



Topic: Court Ordered Sale of the Matrimonial Home
Opinion by: Justice Doug Campbell

Date: February 13, 2015

This memorandum was prepared by Justice Doug Campbell in reply to the request of ACJ O'Neil as outlined in his Notice to the Bar dated November 6, 2014. It represents Justice Campbell's personal viewpoint and may or may not require some adjustment to conform to the preferences or practices of individual Judges. That will be left up to the Judge and the lawyer, if any, involved. Readers who make use of the within material do so therefore at their own discretion and subject to their own judgment.

- Formulation: 1)** Section 15(b) of the Matrimonial Property Act is the Court's authority to order the market sale of a matrimonial home in a dispute between 2 spouses who are married to each other;
- 2) To avoid chaos, it is incumbent upon the Counsel and the Court to craft conditions, directions and ultimately to maintain a jurisdiction to deal with practical problems that arise in the course of that sale;
- 3) These remarks can also apply, with modification, to a Court ordered sale of any property;
- 4) When a sabotage by one spouse of the sale is predictable, different provisions in the order may be needed such as a conveyance from one spouse to the other by the authority in section 15 (a); and
- 5) For an alternative approach that involves the Sherriff executing a deed, see the decision of Justice Wood in [Nickerson v Nickerson](#) 2014 NSSC 416.

Context:

This task can arise, for example, as part of a decision at the end of a trial, or after a Settlement Conference or otherwise. These suggestions for a draft order or agreement must be tailored to meet the particular circumstances of each case.

The following is a suggested wording to govern the orderly sale of the Matrimonial Home or other real estate or personal property, generally with the necessary modifications that would be obvious:

- 1) The parties shall cooperate completely with each other with respect to the listing and sale of the property known by civic address as XYZ Address, Halifax, Nova Scotia (hereinafter "the property") to provide for its orderly and early sale at fair market value;

- 2) The parties shall have 96 hours from the time that this order is made (whether it is reduced to writing by that time or not) to agree on the following things:
 - a) Their choice of Listing Agent for the property (and it follows that the Listing Company shall be the Company with whom that agent associates);
 - b) The listing price of the property;
 - c) The rate of sales commission that will apply to the sale; and
 - d) All other terms to be included in that Listing Agreement, subject to paragraph 6 below.
- 3) In the absence of agreement within the time limit referred to above as to any of those matters identified in paragraph 2, either Party has the right to apply to the Court for direction regarding disputed issues;
- 4) The Court hereby reserves its jurisdiction pursuant to section 15 of the Matrimonial Property Act and otherwise to decide those issues and any other matters arising from the administration of the sale of the property that was at any time within that Court's jurisdiction and the Court's decision shall bind the parties;
- 5) Both parties shall execute whatever documents are needed to give effect to the ruling contemplated by paragraph 4 or any other Ruling made by the Court;
- 6) It shall be a term of the Listing Agreement that all offers or counter-offers to purchase the Property must be open for acceptance for a minimum of 96 hours commencing at an hour of a business day;
- 7) Any reasonable offer or counter-offer to purchase must be accepted by both parties by executing the offer or counter-offer within the time during which it is open for acceptance;
- 8) Any reasonable counter-offer proposed by one party must be endorsed in writing by the other party within the time frame that allows for that counter offer to be presented in a reasonable time for its possible acceptance;
- 9) In the event of a dispute as to the acceptance of an offer or counter-offer or the making of a counter-offer by the parties, either party may apply to the Court for a ruling and the Court's jurisdiction to so rule is hereby reserved and its ruling shall bind the parties;
- 10) For the Closing of the Sale pursuant to an Agreement of Sale that results from the process referred to herein, each party shall execute all documents that are reasonably necessary to close the transaction. The net proceeds, being the sale price less all

encumbrances necessary to remove valid objections to title, all reasonable closing costs, legal fees and selling costs plus or minus any recognized closing adjustments (plus HST or other taxes that may be applicable) shall be divided equally. *[Note: any other percentage division that may apply to the parties should be substituted here]*

11) Both parties are entitled to copies of all documents and an accounting of this transaction and neither party shall have any greater entitlement than the other to copies of documents or to an accounting.

[If it is likely that one or both parties will do something to sabotage the sale and the Court can be satisfied as to which party is likely to be the sole "Saboteur", the Court should consider a wording in place of paragraphs 1 through 11 unless the context otherwise requires]

There may be occasions when it would be preferable to the below suggestions to instead direct the Sheriff to sign a Deed in favour of the opposite spouse, if the one spouse fails to sign as directed by the court or when that spouse cannot be found. The Sheriff was engaged by Justice Wood in that capacity in the case of *Nickerson v. Nickerson 2014 NSSC 416*. It is clear to me that Justice Wood was relying on the provisions in sections 32 and 37, among others, but particularly section 39 of the Trustee Act which permits the making of a vesting order in certain situations.

When the purpose of the conveyance is to permit the transferee to sell the property on the market, the below conditions that accompany the alternative method could be employed to ensure that the transferor is treated fairly after the transferee receives the conveyance from the Sheriff. In the *Nickerson* decision, a market sale was not contemplated.

The process which I favour in ordinary circumstances is to create a conveyance by court order (which order can be registered pursuant to the Registry Act) relying on the authority in section 15 (a) of the Matrimonial Property Act which has been interpreted to mean that the court's authority is to make a conveyance between spouses by order, as opposed to making an order that requires a party to sign a deed of conveyance.

The latter suggestion is to make an order in substitution for paragraphs 1 through 11, above, as follows:

- 1) "Pursuant to section 15(a) of the Matrimonial Property Act, the Court hereby transfers to [A.B. Surname] (hereinafter referred to as the "Wife") all of the right, title and interest of [C.D. Surname] (hereinafter referred to as "the Husband") in the real property known by

civic address as [whatever] bearing PID # [whatever] and declares that his claims pursuant to the Matrimonial Property Act are hereby released to the Wife.

2) It is hereby declared that the Wife shall hereafter, on her own signature, be at liberty to list and sell the property on terms satisfactory to her [*note: I might instead confine her discretion in some way*], provided that she must:

- a. provide the husband with a copy of all offers and counter-offers of purchase and counter-offers of sale whether accepted or not (within 6 hours of receipt by her of such documents or of her delivery of a counter-offer); and
- b. within 6 hours, similarly provide confirmation of her acceptance (or the Purchaser's acceptance, as the case may be) thereof; and
- c. provide the husband with copies of the closing paperwork (Lawyer's Statement of Adjustments and Disposition of Funds or similar accounting from her if she shall not have a lawyer) within 6 hours of her possession of them ; and
- d. cause the husband to receive 50% (*alternatively state here any other percentage that may apply*) of the net proceeds, being the sale price less all encumbrances necessary to remove valid objections to title, all reasonable closing costs, legal fees and selling costs plus or minus any recognized closing adjustments (plus HST or other taxes that may be applicable);
- e. it being declared that all costs associated with maintaining the subject property or responding to liability claims relating thereto pending the closing of its sale including, but not limited to, mortgage installments, property taxes, fire insurance premiums, landscaping, snow removal, maintenances and other reasonable costs be shared by the parties equally [*unless some other percentage division is authorized by this Court upon application which different percentage shall be ordered*]; and
- f. It being further declared that this Court hereby reserves its jurisdiction pursuant to the Divorce Act and the Matrimonial Property Act and otherwise to administer, implement, execute, give directions and otherwise deal with this transaction and the Court's decision shall be binding in this proceeding in all aspects of it until the transaction shall have been fully implemented or executed.