SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Murphy v. Murphy*, 2015 NSSC 357

Date: 2015-12-15
No. 1201-066283 (SFHD-081492)
Registry: Halifax

Between:

Carolyn Clare Murphy

Petitioner

v.

Bruce James Murphy

Respondent

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	October 2 and 14, 2015, in Halifax, Nova Scotia
Counsel:	Jennifer Schofield for the Petitioner Sarah Harris for the Respondent

By the Court:

BACKGROUND

[1] The parties were married on August 19, 1989 and separated in March 2011. They have two daughters, J.M. who is now 25 years of age and L.M. who is now 21.

[2] The Petitioner is a registered nurse by profession. The Respondent is a licensed mechanic and has his own automobile repair business. He purchases vehicles that have been damaged, refurbishes them and then resells them. He also does automobile collision repair work.

[3] In June 2012 the Petitioner filed a Petition for Divorce by which she sought a divorce as well as an order for the division of matrimonial assets and debts. In July of the same year the Respondent filed an Answer by which he too requested a divorce and a division of assets. He also asked for an order relating to custody and access, child support, spousal support and costs.

[4] At a Pre-trial Conference held on July 23, 2015 counsel for the Petitioner clarified that the Petitioner was also seeking compensation for her contribution to the Respondent's business over the course of their relationship.

[5] A divorce trial was held on October 2 and 14, 2015. Much of the evidence was presented in affidavit form and the financial statements of the parties. Both parties also testified verbally and were cross-examined by counsel for the opposing party.

[6] Given the ages of the parties' daughters and their circumstances (the parties agreed that J.M. was no longer a "child of the marriage") parenting was not in dispute. The parties also agreed that neither will pay any spousal support to the other.

THE DIVORCE

[7] The parties separated on March 8, 2011. They continued living separate and apart since that date. They were living separate and apart when these divorce proceedings were commenced. I find that there is no reasonable possibility of a reconciliation. I therefore find that there has been a breakdown of the parties' marriage and a Divorce Order will be granted.

ISSUES

[8] The outstanding corollary issues are:

1. What would be the appropriate division of the parties' assets and debts pursuant to the *Matrimonial Property Act*? This issue includes a number of sub-issues including the classification of the various assets and debts, the valuation of those assets and debts, whether the Petitioner is responsible for a portion of the municipal property taxes that accrued after she left the matrimonial home and whether she should be required to reimburse the Respondent for half the house insurance premiums paid by him after the parties separated.

2. Is the Petitioner entitled to a share of the Respondent's business or compensation for any contribution she might have made to his business as contemplated by section 18 of the *Matrimonial Property Act*?

3. Should the Petitioner pay to the Respondent retroactive child support? This issue includes a claim by the Respondent for retroactive child support pursuant to sections 3 and 7 of the *Child Support Guidelines*.

4. What amount of child support, if any, should the Petitioner pay to the Respondent on a prospective basis?

5. Costs.

DIVISION OF ASSETS AND DEBTS

[9] The applicable legislation is the *Matrimonial Property Act*, R.S.N.S. 1989, c.275 including but not restricted to sections 4 (the definition of matrimonial assets), 12, 13 and 18.

[10] The following chart summarizes my findings with respect to the valuation of the various matrimonial assets and debts and their distribution between the parties. Following the chart are my explanatory comments.

Matrimonial Assets			
	Value	**Petitioner**	**Respondent**
1.Matrimonial Home Real Estate Fees (5% + HST) Legal Fees (incl. HST)	$238,000.00 (13,685.00) (1,000.00) $ 223,315.00		$ 223,315.00
2.Household Contents	2,352.00	$600.00	1,752.00
3.Motor Vehicles 2003 Acura 2001 Civic 2008 Yaris	 2,000.00 1,500.00 6,000.00	 6,000.00	 2,000.00 1,500.00
4. Honda ATV	2,500.00		2,500.00
5. CSB	1,230.00	1,230.00	
6.Cape Sable Islander	4,500.00	4,500.00	
7.1978 Sea Ray & Trailer	3,995.00		3,995.00
8.2000 Zodiac & motor	0		0
9.Petitioner's Pension	unknown	at source	at source
10.Respondent's LIRA	unknown	Equally divided	Equally divided
SUB-TOTAL	**$247,392.00**	**$12,330.00**	**$235,062.00**
Matrimonial Debts			
11.BMO MasterCard	($960.39)	($960.39)	
12.Sears	(1,627.60)	(1,627.60)	
13.RBC Visa	(2,035.43)	(2,035.43)	
14.RBC Line of Credit	(39,090.36)	(39,090.36)	
15.MBNA	-	-	-
16.RBC Visa	-	-	-
17.CIBC Visa	-	-	-
18.Cdn. Tire (Options MasterCard	-	-	-
19.Expert Reports	(1,365.62)	(575.00)	(790.62)
TOTAL MATRIMONIAL DEBTS	**($45,079.40)**	**($44,288.78)**	**($790.62)**
NET MATRIMONIAL ASSETS	**$202,312.60**	**($31,958.78)**	**$234,271.38**
EQUALIZATION PAYMENT		**$133,115.08**	**($133,115.08)**
NET MATRIMONIAL ASSETS AFTER DIVISION	**$202,312.60**	**$101,156.30**	**$101,156.30**

EXPLANATORY COMMENTS

Matrimonial Assets

[11] The Respondent sought to keep the matrimonial home as part of the distribution of matrimonial assets and the Petitioner was prepared to let him have it. The parties agreed on the gross value of the matrimonial home and on the notional real estate commission figure. They were apart on legal fees (associated with a notional sale). The Petitioner suggested a figure of $1,000.00 and the Respondent $1,500.00. In the absence of evidence as to why the legal fees should be as high as that proposed by the Respondent I have chosen $1,000.00 (inclusive of HST).

[12] Regarding the household contents, both parties agreed that the value of the contents kept by the Respondent came to $1,752.00. It was the Respondent's position that the Petitioner retained household contents of an equal value. Her household contents were not appraised. It was her evidence that the value of her household contents was only $600.00. Given that she was not challenged on that figure during cross-examination I accept her figure of $600.00.

[13] The parties had three motor vehicles; a 2003 Acura, a 2001 Civic and a 2008 Yaris. The values the parties suggested with respect to the three vehicles differed by a wide margin. Neither party offered an appraisal of any of the vehicles. I was given copies of Kijiji ads for vehicles that were similar to but not quite the same as those belonging to the parties and a "Black Book average asking price" for one of the vehicles. All of the estimates offered by the parties appeared to be estimates of the vehicles' values as of the date of trial as opposed to the date of separation (See *Simmons v. Simmons*, 2001 NSSF 35). Without more reliable evidence the Court can only make an educated guess of what the cars' values were.

[14] Taking into account the evidence that the parties did provide I estimate the value of the Acura as being $2,000.00, the Civic $1,500.00 and the Yaris $6,000.00 (as of March 2011).

[15] The Respondent owns a Honda all-terrain vehicle. Relying on a Kijiji advertisement of a similar vehicle the Respondent placed a value of $2,000.00 on his ATV. The Petitioner estimated its value at $3,800.00 (the figure put forward by counsel during summation). In her updated Statement of Property the Petitioner estimated the value at $3,500.00. I place its value at $2,500.00 as of the date of the parties' separation.

[16] The Petitioner reported having a Canada Savings Bond having a value of $1,150.00 as of April 2, 2011. She did not indicate the bond's series number.

Assuming an average annual rate of return of 1.5% I estimate the current value of that bond to be $1,230.00.

[17] The parties owned a Cape Sable Islander boat sometimes referred to as a "Baby Cape". The Respondent testified that the parties purchased this boat from the Petitioner's father in the early 1990's for $4,500.00 (without the trailer). In August of 2014 the Petitioner sold the boat to one of the parties' daughters for $1,500.00. That was the figure she suggested for asset division purposes. In her Statement of Property sworn on June 7, 2012 she estimated the value of the boat to be $4,000.00. The Respondent said that he believed the boat and trailer to be worth at least $10,000.00 but did not provide an appraisal. Instead I was been given two Kijiji ads of boats which the Respondent said "show boats as close to the value as I could find." The boats depicted in the ads appeared to be quite different from each other. The ads were of little assistance.

[18] Because the sale of the boat was not an arm's length transaction I do not feel bound by the $1,500.00 sale price. I assigned a value of $4,500.00 to the boat and trailer.

[19] The parties agreed that the value of a 1978 Sea Ray boat and trailer in the possession of the Respondent was $3,995.00.

[20] The Respondent owned a 12 foot Zodiac boat and motor. The Petitioner estimated that the Zodiac was worth as much as $5,000.00. It was the Respondent's evidence that the boat was severely damaged in a storm before the date of separation and that after the storm it leaked and that for the past eight years it has been lying in "the woods". He said he did not bother having the boat appraised because he didn't think that the value of the boat was going to be an issue. He did not believe that the boat had any value. Similarly, because the motor had been submerged during the storm he did not believe that it had any value either.

[21] I have assigned no value to the Zodiac or the motor that accompanied it.

[22] The Petitioner has a pension through Capital Health. She acknowledged it to be a matrimonial asset and agreed that its value from the date of the parties' marriage up to the date of the parties' separation will be divided equally at source.

[23] The Respondent acknowledged having a locked-in retirement account and agreed that it will be divided equally between the parties by way of a spousal roll-over. It will be the current value of that LIRA that is divided equally following the date of division principles outlined by Justice Campbell in *Simmons v. Simmons* (Ibid).

Matrimonial Debts

[24] On behalf of the Respondent it was argued that the municipal property taxes and the cost of house insurance premiums that accrued after the parties separated should be deducted from the gross value of the matrimonial home. It was the Petitioner's position that those expenses should not be categorized as matrimonial debts because the Respondent had the benefit of living in the home while she had to seek accommodation elsewhere and pay rent. In the alternative she argued that if they are considered to be matrimonial debts that are to be divided between the parties then she should be given credit for money that she paid on the municipal taxes after the parties separated.

[25] The *Matrimonial Property Act* (supra) contains no definition for "matrimonial debts". Similarly, there is no provision in the *Act* for their division. There are however numerous cases that provide guidance in defining what is a "matrimonial debt" and there are an abundance of cases illustrating the Court's willingness to divide such debts in the same manner as matrimonial assets.

[26] In *Bailey v. Bailey*, [1990] 98 N.S.R. (2d) 9 (N.S.T.D.) Roscoe, J., as she then was, said that in determining whether a debt is a matrimonial debt the Court is to consider whether the debt was incurred for the benefit of the family unit, whether it was an ordinary household debt and, if the debt was incurred post-separation, whether the debt was necessary to meet basic living expenses or preserve any of the matrimonial assets. She also said that the overall consideration is whether the debt was reasonably incurred (see also *Grant v. Grant*, 2001 NSSF 13 and *Larue v. Larue*, 2001 NSSF 23). Roscoe, J. also concluded that a matrimonial debt had to be capable of legal enforcement (see also *Walker v. Walker* (1989), 92 N.S.R. (2d) 127 (N.S.T.D.) and *Rossiter-Forrest v. Forres*t (1994), 129 N.S.R. (2d) 130 (N.S.S.C.)).

[27] The party who seeks to have a debt classified as "matrimonial" carries the burden of proof (see *Abbott v. Abbott*, 2002 NSSF 39).

[28] Proved matrimonial debts are then generally subtracted from the matrimonial assets when a division of assets is considered. As Campbell, J. said in *Larue* (supra) at paragraph 41:

> "In summary, matrimonial debts should be identified and subtracted from matrimonial assets as part of the valuation exercise in considering a Section 12 presumption of equal division. It is that net value which should be divided equally by ordering an equalization payment to be made. Then and only then are the exceptions in Section 13 of the Act, to be considered one of which is subsection 13(b). Couples rarely accumulate assets alone. Their joint venture usually

> produces net worth, being the excess of assets over debt and it is that net worth which should be shared."

[29] The Respondent proposed that the value of the matrimonial home be reduced by $7,597.53 representing municipal taxes that accrued up to the date of trial. He also proposed that the home's value be reduced by a further $5,196.00 representing five years' worth of house insurance premiums that were incurred from 2011 to 2015.

[30] I find that the municipal taxes on the matrimonial home that accrued post-separation and the insurance premiums that accrued post-separation fall within the definition of matrimonial debt because they were incurred for the purpose of preserving and protecting the matrimonial home. The presumption is that matrimonial assets (net of matrimonial debts) will be divided equally between the parties, however, I have concluded that in the circumstances of this case, an equal division of those debts would be unfair and unconscionable. Subsection 13(b) of the *Matrimonial Property Act* (supra) reads as follows:

> "Upon an application pursuant to Section 12, the court may make a division of matrimonial assets [read net of matrimonial debts] that is not equal, or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:…(b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred; …".

[31] After the parties separated the Respondent continued living in the matrimonial home while the Petitioner had to seek accommodation elsewhere. For more than four and a half years the Respondent had the use and occupation of the matrimonial home to the exclusion of the Petitioner. During that time he paid the Petitioner no spousal support (in fairness, she did not ask for any) or any occupation rent or any payments as may be allowed pursuant to subsection 11(1)(b) of the *Matrimonial Property Act*. For four and a half years the Petitioner did not have the use of the matrimonial home and did not have access to her share of the equity in the home.

[32] The evidence did not include a comparison of the parties' shelter expenses, however I was told that the Petitioner was required to pay rent for her accommodation (at least after she moved from her parents' home) and the Respondent was living in the matrimonial home mortgage free. The house insurance premiums and the municipal taxes were some of the few shelter expenses that he had.

[33] In June 2012 the Petitioner paid $4,750.00 on the parties' municipal tax bill outstanding at that time. Of the $4,750.00 that she paid, $1,907.33 was for municipal taxes that accrued after the parties separated. Ignoring her contribution to the post-separation taxes, the cost of the municipal taxes and insurance to the Respondent (from the date of separation to the date of trial) came to less than $233.00 per month.

[34] In *Wong v. Wong*, 2008 NSCA 43 the Appellant husband sought to overturn a trial decision which denied him an unequal division of assets even though he had paid all of the matrimonial debt (mortgage payments, car loan payments and line of credit payments) as well as ongoing expenses associated with the home (municipal taxes, power bills, insurance, maintenance, etc.) for 17 months following the separation. For the first seven of those months the couple actually shared the use of the home. The Appeal Court dismissed the husband's appeal noting that the trial judge had considered all the relevant factors when deciding that an equal division would be appropriate. As a consequence the Appellant husband (who occupied the home post-separation and paid no occupation rent to his wife) was required to absorb all of those costs without contribution from his wife.

[35] Therefore, while the insurance premiums and municipal taxes may be matrimonial debts, they were also the Respondent's post separation shelter expenses. I find that in the circumstances of this case it would be unfair and unconscionable to require the Petitioner to share in those expenses. They will therefore be the sole responsibility of the Respondent.

[36] As Goodfellow, J. said in *Cameron v. Cameron*, 1995 CANLII 4433 (N.S.S.C.) (affirmed on appeal) at paragraph 26:

> "The fact that an indebtedness may meet the test of being labelled a "matrimonial indebtedness" does not automatically result in a sharing of that indebtedness. That determination must be made on a determination of whether or not the division of matrimonial assets in equal shares would be unfair or unconscionable…."

Therefore, there is no figure on the preceding chart for the municipal taxes or house insurance premiums that accrued post-separation.

[37] The parties agreed on the amount owing on the BMO MasterCard, the Sears account and the RBC Visa account and they agreed that they were matrimonial and the Petitioner would be responsible for those debts.

[38] During summation counsel for both parties proposed virtually the same figure regarding the RBC Line of Credit. The Petitioner's figure was slightly lower than that of the Respondent because of an adjustment she made for money she

spent for non-matrimonial purposes. The lower of their two figures is included in the chart. The Petitioner will be responsible for whatever may be the current balance of the RBC Line of Credit.

[39] The debts that were in the name of the Respondent were more problematic.

[40] The Respondent had four credit card accounts. He had a MBNA credit card, a RBC Visa credit card, a CIBC Visa credit card and an Options MasterCard. The Petitioner's position regarding his debts was stated in paragraphs 46 and 47 of her affidavit sworn August 24, 2015 (Exhibit 5) which read as follows:

> 46. I was primarily responsible for purchasing all of the household items which were purchased on my Sears card, RBC visa, and through our joint bank account it would have been only on a rare occasion that the Respondent's credit cards would have been used for family expenses. (sic)
>
> 47. I do not believe that the debts the Respondent has itemized in his materials filed with the court are matrimonial debts. I believe they relate to his business.

[41] The Respondent's reply was contained in paragraphs 51 and 52 of his affidavit dated September 11, 2015 (Exhibit 19):

> 51. The Petitioner is incorrect in her testimony at paragraphs 46 and 47 wherein she states that I rarely used my credit cards for matrimonial purchases. I am attaching as many credit card statements as I was able to get a hold of, to my book of exhibits as tabs K, L, M, N, and O.. I have highlighted in yellow those charges that are matrimonial.
>
> 52. Historically when there was a business purchase made on my credit card, the business paid it off within a thirty day period. The amounts shown on the balances at tab K are matrimonial debt.

[42] The document behind tab K of Exhibit 17 to which the Respondent referred was his MBNA credit card statement showing the balance of that account as of March 2011 – the month the parties separated. The balance shown was $9,596.38. There were no charges to that credit card in that month so the amount shown is a summary of what was previously left outstanding on that account. Behind tab L were a number of credit card statements. The statements were not in order nor were they complete. Indeed most of the Respondent's credit card statements after the date of separation appeared to be missing. Neither the Respondent nor counsel summarized the expenditures that were highlighted in yellow. However, of those expenditures that were highlighted many were purchases from many years ago. The information supplied by the Respondent was completely unhelpful. None of

the purchases on his prior MBNA credit card statements which were highlighted in yellow were current and there was no evidence in his affidavits that assisted the Court in determining whether any portion of the outstanding debt on that card was "matrimonial". The Respondent therefore failed to meet the burden of proof required. I conclude that none of his MBNA credit card account was matrimonial and therefore no figure for that account appears on the chart.

[43] With respect to the Respondent's RBC Visa account, I was given miscellaneous credit card statements for the period August 2000 to April 2013. Not every statement for that period of time was included. There was no statement for March 2011 (the month the parties separated). The most recent statement before the date of separation was the statement for November 2010. Nothing was highlighted on that statement to indicate that it was, at least in the Respondent's opinion, matrimonial in nature. The statement closest to but prior to the date of separation on which the Respondent highlighted purchases was the May 2003 statement.

[44] It was the Respondent's position that over $9,500.00 of this account was matrimonial.

[45] The Respondent has not satisfied me that any portion of his RBC Visa account on the date of separation was matrimonial and therefore no figure for this account was included in the chart.

[46] The Respondent argued that over $26,000.00 in matrimonial debt was owing on his CIBC Visa credit card. I was given an assortment of statements for the period May 2002 to and including October 2008 but I was given no statements even close to the parties' date of separation. There was no evidence to substantiate that any portion of this account was matrimonial.

[47] The Respondent submitted that approximately $859.00 owing on an Options MasterCard account was matrimonial. I was given just a few statements spanning the period of August 2009 to September 2010. They do not include the date of separation. No expenditures were highlighted on those statements to signify they were matrimonial. I therefore have not included any of this account in the chart.

[48] Finally, the parties incurred disbursements in order to obtain appraisals of some of the assets. The husband paid $273.12 in order to obtain an appraisal of his household contents. He also paid $517.50 to have the matrimonial home appraised. The wife incurred a cost of $575.00 to have her pension valued. All of those disbursements will be shared equally. I was told that one of the parties also

incurred an expense to have one of the boats appraised. If such an expense was incurred that too should be shared equally by the parties.

Non-matrimonial Assets

[49] The Respondent owns certain non-matrimonial assets. He and his brother each own one share in Straight Arrow Auto Sales Limited. That is the corporate name of the Respondent's business. His brother has not been active in the business for many years. The value of that business is not known. It does however provide the Respondent with an income.

[50] The business operates from a parcel of land on the Prospect Road in Hatchett Lake which the Respondent said was purchased by the company. It was financed with a mortgage but that mortgage has since been paid in full. The real estate has a tax assessed value of over $143,000.00. Its fair market value was not presented to the Court. The business and the land from which it operates are business assets (see ss. 2(a) and 4(1)(e) of the *Matrimonial Property Act* (supra)).

[51] The Respondent also owns a lot of land located on Club Road in Hatchett Lake, Nova Scotia which he purchased in the spring of 2011 shortly after the parties separated. He also has a lot of land on the Prospect Road in Whites Lake, Nova Scotia which he purchased in March 2014. It was his evidence that he paid $10,000.00 for each of the two lots. The Petitioner made no claim against these properties because they were acquired post-separation.

[52] Finally, the Respondent disclosed a one quarter interest in a lot of land in Dean, Nova Scotia. Again, the Petitioner made no claim against that property.

[53] The Petitioner acknowledged that the Respondent's business and the land upon which it operates were not matrimonial assets, but she sought an unequal division of the matrimonial assets pursuant to section 13 or alternatively a share in the Respondent's business or compensation pursuant to section 18 of the *Matrimonial Property Act* for her contribution to his business while the parties were together. She did not strenuously pursue relief under section 13 but did lead evidence in support of her claim under section 18. I will address her section 18 argument below. Subject to my conclusion regarding her claim under section 18 and except for my earlier conclusion regarding the treatment of the municipal taxes and house insurance premiums, I find that an equal division of matrimonial assets and debts would not be unfair or unconscionable.

[54] The matrimonial assets and debts will be distributed between the parties as indicated in the chart above. The Respondent will pay to the Petitioner an equalization payment of $133,115.08 no later than January 25, 2016.

THE PETITIONER'S CLAIM PURSUANT TO SECTION 18

[55] Section 18 of the *Matrimonial Property Act* (supra) reads as follows:

> "18. Where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order
>
> (a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefor; or
>
> (b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,
>
> and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances."

[56] It was the Petitioner's position that during the parties' marriage and specifically from 1998 until 2008 she performed substantial work in relation to the Respondent's business and as a result she is entitled either to an interest in his business or alternatively compensation for the work she performed.

[57] The Respondent disagreed with almost all of the Petitioner's evidence offered in support of her claim under section 18. It was his position that her contribution was at best minimal and not worthy of compensation.

[58] Prior to the incorporation of Straight Arrow in 1998 the Respondent performed some auto repair services in the garage of the matrimonial home. In or about 1997 the Respondent moved his business to its current location on the Prospect Road where he leased property. Shortly after the company was incorporated the company bought the land and continued operation at that location.

[59] The Petitioner alleges that from 1998 to 2008 she contributed to the business in a number of ways including:

- administrative work including banking and paying bills of the company as well as answering phone calls from customers. She said that the

home phone served as a business phone particularly before the incorporation of the company;

- "constantly" running errands including picking-up and delivering parts and/or picking up and delivering cars;
- booking appointments for customers;
- greeting people at their home who were looking for the Respondent for business purposes. She said that this occurred both during and after regular business hours. She said she would take their contact information and relay it to the Respondent.
- the Petitioner claimed the Respondent would sometimes have his customers make out their cheques payable to the Petitioner in order to avoid having to claim the money as income in the business.

[60] At paragraph 90 of her affidavit sworn August 24, 2015 she said:

> "I was as much involved in the operation and dealings of the business as the Respondent with the exception that I never carried out any work on a motor vehicle and I was not involved with the hiring and firing of employees in the garage."

[61] It was also the Petitioner's evidence that she received no compensation for her contribution to the business. She estimated the value of her contribution to be approximately $62,200.00 by estimating that she worked approximately 17.5 hours per week for 50 weeks a year over an 11 year span.

[62] In addition to whatever work the Petitioner may have performed for the business, she also worked part-time as a nurse. She said her involvement in the business decreased after 2008 because of their daughters' involvement in extra-curricular activities and the time she devoted to their needs.

[63] In his affidavit sworn July 9, 2014 the Respondent said at paragraph 11:

> "I do not agree with the petitioner's statements about how much she participated in my work. Firstly, about 70% of the work that was performed during the years prior to the incorporation, was done at my brother's business. He had a full garage and allowed me to use the facilities and tools that I did not personally have. Further, the work was for cash and as such, there was no banking to do. A lot of the work that I did was from one dealership and was all prearranged by me, so there were very few calls to the house. If the petitioner did answer the phone and it was for me, the extent of her involvement would be to pass me the phone, just as she would if it were a personal call and just as I would if I answered the phone and her employer asked for her. I would say the same thing about picking up the parts for vehicles. By my recollection, the petitioner may have picked up parts for

> me less than a dozen times in our entire relationship. These occasions would happen only because the petitioner was going to be in town for another purpose and not specifically to pick up parts."

[64] In paragraph 17 of the same affidavit, the Respondent said that the Petitioner's involvement in the business was equally minimal after Straight Arrow Auto Sales was incorporated. He said:

> "The petitioner had no involvement in this business aside from perhaps once or twice dropping a deposit to the bank while she ran her own errands and maybe pick up parts as already described. Straight Arrow Auto Sales had suppliers and most of the parts and supplies were delivered. The petitioner did paint up to the chair rail of the walls in my office in 1998.

[65] In paragraph 29 of his affidavit sworn September 11, 2015 he conceded as follows:

> "If the Petitioner did any pick up of parts or deposits or anything else like that for the business, it was in and around a half dozen times over the entire course of our relationship."

[66] It was also his evidence that:

- after working her shifts as a nurse, taking care of the children and sleeping, the Petitioner would not have had enough time to perform all the services for his business that she alleged;
- during the years the Petitioner says that she worked for his business, the Petitioner's alcohol addiction "consumed her life and her daily activities";
- if the Petitioner answered a phone for the Respondent or greeted people at home, it was a "very rare" occurrence. He also said the Petitioner did not schedule any appointments for customers;
- the Petitioner did not pick up or drop off vehicles for his business but there may have been a dozen times between 1997 and 2011 that she drove him places to pick up a vehicle.

[67] The Respondent's brother C.M. gave evidence. He acknowledged that Straight Arrow was incorporated "in the late 1990's" and that he "worked in the garage" until mid-January 1999 and "was an equal partner" with the Respondent until approximately 2006. Beginning at paragraph 6 of his affidavit he said:

> "6. Normal hours of operation would be 8:00 am and 5:00 pm, however, I would often be there well before and well after these hours. I can also recall that I would be there every day except Sunday.
>
> 7. I did not observe nor was I aware or have an understanding that [the Petitioner] did anything for the company. [The Respondent] and myself were responsible for all deliveries, all pickups of parts or other inventory, all book keeping (except taxes which we hired an accountant for), taking all phone calls, setting up all appointments, making any and all bank deposits and anything else the company needed.
>
> 8. There is not one instance that stands out in my memory where [the Petitioner] would have done any of the above listed tasks or anything else for the company."

[68] Under section 18 the onus is on the spouse who is seeking compensation to establish their entitlement. In this case the onus is on the Petitioner to establish that she contributed work, money or money's worth in respect to the acquisition, management, maintenance, operation or improvement of the Respondent's business. Based on the evidence presented the Court must then determine and assess the contribution and decide whether she is entitled to a share in the Respondent's business or compensation for her contribution. The Court's determination is to be without regard to their relationship as husband and wife or "the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances".

[69] For the most part the evidence of the Respondent contradicted that of the Petitioner. The evidence of the Respondent was supported, at least in part, by that of his brothers. The Petitioner's aunt said in her affidavit (Exhibit 3), "I can specifically recall on one occasion [the Respondent] telling me while he was sitting in his office that if it were not for [the Petitioner] I would not have this business." She went on to say that she couldn't recall the exact date when he made that comment but "it would have been over a decade ago". She also said that she was aware that the Petitioner was involved in the business based on comments made by both of the parties. She provided no other specifics.

[70] I find that the Petitioner did contribute "monies' worth" to the operation of the Respondent's business in the form of her physical labour. Her contribution was more than the minimal contribution suggested by the Respondent but I believe the Petitioner has overstated her contribution and overestimated its value. I find that she did paint the Respondent's office at the Hatchett Lake location in 1998. I find too that she did make some bank deposits for the Respondent and there were occasions when she picked up "parts" for the business but not as often as she suggested. I find too that she did answer phone calls from the Respondent's

customers at the home address – particularly before he moved the business to the Hatchett Lake property - and greeted customers at their home address. There were also occasions that she drove the Respondent so that he could retrieve a vehicle. Most if not all of these contributions were acknowledged by the Respondent.

[71] It would appear that most of the Respondent's business was operated out of the Hatchett Lake location since 1998 and perhaps as early as 1997. It would seem likely that by that point in time relatively few of his customers would have phoned the matrimonial home to make appointments for their car to be serviced.

[72] A friend of both the Petitioner and the Respondent, J.H., also offered an affidavit and was cross-examined. He testified that he was a friend of the parties since the 1980's and got to know the Respondent well before he opened his own repair shop. He said that once the Respondent started his business J.H. was often at his shop two or three days each week where he restored some old cars. He said it was his experience that the Petitioner stopped by the shop "may be a couple of times in a month to say hi" (sic) but he also said that he saw her "wallpaper the office once and bring in dog food for the shop dog just a few times over the years prior to [the parties'] separation". On cross-examination he said that he did not observe the Petitioner doing anything that was work related.

[73] I believe that the Petitioner is entitled to some compensation for the contribution that she made to the Respondent's business. I am prepared to grant her compensation in the sum of $2,000.00 which will be paid by the Respondent no later than January 25, 2016.

CHILD SUPPORT:

Retroactive Child Support –Table Amount

[74] The Respondent sought an order for retroactive child support from the Petitioner specifically, an amount equivalent to the table amount based on the Petitioner's income retroactive to the date of their separation. According to calculations provided by his counsel, the Respondent estimated that as of the end of May, 2015 the Petitioner owed him retroactive child support pursuant to section 3 of the *Child Support Guidelines* (i.e. the table amount) in the sum of almost $36,000.00.

[75] The Petitioner is opposed to paying retroactive child support but in the alternative argues that if retroactive child support is to be paid it should only be from the date of the Respondent's Answer and should take into account money that she already contributed to the support of the children.

[76] The applicable legislation can be found in the *Divorce Act*, R.S.C., 1985, c. 3 specifically sections 2 (The definition of "child of the marriage"), and 15.1 (child support orders generally) and the *Federal Child Support Guidelines*.

[77] The parties separated on March 8, 2011 when the Petitioner left the matrimonial home. Since then the Respondent has continued to live in the home.

[78] As stated previously the Petitioner is a registered nurse. On the date of separation she was working full-time for Capital Health. She admitted she suffered from alcohol addiction. Due to her alcohol abuse she was required to leave work in 2012 and at that time started receiving short-term disability benefits through her health plan. From January 2014 until April 2014 she received employment insurance benefits until her long-term disability benefits began. Her LTD Benefits continued up to June 2015. Her last LTD cheque was dated June 26, 2015.

[79] In May 2015 she filed a request with Manulife to have the continuation of her long-term benefits reviewed. As of the trial date she had not heard back from Manulife and was at that time unemployed. She hoped to be able to return to nursing on a full-time basis by January 2016.

[80] Following the parties' separation they had no formal agreement with respect to the payment of child support but the Petitioner said that she gave money to their daughters on a voluntary basis and as well contributed to many of their expenses. A list of her voluntary payments was included in her exhibit book. The Petitioner acknowledged that some of the expenses to which she contributed ought not to be considered for child support purposes as they were the sort of expenditures that she would have paid anyway outside of the scope of child support, for example, birthday gifts and the like.

[81] In addition, the Petitioner maintained a medical plan for the benefit of the children. The added cost to keep the children on her plan came to $34.43 every two weeks. The total cost to her from the date of separation up to June 2015 came to $3,821.73.

[82] In the Respondent's first affidavit sworn July 9, 2014 (Exhibit 16, Tab A) at paragraphs 27 and 28 he said " …I have received no financial assistance from the petitioner as it relates to our children, keeping up with their expenses has only been possible because I am residing in the home." and "The petitioner has not paid any money toward the day-to-day care of the girls while they live with me either."

[83] While the Petitioner did not give money directly to the Respondent she did pay money in relation to the girls' activities (primarily ringette), purchased clothing items for them, gave them gift cards so that they could buy gas and other

items for themselves and she also contributed to their university expenses. While her voluntary contributions to those expenses may not have equalled that which would have been required by the *Child Support Guidelines*, her contribution was too significant to ignore.

[84] In May 2014 the Petitioner filed with the Court a Notice of Motion for Interim Relief. Specifically she sought an order under the *Matrimonial Property Act* requiring the sale of the matrimonial home. As a result of a hearing before the Honourable Justice Beryl MacDonald of this Court on July 17, 2014 the parties were ordered to have the matrimonial home appraised and the Petitioner was ordered to pay directly to the Respondent child support in the sum of $472.00 per month. Since then the Petitioner has been paying support as ordered by Justice MacDonald although not always in the sum of $472.00 per month.

[85] The leading case with respect to retroactivity is the Supreme Court of Canada decision in *D.B.S. v. S.R.G.* 2006 SCC 37. At paragraphs 133 to 135 Bastarache, J. wrote:

> 133. In determining whether to make a retroactive award, a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.
>
> 134. Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.
>
> 135. The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed."

[86] And at paragraph 113 Bastarache, J. stated:

> "Because the awards contemplated are retroactive, it is also worth considering the child's needs at the time the support should have been paid. A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive child support will be less convincing when the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her…This is not to suggest that the payor parent's obligation will disappear where his/her children do not "need" his his/her financial support."

[87] Retroactive child support can be ordered only for a child who is still "a child of the marriage" as defined by the *Divorce Act* at the time the application is made (*D.B.S.*, para 89).

[88] As for the amount of the retroactive award, the Court should look to the appropriate legislation, in this case the *Divorce Act*. However, even there the Supreme Court added a caveat. Bastarache, J. said at paragraph 128:

> "… courts ordering a retroactive award pursuant to the *Divorce Act* must still ensure that the quantum of the award fits the circumstances. Blind adherence to the amounts set out in the applicable Tables is not required – nor is it recommended.

[89] The Court is still to consider whether undue hardship applies:

> "it will generally be easier to show that a retroactive award causes undue hardship than to show that a prospective one does". (paragraph 129)

[90] When the parties separated in March 2011 both of their daughters were still "children of the marriage". J.M. was 20 years old and attending university. L.M. was 18 and was still in high school. Both children were dependent on their parents until the summer of 2013 when J.M. began to live independently. L.M. continues to be dependent on the parties for support. She is still a full-time student and expects to graduate from university in the spring of 2016. She still lives in the matrimonial home with the Respondent and according to him she intends to remain living there at least until her graduation. She continues to be a child of the marriage.

[91] Subsections 3(1) and (2) of the *Child Support Guidelines* read:

> **3.** (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

> (*a*) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (*b*) the amount, if any, determined under section 7.
>
> (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> (*a*) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (*b*) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[92] J.M. was over 19 when the parties separated and L.M. turned 19 in June 2013. In the circumstances of this case I do not think it would be inappropriate to apply the *Guidelines* for the period of time after the two girls attained the age of majority.

[93] The following chart shows the income of the Petitioner in each of the years since the parties separated up to and including June 2015. The income figures shown for the years 2011 to 2014 are her total income figures (line 150 on her T1 General Income Tax Return) less any union or professional fees in each year. For 2015, I annualized the rate of her long-term disability ($4,307.84 gross per month X 12).

[94] The chart also shows the table amount that would otherwise be payable, the amount of voluntary support paid by the Petitioner to the children or on their expenses as well as any support paid by virtue of the Court's July 2014 order and the monthly and total shortfall. I have not included in this chart the amount that the Petitioner contributed to what I would consider to be section 7 expenses such as university tuition or ringette costs.

YEAR	INCOME	NO. OF CHILDREN	TABLE	PAID	SHORTFALL
2011	$78,451.97	2	1,088 x 10 = 10,880.00	2,867.92	$8,012.08
2012	81,144.00	2	1,116 x 12 =13,392.00	4,014.57	9,377.43
2013	61,781.00	2 x 6 months 1 x 6 months	860 x 6 523 X 6 =8,298.00	3,856.09	4,441.91
2014	49,228.90*****	1	413 X 12 = 4,956.00*****	Volunteered 1,499.00 Ordered 2,684.00 Total 4,183.00*	773.00
2015	51,694.08*	1	434 X 6 = 2,604.00*****	2,084.56*	519.44
TOTAL			**$40,130.00**	**$17,006.14**	**$23,123.86**

*****The child support ordered by Justice MacDonald in July 2014 assumed the Petitioner would have an income of $56,000.00 per year, a figure which parties had agreed upon. As a result the parties agreed that the Petitioner would pay to the Respondent $472.00 per month on an interim basis. In retrospect, the Petitioner overestimated her income. The above chart shows her actual income for child support purposes for the year 2014 as well as the table amount payable at that level of income. As of July 2015 the Petitioner had no income and for that reason no support was paid.

[95] As the chart above indicates, the amount paid by the Petitioner to or on behalf of the children from the date of separation up to June 2015 amounted to approximately 42% of the amount that would have been expected of her according to the *Child Support Guideline* tables.

[96] After having considered the factors contained in *D.B.S.* (supra) I have concluded that this is an appropriate case to order retroactive child support. There was no undue delay on the part of the Respondent in asking for child support in his Answer. Prior to the Petitioner filing her Petition she had her then lawyer write to the Respondent by way of a letter dated March 16, 2011. The contents of that letter could reasonably have led the Respondent to believe that the Petitioner understood her obligation to contribute to the support of the children. Whereas the Petitioner

had access to legal advice from the date of separation, it would be unreasonable to assume that she did not have some appreciation for what was expected of her in terms of the support of the children.

[97] While she did contribute to the support of the children on a voluntary basis, her contribution was well below that which would ordinarily be required by the *Guideline* tables. As for the Petitioner's ability to pay, had she claimed undue hardship during the retroactive period March 2011 to June 2015, the evidence does not disclose any circumstance that would lead me to believe that she would have been granted relief on that basis.

[98] Therefore, using the table figures noted above, I order the Petitioner to pay to the Respondent retroactive child support pursuant to section 3 of the *Guidelines* in the sum of $23,123.86. That sum may be set off against the equalization payment referred to earlier.

CHILD SUPPORT:

Retroactive Child Support – Section 7 Expenses

[99] The Respondent also sought an order requiring the Petitioner to pay on a retroactive basis a proportionate share of the children's university related expenses and ringette expenses from the date of the parties' separation up to the date of trial.

[100] Subsection 7(1) and (1.1) of the *Guidelines* read as follows:

> **7.** (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
>
> (*a*) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
>
> (*b*) that portion of the medical and dental insurance premiums attributable to the child;
>
> (*c*) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
>
> (*d*) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(*e*) expenses for post-secondary education; and

(*f*) extraordinary expenses for extracurricular activities.

(1.1) For the purposes of paragraphs (1)(*d*) and (*f*), the term "extraordinary expenses" means

(*a*) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(*b*) where paragraph (*a*) is not applicable, expenses that the court considers are extraordinary taking into account

(i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs and talents of the child or children,

(iv) the overall cost of the programs and activities, and

(v) any other similar factor that the court considers relevant.

[101] I find that J.M.'s tuition and other university expenses up to January 2013 when she graduated and L.M.'s university costs fall within the scope of what is contemplated by subsection 7(1)(e).

[102] Both girls were also involved in the sport of ringette. J.M. played the sport purely for enjoyment. L.M. played at a higher level than her sister and thus the cost for her participation in the sport was considerably higher. I find that the costs associated with the girls' participation in ringette is an extraordinary expense as contemplated by subsection 7(1)(f).

[103] The Respondent's evidence of the girls' university and ringette expenses that he wants the Petitioner to share, is confusing to say the least. His Statement of Special or Extraordinary Expenses contains a list of expenses that he is claiming for each child between 2011 and May of 2015. It is unclear whether he paid all of those expenses or if the children paid some of them. He has included in that list figures for tuition, books, etc. but he has also included in that list house insurance premiums as well as the cost of tires for the car usually driven by the parties'

daughters. Nowhere is there a year-by-year summary. Behind his list of expenditures are many pages containing photocopies of various receipts and cancelled cheques. Many of the receipts and cancelled cheques are illegible. Many receipts do not tell me what they were for. No attempt was to line up the receipts with the list of expenditures.

[104] During her summation counsel for the Respondent said that the total section 7 expenses incurred by the Respondent in the year 2011 came to $6,590.00, in 2012 they came to $9,282.37, in 2013 they came to $8,904.08 and in 2014 they came to $13,402.14. When I added L.M.'s university tuition for the first half of 2015 ($2,805.30) her figures totalled $40,983.89 to be shared by the parties. I have reviewed the Respondent's affidavits, his exhibit books and his Statement of Special or Extraordinary and I could not arrive at the same figures as did counsel.

[105] According to the Respondent's list of expenditures in his Statement of Special or Extraordinary Expenses I arrived at figures of $3,608.60 for 2011, $6,612.36 for 2012, $7,184.98 in 2013, $12,367.14 in 2014 and $2,805.30 so far in 2015 for a total of $32,578.38.

[106] I conclude that the university expenses are a necessity for the parties' children. The cost of that expense is reasonable relative to the cost of university expenses elsewhere in the province or for that matter elsewhere in the country. As for ringette, it is clear the children enjoyed that activity and L.M. in particular, has excelled at it. Both parties, after their separation, contributed to that expense. That is an indication to me that they too thought that the activity was necessary and the cost reasonable.

[107] Subsections 7(2) and (3) of the *Guidelines* provide:

> (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.
>
> (3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

[108] Counsel for the Respondent argued that the Petitioner owes over $23,000.00 in retroactive child support pursuant to section 7. In arriving at that figure she used a higher figure than did I for the total section 7 expenses and when determining the parties' proportionate shares she used the Petitioner's income on line 150 for the years 2011, 2012 and 2013 and $56,000.00 for 2014 and 2015. She also assumed

that the Respondent's income in each of those years was $50,000.00. Finally, she gave no credit to the Petitioner for contributions that she previously made to the section 7 expenses.

[109] I will not require the Petitioner to pay any further child support pursuant to section 7 of the *Guidelines* on a retroactive basis for the reasons that follow, taken collectively.

[110] Subsection 7(2) provides the guiding principle. It provides that the Court may require the parties to share the cost of certain section 7 expenses "in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child." The Respondent did not make any deduction from his list of expenses for any amount the children contributed or could have contributed.

[111] The Petitioner provided evidence of their daughters' earnings since the date of the parties' separation. J.M. worked in retail during some summer months. She also tutored and worked in a group home where she still works today. L.M. worked in retail. She too tutored and worked in a nursing home. Both of the girls also spent some time working for their father's business. The summaries of J.M's income tax returns in the years 2011 and 2012 showed income figures of $2,160.00 and $3,235.00 respectively. L.M.'s tax summaries for 2012, 2013 and 2014 showed income figures of $6,594.00, $7,496.00 and $10,485.00 respectively.

[112] Most of the section 7 expenses were incurred by or on behalf of L.M.. Of the two children she had the greater ability to contribute to those expenses and with the income that she earned I would expect her to make a contribution. A contribution of at least $7,000.00 over the years 2012 to 2014 would not be unreasonable. If her income in 2015 was similar to her 2014 income then a further contribution of $2,000.00 or $3,000.00 could be expected.

[113] Further, counsel for the Respondent, in arriving at her figures, failed to make the necessary schedule III adjustments to the Petitioner's income which in her case was for union dues. By making that adjustment her proportionate share in each year is reduced.

[114] Further, the Respondent's figures fail to take into account any income tax deductions or credits relating to the expenses which is required by subsection 7(3). In the years that the children attend university, they are entitled to claim their tuition, books and other educational costs when arriving at their taxable income. Ordinarily a student does not need to claim those expenses in order to bring their taxable income down to zero because most full-time students do not earn enough in

any given year that they would have to pay any income tax after their personal exemption has been taken into account. Their parents then have the ability to claim a portion of those expenses to reduce their tax payable with any remaining expenses left to the child to claim in future years.

[115] The Respondent gave evidence that he did not claim any of the children's university costs for tax purposes because he chose to allow the girls to keep all that they could to minimize their income tax payable in the future. As altruistic as that sounds, he did not offer the Petitioner the opportunity to make that claim. It also does not prevent the Court from adjusting the expense figures for the tax savings that could have been realized. The tax that could have been saved beginning in the second half of 2011 to and including the first half of 2015 would come to approximately $4,000.00.

[116] The Respondent's figures also failed to take into account the cost to the Petitioner of the medical plan premiums that she paid for the benefit of the children. As stated earlier, the total cost to her from the date of separation up to June 2015 came to $3,821.73. That is a section 7 expense by virtue of subsection 7(1)(b) of the *Guidelines*. The total cost should be off set against the expenses claimed by the Respondent.

[117] Further, the Respondent's figures do not take into account the money the Petitioner has already contributed to the children's university and ringette expenses on a voluntary basis. Between March 2011 and January 2014 she contributed a total of $8,925.16 to those expenses.

[118] If the incomes of the parties were equal, by making the adjustments that I have referred to above, I would conclude that the Petitioner has already met any obligation that could reasonably be imposed upon her pursuant to section 7 for the years 2011 to the first half of 2015. The Respondent argued, however, that the Petitioner actually earned more than him in each of those years. It is a position that is not supported by the evidence.

[119] In the Respondent's Statement of Income dated August 13, 2015 he swore that his current income from all sources came to $36,000.00 per year. His tax returns show that all of his income comes to him from the company in the form of dividends.

[120] In his affidavit sworn July 9, 2014 he disclosed at paragraph 12 that in addition to any income he receives from the company he also received cash income which he kept out of the bank and put "into a safe location" in the family home which money was referred to as the "stash".

[121] In his affidavit sworn September 11, 2015 – just a month before he swore his Statement of Income – he said that the cash work varied over the years and that his "best guess average" for his income over the years was $50,000.00 per year "inclusive of cash and reported income".

[122] The Respondent did not deny that the income information that he has been giving to Canada Revenue Agency – essentially since he began repairing cars in his garage – was knowingly inaccurate. So called "cash jobs" simply went unreported.

[123] The dilemma for the Court is that if the Respondent is prepared to falsify his income information to Canada Revenue Agency year after year, what reason do I have to believe that he would not falsify the income information he gives the Court.

[124] He suggested that the Court accept that his income from all sources came to $50,000.00 per year. I do not accept that as an accurate estimate. Given that he has been able to cover all of his personal expenses, pay much of his daughters' tuition and ringette expenses, and buy two separate lots of land for a total of $20,000.00 apparently without incurring any debt, I do not accept that his yearly income is only $50,000.00. Even if it was, a portion of that $50,000.00 is tax free and would therefore have to be grossed up.

[125] A review of his company's financial statements was of little assistance. The accuracy of those statements would depend upon the accuracy of the information the Respondent provides. Because that information is inaccurate the statements themselves are unreliable. On their face they show the company had no retained earnings during the years 2011 through to and including 2014. The shareholders' deficit grew from $92,000.00 in 2011 to over $188,000.00 in 2014. In each of those years the company had a net income lower than the amount supposedly paid to the Respondent in the form of dividends.

[126] If I felt the need to apportion any section 7 expenses between the parties on a retroactive basis, section 23 of the *Guidelines* allows the Court to draw an adverse inference against a spouse who fails to provide adequate financial disclosure when a claim for child support is to be heard. The Respondent can't reasonably expect the Court to accept as his income whatever figure he chooses to put forward on the day of the trial. The obligation is on him to provide proper, adequate and honest disclosure. As Kiteley, J. of the Ontario Superior Court of Justice said in *Meade v. Meade*, 2002 CANLII 2806 at paragraph 81:

> "It is inherent in the circumstances of those who are self-employed or who have irregular income and expenses, that they have a positive obligation to put forward

> not only adequate, but comprehensive records of income and expenses. That does not mean audited statements. But it does mean a package from which the recipient spouse can draw conclusions and the amount of child support can be established. Where disclosure is inadequate and inferences are to be drawn, they should be favorable to the spouse who is confronted with the challenge of making sense out of financial disclosure, and against the spouse whose records are so inadequate or whose response to the obligation to produce is so unhelpful that cumbersome calculations and intensive and costly investigations or examinations are necessary."

[127] If it was necessary I would have considered imputing income to the Respondent.

[128] If I needed any further justification for not making a retroactive order under section 7, it would be that all of the girls' university and ringette expenses appear to have been paid in full. They did not suffer because of the absence of any formal child support order. Any retroactive order now would not benefit them. And finally, there is nothing in section 7 that requires parents to fully fund any of the expenses listed in section 7. Any order under section 7 is to take into account, among other things, the means of the parties.

[129] I therefore dismiss the Respondent's claim for retroactive support pursuant to section 7 of the *Guidelines*.

Prospective Child Support

[130] The Respondent also sought an order for prospective child support requiring the Petitioner to pay to him the table amount of child support for the support of L.M. as well as a contribution pursuant to section 7 of the *Guidelines* representing her proportionate share of L.M.'s university and ringette costs.

[131] The Petitioner received her final disability cheque at the end of June, 2015. She testified that her insurer discontinued her coverage because she was deemed to be able to work. She appealed that decision but as of the date of trial had not received a response. It was her evidence that she was not working but she hoped to be able to return to nursing by January, 2016. She cautioned that she anticipated that it may be longer than that because her union and her employer needed to meet before a decision could be made as to when she could return to work. In the meantime she said she was looking for other employment but so far without success.

[132] On her behalf it was suggested that child support payments recommence as soon as she is gainfully employed and that it be based on her income at that time. It was the Respondent's position that the Court should impute income to the

Petitioner on the same level of income as she received in 2014 and require her to pay child support relative to that income.

[133] I have no reason to believe that the Petitioner is intentionally unemployed. Her disability benefits came to an end against her wishes. She has been looking for employment and hopes to be able to return to nursing for Capital Health shortly. She seemed to appreciate that if the decision to allow her to return to nursing takes an inordinate amount of time, she will have to find employment elsewhere. It is for that reason that she has already started submitting applications.

[134] I therefore order that at the present time no prospective child support is to be paid. The Petitioner will make reasonable and diligent efforts to obtain employment as soon as possible. The Petitioner is ordered to immediately advise the Respondent in writing once she obtains employment of any kind. She is also to provide him with the particulars of that employment i.e. whether it is full or part-time employment, where she will be employed, her working hours per week and rate of compensation. At that time it would be expected that the Petitioner will pay to the Respondent the table amount of child support for L.M. - if she is still a "child of the marriage" - based on her income for child support purposes. Without knowing what L.M.'s section 7 expenses might be at that time or what the Petitioner's income is going to be and without accurate and full particulars of the Respondent's income, it is impossible for the Court to make an order at this time pursuant to section 7 of the *Guidelines*. If the Respondent feels that he is entitled to an order pursuant to section 7 and the parties are unable to agree on what the Petitioner should pay, then he may make a further application to the Court by way of a variation application pursuant to section 17.

SUMMARY

[135] In summary the following is ordered:

1. The order will acknowledge that at the present time L.M. is residing primarily with the Respondent and J.M. is no longer a "child of the marriage" as defined by the *Divorce Act*.
2. No spousal support will be paid by either party to the other.
3. The Petitioner will pay to the Respondent retroactive child support pursuant to section 3 of the *Guidelines* in the sum of $23,123.86 which sum will be set off against the equalization payment that is to be paid by the Respondent to the Petitioner pursuant to the *Matrimonial Property Act*.
4. The Respondent's claim for retroactive child support pursuant to section 7 of the *Guidelines* is dismissed.

5. There will be no child support paid by the Petitioner to the Respondent for the support of L.M. at the present time.

6. The Petitioner will make reasonable and diligent efforts to obtain employment as soon as possible and upon obtaining employment she is to immediately advise the Respondent in writing that she has obtained employment and will, at the same time, provide him with the particulars of that employment including where she will be employed, whether the employment is part-time or full-time, the hours that she will be working each week and the rate of her compensation.

7. (a) The matrimonial assets and debts will be distributed between the parties according to the chart contained in paragraph 10. For clarification purposes the Respondent will be the sole owner of the matrimonial home and will be fully responsible for all expenses associated with that property including municipal taxes, house insurance premiums, utilities and the like.

(b) Each party will keep the household contents that are now in his or her possession however, as the parties agreed, the Respondent will immediately deliver to the Petitioner the cedar chest and a fair share of the family photographs contained in the chest.

(c) The Petitioner's pension will be divided at source from the date of the parties' marriage to the date of their separation i.e. March 8, 2011. The Respondent's locked-in retirement allowance account will be divided equally between the parties by way of a rollover.

(d) The Petitioner will be solely responsible for her BMO MasterCard account, Sears account, RBC Visa account and RBC line of credit. The Respondent will be solely responsible for his MBNA credit card account, RBC Visa credit card account, CIBC Visa credit card account and his Canadian Tire/Option MasterCard credit card account.

(e) The non-matrimonial assets to which I have referred herein belong solely to the Respondent.

(f) The Respondent will pay to the Petitioner an equalization payment of $133,115.08 which sum will be paid no later than January 25, 2016. If either party incurred any further expense for the appraisal of any matrimonial asset, the cost incurred for that appraisal will be shared equally between the parties.

8. The Respondent will pay to the Petitioner the sum of $2,000.00 representing compensation pursuant to section 18 of the *Matrimonial Property Act*. That sum will be paid to the Petitioner no later than January 25, 2016.

Consequently, the Respondent will, by January 25, 2016, pay to the Petitioner a net payment of $111,991.22 calculated as follows:

Equalization payment	$133,115.08
Section 18 compensation	2,000.00
Retroactive child support	- 23,123.86
NET PAYMENT BY RESPONDENT TO PETITIONER	**$111,991.22**

COSTS

[136] If either party wishes to be heard on the issues of costs, they are to contact my office within four weeks of the release date of this decision and a date will be set for the hearing of submissions.

[137] I direct that counsel for the Petitioner prepare the Divorce Order and the Corollary Relief Order.

Dellapinna, J.