

1990 CarswellNfld 156, (sub nom. Campbell v. Campbell (No. 2)) 83 Nfld. & P.E.I.R. 340, 260 A.P.R. 340, 21 A.C.W.S. (3d) 693

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Campbell v. Campbell

Geraldine Ann Campbell, Plaintiff v. William Campbell, Defendant

Newfoundland Unified Family Court

Barry J.

Judgment: May 31, 1990

Docket: Doc. F/85/453

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Counsel: *Robert Regular*, for the Plaintiff.

Edward Shortall, for the Defendant.

Subject: Family; Contracts

Family Law --- Domestic contracts and settlements — Attacking validity of contract — Duress, fraud, unconscionability

Court finding contract, while improvident, valid and enforceable.

Wife submitted that the marriage contract was either void or voidable due to duress, undue influence, unconscionability and inequality. Its terms left the legal estate of the matrimonial home vested in husband and permitted him to use it to obtain financing. The contract divided matrimonial assets equally, and ensured that real and personal property as well as business assets owned by each spouse were not to be divided. Wife maintained that she signed the contract in an attempt to save her marriage, as husband threatened divorce unless it was signed. Wife had been subjected to two incidents of physical abuse from husband that occurred 2 years prior to the execution of the contract. Medical opinions were such that wife was not suffering from an extreme level of stress at the time of the execution of the contract and was not in a state of depression. Wife received independent legal advice regarding the contract. Held, the marriage contract was valid and enforceable. Insofar as wife's claim of duress was concerned, the fact that incidents of violence did occur did not mean that all future transactions entered into by wife at husband's request were duress-related. There was no evidence of any threats of husband to commit a crime or a tort against wife in the event that she refused to sign the contract. Wife did not satisfy the onus of proving undue influence, as she had not had a nervous breakdown, was not under doctor's care at the time of signing, and had received independent legal advice. Insofar as wife's claim of unconscionability was concerned, husband satisfied the burden of establishing that he did not "prey" upon wife. Wife had received independent legal advice and made a conscious decision to enter into the contract. There was similarly no inequality of bargaining power, as wife had obtained independent legal advice.

L.D. Barry, J.:

1 This is a decision on a preliminary issue which the parties have agreed to request this Court to decide, pursuant to Rule 40.04 of our Rules of Court, before other issues relating to matrimonial property and business assets are dealt with.

2 The issue is whether a document dated the ____ day of April, A.D., 1980, is valid and enforceable, in whole or in part, with respect to business assets and matrimonial assets of the parties.

3 In answering this question, I have been asked to determine only those issues flowing from the matrimonial property and business asset provisions of The Family Law Act. I have been requested to leave the issue of support for subsequent adjudication.

4 On November 2, 1989, I delivered a decision on a motion for nonsuit. That decision is attached as appendix "A".

The Facts

5 The parties married in 1961, finally separated In July, 1985 and divorced on March 10, 1989.

6 There were several earlier separations. The first was in 1978 when the Plaintiff left the matrimonial home from June until September or October. There was some conflicting evidence that there may have been a separation in late 1979. Also the Plaintiff moved to British Columbia for a short time in 1981.

7 A short while before The Matrimonial Property Act (the predecessor of The Family Law Act) became law, on July 1, 1980, the parties signed a marriage contract. The contract is dated the ____ day of April, 1980, but the Plaintiff says she thinks it was not signed until June. The Plaintiff says that she signed the marriage contract as an attempt to save her marriage. She says that the Defendant had commenced a divorce action and threatened to proceed to divorce unless she signed. The Defendant says that he commenced the divorce action because he and his wife had been having difficulties for some time. He says that he wanted to bring matters to a head and that the filing of the divorce action did that. He points out that the divorce action had been discontinued before the date of the marriage contract. He says that both he and his wife knew that The Matrimonial Property Act was pending and that each had expressed a desire to have a matrimonial contract because each of them had business assets which they wanted to be kept separate and apart from any of the business affairs of the other.

8 The Plaintiff denies having any interest in signing the marriage contract other than to save her marriage. She states that she was in a state of depression from approximately 1977 because of marital problems. She says that, while the first ten years of the marriage were good, she was completely dominated up to April, 1980 by her husband. She said he treated her in an arrogant and vindictive fashion and that she eventually became afraid of him because of two incidents where she says he physically assaulted her in 1978.

9 The Plaintiff admitted that, other than the threat of divorce, the Defendant did not threaten her in order to obtain her signature on the marriage contract. She says, however, that she was desperate to keep her marriage together because she had found, on the earlier separation, that she was unable to cope without her family and without the social contacts she had as a married woman. She says that she did not really read the marriage contract and that she was distraught at the time of signing because of the fear of her marriage failing. She also says that she feared the vindictive nature of her husband.

10 The Defendant's solicitors drew up the marriage contract. It was reviewed and modified by the Plaintiff's solicitors but both she and her solicitors testified that her instructions were to avoid "making waves" because she intended to

sign the contract. Her solicitors advised her not to sign the contract but she said she had no choice because she wanted to avoid divorce. She testified that, since in her view it was a contract to govern the parties after separation, it didn't bother her too much to sign it because she was determined that there would never be a separation.

11 The Plaintiff testified that she has held one share in Complete Rent-Alls Limited from 1971. The annual returns filed with the Registry of Companies show her as holding one share from 1971 to 1986. In 1986 the share is shown as having been transferred to the Defendant's brother. The Plaintiff also says that she was supposed to be a fifty percent shareholder in Campbell Development Limited from the time of its incorporation in 1976. The annual returns filed with the Registry of Companies show her as holding one share in Campbell Development Limited from 1976 to 1978. In 1978 the share is shown as held by her husband's father. The Plaintiff says she never agreed to any share transfers. Neither did she agree, she says, to the Defendant increasing his shareholding in Campbell Developments Limited from one to ninety-eight in 1977. The Defendant denies that the Plaintiff held any equitable interest in the snares of either company. He says that his wife held the shares in trust for himself because three shareholders were needed under the Companies Act at the time.

12 The Defendant says that in the 1970's he made a conscious attempt to ensure that the Plaintiff was less dependent upon him. He said that he ensured that she attended meetings with him and his solicitors so that she would be able to deal with financial matters in case anything happened to him. He also testified that he encouraged the Plaintiff to participate in an investment club with friends and to buy real estate. The Plaintiff's evidence, however, is that the investment club did not start until after the marriage contract had been signed.

13 The Plaintiff was quite successful in her stock market and real estate investments, making capital gains of approximately \$75,000.00 between 1980 and 1985. By the end of 1980 the Plaintiff owned seven properties, most of which supplied rental income. Five of those she had when the marriage contract was signed. By the time of separation in 1985 she owned eight properties, having bought and sold some in the meantime.

14 There was evidence that the value of the shares in Complete Rent-Alls Limited and Campbell Development Limited, in 1980, were worth considerably more than the plaintiff's real estate investments.

15 The Plaintiff submits that the marriage contract is either void or voidable for the following reasons:

- (1) Duress - the Plaintiff alleges that she was forced to sign the marriage contract because of the threat of divorce or the fear of a vindictive response by her husband if she did not sign.
- (2) Undue influence - the Plaintiff alleges that there was oppression, coercion or a sufficient degree of compulsion to establish that she did not really consent to the marriage contract.
- (3) Unconscionability - the Plaintiff alleges that the evidence establishes conduct tantamount to fraud on the part of the Defendant which perpetrated an injustice on the Plaintiff.
- (4) Inequality - the Plaintiff alleges that because of her emotional or physical condition and because of the discrepancy between the assets in her name and those in the name of the Defendant, the Plaintiff was in a position of unequal bargaining power with the Defendant.

Issues

16 Should I find the marriage contract to be void or voidable because of

1990 CarswellNfld 156, (sub nom. Campbell v. Campbell (No. 2)) 83 Nfld. & P.E.I.R. 340, 260 A.P.R. 340, 21 A.C.W.S. (3d) 693

- 17 (1) Duress,
- 18 (2) Undue influence,
- 19 (3) Unconscionability, or
- 20 (4) Inequality?

The Law

1. Statutes

21 At the time the marriage contract was signed The Matrimonial Property Act, Stats. Nfld. 1979, c. 32, had been passed but it did not come into force until July 1, 1980. That Act provided as follows:

31. A man and a woman may enter into an agreement, to be known as a marriage contract, before their marriage or during their marriage while they are cohabiting, in which they agree on their respect rights and obligations

- (a) under the marriage,
- (b) upon separation,
- (c) upon the annulment or dissolution of the marriage, or
- (d) upon the death of either spouse.

22 By Section 19 of the Act either spouse could apply for an equal division of matrimonial assets, notwithstanding the ownership of those assets.

23 The Act also provided in Section 27 for a sharing of business assets

Where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of the business asset of the other spouse... .

24 Section 70 of The Family Law Act, Stats. Nfld., 1988, c. 60, provides that domestic contracts, including marriage contracts, entered into before July 1, 1980 are considered domestic contracts for the purposes of that Act and are not invalid for the reason only that they were entered into before that day.

2. Burden of Proof

25 In *O'Brien v. O'Brien* (1987), 65 Nfld. & P.E.I.R. 126 (Nfld. U.F.C.), Noonan, J. stated:

It is generally accepted that parties should be encouraged to settle their financial affairs privately. It is in keeping with current trends in family law that private dispute resolution is Preferable to adversarial confrontation. However, this goal will be frustrated if courts indiscriminately vary or set aside separation agreements. As Anderson, J., said in *Dal Santo v. Dal Santo* (1975), 21 R.F.L. 117, at 120 (B.C.S.C.):

The modern approach in family law is to mediate and conciliate so as to enable the parties to make a fresh start in life on a secure basis. If separation agreements can be varied at will, it will become much more difficult to persuade the parties to enter into such agreements.

1990 CarswellNfld 156, (sub nom. Campbell v. Campbell (No. 2)) 83 Nfld. & P.E.I.R. 340, 260 A.P.R. 340, 21 A.C.W.S. (3d) 693

26 The Newfoundland Court of Appeal, however, has accepted that in certain cases, such as where an agreement is unequal and improvident, the onus lies upon the party seeking to uphold it to show an absence of duress, undue influence, and so forth. *Mushrow v. Mushrow* (1986), 60 Nfld. & P.E.I.R. 305 (Nfld. C.A.). The Court of Appeal quoted with approval the Comment by Professor Bradley E. Crawford on unconscionable transactions where undue advantage is taken of an inequality between the parties, (1966), 44 Can. Bar Rev. 142, at 143, where he stated:

If the bargain is fair the fact that the parties were not equally vigilant of their interest is immaterial. Likewise if one was not preyed upon by the other, an improvident or even grossly inadequate consideration is no ground upon which to set aside a contract freely entered into. It is the combination of inequality and improvidence which alone may invoke this jurisdiction. Then the onus is placed upon the party seeking to uphold the contract to show that his conduct throughout was scrupulously considerate of the other's interests.

27 The Court of Appeal decided that being "scrupulously considerate of the others interests" can and should impose no heavier burden than to have the party establish there was no duress, undue influence, and so forth and that the other party was not "preyed upon" in any manner by the one seeking to uphold the agreement.

28 There is some confusion in judicial analysis of the Crawford Comment, in the use of the term "inequality". It is not always clear whether what is being spoken of is the unequal division of property which results from a particular agreement or the inequality of bargaining power which may exist between the parties. Professor Crawford's statement was in a context of cases where "one of the parties was incapable of adequately protecting his interests and the other has made some immoderate gain at his expense". Crawford, at 143. It would seem that the mere presence of an inequality of bargaining power would not impose any special burden on the one seeking to uphold an agreement if there is no "inequality" in terms of sharing under the agreement. In other words, if the bargain is "fair" that ends it. Then it doesn't matter if, in addition to inequality of bargaining power, there was also improvidence on the part of the other party, in the sense of "heedlessness as to the future" or "lack of foresight" or "lack of full knowledge of the facts". *Mushrow*.

3. Duress

29 Until recently, to avoid a contract on the ground of duress, one had to show actual or threatened physical violence sufficient to negate the apparent consent of the threatened party. Fridman, *The Law of Contract* (2nd ed. 1986), at 294.

30 In England Lord Denning, M.R. commenced the introduction into English law of a new doctrine of economic duress in two decisions, *D & C Builders Ltd. v. Rees*, [1966] 2 Q.B. 617, [1965] 3 All E.R. 837 (C.A.) and *Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326, [1974] 3 All E.R. 757 (C.A.). Then in *Pao On v. Lau Yiu*, [1979] 3 All E.R. 65, at 79; [1975] 3 W.L.R. 435, at 451, Lord Scarman of the Privy Council observed that "there is nothing contrary to principle in recognizing economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must always amount to a coercion of will, which vitiates consent". The principle of economic duress was also applied by Mocatta, J. in *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.*, [1979] Q.B. 705. In addition the House of Lords in *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation*, [1983] 1 A.C. 366, [1982] 2 All E.R. 67 assumed that there was a doctrine of economic duress which would render the contract voidable because one party had entered into it as a result of economic pressure which the law regards as illegitimate. See generally Cheshire, Fifoot & Furmston, *Law of Contract* (11th ed. 1986), at 299-302.

31 The suggestion that sometimes commercial pressure might amount to duress entitling the victim to avoid a contract was approved and adopted in Canada in one case in the lower courts even though, ultimately, the Supreme Court of Canada resolved the case on other grounds. *R.E. Lister Ltd. v. Dunlop Canada Ltd.* (1978), 85 D.L.R. (3d) 321 (Ont. H.C.); reversed (1979), 105 D.L.R. (3d) 684 (Ont. C.A.) ; reversed (1982), 135 D.L.R. (3d) 1 (S.C.C.); *Fridman*, at

297-301.

4. Undue Influence

32 Equity exercised a separate and wider jurisdiction over contracts made without free consent than did the courts of common law. Equity developed the doctrine of undue influence which may be stated as follows: If a person obtains any benefit from another under a contract by exerting an influence over that person which, in the opinion of the court, prevents the person from exercising an independent judgment in the matter in question, the second person can set aside the contract. *Cheshire, Fifoot & Furmston*, at 298.

33 Undue influence has been defined as "some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally though not always some personal advantage obtained by (the guilty party)". (*Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.); *Blanchette v. Blanchette* (1984), 40 R.F.L. (2d) 20 (Sask. Q.B.)). Any improper use by one contracting party of any form of oppression, coercion, compulsion or abuse of power or authority for the purchase of obtaining the consent of the other party may result in avoidance of the resulting contract on the ground of undue influence. *Fridman*, at 301.

5. Unconscionability

34 In some cases the conduct of one party in obtaining the assent of the other to a particular contract may be of such an unconscionable character that a court might well consider that to uphold the ensuing contract would be to perpetuate an injustice and produce an unfair result. Examples are where one party is under the influence of drink or drugs at the time of contracting, is feeble-minded or illiterate, ignorant, uneducated or otherwise mentally or intellectually disadvantaged. Here it is not the consent of the party that is impugned (as is the case with undue influence) "but the reasonableness of the bargain, the conscientiousness of the other party, the equitable character of the transaction". *Fridman*, at 303-304.

35 The courts have distinguished between pleas of unconscionability and those of undue influence and duress. In *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.), at 713 it is stated, by Davey, J.A.:

A plea of undue influence attacks the sufficiency of consent: a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscious use of power by a stronger party against a weaker. On such claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, needs or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger.

6. Inequality in Bargaining Power

36 The doctrine of inequality of bargaining power can be regarded as an updated version of the traditional notion of what is unconscionable. *Fridman*, at 306-11. In *Lloyd's Bank v. Bundy*, Lord Denning stated:

... the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear upon him by or for the benefit of the other.

37 Factors which the courts have deemed to constitute inequality of bargaining power, include lack of independent advice, lack of business experience, limited education, ignorance of the true effect of the transaction, distress or need. *Moore v. Fed. Bus. Dev. Bank* (1981), 30 Nfld. & P.E.I.R. 91, at 98 (P.E.I.S.C.).

Submissions of Counsel

The Plaintiff

38 The Plaintiff's Counsel submits that the bargain struck by the Defendant was unfair and improvident in that the Plaintiff gave up much more than the Defendant in the marriage contract when one considers the business assets that were left to each party and when one considers that the Plaintiff gave up her right to seek an unequal division of matrimonial assets. The Plaintiff says that the previous physical abuse inflicted upon the Plaintiff and the vindictiveness shown her and others by the Defendant are enough to constitute duress and to negate the consent of the Plaintiff and avoid the contract. The Plaintiff's Solicitor also requests the Court to find that in the circumstances of this marriage the husband was, by the very nature of the relationship, in a position of undue influence with respect to the wife, because of his domineering approach. The Plaintiff's Solicitor also submits that the marriage contract was an unconscionable transaction because of the Plaintiff's depression and weakened mental state and because of her inability to cope during a separation. Finally, the Plaintiff's Solicitor submits that the greater share of assets owned by the Defendant meant that there was such an inequality of bargaining power at the time of the marriage contract as to result in the perpetration of an injustice against the Plaintiff if the contract is not avoided.

The Defendant

39 The Defendant's Solicitor denies duress occurred. He says that no physical abuse or vindictiveness by the Defendant was proven and, in the alternative, that if proven, it was so far in the past that it did not affect the entering into of the marriage contract. The Defendant's Solicitor submits that the relationship of husband and wife does not give rise to a presumption of undue influence. He submits that there was no undue influence proven in this case where, on the evidence, the Plaintiff had shown herself able to pursue her own choices and able to avoid automatically succumbing to her husband's wishes. He submits that there has been insufficient proof of the value of each party's interests at the time of separation to establish unfairness or improvidence. Also he submits there was no evidence that the Defendant preyed upon the Plaintiff. Accordingly he submits there is no basis for avoiding the contract because of unconscionability or inequality of bargaining power.

Analysis

(1) The Marriage Contract

40 The marriage contract recites past matrimonial difficulties and periods of separation and states that the purpose of the agreement is to agree on the parties' respective rights and obligations concerning the matrimonial home, matrimonial assets and business assets. Although The Matrimonial Property Act was not in force when the agreement was signed, the marriage contract states that it is made pursuant to Section 31 of that Act.

41 Under the heading "Independent Legal Advice" there is a recitation that each party "is fully advised and informed of their rights under The Matrimonial Property Act and [that] they have severally been advised and informed by their Solicitors of their respective rights and liabilities against and to each other and to and with reference to the property and estate of the other in accordance with the provisions of The Matrimonial Property Act."

42 "Matrimonial Home", "Matrimonial Assets", and "Business Assets" are defined basically as they are in the Act.

43 The contract leaves the legal estate of the matrimonial home vested in the husband and permits him to use it to obtain financing, with the provision that he agrees to indemnify and save harmless the wife against such financing. Out

of the proceeds of any sale of the matrimonial home shall be paid an outstanding loan to Complete Rent-Alls Limited in the amount of approximately \$83,000.00. The balance of the proceeds are to be divided equally between the husband and wife.

44 The contract states that matrimonial assets are to be divided equally between the husband and wife.

45 The contract provides that the business assets owned and controlled by each shall remain that person's despite any contribution made by either to the acquisition of business assets of the other.

46 By the contract, the personal property and real property owned by each was to remain vested in the name of that person and was not to be divided upon separation.

47 It was agreed that in the determination of the question of any lump sum payment on divorce, the business assets of the parties were not to be taken into consideration.

48 Under the heading "Understanding of Agreement", the parties confirm that the terms and conditions of the contract have been entered into without undue influence or fraud or coercion or misrepresentation and that each has read the contract in its entirety and with full knowledge of and understanding of the contents and that they affixed their signatures voluntarily.

2. Improvidence

49 Although it may not be necessary in the case of duress, which some authorities suggest vitiates consent and renders a contract void from the beginning (Waddams *The Law of Contracts* (2nd ed. 1984), at 376), before the Plaintiff can rely upon allegations of undue influence, unconscionability or inequality of bargaining power, she must establish on a balance of probabilities that the contract brings about an unfair division of property. The Defendant has submitted that the relevant time for determining the value of the property is at the date of separation. While the value at that date may be circumstantial evidence in determining whether one of the parties acted under pressure or without foresight or heedlessly, I believe that the relevant time is the time the marriage contract was signed. It is as of that time that the Court is attempting to determine what was taking place in the mind of the Plaintiff. Did she really consent? Was she acting under pressure? Did she fully realize the value of the rights she was giving up compared to the rights she was getting? Defendant's Counsel submits that the Court must know the value at the time of separation because that is the only way one can determine whether what the Plaintiff gets out of the contract is "significantly out of line with what might have been the end result of an action under The Matrimonial Property Act". *Mushrow*. I believe the Court must ask: What would a reasonable person in the place of the Plaintiff have understood, *at the time of signing the marriage contract*, to be the value of what she would get out of the contract compared to what she would get pursuant to the Act. Since neither party could foresee when a separation might occur, I find that it is the respective values *at the time of signing* which must be considered, to determine if a bargain was improvident. It is sufficient if the Court can determine approximate values. Also, if there is no evidence of values on the actual date of signing, evidence of values shortly after signing may be circumstantial evidence of the values at the time of signing. The exact values need not be established as of that time. In case I am wrong on the matter of timing, however, I intend to deal with the relative values of the assets both at the time of signing and at the time of separation.

50 Section 27 of The Matrimonial Property Act entitles a spouse who has contributed work, money or monies worth to the business assets of the other spouse, to compensation or to a share in the business assets in accordance with the contribution. In my first decision in this case, on the motion for nonsuit, I found that the Plaintiff provided certain guarantees of financing to Campbell Development Limited and Complete Rent-alls Limited and that the Plaintiff also pledged cer-

tain securities to assist those corporations in raising financing and personally joined in mortgages. In my first decision I detailed the extent to which the Plaintiff was involved in the financing of the two companies. I have found that this constituted a contribution of money or monies worth to the Defendant's business assets.

51 While it would be preferable to have the exact value of this contribution in order to determine what the Plaintiff gave up under the contract, this is not necessary. Relative values are, I believe, sufficient for the purpose of determining what the Plaintiff received in relation to what she might reasonably have expected to receive had the contract not been signed.

52 In my earlier decision I found that the giving of guarantees and the pledging of securities by the Plaintiff was of significant value to the two corporations although I was not given sufficient evidence to establish the actual value of the Plaintiff's contribution. The Defendant has since given evidence that there was payment to the Plaintiff of approximately \$16,000.00 through a directors account from Campbell Development Limited, that the Plaintiff received the benefit of a truck from Complete Rent-Alls Limited worth approximately \$6,000.00, that approximately \$17,000.00 was contributed by labour, equipment and so forth from Complete Rent-Alls Limited to the Plaintiff's rental properties, that another \$22,000.00 was contributed by that corporation to a business, Fridays Limited, operated by the parties' son in a building leased from the Plaintiff and the Plaintiff received a benefit from this, that other contributions were made to the matrimonial home and payments made from the Defendant's Avalon Apartments business on the mortgage for the Ringdove boat, and that the Plaintiff had the use of a helicopter and other assets of the corporations.

53 I am satisfied that the value of the money or monies worth received by the Plaintiff is at least as great as the value of any compensation to which the Plaintiff would otherwise be entitled because of the Plaintiff's contributions to the corporations and to the Defendant's business assets. Accordingly, I find that, even without the marriage contract, the Plaintiff would not be entitled, by virtue of Section 29 of The Family Law Act, to any additional amount as compensation for the Plaintiff's contribution or to any share in the business assets.

54 In any event, even if I am wrong on the last point, I am not satisfied that any compensation or share in the business assets to which the Plaintiff would be entitled pursuant to Section 29, would be so great compared to the compensation or share in the Plaintiff's business assets to which the Defendant would be entitled as to constitute an unfair result. While the Defendant's equity in the two corporations was worth considerably more than the Plaintiff's business assets, both at the time of the signing of the contract and at the time of separation (assuming that the Plaintiff does not have a beneficial entitlement to any of the shares - an assumption which will be dealt with below), the Plaintiff's direct contribution to that equity was relatively small compared to the contribution made by the Defendant in building up the equity in the two corporations. The legislation in Newfoundland does not permit me to take into consideration the effort expended by the wife in the home in determining the wife's contribution to the growth of business assets. *Wedgewood v. Wedgewood (No. 2)* (1989), 74 Nfld. & P.E.I.R. 181 (Nfld. U.F.C.). Consequently, I am not satisfied that the Plaintiff gave up so much of an interest in the business assets as to bring about an unfair result.

55 However, the Plaintiff in the marriage contract also gave up the right to an unequal division of the matrimonial assets and gave up the right to have the business assets of the parties considered in the determination of any lump sum payment upon divorce. The contribution made by each of the spouses to the welfare of the family, including a contribution made by a spouse in looking after the matrimonial home or caring for the family, is a factor for the Court to consider in determining whether an equal division of matrimonial assets would be grossly unjust or unconscionable in the circumstances. The income, earning capacity, property and other financial resources that each of the spouses has or is likely to have in the foreseeable future, are other factors. These factors would also be relevant in determining the amount of any lump sum payment involved in the issue of support.

56 The Newfoundland Court of Appeal has noted that Section 20 of The Matrimonial Property Act (now Section 22 of The Family Law Act) uses the words "grossly unjust or unconscionable" as opposed to the word "inequitable" found in the legislation of other jurisdictions. The Court of Appeal concluded that this language would appear to place a heavy burden on a party seeking an unequal distribution of property. But the burden cannot be so great as to render an applicant's right to an unequal division of property illusory. *Clouston v. Clouston* (1986), 60 Nfld. & P.E.I.R. 294 (Nfld. C.A.), at 297.

57 I believe that the large difference in the value of the assets which each party would end up with (assuming that the Plaintiff does not have any beneficial interest in the shares of the corporations - an assumption which will be dealt with below), coupled with the fact that for the first ten years or so the marriage was a traditional one with the Plaintiff staying at home to care for the family in the matrimonial home, would probably make it grossly unjust or unconscionable to have an equal division of matrimonial assets. Accordingly, I will proceed now on the basis that the marriage contract was an improvident bargain for the Plaintiff to make. As I will mention below, this may not be the case if the Plaintiff is beneficially entitled to any of the shares.

3. Duress

58 The Plaintiff bases her claim of duress on two grounds, her husband's threat of divorce and her fear of a vindictive response from him if she did not sign. She alleges that her weakened mental and physical state brought on by depression and insomnia made her so much more susceptible than normal to the resulting pressure that her signature on the marriage contract should not be taken as indicating her consent to that agreement. The Plaintiff alleges that she was completely under the domination of an overbearing husband whom she feared because of previous physical abuse she received from him and because of the vindictive way in which he had treated business competitors and former friends.

59 The Plaintiff called Dr. Martin Hogan, a Psychiatrist who saw her in September and October and twice in November, 1980. Dr. Hogan testified that Mrs. Campbell was depressed and anxious concerning her marital difficulties. In Dr. Hogan's notes there was a reference to the marriage contract in that Mrs. Campbell stated that it tended to give her husband most of the property. In her words "he has everything in the marriage".

60 Mrs. Campbell was taking a small dose of a tranquilizer at the time of her third visit on November 3, 1980. The medication was not taken regularly but only as necessary.

61 The reference concerning the marriage contract was in the notes of Mrs. Campbell's last visit to him on March 2, 1981. On cross-examination there was some question raised as to whether that reference may have been put in by Dr. Hogan after he had been called by the Plaintiff's Solicitor concerning the present action.

62 Dr. Hogan stated that he would classify Mrs. Campbell's depression as probably "reactive", that is, caused by external forces, as opposed to "endogenous". He labeled it as mild to moderate and has no record of recommending medication.

63 Dr. Vaughan-Jackson, who is a General Practitioner and was the Plaintiff's family physician from July, 1973, testified that in 1977 the Plaintiff had seen him because of a reduced appetite and weight loss resulting from marital problems. Divorce was being discussed by the Plaintiff and her husband at the time. In January, 1978, the Plaintiff again visited him because of her emotional state. She was "up tight" because of marital problems. She requested medication and he prescribed a minor tranquilizer. There was no reference in his notes to any prior emotional stress. In January, 1980, on a routine check he noted that her weight was down and he attributed this to her having recently broken up with her husband again. On February 11, 1981, on a routine visit there was no reference to the Plaintiff's emotional state. The

parties were together again and to his recollection the Plaintiff was pleased and working at the marriage. On February 18, 1981, the Plaintiff visited because of a minor gynecological problem. He noted that the Plaintiff had commented that this type of problem seemed to occur for her when she was under stress. He did not note the details of the stress. On November 12, 1982, Dr. Vaughan-Jackson noted that the Plaintiff's weight was remaining constant and there were no major problems. In 1983 there were no emotional problems noted. On April 13, 1984, the Plaintiff visited wondering if she had an ulcer. Tests were negative. On February 5, 1985 the Plaintiff requested something for depression. She was not sleeping and had little appetite.

64 This doctor had no notes concerning any reference to physical violence by the Plaintiff. There was no specific discussion concerning her relationship with her husband that the doctor could recall. The Plaintiff appeared emotionally stable apart from the stress caused by trying to stay in a marriage that was not working.

65 It was only in 1985 that Dr. Vaughan-Jackson prescribed on one occasion an antidepressant which an associate of his continued in July of 1985. Before that occasion he had only once prescribed a tranquilizer "in a very modest dose", namely, five milligrams of valium up to three times a day over approximately ten days.

66 In Dr. Vaughan-Jackson's opinion, the Plaintiff was not suffering from an extreme level of stress. He felt it was significant, however, and it affected the way she felt to a marked extent. He had not diagnosed her condition as depression. He felt if she was suffering from depression it was a reactive depression. He felt it was an academic distinction whether she was suffering from anxiety with depression symptoms or depression from anxiety.

67 Dr. Vaughan-Jackson had no note of having referred the Plaintiff to a Psychiatrist. If she had requested a referral he would have given her one as she was experiencing significant symptoms.

68 Dr. John Butler was called by the Defendant and testified to treating the Plaintiff in 1980. The first time she complained of insomnia and he gave her some pills, valium or something of that nature. In September of 1980 she came and asked him if he knew a good psychiatrist. She said she was having a lot of trouble with her oldest son. She also said that she was having some sort of business problems and said that she "thought she was going nuts".

69 Dr. Butler said he first assured her that he didn't think that there was anything wrong with her. However he had a practice of referring any patient who asked and he referred her to Dr. Hogan. Dr. Butler said that there was no mention of marital problems other than that he asked the Plaintiff how herself and her husband were making out (he knew them socially) and the Plaintiff said she had had some problems but they were now all ironed out.

70 Dr. Butler stated that he may have given the Plaintiff ten or twenty valium pills but that he has never given a prescription for more than thirty to anyone. From his records it seemed that the Plaintiff had been to see him on September 24, 1980 and everything was okay. She then returned on September 25, 1980, saying that she wanted to see a psychiatrist. He did not believe there was anything seriously wrong with her.

71 Duress at common law, or what is sometimes called "legal duress", means actual violence or threats of violence to the person, that is, threats calculated to produce fear of loss of life or bodily harm. The rule here is that the threat must be illegal in the sense that it must be a threat to commit a crime or a tort. Cheshire, Fifoot and Furmston's, *Law of Contract* (11th ed. 1986), at 297. There is no evidence in the present case of any such threat. In some cases where a history of physical abuse and intimidation has been proven, a mere request by the prior abuser or intimidator might be sufficient to establish duress. *Foggo v. Foggo* (1984), 40 R.F.L. (2d) 129 (Ont. High Ct.). There has been no such history proven in the present case.

72 The Plaintiff has testified to two incidents of physical abuse during the parties' twenty-four years of living together. They occurred in 1978, approximately two years before the marriage contract was signed. It is wrong for one spouse in any circumstance to physically abuse the other. But the fact that two incidents of violence have occurred does not mean that all future transactions entered into by the wife at the request of the husband may be set aside on the ground of duress. The Court must look at the circumstances of the transaction and attempt to determine whether it can truly be said that the consent of the wife was vitiated.

73 I have considered the Plaintiff's statement that she was afraid of her husband after the two incidents of abuse. I have also, however, considered the testimony of her doctors, her lawyers, her relatives and her friends who testified. I am unable to find in their testimony enough to satisfy me that the Plaintiff's fear was sufficient to put her in a position of duress when she was requested to sign the marriage contract. I note also from the Plaintiff's testimony that she had shown herself, before the signing of the marriage contract, willing to go against the wishes of her husband. She had separated in 1978 although he did not want that. Also, the Plaintiff testified that the Defendant had sometimes, prior to 1980, punished her by not speaking to her for long periods after she had from time to time refused to sign certain business documents. The Plaintiff also confirmed on cross examination that there were a "fair number" of occasions prior to 1980 when she had engaged in lengthy arguments with the Defendant. These incidents indicate to me that the Plaintiff was able to go against her husband's wishes without fear of physical harm. She was not totally dominated by him as she now alleges.

74 The Plaintiff has attempted to paint a picture of a fear of emotional or psychic violence arising from the husband's previous vindictiveness against her and others. While in some cases the fragility of a person's emotional or psychological state might mean that a history of vindictiveness could establish duress, I am not satisfied that this was the case here. The medical testimony set out above just does not support the Plaintiff's description of her emotional condition in the years leading up to the signing of the marriage contract in 1980.

75 She had seen a doctor, prior to 1980, on only two occasions for emotional problems, in 1977 and 1978. At that time the doctor's diagnosis was that the Plaintiff was suffering from stress. He had not diagnosed depression. Light medication was prescribed and there was no referral to a psychiatrist. On January 8, 1980, a few months before signing the marriage contract, the Plaintiff saw her family doctor for a routine check. She did not indicate to him any problem with depression at that time. In September of 1980, only five months after signing the marriage contract, the Plaintiff saw a psychiatrist. At that time the diagnosis was mild to moderate depression requiring only light medication. It is significant also that the Plaintiff was able to engage in business transactions and complete real estate purchases in the months just before and just after the signing of the marriage contract. Also she met with her Solicitor and he testified that in his opinion she knew what was happening and was able to code. In these circumstances I am not satisfied that there was such a fear of emotional or psychic violence as to constitute duress.

76 There was evidence from her solicitor indicating that the Plaintiff, because of concerns about her husband's potential tax and other liabilities, had reasons for seeking to have her business assets kept separate and apart from her husband's business affairs. There is also evidence that the Divorce Petition filed by her husband had been discontinued on February 28, 1980, some months before she signed the marriage contract. The Plaintiff says that she signed the marriage contract because her husband had stated that if she didn't he would leave her. For the purposes of this decision I will proceed on the basis that the real reason the Plaintiff signed the marriage contract was because she wished to try to save her marriage. The evidence of the Plaintiff's emotional and psychological state, referred to above, does not satisfy me that this threat of divorce created a sufficient threat of emotional or psychological harm as to constitute duress. The question arises whether it might constitute economic duress.

77 There is not sufficient evidence in the present case to satisfy me that the Plaintiff signed the marriage contract in

the present case because she feared the economic consequences of divorce. Indeed, the evidence is that on her earlier separation in 1978 she did not suffer any serious financial pressures. Her testimony was that her husband was usually generous towards her with money. There was evidence that after the marriage contract was signed, in 1981, when the Plaintiff separated and went to British Columbia, her husband gave her \$5,000.00 and was prepared to give her more if she wished to have it.

78 In any event, the defense of economic duress is not sustainable where a party, as here, had obtained independent advice prior to signing. *Deforest v. Deforest*, [1982] 4 W.W.R. 701 (Sask. C.A.); *Blanchette*.

79 In addition, even if duress had been present in the present case, the claim of duress is not available to a party such as the Plaintiff who, after making the agreement, engaged in conduct which amounted to affirmation of the transaction. *Fridman*, at 300. The Plaintiff in 1983 signed an Affidavit of Marital Status in which she treated the marriage contract as valid. Also, in arranging real estate financing with the Newfoundland Co-Op, the Plaintiff, in 1983, again referred to the marriage contract and treated it as valid. It is significant as well that in the initial pleadings in the present case, later amended, the Plaintiff treated the marriage contract as valid. A person claiming to have signed a contract under improper pressure must, to successfully avoid the obligation, show that he or she repudiated the transaction as soon as the pressure was relaxed. *Fridman*, at 300. That was not shown in the present case.

80 In addition, the essential idea behind the plea of duress is that *improper or wrongful pressure* has been brought to bear by one person upon another so as to make the latter unwillingly do something against his or her interest. *Fridman*, at 295-296. The compromise of a threatened civil action has been held valid. *Fridman*, at 296. The present case may be regarded as such a situation. The Plaintiff signed the marriage contract to compromise and avoid a threatened divorce action. Unless the Plaintiff can show some factor which would in law be regarded as a coercion of her will so as to vitiate her consent, the compromise is valid. I am not satisfied that any such coercion of will was present at the time of the signing of the marriage contract. The Plaintiff's fear of divorce stemmed from the loneliness and loss of contact with their friends that she had experienced on previous separation. These were psychological rather than economic pressures and, as I have stated above, I do not find that the psychological pressures were sufficient to constitute duress.

4. Undue Influence

81 As can be seen from the earlier discussion of undue influence, the question in the present case is whether the Defendant prevented the Plaintiff from exercising an independent judgment in the matter of the marriage contract.

82 In certain cases, the one alleging undue influence is able to discharge the onus of proving lack of consent on such basis by merely showing a history of that spouse having been dominated by the other. Particularly, when one spouse establishes a fragile emotional or psychological state, such a history will give rise to the presumption of undue influence whenever the domineering spouse requests the other to enter into a transaction. *Mundinger v. Mundinger*, [1969] 1 O.R. 606 (Ont. C.A.); Aff'd (1970), 3 D.L.R. (3d) 338 (S.C.C.); *Foggo*.

83 In *Mundinger*, however, the wife had had a nervous breakdown and had taken an overdose of pills. The husband demanded a separation while she was in hospital. The Court found that this was a severe shock to the wife which aggravated the condition of tension and anxiety under which she was then labouring. The husband had flown into a violent rage and quarrelled with the wife, addressing her in an abominable manner and adopting a very threatening attitude towards her when he learned that she had sought the advice of a solicitor. The wife ended up signing the agreement previously prepared by her husband's solicitors, with the only change being an increase in the amount to be paid to her from \$5,000.00 to \$10,000.00, without further consultation with her solicitors. While two doctors had testified that the wife was mentally capable of entering into the transactions, her family physician and the psychiatrist under whose care she

had been for several years both testified that, in their opinion, she was not in a mental condition to exercise proper judgment in matters affecting her property rights and temporal welfare. The Court also found that the wife was under the influence of tranquilizers and brandy at the time she signed the agreement. The Court concluded that the husband was in a position of dominance and control over the wife and that he took full advantage by exercising undue influence upon her to carry off the improvident transaction.

84 In the present case the circumstances are quite different. As I have indicated above, there were no threats by the husband. There was no evidence that the Plaintiff was in the acute mental and emotional state of anxiety and stress present in *Mundinger*. She had not had a nervous breakdown. She was not under doctor's care at the time. She was not taking medication at the time. Her husband had not objected to her consulting a solicitor. In fact, changes had been made to the marriage contract to her advantage on the recommendation of her Solicitor. There was no evidence that the Plaintiff was not in a mental condition to exercise proper judgment in matters affecting her property rights. To the contrary, the evidence is that just approximately one month prior to the signing of the marriage contract, the Plaintiff had been capable of engaging in real estate transactions.

85 In *Foggo* the Court found that the wife signed the separation agreement while in a depressed emotional state and while having serious financial problems. The Court concluded that the wife either did not fully understand the terms of the agreement or did not appreciate the implications of signing. The Court found that there was duress upon the wife because of the husband's cruel conduct over fourteen years, his statements prior to her signing and his failure to make interim payments to her on a regular basis. Those circumstances differ from the present case where, as I have stated above, the evidence does not establish a depressed emotional state or duress or lack of ability to comprehend and appreciate what she was signing or financial pressure.

86 The present case is more like *Blanchette*. There the wife had been advised throughout by experienced and capable Counsel. The Court found that she fully appreciated her legal position and signed the marriage contract against the advice of her Solicitors because she was desirous of reconciliation. While the husband had physically assaulted the wife previously, the Court found that any physical abuse or actual physical domination had ceased several months prior to the execution of the agreement. Even though the wife had no means and was being sustained by social assistance, the Court was not satisfied there was any deprivation such that she would not have enjoyed a free, independent and knowing mind and will. The Court found that there was no undue influence.

87 The Plaintiff also relied upon *Puopolo v. Puopolo* (1986), 2 R.F.L. (3d) 73 (Ont. High Ct.). There the husband had been violent and threatened his wife with a knife on more than one occasion, threatening to kill her if she did not do what he wanted her to do. There had been a previous separation when the husband had threatened the wife. The wife, with the advice of Counsel, signed a separation agreement giving up her entitlement to proceeds from the sale of the matrimonial home.

88 The Court there pointed out that there is no presumption of undue influence in the case of husbands and wives. Instead of the presumption of undue influence arising from a special relationship, in the case of husbands and wives there must be "express influence" proven. There must be an exercise on the mind and will of general domination or control which undermines independence of decision.

89 The person who alleges undue influence has the onus of proving that it existed at the time of the making of the contract. The voluntariness of the mental element must be proven not to have existed. And the person who was unduly influenced must not later affirm the agreement by his or her conduct. The Court in *Puopolo* concluded that although the wife had a genuine fear of her husband, and although it may well not have been the best bargain available to her, she

made a conscious choice, with independent legal advice, to buy peace and she was bound by her decision. I believe a similar conscious choice was made by the Plaintiff in this case.

90 For the reasons given above when dealing with duress, I am not satisfied that the Plaintiff was prevented from exercising an independent judgment. The evidence relating to the two incidents of abuse, the history of vindictiveness exhibited by the Defendant, the Plaintiff's emotional and psychological state, the Plaintiff's stated inability to cope outside the marriage, the financial circumstances of the parties, these matters, whether considered individually or together, do not satisfy me that "the more subtle effects of non-physical pressure upon the mind and ultimate consent of" the Plaintiff were sufficient to mean that an unfair advantage had been taken of the Plaintiff by the Defendant. *Fridman*, at 301.

5. Unconscionability

91 In *Trottier v. Altobelli* (1983), 36 R.F.L. (2d) 199 (Ont. C.A.) the Court of Appeal set aside a separation agreement made a few days after the separation where the wife renounced any right to alimony or maintenance or to any claim against any assets. The wife had contributed to the acquisition of the matrimonial home, to the maintenance of the home and to the payment of the mortgage. It was admitted by her husband that when the property was acquired it was their intention that she should have a one-half interest in it. The Court of Appeal held that the agreement on its face was clearly unconscionable. In that case there had been no independent legal advice. In *Lono v. Lono* (1984), 52 Nfld. & P.E.I.R. 208 (Nfld. T.D.) Cameron, J. adopted the description of unconscionable bargain given by Davey, J.A., in *Morrison* as set out above. She concluded that the separation agreement in question was unfair and an unconscionable transaction. She set it aside as the Defendant had failed to show that no advantage was taken.

92 I have already found that there was substantial unfairness in the marriage contract. I am not satisfied, however, that in this case there was such inequality in the position of the parties as to leave the Plaintiff in the power of the Defendant. The Plaintiff took the marriage contract to her solicitor and through him negotiated certain changes to her advantage. From *Mushrow*, I conclude that if the Defendant satisfies me that he did not "prey upon" the Plaintiff in reaching agreement on the marriage contract, there is no basis for setting aside the contract on the ground that it is unconscionable.

93 Here the Plaintiff received independent legal advice. She made a conscious decision, without duress or undue influence, to try and save her marriage by entering into the marriage contract. She did this, however, only after having her solicitor negotiate certain changes to her advantage. In these circumstances I find that the Defendant has satisfied the burden of establishing that he did not prey upon his wife. *Kelbrick v. Kelbrick* (1984), 50 Nfld. & P.E.I.R. 89 (Nfld. T.D.).

6. Inequality of Bargaining Power

94 I am not satisfied that there was inequality of bargaining power where the wife had independent legal advice. If the legal advice was limited or if the advice was ignored, this was the conscious decision of the wife. *Bragg v. Bragg* (1986), 4 R.F.L. (3d) 173 (Nfld. U.F.C.). I do not accept that the strong desire of the Plaintiff to maintain her marriage is a sufficient basis to conclude that her bargaining power was so impaired as to justify avoiding the contract.

7. Ownership of Corporate Shares

95 I have assumed, for the purposes of my decision on the preliminary issue, that the Plaintiff does not have any equitable interest in any shares of Campbell Development Limited or Complete Rent-Alls Limited but I make no finding in this regard. The Defendant claimed that the pleadings did not properly raise this issue. I agree. If the parties cannot re-

solve this issue by agreement, they may make further application and I will decide whether I have jurisdiction to decide that issue in the present case. The result in this decision would not change if the Plaintiff were found to be beneficially entitled to any of the above shares. That finding would only reduce the evidence available to support the conclusion that the marriage contract was an improvident bargain for the Plaintiff to make.

Disposition

96 I hold that the marriage contract dated the _____ day of April, A.D., 1980 is valid and enforceable with respect to the division of the matrimonial and business assets of the parties. If the parties cannot agree upon the division they may make a further application and I will decide the matters in dispute.

97 Costs of this hearing on the preliminary issue shall be costs in the cause since much of the evidence will be relevant to the determination of matrimonial assets.

Appendix "A" — 1985 No. F/85/453 In The Supreme Court of Newfoundland Unified Family Court

BETWEEN :

GERALDINE ANN CAMPBELL

PLAINTIFF

AND :

WILLIAM CAMPBELL

DEFENDANT

Heard: September 13, 14, 15, 18, 19, 20, 21, 22, 26, October 10, 11, 12, 13, November 1.

Decided: November 2, 1989

Decision No. 1 of L.D. Barry, J. (Orally)

The Defendant has moved for a nonsuit, pursuant to Rule 42.08, at the close of the Plaintiff's case, on the ground that upon the facts and the law no case has been made out.

The Defendant submits that the Plaintiff, on her claim to have the marriage contract declared void for alleged duress, undue influence, unconscionability, and inequality of bargaining power, has failed to prove the following essential elements of her case:

1. That the Plaintiff made a contribution of money or money's worth to the Defendant's business assets within the meaning of Section 29 of The Family Law Act, 1988, Statutes of Newfoundland 1988, c. 60;
2. The value of the Plaintiff's contribution and the value of each party's assets at the time of separation, so as to permit a determination of whether the marriage contract which excluded the business assets from sharing was improvident for the Plaintiff; and
3. The presence of unfairness in the circumstances where the Plaintiff had independent legal advice before signing the marriage contract.

The Law

The test on motions of this kind is usually stated as: has the Plaintiff presented evidence upon which a jury, properly instructed, could find in her favour. *Anderson v. Short* (1986), 62 Nfld. & P.E.I.R. 44 (Nfld. T.D.), *Halifax Insurance Company v. Reid and Reid* (1983), 63 N.S.R. (2d) 263 (N.S.C.A.).

As a judge sitting without a jury I find that this statement of the test still leaves me with the question of: how cogent, how convincing, how probatively sufficient, must that evidence be? Must I at this stage get into the question of weighing the evidence at all? If so, to what extent do I carry out the process of reviewing the evidence and weighing it?

The *Anderson case* relied upon *Colford v. Randall* (1975), 20 N.S.R. (2d) 195 (N.S. T.D.) where Hart, J. stated, at 204:

Counsel for all parties were in doubt as to whether under this new rule it was necessary for the case of the plaintiff to be established by a balance of probabilities or whether it was only necessary to establish a prima facie case, and I ruled as follows:

In my opinion the changes in this rule were made merely to clarify the right of defence counsel to move for dismissal at the end of the plaintiff's case without electing whether or not to call evidence. I do not believe there was any intention to change the grounds for the motion and I interpret the rule to mean that the motion will only be granted if there was no evidence upon which a jury properly instructed could find for the plaintiff. If a prima facie case has been made out then the weight of the evidence is for the Court.

How does a judge determine that a "prima facie case" has been established. There is more than one meaning that can be given to "prima facie". Cross, *Evidence* (4th ed. 1974), at 26-27 states:

The fact that evidence may be of varying degrees of cogency gives rise to terminological difficulties which have not been solved.

(i) Insufficient evidence.- The lowest degree of cogency is where a party's evidence in support of an issue is so weak that no reasonable man could properly decide the issue in his favour. An example is afforded by *Hawkins v. Powells Tillery Steam Coal Co.* where the Court of Appeal reversed the County Court judge's finding that a fatal attack of angina pectoris arose out of a workman's employment. The workman had been pushing trucks shortly before the attack occurred, but the disease was one of delayed action which might have been brought about by a great variety of causes such as the disordered state of the deceased's stomach, or a walk in windy weather. The claimant had failed to take the case out of the realm of conjecture, and, in such circumstances, the evidence in support of an issue is best described as "insufficient".

(ii) Prima facie evidence: first sense.- The next degree of cogency is where a party's evidence in support of an issue is sufficiently weighty to entitle a reasonable man to decide the issue in his favour, although, as a matter of common sense, he is not obliged to do so. An example is provided by *Smithwick v. The National Coal Board* in which the Court of Appeal affirmed the trial judge's finding that a workman's death had been caused by the defendant's breach of statutory duty by failing to guard dangerous machinery on proof that the man's arm had been caught in the machine with fatal consequences. The catastrophe might have been due to a breach of statutory regulations on the part of the deceased, but the connection between his death and the unguarded machine was closer than that between the angina pectoris and the pushing of the trucks in the previous example. Accordingly, the evidence took the case out of the realm of conjecture into that of permissible inference. In the words of DENNING, L.J.:

one often gets cases where the facts proved in evidence-the primary facts-are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or, equally legitimately, refuse to draw any inference at all.

When this is so, the evidence is most conveniently described as "*prima facie*", but there is no uniform usage with regard to the matter.

(iii) *Prima facie* evidence: second sense (presumptive evidence).- The next degree of cogency is where a party's evidence in support of an issue is so weighty that no reasonable man could held deciding the issue in his favour in the absence of further evidence. If a ship founders shortly after leaving port, and no further evidence appears in the case, the judge should direct the jury that they ought to infer unseaworthiness at the time of departure. If the jury were to find the contrary, "It would not be a finding against any principle of law, but it would be such a finding against the reasonable inference from the facts, that it would amount to a verdict against the evidence". It would be convenient to describe evidence of this degree of cogency as "presumptive", but it is usually said to be *prima facie*.

'*Prima facie* evidence' in its usual sense is used to mean *prima facie* proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving its discharges his onus.

(iv) Conclusive evidence.-The evidence of a fact is sometimes said to be "conclusive" when the court must find that fact to be proved.

The *Colford Case* (and the *Anderson Case* following it) indicate however, that whatever the meaning of "prima facie" it does not mean that the case for the Plaintiff must be found to be "established by a balance of probabilities" at this state. This indicates to me that a judge sitting without a jury need not on a motion for nonsuit proceed to fully analyze and weigh the evidence as he must in order to arrive at his final decision at the end of a trial.

The use of the qualifying phrase "properly instructed" implies that it is not enough to conclude merely that there is *some* evidence. Otherwise the rule would be: the motion will be granted if there was no evidence upon which a jury could find for the Plaintiff. The jury must be properly instructed so that they may weigh the evidence rationally. It follows that there must be some degree of weighing the evidence by a judge in order to determine, whether a jury "could" find for the Plaintiff.

I find support for this conclusion in the decision of Goodridge, J. in *Blue Chip Investments Inc. v. Kavanagh et al* (1986), 60 Nfld. & P.E.I.R. 85 (Nfld. T.D.), at 88 where he says:

On a motion for a non-suit, the test to be applied is not whether the plaintiff has proved its case but whether or not it has presented any evidence upon which a verdict in its favour might be granted, assuming that no further evidence was called.

Similarly in *Hyndman et al. v. Jenkins* (1981), 18 C.P.C. 303 (P.E.I. T.D.), Campbell, J. quoted *Colford* and also this extract from Sopinka & Lederman, *The Law of Evidence in Civil Cases* (1974, Butterworths) where, at 521-522, is found the following comment:

If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, *may* be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability *ought* to be inferred. The judge, in performing his function, does not decide whether in

fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it. This decision of the judge on the sufficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence which is a question of fact. Because it is a question of law, the judge's assessment of the probative sufficiency of the plaintiff's evidence, or the defendant's evidence on a counter-claim for that matter, is subject to review by the Court of Appeal.

If the plaintiff has failed to prove a prima facie case in his evidence in chief and the defendant brings a successful non-suit motion, then the plaintiff's action will be dismissed.

So, while a judge must "assess the probative sufficiency" of the Plaintiff's evidence, he is not "ruling upon the weight" or the believability of the evidence. But what is the difference between "assessing the probative sufficiency" and "ruling upon the weight" when the matter is being dealt with by a judge without a jury? In the *Hyndman Case* Campbell, J. concluded that it is enough if on the evidence the liability of the Defendant "may" be inferred and he dismissed the motion for nonsuit without indicating at that stage whether he believed that liability "ought" to be inferred from the brochure which was a key piece of evidence in that case.

An earlier case *J.W. Cowie Engineering Limited v. Allan et al.* (1982), 26 C.P.C. 241 (N.S.C.A.) looked at the same question, referred to the same comment from Sopinka & Lederman, and quoted from *Cross on Evidence* (4th ed., 1974), at 66 as follows:

The extent of this method of control increased during the nineteenth century, for, as Willes, J., said in *Ryder v. Wombwell*, (1868), L.R. 4 Exch. 32, at p. 39:

It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, ... not whether there is literally no evidence but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.

The test to be applied by the judge in order to determine whether there is sufficient evidence in favour of the proponent of an issue, is for him to enquire whether there is evidence which, if uncontradicted, would justify men of ordinary reason and fairness in affirming the proposition which the proponent is bound to maintain, having regard to the degree of proof demanded by the law with regard to the particular issue. This test is easy to apply when the evidence is direct, for the question whether witnesses are to be believed must be left to the jury, but it is necessarily somewhat vague when circumstantial evidence has to be considered. In that case, little more can be done than inquire whether the proponent's evidence warrants an inference of the facts in issue, or whether it merely leads to conjecture concerning them.

Although the judge may withdraw an issue from the jury of his own motion, questions of the sufficiency of evidence are usually raised on a submission that there is no case to answer made by the opponent of the issue. When ruling on such a submission, the judge assumes that the proponent's witnesses are telling the truth in cross-examination, as well as in their evidence-in-chief, and on matters which are unfavorable to the proponent, as well as those which are in his favour. He may rule in favour of the submissions either because the proponent's evidence discloses no case as a matter of law or else because of the weakness of the proponent's evidence. If the judge rules against the submission, the issue must be determined by the jury, but, even when the opponent calls no evidence, their decision will not

necessarily be in favour of the proponent. The jury may disbelieve the testimony given on his behalf, or, if they do accept it, they may not be prepared to draw the requisite inference.

The Court of Appeal applied the test of a prima facie case and held that the mere fact there is some evidence, however weak, does not prevent a trial judge from granting the motion. The Court of Appeal, in my opinion, was saying there that a trial judge is entitled to weigh the evidence and dismiss it if the evidence is weak.

With respect, I have some difficulty in seeing how a trial judge sitting without a jury is doing anything else but applying the test of whether the case for the Plaintiff has been established by a balance of probabilities if he asks whether there is "evidence that ought reasonably to satisfy the jury that the fact sought to be proved is established." Can a judge sitting without a jury decide at the time of his final decision not to draw an inference which he, at the time of the motion for non-suit, decided was a reasonable inference to be drawn?

Looking at the matter from the viewpoint of the practicalities of the conduct of trials, it does not seem reasonable that a trial judge, should have to bring the same process of assessment or weighing of evidence into play on a motion for non-suit as is expected of him at the stage of final decision. In a case, such as the present one, with many witnesses, lengthy testimony, much documentary evidence and involved questions of law, it could take weeks, if not months, to properly arrive at a decision on a balance of probabilities after the necessary consideration of the facts and the law. In my opinion, after reviewing of the cases cited, it is not intended that a Defendant should be able to bring about a lengthy delay in a trial by bringing a motion for nonsuit.

I conclude that on a motion for nonsuit I must review the testimony and exhibits to establish whether there is any evidence by which I may be satisfied that the Plaintiff has established her case. If there is not, I allow the motion for nonsuit. If there is some evidence, I must weigh that evidence but only to the extent of determining whether there is enough probative value to the evidence to permit the conclusion that full and proper reflection on the evidence and the law will *possibly* lead me to conclude that the Plaintiff has proven her case on a balance of probabilities. To put it another way, I must determine whether there is at least enough evidence put in to be worth considering by a jury, if we had one, and in the absence of a jury, by myself if no further evidence is adduced. See Delisle, *Evidence* (2nd ed. 1989), at 120 ff. especially the quote from Wigmore, at 121. That is the approach which I believe is contemplated by the test of whether the Plaintiff has presented evidence upon which a jury, properly instructed, could find in her favour. *Blue Chip, supra*. I will refer to this below as the test of probative sufficiency.

Analysis

1. Contribution of Money or Money's Worth

There is evidence that the Plaintiff provided certain guarantees of financing to Campbell Development Limited and Complete Rent-Alls Limited, the corporations which the Defendant claims are owned solely by him, and that the Plaintiff also pledged certain securities to assist those corporations in raising financing as well as remaining personally on the mortgages.

Defendant's counsel does not question the adequacy of the evidence on this but submits that there are no authorities which recognize that the giving of guarantees and the pledging of securities with respect to business assets constitute a contribution of money or money's worth.

The giving of guarantees and the pledging of securities by the Plaintiff was of significant value to the corporations and I find that this constitutes a contribution of money or money's worth to the Defendant's business assets within the meaning

of Section 29 of The Family Law Act, 1988. If the Defendant had to seek such assistance from a stranger, there would have had to be a significant payment made by the Defendant for the assistance.

2. Valuation of Plaintiff's Contribution and Parties' Assets

(a) Contribution

The Defendant submits there is no evidence of the value of the Plaintiff's contribution.

The evidence is that the Plaintiff in 1977 pledged a security valued initially at \$20,000.00 (which increased with interest over the years), to permit Campbell Development Limited to obtain a mortgage of \$30,000.00 from C.I.B.C.. She also signed a promissory note for that mortgage as well as guaranteeing a mortgage in 1976 for \$75,000.00 of property at Mc-Curdy Drive, Gander, Newfoundland and a mortgage in 1977 of \$82,500.00 of property at Grand Falls, Newfoundland. She also signed notes and guarantees to support bank loans of Campbell Development Limited and pledged certain of her securities with respect to these loans. She also guaranteed a mortgage of \$100,000.00 for property purchased at Black-marsh Road, St. John's, Newfoundland, in the name of herself and her husband and remained on that mortgage until now (although she sold her one-half interest to her husband in 1979 for \$10,000.00, which she claims was inadequate consideration). All of the mortgaged properties benefitted Campbell Development Limited and Complete Rent-Alls Limited. There is also evidence that the Plaintiff acted for a time as a director and officer of both corporations and that she travelled with her husband in the early years buying for Complete Rent-Alls Limited and that she helped decorate some stores.

I am satisfied that from this there is some evidence of the value of the Plaintiff's contribution although the exact value may not have been established. I am also satisfied that there is sufficient probative value to the evidence to meet the test of probative sufficiency set out above and to permit me to *possibly* arrive at a decision that the marriage contract was improvident for the Plaintiff.

(b) Parties' Assets

The Defendant submits that there was no valuation of the Plaintiff's or Defendant's assets as of the date of separation and that, therefore, there is no evidence of improvidence. In *Mushrow v. Mushrow* (1983), 45 Nfld. & P.E.I.R. 296 (Nfld. T.D.), subsequently upheld by the Newfoundland Court of Appeal, Goodridge, J. said at p. 308:

Inequality relates not so much to the parties as to the nature of the agreement. Equality relates not to the question of what one party receives in relation to what the other party receives but to the question of what one party receives in relation to what that party might reasonably have expected to receive. The test might be applied as to whether or not it is fair or whether or not it is unconscionable.

And further at paragraph 116:

Whatever may be said of these two words, inequality and improvidence, they are clearly related. In the modern context they both may be said to invoke the question as to whether the agreement is significantly out of line with what might have been the end result of an action under *The Matrimonial Property Act*.

In my opinion the question in the present case is whether what the Plaintiff would get with respect to business assets under the agreement is significantly out of line with what she might get under The Matrimonial Property Act. I am satisfied that there is evidence which may establish that the value of the Plaintiff's business assets which were excluded from sharing under the marriage contract was significantly less, at the time the marriage contract was signed, than the value of the

Defendant's business assets which were excluded from sharing.

There is evidence that the shareholders' equity and retained earnings of Campbell Development Limited was \$72,000.00 as of March 31, 1980 and that of Complete Rent-Alls Limited was \$289,000.00 as of August 31, 1980. There is also evidence of seven properties held by the Defendant personally. There is, in addition, evidence on the personal net worth statement supplied by the Defendant to RoyNat that the value of the Defendant's interest in Complete Rent-Alls Limited as of February 6, 1986 was \$2,500,000.00 and the value of his interest in Campbell Development Limited was \$1,562,000.00.

In comparison, the Plaintiff had only five properties purchased with an initial investment of \$30,000.00 over twenty months. She had acquired several others by the end of 1980. There is no evidence as to whether other properties were acquired by her after 1980 or at least as to the value of these. The contribution of the Plaintiff to the Defendant's business assets was earlier set out. The significant contribution by the Defendant to the Plaintiff's business assets was an amount of \$16,609.30 paid by the Defendant for the director's account for the Plaintiff on the books of Complete Rent-Alls Limited. The account had built up through payment of insurance and other matters relating at least in part to the Plaintiff's properties.

I am satisfied that there is sufficient probative value to this evidence to meet the test of probative sufficiency set out above and to permit me to *possibly* arrive at a decision that the respective business asset values excluded were so significantly out of line as to constitute an unequal and improvident contract. Indeed, I find that there is sufficient evidence in this respect whether the relevant point in time is the date of signing the marriage contract or the date of separation.

(c) Unfairness Where There Has Been Legal Advice

The Defendant submits that there can be no finding of unfairness by the Defendant or preying by the Defendant since the Plaintiff had independent legal advice.

There is evidence, however, that the Plaintiff sought advice only within certain variously defined parameters and that she did not give her solicitors free rein to fully advise her on all important aspects of the marriage contract.

I am satisfied that there is sufficient probative value to this evidence to meet the test of probative sufficiency set out above and to permit me to *possibly* arrive at a decision that the Defendant did treat the Plaintiff unfairly.

I find that there is evidence meeting the test of probative sufficiency with respect to the claims of duress, undue influence, unconscionability and unequal bargaining power when one considers the evidence of the Plaintiff concerning her mental state and the marital relationship. As explained above, this does not necessarily mean that I have been yet satisfied on a balance of probabilities.

Disposition

The motion for nonsuit is dismissed. Costs will be in the cause.

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