

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Rizzo v. Rizzo, 2007 NSSC 358

Date: 20071205

Docket: SN 1206-002746/103437

Registry: Sydney

Between:

John Walker Rizzo

Petitioner

v.

Jane Frances Rizzo

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: February 28 and August 16, 2007 in Sydney, Nova Scotia

**Final Written
Submissions:** November 2, 2007

Counsel: Charles Broderick, for the petitioner
Gussie W. Postlewaite, for the respondent

By the Court:

[1] John Walter Rizzo (“Mr. Rizzo”) and Jane Frances Rizzo (“Ms. Rizzo”) were married on the 21st day of October, 1972.

[2] They ceased cohabitation on or about the 28th day of March, 1993. Subsequent to their separation the parties entered into a Separation Agreement which was signed by Mr. Rizzo on the 17th day of June, 1993 and by Ms. Rizzo on the 3rd day of July, 1993.

[3] Ms. Rizzo is now challenging the Separation Agreement despite clauses suggesting that the parties entered into it freely and voluntarily and without any undue

influence, fraud or coercion or misrepresentation and with both parties acknowledging that they had had the benefit of independent legal advice.

[4] In his Petition for Divorce filed with this Court on October 10, 1995, Mr. Rizzo seeks to enforce the Separation Agreement and have it incorporated as part of the Corollary Relief Judgment.

[5] Ms. Rizzo's Answer to the Divorce Petition was filed on December 7, 1995. In it she sought both child and spousal support as well as a division of assets under the *Matrimonial Property Act*. She referred to the Separation Agreement which she had signed despite the advice of legal counsel. More will be said about this later. I would like to first provide some of the details of the procedural history of this file.

[6] Initially the matter was set down to be heard on September 5, 1996. Since the validity of the Separation Agreement was being challenged, Mr. Rizzo's counsel, Mr. Keith Anderson, decided it would be prudent for Mr. Rizzo to retain new counsel.

[7] A new date for the trial was arranged for February 10, 1998. This, too, had to be adjourned to allow Mr. Rizzo's new counsel time to properly prepare. Instead of proceeding with the trial, a pre-trial conference was convened in an attempt to settle the issue of the Separation Agreement's enforceability. These efforts did not lead to settlement.

[8] Counsel for the parties attempted to get new trial dates but without much success. After Ms. Rizzo's counsel relocated to Dartmouth the carriage of her file languished until her current counsel became involved. After first filing a Notice of Intention to Proceed on May 10, 2004, a Notice of Trial was filed on August 24, 2004. This led to a Date Assignment Conference ("DAC") on February 1, 2005. As a result of the DAC the matter was once again set down for hearing on April 28, 2005. On March 11, 2005 counsel for Ms. Rizzo filed a Notice to Produce for Inspection requiring Mr. Rizzo to produce a considerable amount of new documentation and other information. Realizing that the matter could not proceed on April 28th counsel for the parties filed a Consent Order requesting that the matter, once again, be adjourned *sine die*. The Consent Order was issued on April 26, 2005. For some reason an exact duplicate of this Consent Order was re-issued on May 10, 2005.

[9] On October 7, 2005 counsel for Mr. Rizzo filed a Request for Trial Date and Certificate of Readiness.

[10] On October 18, 2005 counsel for Ms. Rizzo filed a Reply to the Request for Trial Date. In it he confirmed that he had filed and served the documents required of his client including the report of the expert retained to evaluate the lobster fishing license and assets of the Petitioner, Mr. Rizzo. The Reply also contained a Notice to Produce requesting four additional items of information. A separate Notice to Produce for Inspection was filed along with the Reply. The information requested was as follows:

1. Confirmation of amount of insurance monies that were received on behalf of Mr. Rizzo as a result of the burning of the boat which occurred in approximately 1993.
2. Confirmation on whether any loans or liens were paid out as a result of the receiving of the insurance monies in connection with the burning of the boat and the value of any loans or liens paid out.
3. Confirmation on whether any insurance monies were received on behalf of Mr. Rizzo as a result of the loss of the wharf.
4. Determination of how much was owed on the mortgage on the matrimonial home at the time of separation and as well as the payout on the mortgage at the time that the property was sold.

[11] The matter was scheduled for trial on March 9, 2006. On March 2, 2006 the matter was adjourned to March 22, 2006. For some reason it had to be adjourned yet again. On September 28, 2006 counsel were advised that the matter would finally be heard on February 27, 2007. On October 4, 2006 it was, finally set to begin on February 28, 2007.

[12] At long last the trial finally commenced before me on that day. It could not however be completed in the one day that had been set aside for it. It had to be continued to August 16, 2007. By the end of the second day the Court had heard all the evidence. Counsel agreed to file written summations which was completed by November 2, 2007. It is now approximately 12 years since the Petition for Divorce was first filed. The numerous delays and adjournments are not the fault of only one party. Each of the parties must bear some responsibility for the numerous delays in having this matter heard.

FACTUAL BACKGROUND

[13] The Petitioner was first called to testify as to the alleged grounds for the divorce. After being satisfied that there was no possibility of a reconciliation, the Court heard evidence establishing that the parties had been living separate and apart for a period in excess of one year. All other jurisdictional requirements having been met the Court granted a divorce on February 28, 2007. This is simply to confirm what the Court has already pronounced orally.

[14] Since the Respondent was challenging the enforceability of the Separation Agreement the burden switched to her to have it set aside.

[15] In addition to having the Separation Agreement declared unenforceable the Respondent sought the following relief:

- An equal division of assets and debts;
- An equal division of the value of the lobster fishing business;
- Occupation rent from the time of separation (presumably to the date the house was sold by the Petitioner [Court's comment]);
- Lump sum spousal support;
- Protection from liability for any post-separation debts incurred by the Petitioner.

[16] At the time of separation on March 28, 1993 the parties had been married for over 20 years. They had four children, two of whom were still considered “children of the marriage” as defined by the *Divorce Act*.

[17] These two dependent children were:

- Diane, born January 12, 1981; and
- Leah Marie, born June 25, 1976.

[18] Throughout the marriage both Mr. Rizzo and Ms. Rizzo worked to support their family. After giving birth to her children, Ms. Rizzo took some maternity leave but for relatively short periods of time. By 1989, due to the hard work and thrift of both

parties, they had a house that was paid for, two motor vehicles of which one was subject to an outstanding loan, household furnishings and appliances and \$20,000.00 invested in a GIC. They had some credit card debt but generally they were in good financial shape.

[19] Mr. Rizzo, with the full support of his wife, decided to purchase a lobster license, boat, wharf and gear from another fisherman. Mr. Rizzo wanted to get away from working in the coal mines and become a lobster fisherman like his father before him.

[20] In order to pay the \$90,000.00 purchase price for the fishing operation, Mr. and Ms. Rizzo cashed in their \$20,000.00 GIC and mortgaged their house for approximately \$50,000.00. Mr. Rizzo borrowed the balance from his parents and his sister and brother-in-law. Mr. Rizzo testified to having borrowed \$15,000.00 from his parents and a like amount from his sister and her husband. Some, if not all the money borrowed from his sister and her husband, was likely used to pay for a new boat. The new boat was purchased after the original one was destroyed by fire. The insurance company contributed \$30,000.00 towards the \$47,000.00 purchase price of the new vessel.

[21] After acquiring the fishing operation in 1989, Mr. Rizzo worked full-time as a fisherman. Ms. Rizzo continued to work at Sobeys until 1991 while all along assisting her husband with his business. She maintained the books for the business, made up the payroll and even helped knit the headings for the traps.

[22] After 1991 she continued to perform these functions but also became a member of the crew. She was paid wages while she worked on the boat and collected employment insurance benefits after the season ended. She used her income to support the family as she had always done.

[23] Unfortunately Mr. and Ms. Rizzo not only had to contend with rough waters while at sea but they were also experiencing similar conditions at home.

[24] Mr. Rizzo suspected Ms. Rizzo of carrying on an extra-marital affair. Likewise, Ms. Rizzo suspected Mr. Rizzo of doing the same thing. The alleged indiscretions of the parties have no bearing on the decision this Court has to make. The *Divorce Act* makes it clear that past conduct is not to be taken into consideration unless the conduct is relevant to the ability of that person to act as a parent of a child. Neither child

custody or child support is at issue in these proceedings due to the elapse of time. As such, conduct is of no relevance other than to determine the circumstances that existed at the time the Separation Agreement was signed.

[25] Based on the evidence of Ms. Rizzo which was corroborated in part by the testimony of her daughter, Cynthia MacMullin, and by her neighbour, Jerry Ryan, and at least somewhat admitted by Mr. Rizzo himself, the last few years of their marriage was marked by verbal abuse and physical violence mainly perpetrated against Ms. Rizzo by Mr. Rizzo. Ms. Rizzo, out of concern for her safety, had to flee the matrimonial home on a number of occasions. For a while she resided at Transition House and on several other occasions she had to move into her mother's house while things at home cooled down.

[26] Eventually the couple realized they had reached the end of their married life together and so decided to separate. They discussed the terms of their separation and on April 6, 1993 a handwritten agreement prepared in duplicate was signed by each of them. It simply stated:

I, Jane Frances Rizzo, do hereby relinquish all rights to the house, truck, fishing boat "Leah Marie" and fishing business. The car I will own. The trailer to be used when needed. All assets hereby given to John Rizzo.

[Signed: Jane Rizzo and John Rizzo]

[27] Each of the parties had an original copy of this handwritten agreement. Mr. Rizzo's copy was tendered first as an exhibit. On the bottom half of the document and on the reverse side were additional handwritten entries which Mr. Rizzo attributed to the lawyer he first retained to draft a formal Separation Agreement.

[28] Ms. Rizzo was called to testify a second time. She had discovered a second version of the agreement which she obtained from lawyer Neil McMahan. Apparently she had provided Mr. McMahan with it when she approached him to witness her signature on the formal Separation Agreement that Mr. Rizzo's lawyer had drafted. The second version contained the following additional clause:

I get to keep my job. My unemployment stamps to be put in each year at high rate.
If business ever sold I will receive 50% of profit from sale.

[Signed: Jane Rizzo and John Rizzo]

[29] Mr. Rizzo denies ever signing his name to acknowledge this second entry. It is interesting to note, however, that the Separation Agreement which was eventually prepared by Mr. Rizzo's lawyer and signed by the parties only a few months later did contain a provision whereby Mr. Rizzo agreed to allow Ms. Rizzo to keep her job in the lobster fishing business. It did not, however, include any provision entitling Ms. Rizzo to share 50% of the profits should the business ever be sold. Indeed the Separation Agreement contained a clause whereby Ms. Rizzo agreed to release and discharge any interest she may have in:

- (i) 1984 Ford Truck;
- (ii) The Husband's Lobster Fishing Business;
- (iii) One Travel Trailer; and
- (iv) The Lobster Boat "Leah Marie".

[30] She also agreed to convey her interest in the matrimonial home in return for Mr. Rizzo's agreement to assume sole responsibility for the repayment of the mortgage and an undertaking to try to have her released by the bank from such responsibility.

[31] In effect, Mr. Rizzo, under the terms of the Separation Agreement, became sole owner of pretty well all the matrimonial assets including the entire fishing operation which by 1993 included a new fishing boat paid for mainly out of insurance proceeds.

[32] Mr. Rizzo did assume responsibility for the repayment of all existing matrimonial debts save for Ms. Rizzo's Scotiabank Visa card which she agreed to remain responsible for. Mr. Rizzo also claims to have paid off the balance of the loan taken out to purchase a 1988 Nissan automobile. This vehicle was the only asset other than some household furnishings which Ms. Rizzo retained from the 20-plus year marriage. The amount required to pay off the car loan is not known for certain. Initially, Mr. Rizzo indicated that it was approximately \$4,000.00 but on cross-examination he agreed that it was likely less than this amount. Since there were only five or six payments left to be made on the loan I will set the amount at \$1,500.00.

[33] Ms. Rizzo's main concern was the custody of her children and the guarantee of a job on the boat which would provide her with an income and the opportunity to collect employment insurance benefits. All she had to do was sign the Separation Agreement and have her signature witnessed. Initially she thought she had to have a lawyer act as witness. To this end she contacted two lawyers both of whom refused to act as a witness to her signature.

[34] The first lawyer she contacted was Mr. McMahon. Mr. McMahon testified that Ms. Rizzo appeared "*to be at wit's end*" when he met with her. He cannot recall reviewing the agreement in great detail but enough that he would not sign as a witness to her execution. He advised her not to sign it.

[35] Ms. Rizzo decided not to take Mr. McMahon's advice and instead went to see another lawyer, Ms. Darlene MacRury, of Glace Bay. Like Mr. McMahon, Ms. MacRury advised against signing and she also refused to witness Ms. Rizzo's signature. Ms. MacRury was not called to testify and so the Court has no way of knowing for sure what prompted Ms. MacRury to refuse to act as a witness to Ms. Rizzo's signature.

[36] According to Ms. Rizzo, Mr. Rizzo was pressuring her to have the agreement signed and witnessed. After checking with someone he told her that the witness did not necessarily have to be a lawyer. Ms. Rizzo then had her sister sign as a witness. Ms. Rizzo moved out of the matrimonial home in 1993 taking her two dependent children and an older daughter who was no longer considered a child of the marriage. They moved in with Ms. Rizzo's mother and remained living with her for approximately a year and a half.

[37] Ms. Rizzo worked as a member of Mr. Rizzo's crew in 1993 and 1994. She also maintained the books for her husband's business. Her combined income from employment and employment insurance benefits was greater than Mr. Rizzo's reported earnings for this two year period. This was indeed fortunate since she had not only waived any entitlement she might have had to spousal support but she had also agreed to forego child support payments for the two dependent children. After ceasing to work as a member of Mr. Rizzo's crew in 1995 Ms. Rizzo had to apply for social assistance benefits for herself and her two daughters. The Department of Community Services refused to provide her any assistance until she took Mr. Rizzo to court for child support which he was ultimately ordered to pay.

[38] Ms. Rizzo eventually found other employment but not in the fishing industry. She did what she could to support herself and her family until she was forced to stop working due to ill health. She is now in receipt of disability insurance benefits. Her two youngest children are long since becoming independent and hence able to provide for their own needs.

ISSUE

[39] The first issue for this Court to decide relates to the validity of the Separation Agreement. Under section 29 of the *Matrimonial and Property Act* (“MPA”), R.S.N.S., 1989, c. 275, as amended:

29. Upon an application by a party to a marriage contract or Separation Agreement, the court may, where it is satisfied that any term of the contract or agreement is unconscionable, unduly harsh on one party, or fraudulent, make an order varying the terms of the contract or agreement as the court sees fit.

[40] If the Court determines that the Separation Agreement is valid and hence enforceable then all matters related to corollary relief will have been determined by agreement. The Court would not interfere with an agreement that is equitable and fair taking into consideration all relevant facts. On the other hand if the agreement is found to be unconscionable, unduly harsh on one of the parties or fraudulent then the Court will intervene to protect the interests of both parties.

[41] In the preamble to the *MPA*, the following recitals are important to the proper understanding of this piece of legislation. They read:

WHEREAS it is desirable to encourage and strengthen the role of the family in society;

AND WHEREAS for that purpose it is necessary to recognize the contribution made to a marriage by each spouse;

AND WHEREAS in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship;

AND WHEREAS it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children;

AND WHEREAS it is desirable to recognize that childcare, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets:

[42] There is a presumption that matrimonial assets will be divided equally under the *MPA* (reference ss. 12(1)) although the Court can make an unequal division under section 13 where it is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable. This section also allows the Court to divide property that might not fit the definition of a matrimonial asset as defined in Section 4 of the *MPA*.

[43] Counsel for Ms. Rizzo referred the Court to the Supreme Court of Canada case of **Miglin v. Miglin**, [2003] 1 S.C.R. 303. Counsel for Mr. Rizzo suggested that this case had no application to the case before this Court. **Miglin**, *supra*, dealt with the issue of spousal support in the context of a Separation Agreement. I feel it is applicable and I will refer to it in making my decision.

[44] According to **Miglin**, *supra*, if the agreement was intended to be final, the Court must embark on a two-stage inquiry. At stage one, the Court must look to the surrounding circumstances at the time the agreement was executed. At stage two, the Court must look to the circumstances prevailing at the time of the application.

[45] At stage one, there are two distinct inquiries to be made by the Court. The first is to determine whether the circumstances surrounding the formation of the contract yield reasons to discount it. The second inquiry is into the substance of the agreement. The Court must determine the extent to which the agreement takes into account the overall objectives of the legislation, whether it be the *Divorce Act* for support matters or the *MPA* if it involves the division of assets.

[46] At stage two of the inquiry, the Court must also make two separate inquiries. The first is whether the agreement still reflects the original intention of the parties. The second is the extent to which the agreement continues to reflect the overall objectives of the relevant legislation. (See paras 79 - 91 of **Miglin**, *supra*)

[47] When applying the facts of this case to the two-stage inquiry described in **Miglin**, *supra*, it is clear that the Separation Agreement was signed by Ms. Rizzo in

circumstances where she felt pressured to do so. Based on her evidence which was corroborated by her daughter and a neighbour, the relationship that existed between Mr. and Mrs. Rizzo was at best acrimonious and, at worst, volatile. Mr. Rizzo had previously threatened his wife and had physically assaulted her. He tried to downplay his actions but he could not deny the allegations levelled against him by his wife. For some considerable time he subjected her to degrading verbal attacks and other intimidating conduct.

[48] This led to Ms. Rizzo signing a very one-sided agreement that was so unfair as to be unconscionable.

[49] Despite the advice of two lawyers, Ms. Rizzo signed the agreement. Should the Court then hold her to her agreement and declare it valid and enforceable? Under circumstances where the parties enjoy equal bargaining power and have full knowledge of all relevant facts and particularly in cases where each party has had the benefit of independent legal advice the Courts would normally be reluctant to intervene save for cases where the end result is patently unfair to one of the parties.

[50] In the case before me, Ms. Rizzo sought out a lawyer not so much to obtain legal advice but rather to simply get a lawyer's signature as a witness to her execution. The fact that she signed an agreement which two lawyers advised her not to do nor would they even allow their signatures to be seen on the document is evidence of the duress she must have been under at the time.

[51] The agreement which Ms. Rizzo now seeks to avoid is so clearly one-sided in favour of Mr. Rizzo that it would be unconscionable for this Court to force it upon her.

[52] After 20 plus years of marriage during which she contributed financially to the family almost continuously save for a few brief maternity periods, Ms. Rizzo had custody of her two remaining dependent children and ownership of a 1988 Nissan automobile and virtually little else. She was given an opportunity to work on Mr. Rizzo's boat but was expected to provide for both herself and her children without any contribution whatsoever from him. Even if Ms. Rizzo stood to earn more income as a member of the crew, Mr. Rizzo had the legal and moral obligation to at least provide financially for his dependent children. He did not even agree to do this.

[53] It is true that Mr. Rizzo assumed responsibility for the vast majority of the matrimonial debts including the balance of the loan taken out to purchase the automobile which Ms. Rizzo retained. In return he was given sole ownership of all the remaining matrimonial assets. This included a 1984 Ford F-150 truck, the matrimonial home and the bulk of household furnishings. It also included a lobster fishing license, a relatively new boat and all the gear associated with what was initially a family business. Ms. Rizzo helped to finance the purchase of all family assets, she also worked hard to establish the lobster fishing operation after it was acquired in 1989. She continued to make a contribution right up until the time of separation. By signing the agreement that had been prepared by Mr. Rizzo's lawyer, Ms. Rizzo had practically walked away from everything she had worked so hard to accumulate over the course of her marriage. At the time she might have felt that it was worth giving up everything just to get out of the situation. When she finally obtained legal advice after Mr. Rizzo commenced divorce proceedings in October of 1995, she was persuaded to challenge the enforceability of the agreement. Given the elapse of time since the challenge was commenced certain assets are no longer in the possession of Mr. Rizzo. The matrimonial home was sold by Mr. Rizzo several years after the couple separated. The proceeds of sale were not shared with Ms. Rizzo.

[54] Mr. Rizzo still owns and operates John Rizzo Fisheries. He would like to sell the operation and retire from the fishing industry when he reaches age 60 but he now realizes that this decision might have to be postponed. At present he continues to own all the fishing assets. There was no evidence presented of any current indebtedness associated with this operation.

[55] Counsel for Ms. Rizzo retained the services of Mr. Robert French, a Chartered Accountant ("CA"), who was qualified as an expert in the area of accounting, taxation of income and business valuations including the valuation of fishing licenses and related activities.

[56] Mr. French has held a CA designation since 1970 and has personally performed in excess of 700 business valuations over the course of his career. Of these 700 business valuations about 12 have involved fishing operations such as the kind owned and operated by Mr. Rizzo. He testified in Nova Scotia Supreme Court on one prior occasion as an expert regarding the valuation of a lobster fishing licence.

[57] Mr. French's report which was admitted in evidence is qualified to the following extent:

I have not been engaged to express a formal valuation opinion. Therefore, it must be clearly understood that the estimates of value and the comments in this report do not constitute my considered opinion with respect to the fair market value of the fishing licenses. Rather they are merely intended to provide you with an indication of value for the purpose described. The conclusions under a formal valuation opinion may differ materially from a valuation estimate.

[58] The purpose for his report was to estimate “*the fair market value of the fishing licenses of Mr. Rizzo.... for a divorce action between the parties.*” His report also stated:

Please note my value estimates for both December 31, 1993 and December 31, 2004 are with respect to the licenses only and do not include: the fishing vessel, wharf, gear and lobster traps used in the fishing activity.

[59] In determining his estimate of fair market value, Mr. French relied on the financial information provided by Mr. Rizzo’s counsel. He then used a going concern approach to arrive at an estimated value for the fishing license of \$63,800.00 as of December 31, 1993. Taking into consideration the fact that Mr. and Ms. Rizzo paid \$90,000.00 for the license, boat, wharf and gear in 1989, Mr. French’s valuation is likely quite accurate.

[60] In order to determine the actual distribution of assets and debts it will be necessary to list them and then assign an estimated value based on the evidence accepted:

ASSET	JOHN RIZZO		JANE RIZZO	
	CREDIT	DEBIT	CREDIT	DEBIT
Matrimonial Home	50,000.00			
Furnishings	2,500.00		1,500.00	
1988 Nissan			3,000.00	
1984 Ford F-150	2,500.00			
Fishing License	63,800.00			
Boat (1 year old)	40,000.00			
Equipment/Gear (275 traps, buoys, rope, etc.)	10,000.00			
Travel Trailer	400.00			
Total Credits	\$169,200.00		4,500.00	
LIABILITIES				
Mortgage		40,000.00		
Bank Loan/RBC		10,000.00		
Loan from John Rizzo's Parents		3,000.00		
Loan from John Rizzo's sister and brother-in-law		9,000.00		
RBC/Scotiabank Visa		6,000.00		
Car Loan (Ms. Rizzo's Nissan)		1,500.00		
Total Debits		69,500.00		
Net Value	\$ 99,700.00		4,500.00	

[61] The estimated value of the various matrimonial assets remaining in Mr. Rizzo's possession less the approximate balance of loans outstanding at the time of separation leaves him with assets having a net value of approximately \$99,700.00.

[62] Ms. Rizzo, on the other hand, retained ownership of assets worth approximately \$4,500.00. In arriving at this figure I might be generous in attributing to her household furnishings worth \$1,500.00.

[63] In order to account for the expenses associated with the sale of the matrimonial home I will reduce its estimated value by six percent (6%) to cover real estate commissions and an additional \$500.00 to cover the estimated legal fees that would have been incurred if the property had been sold in 1993. Conversion fees such as are incurred now by virtue of the *Land Titles Act* would not have been a factor back then. After deducting these two amounts the value of the matrimonial home should be: $\$50,000.00 - 6\% (\$3,000.00) - \$500.00 = \$46,500.00$ which reduces the net value of Mr. Rizzo's assets to: $\$99,700.00 - \$3,500.00 = \$96,200.00$.

[64] Mr. Rizzo will likely incur capital gains when he sells the lobster license, boat and gear. The exact amount will depend on how much he realizes when they are sold. Tax laws pertaining to the sale of such assets are always subject to change. According to Mr. French's estimate, Mr. Rizzo's fishing license could be worth as much as \$108,000.00 as of December 31, 2004. He will not have to share any gain with Ms. Rizzo when he eventually sells these assets. As such, I am not prepared to reduce the value of the various fishing related assets to account for any capital gains tax which he might have to pay when the assets are sold. He will have to bear this responsibility himself.

[65] The amount that must be equalized is: $\$96,200.00$ (net value of assets retained by Mr. Rizzo) - $\$4,500.00$ (net value of assets retained by Ms. Rizzo) = $\$91,700.00$. One half of this amounts to $\$45,850.00$.

[66] In order to equitably share the value of matrimonial assets owned by the parties at the time of separation on or about March of 1993, Mr. Rizzo will be required to pay Ms. Rizzo the sum of $\$45,850.00$. He shall have until July 31, 2008 to do so. Until then this shall be a charge against all of Mr. Rizzo's fishing related assets. Ms. Rizzo will be entitled to be paid interest on the outstanding amount at the rate of 5% per annum beginning on December 1, 2007 until payment is received in full.

[67] In addition to an equal division of assets, Ms. Rizzo initially also sought payment for occupation rent, lump sum spousal support and elimination of responsibility for any of Mr. Rizzo's debts. She discontinued her claim for occupation rent during the course of the trial. She still asks for lump sum spousal support.

[68] I am not certain if Ms. Rizzo might still be jointly obligated to repay any of Mr. Rizzo's debts. The mortgage placed on the matrimonial home would have had to have

been paid off when Mr. Rizzo sold the house. The personal loans from Mr. Rizzo's parents and his sister and brother-in-law have also been paid back. The only other possible debt is the loan taken out in 1992 when the house was re-mortgaged with RBC. There was no evidence to suggest this remains outstanding. If it is, I direct Mr. Rizzo to take all reasonable steps to have Ms. Rizzo's name removed and to report to her counsel within 60 days of the date of this decision as to his success in doing so. If the loan no longer remains outstanding, confirmation of this should be provided within the same time frame stipulated above.

[69] After considering all the evidence and the submissions of counsel I have concluded that this is not an appropriate case in which to order spousal support, either periodic or lump sum. Ms. Rizzo was permitted to remain as a member of Mr. Rizzo's crew. This afforded her the chance to earn income and also provided her with the opportunity to apply for employment insurance benefits. Ms. Rizzo decided to forego the opportunity of continuing to be so employed after the 1994 fishing season. Her health might have been a factor but it was likely due to the awkwardness of working with her estranged husband. In any event, she was capable of finding alternate employment and did so. After the elapse of 12 years she has demonstrated an ability to provide for her own needs. I do not consider this an appropriate case to now order spousal support. The delays in bringing this case to court can be attributed somewhat to Mr. Rizzo but the main causes for the delay rest with Ms. Rizzo. She failed to move the case forward as expeditiously as she should have. She could have made an application for interim spousal support when she first sought child support for her two dependent children. She did not. Also for a time she enjoyed a higher income than did her estranged husband. For these reasons I will not order spousal support to be paid.

[70] As to costs, each party shall bear his or her own.

J.