SUPREME COURT OF NOVA SCOTIA
Citation: *Chipman v Chipman*, 2017 NSSC 297

Date: 2017-07-06
Docket: 1204-006357
Registry: Kentville

Between:

Doreen Lynn Chipman

Petitioner

v.

Frank Miles Chipman

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	July 4 to 6, 2017, in Kentville, Nova Scotia
Oral Decision:	July 6, 2017
Counsel:	Marion Hill with assistant Lisa Eisses, for the petitioner Maggie Shackleton, for the respondent

By the Court:

This decision has been edited for grammar.

[1] As is usual, but complicated by an emergency hearing held over the noon hour, I did not have time to prepare thorough notes for this oral decision. It will contain all of the significant facts and the court's analysis. It may be inarticulate, and I reserve the option to make the decision more articulate and readable.

[2] I have created a spreadsheet that sets out the asset division determination.

[3] This is an oral decision respecting the divorce proceedings brought by Doreen Chipman against Frank Chipman. They commenced cohabitating in about 1977, married on December 16, 1979, and separated on November 1, 2015. They have two children, who I think were born in 1980 and 1983. Their ages are not particularly relevant because both children are of the age of majority and independent.

[4] Ms. Chipman is 63; Mr. Chipman is 70.

Divorce

[5] The court is satisfied it has jurisdiction to hear this divorce proceeding and grant a divorce based on the residence of both parties in Nova Scotia since at least 1970. I am satisfied based on the evidence and the documents filed that the parties were married. I am satisfied, based on the oral evidence heard this week, that the parties have been separated by reason of breakdown of their marriage since November 1, 2015. I therefore grant a divorce judgment.

[6] Because the two children of the marriage are of age and independent, there are no parenting or child support issues.

[7] When this proceeding commenced in 2016, Ms. Chipman brought an application for interim spousal support. It was heard and determined based on affidavits and cross-examination. At that time, Mr. Chipman was a municipal counsellor and his income was about $38,000.00. Ms. Chipman's income was around $29,000.00. Applying the *Federal Spousal Support Guidelines*, this court ordered interim spousal support of $500.00 per month.

[8] Counsel for the petitioner has acknowledged that as a result of the change in the income of Mr. Chipman, by reason of the loss of his position as a municipal councillor, there should be no prospective spousal support. I therefore order effective immediately termination of interim spousal support. Neither party shall pay spousal support to the other.

[9] The sole issue left for determination and litigated this week relates to the division of assets and debts. The parties disagree on whether all of the assets are matrimonial assets and therefore subject to division or are exempt from division. There are valuation issues and I will identify valuation times as the times for valuation are not identical for all assets.

[10] Finally, depending on the court's determination as to what is in and out of the pot and subject to division, the respondent seeks an unequal division in his favor.

The Evidence

[11] The court heard from several witnesses. Some of their evidence may have had limited relevance to the issues the court has to decide. Ultimately in any civil case, the legal burden of proof, called the "persuasive burden", is on the proponent to establish his or her claim. A secondary burden, called the "evidentiary burden", is the onus on a party to ensure sufficient evidence of a fact is before the court. This latter burden may switch between the parties.

[12] The standard of proof in a civil proceeding like a divorce proceeding is to establish any allegation on a balance of probabilities. Circumstantial evidence and fair inferences of fact arising from other proven facts that render it probable or that reasonably tend to give certainty to a contention that is supported by the proponent are in law evidence the court can consider in coming to its decision.

[13] Determinations of evidence made at a trial like this depend on two things. The reliability of the evidence, which primarily relates to the court's assessment of the ability of a witness to observe, to remember and to articulate their evidence. That is separate and apart from credibility. Credibility is an assessment made as to the honesty of a witness. Both credibility and reliability are assessments made in this case.

[14] In terms of reliability, the court focuses on:

- the accuracy and completeness of observations;

- the circumstances of the witness at the time any observations were made;

- the memory of the witness;

- the availability of any other corroborating evidence, that might back up what the witness states; and,

- the inherent reasonableness of their testimony.

[15] Issues dealing with credibility deal with honesty. They deal with the interest that the witness may have in the proceeding. They deal with the consistency of their evidence with other evidence accepted by the court, both internally and from other sources.

[16] There is no principle of law that requires me, as the trier of fact, to believe or disbelieve a witness's evidence in its entirety. I can believe some, none or all of what a witness says. It does not mean that it must be 100% one way or the other. It depends on the court's assessment of reliability and credibility.

[17] Before getting into the individual property issues, I will give a little background.

Background

[18] Frank Chipman was a police officer in Ontario when his father died in or about 1971. He returned to Nova Scotia to take over the family farm and assist his mother. He inherited with two older sisters several thousand acres of land in or about Annapolis County. He traded a few lots with his sisters in order to become the sole owner of what I am going to call the "homestead property" in the early 1970s. On that homestead property, he built the present home that has been occupied by Mr. and Mrs. Chipman for about 38 years.

[19] He built the home before he met Ms. Chipman.

[20] The homestead property consisted of about 200 acres. The house was set about 1,800 feet back from the public road. The driveway was about half-a-mile long.

[21] Behind the home is mostly wood land. In front and to the side of the home are fields.

[22] Mr. Chipman developed those fields primarily into a u-pick strawberry operation, part of them into a haying operation, and later, in the 1990s for three to five years, part of the land for growing corn for sale commercially.

[23] Mr. Chipman also acquired, I think from his uncle, a nearby farm property, which he called the Chipman family farm, which he testified had been in his family since the early 1800s. That farm he operated primarily as an apple farm - in the later years, as an apple juice operation, with sales primarily to Mason.

[24] From the homestead property Mr. Chipman initially cut firewood and pulpwood. As noted, he developed the fields in front and beside the house for u-pick strawberries, hay fields and, for a short time, the growing of corn.

[25] He operated both properties - the homestead property and the Chipman farm, as working assets in an entrepreneurial sense from the early 1970s to the latter half of the 1990s, when he became first a municipal councillor, then, from 1999 to 2003, a Provincial MLA. After he became a municipal councillor and MLA, the evidence of all the parties appears to be that the homestead property ceased to be operated as an active farm in the entrepreneurial sense. I understand that the Chipman farm with the apple operation continued as a going concern. Mr. Chipman was unemployed between 2003 and 2008. In 2008, he was re-elected as a municipal councillor until the fall of 2016.

[26] I am satisfied that some time in the late 1990s the homestead property ceased to be operated as a working farm. There was some cutting of fire wood, mostly for personal use. There was rental of some of the land to a farmer, I think Spurr was the name. And there was some hay cut.

[27] After the parties' daughter was - I am guessing - in her teens, although I do not think there was direct evidence of that, the parties built a second barn behind the house, which was used for their horses and other personal uses – to store personal equipment. The homestead property was clearly not used in the sense of an entrepreneurial working farm.

[28] The court has no business records or income tax records for Mr. Chipman and the farm for the period before 2005. While the court accepts the general evidence that the farm was busier and more active, and operated in an entrepreneurial sense before the period covered by Mr. Chipman's tax returns, there are no tax returns for the late 1990s. The court has no evidence as to whether, in fact, the homestead farm ever produced income or profit in an entrepreneurial sense.

[29] It is clear, as Mr. Chipman confirmed in his evidence, that for the 11 years that the court has his partial or full tax returns, from 2005 to 2015, the gross receipts from both the homestead farm and the Chipman family farm were $127,986.00 or about $11,600.00 per year, almost all of it from land rental; and that the expenses were $189,100.00 or a little over $17,000.00 per year. In no year did the farming operation from either property earn an income or a profit.

[30] Doreen Chipman has a Grade 10 education. Her history of employment starts in 1977, when she first worked fulltime for three years at Den Haan Greenhouses. From the time their first child was born in 1980 she was a stay-at-home mom, until about 1987 or 1988 when her youngest child started school. Thereafter, she worked for six months for a person who was out on leave at a drug store. She then worked full-time for two fashion shops for about 14 years. Finally, she returned to Den Haan Greenhouses, where she continues to work.

[31] Her early work was mostly at the minimum wage. She presently earns about $30,000.00 per year. She has always kept her own personal bank account and put her earnings into her bank account. She used her income, it appears, to pay her vehicle expenses and any personal items she wants. It appears the family lived off the monies that Frank Chipman either earned or otherwise received.

[32] Doreen Chipman testified that she assisted with farm duties when required. During the time she was at home, she obviously would be more available. She says after she resumed working full time, she would help when possible. She described her work in the strawberry u-pick operation, the corn operation and the Christmas tree operation.

[33] Gloria Atkin, an acquaintance of Ms. Chipman, recalled one occasion when she and her husband bagged corn and Doreen was there doing the same. Ms. Atkin was a nice lady, but she clearly had a very poor memory and struggled tremendously to recall anything with precision or of any particularity despite being encouraged to do so. She remembers herself picking u-pick strawberries, but said nothing about Ms. Chipman's involvement in that business. She said that both Mr. and Mrs. Chipman worked very hard as well as that Doreen was coming and going all the time. She described the one occasion when she and her husband bagged corn with Ms. Chipman.

[34] Linda Farren is a long-time, close friend of Doreen Chipman. Since 1977 she would visit back and forth a couple times a week. She recalls Doreen Chipman picking flowers from strawberries, picking strawberries, and overseeing pickers. She

once saw her take cash from the fields to the house. Ms. Farren herself worked one week in 1989 picking strawberries because they were short handed, and she was out of work at the time.

[35] In their evidence, Frank Chipman and the parties' daughter Amy suggested that Ms. Chipman's involvement in the farming operation was not as extensive as she described. Amy Chipman's evidence was in clear contradictions to her mom's. She says from the age of 13 she ran the u-pick, not her mother. She only ever recalled her mother being involved in picking flowers off the strawberry bushes; this was before Amy took over running the u-pick. She did not recall her mother being actively involved in the strawberry u-pick operation.

[36] If Ms. Chipman had made an application for a share in business assets pursuant to s. 18 of the *Matrimonial Property Act*, on the assumption the farm was a business asset, the court's determination on the extent of the involvement of Ms. Chipman would have been important. But, absent a s. 18 application, it is not relevant, and I need not determine, who was more credible and reliable. I suspect there is some truth in what each side said, probably less than what Ms. Chipman characterized her involvement was and slightly more than what Frank Chipman said it was. It really does not influence the decision the court must make today.

[37] Ms. Chipman's evidence was that the farm business was, to a large extent, conducted on a cash basis; Mr. Chipman kept a large quantity of cash in a file cabinet or a safe in the house or maybe in a safety deposit box; and there exists a considerable amount of cash. Mr. Chipman's position is that he deposited the cash weekly. He did not deny paying a lot of bills by cash.

[38] I must determine whether there was a significant amount of cash - significant enough to make a difference in the court's analysis, that Mr. Chipman had as of the date of separation.

[39] The court asked questions of Ms. Hill during her submissions about her client's claim. If someone claims there is a matrimonial asset, it is their obligation to prove it on a balance of probabilities. I summarized that law at the beginning of my decision.

[40] The evidence with regards to the active farming, the u-pick strawberry and the smaller u-pick corn operations, is that the strawberry operation was big in the 70s, 80s and 90s, but that it stopped in the late 1990s. It appears the apple business and the rental of land business were conducted for payment other than in cash. No

estimates as to the amount of cash are in evidence. Obviously, the petitioner was not in a position before this court to know how much cash there might or might not be.

[41] It is a fact that Mr. Chipman's earnings as a municipal counsellor and an MLA does not appear to be that great. He was not challenged on his evidence that, between his defeat as an MLA in 2003 and his re-election as a municipal counsellor in 2008, he basically had no income. This suggests, as a matter of common sense, that if there had been any amount of cash held from the 70s, or 80s, or early 90s, that it is unlikely that any survived the period when he had no income other than some income from his disposition of inherited lands.

[42] I am not satisfied on a balance of probabilities that no matter how much cash there might or might not have been in the safe or safety deposit box in earlier years whether Mr. Chipman held any significant cash at the time of separation.

[43] Other than that, the parties have not seriously contested what the assets are, although the petitioner has always complained about non-disclosure, which I will deal with at the end of this decision, and they contest which assets are in the pot and divisible.

[44] From the beginning the petitioner acknowledged that of the land inherited by Mr. Chipman with his sisters from his father, that those lots that have not been sold over the last 40 years are inherited lands and not in the matrimonial pot. There was an on-line assessment record showing about 26 assessments entered as evidence. It is not contested that they are exempt, so I do not have to make that determination.

[45] It is not contested that Ms. Chipman received, upon the death of Mr. Chipman's mother about the year 2002, as an inheritance, 200 Emera shares; they have not been used for the benefit of the family [and are not in the matrimonial pot].

[46] Regarding the homestead farm, the matrimonial property at 8936 Highway 201, the parties disagree whether anything more than sufficient land around the house itself, a couple acres, is matrimonial or exempt from division as a business asset, i.e. a farming operation. It is also contested whether the Mount Hanley property, purchased in the 1980s, I think 1988, is exempt either as a business asset or an asset acquired with inherited monies and not used for the benefit of the family.

[47] It is not contested that there are homestead contents, although there is no agreement on their value. It is not contested that the Dodge Caravan is a family asset; the Chevy Tahoe is a family asset; and the boat and motor are a family asset. Mr.

Chipman says the 4x4 truck, the Kubota tractor and the 4-wheeler are business assets associated with the farm. It is not contested that the Annapolis County municipal pension benefit, invested with Manulife, is a divisible matrimonial asset, or that the two MLA funds, one called a pension and the other called a return of contributions, are divisible matrimonial assets and there is no contest with regards to their values.

[48] There appear to be two investments with Investia, one in Mr. Chipman's sole name, a gold account; and another in the joint name of both Chipmans. There appears to be a Canada Life insurance policy, that at the time of separation had a cash surrender value of about $18,000.00, although, for whatever reason, any documentation with respect to it has not been disclosed to the petitioner or produced at trial.

[49] There appears to have been three accounts with the Royal Bank that are relevant to the proceeding.

[50] The first is account #129, the particulars of which were delivered to the court by the Royal Bank representative who testified. It was marked as Exhibit #14. Mr. Chipman described that account as his working account, into which he put whatever income he received - as MLA, then municipal councillor as well as from the farm. He used this income for living and farm expenses. It was in the joint names of Mr. and Mrs. Chipman. All of the deposits in that account were made by him, none by Ms. Chipman. The exhibit contained the record of the account from October 2010 to its closing on November 13, 2015.

[51] On October 7, 2015, shortly before the parties separated, Mr. Chipman removed $5,400.00 from the account and put it into another account in his name alone, account #383.

MS. HILL: I think it's $54,000.00. I hate to correct the court

[52] $54,000.00 was transferred into a new account he created at the Royal Bank in his name, account #383. On November 4th, Ms. Chipman removed from that account [#129] $5,746.89 and put it in an account in her name. Then, on November 13th, Mr. Chipman took out the last $249.75, and presumably transferred that into his new #383 account.

[53] There was no argument that that this account [#129] was not a matrimonial asset. It was the normal bank account, which would not be exempt under any

circumstances. It was his working account, subject to any claim of unequal division; it is a divisible matrimonial asset.

[54] The account proceeds as of the date of separation was $60,026.64, of which Mr. Chipman had $54,279.75 and Ms. Chipman had $5,746.89.

[55] Ms. Chipman had her own account at the Bank, into which she deposited her income. There is no 'if, ands and buts' that her account was a matrimonial asset at the time of division. It is not exempt from division. It apparently had a balance of $3,700.70 at separation.

[56] After separation Mr. Chipman opened another account - account #159. It is one of the two accounts listed in Exhibit #16. There is a post-separation deposit which is not included in the assets being divided.

[57] At the Bank of Nova Scotia, there appear to have been five accounts. One was Ms. Chipman's account #997, an i-trade account worth $4,893.00. The other accounts were in the name of Mr. Chipman.

[58] Mr. Chipman said that the accounts he had at the Royal Bank were where he put he put all of his working receipts, together with some of the monies from the sale of the lots that he inherited with his sisters from his father. He testified that his Bank of Nova Scotia accounts contained only inherited monies [or proceeds from the sale of inherited lands].

[59] Exhibit #12 are the bank records for the last five years with respect to five accounts, #150, #358, #882, #823 and #082, which contained around $278,000.00 at about the time of separation. It is disputed as to whether those accounts are matrimonial or proceeds held solely in Mr. Chipman's name from the sale of properties he inherited and not used for the benefit of the family.

[60] There was another Bank of Nova Scotia Account #508, which was divided equally as a result of the interim order. It contained $103,489.52. The evidence of Mr. Chipman was that this was also proceeds from the sale of inherited lots, but, in the process of estate planning before separation, he had transferred the contents into the joint names of him and Ms. Chipman.

[61] My review of the exhibits filed by the Bank of Nova Scotia witness did not answer the question as to whether the contents of this account arose solely from the sale of inherited lots, but the fact the monies were transferred in their joint names

and divided leads me to conclude that, even if they were proceeds from the sale of inherited lands, the monies ceased to be exempt by reason of their transfer into a joint account before separation as part of estate planning.

[62] At the time of separation, Ms. Chipman emptied the last $6,629.01 from account #722 at the Bank of Nova Scotia. Finally, there was an i-trade account, #187, which Mr. Chipman stated was his inheritance from his mother in the amount of $20,000.00, received at the same time that Ms. Chipman received the Emera shares. He invested this inheritance; none of it has ever been used for the benefit of the family.

Categorization of Assets

[63] I have to categorize whether three substantial assets are in the matrimonial pot or whether Mr. Chipman established that they are out of the pot; first, the homestead farm, that is the entire 198 acres as opposed to 2 acres; second, the Mount Hanley property; and third, the bank accounts held at the Bank of Nova Scotia in Mr. Chipman's name only.

[64] The characterization of assets has been dealt with several times by the Supreme Court and the Nova Scotia Court of Appeal. Recently in *Murphy v Murphy*, 2015 NSSC 41 ("*Murphy*"), beginning at para. 20, the court noted that s. 41 of the *Matrimonial Property Act* defines matrimonial assets as the matrimonial home and homes "… and all other real and personal property acquired by either or both spouses before or during their marriage."

[65] The starting point is that everything is in the pot.

[66] Section 4 does provide for certain exceptions. In *Murphy*, Justice Jollimore notes that in a 2010 Court of Appeal decision called *Cashin v Cashin*, 2010 NSCA 51 (*"Cashin"*), the court stated that the burden of proving that an asset is not matrimonial by reason of an exception falls on the spouse making the assertion.

[67] During their submissions, I referred counsel to the decision of Justice Hallett in *Best v Best* (1983), 61 NSR (2d) 400 ("*Best*"). It deals with the business asset exemption, as defined in s. 2(a), and, in that case, a farm. It is probably the most relevant precedent and an articulate summary of the framework for the analysis in this case.

[68] Justice Hallett cited the Nova Scotia Court of Appeal in *Lawrence v Lawrence* 1981, 47 NSR (2d) 100 ("*Lawrence*"), at para. 12:

> The most difficult problem in relation to the determination of the matrimonial assets of the parties is to decide what assets should be excluded as being business assets under the definition contained in s. 2. …
>
> It seems to me therefore that 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 is not enough to say that some gain or benefit may accrue in the future from an asset, but rather it must be said that it is working in a commercial, business or investment way for the production of income or profit.

[69] Justice Hallett wrote [at para 13]:

> In summary, the only assets that should be classified as business assets are those that are purposefully held or used for the production of income or profit and the asset must be a working asset; that is, working in a commercial, business or investment sense and not merely held in the hope of gain. The definition and the words used by Hart J.A. [in *Lawrence*] make it clear that the primary purpose for which property is used or held will be the determinative factor.

[70] In *Best*, a person purchased a 15-acre property, put 30 cattle on it, leased another 60 acres, and bought farm equipment. In the one year, the court had evidence of his income, the year 1982, the farm did not show a profit. The majority of the expenses were related to equipment and machinery.

[71] The court in *Best* held at para 16 that:

> [16] There is no doubt that this is "an operating farm" and that cattle are bred and raised on the farm, pasture land is leased, men are hired, land has been developed, lands are hayed, machinery is owned and maintained, and the respondent has a working capital loan at the Bank of Nova Scotia. However, it has not made any money and it obviously must be propped up with other funds from the respondent which I assume are diverted from his salary as he has no other sources of income. The fact that the farm does not make money does not

> necessarily disqualify it from being a business asset. That is simply a factor to take into account. … On the other hand, it has been a constant loser. In fact, not only does it have a paper loss but it had a substantial cash loss in 1982 and there apparently were losses in previous years. The issue is what is the primary purpose for the use of the farm or the holding the farm as an asset? ...
>
> …
>
> [18] The tax department has recognized that it is a business and apparently Agriculture-Canada is prepared to make a grant, irrespective of what those government departments may do, the test of the *Matrimonial Property Act* is what is the primary purpose in holding or using the asset. If it not for the purpose of producing an income, it is not a business asset but a matrimonial asset. … Each case turns on its facts. In view of the losses sustained, one cannot suggested, in view of all the surrounding circumstances, that the farm is primarily being held and used for the production of income. Although it is an operating farm in the sense that it operates, its primary purpose in this case is not for the purpose of producing income. That is not to say that any asset that does not produce income is therefore not a business asset. It turns on what the intention of the parties is in holding the asset. It is clear to me from the evidence that the primary purpose is not for producing income but for the purpose of building an asset … Each case must be looked at on its own facts.
>
> If it is not for the purpose for producing an income, it is not a business asset, but a matrimonial asset. The burden is on that person to prove that it is a matrimonial – is on the petitioner to prove it is a matrimonial asset. Considering all the facts, the court held in this particular case that it was a matrimonial asset. The court emphasized that each case turns on its own facts.

[72] I also refer to the *Eyking v Eyking*, 2012 NSSC 409, beginning at para, 104:

> … The onus of proving an asset is exempt is with the party who claims the exemption, … A determination of whether an asset meets the definition of a business asset requires an interpretation of that definition.

[73] The court went on to quote the Supreme Court of Canada in *Clarke v Clarke* (1990) 101 NSR (2d) 1, a case from Nova Scotia, which said the *Act* is remedial, and was designed to alleviate inequities when the contribution made by women to the economic survival and growth of the family was not recognized. In interpreting the provisions of the *Act*, the purpose of the legislation must be kept in mind and the *Act* given a broad construction.

[74] Wilson J. quoted *Lawrence* and *Clarke* again, stating that the definition of business assets has been fairly defined as assets that are truly of a business character. An investment portfolio is not a business asset. He went on to quote from a Court of Appeal decision called *Tibbetts*, in which the court described a business asset as being an asset working in an entrepreneurial sense.

[75] With regards to the homestead farm, the court has no evidence that at any time the farm operation made a profit. The court is satisfied that in the 70s, 80s and 90s it was operated in an entrepreneurial sense. That alone is not enough. It must be shown, in my view, that the purpose was to generate an income or profit - not the prospect of an income or profit at some point in the future.

[76] Each case has to be decided on its own facts. The court does not know if at any time or when the farming operation on that property made money. It might have. I assume there was a better chance that it did before than after 1997, when it was basically wound down by the evidence of all parties, and barely carried on as a land rental and hay operation on two farms - not just the homestead farm, but on the Chipman farm as well, producing minimal gross receipts and greater gross expenses - mostly related to machinery, equipment and repairs.

[77] While any business has ups and downs, the tax returns from 2005 to 2015 clearly demonstrate that this farm was not operated for the purpose of generating income or a profit. The farm operation was on the same property as the home. The onus is on Mr. Chipman to show that it is exempt as a business asset.

[78] Even if it was an active business in the early years, for at least 20 years it has not been operated in an entrepreneurial sense. The evidence does not show how much of the revenue shown on Mr. Chipman's tax returns comes from that property as opposed to the Chipman farm down the road. I therefore find that the homestead property of 198 acres is a matrimonial asset and not exempt as a business asset.

[79] The court recognizes that that property existed before Ms. Chipman came onto the scene with the matrimonial home on it.

[80] The second property in dispute in the Mount Hanley property.

[81] Mr. Chipman's evidence is that $13,800.00 was paid for it in about 1988. It was put in his name alone. His evidence was that it was held for development. It has been 29 years – 29 years and there has been no development. The evidence of activity on that particular property was the construction of a road way, I presume a dirt road way over a period of about five years and, more recently, the construction of a one-room shanty on the property.

[82] There was a dispute with regards to the extent that the property was used for anything. There is no question that there was not a great amount of use of that property.

[83] Mr. Chipman says they only stayed there overnight once and they used to attend more to check on it on a regular basis than to do anything on it.

[84] Ms. Chipman said on cross-examination that the last time she had been on the property was a year-and-a-half before the separation, when she was there with her kids and grandkids, or at least one of the kids and grandkids. She said that the purpose of the property was as a recreational retreat place, and she used to visit it periodically.

[85] I have to determine whether Mr. Chipman has established on a balance of probabilities that the property is exempt either as a business asset or because he says it was purchased with proceeds of an inherited asset. When I talk about the proceeds of an inherited asset, I am referring to the definition of an inheritance in s. 4(1), which means an inheritance received by a person, other than the other spouse, except to the extent it is used for the benefit of both spouses or their children.

[86] As to whether it is a business asset, there has been not business carried out on that property. To the extent that Mr. Chipman says it was purchased for development, I note that there has been considerable activity over 40 years with regards to the thousands of acres of inherited lands, but over the 29 years that this property has been held, there has been no activity of a commercial nature.

[87] Whatever he meant when he said it was held for development purpose, it is his actions more than his words that count. I am not satisfied it was held for a commercial or business purpose. There is no evidence of that. In fact, the construction of the one-room shanty would be contra-indicative of development for a commercial business, or a business of an entrepreneurial nature.

[88] The other claimed basis for exemption is that it was purchased with the proceeds of inherited property and not used for the benefit of both spouses or their children.

[89] I made comments to counsel during the trial – about his obligation to show that the source of the funds [to purchase this property] was inherited. There was a relevant, recent decision called *Rafuse v Rafuse,* 2015 NSSC 374, where a margin account was said to have been obtained by Mr. Rafuse from three sources: his grandfather, his grandmother and his mother. There was some evidence of some deposits into that account that appeared to correlate with bequests from an estate, but there was also evidence of other deposits that appeared not to have been related in any way to inheritances.

[90] The court determined that there was significant evidence of deposits directly into the margin account to establish that some of that account was inherited property. The money was not spent. But because not all of the deposits into the account were related to an inheritance, the court then apportioned the account between inherited exempt and non-exempt.

[91] In this case, we have a long history. It would take some effort for Mr. Chipman to go through banking records back to 1988, presumably, to show where the purchase money came from. The evidentiary burden is on him where he is in possession [of the banking documents]. I spoke about the evidentiary burden at the beginning of this trial. The link [between inherited money and the purchase of this property] has not been made.

[92] Whether he paid $13,800.00 for it or a higher amount is not the point. The point is – the asset has grown considerably in value, apparently, in the 29 years since it was acquired. The appraisal provided by Mr. Chipman's appraiser for this property was $125,000.00; the appraisal of Ms. Chipman's appraiser was $96,000.00.

[93] I am not satisfied that it is exempt, based on the onus on the person claiming the exemption under the *Matrimonial Property Act*, in light of the remedial intent of the legislation. Mr. Chipman had to establish that it is exempt. I therefore find it is a divisible matrimonial asset.

[94] The third significant issue deals with the monies in the Scotia accounts.

[95] I gave a bit of a hard time to counsel during the trial as to why there is an absence of evidence of actual deposits into the Scotiabank accounts from the proceeds of sale of lands and from Mr. Chipman's mother.

[96] Because I find that the farm did not generate income, I mean net income, real income, and because Mr. Chipman's income from his responsibilities as an MLA and later as a municipal councillor were not substantial, I am satisfied that the only place the money in the Scotiabank accounts could have come from was proceeds of the sale of lots by him and his sisters over a period of 30 or 40 years. He has established that fact on a balance of probabilities.

[97] I accept his evidence that his operating account was the Royal Bank Account, the #129 account that was in his and Ms. Chipman's joint names. These [Scotia accounts] were all either savings or investments accounts. I find that they are all exempt from division as the proceeds of an inheritance [in his name only].

[98] When I looked through the records made available through the Bank of Nova Scotia witness and marked as exhibits, I did not see anything, nor did it appear from cross-examination, that any of the proceeds from those accounts were used for the benefit of both spouses or their children. There was no such evidence with respect to any of the Bank of Nova Scotia accounts – one was a GIC account, one was a stock account, one was a dividend investment account. I did not see any evidence that they were used in the manner that the Royal Bank accounts were used - either the Royal Bank Account #129 or the predecessor accounts. Mr. Chipman was cross-examined on these records that go back a long way by counsel for Ms. Chipman.

[99] I find that Bank of Nova Scotia accounts, and that include the investments itemized on Exhibit #11 and the i-trade account which [contained] $27,000.00 and was account #187, [and exempt from division as the proceeds of inherited assets not used for the benefit of both spouses or their children].

[100] With regards to the assets whose character was contested, I find that the homestead property and the Mount Hanley property were not shown to be exempt from division, but that the Bank of Nova Scotia accounts in the sole name of Mr. Chipman have been established to have maintained their character [as exempt assets]. There was no contest between the parties that the other [inherited] real property held by the respondent was exempt.

[101] Now I am going to assign values to the assets and which pile they go into [who will retain them].

[102] I have already said that other than the homestead property and Mount Hanley property, the other properties in the name of Mr. Chipman are exempt from division by agreement.

[103] The matrimonial home – the only appraisal I have of the full property was an appraisal of $300,000.00. Mr. Chipman testified that the septic system was in need of repair and in his appraisal report Mr. Wetmore agrees. The evidence given by Mr. Chipman, which I do not doubt, was that it could cost up to $10,000.00.

[104] I therefore find the value of the matrimonial home is $290,000.00 less realtor fees of 5%, less HST on realtor fees, less legal fees in the amount of $750.00 or a net amount of $272,575.00.

[Clarification of amount for Marion Hill]

[105] The Mount Hanley property – [The appraisers did not testify]. I split the difference between the two appraisals. This comes to $110,500.00. I deduct 5% realty fees, HST on realty fees, and $750.00 in legal fees on any potential future disposition. The net value of that property is $103,396.25.

[106] With respect to the household contents, the court had no appraisal but it had lengthy, handwritten lists. Ms. Chipman said that the value of what Mr. Chipman kept in the house was $9,000.00 in household contents and she received $1,000.00.

[107] I asked questions about how new the furniture was. While furniture and contents cost a lot new, one would not get very much for them after they have been in use for a short period of time. The evidence was clear that they were very old. There was no evidence of any antique items that may have a special value. I find that the value of the household contents that Ms. Chipman received is the $1,000.00 as she says, and I estimate, based on her list, that Mr. Chipman's kept contents valued at $5,000.00.

[108] With regards to the 2006 Dodge Caravan, which is in the possession of Ms. Chipman, one valued it at $3,000.00 and the other at $2,500.00. I split the difference, which is the normal practice absent appraisal evidence, at $2,750.00.

[109] The Tahoe in the possession of Mr. Chipman has an agreed value of $2,000.00. The boat in the possession of Mr. Chipman has agreed value of $1,000.00.

[110] There were three other items which Mr. Chipman claimed were exempt as business assets – a 4x4 truck, a Kubota tractor and a four-wheeler. While I have no doubt that these vehicles were used at some time for earning income, the farm never earned income. I am satisfied, from the totality of the evidence, that they were used as much for personal use on this very large property as for any income producing purpose. I therefore find them to be matrimonial assets.

[111] The 4x4 truck has an agreed value of $2,000.00. The Kubota tractor has an agreed value of $10,000.00. The four-wheeler has an agreed value of $3,000.00.

[112] Mr. Chipman had three pension entitlements. The municipal council pension [with a] value of $13,252.54 is divisible. The MLA pension is valued at $23,663.84, as of separation, based on the documents attached to his disclosure. The refund of the contributions to the MLA pension is in the amount of $11,831.86. I do not believe those figures were in dispute.

[113] It is not in dispute that Ms. Chipman took $6,629.01 from account #722. It is in her column on the spreadsheet.

[114] The parties have already shared the proceeds from the joint account with the Bank of Nova Scotia, #508, [and received] about $51,000.00 each.

[115] Ms. Chipman acknowledged a Bank of Nova Scotia i-trade account #997 in the amount of $4,893.00, which is in her column. I already made reference to Ms. Chipman's Emera shares which are exempt as are Mr. Chipman's Scotia i-trade account.

[Discussion: Clarification of his i-trade account - #187]

[116] From the Royal Bank Accounts, #129, which was the joint account into which Mr. Chipman put all his income, but not inherited money, he received $54,279.75; Ms. Chipman took $5,746.89.

[117] I put in Ms. Chipman's column the Royal Bank Account #046 in the amount of $3,700.70.

[118] I am not counting [including in the spreadsheet] the Exhibit #16 items, which were simply the proceeds from #129 put into an account that was opened after separation.

[119] I have used the current value for the Investia gold fund account of $5,506.98, because it is a passive asset. It is divisible between the parties. It is in Mr. Chipman's name alone. There is a joint Investia account, #046, which has a present value of $4,307.30, which presumably the parties are going to divide equally or have the broker divide at source.

[120] I accept Mr. Chipman's oral evidence that the cash surrender value of the Canada Life insurance policy was about $18,000.00. I have used the figure of $18,000.00 [in the spreadsheet] – I do not use the $20,000.00 figure in his sworn Statement of Property.

[121] I also find that Ms. Chipman's VISA bill was incurred, on its face, for personal use as a living expense debt, and is divisible as a matrimonial debt.

[122] The net amount of the divisible matrimonial assets, using my arithmetic, is $656,215.52.

[123] The amount of those assets that are in the control and possession of Ms. Chipman are $76,810.88, and in the possession of Mr. Chipman are $579,404.64.

[124] These are only the divisible assets.

[125] An equalization payment, absent an analysis of an unequal division claim, pursuant to s. 13, would require either the transfer of assets or the transfer of money, equal to $251,296.88.

[126] I now have to deal with the claim for an unequal division.

[127] Section 13 of the *Matrimonial Property Act*, which I noted earlier in the context of Justice Bateman's decision in *Cashin supra* about the heavy onus to make it equal, also cited *Best v Best*, 1991 CarswellNS 50 (NSCA), says that the court may make a division that is not equal where it would be unfair or unconscionable, and the case law appears to lean to unconscionable, taking into account the following factors:

a) the unreasonable impoverishment of either spouse – and that is not a relevant factor on the facts of this case;

b) the amount of debts and liability of each spouse, and the circumstances in which they were incurred – the debts are minor and not relevant to this analysis;

c) a marriage contract between the spouses – there is none;

d) the length of time that the spouses have cohabitated with each other during the marriage - the case law on that suggests that, if it is a short-term marriage and one brings in substantial assets and the other brings in insignificant assets, it is unfair after a short marriage to equalize their assets.

The length of this marriage is as long as any in the case law. This is not a one, two or even ten-year marriage. That scenario does not fit this marriage. Courts deem that the parties' finances merge over time.

e) the date and manner of acquisition of the assets. I am going to come back to this consideration because that is probably the most troublesome.

f) the effect of the assumption by one spouse of any housekeeping, child care or domestic responsibilities on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset. There were no sacrifices by either party in that sense, so that is not a relevant factor.

Actually, (f) usually applies where the biggest asset is a business asset, the matrimonial assets are smaller, and it is unfair to divide the matrimonial assets equally and allow the one who owned the business asset to walk away with a significant portion of the total assets. In this case it is the opposite, so it is not helpful to the respondent Mr. Chipman in this case.

g) the contribution by one spouse to the education or career potential of the other. There is no evidence of this. This is not a situation where one person worked while the other went through college and became an orthopaedic surgeon or something of that nature.

h) the needs of a child who has not obtained the age of majority. That is not relevant in this case.

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 a parent. In this case, it appears that except for a short period of time, both parties pursued their own employment. This factor is not something that would make unconscionable an equal division of the matrimonial assets in this case.

j) whether the value of the assets substantially appreciated during the marriage. This is a relevant consideration in this case. The relevance is: if one party

brought into the marriage assets worth for example, $100,000.00, but those assets, by default, over 30 years, became worth a million dollars, then if $900,000.00 of that value was accrued during the marriage, it is unfair to exempt the asset [from division].

While I do not have values as of the dates these parties commenced cohabitation in 1977, I can infer as a matter of common sense that the value of these assets would have been significantly less [in 1977] than they are today - that there has been an accrual or appreciation in the value of the assets that is substantial during the period of their marriage.

k) this factor deals with whether proceeds of insurance or awards of damages for physical injuries to a spouse should be divided with the party who has not suffered the physical disability. That is not relevant in this case.

l) the value to either spouse of any pension or other benefit that they will lose the chance of acquiring. That is not relevant in this case.

m) the taxation consequences of the division of assets. None have been advanced.

[128] So, I am primarily dealing with whether the date and manner of acquisition of assets (with respect to what we called matrimonial assets - not the assets we have exempted), balanced against whether the value of the assets substantially appreciated during the marriage, somehow creates an unconscionable situation. Whether it is unconscionable that, in this case, Ms. Chipman can walk away with an equal share of what we called matrimonial assets.

[129] The primary asset that the court is concerned about is the matrimonial home – the homestead farm, which has a value of around $270,000.00 after deducting potential sale expenses. Whether, effectively, it is unconscionable that she would walk away with half the value of the matrimonial home. Mount Hanley is not the same box, as it was $13,000.00 investment [in the 1980's] that is now worth over $100,000.00.

[130] I have determined on a balance of probabilities that Mr. Chipman, even absent individual deposit records, will retain, exempt from division, all of his Scotia accounts, by reason of my conclusion that there is no other reasonable likelihood than that they are the proceeds from the sale of the real estate he inherited. They have already been taken out of the pot, so to speak.

[131] Considering the totality of those circumstances, I am not satisfied that it is unconscionable to divide the remaining matrimonial assets equally.

[132] I dismiss the application for an unequal division pursuant to s. 13.

[133] I have the benefit of Justice Campbell's spreadsheet application on the court's website [into which I and my assistant have put the assets which are divisible, who will retain each and their values] based on the determinations I have made. I have concluded that an equalization payment, or transfer of assets with the values that I have assigned, requires an equalization payment of $251,296.88 to Ms. Chipman.

[134] I am not going to ask for submissions on costs today. The court has no knowledge of what offers were made between the parties before today. The court prefers to receive written submissions, not a long time down the road.

[135] My practice has been, if one party thinks they have been "a winner" today in terms of whatever discussions and exchanges took place either pursuant to *Rule 10* regarding formal settlement offers or otherwise, then I am giving them two weeks to outline what the costs order should be. The other side will then have two weeks to reply.

[136] I say this with regards to costs: the petitioner's requirement to subpoena bank records that would normally have been in the possession of Mr. Chipman, in my view, should have been an unnecessary expense. It was not a matter that it took a lot of court time, but it was an expense. Regardless of whoever made the best offer in terms of where court came down, and I have no idea of who made what offers, in my view, that conduct [Mr. Chipman's failure to produce the records] is conduct that the court will consider in the costs order.

[137] Those records should have been disclosed from the beginning, or at least from an early stage. It is not like their relevance just became apparent a few months ago. I think the first demand for disclosure was made back in April 2016 and the second in November. Parties have an obligation to make disclosure in the least expensive and efficient way, and do it in a timely manner.

[138] So, I will entertain submissions on costs that relate to the fact that these records had to be subpoenaed, and for the expense and time that should not have had to have been required. They should have been in the joint exhibit book from Day 1.

[Discussion regarding an offer Ms. Hill made – with no details disclosed]

[139] Ms. Hill will write her brief first. Ms. Shackleton will write hers second.

Warner, J.