a paper legal basis which would entitle her to some of the net proceeds from the sale. This is particularly so because the commercial building sold was owned solely by N.S. Ltd. and she held 49% of the class B common shares in that company.

It seems clear that the Wife gave up her shares in N.S. Ltd. to the Husband based on the representations in his email of May 24, 2016, that doing so would benefit both parties and the children. Despite those representations, if

the Husband's position is accepted, it means he walks away with all of the net proceeds from the sale, while the Wife gets absolutely nothing. This is despite the fact that by transferring her shares to him as he requested, he saved a significant tax liability (which he agreed was around \$100,000), thereby increasing the value of the net proceeds. In these circumstances, to allow him to keep the entirety of the net proceeds and simply divide the matrimonial assets equally would be unfair or unconscionable as contemplated by s. 13 of the *MPA*.

Subsection 13(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" and

Subsection 13(i) - "the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent"

[68] While I accept that the both parties were active parents, I'm satisfied that the Wife assumed a greater role in child care and other household related tasks for the benefit of the family. This, in turn, helped the Husband focus more efforts on his dental practice.

[69] I won't go through all the evidence that supports this conclusion, but highlight the following as examples:

- After the parties' daughter was born, the Wife testified she did the vast majority of the child care and household duties to permit the Husband to study when he wasn't in class;
- After graduating as a dentist, the Husband travelled to and from Windsor each day for work, while the Wife was the parent who generally drove the children to and from the Halifax Grammar school after they started attending there;
- After the son's birth in 2002, the Wife reduced her work hours to a 0.5 position so she could spend more time on the family and household needs while the Husband focussed on operating his dental practice in Windsor;
- The Wife maintained her reduced hours until 2009 when she returned to work full-time after the son entered Grade 3;

- The Wife reduced her work hours again to a 0.9 position from September 2015 to 2017, to accommodate the son's schedule, as he was too old for the after-school program; and
- The Wife testified that, as a result of her assuming more of the childcare/household responsibilities through reducing her work hours, her pension contributions were reduced by approximately 10%, thereby decreasing the value of her overall retirement savings (Exhibit 1, Page 34).

Subsection 13(g) - “the contribution by one spouse to the education or career potential of the other spouse”

[70] When the parties married in 1989, the Wife had already been working as a physiotherapist at the QEII. She held a permanent full-time position. The Husband had recently graduated from Dalhousie with a B.Ed. and B.Sc.

[71] The Wife remained a physiotherapist during the entirety of the parties' marriage. The Husband, on the other hand, with the Wife's support, trained for three different careers - first as a teacher, then as a pharmaceutical sales representative, and finally, as a dentist.

[72] I find that the Wife has made significant contributions to the Husband's education and career potential. I highlight the following:

- After the Husband graduated, the couple moved to Ontario so that the Husband could teach full-time. The Wife left her full-time permanent position as a physiotherapist at the QEII to work as a full-time physiotherapist in Ontario, before the parties eventually returned to Nova Scotia in 1991 when the Husband secured a full-time teaching position. The Wife returned to her former full-time physiotherapist position at the QEII, but testified that she had lost some pensionable time because she moved to Ontario so the Husband could pursue his teaching career.
- The Husband didn't wish to continue teaching so, with the Wife's support, decided to become a pharmaceutical company sales representative. He did this from 1993 to 1996.
- In 1997, again with the Wife's support, the Husband changed careers once more and embarked on the four-year dental school program at Dalhousie University. During this time, the Wife not only assumed additional financial responsibility for the parties' expenses, including the expenses of their daughter born in 1999, but she also paid various expenses in relation to the

Husband's attendance at dental school. The Wife claims she paid about \$40,000 towards the Husband's dental school expenses over the four years. While the Husband disputes that she paid all his dental school expenses, he agreed that:

- His tuition was approximately \$7000 to \$7700 annually. He also had additional expenses for equipment, student union fees, books, etc.
- The wife claimed the education tax credit on her income tax return each of the years he was at dental school;
- He didn't work the entire time he was at dental school, including any summers when he wasn't in school; and
- His attendance at dental school both diminished his ability to contribute to the household income and increased the family expenses.

Subsection 13(j) - "whether the value of the assets substantially appreciated during the marriage"

[73] There was no dental practice in existence before the marriage. The entire growth of the Husband's dental practice occurred during the marriage. I'm satisfied that, without the Wife's financial and household contributions which helped the Husband embark on his third career as a dentist, he may not have been able to become a dentist, and to subsequently build up a lucrative practice. The Husband testified that he reached an agreement as to the purchase price around the time of the parties' separation. Thus, this isn't a situation where the overall value of the dental practice substantially increased after separation. If anything, the Wife maximized its value after the parties separated by giving in to the Husband's request to give up her shares in N.S. Ltd. to him in order to avoid a significant tax liability.

[74] It also seems clear that the parties themselves always contemplated that they both would benefit from the appreciation in the value of the Husband's dental practice, at least when it was contemplated that the family may move to Florida after the practice was sold. For example, on November 18, 2015, less than three months prior to separation, the Wife sent the Husband an email with the Subject Line: "retirement" in which she stated:

Hi Sandy,

As I mentioned, depending on the final sale of your practice, retiring at about age 60 (2026) and becoming snowbirds looks very realistic according to the CIBC retirement calculator and conservative numbers.

Another option could be for us both to retire at age 55 (2021), depending again on the final sale of your practice, and then you work part-time in Florida for Aspen. I could work part-time doing something other than [physiotherapy] as well if necessary. [The son] will be done his first year of post-secondary by then so he should be independent, and [the daughter] will be finishing her fourth year of post-secondary studies.

It's hard to believe retirement is getting so near!

Love,

Sue

Subsection 13(l) – “the value to 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”

[75] The Wife has worked as a physiotherapist for over 30 years, including the entirety of the parties' marriage. Based on their updated equalization charts, the parties appear to agree that her pension will be divided at source on a 50/50 basis for the period from September 3, 1991, to February 7, 2016 (i.e. the separation date).

[76] The Husband, on the other hand, has worked as a dentist for a significantly shorter time after the Wife helped support him to leave two prior careers and go back to school so that he could become a dentist. In these circumstances, to simply equally divide all the matrimonial assets including the Wife's pension, but allow the Husband to keep all of the net proceeds from the sale of the dental practice as an exempt business asset, would be unfair and unconscionable.

Conclusion on Wife's claim under s. 13 of the MPA:

[77] I recognize that I have dealt with the Wife's s. 13 claim now before any final determination of the other issues including any remaining property division issues. I also appreciate that s.13 of the MPA allows me to divide a non-matrimonial asset where I'm satisfied that an equal division of matrimonial assets would be “unfair and unconscionable”. I have dealt with the Wife's s. 13 claim now because:

- This is what the parties requested I do on March 19, 2020, in the hope that they may be able to resolve all the other issues, including remaining property division issues, on their own. This request was confirmed again in emails sent by the parties' respective counsel to my judicial assistant on July 23, 2020.

- Plainly, the net proceeds from the sale of the Husband's former dental practice are, by far, the largest asset accumulated by the parties during their lengthy marriage. Each spouse contributed significantly to the overall success of the family during the marriage and, with the Wife's support, the Husband was able to re-train to become a dentist while she continuously worked as a physiotherapist.

Both parties provided me with updated proposed equalization charts in late February 2020. They largely agree on how their other assets and debts should be divided subject to a few issues which were in dispute. Some of those differences were further resolved during the discussions which ensued on March 19, 2020. Thus, it doesn't appear that the parties significantly disagree on how to divide most of their matrimonial assets equally.

Thus, even if I was to divide all the remaining property in the most favourable way to the Wife as she requests, I'm satisfied that it would be unfair and unconscionable to allow the Husband to walk away with the entirety of the largest asset accumulated during the parties' lengthy marriage worth \$773,672 created through his job as a dentist while, at the same time, simply equally divide all the parties' matrimonial assets including the Wife's pension earned by her working over 25 years as a physiotherapist.

Sub-Issue 5: If the Wife has established a claim to the net proceeds from the sale of the Husband's former dental practice under either s. 18 or 13 of the MPA, what interest or amount should she be awarded?

[78] As noted from *Clarke, supra*, the MPA should be given a broad and liberal interpretation. Further, as stated in *Young, supra*, the "predominant concept" under the MPA "is the recognition of marriage as a partnership with each party contributing in different ways".

[79] Here, the parties have had a lengthy marriage of over 26 years. They successfully raised two wonderful children together. During their marriage, each spouse contributed in different ways to the overall success of the family. The Wife had, for many years, assumed a greater responsibility in relation to the children and household, while also financially and emotionally supporting the Husband as he pursued three different careers. The dental practice grew to be the parties' most sizable asset. It was accumulated entirely during their marriage.

[80] When I consider all the circumstances, I exercise my discretion pursuant to sections 18 and 13 of the *MPA* to cumulatively award the Wife a 40% interest in the net proceeds from the sale of the Husband's former dental practice. I conclude that doing so represents a fair and equitable result based on the evidence and the law, including the principles of the *MPA*. In reaching this result, I decline to engage in, as the Husband suggests, a detailed weighing of the parties' respective financial contributions post-separation. I have declined to do so largely because:

- On March 19, 2020, and again confirmed on July 23, 2020, the parties specifically requested that I solely focus on the single issue of what interest, if any, the Wife has in the net proceeds from the sale of the Husband's former dental practice, as opposed to issues which go to each parties' respective contributions towards things such as child support, etc.;
- As acknowledged in the Husband's post-trial submissions dated February 13, 2020, some of the claims or circumstances relating to the post-separation contributions are in dispute and may have to be determined by me in the event the parties cannot agree on same.

[81] I reserve the jurisdiction to deal with any implementational issues arising from my decision. I direct counsel for the Wife to prepare the appropriate form of order reflecting my decision, which should be consented as to form only by both counsel and sent to me within 30 days.

[82] Given that the parties have expressed a desire to try to resolve all other issues after I released this decision, I will give them 30 days to try and reach agreement on the outstanding issues. Counsel should then provide me with an update and, if necessary, they can request that a 30 minute conference be scheduled on my docket to discuss how to proceed.

Jesudason, J.