

**IN THE SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Whitty v. Whitty, 2008 NSSC 243

**Date:** 19082008

**Docket:** SFSND1206-004938

**Registry:** Sydney, Nova Scotia

**Between:**

**WENDY WHITTY**

**Applicant**

**v.**

**PERCY WHITTY**

**Respondent**

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**DECISION**

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**Judge:** The Honourable Justice Darryl W. Wilson

**Heard:** June 19<sup>th</sup> & 20<sup>th</sup>, 2008

**Written Decision:** August 21, 2008

**Counsel:** William P. Burchell, Counsel for the Applicant  
Candee J. McCarthy, Counsel for the Respondent

**By the Court:**

[1] The Petitioner, Wendy Whitty, and the Respondent, Percy Whitty, were “childhood sweethearts” who began dating in high school and were married on September 1, 1984 when they were 21 years old.

[2] They are the parents of two (2) children, Courtney, age 22, who graduated from Mt. St. Vincent University in May, 2008, with a Degree in Child & Youth Studies, and Carissa, age 19, who is attending a one (1) year Esthetics Program at the Concepts School of Cosmetology in Halifax, which she will complete in August, 2008.

[3] The date of separation is disputed. The mother claims it was May, 2004 and the father claims it was May, 2005. The date of separation is relevant to the valuation of matrimonial property/debt and commencement of support obligations.

## **DATE OF SEPARATION**

[4] The father left the matrimonial home in the Spring of 2004. The parties had separated on two (2) or three (3) occasions in the preceding year for short periods. When the father left in the Spring of 2004, the parties needed time away from each other but reconciliation was still a possibility. The father would attend his shop on the property without restriction to work on his lobster traps. He did not sleep in the home or take meals with the family, although, on occasion, he made sandwiches for himself while working in his shop. The parties kept the same family financial arrangements with the father paying the mortgage and the vehicle expenses from his bank account, and the mother paying the house and child related expenses from hers. In the Spring of 2005, the father advised the mother to retain a lawyer when he realized there was no chance of reconciliation. She filed her Petition for Divorce on June 28, 2005.

[5] In September, 2004, Courtney attended Mount St. Vincent University in Halifax for her first year of university. The father paid her living and school expenses not covered by scholarships, bursaries and savings. She did not have to apply for a student loan that year. During the period from April 2004

to April 2005, the father purchased medication for himself. He gave the receipts to the mother, who claimed re-imbursement on her medical plan through work. The mother retained the re-imbursed amounts. The father was not able to identify the amount involved.

[6] The father purchased a home for himself in the Fall of 2005.

[7] Section 8(2)(a) of the **Divorce Act** provides:

**(2) Breakdown of a marriage is established only if  
(a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding;**

[8] Section 8(3) of the **Divorce Act** provides:

**For the purposes of paragraph (2)(a),  
(a) Spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other.**

[9] A review of the case law indicates the definition of “separate and apart” requires physical separation coupled with a recognition by one of the parties that the marriage is at an end. [**Memisoglu v. Memisoglu** (1995), 18 R.F.L. (4<sup>th</sup>) 150].

[10] Although the parties were living apart during the period April, 2004 to April, 2005, it has not been established on a balance of probabilities that either party intended to end the marriage until the husband advised the wife to retain a lawyer in the Spring of 2005. The lengthy period of living apart would suggest a withdrawal from the marital relationship but the evidence on the parties' intention is equivocal. During the period from the Spring of 2004 until the Spring of 2005, the parties continued the same financial arrangements, the father attended the property without restrictions to look after his lobster traps; on occasion he prepared a lunch for himself; he paid living and school expenses for his oldest daughter and there was regular communication between them. The mother agreed with counsel for the father's suggestion that reconciliation was possible when the husband left in the Spring of 2004. The mother also agreed with counsel's suggestion they held themselves out as husband and wife while living apart.

[11] Therefore, I find the date of separation occurred in the Spring of 2005, when the father advised the mother to retain a lawyer which resulted in her filing a Petition for Divorce.

## **ISSUES**

[12] The remaining issues to be determined include:

- (i) Child support:
  - (a) Determination of income;
  - (b) Imputation of income;
  - (c) Retroactive;
  - (d) Amount;
  
- (ii) **Matrimonial Property Act:**
  - (a) Division - unequal division sought if specific assets classified as business assets;
  - (b) Classification of assets - business v. matrimonial;
  - (c) Valuation of Business Assets;
  - (d) Section 18 claim if business classification granted to specific assets;
  
- (iii) Spousal support, including duration, lump-sum, periodic and retroactive;

## **DIVORCE**

[13] The jurisdictional and procedural requirements have been met. There is no possibility of reconciliation. The marriage has been proven, as well as the grounds for divorce. There has been a permanent breakdown of the marriage by reason of the fact that the parties have been living separate and apart for a period in excess of one (1) year prior to the court hearing date and

were living separate and apart at the commencement of the proceeding. A Divorce Judgment is granted.

### **BACKGROUND**

[14] The mother has a Grade 12 education. She worked as a waitress at the Seagull Restaurant on a seasonal basis for twenty-four (24) years and collected E.I. Benefits and income from babysitting children during the off-season. Approximately four (4) years ago, she began working at a Rona building supplies outlet on a full-time basis.

[15] The father was a fisherman's helper on his cousin's boat until he bought his own lobster license, boat and gear, approximately thirteen (13) years ago. He collects E.I. Benefits during the off-season. He also owns a crab quota. The father's fishing operation includes the lobster license, crab quota, boat/motor and gear. He has two (2) loans with Scotia Bank, one for the purchase of the lobster license and a second for the purchase of a new motor for the boat. He has an account with Victoria Co-op Fisheries for fishing supply purchases.

[16] The matrimonial home is located at 54 Bayview, Ingonish, Victoria County. Initially, the parties lived in a small trailer, which was sold when they purchased a mini home and placed it on land conveyed to the mother by her family as a gift in December, 1988. The mini-home was extensively renovated approximately eleven (11) years ago to make it look more like a home. Funds from mortgage re-financing were used to purchase the materials and supplies for the renovation while the father contributed most of the labour.

[17] The mother is residing in the matrimonial home by herself.

[18] The father is residing in a mobile home located at 10 Harbour Drive, Ingonish Beach, which he purchased after separation with borrowed funds.

[19] The parties' daughter, Courtney, has her own apartment in Halifax. She is working full-time at a home for troubled-teens, but has plans to further her education by taking a Bachelor of Social Work Degree at Dalhousie in the Fall. The younger daughter, Corissa, also has an apartment in Halifax and will graduate in August as an Esthetician. She has a job opportunity in September, but is considering returning to school to study massage therapy.



The father has a good relationship with Courtney, but Corissa has not spoken to him in approximately four (4) years.

[20] During the marriage, the parties enjoyed a fairly simply lifestyle. They did not incur substantial debt or take expensive vacations. Both parents had seasonal employment and were home for significant periods of time during the year. The father's fishing business occupied approximately three (3) months' employment a year. On occasion, during the off-season, he would do carpentry work. The mother was primarily responsible for child care and house chores. She said the Respondent was a good father but he was not around much when the children were younger. He spent more time with them when they got older. Occasionally, he prepared a meal or washed the dishes. The father said that the Petitioner was an excellent mother to the children but she did not raise them on her own. He took them for visits to his family and to various activities and functions. He was responsible for yard work, including mowing the grass and he did repairs around the home and, on occasion, he did the laundry and dishes.

[21] The parties kept their own bank accounts. The mother paid most of the house expenses such as insurance, power, phone and groceries and child related expenses and her credit card balances from her account. The father's account was used mostly for expenses connected to his fishing business. He paid the house mortgage and vehicle related expenses from this account. The father also paid child related expenses from his account when the mother did not have the funds. The parties also had a joint bank account, which was funded by the father. It was used for major purchases such as the fishing boat and motor. Although the mother had signing authority on this account, she did not use it very often.

[22] The mother had three (3) credit cards in her name, including a Scotia Value Visa, C.I.B.C. Visa and a Sears account.

[23] The outstanding balances at the date of separation were:

Value Visa	\$6,290.64
C.I.B.C. Visa	\$2,428.18
Sears	\$ 200.00

[24] The outstanding balance of the father's Scotialine Visa at date of separation was \$14,878.48. Although the father was the primary account owner, the mother had a separate card which enabled her to charge purchases to this account.

[25] There were some business expenses charged to the father's account in April, 2003, which were paid soon after they were incurred. Otherwise, neither party disputed the matrimonial nature of the credit card debts and I find the outstanding balances at the date of separation to be matrimonial debt.

[26] Since separation, each party assumed responsibility for payment of the debt in their name.

[27] The bank accounts had nil or minimal balances in the Spring of 2005 and neither party advanced a claim for division of these accounts.

### **THE FISHING ENTERPRISE**

[28] The parties agreed to value the fishing assets as follows:

Lobster license	\$187,500.00
Crab quota	\$ 46,000.00
Boat and Gear	\$ 25,000.00
<b>TOTAL</b>	<b>\$258,500.00</b>

[29] At separation there was an outstanding account with Victoria Co-op Fisheries Limited and two (2) loans with Scotia Bank, which were used to purchase a lobster license in 1995 and a new motor in 2002. The father paid \$6,000.00 a year on the loan for the lobster license and \$4,222.80 a year on the loan to purchase the engine. These payments were made once yearly during the fishing season. Interest on these loans accumulated during the year and was paid during the fishing season. The loan for the lobster license was paid in full in 2005 and the loan to purchase the motor was paid in full in 2007.

[30] The lobster license was purchased for approximately \$60,000.00 in 2005.

[31] The mother's involvement in the father's fishing operation included preparing and remitting payroll deductions to Revenue Canada for the father

and his helper during the fishing season and corresponding with the accountant, who prepared his income tax returns. She also prepared lunches for people working on lobster traps and on occasion joined other family members painting buoys. She co-signed a bank loan with the father, which enabled him to obtain funds to purchase his lobster license. It appears the home was not used as collateral for this loan. Friends of the parties signed the loan as guarantors.

### **CHILD SUPPORT**

[32] The parties agree that the children will cease being dependent children of the marriage in August, 2008 and the father's child support obligation will end at that time. The Court must determine the appropriate amount of child support payable from the time of the parties' separation until August, 2008.

[33] The first issue to determine is the father's annual income for purposes of determining child support payments. The father's sources of income include lobster fishing, a snow crab allocation and employment insurance benefits. The father's employment insurance benefits is clawed back if his income from other sources exceeds a certain level in any particular year. This

occurred in 2005 and 2007, but not in 2006. Also in 2006, he paid a crew share of \$10,000.00, which he did not do in other years. The parties agree that an additional \$10,000.00 should be added to his income for 2006 for purposes of determining his child support obligation. The father expects the 2008 fishing season to be similar to the 2007 season and, therefore, his income for child support purposes in 2008 will be fixed at the same amount as assessed in 2007.

[34] I have reduced the father's total income on Line 150 of his Income Tax Return by the employment insurance benefits clawed back because the Child Support Guidelines refer to sources of income at Line 150 and not the amount of income. His income for child support purposes should reflect the actual amount of income earned from each source.

[35] Therefore, I fix the father's annual income for purposes of determining child support as follows:

2005	\$80,387.00
2006	\$55,154.00
2007	\$78,123.00
2008	\$78,123.00

[36] The Court was not provided with particulars of any Section 7 claims, although both children were taking post-secondary courses of study. The children of the marriage appear to be very independent and are utilizing their own resources to pay for the cost of their education with minimal financial contribution from either parent. In these circumstances, the Table amount has been used to determine the appropriate amount of support payable from the date of separation in 2005 until August, 2008.

<b><u>INCOME</u></b>	<b><u>YEAR</u></b>		<b><u>AMOUNT</u></b>
\$80,387.00	May to Dec. 2005	8 @ \$1030.00	\$8,240.00
\$55,154.00	Jan. To April 2006	4 @ \$744.00	\$2,976.00
\$55,154.00	May to Dec. 2006	8 @ \$785.00	\$6,280.00
\$78,123.00	2007	12 @ \$1,084.00	\$13,008.00
\$78,123.00	Jan. to Aug. 2008	8 @ \$1,084.00	\$8,672.00
<b>TOTAL</b>			<b>\$39,176.00</b>

[37] A conciliator issued an Interim Child Support Order on January 3, 2006, which the father appealed. The parties then agreed to a Child Support Order of \$996.00 a month, beginning February 1, 2006 based on an annual income

of \$71,000.00, which was reviewable at the final hearing. The father has paid the Order and there are no arrears owing. The father made the monthly mortgage payments on the home from the date of separation in the Spring of 2005 until the Child Support Order was issued.

[38] In addition to the child support payments to the mother, the father paid approximately \$800.00 for a summer school course for Courtney in 2007 and on a few occasions, paid transportation costs for travel between Halifax and Victoria County. He also gave her \$250.00 when she was returning to university in September, 2007.

[39] The father's relationship with Corissa is strained. Corissa obtained a loan of \$10,500.00 to pay for her education, which cost approximately \$10,000.00. She also saved money from summer employment. The father gave her \$250.00 in September, 2007, when she was going to Halifax, as well as \$80.00 for her birthday and \$300.00 for Christmas.

[40] The father believes the mother should have been giving more of his monthly child support payments to the children.



[41] The mother took out a line of credit which was co-signed by her father in the amount of \$9,200.00, to help pay Courtney's 2<sup>nd</sup> year university expenses. Courtney was late in applying for a student loan that year. The mother is paying the monthly interest expense (approximately \$60.00) on this loan, which will be taken over by Courtney when she completes her studies. The father was not made aware that the mother took out a line of credit for Courtney's benefit.

[42] Courtney would stay at the mother's residence during the summer break. She remained in Halifax during the Summer of 2008 where she has full-time employment. The mother assisted Courtney with transportation costs on her return to university each year and, on occasion, paid transportation costs for trips home during the year. On three (3) or four (4) occasions she gave money to help with miscellaneous expenses, including groceries. She paid a \$200.00 deposit so Courtney could attend summer school in New Brunswick during 2007.

[43] On a few occasions during the past year, the mother provided funds to Corissa to help with groceries and the cost of a natural healing therapy for a physical ailment.

[44] The father will receive a credit toward his child support obligation for the child support payments made to the Maintenance Enforcement Program plus the mortgage payments made from May 2005 onward.

[45] Any additional payments by the father to the children were in a nature of gifts and not intended to be in furtherance of his child support obligation.

[46] Since the Court is not certain of the exact amount of the mortgage payments, counsel can do the calculations in order to determine the amount of child support still owing by the father.

### **DIVISION OF MATRIMONIAL PROPERTY**

[47] Section 4(1) of the **Divorce Act** provides:

**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 their marriage, with the exception of...**  
**(e) business assets;**

[48] The classification of the father's fishing assets will be considered later in this decision.

[49] The matrimonial assets not disputed include the home, contents, vehicle and trailer. The trailer was sold and the proceeds divided equally. It appears personal property has been divided to the parties satisfaction as neither party made a claim on personal property currently being held in the possession of the other party.

[50] The motor vehicle remained in the possession of the mother after separation. It was purchased for approximately six thousand dollars (\$6,000.00) shortly before the father left the residence in 2004. The vehicle was damaged by the father prior to him leaving the home and not repaired. The car was recently removed from the road by the mother. She is without a vehicle at this time. I estimate the value of this vehicle at \$2,500.00 as of the date of separation.

[51] The matrimonial home was assessed at \$78,000.00. The parties agree to this valuation. The mortgage outstanding in April, 2005 was \$29,051.23.

[52] I fix disposition costs at \$6,400.00 consisting of real estate commission at 6% and migration costs of \$1,000.00 and G.S.T. at 13%.

[53] An equal division of these matrimonial assets/debts would require the mother to pay the father an equalization payment of \$25,504.21.

<b>ASSETS</b>	<b>VALUE</b>	<b>MOTHER</b>	<b>FATHER</b>
Home (78,000 - 6,400)	71,600.00	71,600.00	-
Vehicles	<u>2,500.00</u>	<u>2,500.00</u>	=
	74,100.00	74,100.00	-
<b>DEBT</b>			
Mortgage	29,051.23	29,051.23	
Value Visa	6,290.64	6,290.64	
CIBC Visa	2,428.18	2,428.18	
Sears	200.00	200.00	
Scotialine Visa	<u>14,878.48</u>	_____	<u>14,878.48</u>
	52,848.53	37,970.05	(14,878.48)
<b>BALANCE</b>	<u>21,251.47</u>	<u>36,129.95</u>	(14,878.48)

Equalization Payment		<u>-25,504.21</u>	<u>+25,504.21</u>
<b>TOTAL</b>		10,624.74	10,625.73

### **CLASSIFICATION OF FISHING OPERATION**

[54] Counsel for the father submits the fishing operation is a business asset as defined in Section 2(a) of the **Matrimonial Property Act**. Section 2(a) provides:

**2 In this Act,**

**(a) "business assets" means 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, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;**

[55] Counsel for the father submits that the fishing assets are used primarily for income producing purposes.

[56] Counsel for the mother submits the fishing operation should be matrimonial assets. Counsel for the mother submits that the lobster license, crab quota, boat and lobster traps were acquired during the parties relationship, the mother assumed a risk by co-signing the bank loan which

enabled the father to purchase a lobster license, there was no other retirement plan for the parties, the matrimonial home was used to store fishing traps and equipment and the mother performed unpaid work for the fishing operation.

[57] In some instances, assets which appear to be business assets may be considered matrimonial if there is an intent by the parties that the primary purpose of purchasing the asset was for the parties' future retirement. There was no evidence of that in this proceeding. The father's fishing operation is truly a business enterprise with its primary purpose to generate income in an entrepreneurial sense. I, therefore, find that the fishing operation, including the lobster license, crab allocation, boat motor and gear are business assets as defined in the **Matrimonial Property Act**.

[58] Assets acquired during the marriage, which are classified as business assets, are excluded from matrimonial assets pursuant to Section 4(1)(e). Contributions to business assets by a spouse are considered pursuant to Section 18 of the **Matrimonial Property Act**.

[59] The parties agreed that the value of the business assets totalled \$258,500.00. I approximated the value of the outstanding business debt at the time of separation in May, 2005, at \$22,000.00 consisting of \$6,000.00 for the lobster license loan, approximately \$12,500.00 on the motor boat loan, and approximately \$3,500.00 to Victoria Co-op Fisheries Ltd. Therefore, I determine the net value before tax of the father's business operations at \$236,500.00. The disposition of a capital asset would incur capital gains tax which is difficult to estimate at this time. The net value of the fishing enterprise would have to be discounted. Without additional information, my best estimate of the net value of the father's fishing operation is \$200,000.00.

### **UNEQUAL DIVISION**

[60] The mother seeks an unequal division of assets/debt, pursuant to Section 13 of the **Matrimonial Property Act** or alternatively, a lump sum award pursuant to Section 18 such that the result is an equal division of the parties' assets if the fishing operation is not classified as a matrimonial asset.

**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 spouses;**

**(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 spouse;**

**(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 made 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 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;**

**(m) all taxation consequences of the division of matrimonial assets.**



[61] Counsel for the mother claims an equal division of only the matrimonial assets would be unfair or unconscionable. He requests an equal division of the fishing assets and asked the Court to consider that:

- (1) The mother contributed valuable unpaid work to the business and the home and the parties retirement security was the fishing business.
- (2) The mother assisted in the acquisition of the lobster license by guaranteeing a business loan.

[62] Counsel for the father submits the matrimonial assets should be divided 60/40 % in favour of the mother as compensation for any contribution by her to the father's fishing operation.

[63] In **Young v. Young, (2003) 216 N.S.R. (2d) 94 (C.A.)**, Bateman J.A. reviewed the discretionary limitations of s. 13 of the Act at paras. 15, 18, 19, 20:

**15 There is no presumption that business assets be divided equally, or at all. Under s. 18, the division of a business asset is made solely in accordance with the contribution of the non-owning spouse to the business asset, ignoring the relationship of the parties. In contrast, the division of matrimonial assets is prima facie equal, with unequal division permitted only in limited circumstances. The inquiry under s. 13 is broader than a straight forward measuring of contribution. The predominant concept under the Act is the recognition of marriage as a partnership with each party contributing in different ways. A weighing**

of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Since the introduction of the Act, it has been repeatedly stressed by this Court, that matrimonial assets will be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable. MacKeigan, C.J.N.S. wrote, for the court, in *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414; [1981] N.S.J. No. 6 (Q.L.) (A.D.), one of the first cases in which the Matrimonial Property Act was considered:

7 Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the Act and prescribed by s. 12 should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be clearly unfair - not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his discretion concludes that equal division would be unfair is he called upon to determine exactly what unequal division might be made. (Emphasis added)

...

18 As set out above, substantially different considerations are applied to a division of matrimonial assets than the basic contribution assessment applied to the division of business assets. It is not sufficient, for an unequal division of matrimonial assets, that one of the s. 13 factors be present. The judge must make the additional determination that an equal division would be unfair or unconscionable. The terms "unfair" and "unconscionable" do not have precise meaning. Lambert, J. A. wrote in *Girard v. Girard*, (1983), 33 R.F.L. (2d) 79; [1983] B.C.J. No. 4 (Q.L.) (B.C.C.A.) supra, at p. 86:

I come then to the legislative purpose expressed in the word "unfair". That word evokes ethical considerations and not merely legal ones. It is not a lawyer's word. The section does not give a judge a broad discretion to divide property in accordance with his own conscience. There can be no doubt about that. There must be uniformity and predictability of judgment. The question of unfairness must therefore be measured by an objective standard. The standard is that of a fair and reasonable person whose values reflect those generally held in contemporary British Columbia. Such a person, while not insisting that everyone adopt his or her behaviour preferences, can recognize unfairness in the form of a marked departure from current community values.

**19** As directed in *Harwood v. Thomas*, supra, the judge must look at all of the circumstances, not simply weigh the respective material contributions of the parties. In *S.B.M. v. N.M.*, [2003] B.C.J. No. 1142 (Q.L.)(C.A.), a recent decision of the British Columbia Court of Appeal, the court was asked to review the trial judge's unequal division of family assets. The Family Relations Act, R.S.B.C. 1996, c. 128, s. 65(1) permits a deviation from the prima facie unequal division of family assets, where an equal division would be "unfair". I would endorse the approach to the question of unfairness outlined by Donald, J.A., for the court. It is consistent with the direction in *Harwood*, supra and the cases in this province which have followed:

para 23 ... The question is not whether an unequal division would be fair; that is not the obverse of the test in s. 65(1). The Legislature created a presumption of equality - a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of s. 65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair, a reapportionment could be ordered on the basis that it is more fair, and that, in my opinion, is not what the statute intends. (Emphasis added)

**20** Section 4(1) of the Act expressly includes as a matrimonial asset (subject to the enumerated exceptions) all real and personal property acquired by either or both spouses before or during their marriage. Thus the mere fact of prior acquisition does not remove the asset from prima facie equal division. Section 13(e) entitles the judge to take into account "the date and manner of acquisition of the assets" when considering whether an equal division would be unfair or unconscionable. Under the s. 13 analysis the significance of the prior acquisition must be looked at taking into account factors such as the timing of the contribution of the particular asset to the marriage; 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. This is not an exhaustive list. The judge failed to conduct a contextual assessment of the significance of Mr. Young's prior ownership of the farm.

[64] The **Young** case involved an application for an equal division of property acquired before the marriage. The classification of the property was disputed. The Court determined the property was matrimonial but viewed the property as a business asset when determining the wife's interest in the property. This proceeding concerns, in part, an application for an equal division of business assets acquired during the marriage. As stated by Bateman, J.A., substantially different considerations are applied to a division of matrimonial assets than the basic contribution assessment applied to the division of business assets.

[65] The mother's request for an equal division of the business assets pursuant to Section 13 is denied. I have considered the factors listed in Section 13, and I find that a division of matrimonial assets in equal shares would not be unfair or unconscionable. Although there has been a substantial increase in the value of the lobster license and crab quota during the marriage, the future value of these assets are uncertain. The major matrimonial asset is the matrimonial home. Both parties contributed to the acquisition and improvement of this home. The mother acquired title to the property as a gift from her family and the father contributed a significant

amount of labour in making improvements to the home. The mother's interest in the father's business will be determined pursuant to Section 18 of the **Matrimonial Property Act**.

### **ENTITLEMENT PURSUANT TO SECTION 18**

[66] In the event the fishing operation is not divided equally, the mother requests a lump sum award pursuant to Section 18 of the **Matrimonial Property Act** to compensate for the work she performed for the business, including the use of the family home to store fishing assets and her co-signing the loans related to the lobster license.

#### **Contribution to business asset by spouse**

**18 Where one spouse has contributed work, money or moneys worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order**

**(a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefor; or**

**(b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution, and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.**

[67] I have considered the evidence relating to the mother's contribution to the fishing operation. The father relied upon her and she assumed responsibility for office work related to the business for which she was not compensated. She put personal assets at risk by co-signing a business loan, which allowed the father to acquire a lobster license. Her property was used by the father to store business assets and repair traps. However, much of her work was seasonal and related only to one (1) or two (2) workers. Her employment was not affected in any way by the work she contributed to the fishing operation. Most of the effort of the fishing operation was the work of the father. The mother is entitled to compensation for her contributions to the father's business assets. I have reviewed the amount of contribution awarded in other cases. I fix the amount of her contribution at 7.5% of the net value of the business, which amounts to \$15,000.00.

### **SPOUSAL SUPPORT**

[68] The relevant sections of the **Divorce Act** include:

**15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.**

...

**Terms and conditions**

**(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.**

**Factors**

**(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including**

- (a) the length of time the spouses cohabited;**
- (b) the functions performed by each spouse during cohabitation; and**
- (c) any order, agreement or arrangement relating to support of either spouse.**

...

**(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should**

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;**
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;**
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and**
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.**

[69] The mother wishes to retain the matrimonial home and the father is willing to release his interest in the home to the mother. The father does not believe the mother is entitled to share in the value of his fishing operation. Both parties claim to be in dire financial straits and are unable to access additional credit. The mother's employment income remains stable at

approximately \$20,000.00, yearly. Although it was suggested she would earn additional income through cleaning work at her work place, teaching fitness classes or working at a volunteer society, I am satisfied that these odd jobs are not guaranteed and would not add a significant income if available. She needs a motor vehicle. She is committed to carrying the cost of a bank loan incurred for the benefit of her daughter's education until Courtney is able to take over the loan. She has paid off her credit card balances but does not have access to a credit card at this time.

[70] After separation, the father increased his debt with the purchase of a mobile home. The father said that his Scotialine Visa Account and his Scotialine Business Visa balances have increased substantially since separation because of increased living expenses. He leased a new truck. He had a bad fishing season in 2006. However, since separation, the father paid off the business loans on his lobster license and new motor, which should have improved his net worth. Although he increased debt, he acquired an asset with the purchase of a mobile home. I am unable to determine whether the increase in his credit card balances are reasonable or not since particulars weren't provided.



[71] Neither party provided the Court with a current statement of expenses. The mother listed total expenses including income tax at \$3,646.00 a month when she filed her Petition for Divorce in 2005. These expenses included many expenses related to the children. The father's Statement of Income and expenses filed in August, 2005, indicated he was receiving employment insurance benefits and he listed his monthly expenses, including income tax at \$2,753.00. The father's income for the last three (3) years averaged approximately \$71,000.00, taking into account the clawback of his employment insurance benefits and adding \$10,000.00 in 2006 for the crew share which he did not pay in other years. The mother's annual income is approximately \$20,000.00. Although the mother is dating another person, there is no evidence at this time they are residing together or sharing expenses.

[72] The mother will suffer an economic disadvantage as a result of the breakdown of the marriage since she will no longer have access to the more substantial income generated by the father's fishing operation. The father will realize an economic advantage from the breakdown of the marriage since he

was able to acquire a valuable business asset during the marriage which he can dispose of on his retirement.

[73] The mother, who is working full-time, requires support to meet her reasonable needs and the father has the ability to contribute to her needs. The mother's access to credit will be limited because of the loan taken out for her daughter's education.

[74] I have considered that the parties have been married for twenty (20) years and the functions performed by the mother during the marriage included the majority of child care and household responsibilities in addition to a significant financial contribution.

[75] I set the amount of spousal support at \$1,500.00 a month beginning September 1, 2008 and continuing for a period of fifteen (15) years, subject to an application to vary for any material change in the condition, means, needs and other circumstances of the parties.

[76] In addition, the Court is satisfied that the mother has established an immediate need for a motor vehicle to assist her in travelling to her workplace and generally getting around in a large rural area of the province. I am satisfied that the father has the ability to contribute a lump sum award towards the purchase of a vehicle since he no longer is responsible for two major business loans and his child support obligation will end in August. I award the mother a lump sum of \$10,000.00 to assist with this purchase.

[77] I am not satisfied that the father was able to pay spousal support during 2005 and 2006. I am satisfied he had the ability to pay spousal support during 2007 and 2008 in addition to his child support payments and the lump sum award. I set spousal support at \$250.00 a month from January 1, 2007 until August 31, 2008. Payment is due on or before June 30, 2008.

[78] The mother's equalization payment will be set off against the father's child support obligation, lump-sum spousal support award and mother's entitlement to a division of the father's business assets. The balance owing is due within sixty (60) days of the issuance of the Corollary Relief Judgment. The father shall release his interest in the matrimonial home and the mother

shall make her best effort to remove the father from the mortgage obligation. The mother shall indemnify the father if he is called upon to make any payments on the mortgage.

[79] Since success has been divided, each party will be responsible for their own costs.

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Wilson, J.