Most Negative Treatment: Distinguished
Most Recent Distinguished: Dunn v. Dunn | 2011 ONSC 6899, 2011 CarswellOnt 14551, 16 R.F.L. (7th) 156, [2012] W.D.F.L. 1648, [2012] W.D.F.L. 1687, [2012] W.D.F.L. 1694, 210 A.C.W.S. (3d) 481 | (Ont. S.C.J., Dec 7, 2011)

2005 CarswellOnt 1649
Ontario Superior Court of Justice

Mavis v. Mavis

2005 CarswellOnt 1649, [2005] O.J. No. 1672, 138 A.C.W.S. (3d) 1115, 15 R.F.L. (6th) 369

HELEN MAVIS (Applicant) and CLIFFORD MAVIS (Respondent)

J. Mackinnon J.

Heard: January 10-14, 17-21, 24, 25, 27, 28, 2005
Judgment: April 21, 2005
Docket: 03-FL-1877

Counsel: Susan Galarneau for Applicant
Jack Pantalone for Respondent

Subject: Restitution; Family; Property; Income Tax (Federal); Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Family law

III Division of family property
  III.6 Valuation of specific assets
    III.6.b Business
      III.6.b.iii Miscellaneous

Family law

III Division of family property
  III.6 Valuation of specific assets
    III.6.g Real property
      III.6.g.i General principles

Restitution and unjust enrichment

I General principles
  I.2 Requirements for unjust enrichment
    I.2.b Deprivation corresponding to enrichment

Tax

II Income tax
  II.7 Capital gains and losses
    II.7.l Principal residence exemption
      II.7.l.v Miscellaneous

Headnote

Restitution --- General principles — Bars to recovery — No deprivation corresponding to enrichment

Husband and wife separated after approximately 8 years of marriage — Wife was sole owner of waterfront property on which matrimonial home, rental cottage, and guest cabin were situated — When parties met, wife was successful financial consultant and husband owned and operated automotive garage — Shortly after parties married, husband's garage failed and with financial assistance of wife, husband opened coffee shop — After coffee shop was sold at loss some three years later, husband, with financial help of wife, undertook training necessary to qualify as financial consultant — During marriage, wife paid for great majority of household expenses and husband's financial contribution was small — Wife would buy building materials and husband would provide his labour to improve wife's waterfront property — Husband also looked after general repairs and upkeep to house and rental unit — Husband brought claim for unjust enrichment based on work done in maintaining and improving wife's property, seeking monetary award of $50,000 — Claim dismissed — Having regard to financial contributions made by wife and including fact that husband made little financial contribution to household expenses, wife had not been unjustly enriched and no corresponding detriment existed to husband — Wife's financial contributions at least offset value received from husband, and he himself regarded his contributions of labour to property as his contribution to marriage partnership.

Family law --- Family property on marriage breakdown — Valuation of specific assets — Real property — General principles

Wife was sole owner of waterfront property on which matrimonial home, rental cottage, and guest cabin were situated — Main house occupied 1,273 square feet at date of marriage, rental cottage measured 794 square feet, and guest cabin measured 400 square feet — Rental cottage had been on property when wife first purchased property and had been rented out virtually constantly since that time — According to wife, overall property was used almost equally by herself and tenant of rental cottage and guest cabin was available for use by tenants and was sometimes used for tenant storage — Wife had always deducted half of overall upkeep and repair as expenses against rental income, together with one-half of property taxes and mortgage interest — Municipal taxes were assessed equally against house and rental cottage — Following separation of parties, issues arose as to value, at date of marriage, of portion of property not meeting Family Law Act definition of matrimonial home for deduction purposes and as to value of property at date of separation — Wife entitled to deduct 25 per cent of overall value of property at date of marriage on account of non-matrimonial home portion, and fair market value of property at date of separation was $474,000 — Main house, garage, and guest cabin, which accounted for 75 per cent of total square footage of buildings at date of marriage, were reasonably necessary for use and enjoyment of family residence pursuant to requirement of s. 18(3) of Act — Parties had exclusive use of garage and virtually exclusive use of guest cabin, and husband's evidence in that regard was to be preferred over that of wife.

Income tax --- Capital gains and losses — Principal residence exemption — General

Wife was sole owner of waterfront property on which matrimonial home, rental cottage, and guest cabin were situated — Main house occupied 1,273 square feet at date of marriage, rental cottage measured 794 square feet, and guest cabin measured 400 square feet — According to wife, overall property was used almost equally by herself and tenant of rental cottage and guest cabin was available for use by tenants and was sometimes used for tenant storage — Property increased in value by $174,000 between date of parties' marriage and date of their separation — Issue arose as to what portion of overall gain ought not to be exempt for capital gains purposes and whether wife was entitled to claim as contingent liability, at date of separation, amount for capital gains tax referable to rental portion of property — Non-exempt portion of entire gain was 22 per cent and wife entitled to claim as contingent liability 25 per cent of income tax payable — Between 20 to 25 per cent of property was rented to or used by tenant of rental cottage and, contrary to wife's assertions, much more than one-half of property could be reasonably regarded as contributing to use and enjoyment of main house as residence — Property sat on one parcel of land and as access to rental cottage was not by direct road access but, rather, across parties' laneway, it was clear that value, and not merely square footage, of rental portion was very relevant to capital gains calculation — Absent credible proposal from wife as to when she might sell property, based either on actual disposition or deemed disposition, appropriate value for contingent liability was 25 per cent.

Family law --- Family property on marriage breakdown — Valuation of specific assets — Business — Miscellaneous issues

Husband and wife separated after approximately 8 years of marriage — Wife was successful self-employed financial advisor with investment company who was one of top 20 producers for company in province — Wife had extensive client list known as her book of business which, at date of marriage, contained $26,850,644 of assets on behalf of clients and which totalled $76,858,035 at date of separation — Investment company established "Assured Value Program" which enabled eligible consultants to receive compensation in exchange for assisting in successful transfer of client accounts to other consultants in company — Compensation was payable over 30 months and program established compensation formula which was 2.5 times "Annual Asset Retention Bonus" of consultant calculated at end of month preceding date of agreement — Issue arose as to value, under "Assured Value Program", of wife's book of business for purposes of inclusion in wife's net family property — Book of business valued at $132,167 — No redemption rate ought to be applied between date of marriage and date of separation, or after first 12-month period after date of separation — Family Law Act directs valuation of wife's asset at specified valuation dates, marriage and separation — Value of book at date of separation was $215,162 — Approach of determining value of asset on valuation date and then considering discount to reflect deferred date of realization of asset was appropriate — Value of asset should be discounted to reflect potential disposition date of 7.2 years following parties' separation, when wife would be 65 years old.

Table of Authorities

Cases considered by *J. Mackinnon J.*:

Becker v. Pettkus (1980), [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 1980 CarswellOnt 299, 1980 CarswellOnt 644 (S.C.C.) — followed

Bell v. Bailey (2001), 2001 CarswellOnt 2914, 203 D.L.R. (4th) 589, 148 O.A.C. 333, 20 R.F.L. (5th) 272 (Ont. C.A.) — considered

Best v. Best (1999), 1999 CarswellOnt 1995, 1999 CarswellOnt 1996, 43 O.R. (3d) 740 (headnote only), 174 D.L.R. (4th) 235, 242 N.R. 1, C.E.B. & P.G.R. 8361 (headnote only), 21 C.C.P.B. 1, 123 O.A.C. 1, 49 R.F.L. (4th) 1, [1999] 2 S.C.R. 868 (S.C.C.) — distinguished

Depauw v. Depauw (2004), 1 R.F.L. (6th) 151, 2004 CarswellOnt 1444 (Ont. S.C.J.) — considered

Federici v. Therrien (2003), 2003 CarswellOnt 4700, 46 R.F.L. (5th) 381 (Ont. S.C.J.) — considered

Fitzpatrick v. Fitzpatrick (2004), 3 R.F.L. (6th) 325, 2004 CarswellOnt 2606 (Ont. S.C.J.) — followed

Ganson v. Ganson (1996), 1996 CarswellOnt 4073, 17 O.T.C. 340 (Ont. Gen. Div.) — considered

Kelian v. R. (2003), 2003 TCC 162, 2003 CarswellNat 1119, [2003] 3 C.T.C. 2685 (T.C.C. [Informal Procedure]) — considered

Kennedy v. Kennedy (2004), 2004 CarswellOnt 3192, 8 R.F.L. (6th) 155 (Ont. S.C.J.) — considered

McAndrew v. Rooney-McAndrew (2003), 229 Nfld. & P.E.I.R. 270, 679 A.P.R. 270, 47 R.F.L. (5th) 120, 2003 PESCAD 25, 2003 CarswellPEI 101 (P.E.I. C.A.) — considered

McLean v. McLean (2004), 2004 CarswellOnt 4234 (Ont. S.C.J.) — not followed

Nahatchewitz v. Nahatchewitz (1999), 1999 CarswellOnt 2604, 123 O.A.C. 319, 178 D.L.R. (4th) 496, 1 R.F.L. (5th) 395 (Ont. C.A.) — considered

R. v. Mitosinka (1978), [1978] C.T.C. 664, 78 D.T.C. 6432, 1978 CarswellNat 238 (Fed. T.D.) — considered

Rawluk v. Rawluk (1986), 3 R.F.L. (3d) 113, 29 D.L.R. (4th) 754, 55 O.R. (2d) 704, 23 E.T.R. 199, 1986 CarswellOnt 287 (Ont. H.C.) — considered

Rowe v. R. (1998), 1998 CarswellNat 1296, [1998] 4 C.T.C. 2859 (T.C.C.) — considered

Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208, 69 O.A.C. 312, 111 D.L.R. (4th) 19, 25 C.P.C. (3d) 61, 2 R.F.L. (4th) 232, 1994 CarswellOnt 375 (Ont. C.A.) — followed

Wylie v. Leclair (2003), 2003 CarswellOnt 1966, 38 R.F.L. (5th) 227, 64 O.R. (3d) 782, 226 D.L.R. (4th) 439, 172 O.A.C. 187 (Ont. C.A.) — considered

Zadegan v. Zadegan (2002), 2002 CarswellOnt 2710 (Ont. S.C.J.) — considered

Statutes considered:

Family Law Act, R.S.O. 1990, c. F.3
Generally — considered

s. 4(1) “net family property” — referred to

s. 4(1) “net family property” (b) — referred to

s. 18 — referred to

s. 18(1) — considered

s. 18(3) — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

s. 34.1 [en. 1996, c. 21, s. 8(1)] — considered

s. 54 “principal residence” (a) — considered

s. 54 “principal residence” (e) — considered

RULING on issues concerning unjust enrichment and matrimonial property division in family law action.

***J. Mackinnon J.*:**

Introduction

1 The Applicant and Respondent met in the spring of 1994. Six months later, the Respondent moved into the Applicant's home at 2610 River Road. At that time, she was, and she still is a successful financial consultant with Investors Group. He owned and operated a garage known as Active Automotive. The couple married on July 13, 1996. Not long after, Mr. Mavis' business failed. With the financial help of Ms. Mavis, he opened a coffee shop called Brewed Awakenings, which he operated for some three years, until it was sold, at a loss, in June 2000. Also with the financial help of Ms. Mavis, Mr. Mavis undertook the training necessary to qualify as a financial consultant. Their plan was that he would qualify then assist her with her large clientele. Starting in January 2001, Ms. Mavis employed him in this capacity, until March 2002, when she terminated his employment.

2 The property at 2610 River Road fronts on the Rideau River. It consists of a main house, a rental cottage, and other secondary buildings. It was purchased by Ms. Mavis and her former husband in 1987. Title was conveyed to Ms. Mavis in 1990 or 1991 and has remained in her name as sole owner.

3 Many issues in the case revolve around this property. Ms. Mavis claims a date of marriage deduction for the rental part of it. She claims various contingent liabilities associated with it, including capital gains tax on the non principal residence exempt portion, and disposition costs. The value of the property at both date of marriage and date of separation is in dispute, as is the portion of the property attributable to rental and the value of that portion.

4 Part of Mr. Mavis' claim relates to the repairs, maintenance and improvements which he says he undertook at River Road. The extent and value of his contributions to the property are in dispute. He seeks a monetary award based on a claim for unjust enrichment.

5 In addition to the unjust enrichment claim, the other claim still before the court is for equalization of net family property. In addition to the many issues associated with 2610 River Road, a principal issue relates to the value to be attributed to Ms. Mavis' "book of business" or client list with Investors Group. At the date of separation, her book consisted of some $76 million in assets. In her view, little value should be attributed to this given that she intends to continue to work for years to come, operates under an agreement with Investors Group that prevents her from soliciting clients should she leave and the existence of other contingencies. Mr. Mavis submits that this is a substantial asset and should be valued in accordance with Investors Group's Assured Value Program. This program facilitates the transfer of "client servicing responsibilities" from one consultant to one or more other consultants, according to a set formula. There are certain criteria for eligibility, which he says Ms. Mavis has and will continue to meet. The Assured Value Program has been in place since June 1999, but it is not a contractual term between Investors and its consultants. It is available to consultants who are retiring, leaving Investors for a new career, on death, or to an active consultant who would like to transfer some clients off to new servicing consultants.

6 A number of other issues of ownership and value must also be determined in order to determine the equalization issue. There is no claim for an unequal division of net family property before the Court.

7 The parties are already divorced and have signed partial minutes of settlement containing mutual, full and final releases of spousal support.

8 Mr. Mavis moved out of River Road at separation. He is now 44 years of age. His income has been very modest. He has continued to work at another Investors Group office and has also done landscaping and mall maintenance to make ends meet. Ms. Mavis has continued to reside at River Road. She has continued in her self-employment through Investors and her current financial statement shows an earned income from this source of $288,648 per annum.

9 In summary form, for reasons which follow, I have dismissed the claim based on unjust enrichment and determined the equalization payment owing from Ms. Mavis to Mr. Mavis. On the basis of this outcome, I have exercised my discretion to approve the partial Minutes and to include as part of my judgment that no spousal support is payable to or by either party.

The Unjust Enrichment Claim

10 Mr. Mavis asserts a claim for unjust enrichment based on work done in maintaining and improving Ms. Mavis' property at 2610 River Road. In closing submissions, he abandoned his claim for a constructive trust remedy, seeking a monetary award of $50,000 instead.

11 The property was purchased by Ms. Mavis and her former spouse in 1987 for $200,000. At the date of the Mavis' marriage in 1996, it was worth between $290,000 to $310,000 or, $300,000, accordingly to the parties' respective appraisals, subject to encumbrances.

12 Mr. Mavis states that he made significant contributions to the maintenance and improvements of the property, before and during the marriage, primarily of a non-financial nature.

13 Ms. Mavis opposes this claim. She disagrees with the extent and value of the work claimed to be done by Mr. Mavis. She states that she paid for most of the materials and outside labour that went into the work he did, and that she paid for all of the household expenses, without any contribution by Mr. Mavis.

14 Unjust enrichment requires a finding that Ms. Mavis was enriched to Mr. Mavis' detriment and that there was no juristic reason for the enrichment. In considering these issues, regard must be had not only to Mr. Mavis' contribution to the real property, but to the contributions by both parties to the "family enterprise". For example, in *Bell v. Bailey*, [2001] O.J. No. 3368 (Ont. C.A.), the court states at paras. 28 and 43:

> ¶ 28 In my view, there is nothing in the evidence which supports the finding that in the second part of their co-habitation Mr. Bailey was unjustly enriched to Ms. Bell's detriment. Rather, their contributions in their somewhat fractured relationship were proportional. From January 1994 until September 1997, when they separated, neither party was unjustly enriched by the contributions of the other.
>
> . . . . .
>
> ¶ 43 Ms. Bell's entitlement to a monetary award as a remedy for unjust enrichment necessarily focuses on that period ending in December 1993, during which she contributed, in both a direct and indirect way, to the discharge of Mr. Bailey's $40,000 mortgage and his purchase of a truck, boat and motor. She is entitled to be compensated for her disproportionate contributions to the family enterprise in that period.

15 In *Federici v. Therrien*, [2003] O.J. No. 4992 (Ont. S.C.J.), the court states:

> ¶ 22 Accordingly, the result that follows in an individual case will depend on the particular circumstances of the parties. In *Beckett v. Spencer*, [2002] O.J. No. 3682 (S.C.J.), following a detailed review of the financial history and labour contributions of the parties, the court held that the contributions of the plaintiff were not disproportionate to the benefits enjoyed during cohabitation, and otherwise were insufficient to warrant a judgment for unjust enrichment. In short, it was found that the plaintiff had not been required to do or pay more than fair share, as the manner in which the parties allocated the labour and expenses of their cohabitation was neither unfair to the plaintiff nor unjustly enriching to the defendant.

16 In *Wylie v. Leclair*, [2003] O.J. No. 1938 (Ont. C.A.), the Court of Appeal for Ontario also states:

> [19] Third, after stating at the outset that the "value received" approach was the applicable calculation method, the trial judge's reasons are silent on any quantum meruit calculation. The value of the benefits that Leclair and Wylie received from each other were not assessed or set-off. A set-off analysis would have been particularly relevant in light of findings of the trial judge that Leclair lived rent-free for the duration of her 15-year relationship with Wylie and had made no contribution during the first three years of their relationship.

17 Finally, in *Depauw v. Depauw*, [2004] O.J. No. 1489 (Ont. S.C.J.), the court states

> ¶ 33 It is difficult, as always, to balance and quantify the extent of Mr. DePauw's deprivation against any benefit he received to find the value of the services he provided: *Nasser v. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (Ont. C.A.) at para. 44, which held that a monetary award couldn't be determined with precision. Mr. DePauw expended about $20,000 of labour and material; however, he lived free in the apartment for over 33 months and his resulting benefit from that available accommodation must be taken into account. In my view, an appropriate figure to redress the unjust enrichment of Mrs. DePauw is an award of $10,000.

18 Mr. Mavis testified that the parties' cohabitation began in the fall of 1994. He acknowledges that Ms. Mavis paid for the great majority of the household expenses and that his financial contribution was small. He testified that because she made so much more than he did, she would buy materials and he would provide his labour to the property. He thought it was a good

mix and that they were both satisfied with each other's respective contributions until about 2001 when their marital troubles began. He stated that, at the time, he did not expect to be remunerated. He considered that he was making an investment in his own home.

19 Mr. Mavis looked after general repairs and upkeep to the house and the rental unit. By his guestimate, he spent as many as 2,730 hours on repairs, maintenance and improvements to the property, including: cleaning up and repairing ice storm damage, replacing 2 roofs (with 2 other men), window replacement, 90 percent of the work on the front foyer addition, laying interlock pathways, building and maintaining the Japanese pond, laying hardwood floors, bathroom remodeling, installing a kitchen skylight, preparing and paving laneway, deck and erosion work, help to install the sprinkler system and repair the septic systems.

20 In addition to his own labour, he was assisted from time to time by friends of his, who by and large worked for free or for return favours from him, although some were paid by Ms. Mavis. Mr. Mavis did not receive any payment from Ms. Mavis for the work he performed. Although she suggested in her testimony that he may have appropriated to his own use some of the money she gave him to pay for third party wages or materials, this suggestion was not established on a balance of probabilities. Mr. Mavis also spent about $5,600 on materials such as stone and asphalt prior to the marriage.

21 On balance, I accept Mr. Mavis' testimony as to the nature and extent of work performed by him. His testimony was detailed and descriptive. His testimony was corroborated by some of the friends who had helped him, such as Eric Bradley and John Kearns. Ken Laroque also provided corroboration as to part of the septic work. Mr. Laroque has worked for Ms. Mavis for over four years and is independent between the parties. Ms. Mavis acknowledged many of her husband's projects, but did not think they added to the value of the property. She diminished some of his efforts in a way I concluded to be unfair. In particular, she referred to his work in cleaning up after the ice storm as playing with a wood chipper. She also acknowledged that she had not been present when some of the work was underway and therefore, did not have first hand knowledge of what Mr. Mavis had done.

22 In addition to paying all the household expenses, Ms. Mavis also paid for Mr. Mavis' life insurance, advanced him funds for his failing automotive business, and to open a new coffee shop business and paid for his courses in obtaining accreditation as an investment consultant. She looked after most of the household duties as well as being an avid gardener, although she did have a regular cleaning service and gardener. The specific amounts that she advanced to her husband included: $12,000 for Active Automotive, $20,000 lost in Brewed Awakenings, $5,000 for his course work plus related expenses, $2,000 legal fees to defend Active Automotive law suit, $10,000 deposit on his car lease, $4,000 for the cost of his laser eye surgery, $16,000 RRSP deposit and $500 per month into his life insurance policy which included a $320 per month savings component. She also transferred $1.2 million of client assets to him, which gives him an ongoing income of between $200 and $300 per month.

23 The couple also made several trips at Ms. Mavis' expense.

24 Having regard to the financial contributions made by Ms. Mavis, and including the fact that Mr. Mavis made little, if any financial contribution to household expenses, I do not find that she has been unjustly enriched or that there was a corresponding detriment to Mr. Mavis. Even applying an hourly rate of between $25 to $40 to the work done by Mr. Mavis, as suggested appropriate to his own work by Mr. Bradley, Ms. Mavis' financial contributions at least offset the value received from Mr. Mavis, particularly when taking into account her expenses for the mortgage, food and other household expenses over their cohabitation. The value of his contribution has been offset by hers. His own testimony is consistent with this ruling. He, himself, regarded his contributions of labour to the property as his contribution to the marriage partnership, which he regarded as fair and satisfactory in comparison to her financial contributions. As was made clear in *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), it is not enough to demonstrate that one spouse has benefited from the work of the other:

> ¶39 ...It must, in addition, be evident that the retention of the benefit would be unjust in the circumstances of the case.

25 For these reasons, Mr. Mavis' claim based on unjust enrichment is dismissed.

2610 River Road

26 A number of issues in the case depend upon the value of this property at date of marriage and date of separation. It is necessary to determine what portion of the property meets the definition of matrimonial home in the *Family Law Act* and the value of the other part at the date of marriage, for deduction purposes. There is also an issue as to whether Ms. Mavis is entitled to claim as a contingent liability at date of separation an amount for capital gains tax referable to the rental portion of

the property. Other issues related to contingent liabilities claimed for future disposition costs and to remedy a septic and deck encroachment to the neighbouring property.

27 2610 River Road consists of:

• a lot measuring 208' at the waterfront by 145' (irregular), approximately 30,000 square feet

• a main house, which had 1,273 square feet at date of marriage, and 1,330 square feet at date of separation.

• a detached two car garage measuring 750 square feet

• a rental cottage measuring 794 square feet

• a guest/storage cabin measuring 400 square feet

28 The main house is situate at about the mid-point of the lot. To the south are 85' of waterfront. This area contains a pond and garden exclusive to the use and enjoyment of the main house. The garage is also exclusive to the main house and is located on the south half of the lot, close to the east line. The rental cottage is also on the waterfront, and is located at the northerly end of the lot. Behind it sits its septic field and behind that, close to the east line, the guest/storage cabin.

Value of 2610 River Road — Date of Marriage Deduction

29 Each party presented opinion evidence as to the value of 2610 River Road. Mr. Shore testified for Mr. Mavis that the property value was:

$300,000 at July 13, 1996

$500,000 at June 9, 2002

$600,000 at May 17, 2004

30 Ms. Clairmont testified for Ms. Mavis that the property value was:

$290,000 to $310,000 at July, 1996

$410,000 to $430,000 at June, 2002

31 On the basis of their testimony I have concluded that the value at the date of marriage was $300,000.

32 Mr. Shore provided an opinion that the rental cabin and storage cabin would contribute $50,000 towards the date of marriage value, rounded from $34,000 and $17,000 respectively. He based this on an estimated new replacement cost depreciated to the date of marriage. The new replacement cost was based on information provided by Pan-Abode, the type of construction of the two buildings. The rate of depreciation was based on his observation of a 20% depreciation in 2002, taken back to July 1996 on a straight line basis. In his opinion this approach was appropriate given that:

• the land consists of one parcel only

• the entire parcel of land together with the principal residence and garage should be valued by the direct market comparison approach

• the value should then be adjusted to reflect the added value that the outbuildings contribute, based on depreciated replacement cost.

• the outbuildings have no market value on their own, as they sit on the one parcel and cannot be sold independently. The value of the land on which they sit is properly included in the value of the parcel and main building taken together.

33 Ms. Clairmont did not provide an opinion in her report as to a separate value for the rental house and guest cabin. She was critical of Mr. Shore's decision to use the depreciated cost approach. She made adjustments to the comparables she used for date of marriage which reflect that she did adjust the value of 2610 River Road up by $45,000 on account of these two buildings. She agreed that these buildings contributed this value to the subject property at date of marriage and contributed $60,000 at the date of separation, in comparison to Mr. Shore's figure of $80,000 at that date. However, unlike Mr. Shore, she did not allocate this value between the two buildings. Although she was critical of Mr. Shore's use of the depreciated cost method given the age of these buildings, she arrived at her adjustment figures by application of a dollar per square foot multiple chosen to reflect the size and caliber of the building. In fact there is very little difference between the dollar per square foot value applied by Mr. Shore and Ms. Clairmont at the date of marriage. And they both took the approach of valuing the parcel and main building, then adding or adjusting for contributory value of the two outbuildings.

34 It is submitted by Mr. Mavis that I should allow Ms. Mavis a date of marriage deduction for her rental house of $34,000 based on Mr. Shore's opinion. However, Ms. Mavis argues for a date of marriage deduction of $127,500, representing 42.5% of the value of the entire property.

35 Sections 18(1) and (3) of the *Family Law Act* provide:

> **18.** (1) Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home. R.S.O. 1990, c. F.3, s. 18 (1).
>
> . . . . .
>
> (3) If property that includes a matrimonial home is normally used for a purpose other than residential, the matrimonial home is only the part of the property that may reasonably be regarded as necessary to the use and enjoyment of the residence. R.S.O. 1990, c. F.3, s. 18 (3).

36 The rental cottage was on the property when Ms. Mavis and her former husband purchased it in 1987. It has been rented out virtually constantly ever since. Ms. Mavis bases her claim for a date of marriage deduction equal to 42.5% of the value of the property on several factors. First, she says that the overall property is used almost 50/50 by herself and the tenant. It is agreed that the tenant accesses the rental cottage by walking across her laneway along a path that leads to the main house and then goes on to the rental cottage. It is also agreed that the tenant's parking is apparently located on a right of way that does not form part of 2610 River Road. Ms. Mavis says that she stays mostly on the part of the property to the east and south of the main house. She says that the guest/storage cabin is available for use by the tenants and is sometimes used for tenant storage. It is agreed that the tenants may use the waterfront in front of the rental cottage and some of the grounds adjacent to it, for example to exercise a dog, stack firewood, plant flowers and place lawn chairs. As well, Ms. Mavis has always deducted half of the overall upkeep and repair as expenses against rental income, together with one-half of the property taxes and mortgage interest. The municipal property taxes are assessed equally against the house and rental cottage. She also relies on the definition of principal residence in the *Income Tax Act* and the criteria utilized by Canada Revenue Agency ("CRA") in determining whether a part of the property is entitled to the principal residence capital gains exemption in support of her position. I disagree. On this issue, it is s. 18 of the *Family Law* Act which is applicable.

37 Mr. Mavis argues that fair market value should be determinative. Since the rental cottage cannot be sold, it has no independent market value. Nonetheless, he is prepared to acknowledge a date of marriage deduction equal to the contributory value of the rental cottage as determined by Mr. Shore, namely $34,000. Mr. Mavis does not agree with Ms. Mavis' description of the use of the property. His testimony is that the guest/storage cabin was only used at one time by one tenant to store her bicycle. Tenant Andrea Burns confirmed in her testimony that this was her only use of the cabin. She leased the rental cottage from June 2000 to June 2003. She testified that she kept to herself and to the area immediately adjacent to the rental cottage. Her dog was kept primarily to the grassy area behind the rental cottage, although occasionally, he did run in the area between the rental and the main house. Mr. Mavis states that the cabin was specifically not allowed to be used by a prior tenant, Ms. Hamilton, as set out in documents filed by Ms. Mavis' lawyer in a residential tenancy dispute with this tenant. Ms. Hamilton leased the cottage from June 1994 to February 1995. Ms. Mavis retained a lawyer to represent her in a residential tenancy dispute with Ms. Hamilton. The statement which he submitted on Ms. Mavis' behalf states in part:

> 1. The Tenant moved into the premises in January of 1994 pursuant to a verbal month to month Tenancy Agreement which required her to pay rent of $850.00 per month and her utilities and services. For this rent, she received a two-

> bedroom one storey cottage, use of the adjacent grounds, access to the Rideau River and a shared driveway.
>
> . . . . .
>
> 4. The Tenant was not provided with use of the garage or other storage areas as part of the Tenancy Agreement. The Landlord did not allow the Tenant to use the guest house and garage as part of the [Tenancy]. The Tenant used the guest house for her friends and family without permission. The Tenant used the garage for storage on the clear understanding that it was temporary and that the Landlord would require her to remove the items at any time. Storage was not part of the Tenancy Agreement.

-*Applicant's Book of Documents, Vol. 1, tab 6*

38 According to Mr. Mavis, the family had exclusive use of this building, for storage of furniture, cupboards and appliances originally located in the main house, and by Ms. Mavis' teenage son for entertainment and recreation for himself and his friends. Mr. Mavis says that the entire lot was regularly used for the enjoyment of the family. Both Mr. and Ms. Mavis were actively involved on the grounds, in creating and maintaining gardens.

39 I have concluded that the main house, garage and guest/storage cabin, which account for 75 percent of the total square footage of the buildings at the date of marriage, were reasonably necessary for the use and enjoyment of the family residence pursuant to the requirement of s. 18(3) of the *Family Law Act*. I find that the family had exclusive use of the garage and virtually exclusive use of the guest/storage cabin. I preferred the evidence of Mr. Mavis in this regard. It was corroborated by other witnesses and by the rental documents noted above. Dylan, age 22 years, was not called to testify. The current use by the current tenant is not indicative of the use at the dates which are the relevant to the case. Testimony from Ms. Mavis' former husband as to the use of the property by tenants before their separation was quite general and not of much assistance on the date of marriage deduction issue or determining the use during the Mavis' marriage.

40 I have also concluded that the primary use of the land behind the rental cottage was for its septic field. Although Ms. Mavis testified that she did not go beyond the flag pole, which is quiet close to the main house, there was no evidence that the tenants came over to that part of the property. Based on testimony from Ms. Burns and Ms. Mavis, I find there was a mutual respect for a "privacy zone" of land between the house and the rental cottage. I concluded that the rental cottage and its share of the privacy zone account for about 40 feet of frontage, or about 20 percent of the total frontage. Then, working from the 2002 survey marked as Exhibit 44, I find that the area occupied by the rental cottage, septic field and "privacy zone" is somewhat less than 20% of the entire parcel. An allowance must also be made for the access path from the laneway to the rental cottage and the occasional use of the laneway. Thus, I find that the rental use is more than 20% and less than 25% of the entire parcel.

41 Next, the value of the rental use portion of 2610 River Road at the date of marriage must be determined. I have heard evidence that Mr. Kearns offered to sell Ms. Mavis waterfront at $2,000 per foot, which she did not accept. That figure would indicate a value in the range of $80,000 for the rental use portion of the property. The square foot approach would yield a value between $60,000 to $75,000. Mr. Shore opined a value of $34,000 based on the contributory value of the rental cottage to the overall value of the property at the date of marriage. That is too narrow an approach given the wording of s. 18(1) and (3) of the *Family Law Act*. I have not found that all of 2610 River Road except the actual rental building itself, is reasonably necessary to the use and enjoyment of the family residence. I have also considered that at the date of marriage, there was less of a difference between the two dwellings than was the case at the date of separation. By that date, the main house had undergone an extensive renovation which cost in the range of $130,000. The foyer addition had also improved this residence and added 57 square feet to its size. By the date of separation, the calibre of the main residence was of a significantly different quality than that of the rental cottage. This observation is consistent with Mr. Shore's report, where the value he determined that the rental cottage added to the overall property value was .113 at date of marriage and only .108 at date of separation. Accordingly, I have concluded that the fair value of the portion of the property at the date of marriage that does not meet the definition of matrimonial home in the *Family Law Act* is $75,000.

42 For these reasons, Ms. Mavis is able to deduct $75,000 at the date of marriage on account of the non matrimonial home portion of River Road. Stated as a percentage of the overall value of the property at that date, this is 25 percent. Accordingly, I have fixed the amount of the associated mortgage encumbrances to be shown as a date of marriage debt at 25 percent of the total encumbrance registered against 2610 River Road at that date.

Value of 2610 River Road at Date of Separation

43 The real estate appraisals were $80,000 apart as of the second valuation date, using Ms. Clairmont's midpoint of $420,000 and Mr. Shore's figure of $500,000. The drawbacks to Ms. Clairmont's opinion are that:

- She did not value as at a precise date in June 2002, as is the norm by industry standards.

- A precise date is required by the *Family Law Act.* Market factors may change with time, and the use of hindsight in market valuations is limited.

- Two of the comparables she used for June 2002 postdated the valuation date.

- Two comparables were not, in my view, actually comparables, as being inferior to the subject property to such a degree as not to be comparable. Ms. Clairmont acknowledges this when she states that she assigns "the least weight" and "minimal weight" to these two, but nonetheless felt them useful to provide a bottom end benchmark. I recognize it may be useful to the appraiser to identify some properties which are sufficiently dissimilar such that the subject property could in no way fall to that low a value. This is quite different than describing them as comparables. The two properties in question sold for $280,000 and $285,000, almost one-third less than Ms. Clairmont's valuation of the subject property.

44 In the result, I regard Ms. Clairmont's opinion as resting on two valid comparables. One sold for $459,000 on April 21, 2002, which she adjusted to $469,000 for comparison to the subject property. This property had less waterfront (119 feet compared to 208 feet, and was smaller, .41 acres compared to .65 acres) than the subject. No adjustment was made on account of these particular differences. Ms. Clairmont stated that the location of the lot in the village of Manotick offset the smaller lot size and lesser waterfront. In my view, some adjustment should have been made for lot size and waterfront. I have taken an adjustment at the low end of the range of adjustments that Ms. Clairmont made for these factors in other lots. I have concluded that a $3,000 upward adjustment should be made to bring this to $471,000 for 2610 River Road. The second comparable sold for $353,000 on September 5, 2001 and was adjusted to $418,000 in reference to the subject property. This property had 102 feet of waterfront and was .62 acres. A $3,000 adjustment was made in favour of the subject property's value for these differences.

45 Mr. Shore's opinion was challenged on the basis that:

- he used two comparables on Marina Drive, said to be superior to the subject property because they are part of a golf course development and are waterfront properties.

- his depreciated cost approach to the outbuildings noted above.

- all of his comparables were larger houses.

- his value was simply too high, having regard to other available properties in the $500,000 range.

46 I agree that the effect of including two properties, so closely situated, selling within a week of each other, could result in too much weighting in the overall direct comparison approach. Ms. Clairmont suggested it would be preferable to include only one. I agree. Removing 6611 Marina Drive, a larger house by 444 square feet on a significantly smaller lot, leaves Mr. Shore with two comparables, producing adjusted values of $499,000 and $474,000 for the subject property.

47 I have considered these four comparables, two from each appraiser, as the most appropriate indicators of value of Ms. Mavis' property at June 9, 2002. Of these, I regard 6325 Rideau Valley Drive (adjusted to $474,000) and 5435 N. Riverside Drive (adjusted by me from $469,000 to $471,000) as attracting the most weight. I regard 2696 River Road ($418,000) as the least comparable of the four. It did not have a basement or a garage and had only about one-half the waterfront of the subject property.

48 On this basis, I have concluded that the fair market value of 2610 River Road at the date of separation was $474,000. I do not regard Mr. Tilbury's appraisal done in July 2003 at $465,000 as detracting from this conclusion. This appraisal was done for financing purposes and included only nominal value for the rental cottage and storage/guest cabin. Nor was it tendered as opinion evidence or subjected to cross-examination.

Capital Gains Principal Residence/Rental Unit

49 Both parties agree that for ease of reference, this issue should be addressed on the basis of the increase in value between the two valuation dates, rather than by two separate calculations, one at each date. The total increase in value, as I have determined it to be, is $174,000. At the date of separation, all of the value of 2610 River Road is included for Net Family Property purposes. The gain on the portion of 2610 River Road found by CRA to be used for rental purposes will not receive the principal residence exemption. The questions are what portion of the overall gain will not be exempt, when will the tax consequences be incurred on the nonexempt portion, and what if any notional deduction should be allowed on this account, representing a contingent liability at the date of separation.

50 If a property qualifies as a taxpayer's principal residence, then she or he can use the principal residence exemption to reduce or eliminate any capital gain otherwise occurring for income tax purposes on the disposition of the property. The term "principal residence" is defined in s. 54 of the *Income Tax Act*:

> "principal residence" of a taxpayer for a taxation year means a particular property that is a housing unit, a leasehold interest in a housing unit or a share of the capital stock of a co-operative housing corporation acquired for the sole purpose of acquiring the right to inhabit a housing unit owned by the corporation and that is owned, whether jointly with another person or otherwise, in the year by the taxpayer, if
>
> > (a) where the taxpayer is an individual other than personal trust, the housing unit was ordinarily inhabited in the year by the taxpayer, by the taxpayer's spouse or common-law partner or former spouse or common-law partner or by a child of the taxpayer.
>
> . . . . .
>
> and for the purpose of this definition,
>
> > (e) the principal residence of a taxpayer for a taxation year shall be deemed to include, except where the particular property consists of a share of the capital stock of a co-operative housing corporation, the land subjacent to the housing unit and such portion of any immediately contiguous land as can reasonably be regarded as contributing to the use and enjoyment of the housing unit as a residence, except that where the total area of the subjacent land and of that portion exceeds $1/_2$ hectare, the excess shall be deemed not to have contributed to the use and enjoyment of the housing unit as a residence unless the taxpayer establishes that it was necessary to such use and enjoyment, and...

51 Insofar as part of 2610 River Road consists of the rental cottage, Ms. Mavis submits that a portion of the increase in value to the date of separation will not qualify for the principal residence exemption and will be subject to taxation. Ms. Mavis submits that the allocation as between the principal residence and the rental property should be 57.5 - 42.5 respectively. She bases her submission upon the professional opinion of Mr. Maisonneuve, Chartered Accountant and tax partner at BDO Dunwoody. In rendering his opinion, Mr. Maisonneuve relied upon the following information as told to him by Ms. Mavis:

- the property was purchased in 1987
- it consists of four buildings
    - a principal residence
    - a garage (used with principal residence)
    - a rental cottage
    - a rental guest house or storage cabin
- the rental properties have been continuously occupied throughout the marriage

• 50 percent of the property is primarily used by the tenant

• 50 percent of the property expenses have been claimed by Ms. Mavis against rental income

• the municipal property taxes are allocated 50 percent each to the rental cottage and the main residence

52 Based upon these assumed facts, Mr. Maisonneuve testified that it would be reasonable to attribute 50 percent of the gain to the rental property. If the guest/storage cabin was not rented, rather used primarily by Ms. Mavis, his opinion would be that 35 percent of the gain would be attributed to the rental property. If the guest/storage cabin was part personal and part rental, he would recommend that 42.5 percent of the gain would be allocated to the rental property. This is the position taken on behalf of Ms. Mavis in closing submissions. My finding that the guest/storage cabin was used virtually exclusively by Ms. Mavis' family during the period in question rules out that result, leaving the 50 and 35 percent opinions for consideration.

53 Mr. Maisonneuve's assumption that 50 percent of the property was rented to the tenant was not borne out by the record before the Court. I have found that between 20-25 percent of the property was rented to or used by the tenant. The adjustment down to 35 percent made by Mr. Maisonneuve on account of the guest/storage cabin not being rented does not account for the difference between my finding with respect to rental use and the assumption he made based on what Ms. Mavis told him.

54 In my view, Ms. Mavis' allocation of the garden and land between the garage and guesthouse, and about three-quarters of the space between the rental house and the main house, to rental use was aggressive in its effort to reduce the principal residence exemption as much as possible for the purposes of this litigation. In my view, and as already stated, much more than one-half of this property can be reasonably regarded as contributing to the use and enjoyment of the main house as a residence.

55 Nor did I accept Mr. Maisonneuve's opinion that square footage should be the only determining factor. The cases he relied upon to support the square footage approach are not persuasive on the facts of this case.

56 In *R. v. Mitosinka*, [1978] C.T.C. 664 (Fed. T.D.), 50 percent of the gain on the sale of a two unit duplex-type building was exempt as the personal residence of the taxpayer. The taxpayer wished to allocate all of the land value to the one unit that was his personal residence, but this was denied as "unreasonable".

57 The second case is *Rowe v. R.*, [1998] 4 C.T.C. 2859 (T.C.C.). In this case, in a non precedential ruling, the Tax Court upheld the Minister's use of a square footage approach. The Minister determined that about 60 percent of the property had commercial use. The taxpayer had sold land upon which was located a commercial building and a personal residence. The purchaser tore down both buildings and constructed a supermarket. The Minister determined how much square footage had been used commercially and ruled that the same percentage of the total gain was non exempt. There is no other reference to the buildings on the property, to their comparative structure, or contribution to the overall value of the land. Certainly, they had no value to the particular purchaser.

58 In the Mavis case, the value of the main residence increased significantly over the years of the marriage by reason of the substantial renovations done to it, costing over $130,000. There is no question but that the 750 foot rental cottage is of much less value than the 1330 square foot renovated home. Mr. Shore testified that the house renovation had the most significant impact on the increase in value of the property during the marriage. Ms. Clairmont agreed that it had a significant impact. Although one cannot say that all of the cost contributed dollar for dollar to the increase in value, it does provide support to the view that more than square footage should be considered. This view is consistent with Interpretation Bulletin 120R6 ("IT Bulletin"). Under the subheading, "Disposition of a Property Where Only Part of it Qualifies as a Principal Residence", it states:

> 19. In some cases, only a portion of a property that is disposed of for a gain will qualify as a principal residence (see ¶s 14 to 16). If such qualifying portion of the property is designated as the taxpayer's principal residence, it will be necessary to calculate the gain on such portion separately from the gain on the remaining portion of the property which does not qualify as the taxpayer's principal residence. This is because the gain otherwise determined on the portion of the property designated as the principal residence may be reduced or eliminated by the principal residence exemption, whereas the gain on the remaining portion of the property results in a taxable capital gain. The allocation of the proceeds of disposition and adjusted cost base of the total property between the two portions does not necessarily have to be on the basis of area — consideration should be given to any factors which could have an effect on the relative value of either of the two portions.

59 In the example provided, a house plus one-half hectare of land qualifies as a principal residence and an adjoining, but severable one-quarter hectare of vacant land does not. The IT Bulletin goes on to say:

> If the extra one-quarter hectare were severed, it would still be accessible from the road by which the principal residence's one-half hectare is accessed. However, it would be difficult to sell the extra one-quarter hectare on its own because it forms part of a shallow gully through which a small brook flows. In fact, the only feasible use for the extra one-quarter hectare is to enhance the enjoyment of Mr. A.'s residence or, if severed, the residence of his next door neighbour, i.e., by providing the owner with the enjoyment of such additional land with its natural beauty. Nevertheless, the extra one-quarter hectare is not necessary for the use and enjoyment of Mr. A's house as a residence. Note that in these circumstances, the portion of Mr. A's gain that is considered to pertain to the extra one-quarter hectare may not simply be one-third of the gain pertaining to the entire three-quarters of a hectare of land he sold, but would probably be a lower amount (a determination of the actual amount in such a case could require a real estate appraisal).

60 Here, 2610 River Road sits on one parcel of land. I was not provided evidence that it was or was not severable. Access to the rental cottage is not by direct road access, rather across Ms. Mavis' laneway, and over the shared pathway. It seems clear to me, therefore, that the value of the rental portion is very relevant to the capital gains calculation, not merely square footage as suggested by Mr. Maisonneuve.

61 I was also referred to *Kelian v. R.*, [2003] 3 C.T.C. 2685 (T.C.C. [Informal Procedure]) where the percentage of square footage rented was 20 percent of the total square footage of the four units, one of which was rented and the personal use of the property was determined to be 70 percent.

62 Mr. Maisonneuve placed considerable reliance upon the fact that Ms. Mavis had deducted 50 percent of her expenses against rental income. He referred to para. 14 of the IT Bulleton in support of this:

> 14. By virtue of paragraph (e) of the section 54 definition of "principal residence", a taxpayer's principal residence for a taxation year shall be deemed to include, except where the property consists of a share of the capital stock of a co-operative housing corporation, the land upon which the housing unit stands and any portion of the adjoining land that can reasonably be regarded as contributing to the use and enjoyment of the housing unit as a residence. Evidence is not usually required to establish that one-half hectare of land or less, including the area on which the housing unit stands, contributes to the use and enjoyment of the housing unit as a residence. However, where a portion of that land is used to earn income from business or property, such portion will not usually be considered to contribute to such use and enjoyment. Where the taxpayer claims a portion of the expenses related to the land (such as property taxes or mortgage interest) in computing income, the allocation of such expenses for this purpose is normally an indication of the extent to which he or she considers the land to be used to earn income.

63 Mr. Maisonneuve also gave evidence as to what expenses could be properly claimed against the rental property. These were:

- the actual insurance costs of the building
- 50 percent of the property taxes
- actual costs for repairs and maintenance to the rental units
- mortgage interest determined by use of the funds since the initial purchase and subsequent additions/renovations for the particular building

64 In my view, para. 14 of the IT Bulletin does not compel me to base my finding on Ms. Mavis' pattern of expense claims where as here, no real analysis has been done to show that a 50/50 allocation was accurate, and some of the amounts claimed have been shown to be inaccurate. After the extensive renovation was done to the matrimonial home in 2001, Ms. Mavis continued to deduct half of her mortgage interest, even though $116,000 was added to the mortgage to finance this renovation. I do not agree with Mr. Maisonneuve that this is immaterial. There was also some evidence provide in Ex. 52 which was a list of rental property expenses suggesting that Ms. Mavis may have included a $5,500 glass and mirror account referable to the matrimonial home as a rental expense.

65 Mr. Maisonneuve did provide an allocation of the gain as between the rental and principal residence exempt portions, using a mix of fair market value and square footage, although making clear that he did so at counsel's request and not as his own professional opinion. For this calculation, he made assumptions as to the value of the land ($190,000), the main house and garage ($149,000), rental cottage ($54,000) and guest/storage cabin ($27,000), for a total of $420,000. In so doing, he utilized Mr. Shore's individual values for the rental cottage and guest/storage cabin, but Ms. Clairmont's lower overall value of $420,000. So doing would overstate the rental value as a percentage of the whole. He based his land value on the fact that in 1987 the appraisal indicated $150,000 for the lot, which he adjusted to $170,000 at July 1996 and $190,000 at June 2002, in the belief that these were "reasonable increases", based on his personal knowledge. In my view, these assumptions, not founded in evidence, detracted from his calculations. Nonetheless, he did conclude that based on the guest/storage cabin not being rented, should the court decide to use a mix of square footage and fair market value approach, that 32 percent of the total gain would not attract the principal residence exemption. I note that this opinion remains founded on the assumption that one-half of the property had a rental use.

66 Ms. Chouinard is a tax lawyer. She was called as a witness on behalf of Mr. Mavis. In addition to practicing income tax law, she has worked as a Senior Rulings Officer for CRA from 1993-1998. In her opinion, there are several factors at play in determining the portion of gain that is exempt where part of the property qualifies for a principal residence deduction and part does not. Square footage is one factor. Others include whether the property is severable, use restrictions, and whether the non-qualifying portion has a lesser market value. In her opinion if the non-qualifying portion has a lesser value, then a lower proportion than size can be used. In her view, the facts that the rental cottage has no separate road access and is part of a lot, without evidence that it can be severed, would significantly lower the value of the rental portion of the property and would reduce the non exempt share of the gain. In her opinion, if the court were to find that the tenant has use of one-half of the property and the storage cabin, then she would expect 65 percent to be principal residence exempt. If the court determines that the tenant has use of less than one-half of the property and that the guest/storage cabin is not used by the tenant, then in her view, 80 percent of the gain would be principal residence exempt. She bases this on the square footage value of the rental cottage itself as a percentage of the entire value, which she then increased to 20% to account for the land used by the tenant to and around the unit. In her opinion, CRA would look at all these factors, square footage, value and expenses claimed in coming to its determination on this issue. Her testimony was that where the taxpayer had claimed expenses that are clearly disproportionate, less weight is attached to that fact.

67 I accept Ms. Chouinard's opinion with one reservation. My finding that the rental use of the property was between 20-25 percent differs from hers at 20 percent. As at the date of marriage, I concluded that the value of the deduction should be 25 percent, for reasons that related to the comparative value of the rental and residential use at that time. At the date of separation, the comparative values between these two components had shifted, such that comparatively more value is found in the residential portion at this date. This suggests that it is appropriate to use a different percentage of total value at each individual date: although the percentage of the property used for non residential purposes did not change, its value, as a part of the whole, did change.

68 Mr. Shore's opinion was that taking only the rental cottage itself into account, its contribution to the total value of 2610 River Road fell by .5 percent between the two dates. Although I did not agree with him that the value for *Family Law Act* purposes should be limited to the rental building only, this does provide some measure of the change in value as part of the whole. Extrapolating from this to my own finding as to the non capital gain exempt portion of 2610 River Road, I have determined that 22 percent of the entire gain would be non exempt.

Valuing the Contingent Liability for Capital Gains Tax

69 Twenty-two percent of the increase in value over the years of married cohabitation is $38,280. Bringing one half of that into income at the highest rate for 2002, 46.4 percent, results in $8,880.96 of income tax payable. Given the findings that I have made, this is the amount that Ms. Mavis would claim as her contingent liability. Mr. Mavis takes the position that nothing should be allowed because it is too uncertain when the property will actually be sold and the taxes actually incurred.

70 The applicable law is found in *Sengmueller v. Sengmueller*, 2 R.F.L. (4th) 232, 17 O.R. (3d) 208, [1994] O.J. No. 276 (Ont. C.A.):

> ¶18 In my view, it is equally appropriate to take such costs into account in determining net family property under the Family Law Act if there is satisfactory evidence of a likely disposition date and if it is clear that such costs will be inevitable when the owner disposes of the assets or is deemed to have disposed of them. In my view, for the purposes of determining net family property, any asset is worth (in money terms) only the amount which can be obtained on its realization, regardless of whether the accounting is done as a reduction in the value of the asset, or as deduction of a liability: the result is the same. While these costs are not liabilities in the balance sheet sense of the word, they are

> amounts which the owner will be obliged to satisfy at the time of disposition, and hence, are ultimate liabilities inextricably attached to the assets themselves. ...
>
> . . . . .
>
> ¶2 1 ... The reasons [in *McPherson v. McPherson*] give us the following guidance: first, that as a basic principle the entire costs of disposition of assets should not be visited on one spouse, and that those costs, like benefits, should be shared equally; and second, that this principle should be departed from only where the timing of disposition, and thus disposition costs, is "so speculative" that such costs "can safely be ignored". ...
>
> . . . . .
>
> ¶26 ... If the evidence satisfies the trial judge, on a balance of probabilities, that the disposition of any item of family property will take place at a particular time in the future, then the tax consequences (and other properly proven costs of disposition) are not speculative, and should be allowed either as a reduction in value or as a deductible liability.
>
> . . . . .
>
> ¶29 By requiring evidence of the expected time of the disposition, and by making a present value calculation, courts could avoid inevitable unfair results flowing from the application of the approach used in *Heon v. Heon*, and from the approach suggested by the appellant.
>
> . . . . .
>
> ¶32 It would be much fairer to require her to adduce evidence (see s. 4(3) of the Act) from which the trial judge could assess the likely time of disposition, the likely disposition costs at that time, and the present value of those costs as at the valuation date. The deduction allowed would be [substantially] less than would be the case if assets were valued as if disposed of on valuation day. It is true that such calculations are not exact, but courts have never refused to make assessments merely because the evidence available is less than precise.

71 Ms. Mavis also claimed disposition costs for real estate commission and legal fees that will be associated with the future sale of the matrimonial home. She claims $23,750 which is about 5.5 percent of her valuation of the property.

72 Ms. Mavis testified that she had thought of selling the home at the time of separation. She pointed out that she had signed an Agreement of Purchase and Sale with a friend to jointly purchase a one bedroom condo in July 2002. She also testified that she had been prevented from selling because of the disputes with her neighbour over the location of her septic tank and the deck encroachment onto his property. I do not accept that Ms. Mavis intended to sell the home at date of separation. Mr. Kearns did not have his survey done until June 24, 2002, after the separation and did not contact Ms. Mavis about these issues until January 2003 when his lawyer wrote to her. Nor has Ms. Mavis been active in resolving the dispute with Mr. Kearns, as she might have been had she actually wanted to sell the property. In addition, Ms. Mavis has spent an additional $50,000 on the matrimonial home since separation. The condo is not yet ready for occupancy and appears more of an investment than a future home for Ms. Mavis.

73 On the basis of these facts, I find that Ms. Mavis had no intention of selling the house at the date of separation. I was not provided with testimony as to any other probable sale date and am, therefore, unable to accurately present value the future costs.

74 In *Zadegan v. Zadegan*, [2002] O.J. No. 2190 (Ont. S.C.J.), I said:

> ¶ 57 Both parties had some RRSPs at the date of separation. The Applicant has claimed an income tax discount of 25 percent on account of the future tax inherent in this asset. No basis was provided for arriving at this percentage. The Respondent says no discount should be allowed. In absence of evidence as to the probable income tax rate that would likely apply when the Applicant is likely to incur income taxes on this asset, I have decided to allow a discount rate of 10 percent. This gives some effect to the fact that there is an inherent tax cost in the asset, but I am not prepared to apply a higher discount without a proper evidentiary basis. In so doing, I adopt the remarks of Aston J. in *Downe v. Downe*, [2002] O.J. No. 1005 (S.C.J.):

Courts routinely discount R.R.S.P.'s for the income tax liability that will arise when funds are de-registered. The wife's claim for a 25 percent discount is customary. However, there is an onus on the person claiming a deduction to prove such a deduction. Asking the court to take judicial notice of the fact that R.R.S.P. income will always be taxable only satisfies part of the requirement. In this case, I must also consider these facts:

(a) Mrs. Downe is only 33 years of age and it will be many years before she is likely to retire;

(b) The amount in her R.R.S.P. is relatively modest and is likely to be kept longterm as a retirement nest egg;

(c) When she badly needed money during the currency of this litigation, and even before the parties separated, she did not cash in her R.R.S.P.'s but, instead, looked to her parents and grandmother for financial help;

(d) She will, on a balance of probabilities, have other income at the time of retirement and it is fair to assume the funds will be taxable.

In the circumstances, the rate of discount will be 10 percent rather than 25 percent. Mr. Downe did not offer evidence to support a notional tax deduction on his R.R.S.P.'s, but considering the inevitability of some tax on de-registration, the 10 percent figure should apply for him as well.

75 Aston J. took a similar approach in *Kennedy v. Kennedy*, [2004] O.J. No. 3222 (Ont. S.C.J.) in determining the value to include for the wife's contingent asset, namely the survivor's benefit in her husband's pension:

¶ 29 Mr. Kennedy's pension plan would provide a survivor benefit for Mrs. Kennedy if the two of them were still married to one another at the date of his death, but not otherwise. Mr. Kennedy claims the value of that survivor pension, $20,528, ought to be included in the wife's net family property. I disagree. It is clear to me that the marriage was at an end on the date of separation, with Mrs. Kennedy having decided to pursue a divorce, a claim also made by Mr. Kennedy in his responding court documents. It is far more likely that the parties would be divorced within Mr. Kennedy's lifetime than that she would receive a survivor pension because of his death. On the other hand, there is at least some possibility Mr. Kennedy might have died before the divorce was granted. A small part of the full theoretical value can properly be included in Mrs. Kennedy's net family property as a contingent asset to reflect that possibility. Though there is no actuarial evidence, I fix the amount at 10 percent of the $20,528, or $2,053.

76 Ms. Mavis is now 60 years of age. There is more than "some possibility" that she will sell 2610 River Road and move during her lifetime. Absent a credible proposal from her as to when this might be, since capital gains tax will inevitably be incurred at some point in the future, based either on an actual disposition or a deemed disposition, I have determined the contingent liability to be 25 percent. For the same reasons, I determine the contingent liability for disposition costs to be 25 percent based on the value of the home at date of separation, using the 5.5 percent rate proposed by Ms. Mavis. The amounts so determined are $2,220 and $6,517.50 respectively.

Septic/Deck Encroachments

77 Ms. Mavis has claimed a deduction for a contingent liability arising out of a deck encroachment onto her neighbour's property and the proximity of her septic field to his line, which is closer than prescribed by the local authority. She has claimed $38,000 as necessary to deal with the property line dispute, and between $5,000 and $8,000 on account of the septic location plus $10,000 for associated legal fees.

78 Mr. Mavis takes the position that no deduction should be allowed on account of any of these items.

79 It is not in dispute that the decking of the rental cottage encroaches onto Mr. Kearn's property. The encroachment ranges from 2.5 feet to 7.0 feet from front to back. This encroachment existed at the date of marriage and date of separation, and was well known to Ms. Mavis.

80 The septic tank was installed in 1994 and is closer to the neighbouring line than the three metre minimum. This problem was also in existence at the date of marriage and date of separation, but did not become known to Ms. Mavis until

January 2003 when Mr. Kearn's lawyer wrote to her lawyer.

81 Mr. Shore's opinion was that since the same conditions of encroachment were in existence at both valuation dates, that the property value, for comparative purposes, was not affected. Ms. Clairmont did not disagree. Although she was made aware of the problems by Ms. Mavis, she did not take them into account in her appraisal.

82 To rectify the deck encroachment, Mr. Kearns proposed that Ms. Mavis simply remove the part of the deck that was on his property within a reasonable period of time. She declined. She redid the deck in 2004 and did not correct the problem then, although she could have easily done so. Instead, she asserts that she has acquired title to the land upon which the deck sits, by adverse possession, based on the deck being in that location since at least 1979. Her position is that should she sue Mr. Kearns for possessory title, she would succeed in obtaining more land than just the part upon which the deck encroaches with a legal bill in the range of $30,000 for the proceedings.

83 I also note that Ms. Mavis owns a metal shed which sits entirely on Mr. Kearns' property. He asked her to move it. In March 2003, she agreed to do so. Nonetheless, she has not.

84 Mr. Kearns offered to sell Ms. Mavis a piece of land with 19 feet of waterfront, for $38,000 which would, as set out in his letter of proposal, improve her water frontage and result in her deck and septic system all being within her new property line. Ms. Mavis rejected this proposal, wanting instead to acquire 22 feet of waterfront. Nonetheless, she also submits this cost of $38,000 in support of the amount of contingent liability to deal with the deck encroachment/property line dispute.

85 Based on these facts, I disallow the claim for $38,000 as a contingent liability on account of the property line dispute. I accept Mr. Shore's opinion that as the problem existed at both valuation dates, it does not effect the comparative value of the property at those dates. Secondly, were Ms. Mavis to buy land from Mr. Kearns or successfully sue him to affirm possessory title in order to correct the problem, she would also obtain an offsetting asset. Thirdly, she could have fixed the problem as part of the work done in 2004 at little additional cost, if any, but chose not to.

86 Mr. Kearns also made a reasonable proposal regarding the septic tank. In February 2003, he agreed that the septic tank could remain where it was, until such time as a new septic system needed to be installed anyway, when it could be properly located. He specifically provided that this would be available to her "or her successors in title". Ms. Mavis did not accept this offer and presented an estimate at trial for approximately $30,000 to relocate the septic system properly on her property. The manager in charge of septic systems for the Rideau Valley Conservation Authority testified at trial that the work order issued against Ms. Mavis with respect to this septic system, in July 2003 had expired when one year passed with no action taken to enforce it. Ms. Mavis nonetheless, maintained that she should still be allowed a contingent liability for the rebate she would have to allow a prospective purchaser who would know that the septic was too close to the line and would have to be relocated at some point in time.

87 The effect of Mr. Kearn's proposal and the expiry of the work order substantially reduces the risk of this contingency. It remains true that his proposal did not expressly bind his successors in title and that the cost of relocating the septic properly, when the time came, would exceed what would be involved in simply using the same site. Additional costs in excavating, tree removal and landscaping would be incurred. In *Ganson v. Ganson* (1996), 17 O.T.C. 340 (Ont. Gen. Div.), Herold J. states:

> ¶ 15 The courts have consistently and properly held that a contingent liability may be a debt properly deducted from the value of one's family property. Before permitting the deduction, however, the court must find that there is a risk at the date of separation that the liability would be called and if so to assess that risk. In considering whether or not there was such a risk and if so the appropriate value to attribute to it I have considered the following among other factors:
>
> > a) the loan had not been called;
> >
> > b) even though there was on paper and probably in fact (as the parties have agreed) a shortfall of assets to meet liabilities in Lisk the reality is that the shareholders of Gunn could not afford to lose their premises and would not permit Lisk's only asset to be lost to the bank with a shortfall which could then be claimed against the guarantors;
> >
> > c) Gunn itself was a guarantor of the debt and on anybody's valuation of Gunn on the date of separation its net value was more than sufficient to cover the indebtedness;
> >
> > d) of the three individual guarantors, Ian Ganson had no net worth to speak of other than his interest in Gunn, whereas his father John Ganson, had a net worth far in excess of the amount owing to the Toronto-Dominion Bank.
> >
> > Although there was no direct evidence on the point, I infer from the fact that Mary Ganson initially loaned money

to the company to cover its start up costs, that she was not in an impoverished state either; and

e) if a guarantor other than the husband was called upon to satisfy all or part of the debt to the bank if it was called, that other guarantor would have at least a potential claim against the husband pursuant to the provisions of s. 2 of the Mercantile Law Amendment Act, R.S.O. 1990, c. M10.

88 Here I have considered the fact that the work order was not enforced and has expired, that Mr. Kearns was willing to resolve this issue as stated and that the date of sale of 2610 River Road is, at present, unknown. I have also considered that, although this problem did exist at the date of marriage, Ms. Mavis was unaware of it and a prospective purchaser at that date would not have learned of the problem from her or from a properly prepared survey. A well informed purchaser would have learned that a permit approving the septic system was issued in 1994 and would not have found out that it was too close to the neighbouring line. Therefore, in spite of Mr. Shore's opinion, I have concluded that the septic problem would not have affected the value of 2610 River Road at the date of marriage, but does affect its value at date of separation.

89 For these reasons, I have determined the contingent liability for the impact on value at date of separation based on the anticipated additional costs involved in relocating the septic as opposed to just replacing it at the end of its useful life. The estimate provided at trial did not actually include these costs. I have accepted Ms. Mavis' own estimate, at the low end of the range she submitted, which is $5,000. This appears to me to be a reasonable estimate for the reduction in price that a notional purchaser would have required to the price at the date of separation.

Income Tax: Refunds and Liabilities

90 Mr. Mavis takes the position Ms. Mavis' income tax refund for 2002 should be prorated to the date of separation and entered as an asset in her Net Family Property. The full refund of $3,711.46 prorated for five months results in the figure of $1,546.

91 Ms. Mavis disagrees with this approach. Her proposal is that the court treat her income tax debit at the date of marriage and credit at the date of separation as zero/zero entries based on the fact that she elected to use the alternative method to calculate her taxable income under s. 34.1 of the *Income Tax Act*. Mr. Maisonneuve, Chartered Accountant and Tax Partner at BDO Dunwoody, gave opinion evidence on this point. By electing the alternative method, Ms. Mavis continued her business year end as January 31st. Where the alternative method applies, the individual includes income from the business in the calendar year in which the fiscal period of the business ends, in this case the regular income for the year ended January 31. Additionally, the individual must also include "additional business income" in the calendar year under s. 34.1, which is an estimate of the "stub period" income for the remainder of the calendar year, in this case from February 1st to December 31st. The additional business income included in one year is in turn deducted from income in the next calendar year (in which a further additional business income amount is included) and the pattern continues in each subsequent calendar year. The mechanism in s. 34.1 was introduced to allow individuals to maintain their off-calendar year fiscal periods while effectively reporting business income on a calendar year basis.

92 Mr. Maisonneuve's point is that, over time, Ms. Mavis will pay the same amount of income taxes that she would if she were paying on a regular calendar basis. But, the timing will be different. When her business income goes up from the previous year, as it did in 1996, this will create a tax liability, and when it goes down from the previous year, as it did in 2002, a tax refund is created. In Mr. Maisonneuve's opinion, the liability created in 1996 by the alternative method should be treated as offset by the future benefit thereby achieved for the tax payer, because tax has effectively been paid on a future, notational income. He points out that as an accounting principle, prepaid taxes are an asset. Because the tax paid will all balance out in the end, he would not include either the 1996 liability nor the 2002 refund in Ms. Mavis' Net Family Property.

93 In my view, Mr. Maisonneuve's opinion does not accord with the scheme of the *Family Law Act*, which is to value assets and liabilities as at particular valuation dates. He agreed that at the date of marriage, Ms. Mavis owed an enforceable debt to CRA and at the date of separation CRA owed her a refund. The fact that on a running balance, over all the years in which she reports business income, the tax treatment she has elected would even out with the regular tax treatment, does not change this. Moreover, he treats the tax liability as equivalent to a prepayment of taxes and therefore an offsetting liability and asset. But the taxes were unpaid as of the date of marriage.

94 *Family Law Act* s. 4(1) defines "net family property":

"net family property" means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,

(a) the spouse's debts and other liabilities, and

(b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, calculated as of the date of the marriage;

95 The intention and effect of the net calculation at date of marriage is that a reduction in date of marriage debt over the years of cohabitation does constitute an increase in the person's Net Family Property. Paying a date of marriage tax liability off from earnings is, pursuant to subparagraph (b) above, in effect to add the liability, reduced during the period of married cohabitation, back into the net family property.

96 In *McAndrew v. Rooney-McAndrew*, 47 R.F.L. (5th) 120, [2003] P.E.I.J. No. 95 (P.E.I. C.A.), the court states:

> ¶ 14 The legislative direction is clear. In calculating the value of a spouse's net family property, the spouse's pre-marital net assets are to be deducted from the net assets of the spouse at the valuation date. In this case the value of one spouse's net pre-marital assets was in the negative. Mathematically, when a negative value is to be deducted from a positive value, the calculation is completed by adding the two.
>
> ¶ 15 This was the approach taken in *Jackson v. Jackson* (1995), 5 R.F.L. (3d) 8 (Ont. S.C.) at p. 12. Also, in *McDonald v. McDonald* (1995), 17 R.F.L. (3d) 258 (Ont. Ct. of Justice) at p. 260 Rutherford J. took the negative value of the pre-marital property and added it to the spouse's net assets on valuation to arrive at the value of the spouse's net family property. At p. 260 Rutherford J. stated:
>
>> Secondly, in arriving at the value of Mr. McDonald's net family property, his net debts totalling $4,300. which he brought into the marriage were included in the calculation. In doing this, I treated those debts as 'property' within the meaning of that term in the definitions of both 'property' and 'net family property' in s.4(1) of the Family Law Act, R.S.O. 1990, c. F.3. That this negative pre-martial property value should in this way be converted mathematically into an addition to a party's net family property is debatable. On the one hand, a fair sharing of wealth acquired during marriage should, arguably, take into account the extent to which the partnership pulled one party out of pre-marital debt. On the other hand, valuing pre-marital property in the red or as a negative may tend to strain the language of para. (b) in the definition of net family property in the Act, somewhat.
>
> ¶ 16 Rutherford J. goes on to conclude it is fair that the net debts which a spouse brings into the marriage should be accounted for when the net family property is equalized upon the breakdown of the marriage. In *Nahatchewitz v. Nahatchewitz* (1999), 178 D.L.R. (4th) 496 (Ont. C.A.) at para. 34 the Court appears to confirm this approach.
>
> . . . . .
>
> ¶ 20 Furthermore, the approach in the Jackson, McDonald and Nahatchewitz cases is consistent with the spirit of the division of property under the provisions of the Family Law Act because it reflects the contribution one spouse made during the marriage to the improvement of the other spouse's financial position. The objective of the Act is to equalize the value of property or wealth accumulated during the marriage, and this includes the reduction or the elimination of a spouse's pre-marital debts.

97 In *Nahatchewitz v. Nahatchewitz*, 1 R.F.L. (5th) 395, [1999] O.J. No. 3154 (Ont. C.A.), the Ontario Court of Appeal also "added back" a negative worth at date of marriage in calculating Net Family Property:

> ¶ 34 The recalculation thus entailed produces a net asset value at separation for the husband of $128,532.03 and for the wife of $556.88 and at marriage, for the husband of $105,940.00 and for the wife of negative $2,200.00. Since there is no basis for anything other than the usual equal division, the resulting equalization required is a payment by the husband to the wife of $9,917.58.

98 The next issue is the income tax due on the reserve arising from the change in reporting self employed earnings

effective in 1995. Ms. Mavis' reserve totaled $69,345. Of this, the balance remaining to be brought in to income at the date of marriage was $60,766 and at the date of separation was $17,336. I agree that the income tax payable on each amount represents a liability owing at the applicable valuation date.

99 Ms. Galarneau submitted that this liability should be discounted because it was raised at trial by Mr. Pantalone during cross-examination of Mr. Maisonneuve. With respect, it is up to Ms. Mavis to present an accurate statement of her assets and liabilities and she cannot complain if, as Mr. Pantalone put it, he only discovered during trial something that she should have disclosed prior to trial.

100 Nonetheless, I believe that it is appropriate for me to consider the fact that the taxes on the reserve are payable in 10 annual installments ending with 2005, without interest. Counsel took the approach that I should use the net difference between the two valuation dates as the amount, to which I have applied the rate of 46.1 percent which was the agreed discount rate applied to her RRSPs, since I do not have her actual rate in 1996. I was not provided a present value calculation. My own estimate is that the present value of the total tax expense related to the reserve at the date of marriage is $14,000. I have included this figure as Ms. Mavis' tax liability on the reserve at date of marriage.

Assured Value Program: Ms. Mavis' Book of Business

101 Ms. Mavis was a self-employed financial advisor with Investors Group at the date of marriage, and on a continuous basis thereafter. She is very successful and is one of the top 20 producers for Investors Group in Ontario. She is now 60 years old and has no plans to retire. She loves her work and also needs her income. She knows of some individuals at Investors who have worked into their 80's.

102 Ms. Mavis has an extensive client list, known as her book of business. At the date of separation, her book contained $76,858,035 of assets on behalf of these clients. At the date of marriage, her book totaled $26,850,644. I agree that this is an asset to be valued and included in Ms. Mavis' Net Family Property. Counsel provided me with *McLean v. McLean*, [2004] O.J. No. 4621 (Ont. S.C.J.) to this effect. I also heard testimony from various witnesses that books of business such as this one had value, could be transferred for consideration between consultants or brought by the consultant to another firm, also for valuable consideration. I therefore conclude that Ms. Mavis' book of business is property within the definition of the *Family Law Act.*

103 The real issue in this case is one of value. Both parties based their approach to value on the Assured Value Program. This was established by Investors Group in June 1999 to compensate consultants for the value they have developed in the business. Eligible consultants receive compensation in exchange for assisting in the successful transfer of client accounts to another Investors Group consultant. In this way, the consultant is compensated for the book of business he or she has built up and Investors also benefits by retaining the clients. As well, Investors maintains a competitive status with competing firms in terms of attracting and maintaining good consultants by facilitating an orderly transfer for value of the consultant's book of business.

104 The program may be used by a consultant who is departing Investors or who wishes to remain at Investors but to transfer off some portion of his or her book, while maintaining the balance.

105 The Assured Value Program facilitates such transfers by establishing a formula for the compensation, which is payable over 30 months. At the end of the first year, the remaining payments are adjusted if 10 percent or more of the qualified assets that were transferred are lost due to redemptions during that 12 month period. The formula is 2.5 times the Annual Asset Retention Bonus of the consultant calculated at the end of the month preceding the date of the agreement.

106 In order to be eligible, the consultant must have a minimum of $5 million in qualified mutual fund assets, or $3 million and at least two years with Investors Group, and if the consultant is leaving Investors, it must be for a reason other than a violation of Investors Group business standards or to work for a competitor. Transactions pursuant to the Assured Value Program must be approved by the Regional Manager.

107 In its description of the Assured Value Program, Investors Group notes that prior to June 1, 1999, private agreements were in place between individual consultants. All future arrangements to transfer client servicing responsibilities must, however, be pursuant to the Assured Value Program. Investors describes the benefits of the Assured Value Program as follows:

> **Benefits** — Consultants taking advantage of this policy receive the benefit of:

1. A simple and effective method of transferring the servicing responsibility for clients to a new servicing Consultant(s)

2. Fair value for the transfer of servicing responsibility

3. Certainty of receiving payment from Investors Group over the term of the agreement thus eliminating the risk associated with "private" arrangements.

108 Investors also represents that the Assured Value Program "represents fair market value in the industry. Investors Group will monitor the market place to ensure that the payment amount continues to reflect fair market value". Thus, Investors Group regards its Assured Value Program as providing fair market compensation to departing consultants.

109 Although the Assured Value Program was not in existence at the date of marriage, nonetheless, both parties applied its formula to the book of business on that date as if the plan had been in existence. It was also agreed that proceeds of the Assured Value Program received by Ms. Mavis would be subject to income tax and a discount rate for taxes was agreed upon. On a net basis, Mr. Mavis submits that the value to Ms. Mavis is $228,434. Ms. Mavis submits that the value should be determined to be $25,000.

110 Ms. Mavis points to a number of contingencies which, in her view, go to reduce the value of her book of business, as follows:

1. The Assured Value Program is not a contractual benefit or entitlement. It could change or disappear before she avails herself of it.

2. She may not meet the eligibility criteria of the Assured Value Program.

3. The rate of redemption after her departure may exceed 10 percent or more, thus reducing the remaining payments to her.

4. She has no plans to retire and hopes to work for a long time to come. The book should, therefore, be valued as if realized on at a retirement age later than age 65, perhaps even to age 80.

5. Her client list may drop off before retirement, leaving her less to transfer off at that time.

6. The non solicitation clause in her contract is a serious restriction on her ability to realize value from her book, other than through the Assured Value Program.

111 No evidence was tendered to the effect that the Assured Value Program is at risk or even under review by Investors. It is true that Investors could change its policy, and revoke or change the Assured Value Program to Ms. Mavis' disadvantage. But, there was no evidence to suggest that either is probable or even likely. The one known change to the Assured Value Program since the date of separation has been to Ms. Mavis' advantage.

112 Mr. Evans is the Regional Director for Investors Group in Ms. Mavis' region. He is responsible for compliance. He testified that he had no concerns either at the date of separation or since, with respect to Ms. Mavis' compliance with Investors' eligibility requirements. Her recording needed to be completed, but in his view, this would not affect her eligibility for the Assured Value Program. I accept this testimony and find it highly unlikely that Ms. Mavis would not continue to be eligible for the Assured Value Program.

113 In the three years prior to separation, Ms. Mavis' actual redemption rates were 9.9, 9.7 and 9.8. In 2002, it fell to 5.5 and in 2003 it returned to 9.8. Thus, she has a steady record of a rate of redemption that is less than 10 percent. Mr. Evans testified that after a consultant departs, 10 percent is considered a reasonable rate of redemption. The Regional Director for the Investors office from which Mr. Mavis works also testified. His testimony was that he did not often see redemption rates exceed 10 percent after a consultant departed. He also stated that a consultant's usual rate of redemption would increase slightly after departure.

114 Because of its size, Ms. Mavis' book would be spread out among at least six consultants. This would have a lowering effect on the rate of redemption in comparison to allocating such a large book to fewer individuals.

115 On the basis of the testimony of Mr. Evans and Mr. Gobel, and having regard to Ms. Mavis' historic rates of redemption, I have concluded that after her departure, it is reasonable to assume a rate of redemption of 10 percent in the first 12 months following her departure. This would represent a slight increase over her usual, actual rate. I was not persuaded of a real risk that her redemption rate would exceed 10 percent.

116 Throughout 18 years with Investors Group, Ms. Mavis has given no thought to moving to another firm. She is not likely to leave Investors to go elsewhere. I agree that it is more than probable that she will remain with Investors until she does retire. Were she to leave Investors and continue to work elsewhere in the field, she is bound by her contract with Investors not to solicit Investors clients for up to two years.

117 There was conflicting evidence about the effect of the non solicitation clause on Ms. Mavis' ability to move her book of business to a new firm. Given my finding that she is probably going to remain with Investors Group to the conclusion of her career, the non solicitation clause is unlikely to come into play or to be a factor in the valuation of her book.

118 Nor do I regard the fact that her client list might drop off before retirement as a factor in valuing her book of business at the date of separation. And, the evidence is that her book has actually increased after the separation.

119 The focus of the evidence was directed towards the approach that should be taken to the valuation of this asset having regard to the terms of the Assured Value Program. In brief, Ms. Mavis took the position that retirement assumptions should be applied given that she would not realize on it until she did retire. Mr. Mavis took the position that the book should be valued as a business asset, on each specific date, and that retirement age did not factor into it.

120 Ms. Mavis tendered opinion evidence on this issue from an actuary and from a Certified Business Valuator. The actuary, Mr. Woods, applied a 10 percent redemption rate to the book of business as it stood at the date of marriage, for each year to the date of separation. By so doing, he concluded that $14,405,487 of the book of $26,850,644 as at date of marriage would still remain at date of separation. He then selected three dates, date of separation, Ms. Mavis' age 60 and age 65. For the first scenario, Mr. Woods' approach produced a higher date of separation value than did Mr. Martel, namely $268,708. This is due to the fact that applying the 10 percent redemption to the date of marriage book reduces the date of marriage deduction.

121 In his second and third scenarios, Mr. Woods assumed that the qualified assets obtained during the marriage would be redeemed at the 10 percent per year to each specified age. He did so in order to apply retirement assumptions which he saw as reasonable since Ms. Mavis was not likely to realize upon her asset until she retired. In this way, he produced present values, net of taxes of $182,451 at age 60 and $77,302 at age 65. The business valuator, Mr. Savage, agreed that Mr. Woods' approach would show what would remain of her date of separation book, at those dates, on a present value, after tax basis.

122 Mr. Mavis also tendered two expert witnesses on this issue. Ms. Day is a Certified Business Valuator. She testified that the book of business is an asset and should be valued at each valuation date, by reference to the standard definition of fair market value. She does not agree that subsequent changes to the asset as it stood on the particular valuation date should be accounted for in establishing its value on that date. In her opinion, so doing would result in valuing the asset at another point in time, not at the specific valuation date required by the *Family Law Act.* In her view, a discount should not be applied based on a future realization date. Although Ms. Mavis generates her income from the asset, in her opinion, this is true of many assets, for example, rental property where value is not discounted because it is also income producing. Nor would she apply a discount because Ms. Mavis did not want to dispose of the asset at valuation day. The definition of fair market value assumes a willing seller and buyer; the fact that a particular owner does not want to sell does not affect value, although an inability to sell would.

123 Mr. Martel is an actuary. He applied the Assured Value Program formula to the increase in Ms. Mavis' book between the date of marriage and the date of separation without applying the 10 percent rate of redemption in each year from the date of marriage up to the date of separation. He applied the agreed upon tax adjustment factor, in order to establish a net value after tax. He did this assuming no redemptions at the end of the first year, to arrive at a net value of $228,434, and assuming a 10 percent redemption after the first year, to arrive at a net present value of $215,162 at the date of separation.

124 Mr. Martel also calculated the present value, assuming the 10 percent rate of redemption in the first year after separation, but, postponing the realization date until Ms. Mavis' age 60 and 65, and then taking a net after tax present value. For age 60, this resulted in $184,203 and for age 65, $132,167.

125 I agree that the 10 percent redemption rate in the first year following departure should be applied. Given my findings

that this is the probable redemption rate in the 12 months following the notional transaction, it is proper to factor this into the valuation at date of separation. Therefore, based upon the opinions of Ms. Day and Mr. Martel, the Assured Value Program would result in a net value of $215,162 at the date of separation.

126 In my view, no redemption rate should be applied between the date of marriage and the date of separation, nor after the first 12 month period after date of separation. The *Family Law Act* stipulates valuation dates. The value of Ms. Mavis' book of business at the date of marriage is not the same thing as the value of what would remain of that book, years later at the date of separation. Similarly, the value of her book at date of separation is not the same as the remaining value of that book, years later, at assumed retirement ages. Indeed, it is fair to say that the value of her book at retirement will likely differ for both clients lost and clients gained after the date of separation. The point is that the *Family Law Act* directs a valuation of her asset at specified valuation dates, marriage and separation.

127 The fact is Ms. Mavis' book of business increased substantially over the years of marriage. In my view, it should be valued as it stood at each valuation date. I do not agree with Mr. Woods approach of applying the 10 percent redemption rate in each year between the date of marriage and date of separation and for each year after separation to an assumed retirement age. In my view, this approach does not value the asset as it existed at each valuation date. Rather, and as noted by Mr. Savage, this would show the value of what would be left of the qualified assets that existed at date of separation, on each of these subsequent dates. In my respectful view, that is not a suitable approach to determining the value at the date of separation. I do agree that the value at date of separation must reflect the probability of the 10 percent redemption rate in the first year after the notional transaction, because, using the Assured Value Program formula, that will have a direct impact upon the compensation received by Ms. Mavis. I accept Mr. Martel's figure of $215,162 as representing this value.

128 In *Fitzpatrick v. Fitzpatrick*, [2004] O.J. No. 2695 (Ont. S.C.J.), Aston J. acknowledges this when he states:

> ¶ 78 The theoretical fair market value of the business at valuation date can be assumed to be receivable by Mr. Fitzpatrick on retirement. Whether that business goes up or down in value after v-date as a result of unrelated or unanticipated post v-date events is irrelevant to the net family property calculation. (Emphasis added.)

129 Mr. Woods also prepared a supplementary report. In this approach, he projected the total value of the book to an assumed date of retirement and applied a pro rata valuation method. He used 4 percent to project her qualified assets based on actual growth over the years since date of separation. He treated each year that she worked at Investors Group as being of equal value at retirement. Mr. Woods' pro rata approach has the effect of leveling the growth of Ms. Mavis' book of business over all of her years with Investors Group. In *Best v. Best*, [1999] 2 S.C.R. 868 (S.C.C.), the majority approved this approach with respect to deferred benefit pensions:

> ¶ 35 Valuing a defined benefit pension prior to retirement is necessarily artificial. The true value of the appellant's pension benefit cannot be determined [page894] with finality until retirement, when the total number of years of service and the five best salaries are known with certainty. ...
>
> . . . . .
>
> ¶ 66 The Court's duty is to determine which valuation method most fairly apportions the pension's value to the pre-marital and marital periods. ... It is possible for an asset to increase slowly in value and then rise dramatically in a short period of time. It would be inequitable to deprive the respondent of her share of the good fortune that arose during the course of the marriage. The Court should decide which valuation method most nearly describes how the defined benefit pension's value varied over time, with proper regard for the nature of the asset itself.
>
> . . . . .
>
> ¶ 81 ... The appellant argued that, under the benefit formula, the most important factor in calculating the value of his pension is the number of his years of service. The benefit formula incorporates years of service directly, so that each additional year of service effectively increases the annual pension benefit by 2 percent of the average of the best five years' earnings. ...
>
> ¶ 82 I agree with the appellant that the pro rata method reflects this aspect of his defined benefit pension. ...

130 In my view, none of the characteristics of a defined pension plan that required that particular valuation approach exist in Ms. Mavis' book of business. Its value is not tied to years of service, salary, or to any particular age, including of retirement. The book of business is not a future asset. The amount of eligible assets is a fact that is known at any point in time. And, the asset can be realized at any time in full or in part, under the Assured Value Program, should Ms. Mavis wish to avail herself of its terms. Ms. Mavis is not an employee of Investors. No contributions to or funding of her book is made by Investors. For these reasons, I do not regard the alternate, pro rata approach as appropriate to the valuation of this asset.

131 There still remains the issue of whether the probable actual disposition date of the asset, namely some date in the future, years after the date of separation, should factor into the value of this asset. In *Rawluk v. Rawluk* (1986), 3 R.F.L. (3d) 113 (Ont. H.C.), Walsh J. states at p. 122:

> While the Act speaks of value, it contains no definition of that term nor, indeed, guidelines of any kind to assist in the determination of its meaning other than the provision contained in s. 4(4) that when value is required to be calculated as of a given date, it shall be calculated as of close of business on that date. Absent any statutory direction, "value" must then be determined on the peculiar facts and circumstances as they are found and developed on the evidence in each individual case. While this approach does not lead to uniformity and predictability of result, it does recognize the individuality inherent in each marriage and case and permit the flexibility so often necessary to ensure an equitable result.

Similarly, in *Fitzpatrick v. Fitzpatrick*, [2004] O.J. No. 2695 (Ont. S.C.J.), Aston J. states:

> Although, at first blush, there may appear to be a difference of opinion between proponents of fair market value as the standard for valuation and proponents of a flexible "fair value" approach, that difference is more semantic than real. In most cases, appropriate adjustments to fair market value have been made to take into account the idiosyncrasies of each fact situation.

132 Aston J. relied upon this flexibility to take into account the probable date of realization on the asset in determining its valuation date value:

> ¶ 76 The concept of "fair market value" is based on a notional market place, without regard to whether an owner is actually selling at that particular time. However, in my view, the context of the Family Law Act also necessitates a consideration of when that value might be realized. There is no possibility Mr. Fitzpatrick would have chosen to sell his shares in the fall of 1999, nor evidence that he could have been compelled to do so.
>
> ¶ 77 This case is not a theoretical exercise. In my view, a just outcome should reflect the actual facts of the case, not a hypothetical construct. Because it is clear on the evidence Mr. Fitzpatrick will not retire before the age of 60, the valuation of his business perhaps should be discounted to reflect the deferred realization of that asset. He has ability to pay substantial spousal support because he retains his interest in the business. Unlike other assets, a disposition of his ownership in the business would constitute a disposition of his job as well. The parties agree the future disposition costs are to be discounted. Should the deferred receipt of proceeds of sale also be discounted?
>
> ¶ 78 The theoretical fair market value of the business at valuation date can be assumed to be receivable by Mr. Fitzpatrick on retirement. ...
>
> ¶ 79 I accept Mr. Fitzpatrick's evidence that before the valuation date in September 1999, his personal plan was to retire at the age of 60 or soon thereafter.
>
> . . . . .
>
> ¶ 80 Mr. Fitzpatrick had just celebrated his 52nd birthday on the valuation date. On the evidence, I find that he will continue with the company to age 60 or older. His counsel, Mr. Morga, submits that age 62 is the appropriate retirement age to assume. I accept that. Assuming receipt of $2.18 million ten years post-separation (because special purchasers can be assumed if a long term view is taken), the discount rate of 5.58 percent per annum, compounded annually (Exhibit 40), produces a "present value" figure (September 30, 1999) of $1,266,580; rounded to $1.27 million.
>
> ¶ 81 However, one cannot ignore the possibility Mr. Fitzpatrick would sell some of his shares between September 1999 and September 2009, when he turns 62. Indeed, he did sell 30 percent of his shares to Lombard for more than $500,000 within a few months of the valuation date, and had sold a smaller number of shares to Chip Purdom just before the

> valuation date. It follows that not all of his valuation date holdings ought to be discounted. In my view, a fair assessment would adjust the $1.27 million back up to a figure of $1.5 million to $1.6 million.

133 Then, Aston J. went on to consider not just this factor, but all relevant factors and valued the asset at $1.75 million, nothing that a fair market value would be $1.8 million. He states:

> ¶ 83 I have concluded that
>
> . . . . .
>
> (e) The figure for the v-date value of Mr. Fitzpatrick's shares required by the purpose and context of the Family Law Act is not determined by any of these conclusions but must reflect a consideration of all of them.

134 In my view, the approach of determining the value of the asset on valuation date and then considering a discount to reflect a deferred date of realization of the asset is appropriate in this case. Mr. Mavis disagrees and notes that in *Fitzpatrick*, *supra*, the husband was required to pay spousal support, which he could not do if he disposed of his business. Ms. Mavis has not and will not be paying spousal support to Mr. Mavis. In my view, this distinction does not render the approach inapplicable. Rather, it is a factor to consider in weighing a deferred realization date for the asset into the valuation. In *Fitzpatrick*, *supra*, both parties would benefit from the proposed retention of the asset by way of income in the intervening years. In this case, only Ms. Mavis would benefit.

135 Ms. Mavis submits that the age 65 value should be further reduced to reflect an even later retirement age. I know that Ms. Mavis has not realized upon her book of business at age 60. It is not probable that she will before age 65. It is true that she does not intend to retire until later than that. In spite of suggesting that she would like to continue to work as long as possible, she did not present any specific reasoned plan, as did Mr. Fitzpatrick, for the court's consideration. As with the timing of disposition of the house and the encroachment issues, I concluded that Ms. Mavis' position and testimony with respect to this asset was more designed to result in the lowest possible value than to assist the Court in actually determining the issue based on probabilities. For example, her statement that she would require $5 million in assets to maintain her current lifestyle was admittedly not a realistic retirement goal and accordingly, not helpful to me in determining a probable age of retirement. I have also taken into account that it is open to her to dispose of part of her book at any time and still to continue on working. For example, she could take on an associate, as she did with Mr. Mavis, and transfer part of her book under the Assured Value Program. This would suggest that not all of the book's value should be discounted to the same extent.

136 Ms. Mavis also relies upon *McLean*, *supra*, where the court considered a number of factors, including some contingencies. In that case, Vogelsang J. found that Mr. McLean's book was worth $62 million, and valued it at $75,000. She suggests this should be persuasive as to the value of her book. I cannot, of course, rely on *McLean*, *supra* for an evidentiary purpose. I note that Vogelsang J. did not appear to have heard the type of extensive opinion evidence that I did, nor did the ScotiaMcLeod agreement appear to have the type of precise formula as is set out in Investors Group. I have considered the contingencies put forward by Ms. Mavis. I have already given my reasons and findings as to why I do not believe that they constitute a sufficient risk to factor into the valuation of her asset.

137 Nor, am I prepared to accept her own proposed value for the book of business, namely $25,000. In 1999, Ms. Mavis applied for disability insurance. In the statement of financial information she provided in support of her application, she listed under "business equity" $450,000 in reference to what she thought she would get at the time under the Assured Value Program. This would be before income taxes. Reducing it by 46.4 percent, the top combined income tax rate in Ontario in 2002, results in a net value of $241,200. This estimate on her part corresponds well to the scenario one calculations done by both actuaries, as their present value calculation as at the date of separation. In my view, this shows a much more realistic estimate of the value by Ms. Mavis, than the $25,000 she proposes in this trial. I also note that before the Assured Value Program was in place, Ms. Mavis made a private purchase of $10 million of assets from another Investors Group consultant for $50,000 payable over 12 months. This transaction also supports a much higher value for her own book than she now suggests.

138 I have adopted the formula provided by the Assured Value Program as the method to establish a value for Ms. Mavis' book of business. For reasons given, I prefer the approach of Mr. Martel and Ms. Day. I do consider the fact that Ms. Mavis has not yet used the Assured Value Program and continues to work as relevant. I know that she has attained the age of 60 without retiring. I find it probable that she will continue to work to age 65. Should she avail herself of the Assured Value Program at that age, she will receive a substantial income from it over the next 30 months, bringing her to age 67.5. She

could also make partial dispositions prior to age 65, or to continue to work after that age. Ms. Mavis may not actually retire until after age 65, perhaps as late as age 70. Of course, a later disposition date of this asset would reduce the present value of the asset as at date of separation. However, I do not agree that the asset should be discounted to reflect a potential disposition date after age 65.

139 In departing from the fair market value approach that was accurately described by Ms. Day, the Court should be guided by the direction to ensure an equitable result in the facts of the individual case, to both parties. It would, in my view, be unfair to Ms. Mavis to value the book of business at fair market value at date of separation, knowing that she intended to retain it for the purpose of earning her living. Nor would it be fair to Mr. Mavis to value the asset with a very substantial discount dictated solely by Ms. Mavis' personal plans in relation to her retirement. Therefore, I am prepared to depart from fair market value to reach a result that is just and equitable to both parties. Ms. Mavis' personal choice of age of retirement is only one of the factors that I must consider. In my view, age 65, coming 7.2 years post date of separation, strikes a balance that is fair to both parties.

Wildmint

140 This residential property was purchased in June 2000 and registered in the names of Ms. Mavis and her daughter, Ashley, as joint tenants. Ms. Mavis contributed the downpayment and lawyer's retainer. The purchase price was $130,945, with a mortgage of $126,886.25. Ms. Mavis testified that this was Ashley's house and that she was only on title because the mortgagee required this and would not advance the funds if she were only to have guaranteed the mortgage. Further, Ms. Mavis testified that she wanted to help her daughter, who has Crohn's Disease, and to balance the fact that Ms. Mavis was supporting her son through university, which Ashley had not attended. Ms. Mavis testified that she regarded the house as Ashley's and did not expect to be repaid for her contributions.

141 I was not persuaded on balance of probabilities that the title documents did not reflect the true ownership of the property. There is nothing in writing between Ashley and Ms. Mavis to support Ms. Mavis' testimony that she intends a gift of her contribution to Ashley. Ashley was not called to testify. No explanation was given, except in submissions, that her mother did not wish to distress her by calling her to the stand. Ashley is 25 years of age and if ill, could have deposed an affidavit. The fact that her father testified that he knew Ms. Mavis was helping Ashley with the house does not address this deficiency.

142 In addition, Ms. Mavis did not identify the Wildmint property on a financial statement until January 2005 nor produce the reporting letter and attachments until the eve of trial. In answer to a question from Mr. Mavis' lawyer, Ms. Mavis' lawyer wrote on March 23, 2004 that Ms. Mavis makes a contribution to the mortgage but has no interest in the home. This answer is incorrect. Ms. Mavis should have disclosed the state of the title and offered her explanation, rather than provide the misleading answer that she did. Ms. Mavis did include an expense of $600 per month on all of her financial statements for "daughter's mortgage". Yet, in testimony, she maintained, at first, that this was to help with expenses and not for the mortgage in particular, and then reverted to saying it was intended for the mortgage.

143 These non disclosures and inconsistencies, combined with the actual title, persuade me that Ms. Mavis is a half owner of Wildmint.

144 Both parties filed listings of similar properties as evidence of proof of value. Four of the listings presented by Ms. Mavis predated the separation and were closer in date and description to the subject property than what Mr. Mavis presented. I accept their average sale prices as the value of Wildmint, namely $175,200. The balance on the mortgage was $122,605 at date of separation, producing an equity of $52,595. I have included one half of that in Ms. Mavis' Net Family Property.

Miscellaneous Property Issues

145 The existence and value of a number of miscellaneous assets and liabilities were in dispute. In some instances, appraisals, proof of ownership or account statements were not produced. The parties testified as to the basis for the particular view each held. In some instances, evidence of an actual, arm's length transaction at another date was tendered to assist me in determining value. Doing the best I can on the available evidence, I have reached these conclusions:

Boat Parts

146 Mr. Mavis estimated the value of the parts he owned at date of separation at $5,400. Ms. Mavis had an estimate from Hurst Marina for the cost to replace and install these, upon which she relied in stating the value to be $7,000. Given that Mr.

Mavis' own boat parts were used and that the labour estimate of $1,600 is not applicable, I have determined the value to be $5,400.

Baja Boat, Trailer and Spare Motor

147 Mr. Mavis valued these items at $25,000 for the boat, motor and trailer, plus $25,000 for the second motor. Ms. Mavis valued all of these items at $9,500. This was the amount for which she sold them to Mr. Villeneuve in May 2003. In support of his position, Mr. Mavis testified that the boat with motor and trailer had been purchased for $35,000 in 1997 and that these boats held their value. They had acquired a second motor, which he had installed in the boat and worked on to enhance its performance. He referred to various listings for sale of similar boats and motors in support of his position. He produced an e-mail from Ms. Mavis to himself wherein she stated that the boat was worth $40,000. He described the transaction whereby Ms. Mavis' purchaser had sold the boat, trailer and both motors to Mr. Kearns in August 2003 for $24,000. He said that he had an understanding with Mr. Kearns that, if able, he would pay Mr. Kearns $24,000 for the boat, motor and trailer and Mr. Kearns would retain the other motor. In his view, this potential transaction was at a low overall price, but also showed that the entire package was worth more than $24,000.

148 After the separation, Ms. Mavis decided to sell the boat. She did not use it and was paying the full carrying costs on it. She testified that she did not know what it was worth and was only quoting Mr. Mavis' price of $40,000 back to him. She had the boat, trailer and second motor taken to Hurst Marina, from where she herself had purchased it. Hurst did a visual inspection and quoted her $24,620 as what it would cost for them to put the boat into the condition at which they would broker it for her. Hurst will only broker boats that are basically in perfect working order and cosmetically good. With this work done, Hurst would broker the boat at $39,000, expecting to get $35,000, less a 10 percent broker fee payable by Ms. Mavis. Mr. Hurst cautioned that these figures were estimates or even guestimates because the inspection was visual and they had not started the motor given the missing parts. Nonetheless, in this scenario, I concluded that Ms. Mavis would have expected to net something in the range of $6,000 to $7,000. However, Mr. Hurst acknowledged that the Marina did not want this boat and quoted accordingly. Mr. Hurst also offered Ms. Mavis $5,000 for the boat in an 'as is' condition, a low offer, reflecting his preference not to acquire the boat.

149 Mr. Hurst also testified that if the missing parts were reinstalled at a cost of $7,845, the boat with the performance motor in it might fetch $20,000, but that he would not sell it in that condition. That would indicate an 'as is' value of about $12,000, plus, the value of the original stock motor, which might have been about $3,500 in good working order, for a total of $15,000.

150 Mr. Villeneuve also purchased a sea doo and trailer from Ms. Mavis for $2,500. He felt that this was high given that the sea doo motor was in a box, but that the combined price for it and the boat was fair. He only owned the boat for two to three months, during which he sent it out for engine repairs at a cost of $7,800. He spent another $1,200 and did considerable work himself on the boat. Accordingly, when he sold it for $24,000, he had $18,500 in it plus his own labour and earned a profit of $5,500. He had it appraised at this point, at $32,000.

151 I am not prepared to rely on the advertisements for sale of other boats and motors as evidence of the value of this boat and motor. Neither party had an actual appraisal done, although each of them could have done so; Ms. Mavis before she sold it and Mr. Mavis after his friend Mr. Kearns purchased it. Nor do I put much weight, if any, on the Kearns/Mavis understanding. This is clearly not an arm's length transaction. Mr. Kearns and Mr. Mavis often help each other out in various chores and projects and are close friends. The transaction has not yet occurred and remains hypothetical. Certainly, the actual transactions that have occurred are all at a far lower price than asserted by Mr. Mavis as the value at date of separation. Based on all of the evidence, I have concluded that $9,500 was a low price, even in an "as is" condition, based on Mr. Villeneuve's testimony which suggests that the boat price was fair only taking into account what he paid for the see doo. However, both parties have entered the sea doo and trailer at $2,500 as Ms. Mavis' asset at the date of separation.

152 Had Ms. Mavis gone ahead with the $7,845 for parts replacement and labour as estimated by Hurst, plus done some other work, as Mr. Villeneuve did, she could have come out with, say, $5,000 more than she did, based on Mr. Hurst's testimony. But, given the totality of the testimony from Mr. Hurst, I cannot say that she made an improvident sale to Mr. Villeneuve or significantly undersold the boat in an "as is" condition. She was not obliged to spend the money and perform the labour that Mr. Villeneuve did in order to extract another $5,000 or so from the asset. I find this was a reasonable value, taken together with the sea doo, and that the combined value received for the sea doo and boat of $12,000 was reasonable and I have therefore accepted the $9,500 value.

CRV

153 Ms. Mavis owned a 1997 Honda CRV at date of separation. She had originally leased it. When the lease expired in January 2001, she purchased the vehicle for a total of $18,604.90, including taxes. Accordingly, the vehicle itself amounted to $15,800. Mr. Mavis relies upon Auto Trader advertisements for similar vehicles and the assertion that one would not buy the car at the end of the lease period unless it was at less than market price, to support a value of $18,000 for the vehicle at the date of separation, about one and one-half years later. Ms. Mavis asserted a value of $12,500 based on her own sense of depreciation over that year and one-half. She did not present any independent evidence of value, such as from a Honda dealer.

154 I accept the value of $15,800 as accurate at January 2001, based on what Ms. Mavis actually paid. I have allowed $1,800 for depreciation from then to the date of separation, which strikes me as more reasonable than the amount claimed by Ms. Mavis, to reach a value of $14,000. In doing so, I have taken an inference that Ms. Mavis would have produced an appraisal had so doing been to her advantage, that is, had it confirmed her view of the vehicle's value, but did not do so.

Coats

155 Ms. Mavis owned a fur coat of some description at the date of marriage. She still owned it at separation, but says it really had no value by that time. In August 2001, she purchased a new fur coat for $5,175, on sale, including taxes. Her position is that that coat had depreciated to the date of separation to $3,500.

156 Mr. Mavis does not agree. He only found out about the new coat when he noticed the transaction in Ms. Mavis' productions. By this time, she had already entered offsetting $3,500 amounts in her financial statement, for what he believes to be the older of the coats. He therefore, values the newer coat at $5,175.

157 Mr. Mavis agreed that the older coat was worth $3,500 at date of marriage. Probably, it was worth less on the date of separation than it was worth six years earlier. The newer coat would have declined in value after purchase. Taking into account that taxes formed part of the $5,175 and that the coat would depreciate, I find $3,500 is reasonable for a date of separation value for the newer coat. I note that Mr. Mavis had a leather jacket and suede jacket at date of separation that were not included in his Net Family Property, and would in some way offset the value of Ms. Mavis' older coat at that date. I have therefore, decided to value Ms. Mavis' coats at $3,500 on both valuation dates.

Stereo and Electronics

158 I accept Mr. Mavis' statement that the stereo, amplifier and speakers that he had purchased years before the marriage were worth about $500 at date of separation. However, he had other electronics at that date that included a television, a GPS, a cell phone, car speakers and amplifier, DVD player, VCR player, video camera, still camera, palm pilot and a telescope. I do not accept Mr. Mavis' testimony that all of these items were worth $500. Ms. Mavis made the purchases. None of the items are very old. She values them at $3,000. I have, therefore, decided to value his stereo equipment at $500 and to accept Ms. Mavis' value of $3,000 for his electronics. I note that he did not list or value the electronics until during cross-examination at trial. She values her own electronics at $2,000, which value Mr. Mavis accepts.

Jewellery

159 The increase in value of Ms. Mavis' jewellery was agreed to be $20,000 from the date of marriage to the date of separation. Mr. Mavis valued his watch and wedding band at $1,600. Ms. Mavis purchased these for him at a cost, she says, of $3,000 and valued them at $2,000 at date of separation. Mr. Mavis originally omitted to include these items in his Net Family Property. For this reason and because Ms. Mavis knew the purchase price, I prefer her evidence of the value.

Tools

160 Mr. Mavis' testimony was that he had $15,000 of personal tools at date of marriage and $17,000 worth at date of separation. He had owned a garage called Active Automotive and says that he had personal tools retained from that business. Ms. Mavis did not think he personally owned any tools at date of marriage, although his business may have. In his Net Family Property statement, however, he does not include any specific amount for tools at date of marriage. Ms. Mavis confirms that he had a lot of tools that she believes he acquired during the marriage. She values his tools at $30,000 at date of separation, but she did not purchase the tools and could not provide any real basis for her figure. Nor was she able to give many specifics about his tools.

161 The evidence as to the tools was very unsatisfactory. There was no itemized list or records of any specific purchases. I

am satisfied based on the testimony I have heard about the projects undertaken by him, that Mr. Mavis did have personal hand tools and that he had the types of tools a handy man would use in and around the home and on his car and boat motors. Some value must be placed on these tools at the date of separation. It would be unfair to Ms. Mavis not to do so. I have concluded that Mr. Mavis is more likely to know the value of his tools than Ms. Mavis is, and have, therefore, decided to accept Mr. Mavis' testimony that he had $19,600 worth at the date of separation, including his sea doo trailer, exercise equipment, a cast intake and computer. I have not allowed any value at the date of marriage, since no specific value, inventory or basis for a value was provided by him.

Life Insurance

162 Mr. Mavis owned a life insurance policy at the date of separation. It had a cash surrender value. Ms. Mavis had arranged the policy for him, in her professional capacity. As such, she was able to get a verbal statement of the cash surrender value at date of separation, of $9,200. Mr. Mavis admits he made no effort to determine the cash surrender value and while he estimated it at $8,500, also admits $9,200 is possible. Given that it is up to him to produce evidence of the value of his asset, and he did not do so, I draw an inference that he would have, were it to his advantage and, in the result, I prefer the value obtained by Ms. Mavis.

Husband's Debts

163 The disputed debt is MasterCard at the date of separation, namely June 9, 2002. Mr. Mavis claims $7,497.75. He has produced a MasterCard statement dated June 17, 2002, which shows the May 17, 2002 balance. Ms. Mavis has adjusted the May 17, 2002 balance based on the entries on the June 17, 2002 statement, and added the interest charge to reach the amount of $2,613 owing at June 9, 2002. I agree that this is the correct number, not the balance at June 17, 2002 of $2,724.18 claimed by Mr. Mavis.

164 Mr. Mavis also had a Capital One Platinum MasterCard account. He produced a statement for the period June 27 to July 26, 2002, which showed an opening balance of $4,772.57 and the new balance at $5,026.13. He produced a statement for the period April 27 to May 26, 2002 with an opening balance of $4,255.29 and a closing balance of $4,324.60. Mr. Mavis claims the opening balance of $4,772.57 on June 27, 2002 as the debt he owed on June 9, 2002. He says he has not been able to obtain the missing statement for May 27 to June 26, 2002. Ms. Mavis takes the position that without the missing statement, he has not proven any debt owing at the date of separation. She says it is possible that he paid off the debt between May 27 and June 9, 2002 and then incurred additional debt thereafter. Given that the parties had just separated, that he had lost his employment in March 2002 and had very little income at all, I do not agree that this is probable. What is probable is that he continued to run an increasing balance on this card, as evidenced by the two available statements. Indeed the July statement shows that his scheduled prior payment had not been received. In the result, I have allowed the amount as at May 26, 2002 as the amount of debt owing at the date of separation, namely $4,324,60. I have chosen the lower of the May 26 balance to the July 26 balance to reflect the onus that is on Mr. Mavis to establish the amount of his debt. This brings the total MasterCard debt at the date of separation to $6,937.80.

Husband's Vehicles at Date of Marriage

165 It is admitted that the husband owned a 1972 Lemans, a 1991 Chevrolet truck and a ski doo at the date of marriage. The values are not agreed upon. Mr. Mavis also states that he owned other vehicles, trailers and a ski boat at the date of marriage. He claims a $50,000 deduction at the date of marriage. No appraisals were available for any of these items. I do have evidence of the insurance coverage for the truck and the snojet indicating a purchase price of $14,000 and $2,000 respectively. Mr. Mavis' testimony was that he sold the truck for $9,000 some time after marriage. This was not contradicted and I have determined that $9,000 was closer to the value at date of marriage, than the $12,000 he claims, having regard to what was paid for it. I have determined the snojet to be worth $1,000 at date of marriage.

166 The 1972 Lemans was purchased in 1989 for $12,000 and sold in 1997 for the same price, according to Mr. Mavis' oral testimony. The dates are confirmed by the V.I.N. summary. Although Mr. Mavis says that this vehicle increased in value in the intervening period based on improvements he made to it, I prefer his testimony as to actual purchase and sale prices over his personal view of the value he added to the vehicle. I have valued it at $12,000.

167 Based on his testimony, the registrations and video/photographic evidence, I have concluded that Mr. Mavis did own a home made race car and two trailers, also home made. He testified that he sold the race car in 2000 for $12,000. There is no documentary proof of this sale, nor of the price received. There is no explanation for the lack of any supporting documentation. The same can be said of the ski boat I have, therefore, not allowed any deduction for the race car, the trailers

or the ski boat. In my view, Mr. Mavis has not met his onus of establishing what they were worth or that they were sold after marriage.

Husband's Bank Account at Date of Marriage

168 Mr. Mavis claimed $500 in a bank account at date of marriage. He had no bank statements at all to support this entry and I disallowed it.

Husband's Debt at Date of Marriage

169 Mr. Mavis records $4,837.45 as miscellaneous debts owing at date of marriage. Ms. Mavis accepts that figure, but adds $10,000 to it on account of a truck loan which she believes was outstanding at that time.

170 Mr. Mavis acknowledges that he incurred a loan with CIBC to purchase the truck, and that it was possible that he still owed a balance in 1996, but had not been able to obtain any records. He also confirmed that the truck loan was his only CIBC loan.

171 CIBC statements were filed showing a CIBC loan payment by Mr. Mavis in February 1997 of $409.56 and one each for August, September, November and December 1997, all in the monthly sum of $395.31. Based on Mr. Mavis' testimony, this must have been for the truck loan. Based on these statements, I have concluded that Mr. Mavis paid $409.56 to the CIBC from the date of marriage to and including July 1997 and $395.31 per month from August 1997 to and including December 1997, for a total of $7,300.83.

172 On this basis, I determine his debt at date of marriage to be $12,138.28.

Equalization Payment and Prejudgment Interest

173 On the basis of the findings made, I have calculated the parties' Net Family Property as follows:

NET FAMILY PROPERTY STATEMENT		
ITEM	HUSBAND	WIFE
1. Assets		
Matrimonial Home		$474,000.00
Wildmint Road		$26,297.50
Household goods/furnishings — Contents		$35,000.00
Painting		$2,000.00
Sea doo&trailer		$2,500.00
Boat parts	$5,400.00	
Cars/boats — 24 Baja boat/trailer— Boat motor		$9,500.00
CRV		$14,000.00
Coat(s)		$3,500.00
Stereo & electronics	$3,500.00	$2,000.00
Jewellery	$2,000.00	$20,000.00
Tools & equipment	$19,600.00	
Other special items — hot tub		$600.00
Savings		($1,185.25)
RRSP		$49,656.00
NON RRSP		$134,281.00
Share Plan RRSP		$22,068.00
Share Plan non RRSP		$34,137.00
PIP RRSP		$48,642.58
PIP non RRSP		$52,994.00
Assured value program		$132,167.00
Chequing	$500.00	

RRSP	$11,755.64	
Corporate Shares		$13,221.94
Life Insurance	$9,200.00	
Tax refunds	$242.00	$1,546.00
TOTAL 1.	$52,197.64	$1,076,925.77
2. Debts and Liabilities		
Royal Bank LOC		$8,100.00
Royal Bank Visa		$852.00
CIBC Visa		$31,097.40
MBNA Visa		$50,062.14
Boat loan		$30,200.00
Investment LOC		$49,678.00
Investment LOC		$65,958.67
Mortgage		$240,000.00
MBNA Visa		$9,745.76
Disposition costs on RRSP — based on 46.1% Discount rate is not disputed.		$57,881.62
Capital gains on rental portion of the home		$2,220.00
Disposition costs on home — wife claiming real estate commission and legal fees that will be associated with the sale of the home		$6,517.50
Property line dispute — contingent liability		$0.00
Septic repair — contingent liability		$5,000.00
Line of credit		$11,002.34
Husband's Debts — Income tax 2001	$2,929.61	
Mastercard	$6,937.80	
Canadian Tire	$1,332.94	
The Bay	$1,169.07	
Deep Short Marine (joint debt paid by wife post separation)		$3,933.59
TOTAL 2.	$12,369.42	$572,249.02
3. Property Owned at Marriage		
Vehicles — 1972 Lemans	$12,000.00	
1991 Truck	$9,000.00	
Snojet	$1,000.00	
Rental portion of matrimonial home		$75,000.00
Perth Investment property		$30,000.00
Wife's vehicles and household contents (includes coat)		$52,000.00
Wife's bank accounts and securities		$204,343.43
Corporate shares		$6,855.06
Husband's bank account on marriage	$0.00	
Debts and other liabilities — husband	($12,138.28)	
LOC		($8,411.09)
LOC (investment)		($50,000.00)
Debts and other liabilities — Mortgage allocation to the rental property		($30,000.00)
Debts and other liabilities — 2{ nd} mortgage allocation to the rental property		($8,860.00)
Debts and other liabilities — Perth mortgage		($17,720.00)
Disposition costs on RRSP		($44,881.86)
Income tax owing		($17,336.50)

Income tax Reserve (net)		($14,000.00)
TOTAL 3.	$9,861.72	$176,989.04
4. Excluded Property		
TOTAL 4.	$0.00	$0.00
5. Net Family Property *(Total 1 minus Totals 2, 3 and 4)*	$29,966.50	$327,687.71
6. Equalization Payment	Wife pays to Husband	$148,860.61

Powered by DIVORCEmate Software Inc. (c) 2002

174 Therefore, Ms. Mavis owes an equalization payment of $148,860.61 to Mr. Mavis. I have concluded that prejudgment interest should be paid. The prescribed rate is 3.5 percent. Since separation, the value of the matrimonial home has increased by $100,000 according to Mr. Shore's testimony. Ms. Mavis' book of business has also increased, up to $83 million in qualified assets. She has had the advantage of the trailer fees on these assets since separation. In addition, she has had the benefit of the use of both of these assets, as owner, since separation, to occupy, enjoy and support herself, without making the required equalization payment to Mr. Mavis. I do not overlook the fact that Ms. Mavis' own efforts have also contributed to both of these increases. She has spent money to improve the house since separation and she has continued to work hard in her business. Nonetheless, no advance on the equalization payment has been made. In all, I have concluded that prejudgment interest at one-half of the statutory rate is appropriate.

Observations on Testimonial Factors

175 The reliability of Ms. Mavis' testimony was weakened in several ways. She based some of her testimony on assumptions rather than known fact. She assumed that Mr. Mavis had received $30,000 from the sale of Brewed Awakenings which was demonstrated not to be the case. She assumed that she was one year behind in her income taxes and accordingly, incorrectly included a substantial tax liability in her financial statement until December 2004. She assumed that it was proper to deduct half of her mortgage interest against rental income even after almost doubling the mortgage in 2001 on account of the renovation to the main house.

176 She made a number of other assumptions adverse to Mr. Mavis, which were not proven, including that he had taken her 1994 income tax return and had stolen her son's amplifier. She made a serious allegation against him, namely that he had entered her home and removed some of her documents and that she had reported this to the police two or three times. She undertook to provide copies of the police reports but did not do so. Her explanation was that she had gone to the police station to get copies but the wait was said to be 1.5 hours, which was too long, so she left.

177 I found Ms. Mavis ready to cast aspersions upon Mr. Mavis without adequate proof or foundation.

178 Her credibility was adversely affected by the documents prepared in connection with the Lee-Anne Hamilton tenancy. The facts set forth there contradicted her testimony as to tenant's use of the storage/guest cabin. Her explanation that "used without permission" in her case against Ms. Hamilton, meant used without written permission in the lease, and that she had always allowed it verbally, was at least disingenuous.

179 The same can be said with respect to funds she had deposited into a spousal RRSP in Mr. Mavis' name. She made the deposit without his knowledge and withdrew from it to pay a large VISA account without his consent. Her attempt to justify this by saying that the bank seemed to have had no difficulty in depositing two such cheques drawn to Mr. Mavis into Ms. Mavis' account was not credible.

180 I also concluded that Ms. Mavis had taken positions in the litigation that were so far removed from the range of what was reasonable that her credibility was affected. She maintained throughout the litigation, up until closing submissions, that the rental property was of equal value to the matrimonial portion. This could not possibly be true given the differences in size and expense of the two buildings. Not until her January 7, 2005 Financial Statement did she identify the Wildment or Sussex properties in any capacity, nor include or value her book of business, whether by the Assured Value Program or on some other basis. I did not believe her explanation that she omitted 700 Sussex because she had only made deposits of about $36,000 pursuant to a Purchase Agreement and would not be a registered owner until the building was completed. Nor was I impressed by her explanation that she relied upon the e-mail from Investors Group legal department to the effect that the Assured Value Program is not an asset and has no value. This is accurate as far as it goes. But, Ms. Mavis herself, had identified and valued her business equity in 1999 and had herself, purchased assets from other consultants by private agreement and under the Assured Value Program. It is simply not credible that she thought her book of business had no value.

181 I found her position with respect to the deck encroachment and septic issue to be unreasonable and calculated to increase the potential costs, rather than to adopt the practical and inexpensive resolution proposed by Mr. Kearns.

182 Mr. Mavis admitted that he had collected Employment Insurance in 1994 during a period when he was working. This does not reflect well upon him. I had difficulty with his description of the purchase of the Baja boat by Mr. Kearns. There were several problems, including the bill of sale made out to Mr. Mavis not Mr. Kearns, the fact that Mr. Kearns did not register the transfer and the fact of Mr. Mavis' girlfriend trading her car for a paint job on a boat ostensibly owned by Mr. Kearns. I did not conclude, however, that Mr. Mavis had, in fact, paid Mr. Villeneuve for the boat or that he was using Mr. Kearns to hide such a fact from Ms. Mavis and the Court.

183 Mr. Mavis also gave inconsistent testimony as to whether he had started work in late summer 2003 or 2004. Through surveillance, Ms. Mavis established that he had worked in September 2003 and was working in September 2004. While I accept the surveillance evidence, I was not persuaded on balance of probability that Mr. Mavis was dishonest, rather that he was inaccurate and may have been confused about the dates.

184 I did not put much weight on the testimony of Mr. Brown. He testified that Active Automotive was his business which he put in Mr. Mavis' name when he was having marital problems with his own wife. This statement did not enhance his credibility. He testified that Mr. Mavis did not own any personal tools, and had lost interest in the business after he married Ms. Mavis. All of Mr. Brown's testimony was coloured by his obvious acrimony towards Mr. Mavis.

185 Overall, Ms. Mavis' testimony was more problematic than that of Mr. Mavis, and in particular, with respect to key issues in the case.

Costs

186 Should the parties be unable to settle the issue of costs, I will receive written submissions. If submissions will be necessary, I ask counsel to notify me and to provide me, in two weeks, with a timetable for the exchange and delivery of their submissions.

Order accordingly.