



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *Dwyer v. Bussey*, 2017 NLCA 68

Date: November 24, 2017

Docket: 201501H0062

BETWEEN:

LINDA DWYER

APPELLANT

AND:

LLOYD BUSSEY

RESPONDENT

Coram: Green C.J.N.L., White and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (F)
(2015 NLTD (F) 33)

Appeal Heard: January 12, 2016

Judgment Rendered: November 24, 2017

Reasons for Judgment by White J.A.

Concurred in by Harrington J.A.

Dissenting Reasons by Green C.J.N.L.

Corrected Decision: The text of the original judgment was corrected on November 27, 2017. A description of the correction is appended.

Counsel for the Appellant: Douglas Moores Q.C.

Counsel for the Respondent: Wayne Bruce

White J.A.:

[1] This appeal involves consideration of the legal nature of a conjugal relationship in order to determine if the parties are “spouses” under the *Family Law Act*, RSNL 1990, c. F-2 (the *Act*).

BACKGROUND

[2] Lloyd Bussey and Linda Dwyer had been living together for a few years on July 12, 2008 when they participated in a peculiar ceremony. Alone in Mr. Bussey’s house in Port de Grave, with no officiant, witnesses, or licence, they exchanged rings that had been blessed by a minister, opened a bible, and read out the verse, “What God has joined together, let no man put asunder.”

[3] In some sense, Mr. Bussey and Ms. Dwyer may have intended to create a traditional marriage. They were living together in a conjugal relationship. Their ceremony deliberately echoed the formalities of a Christian wedding. Over the next few years they called each other husband and wife and introduced themselves as husband and wife to friends, family, and the congregation at their church. They received and preserved cards congratulating them on their wedding. But Mr. Bussey and Ms. Dwyer did not intend to create a *legal* marriage. They had both been married before, characterized themselves as widows on tax forms, and knew they were not complying with marriage law.

[4] The applications judge concluded that the relationship of the parties did not entitle them to benefit from the provisions of the *Act* for the purpose of property division.

ISSUE

[5] Are Mr. Bussey and Ms. Dwyer “spouses” under the *Act*?

ANALYSIS

[6] The rules set out in the *Act* relating to the matrimonial home and family property only apply to “spouses”, which are defined in s. 2(1)(e)(iii):

“spouse” means either of 2 persons who

- (i) are married to each other,

(ii) are married to each other by a marriage that is voidable and has not been voided by a judgment of nullity, or

(iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year,

and, for the purposes of an application under this Act, includes a widow or widower.

[7] Mr. Bussey and Ms. Dwyer are spouses if and only if

1. They are married, in which case they fall under either subparagraphs (i) or (ii) depending on whether their marriage is voidable, or
2. They “have gone through a form of marriage with each other, in good faith, that is void”.

Are Mr. Bussey and Ms. Dwyer Married?

[8] The first question is whether there was a marriage. At the time of the ceremony the key provision was s. 44 of the *Solemnization of Marriage Act*, RSNL 1990, c. S-19:

Where the parties to a marriage solemnized in good faith and intended to be in compliance with this Act were not under a legal disqualification to contract the marriage and after that solemnization have lived together and cohabited as husband and wife, the marriage shall be considered to have been validly solemnized, notwithstanding that the person who solemnized the marriage was not authorized to solemnize marriage and notwithstanding an irregularity or insufficiency in the issue of the licence.

(The successor provision, s. 32(2) of the *Marriage Act, 2009*, SNL 2009, c. M-1.02, is almost identical.)

[9] Mr. Bussey and Ms. Dwyer’s ceremony cannot be brought within this provision. It is not a case where the officiant “was not authorized to solemnize marriages”. There was no “person who solemnized the marriage”. There was no “irregularity or insufficiency in the issue of the licence” as there was no licence at all. Further, Mr. Bussey and Ms. Dwyer did not “[intend] to be in compliance with [the Act]”.

[10] As Mr. Bussey and Ms. Dwyer are not married, they can only count as spouses under the *Act* if (1) the ceremony between Mr. Bussey and Ms.

Dwyer was a “form of marriage” and (2) Mr. Bussey and Ms. Dwyer “[went] through it ... in good faith”.

What does “Good Faith” Mean?

[11] It is unnecessary to decide what “form of marriage” means. I am prepared to assume for the moment that the ceremony was a form of marriage. The central question is whether Mr. Bussey and Ms. Dwyer went through the ceremony “in good faith”.

[12] Three possible meanings of the phrase “in good faith” have been suggested:

1. An intention to form a conjugal relationship.
2. An intention to be married in any sense—legal, social, religious, etc.
3. An intention to be legally married.

[13] Choosing among these interpretations requires an analysis of the statutory text, the jurisprudence, the scheme of the *Act*, and the policy of the *Act*.

The Statutory Text

[14] There is a strong presumption that every word in a statute has meaning: *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 at 45.

[15] Whatever “form of marriage” may mean, it implies an intention to form a conjugal relationship and an intention to be married. So the words “in good faith” are redundant unless they mean “an intention to be legally married”.

Jurisprudence

[16] The good-faith exception can be traced to *Lord Hardwicke’s Act* in 1753, which set out mandatory formalities for entering a marriage in England. The *Act* provided without exception that any marriage that failed to comply with the formalities was void. The courts interpreted that stricture to mean that any deliberate departure from the statutory forms was fraud and invalidated the marriage. A small inadvertent departure would not invalidate

the marriage: *The King against The Inhabitants of Billingshurst* (1814), 3 M. & S. 250, 105 E.R. 603.

[17] This policy was expanded and given a firm statutory basis in section 22 of the 1823 *Marriage Act*. If only one party was aware of the informality, the marriage was valid; if both were aware, the marriage was fraudulent and void: see *Tongue v. Tongue* (1836), 1 Moo. P.C. 90; *Greaves v. Greaves* (1872), 2 P. & D. 423.

[18] Fraud is the antithesis of good faith.

[19] Canadian courts have consistently followed that policy. An invalid marriage was formed “in good faith” if the parties thought it would be legally valid. For cases involving marriage statutes, see e.g. *Alspector v. Alspector*, [1957] O.R. 14 (S.C.), aff’d [1957] O.R. 454 (C.A.); *Friedman v. Smookler*, [1964] 1 O.R. 577 (S.C.); *Smith v. Waghorn*, 2012 ONSC 496; *Isse v. Said*, 2012 ONSC 1829; and *Hassan v. Hassan*, 2006 ABQB 544; *Lin (Re)* (1993), 137 A.R. 1 (S.C.). For cases involving matrimonial-property statutes, see *Re Harris and Godkewitsch* (1983), 41 O.R. (2d) 779 (Prov. Ct.); *Debora v. Debora* (1999), 167 D.L.R. (4th) 759 (Ont. C.A.); *Reaney v. Reaney* (1990), 28 R.F.L. (3d) 52 (Ont. H.C.); and *Guptill v. Wilfred*, 2009 NSSC 44, 275 N.S.R. (2d) 170.

[20] The old Québec *Civil Code* similarly provided that an invalid marriage would have civil effects if the parties entered into it in good faith. That is, if the parties intended to comply with the law: see *Paré v. Bonin*, [1977] 2 S.C.R. 342; *Stephens v. Falchi*, [1938] S.C.R. 354. See also *Berthiaume v. Dastous*, [1930] A.C. 79 (P.C.).

The Scheme of the Act

[21] Like many family-law statutes of the late twentieth century, the *Act* is organized around a distinction between “spouses” and “partners”. In contrast to spouses, partners are persons “who have cohabited in a conjugal relationship outside of marriage”: s. 35(c).

[22] Parts I and II, which ensure a sharing of the matrimonial home and family property, apply only to “spouses”. Part III, which deals with spousal support, applies equally to spouses and partners. And Part IV distinguishes between “marriage agreements” (for “persons who are married to each other or intend to marry”: s. 62) and “cohabitation agreements” (s. 63).

[23] The logic underlying this two-track regime was discussed by Bastarache J. in *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, explaining the *Matrimonial Property Act*, RSNS 1989, c. 275:

48 ... The decision to marry, which necessarily requires the consent of each spouse, encapsulates within it the spouses' consent to be bound by the proprietary regime that the *MPA* creates.

49 Unmarried cohabitants, on the other hand, maintain their respective proprietary rights and interests throughout the duration of their relationship and at its end. ... The general principle is that, without taking some unequivocal consensual action, these cohabiting persons maintain the right to deal with any and all of their property as they see fit.

50 The *MPA*, then, can be viewed as creating a shared property regime that is tailored to persons who have taken a mutual positive step to invoke it. Conversely, it excludes from its ambit those persons who have not taken such a step. This requirement of consensus ... enhances rather than diminishes respect for the autonomy and self-determination of unmarried cohabitants and their ability to live in relationships of their own design. ...

[24] This logic remains controversial: see *Walsh*, per L'Heureux-Dubé J., dissenting; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, per Abella J., dissenting. But in interpreting a statute the Court cannot second-guess the wisdom of the legislative scheme or policy. The Court's role is instead to interpret the legislative text to achieve fair and practical results within the parameters the legislature has set: *Archean Resources Ltd. v. Newfoundland*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124, at paras. 20–22.

[25] If, as here, a couple deliberately avoids the legal consequences of marriage, it is difficult to conclude that they have taken a mutual positive step to bring themselves within the matrimonial property regime.

Policy of the Act

[26] In assessing the fairest and most practical way to interpret the *Act*, it is important to acknowledge that restricting the matrimonial property regime to couples who believe they are legally married can work real injustice.

[27] The matrimonial property regime is meant to protect and recognize the equal contributions of partners, especially partners who are economically dependent in whole or in part. Yet marriage is not a realistic option for some people: see *Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 153, per

McLachlin J. Other people mistakenly believe until it is too late that unmarried relationships have the same legal effects as married ones.

[28] These situations are partly addressed by the modern law of unjust enrichment: *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269. Unjust enrichment, however, can be an imperfect substitute for a statutory property-sharing regime.

[29] Yet couples who deliberately choose to avoid the legal consequences of marriage may have good reasons for doing so. Couples differ in age and stage of life; in commitment; in values; in interdependence; in division of domestic and economic labour; in wealth and earning power; in obligations to dependents, family and others; in aspirations for career or children. The *Act* is not suitable to every couple's circumstances. One size does not fit all.

[30] Respect for couples' autonomy requires deference to couples' choices about how to arrange their own affairs. See *Walsh* at 40, 43, 50, 54; *Quebec v. A* at 272–279, *per* Lebel J.; 435–438 and 442–444, *per* McLachlin C.J. Couples can express their choices through a marriage or cohabitation contract: see sections 31, 62, and 63. But, as long as the law distinguishes between the rights of the married and unmarried, couples also may signify their choice of property regime by entering into a legal marriage or deciding not to.

[31] These arguments have a special force in this jurisdiction because, uniquely among Canadian family-law statutes, the *Act* automatically places every matrimonial home in joint tenancy. The “difficulties” this can create were explained with characteristic vigour and fairness by the then Minister of Justice T. Alexander Hickman when he first introduced the joint-tenancy system:

A man has one major asset, the family home, that he has built, acquired, paid for, worked for over a period of, we will say twenty years. And then he decides to marry and he marries a lady who for one reason or another, [has] either property she inherited from a former husband or property she has worked for and bought, [and] she decides... that the matrimonial home will be the one that her husband owns. There you have a situation where, should there be a dissolution of marriage, or death, half of that home goes to the wife, whereas her properties are not subjected to that distribution of the marriage assets. Now, sure, there will be that kind of problem existing from time to time. You may have a situation—there was one brought to my attention where you have, we will say, a child of the marriage who is forty or fifty years of age, who has worked hard with her father—her mother is dead—and looked after the family home, and suddenly, the father

decides to remarry and then the matrimonial home is owned by the father and his wife; the father dies and the daughter finds herself in a situation where there may be some inequities.

(See J. Derek Green and Christopher P. Curran, *T. Alexander Hickman: Speeches and Writings from a Life in the Law* (St. John's, NL: Privately printed, 2000, at p. 107.)

The Need for Certainty

[32] Another practical problem is that the *Act* in its current form presumes that there is a bright line distinguishing married from unmarried couples. In particular, the joint-tenancy provisions of Part I require couples and third parties to be able to ascertain with certainty whether there is a marriage in the appropriate sense.

[33] Interpreting “good faith” as an intention to be legally married ensures certainty. Only couples who honestly believe they are legally married will be spouses under the *Act*.

[34] Any other definitions would create an ambiguous intermediate class of people who are not legally married and do not believe themselves to be legally married, but may nevertheless be spouses under the *Act*. It is difficult to foretell whose relationships might afterwards be characterized as marital or conjugal.

[35] Cohabiting couples often hope or plan, with varying degrees of commitment, to live together exclusively for life. Sometimes couples who are not married choose to pass as a married couple to ease some particular social situation. It would be difficult for a court to piece together, from fuzzy memories clouded by pecuniary consequences, all the various promises of a conjugal relationship to discern whether the couple’s commitments passed some threshold of firmness. And taking the law as “[t]he prophecies of what the courts will do in fact”, it would be impossible for many couples to tell whether they would turn out to be married or not. (See Oliver Wendell Holmes, Jr., “The Path of the Law” (1897) 10 *Harvard Law Review* 457.)

[36] After a split, this uncertainty would take the form of needless, acrimonious litigation. The formalities of a legal marriage ensure clear evidence of the parties’ intentions. Creating an intermediate class of semi-marital relationships will invite the parties to present wide-ranging evidence about the nature of their relationship and intentions.

[37] People often have mixed or complex reasons for actions; they rarely leave unambiguous evidence of those reasons. Litigation will often invite a broad analysis of each party's character and conduct and often an unflattering one that will undermine the statutory policy of keeping the matrimonial property regime separate from any moral evaluation or condemnation of misconduct: s. 23.

Conclusion on Good Faith

[38] The statutory text, a long and cogent line of jurisprudence, the scheme of the *Act*, respect for couples' autonomy, and the need for certainty all imply that a couple only enters a form of marriage "in good faith" if they intended to become legally married.

CONCLUSION

[39] Mr. Bussey and Ms. Dwyer are not married and, because they deliberately chose not to enter into a legal marriage, they did not enter into a form of marriage "in good faith". They are not spouses. I would dismiss the appeal. I would not award costs as the issue considered was novel.

C. W. White J.A.

I concur: _____

M.F. Harrington J.A.

Reasons Dissenting by Green C.J.N.L.:

[40] This appeal considers the circumstances under which an unmarried couple can be treated as spouses for the purpose of division of property under the *Family Law Act*, RSNL 1990, c. F-2.

BACKGROUND

[41] The appellant, Linda Dwyer accepted the respondent, Lloyd Bussey's proposal of marriage, signified by presentation of an engagement ring, in

December of 2006. They began cohabiting in Ms. Dwyer's home in Harbour Grace but subsequently she moved into his house in Port de Grave which was in the process of being finished. They cohabited in that house until there was a breakdown in their relationship in 2014, at which time Ms. Dwyer moved out.

[42] Shortly after they moved into the Port de Grave house, Ms. Dwyer and Mr. Bussey participated in a ceremony with neither minister nor other marriage commissioner present, and without any other witnesses. Mr. Bussey held open a Bible and quoted a passage to the effect: "What God has joined together, let no man put asunder" (It is not clear from the evidence whether the reference was to Matthew 19:6 or Mark 10:9). They exchanged rings. They had not previously obtained a marriage licence as required by the *Marriage Act*, SNL 2009, c. M-1.02 but they had previously approached their local pastor, told him of their intention to be married and asked him if he would bless the rings. The pastor testified that he expected to hear from the parties again and that a formal marriage ceremony would be conducted. When he did not hear from them, he assumed they had gone elsewhere to have the ceremony performed.

[43] Following the ceremony, they referred to themselves as husband and wife in the community and Mr. Bussey introduced Ms. Dwyer to the congregation at their church and to family and friends as his wife (although he now says he meant 'common law' wife). Ms. Dwyer says they held themselves out as being married and provided evidence of communication from friends congratulating them on their wedding. There was also an email from Mr. Bussey to a third party in which he referred to having taken a "vow of marriage" (he now says he meant a "vow of fidelity").

[44] It is accepted by the parties to this appeal that the ceremony in question was not in conformance with the formalities of the *Marriage Act*. Further, given the fact that both parties had been previously married and were now widowed, it cannot be said that they did not know the rudiments of what a legal marriage ceremony would generally entail.

THE APPLICATION JUDGE'S DECISION

[45] The applications judge ruled that, on the facts as described above, the parties had not gone through a "form of marriage in good faith" within the meaning of sub-paragraph 2(1)(e)(iii) of the *Family Law Act* and therefore could not be considered "spouses" of one another. As a consequence, the

appellant was not entitled to avail of the provisions of the *Act* to obtain a division of their matrimonial property.

[46] The applications judge's conclusion and reasoning is captured in the following passage from her judgment:

[27] It follows that the form of marriage under the [*Family Law Act*] to be recognized in Newfoundland and Labrador has to comply with the laws of the Province, meaning, at a minimum, an intention on the part of the parties to comply with the [*Marriage Act*]. Holding ceremonies yourself without a marriage licence, an officiant, or witnesses and exchanging rings can only be recognized in this Province as a common law union, one not recognized by the definition of "spouse" under the *FLA* for division of property purposes. It is not the intention of section 2 of the *FLA* to recognize these situations as a third type of union or marriage for the purposes of property division.

[47] The reference to a "third type of union" in the foregoing passage is a reference to the submission during argument that the *Act*, specifically subparagraph (1)(e)(iii), effectively recognized, for the purpose of division of matrimonial property, a category of relationship that was neither a legal marriage nor a "common law" union. Rejecting this argument, the applications judge held there could be only two categories of conjugal relationships outside of a marriage in compliance with the *Marriage Act*, one where the parties intended, but failed for some technical reason, to comply with the local legislation, and one which she styled as a "common law union". In her view, only the former was covered by section 2:

[30] ... Anything that does not reach this standard may well lead to a common law union which is not covered by section 2 of the *FLA* for property division purposes as that is not the intention of this section.

[48] In referring to "common law union" it is clear from the tenor of her judgment that the applications judge was using the term "common law union" in the colloquial sense of two people living together outside of marriage, whether under a cohabitation agreement or not and no matter whether the relationship was of an uncertain duration or an ill-defined character.

[49] Having engaged in the foregoing analysis, the applications judge then stated at the very end of her judgment, her judicial conclusion:

[31] It is therefore my conclusion the Lloyd Bussey and Linda Dwyer did not have a valid marriage.

[50] It should be observed at this point that in purporting to state this conclusion in that way, the applications judge erred by focusing on the wrong question. The focus of the inquiry was not whether the parties were validly married, a point she recognized earlier in her judgment (paragraph 8). It was whether, notwithstanding non-compliance with marriage formalities, they were nevertheless to be regarded a “spouses” as defined in sub-paragraph 2(1)(e)(iii) for the purpose of property division. One is left with the impression that by stating her conclusion in terms of whether the parties were married, she was concerned that any extended definition of “spouse” would in some manner incidentally recognize another category of marriage relationship. That of course, was not the case. Even if the parties were to be regarded as spouses for the purpose of property division (which the applications judge held they were not) they would still not be considered “married” for any other purpose.

[51] I mention this because this apparent unstated concern may well have influenced the applications judge in her approach to the interpretation of sub-paragraph 2(1)(e)(iii). Nevertheless, because other parts of her analysis clearly do appear to recognize that what was at issue was whether a non-compliant marriage could qualify to enable a party to meet the extended definition of “spouse” for the purpose of property division, I will proceed to deal with the issue in that context.

ISSUE ON APPEAL

[52] The issue presented in this case is therefore whether the applications judge erred in concluding that Mr. Bussey could not be regarded as a “spouse” of Ms. Dwyer for the purposes of property division because he and Ms. Dwyer did not intend to comply with the recognized marriage formalities in this jurisdiction.

ANALYSIS

(a) The Legislation

[53] Parts I and II of the *Family Law Act* provide for the ownership, division and disposition of, respectively, a matrimonial home and matrimonial assets between “spouses.” One of the triggering events that permit an application to court for a division of assets is where “the spouses have been separated and there is no reasonable prospect of the resumption of

cohabitation” (s. 21(1)(c)). It is accepted that, assuming the parties are “spouses”, this requirement has been satisfied.

[54] The key statutory provision for present purposes is paragraph 2(1)(e) which defines the word “spouse”. It reads:

(e) “spouse” means either of 2 persons who

- (i) are married to each other,
- (ii) are married to each other by a marriage that is voidable and has not been voided by a judgment of nullity, or
- (iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year,

and, for the purposes of an application under this Act, includes a widow or widower.

[55] For the purposes of this case, the applicable provision is sub-paragraph 2(1)(e)(iii). It is accepted that the parties are not “married” in the conventional sense, nor does the relationship constitute a voidable marriage. Sub-paragraphs (i) and (ii) are therefore inapplicable.

[56] The scope of sub-paragraph (iii) depends in large measure upon the meaning and effect of the underlined phrases in the quoted definition (“form of marriage”, “good faith” and “void”).

[57] The approach to interpretation of provincial statutes in this jurisdiction is to ascribe to the words used a meaning that reconciles those words with all other indicators of meaning, including the mischief against which the remedial nature of the statute is directed as well as the context of the surrounding legislative text and related statutes and the social context of the provision, and by inference therefrom, the purpose or object of the provision under consideration: *Interpretation Act*, RSNL 1990, c. I-19, s. 16; *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124 at paragraphs 22-23; *R. v. Pardy*, 2014 NLCA 37, 357 Nfld. & P.E.I.R. 49 at paragraphs 51-52; *Lynch v. St. John’s (City)*, 2016 NLCA 35, 380 Nfld. & P.E.I.R. 13, at paragraphs 75-78, 79.

(b) “Marriage”

[58] Before dealing with the interpretation of sub-paragraph 2(1)(e)(iii), it is also worth considering what the word “married” in sub-paragraphs (i) and (ii) encompasses, as the answer to that question will help to inform as to the scope of sub-paragraph (iii), in particular, the meaning of “*form of marriage*”.

[59] It should first be noted that “marriage” or “married” is not defined in the *Act*. It is tempting to say that they should be interpreted in accordance with the *Marriage Act*, a related statute. If that were the case, however, it would mean that sub-paragraphs (i) and (ii) would only catch marriages entered into in this jurisdiction and strictly in accordance with the formalities of that Act. That would mean that persons properly married under the laws of another province, territory or another country would not be considered to be “married” for the purpose of obtaining access to the division of assets provisions of the *Family Law Act* notwithstanding that they acquired assets in the province and resided and raised a family here. That is not the approach to interpretation that has been taken in other cases. See *Best v. Best*, 2016 NLCA 68 (assuming, *sub silentio*, that if a marriage had been validly constituted according to the laws of Nepal, the parties would be “spouses” for the purpose of the application of the *Family Law Act*).

[60] It might be possible, of course, to regard an extra-provincial or foreign marriage as invalid (and hence not amounting to “marriage” under sub-paragraphs (i) or (ii)) because it does not conform to the local *Marriage Act* and treat it, instead, as a “form of marriage” under sub-paragraph (iii). To do that, however, would require treating all such marriages, though validly created by the *lex loci celebrationis*, as “void”. That would be inconsistent with the conflicts of law rules for recognition of foreign marriages.

[61] Furthermore, it must be remembered that the constitutional legislative jurisdiction as to marriage and divorce in Canada is assigned to the federal government under section 91(26) of the *Constitution Act* and that legislative jurisdiction has been exercised by the enactment of the *Civil Marriage Act*, SC 2005, c. 33 and the *Divorce Act*, RSC 1985, c. 3 (2nd Supp.). What constitutes the essential attributes of a marriage and access to divorce and corollary relief are uniform throughout Canada. It would not be sensible to deny access to relief with respect to division of matrimonial homes and matrimonial assets consequent on marriage breakdown under provincial law on the basis that couples validly married in other parts of Canada are not

“married” or by allowing access only by treating such a relationship as a “form of marriage” and artificially treating it as a “void” marriage even though it is perfectly valid for other purposes.

[62] It is also worth noting that even marriages not fully in compliance with the *Marriage Act* are in some circumstances nevertheless to be treated as valid marriages. Sub-section 32(2) provides:

(2) Where the parties to a marriage performed in good faith and intended to be in compliance with this Act were not under a legal disqualification to contract the marriage and after that marriage have lived together and cohabited as spouses, the marriage shall be considered to have been validly performed, notwithstanding that the person who performed the marriage was not authorized to perform a marriage and notwithstanding an irregularity or insufficiency in the issue of the licence.

[63] Such non-compliant marriage ceremonies are nevertheless validated *ex post facto* and would not therefore be considered “void.” This again points to the fact that the reference to “married” in sub-paragraph 2(1)(e)(i) is not limited to marriages fully in compliance with the procedural requirements of a marriage even under provincial law.

[64] As a result of this analysis, I conclude that the reference to “married” is not limited to a relationship that constitutes a marriage that is in full compliance with the provincial *Marriage Act*. It can and does include other relationships that are validly recognized as marriages according to the laws of other Canadian jurisdictions as well as of other foreign jurisdictions where they are recognized as valid in Canada according to conflicts rules. It would also include marriages that are valid on other bases, as for example, under common law if common law principles are still recognized as effective.

(c) “Common Law” Marriages

[65] By “common law marriage”, I am referring to a relationship which, though informal by contemporary standards was nevertheless recognized by the law as a legally valid union and as carrying legal incidents as a result of its existence (a “true” or legally-recognized common law marriage), not a relationship of cohabitation which exists illegitimately outside of the forms recognized by law (the common law marriage, as used in common parlance).

[66] The original true common law marriage did not require compliance with specified formalities other than legal capacity to marry and an oral

declaration and commitment to live together as husband and wife. Gushue and Day explain:

While the history of solemnization of marriage is in some doubt, this much is certain: in England, prior to the Council of Trent in 1563, notice of marriage was not required and no religious or other ceremony had to be performed. The only requirement of marriage was an oral declaration by the parties taking each other as husband and wife. The marriage was immediately binding where they mutually declared: “I take you as my wife (or husband)”. Where they exchanged declarations that “I shall take you as my wife (husband)”, the marriage became binding as soon as it was consummated.

(Raymond P. Gushue and David C. Day, *Family Law in Newfoundland* (St. John’s: Government of Newfoundland, Department of Printing Services, 1973) p. 25; see also p. 40)

[67] (To the same effect, see P. M. Bromley, *Family Law* (London: Butterworths, 1971), p. 26. So long as the declaration was to take each other immediately as husband and wife (*per verba de praesenti*), the marriage was valid without further formality. See, however, Rebecca Probert, *Marriage Law and Practice in the Long Practice in the Long Eighteenth Century: A Reassessment*, (Cambridge, UK: Cambridge University Press, 2009) chapter 2, which argues that although the contract *per verba de praesenti* had some legal incidents attached to it, it could not be regarded as a full alternative to a regular marriage, since it did not carry the same legal rights as one celebrated in church).

[68] The problem with common law marriages, however, was their clandestine nature. Following the enactment of *Lord Hardwick’s Act*, 26 Geo II, c. 33 in 1753 which was enacted “for the better preventing of clandestine marriages”, any marriage (with some limited exceptions) which took place otherwise than strictly in accordance with the rites of the Church of England was declared null and void for all purposes. That *Act*, however, was expressly declared not to apply to the English colonies. Consequently, the previous common law, to the extent it was received in Newfoundland by the reception of English law doctrine, would have continued to apply. As Trudi Johnson, in her article “A Matter of Custom and Convenience: Marriage Law in Nineteenth Century Newfoundland”, (2003) 19 *Newfoundland and Labrador Studies*, No 2, notes, informality was certainly not regarded as vitiating marriage in the colony in and before the early nineteenth century:

Often, couples simply declared their desire to be married and a leading community member, usually a merchant, performed the ceremony. The service would be repeated when a clergyman arrived in the harbour. This customary practice, well-established by the beginning of the nineteenth century, continued in remote areas even after marriage laws were enacted.

[69] Although the practices referenced by Johnson appeared to encompass something more than a simple declaration and commitment (by emphasizing the use of a merchant as an officiant) – and as such could be said to be at least an unsophisticated attempt to emulate the mandated requirement after *Lord Hardwick’s Act*, that some sort of (religious) official preside at the ceremony – the point that is relevant here is that there existed in Newfoundland a practice of developing and using forms of marriage that accommodated local circumstances. Furthermore, as Johnson notes, even after imperial legislation purporting to regulate marriage in the colony (1817, 1824, 1829 and 1832) and requiring a form of church-regulated ceremony, other forms of marriage were still observed.

[70] This is not the place for a detailed recitation of the subsequent history of marriage legislation in Newfoundland, nor indeed for the drawing of any conclusions as to whether common law marriage still co-exists with the formal marriage ceremony provided in the *Marriage Act*. It is sufficient to record that the historical and social background to marriage legislation in this province is characterized by a degree of informality that was necessary to allow for social and community life to function.

[71] I turn now to the interpretation of the scope of sub-paragraph 2(1)(e)(iii).

(d) The True Meaning of paragraph 2(1)(e)(iii)

[72] A court faced with ascribing meaning to a legislative provision in this province is mandated by section 16 of the *Interpretation Act* to construe the provision “according to its true meaning.” In performing this function, the court must examine the words used and all other relevant indicators of meaning with a view to attempting to reconcile them so as to arrive at the best defensible meaning possible.

(i) Words

[73] In this case, meaning must be ascribed to the phrases “form of marriage”, “in good faith”, and “void”.

A. “Form of Marriage”

[74] The word “form” has a variety of meanings, including:

- a shape, an arrangement of parts
- the outward aspect or shape of a body
- a person or animal as visible or tangible
- the mode in which thing exists or manifests itself
- a species, kind or variety
- a printed document with blank spaces for information to be inserted
- a customary method, what is usually done
- a set order of words; a formula
- behavior according to a rule or custom
- correct procedure
- formality or mere ceremony

(See *The Canadian Oxford Dictionary* (Don Mills, Ontario: Oxford University Press, 2004), 2nd ed.)

[75] In this case, the parties went through a ritualistic ceremony by opening the Bible, referencing a passage relating to the essence of marriage, declaring their intentions and exchanging rings. It was a focused ceremony directed to a specific purpose. But is it sufficient for the parties effectively to create their own “form” or must they attempt to fit their actions within some pre-existing, already-sanctioned, form? A narrower reading of some of the definitions of “form” referenced above could be said to lead to the latter meaning (“set order of words, a formula”; “behavior according to a rule or custom”). Other definitions (“formality or mere ceremony” could be said to include the more expansive meaning because there is no expressed limit in the definitions as to who could create the form or when. If that is so, that would allow for a form of marriage to be created and applied by the parties provided there was some ceremonial aspect to it that is an objective manifestation of an intention to create a relationship that has the essential features of the married state.

[76] (I would also note in passing that even if the narrower definition of form were to prevail, requiring an attempt to comply with some preexisting formula, an attempt to comply with common law forms of marriage might still fall within that narrower definition.)

[77] What are the essential features of the married state? They are to be found in the *Civil Marriage Act*:

2. Marriage for civil purposes is the lawful union of two persons to the exclusion of all others
 - 2.1 Marriage requires the free and enlightened consent of two persons to be the spouse of each other.
 - 2.2 No one who is under the age of 16 years may contract marriage.
 - 2.3 No person may contract a new marriage until every previous marriage is dissolved by death or by divorce or declared null by a court order.

[78] Extrapolating from these provisions we can conclude that the essence of a marriage in Canadian law is the voluntary agreement of two persons, neither of whom is already married, who are not under the age of 16 to cohabit, to the exclusion of all others, in a relationship that is intended to be permanent unless terminated by death, divorce or a decree of nullity.

[79] A ceremonial recognition of some kind marking an agreement to cohabit in an exclusive permanent relationship would therefore meet the meaning of “form of marriage” if the notion of form could be said to encompass a ceremonial acknowledgement of the commitment that is devised by the parties concerned, rather than being limited to attempted compliance with a pre-existing form.

B. “Good Faith”

[80] It was argued in this case that the requirement that the parties go through a form of marriage “in good faith” must mean that they must at the time intend to comply, and mistakenly believe that they are complying, with the legal and procedural requirements of the *Marriage Act*. That was the conclusion reached by the applications judge.

[81] I would note in passing that, unlike the early English legislation dealing with marriage, the Newfoundland and Labrador *Marriage Act* does not declare that failure to comply with the Act renders the purported marriage void. It does not therefore expressly outlaw a true common law marriage which was, of course, recognized in early Newfoundland. This is in contrast to *Lord Hardwick’s Act*, 1753 (U.K.) which specifically provided that failure to comply with the marriage formalities of that Act rendered the marriage void. The history of the informality of marriage in Newfoundland and Labrador and the absence of an explicit provision making it clear that the *Marriage Act* is the exclusive vehicle for entering the married state

suggests that it may be less important to limit the consequences of marriage only to those who clearly wish to comply with it.

[82] Reference has already been made to sub-section 32(2) of the *Marriage Act* which makes it clear that non-compliance with certain marriage formalities (primarily licensure and ceremonial authority) does not affect the validity of the marriage in certain circumstances. Of interest in the present context is that, unlike paragraph 2(1)(e)(iii) of the *Family Law Act*, sub-section 32(2) speaks in terms of a marriage “performed in good faith” and “intended to be in compliance with this Act,” thereby suggesting that the concept of good faith must involve something other than an intention to comply with the legislated marriage ceremony requirements, because the requirement of intention is stated as a separate criterion. Since statutes *in pare materia* should, to the extent possible, be read consistently with each other, this further suggests that the use of the good faith requirement in subparagraph 2(1)(e)(iii) should equally be interpreted as meaning something other than an honest belief in compliance with existing legislation.

[83] In concluding that good faith did mean an intention to comply with the local legislation, the applications judge relied on a number of cases from other jurisdictions which, in the context of their own legislation and different issues, assert that to act in good faith means to intend to comply with the legislated marriage formalities: *Kanafani v. Abdalla*, 2010 ONSC 3651, 89 R.F.L. (6th) 189; *Guptill v. Wilfred*, 2009 NSSC 44, 275 N.S.R. (2d) 170; *Debora v. Debora* (1999), 116 O.A.C. 196 (C.A.); *Isse v. Said*, 2012 ONSC 1829, 19 R.F.L. (7th) 413. None of these cases is binding on this court and, if applied, would lead to a result that would be inconsistent with the implication flowing from the use of “intended to be in compliance with this Act” elsewhere but not in section 2. Furthermore, other cases suggest a conclusion different from that which was arrived at by the applications judge.

[84] The cases referred to by the applications judge have their genesis in *Alspector v. Alspector*, [1957] O.R. 454, 9 D.L.R. (2d) 679 (S.C.), a decision not directly referenced by the applications judge. That case concerned the validity of a Jewish religious marriage for which a marriage licence had not been properly issued. A section of Ontario’s marriage statute, which was equivalent in substance to sub-section 32(2) of our *Marriage Act*, permitted a marriage to be considered valid despite irregularity if the marriage was “solemnized in good faith *and intended to be in compliance with [the] Act*” (emphasis added). The Ontario Court of Appeal upheld the lower court ruling

that the parties believed that a licence was not necessary for the validity of the marriage and that accordingly they acted in good faith and intended to comply with Ontario law. The Court did, however, conclude that only the party seeking relief from the court needed to establish good faith. Furthermore, its emphasis on compliance with the law of Ontario was made in the context of discussing the express requirement in the Ontario legislation that the marriage must be solemnized in good faith *and* “intended to be in compliance with” the Ontario *Marriage Act*.

[85] As noted in subsequent cases, including *Isee* and *Kanafani*, the legislation considered in *Alspector* required four elements to be met for a purported marriage that had been irregularly solemnized to be upheld as valid. Of those four elements, “good faith” and “intention to comply with the law” were stated as two distinct elements (the other two being absence of any legal disqualification to contract marriage and cohabitation as a married couple after the ceremony). Thus, on the analysis in *Alspector*, good faith must mean something *distinct from* an intention to comply with the marriage legislation; otherwise, adding a separate requirement of good faith would be redundant. This is the same conclusion reached above concerning the effect of inclusion of both the phrases “good faith” and “intended to be in compliance with this Act” in sub-section 32(2) of the *Marriage Act*.

[86] Notwithstanding this, the other cases decided after *Alspector* and relied on by the applications judge appear to have misinterpreted its reasoning and have conflated the requirement of an intention to comply with the law with the notion of good faith.

[87] On the other hand, other cases decided under family law legislation and marriage legislation have approached the matter differently. In *Ayoub v. Osman*, [2006] O.J. No. 1176, a traditional Muslim marriage was upheld under Ontario’s marriage legislation even though there was no evidence indicating that the parties intended to comply with the laws of Ontario. Even though they had not formally married each other, the court found that “there is no real doubt that both parties considered themselves formally married to each other on August 4, 1991. They lived together for almost 12 years and had two children.” Accordingly, they fell within the provisions of section 31 of Ontario’s *Marriage Act* which validated certain marriages notwithstanding the absence of a licence or the fact that the person performing the ceremony was not authorized to do so, and required good faith. See also *Biriniv. Lindstrom*, 2009 BCSC 97 which also relied on subsequent cohabitation as evidence of good faith.

[88] The applications judge also relied on *Guptill v. Wilfred*, 2009 NSSC 44 as support for the proposition that good faith meant “an intent to comply with local laws.” The legislation considered in *Guptill* was essentially the same as sub-paragraph 2(1)(e)(iii) of the *Family Law Act*. In fact, however, Warner J. in that case rejected, amongst others, *Debora* with its notion of intention to comply with the local marriage law as being encompassed within the concept of good faith. He referred to this as a “narrow” construction (paragraph 26). He concluded instead that to act in good faith “requires each spouse to believe, on reasonable grounds, that the marriage is valid and not simply a marriage that complies with the [Nova Scotia] *Solemnization of Marriage Act*” (paragraph 27). (Incidentally, the Nova Scotia marriage legislation specifically provided, unlike Newfoundland and Labrador’s, that “no marriage is valid” unless requirements for licensing and authorization were complied with.) Thus, for Warner J., it was a reasonable belief that a marriage was valid, not that it was in compliance with the local legislation that was the key consideration. To that extent the applications judge in the current case misread *Guptill* in relying on it to conclude that good faith meant “in compliance with the laws of Newfoundland and Labrador.”

[89] This, of course, begs the question whether a belief in “validity” means belief that the marriage was valid in the legal sense of compliance with all local procedural laws, or belief that it was valid in the sense that it was intended to create a relationship that reflected the essence of the married state. In that regard, it is not irrelevant that the common law never required an intent to create a “valid” marriage, just an intent to create a “marriage” which in itself would confer validity as a matter of law. In *Guptill*, the issue of whether the form of marriage was entered into in good faith arose not in relation to compliance with the technicalities of the local marriage legislation but in relation to whether the husband went through the form of marriage under that legislation reasonably believing that he had the capacity to marry in light of his having previously been married in St. Lucia. The issue of capacity to marry (minimum age and/or prior unmarried status) goes to the essence of what a marriage is, as previously discussed. In *Guptill*, unlike the current case, the resulting union could not be said to have qualified as a marriage in that sense because part of the essence of the married state was in any event lacking. *Guptill*, therefore, cannot be said to be authority for the proposition that failure to believe that the parties were complying with the local marriage law procedures constitutes an absence of

good faith. That question is left open, because it did not arise on the facts of that case.

[90] There is therefore no basis for concluding, even if the cases relied on by the applications judge were binding on this province's courts, that those cases point to the interpretation of "good faith" adopted by the applications judge in the context of the applicable legislative scheme, as meaning an intention to comply with the formalities of the local legislation.

[91] There is no reason not to ascribe to the words "good faith" in sub-paragraph 2(1)(e)(iii) a meaning that is merely consonant with the general legal understanding of that term, namely, fair dealing and honest intention. See *King v. Newfoundland (Board of Commissioners of Public Utilities)* (1992), 99 Nfld. & P.E.I.R. 121 (Nfld. T.D.), aff'd 2000 NFCA 25 (leave to appeal to SCC dismissed, February 1, 2001), which, citing *Black's Law Dictionary*, 5th ed., p. 623, described it as encompassing, amongst other things, "an honest belief, an absence of malice and the absence of design to defraud or to seek an unconscionable advantage".

[92] This notion of good faith originates in the law of contract and is consistent with the contractual roots of marriage law (see *Hyde v. Hyde* (1866), L.R. 1 P.D. 130 at p. 133). In the end, good faith relates to dealings between the parties, not to the relationship of either party to the state. While the knowledge of the laws and intent to comply with them is relevant evidence concerning whether or not a party intends the marriage to be genuine (in the sense of it being a voluntary union for life to the exclusion of all others), the ultimate question is the agreement reached by the parties, not the sanction by the state. Thus, one need not read into the notion of good faith a requirement to comply with the laws of the state. The requirement of good faith goes to ensuring that the parties are not acting for collateral purposes having nothing to do with the primary intention of creating a permanent union to the exclusion of all others. In that sense, the good faith requirement still has relevance by ensuring that those whose intentions to create a marriage-like relationship are genuine will be protected even if they do not strictly comply with the formalities of marriage.

C. "Void"

[93] The use of "void" in sub-paragraph 2(1)(e)(iii) may usefully be contrasted with the term "voidable" in sub-paragraph 2(1)(e)(ii). In the context of marriage law, the distinction has been stated as follows:

A void marriage is strictly speaking a contradiction in terms, for it is no marriage at all: to speak of a void marriage is merely a compendious way of saying that, although the parties have been through a ceremony of marriage, they have never acquired the status of husband and wife owing to the presence of some impediment. In brief, a void marriage is never a marriage either in fact or in law. A voidable marriage, on the other hand, is at its inception a valid subsisting marriage; in this case the effect of the impediment is to empower one (or, occasionally either) of the spouses to take steps to have it turned into a void marriage. But whilst, in the case of other contracts, a voidable contract may usually be avoided by a simple repudiation by one party, a voidable marriage may only be set aside by a decree of nullity pronounced by a court of competent jurisdiction.

(P.M. Bromley, *Family Law*, p. 58)

[94] Thus, a void marriage is a nullity for all purposes whereas a voidable marriage is regarded as a valid and subsisting marriage until a decree annulling it has been pronounced by a court. The resulting nullity decree, however, has retrospective effect back to the date of the marriage ceremony, thus distinguishing it from the effect of a divorce decree.

[95] It is tempting to say that any non-compliance with the formalities in the *Marriage Act*, however trivial, would automatically render the purported marriage void. However, non-compliance with a legislative provision does not necessarily lead to voidness. Much will depend on the nature and import of the specific requirement, whether it can be construed as mandatory or directory, as well as other factors.

[96] The grounds on which it is clearly recognized that a marriage will be void include existence of a prior subsisting marriage; lack of capacity; relationships of prohibited consanguinity and lack of consent. Voidability, on the other hand is established primarily on the ground on non-consummation. See Gushue and Day, p. 471. The authors also point out, citing *Hounsell v. Hounsell*, [1949] 3 D.L.R. 38 (Nfld. S.C.), that inasmuch as the local Newfoundland legislature, subsequent to its creation in 1832, has enacted no statute respecting annulment, “the present grounds for annulment in Newfoundland are virtually the same as those available in England prior to 1832” (p. 473).

[97] As to whether failure to observe statutorily mandated marriage formalities will render a purported marriage void, in the absence of an express statutory statement to that effect, the matter is not at all clear. Bromley observes:

If the marriage is solemnized in England, it is not every defect in the formalities laid down in the Marriage Act will render the ceremony a nullity. Whilst public policy requires that these formalities should be strictly observed, the consequences of avoiding any marriage where there was some technical defect, however, slight, would be socially even more undesirable (p. 72).

[98] The English marriage legislation about which Bromley was writing in 1971 expressly stated that certain defects in form would never invalidate a marriage. This is similar to the approach taken in sub-section 32(2) of the Newfoundland and Labrador legislation. Even though one might be tempted to infer that by stipulating for non-invalidity in certain circumstances the legislature was implicitly asserting that other defects would have the effect of invalidity, that is not the approach that was taken in England. As Bromley states:

Although these are the only formal defects which the Act says shall not invalidate a marriage, it is a general rule that, if the irregularity is not one which the Act expressly states may invalidate it, the defect will never make the ceremony a nullity. Hence, for example, even though the parties are aware that two witnesses are not present at the ceremony, the marriage will still be perfectly valid. (p. 73; footnotes omitted.)

[99] As already noted above, the current *Marriage Act* does not contain any express provision which states that non-compliance will invalidate a purported marriage. In one sense, it merely provides a mechanism whereby persons desiring to marry may enter into that state by invoking the processes in the *Act*. It does not on its face bar any other form of marriage that might otherwise be recognized by the law.

[100] I conclude, therefore that it is far from clear that the notion of a “void” marriage, as used in sub-paragraph 2(1)(e)(iii) of the *Family Law Act*, was meant to signify that the paragraph was meant to apply to all cases of technical non-compliance with any of the formal marriage requirements of the *Marriage Act*. But was it intended to be limited to only situations of established categories of voidness (bigamy, incapacity, consanguinity and lack of consent) and to exclude any situations involving formal non-compliance? It is one thing to say that non-compliance with a particular provision in the context of proper compliance with the rest of the formal requirements may not result in a marriage being regarded as void; it is another thing, however, to say that total non-compliance with or total disregard of all statutory formalities (as was the situation in this case) will not result in a purported marriage being regarded as void. Voidness in that

situation is a natural assumption to make. Nevertheless, as noted, the *Marriage Act*, inconsistently, does not declare that compliance with the statutory regime is the only way in which a marriage can be created and does not explicitly say that an attempt to create a marriage relationship by other means is forbidden.

[101] In light of these uncertainties, I am prepared to conclude that to the extent that the members of the legislature thought about the issue (there is no discussion of this in Hansard), they made the natural assumption (not necessarily, for the reasons earlier given, a legally correct assumption) that the *Marriage Act* was a self-contained code and that complete disregard of its requirements could not bring about a legally effective marriage. In other words, such a purported marriage would be “void” in the common sense notion of not having been brought about or engaged. It is in that more general sense that “void” in sub-paragraph 2(1)(e)(iii) is used. Indeed, it is that assumption that forms the basis of all of the submissions in this case and in the reasoning of the applications judge.

[102] That being so, in this case, where there was no attempt to comply with any of the provisions of the *Marriage Act*, we can conclude that sub-paragraph 2(1)(e)(iii) applies to a form of marriage that was employed outside *any* of the strictures of the *Marriage Act*. There therefore need not be any intent to comply with the legislation. This analysis reinforces the conclusion, earlier expressed, that the notion of good faith does not encompass the idea that the parties must intend to fit themselves under the *Marriage Act* regime.

(ii) **Legislative Context**

[103] The use of words in one place in legislation should as a general rule be interpreted in a manner that is not inconsistent with the rest of the legislative scheme.

[104] I have already referred to the differences between the language in subsection 32(2) of the *Marriage Act* and sub-paragraph 2(1)(e)(iii) (“good faith” in one place versus “good faith and intended to be in compliance with this Act” in the other) as indicating that, if consistency of usage is to be maintained, the words “good faith” would have to mean something other than an intention to comply with local marriage law.

[105] Furthermore, as already noted, the provisions relating to division of matrimonial property and assets between spouses are now situated as Parts I and II in a larger Act that also deals with child and spousal support and the regulation and enforcement of domestic contracts, among other things. Of particular interest in the present context is Part III which deals with support obligations. It applies to both “spouses” and “partners”: section 36. The definition of “partner”, which is found only in Part III is clearly intended to encompass a broader category of relationship than “spouse” which applies throughout the whole Act. It reads:

35. In this Part

[...]

- (c) “partner” means either of 2 persons who have cohabited in a conjugal relationship outside of marriage
 - (i) for a period of at least two years, or
 - (ii) for a period of at least one year, where they are, together, the biological or adoptive parents of a child.

[106] Provided the threshold cohabitation time requirement is met, Part III allows for spousal support claims to be made by and against persons who are living in what is colloquially (but not legally, from a historical point of view) called a “common law” relationship, i.e. cohabiting without having invoked any marriage ceremony and without necessarily having committed to any lifelong union to the exclusion of all others.

[107] Given the absence of such an expanded definition in the provisions relating to division of matrimonial assets, it would seem to follow that the notion of “spouses” who have gone through a “form of marriage” would not encompass just any form of agreement or understanding, either explicit or implicit, which simply contemplated some form of cohabitation however transitory or lengthy. Rather, a narrower concept of cohabitation (though still not qualifying strictly as a marriage under the *Marriage Act*) seems indicated under sub-paragraph 2(1)(e)(iii).

[108] More generally, the facts, as previously noted, that (i) marriage, as understood even in sub-paragraph 2(1)(e)(i), is not limited to strict compliance with the *Marriage Act*; (ii) the *Family Law Act* contemplates concepts like “form of marriage” and cohabitation by “partners” ; and (iii) subsection 32(2) of the *Marriage Act* expressly overlooks non-compliance with the *Act* in certain circumstances, all point to the idea that marriage, in

the sense of strict compliance with the formalities in the *Marriage Act*, is not a limiting touchstone under the *Family Law Act* for access to the remedies provided in that *Act*.

(iii) **Social Context**

[109] One further way to discern the purpose of a legislative provision, in the absence of a clear or comprehensive definitive statement of purpose in the statute, is to consider the mischief to which the legislation was directed and, in the light of the new legislative provisions, draw an inference from that mischief as to what the motive for the reforming legislation was.

[110] There have generally been at least two themes evident in the reform of family law over the last fifty years. The first is a decreased reliance on the existence of the married state as the touchstone for defining the legal incidents flowing from a family relationship. The second has been an effort to simplify and eliminate the injustice of many of the rules that traditionally applied, especially with respect to their impact on women.

[111] As to the first theme, traditionally, most of the legal incidents flowing from family relationships depended on the existence or non-existence of the married state. Rights to support, to hold and enjoy property and the right of children to inherit from parents based on the rules of legitimacy (which in turn depended of the existence of a marriage) were effectively defined and constrained by whether the adult persons in the family unit were legally married or not. The last half-century has seen a movement away from defining these types of rights strictly according to whether the married state exists. The emphasis is more on the family unit regardless of whether it technically involved marriage. Thus, we see situations where persons who are not married may in certain circumstances be entitled to spousal support on the same basis as married persons: *Family Law Act*, s. 35(c); 36. As well, the right of a child to inherit on death of a parent is no longer dependent on being the issue of married parents: *Children's Law Act*, RSNL 1990, c. C-13, s. 3(1), (4).

[112] With respect to the ownership of property, we have seen that the right to avail of the sharing provisions of Parts I and II of the *Act* extends beyond marriage in the strict sense. The definition in section 2 makes that clear. The issue is how far that extension was intended to go.

[113] The second theme of reform relates to the attempt to eliminate the perceived injustices, flowing primarily from unequal application upon women in conjugal relationships of the rules which affected their financial entitlement on breakdown of the relationship. In the context of acquisition of rights in property acquired during the relationship, the rules respecting resulting and constructive trusts came to be widely regarded as often unfair in result to women because, amongst other things, of their emphasis on financial contribution at the time of acquisition, which disadvantaged the female partner who stayed at home and was unable thereby to be an equal income earner or who, though an income earner, used her income for other aspects of family maintenance instead of putting it toward asset acquisition.

[114] In Newfoundland and Labrador, these injustices were highlighted in the *Newfoundland Family Law Study* conducted by Dr. Raymond Gushue in the late 1960s (See Gushue and Day, especially, Chapter VI). The Study recommended, amongst other things, abolition of the presumptions of advancement and resulting trusts and the continuation of a system of separate property (including the matrimonial home but subject to a right of a spouse to occupy it) during marriage but subject to a balancing claim between spouses on marriage breakdown so that, with some exceptions, the value of acquired assets would be shared roughly equally. The Study also recommended that the parties should have the right to contract out of the regime.

[115] The reform legislation that followed from the Study was enacted as the *Matrimonial Property Act*, SNL 1979, c. 32. It did not follow the Study recommendations with respect to the matrimonial home. It went further and gave to a “spouse” an automatic one-half interest in the matrimonial home from the time of becoming a spouse.

[116] The Minister of Justice, the Hon. T. Alex Hickman, on introduction of the Bill into the House of Assembly on second reading, explained the situation thus:

Now, Mr. Speaker, firstly this bill, the main thrust of this bill, is to reform the law with respect to matrimonial property and in particular to recognize the equal position of spouses as individuals within a marriage. There are several systems that have been tried in various jurisdictions. There is the deferred sharing system of property that some reform commissions have recommended. There is the community of interest approach which other jurisdictions have tried out but I think have found to be unworkable. This bill contains certain principles of the deferred sharing of property but goes a step further than any similar legislation in

Canada with respect to the matrimonial home. There it says, “Beyond all reasonable doubt that the matrimonial home shall be owned jointly by husband and wife...”.

...

This bill, Mr. Speaker, recognizes a very fundamental principle. It recognizes that in the traditional family, where one spouse contributes financially and the other contributes in caring for children and as a homemaker. ... the person so contributing in the care of the children and as a homemaker must be placed in a position at law – and that is generally the wife – where she has equal interest in the matrimonial home.

But the law as it stands today in jurisdictions where legislation has not been brought in recently to change it, and the law as enunciated by the Supreme Court of Canada, ignores the contribution of the homemaker and the fact that the homemaker, which is also very relevant, in order to maintain the home and in order to raise the children, has been required in many instances to give up the opportunity of a making a financial contribution to the matrimonial home because she was not in a position where she could go out and become gainfully employed and hereby be in a position to make that kind of contribution.

... persons should not be required to rely on the ingenuity of a judge to obtain something which should be his or hers by right.

(Proceedings of the House of Assembly, May 11, 1979; underlining added.)

[117] While the Minister’s comments contained references to “spouse” (presumably in the conventional sense and not the extended definition in the Bill) and “marriage”, there can be little doubt that the rationale he put forward for rectifying the injustices of the existing law applied equally to *de facto* as well as *de jure* marriages. It is not without significance that in enunciating the rationale, the Minister laid emphasis on the contribution of “the homemaker”, as opposed to a *de jure* wife, to maintaining a home and raising children as a basis for acquisition of an interest in the matrimonial home.

[118] The rationale given by the Minister for reforming the law with respect to ownership of matrimonial property – to ameliorate the injustice of the current law as it applied to homemakers who, by virtue of the way in which they divided up with their spouse the duties of homemaking, could be seriously financially disadvantaged if the relationship ended – applies equally to a couple who commit to the essence of a marriage-like state

(cohabitation to the exclusion of all others in a relationship intended to be permanent) regardless of technical compliance with the *Marriage Act*. It is the life-long commitment and reliance on that commitment in the ordering of their affairs that brings such a relationship under the justifying umbrella for a simple and certain regime for division of property. This is in contrast to some other sort of looser, less permanent relationship that would have to be dealt with on a case-by-case basis to which the traditional law of resulting and constructive trusts, based on the nature of each party's individual contribution to the acquisition of the property in question, might still be appropriate.

[119] In other words, the mischief to which the reform legislation could be said to be directed is equally present on the facts of the current case.

(iv) **Purpose: Legislative History**

[120] The *Act* provides a general statement of purpose. It states in pertinent part:

5. The purpose of Parts I and II is to reform the law with respect to matrimonial property in order to

- (a) recognize the contribution made by each spouse to a marriage;
- (b) give a ½ interest in the matrimonial home to each spouse;
- (c) provide for the deferred sharing of most other property acquired during marriage

[121] The references to “spouse” and “marriage” in section 5 cannot be taken to limit the application of the *Act* only to the parties to a valid marriage because the phrases are the very ones that are under consideration as to their scope in this case, and we already know “spouse” and “marriage” have an extended meaning, beyond that of a marriage strictly in compliance with the *Marriage Act*. For the matter in dispute in this case, therefore, the statement of purpose is of little help.

[122] Regrettably, statements made in the House of Assembly when the legislation was introduced in 1979 do not address the intended meaning of sub-section 2(1)(e)(iii) and are also of little direct help in discerning the penumbra of meaning of the words.

[123] The *Matrimonial Property Act* was subsequently re-enacted as Parts I and II of the current *Family Law Act*. Of interest is that the title of the

legislation no longer emphasized “matrimonial” property but “family” law. Included within the Act was Part III, which extended support obligations to a “partner” who, as already discussed, was defined as a person who “cohabited in a conjugal relationship outside of marriage” provided the partners did so for at least two years (or one year where they are the biological or adoptive parents of a child). This notion of cohabitation outside of marriage is akin to the commonly understood (though technically inaccurate) notion of common law marriage.

[124] Minister Hickman, later in his speech to the House on introduction of the Bill, also made reference to common law unions (again presumably in the popularly understood sense) and how they fitted into the proposed legislative scheme. He stated: “We do have an obligation as legislators to recognize an obligation to protect people or give people the right to seek protection who are living in common-law union.” He cited an example of injustice involving a woman who had been living with a man for many years and had born his children but could not marry him because she was not divorced from her first husband who had absconded to whereabouts unknown at a time when the divorce jurisdiction in Newfoundland resided in the expensive process of an application to the Senate of Canada. He observed:

To me that was a gross, gross injustice. It would be equally unjust if we were to preclude people who are living common-law from agreeing to bring themselves within the scope of this Act if they desire to do so. I am sure there are many people living in that state of union for many good and valid reasons, where there has been as much contribution by that common-law wife or spouse ... where she has made a contribution to the matrimonial home, has made a contribution to the rising of the family, has made a contribution to the success of her partner and to the education of her children to the same extent as if they had been married. If I go back to that case I referred to ..., what a just thing it would have been if some years before that these two people had been able to bring themselves under a piece of legislation like this so that woman and her family would not suddenly find themselves a charge on the state, without any proprietary rights.

[125] Presumably to assuage the concerns of some legislators who might be concerned that the legislation effectively legalized common law unions, the Minister added:

Mr. Speaker, I repeat that this permissive legislation, which I think is long, long overdue, [cannot] be interpreted as promoting or condoning or aiding and abetting common law unions. ... I hope in the opinion of this Legislature, parties of that

kind of an arrangement should, if they so desire, have the right by contract or agreement to bring themselves within the provisions and scope of this Act.

[126] At first blush, this might be interpreted as a clear statement that all non-marriage-sanctioned unions were intended to fall outside the protection of the Act unless the parties, by contract, opted in. However, although the Minister did not specifically refer to what is now sub-paragraph 2(1)(iii) of the Act in his speech, it must be remembered that the definition of spouse does in fact wrap within it cases that are not *de jure* marriages. Furthermore, when it is realized that the examples given by the Minister in his speech simply refer to cohabitation *simpliciter* without any ceremonially stated commitment to create a life-long union to the exclusion of all others and there is no specific reference by him to situations where the parties by some ceremonial act declared they intended to enter into a marriage-like state (a *de facto* marriage), it is not clear that the Minister, by his comments, intended to include this latter situation in the opt-in provisions. It may be because it was not necessary to do so because it was already intended to be included in the “form of marriage” provision.

[127] Accordingly, little assistance can be had from ministerial statements in the House, except as a general indication that the legislation’s general purpose was to remedy injustices with respect to the application of the existing law with respect to acquisition by homemakers of interests in property acquired during a conjugal relationship. That general purpose could equally apply to *de facto* and *de jure* marriages.

(v) **Conclusion as to Meaning**

[128] Considering the words alone, I might be tempted to say that there must be an attempt to comply with a pre-existing form that would, if properly followed, be expected to bring about a state of marriage recognized by law. But the words are not clear. Certainly, the previous case law in other jurisdictions cannot be relied on to conclude that the requirement of “good faith” means that the parties must have intended to comply with the local marriage legislation.

[129] When the words are read in their context, against the language in the rest of the *Act* and in other statutes *in pare materia*, and in light of the mischief that the reform legislation addressed, the fact that the history of marriage in Newfoundland and Labrador was marked by degrees of informality and even today our marriage legislation does not explicitly say

that failure to comply with it renders a purported marriage void, there is no reason why a “form of marriage” in sub-paragraph 2(1)(e)(iii) should not be interpreted to include a *de facto* marriage, that is, a relationship marked by some ceremonial recognition of an intention to create a relationship that is of the essence of a marriage, namely a union to the exclusion of all others that is intended to be permanent. As in the case of the *de jure* common law marriage (not the popularly understood common law relationship), it is the intention to enter a marriage-like relationship, not compliance with a particular formality, that gives the relationship validity for the purposes of the *Act*.

[130] The requirement for some ceremonial recognition (albeit of the participants’ choosing) of the event provides an outward manifestation of the parties’ intentions. Although there need not be any formal recording of the event, as there would be under the *Marriage Act*, there would still be the requirement of proof in the event of a dispute. Whether that can be established in any particular case will depend on the findings the presiding judge is prepared to make.

[131] The requirement of “good faith” does not, for reasons already given, require the parties to intend, and attempt, to comply with the existing marriage legislation and fail. It merely requires that parties, without any ulterior motive, intend to create a relationship based on the characteristics associated with the marriage state, a union to the exclusion of all others that is intended by them to be permanent.

[132] Recognition of such “forms of marriage” does not result, as some may fear, in another type of marriage-union. It only relates to who is to be regarded as under the umbrella of “spouse” for a particular and limited purpose: the division of property on separation or other breakdown of the relationship.

[133] Nor does such a ruling mean that any common law relationship (in the popular sense), no matter how transitory, or uncertain or entered into without any formality would now qualify for remedial access to Parts I and II of the *Family Law Act*. That access would be limited to some ceremonial act signifying an intention to enter into a relationship characterized by the essential elements of marriage.

[134] Furthermore, including *de facto* marriages within the definition of “spouse” does not violate the notion, alluded to by the Minister of Justice

while speaking about the legislation in the House of Assembly, of giving persons in the popularly-understood notion of common law unions to “opt in” to the regime and thereby remove the choice from such persons as to which regime they want to govern their lives (a point discussed in a different context by the Supreme Court of Canada in *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61). Parties to most relationships existing outside of *de jure* marriage will still have that choice. In the case of parties to a marriage-like relationship that falls within sub-paragraph 2(1)(e)(iii), as I have interpreted it, they will have already signified their desire to be treated like *de jure* married spouses by devising and participating in a “form of marriage”. They should be treated more like married spouses rather than persons living “common law,” as popularly understood. In any event, they still have the option of “opting out” by signing a cohabitation agreement if they want a different regime to govern their proprietary relationship.

[135] The key point, in my view, is that persons, including *de jure* married persons, have the right to opt in or opt out of the matrimonial property regime in the *Family Law Act*. The real question is one of policy: should the presumption be in favour of including persons within the regime, leaving them to opt out, or *vice versa*? The basic position is to include *de jure* married persons within the regime unless they choose to opt out but to exclude persons who choose not to enter the married state unless they opt in. Within the penumbra surrounding *de jure* married persons are those who have marriage-like characteristics – parties to voidable marriages and parties who go through a form of marriage in good faith that does not otherwise qualify for a *de jure* marriage. The *Act* applies the presumption of inclusion to them. As a matter of policy, including what I have called *de facto* marriages within that presumption does no violence to the scheme of the legislation and is more consonant with its underlying purpose. Such relationships are more akin to the *de jure* marriage and therefore are more appropriately treated as part of the inclusive presumption.

(e) Application to this Case

[136] In this case, as found by the applications judge, the parties engaged in a ceremonial arrangement that effectively declared that they were creating a union that was exclusive to them and was intended to be permanent. The reciting of the Bible verses made this clear. They were not doing this to deceive others for any collateral purpose. They genuinely wished there to be a *de facto* marriage between them. They also had capacity to marry and agreed to marry.

[137] While it is true that the respondent husband took a different position in his evidence, suggesting that they were just “playing at” marriage and that he was only taking a “vow of fidelity” not a vow of marriage and was only intending to create a “common law” union (in the non-legal sense), the findings of the judge and her treatment of the evidence precludes such conclusions. There is no basis for disturbing the judge’s factual analysis.

[138] As far as her legal conclusions were concerned, however, the applications judge erred in her interpretation of sub-paragraph 2(1)(e)(iii) when she ruled that the relationship of the appellant and respondent did not result from a “form of marriage” that was entered into in good faith. A relationship such as the parties’ in this case, which was, and was intended to be, marriage-like in the sense of comprising the essential characteristics of marriage as defined in the *Civil Marriage Act* does fall within subsection 2(1)(e)(iii), properly interpreted.

CONCLUSION

[139] I would allow the appeal and declare that the appellant is a “spouse” within the meaning of paragraph 2(1)(e) of the *Family Law Act* and is thereby entitled to seek a remedy under that legislation with respect to division of matrimonial property.

[140] As the issue raised was novel, I would not award costs either in this Court or in the court below.

J.D. Green C.J.N.L.

Correction Notice:

Correction made on November 27, 2017:

1. On the front page, the “**Citation:** *Dwyer v. Bussey*, 2016 NLCA 68” in the top right hand corner was replaced with “**Citation:** *Dwyer v. Bussey*, 2017 NLCA 68”.