SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *McCrate v. McCrate*, 2016 NSSC 6

Date: 20160108
Docket: 1201-067502 SFH-D 0088904
Registry: Halifax

Between:

Anne Marie McCrate

Petitioner

v.

Bradley Craig McCrate

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: July 27, 28 and August 17, 2015

Counsel: Kay L. Rhodenizer for Anne McCrate
Kelsey E. Hudson for Brad McCrate

By the Court:

Introduction

[1] Following almost seventeen years of marriage, Anne and Brad McCrate separated. At issue in their divorce is the division of some of their property, child support, spousal support and costs. Ms. McCrate also makes claims for occupation rent or pre-judgment interest.

[2] Where there are multiple issues, I must deal with them in the appropriate and logical order. Typically, this means beginning with parenting. Here, the parties have agreed their three daughters will be in a shared parenting arrangement. In *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414 (A.D.) (affirming *Harwood v. Thomas* (1980), 43 N.S.R. (2d) 292 (T.D.)), the then-Appeal Division said that it's appropriate to deal with the division of property before support claims, so I will begin there. When dealing with support applications under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, subsection 15.3(1) of the *Act* tells me to address child support before spousal support.

Divorce

[3] I grant Ms. McCrate's request for a divorce. The parties have been separated for more than two years and reconciliation is not possible.

Property division

Assets

[4] The parties decided to separate in late July 2013. Ms. McCrate said that for financial reasons she continued to live at the matrimonial home until December 30, 2013. When she moved, she rented a home nearby, and the couple's three daughters began to alternate their time between her home and their father's on a weekly basis.

[5] The parties entered into an Interim Separation Agreement in December 2013 before Ms. McCrate moved from the home. It contained their agreements regarding interim support, debt servicing and the payment of certain expenses.

[6] Since separating, the parties have agreed on a number of issues relating to their summer cottage, the matrimonial home and their vehicles. They've agreed on the characterization of certain assets and on some values.

[7] I am left to determine the remaining issues, conducting the analysis required by the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275. The first step under the *Act* is to identify all the assets. Second, the assets are to be classified as matrimonial or exempt, as outlined in section 4 of the *Act*. Third, after items are identified and classified, they must be valued. The *Act* provides that matrimonial assets are to be divided equally. In limited circumstances, section 13 allows for an unequal division of matrimonial assets and a division of non-matrimonial assets. Whether this is appropriate is my last consideration.

Identification

[8] The parties agree that the home, cottage, cottage contents, RRSPs, 2013 tax refunds, their vehicles and certain bank accounts are matrimonial assets. Comparing the balance sheets prepared by the parties, there are two items which Ms. McCrate claimed are matrimonial assets and Mr. McCrate claimed are not: cash Ms. McCrate found in the garage at the matrimonial home and Mr. McCrate's foregone tax refund.

Classification

[9] The parties disagreed about the classification of some bank accounts. Ms. McCrate asserted that $6,400.00 found in a paper towel dispenser in the garage is a matrimonial asset, as is the tax refund Mr. McCrate would have received if he hadn't withdrawn approximately $44,200.00 from his RRSP after they separated.

[10] According to subsection 4(1) of the *Matrimonial Property Act*, all property is matrimonial unless it is proven to be otherwise. The *Act* lists various types of assets which are not matrimonial. The party who says an asset is not matrimonial bears the burden of proving the exclusion on a balance of probabilities.

Bank accounts

[11] Unless the parties resume cohabitation, real or personal property acquired after they separate is not a matrimonial asset according to clause 4(1)(g) of the *Act*.

[12] After July 2013, each spouse opened a new bank account. Ms. McCrate opened hers (PC account ending 95-939) at some point after November 23, 2013 when she swore her first Statement of Property. Mr. McCrate opened his (a PC account) on August 31, 2013. At the time, the parties were separated even though they were still occupying the same house. Neither of these accounts are matrimonial assets according to clause 4(1)(g) of the *Act*.

[13] The remaining bank accounts are matrimonial assets.

Money in the paper towel dispenser

[14] In September 2013, Ms. McCrate found paper envelopes and clear plastic ziplock bags in a paper towel dispenser in the garage attached to the home. The envelopes and bags contained money. Ms. McCrate said some of the bills were "very old", suggesting they were bank notes that weren't in circulation following the separation. She took photographs of the clear plastic bags which showed bank notes that are in current circulation.

[15] Mr. McCrate said that the paper envelopes contained money from his mother. He said that approximately eight years ago his mother, Catherine Muise, gave him $30,000.00. According to Mr. McCrate, his mother explained that she didn't like what she'd seen in some families where children fought over their aged

parents' money. Mr. McCrate said that his mother gave him the money so this wouldn't happen and told him not to spend the money unless he was "really desperate". He said she told him that "if anything happened to her, [he] could spend the funds as [he] chose", and she said that if she needed the money, she'd call for it or "would take it back". Ms. Muise did not testify or offer an affidavit. Mr. McCrate said he hid the money and never told his wife about it because she was a spendthrift. Mr. McCrate spent almost all of the money from his mother. He admitted that he didn't spend it because he was desperate.

[16] Mr. McCrate testified that between $8,000.00 and $10,000.00 of his mother's money was used to buy jewellery as gifts for Ms. McCrate, and a laptop computer. He said the remainder was used to avoid carrying debt – so he either purchased items or repaid bills with his mother's funds. In his affidavit, Mr. McCrate explained that the money was spent on household expenses, cottage renovations and family trips. Mr. McCrate said that when the parties separated there was $3,000.00 left of the money from his mother.

[17] When Catherine Muise learned her son and daughter-in-law had separated, she asked for her money back. Mr. McCrate repaid her.

[18] Mr. McCrate argued that the money from his mother was an inheritance or a gift. He said that it falls within clause 4(1)(a) of the *Matrimonial Property Act* and is not a matrimonial asset.

[19] The money from Ms. Muise is not an "inheritance". Ms. Muise was alive when the money was transferred to Mr. McCrate, and she is still alive. The money did not come to Mr. McCrate as a result of a will or intestacy.

[20] As it relates to the $30,000.00, the circumstances between Ms. Muise and Mr. McCrate are those akin to bailment: Ms. Muise transferred possession of the money to her son, but not its ownership. He was to return the money to her on her request. Where Mr. McCrate did not become owner of the money, it is not a matrimonial asset. His breach of the terms under which the money was transferred to him do not alter those terms. The remaining funds ($3,000.00) are not a matrimonial asset.

[21] Mr. McCrate said the plastic ziplock bags contained $3,400.00 that he had saved. He offered no evidence to suggest that he saved this money after the parties separated. A spouse's savings made during cohabitation fall into no excluded category. These are a matrimonial asset.

Mr. McCrate's foregone tax refund

[22] On their balance sheets, the parties agree that a 2013 tax refund of $5,243.62 owed to Mr. McCrate is a matrimonial asset.

[23] Mr. McCrate withdrew approximately $44,200.00 from his RRSP in 2013 after the separation. By adding this sum to his income, he triggered additional income taxes. Ms. McCrate estimates her husband lost a tax refund of $20,195.00 as a result of withdrawing his RRSP contributions, and she seeks $10,097.50 to compensate her for this.

[24] Tax refunds are matrimonial assets: in *Webb*, 1994 CanLII 4248 (NS SC), Ms. Webb's 1992 tax return disclosed a refund of almost $2,700.00. This represented money earned during the parties' cohabitation which was diverted for the payment of income tax. Because Ms. Webb's tax debt for 1992 was not so great, she received a refund of this income tax overpayment. Justice Goodfellow described the refund as representing a "form of saving" which was "postponed" until Ms. Webb filed her 1992 tax return was assessed in 1993.

[25] If Mr. McCrate had received a tax refund, the portion of it that related to the period the couple cohabited as spouses in 2013 would be a matrimonial asset. However, Mr. McCrate did not receive a $20,195.00 tax refund for 2013. He is required to divide the refund he received.

[26] Subsection 4(1) of the *Matrimonial Property Act* describes matrimonial assets as "property acquired by either or both spouses before or during their marriage." The prospect of a tax refund is not property.

Valuation

[27] Based on the parties' balance sheets, they disagree about the value of the home, Ms. McCrate's RRSP contributions and certain bank account balances.

[28] In *Simmons*, 2001 CanLII 4617 (NS SF) at paragraph 34, Justice D. Campbell outlined general principles for determining the date on which to value an asset: use separation date values for assets which "tend to be consumed by actual usage or whose value has been earned or accrued by reference to the passage of time" and value other assets when the spouses do their accounting. While a trial

decision, *Simmons*, 2001 CanLII 4617 (NS SF) has twice been lauded by the Court of Appeal: in *Moore*, 2003 NSCA 116 at paragraph 24, Justice Hamilton described the decision as "[a] good review of the rationale behind the choice of valuation dates" and in *Morash*, 2004 NSCA 20 at paragraph 21, Justice Bateman said it provided "a comprehensive discussion of 'valuation date' ". Justice D. Campbell's general principles fit well within the context of the Court of Appeal's statement that there is "no requirement in Nova Scotia to assign a single valuation date for all matrimonial assets" in *Reardon v. Smith*, 1999 NSCA 147 at paragraph 38.

The home

[29] The home is security for a joint credit line. Each party had a bank card allowing access to the credit line, and each used it following the separation for family expenses and for personal expenses. When the McCrates separated in July 2013, their joint credit line had an outstanding balance of $36,420.24. The parties agree on this. As of June 1, 2015, the balance was $64,956.86. The credit limit is $65,000.00.

[30] The Interim Separation Agreement allowed Ms. McCrate to use $5,000.00 from the credit line for her moving costs. The McCrates agreed that this payment could be adjusted when a final agreement was negotiated and, until then, Mr. McCrate would service the credit line.

[31] Ms. McCrate provided the credit line's monthly statements from July 2013 to May 2015. The credit line statements attached as Exhibit 4 to Ms. McCrate's affidavit (Exhibit 13) identify whether Mr. McCrate or Ms. McCrate incurred an expense, based on the bank card used. Within her card's expenses, Ms. McCrate identified costs she incurred which she argued were for the family. This evidence was not contradicted. Mr. McCrate did not identify any costs which he incurred and said were for the family. Only those expenses noted to be "Xmas", "kids", "dent" and "ortho" (including Stuart and Davidson Ortho), and for one daughter's ringette tournament are debts incurred for the benefit of the family. These expenses of $3,468.48, in addition to the $36,420.24 owed on the joint credit line in July 2013, are to be paid with the proceeds from the sale of the matrimonial home.

Bank accounts

[32] At paragraph 21 in *Simmons*, 2001 CanLII 4617 (NS SF), Justice D. Campbell said that the date of separation is the valuation date for bank accounts where parties separate their incomes and responsibility for expenses near the date

of their separation. For those who continue to use accounts to support the family for many months, this transitional use "demands that [the accounts] be valued as of the eventual date on which those finances are assigned".

[33] The McCrates continued to reside in the same home until the end of December 2013 where family expenses were incurred for all. They began to isolate their income and expenses before Ms. McCrate moved by opening new personal bank accounts. As time passed, their finances were finally isolated by the Interim Separation Agreement which was signed on December 22, 2013. As a result, I find December 22, 2013 is the appropriate date at which to value all bank accounts, except the accounts noted in paragraph 12 above.

Ms. McCrate's RRSPs

[34] According to their balance sheets, the parties don't agree on the value of Ms. McCrate's RRSPs. Ms. McCrate values them at $25,991.10 (after a thirty percent reduction for tax) while Mr. McCrate values them at $23,723.18 (after deducting an unspecified amount for income tax). The evidence I have is that Ms. McCrate has neither added to nor withdrawn from her RRSPs since the parties separated. In these circumstances, it is appropriate to use her RRSP balances at the date these RRSPs are divided. In this way, each party shares the increase or decrease in the value of the RRSPs that has occurred since they separated.

[35] RRSPs may be divided by tax-free inter-spousal roll-over pursuant to subsection 146(16) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 or by allowing one party to retain RRSPs. In the latter case, I must be mindful of the fact that the RRSPs' value cannot be realized without triggering income tax consequences, so I ought not equate the face amount of the RRSPs with the value of any asset that is not equally taxed when its value is realized. The exact amount of taxes due when RRSP funds are withdrawn depends on the annuitant's other income (and marginal tax rate) at that time.

[36] An asset's value is to consider any inherent taxes. In *Gomez-Morales*, 1990 CanLII 2349 (NSSC AD) Justice Hallett said, "While it is difficult to determine the exact tax cost, income tax costs are not speculative and cannot safely be ignored simply because a disposition may be 'well down the road'." The emphasis in Justice Hallett's. His Lordship advised, "An attempt should be made to assess the tax consequences associated with the eventual disposition of an asset and an adjustment of value made if fairness dictates."

[37] Since I have not yet determined whether I will order that the parties equalize Ms. McCrate's RRSPs, I must determine the tax discount to be applied to their value.

[38] Currently, Ms. McCrate's annual taxable income is approximately $40,300.00. At its highest, her marginal tax rate is approximately thirty percent, the current marginal rate for income between $29,500.00 and $44,700.00. There was no evidence Ms. McCrate plans to withdraw funds from her RRSP in the near future. Her RRSP contributions must be withdrawn prior to the end of the year she turns 71. Her retirement income will include funds from both her pension and Mr. McCrate's. Anticipating her retirement income will be within the same marginal tax bracket, I find that thirty percent is a reasonable estimate of the tax rate payable on her RRSP contributions when they are withdrawn.

Debts

[39] Subsection 12(1) of the *Matrimonial Property Act* provides that matrimonial assets are divided equally notwithstanding the ownership of the asset. There is no similar treatment of debts. Some debts are considered when an asset is valued, as I considered the joint credit line in valuing the McCrates' home. Other times, there are debts which don't relate to any particular asset. The *Act* refers to debts only in subsection 13(b) where it provides that I may unequally divide matrimonial assets or divide non-matrimonial assets where to do otherwise would be unfair or unconscionable having regard to the amount of debts and liabilities of each spouse and the circumstances in which they were incurred.

[40] To this point, it is appropriate that matrimonial assets be divided equally between the spouses. I must now consider the debts and whether their allocation based on contractual obligation would render an equal division of matrimonial assets unfair or unconscionable.

[41] Like assets, debts must be identified, classified and valued.

Identification

[42] The debts I must consider include the joint credit line, a Capital One MasterCard, the expense of appraising the cottage and the expense for renting a propane tank at the cottage.

Classification

[43] While common, calling debts "matrimonial" or "family" blurs the analysis required by the *Matrimonial Property Act*. The *Act* doesn't direct me to deduct the amount of a "matrimonial" or "family" debt from the value of matrimonial assets. The *Act* raises a more basic question: should the debt considered in the property division at all? In the jurisprudence, reference to a "matrimonial debt" or a "family debt" is a shorthand reference for the conclusion that an equal division of assets which fails to consider this particular debt is either unfair or unconscionable having regard to the debt, and the division must be adjusted to achieve the *Act*'s objectives.

[44] According to Justice Roscoe in *Bailey*, 1990 CanLII 4116 (NS S.C.) at paragraph 23, when determining if a debt is "matrimonial", I must decide whether it was incurred for the family's benefit, whether it is an ordinary household debt, and, if it arose after the couple separated, whether it was necessary to meet basic living needs or to preserve matrimonial assets. This decision was approved by the Court of Appeal in *Ellis*, 1999 CanLII 4274 (NS C.A.). In *Cameron*, 1995 CanLII 4433 (NS S.C.) at paragraph 24, affirmed at *Cameron*, 1996 CanLII 5598 (NS C.A.), Justice Goodfellow said that indebtedness incurred after separation and for the debtor's sole benefit is generally not "matrimonial", but personal.

[45] At paragraph 26 in *Cameron*, 1995 CanLII 4433 (NS S.C.), affirmed at *Cameron*, 1996 CanLII 5598 (NS C.A.), Justice Goodfellow noted that a debt is not automatically shared simply because the debt has been characterized as "matrimonial". Whether the debt will be shared depends on whether the equal division of matrimonial assets would be unfair or unconscionable. At paragraph 26, Justice Goodfellow said, "In most conceivable situations fairness and conscience dictate a sharing of matrimonial indebtedness."

Propane tank and cottage appraisal

[46] Renting the propane tank at the cottage was a $218.50 cost paid by Ms. McCrate and necessary to allow the family to use the cottage. While the expense was solely incurred by Ms. McCrate, it should be shared equally as both parties used the cottage and had the benefit of the rental.

[47] The $484.61 expense of appraising the cottage arose after separation. It, too, was incurred solely by Ms. McCrate. The appraisal wasn't necessary to meet basic living needs or to preserve matrimonial assets as required by *Bailey*, 1990 CanLII 4116 (NS S.C.). The appraisal was not for Ms. McCrate's sole benefit, but to

assist in resolving the parties' legal dispute. I find it is a debt that should be shared equally by the parties.

Credit line

[48] In their Interim Separation Agreement, the McCrates agreed that Ms. McCrate could withdraw $5,000.00 from the credit line to finance her relocation. They agreed that this payment would be subject to adjustment when a final agreement was negotiated and Mr. McCrate agreed to service the credit line until then.

[49] Each party had a bank card which allowed access the joint credit line. I have already determined that certain debits are debts incurred for the benefit of the family and are to be repaid, along with the $36,420.24 owed on the joint credit line in July 2013, from the proceeds from the sale of the home. The total to be paid from the home's sale proceeds is $39,888.72.

Valuation

Capital One MasterCard

[50] It was Ms. McCrate's evidence that the Capital One MasterCard debt is $3,755.86. This is the amount owing on the account statement received immediately after she left the home, after deducting certain amounts which were personal expenditures. She said that other than approximately $465.00 in personal expenditures, the $3,755.86 balance resulted from purchases for the household and the girls. This evidence was not contradicted, and I accept that the portion of the Capital One MasterCard debt that relates to the family is $3,755.86 and this amount should be equally shared.

Joint credit line

[51] When the McCrates separated in July 2013, their joint credit line had an outstanding balance of $36,420.24. As of June 1, 2015, its balance was $64,956.86. The credit limit was $65,000.00. The credit line is secured by the matrimonial home which is otherwise unencumbered.

[52] In their Interim Separation Agreement, the McCrates agreed that Mr. McCrate would service the credit line until a final agreement was negotiated. According to the credit line history, from December 22, 2013 until June 1, 2015,

there was interest of approximately $3,330.00 owed on purchases and cash withdrawals. Mr. McCrate paid this amount.

[53] Ms. McCrate provided the credit line's monthly statements from July 2013 to May 2015, annotated to show who incurred each expense that she did not consider one that should be shared. This evidence was not contradicted. Each party will be responsible for the remaining debt (and any refunds) associated with his or her bank card. Ms. McCrate is solely responsible for the cost of her relocation and her legal fees. Reviewing the credit line statements, Ms. McCrate is responsible for $14,000.00 owed on the credit line debt, and Mr. McCrate is responsible for the remainder.

Property division conclusion

[54] In the table below, I use the figures I've determined in my decision or I have identified how counsel should calculate the figures because many amounts, such as the net proceeds from the sale of the home, are unknown to me. Knowing that the house was sold for $354,000.00, I have estimated its net proceeds. My estimate, which includes $19,000.00 for real estate commission and legal fees, is not an exact calculation, but an approximation of the parties' financial circumstances as the property division is given effect. The division of assets outlined in this table should be effected to give each party an equal share of the assets' value.

Asset	**Anne McCrate**	**Brad McCrate**
Home 354,000.00 Less sale costs (19,000.00) Less credit line (39,888.72)	147,555.64	147,555.64
Cottage	52,500.00	52,500.00
Cottage contents	7,500.00	7,500.00
RRSP (net of tax)	Face amount of her RRSP at date of division, discounted by 30%	40,906.42
2013 tax refunds	4,187.89	5,253.62
Ford Fusion		17,500.00
Honda Fit 16,000.00 Less loan (24,561.00)	(8,561.00)	
Bank accounts (excluding PC 95-939 and his post-separation PC account)	Valued at December 22, 2013	Valued at December 22, 2013
Ziplock bag cash		3,400.00

Propane tank	(218.50)	
Cottage appraisal	(484.61)	
Capital One MasterCard	(3,755.86)	
ESTIMATED EQUAL DIVISION	200,129.78	274,615.68

[55] The estimated equal division has been calculated with incomplete information. Additional information is required to complete the calculation.

[56] Individually, I have allocated debts of $14,000.00 to Ms. McCrate and approximately $11,000.00 to Mr. McCrate. In light of the overall property division, this allocation is neither unfair nor unconscionable. Property shall be divided as I have outlined, once the additional information is obtained. I remain seised of the matter if required to finalize calculations.

Occupation rent

[57] Ms. McCrate filed her petition for divorce in November 2013. There were no further proceedings in the court until almost a year later, in late October 2014 when Ms. McCrate filed a motion seeking to set aside Mr. McCrate's request for a date assignment conference. By the time her motion was to be heard, she no longer objected to the assignment of trial dates. She did, however, want to bring a motion for the sale of the matrimonial home. She said that Mr. McCrate would not sign a Listing Agreement. A date was scheduled for this motion, but it didn't proceed because Mr. McCrate signed the Listing Agreement. Ms. McCrate signed the Listing Agreement on November 25, 2014 and Mr. McCrate signed it on December 24, 2014. On December 10, 2014, Ms. McCrate amended her petition to seek occupation rent.

[58] I was provided with correspondence relating to listing the matrimonial home for sale. The correspondence discloses that household repairs and staging, which were completed by November 23, 2014, enabled the house to be listed for $369,000.00, rather than at the "as is" price of $359,000.00. From this correspondence it appears the house was not ready to be shown too potential purchasers until late November 2014 – after the repairs and staging were completed. The initial listing price was $374,900.00.

[59] Further work was done by both Mr. McCrate and Ms. McCrate in June 2015. Mr. McCrate spent eighty hours preparing the house for sale: refinishing stairs, painting the exterior decks and painting various interior rooms. He also hired a painter to do additional painting. The painter, Jason McNama, provided a receipt

which indicated the days he worked, but not the amount he was paid. Mr. McCrate paid $270.77 to repair the heat pump at the home. This expenditure was necessary to sell the home.

[60] By June 29, 2015, the listing price was reduced to $369,000.00. The house was sold in October 2015 for $354,000.00. Ms. McCrate had valued the home at $350,000.00 on her Statement of Property, while Mr. McCrate valued it at $325,000.00.

[61] Throughout his occupation of the home, Mr. McCrate has paid the property taxes, property insurance and monthly utility costs. Property taxes were $320.00 each month and insurance cost $50.00 each month. The expense for utilities would reflect consumption by Mr. McCrate and the children.

[62] The home had no mortgage, but was security for the couple's credit line. According to the credit line history, from December 22, 2013 until June 1, 2015, there was interest of approximately $3,330.00 owed on purchases and cash withdrawals made by both parties.

[63] The matrimonial home was on the market for nine months. Ms. McCrate quantifies her claim for occupation rent at $5,976.00 (an amount Mr. McCrate would pay toward "shareable" debt on the couple's credit line). I cannot discern a basis for this amount: Ms. McCrate doesn't relate it to any particular period of exclusive possession or any specific monthly amount of "rent".

[64] Claims for occupation rent stem from one party's exclusion from a property that he or she is entitled to possess, according to Anger and Honsberger's *Law of Real Property*, 3rd ed. (Aurora: Canada Law Book, 2010), at §14:20.140.

[65] Occupation rent claims fail where the property is occupied by a parent with children for whom the dispossessed parent is not paying support (*MacLeod* (1994), 135 N.S.R. (2d) 49 (S.C.)) or where the occupant has paid the mortgage and property taxes (*Dodeman*, 1991 CanLII 4250 (NS S.C.)) and has not been compensated for this. Here, Mr. McCrate was occupying the home with the children. Because his child support payments were calculated on the basis of a set-off, I could consider that he was receiving child support. He was servicing the debt which was secured by the home and paying property taxes and insurance. These amounts total in excess of $6,000.00 for the year following Ms. McCrate's departure from the home.

[66] The delay in listing the sale is not shown to have had any impact on its eventual sale: the home needed work and its initial listing price was too high to attract and immediate buyer. Mr. McCrate incurred costs to maintain the home pending its sale. This is not an appropriate case to award occupation rent, and I dismiss this claim.

Pre-judgment interest

[67] Ms. McCrate asked that she be awarded pre-judgment interest if her claim for occupation rent was dismissed.

[68] Pre-judgment interest is addressed in subsection 41(i) of the *Judicature Act*, R.S.N.S. 1989, c. 240 which provides that in proceedings for "the recovery of debt or damages" a judge shall include pre-judgment interest. A claim under the *Matrimonial Property Act* is not a claim for damages, so pre-judgment interest is only available if the action is for recovery of debt.

[69] While there are a number of older decisions in which pre-judgment interest is awarded (*Carson*, [1987] WDFL 1305 (NS SC(TD)), [1987] NSJ No. 183, *Taylor* (1984), 65 N.S.R. (2d) 294 (T.D.)) in none of these did the judge specifically consider whether the property division claim was a proceeding for the recovery of a debt or damages, before awarding pre-judgment interest. Only in *MacNeil* (1983), 56 N.S.R. (2d) 232 (T.D.) was this clearly addressed: at paragraph 7, Justice Nathanson held that pre-judgment interest cannot be awarded where there is no debt or damages. The property division being neither, he declined to award pre-judgment interest.

[70] An application under subsection 12(1) of the *Matrimonial Property Act* seeks "to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets". Nova Scotia's matrimonial property regime is, according to Robert A. Klotz at page 4-30 in *Bankruptcy, Insolvency and Family Law* (2nd ed.) "a division or distribution" regime. In the context of bankruptcy claims, at page 5-12, Klotz says that "the division claim is not a pure debt claim". He continues, "Usually some part, if not all, of the claimant spouse's share will be valued and converted into a monetary debt obligation". His characterization also applies in this context: until an order for the payment of money is made, there is no debt owed. Once the debt is owed, it will bear interest as provided for in subsection 2(1) of the *Interest on Judgments Act*, R.S.N.S. 1989, c. 233.

[71] The property division claim being neither a claim for debt or damages, I am

unable to award pre-judgment interest, and I dismiss Ms. McCrate's claim for pre-judgment interest.

Support

[72] Ms. McCrate seeks prospective child and spousal support and an adjustment to the support Mr. McCrate paid pursuant to their Interim Separation Agreement. According to Justice Bateman at paragraph 40 in *Staples v. Callender*, 2010 NSCA 49, a payor's current ability to respond to a retroactive order is relevant to assessing hardship as an element of a retroactive support claim. So, I'll address the prospective support claims first. In considering the prospective claims, the claim for child support has priority over the claim for spousal support.

[73] The parties have agreed child and spousal support will be paid by Mr. McCrate weekly.

Prospective child support

[74] The girls are in a shared parenting arrangement. Mr. McCrate proposes that he pay child support determined solely with regard to subsection 9(a) of the *Federal Child Support Guidelines*. Ms. McCrate is prepared to agree to this, if she succeeds with her claim for an adjustment to interim support. At various points in his submissions, Mr. McCrate referred to calculating a contribution to special or extraordinary expenses.

[75] With respect, this is not how child support is calculated in cases of shared parenting. The correct analysis of child support claims in shared parenting cases is outlined in the Supreme Court of Canada's decision *Contino v. Leonelli-Contino*, 2005 SCC 63. When children are in a shared parenting arrangement, the determination of child support does not distinguish among the children's expenses. At paragraph 71 in *Contino v. Leonelli-Contino*, 2005 SCC 63, Justice Bastarache says, "Given the broad discretion of the court conferred by s. 9(c), a claim by a parent for special or extraordinary expenses falling within s. 7 of the Guidelines [. . .] can be examined directly in s. 9 with consideration of all the other factors".

Step one: subsection 9(a)

[76] The first step of my analysis is identified at paragraph 44 of *Contino v. Leonelli-Contino*, 2005 SCC 63: I must calculate the set-off of the amounts each parent would pay the other pursuant to the table. Mr. McCrate works for a Local

of the Longshoremen's Association. As well, he does some work as a union representative. From his 2014 income of $112,374.26, he pays union dues of $2,489.99, bringing his income for the purpose of determining child support to $109,884.27.

[77] Ms. McCrate's annual income is $40,293.12. This is comprised of her earnings of $37,112.12 (from which I have already deducted her union dues of $463.80) and her Employment Insurance benefits of $3,181.00.

[78] At an annual income of $109,884.27, Mr. McCrate would pay $1,915.00 in child support. At an annual income of $40,293.12, Ms. McCrate would pay $762.00 to Mr. McCrate. The set-off amount is $1,153.00.

[79] This set-off amount has no presumptive value. According to Justice Bastarache at paragraph 49 in *Contino v. Leonelli-Contino*, 2005 SCC 63, the value of the set-off is bringing my focus on both parents' contributions, measuring each parents' fixed and variable costs so I can make adjustments to consider the increased costs attributable to shared custody and, then, further adjustments to ensure "the final outcome is fair in light of the conditions, means, needs and other circumstances of each spouse and child for whom support is sought."

Step two: subsection 9(b)

[80] The second step of my analysis involves considering any additional costs that arise by virtue of shared custody. This requires me to consider the exact nature of the girls' shared parenting arrangement.

[81] Neither parent specifically addressed this in his or her Statement of Expenses. It appears that each parent pays the girls' expenses while the girls are with him or her and neither parent identified any additional costs arising from shared custody.

[82] In his affidavit, Mr. McCrate said that during their cohabitation Ms. McCrate usually took care of the children's extracurricular activities. He said that after the relationship ended, Ms. McCrate was paying "the majority towards [the extracurricular] expenses" and he paid the rest. He gave the children cash to assist in paying for their activities, and he asked them for receipts. He agreed that he will share in the uninsured cost of one girl's counselling. His health insurance premiums are paid by a levy on cargo brought into the port.

[83] Ms. McCrate didn't address this issue at all in either of her affidavits. According to her Statement of Special or Extraordinary Expenses, the monthly cost of Amanda's braces in 2015 is $136.66 (after-tax) and her coverage for the girls' health and dental insurance is $103.47 each month. Her monthly health costs for the children total $240.13.

[84] Ms. McCrate itemized historic expenses for the girls' ringette and volleyball. She did not provide estimates for current costs. Using her historic figures, these costs are $135.58 each month. I have not considered an expense for horseback riding: Samantha has not been involved in that activity for approximately one year. (Where the girls are in a shared custody situation, I am not undertaking the typical analysis required of subsection 7(1.1) of the *Guidelines*. I am simply considering the expenses as a cost related to the girls.) The monthly activity costs of $135.58 are paid by Ms. McCrate. Mr. McCrate did not contribute to registration costs, but has occasionally given one or another of the girls some cash toward an ancillary expense.

Step three: subsection 9(c)

[85] At paragraph 68 of Justice Bastarache's reasons in *Contino v. Leonelli-Contino*, 2005 SCC 63, he said that section 9(c) vests me with "a broad discretion for conducting an analysis of the resources and needs of both the parents and the children" and reminds me to be especially concerned with the girls' standard of living in each household and each parent's ability to manage the costs of maintaining the appropriate standard of living.

[86] At this step I am to recognize that a shared parenting arrangement may not result in any saving by a parent. Justice Bastarache, at paragraph 54 of *Contino v. Leonelli-Contino*, 2005 SCC 63, said it's possible to presume, in the absence of evidence to the contrary, that a parent's fixed costs are unchanged, and variable costs are only modestly reduced.

[87] I am mindful of Justice Bastarache's comment at paragraph 51 of his reasons in *Contino v. Leonelli-Contino*, 2005 SCC 63: "one of the overall objectives of the *Guidelines* is, to the extent possible, to avoid great disparities between households." While this comment was made in his remarks about section 9(a) of the *Guidelines*, it was in the context of explaining why I retain discretion to modify the set-off amount if, considering the parents' financial realities, the set-off would "lead to a significant variation in the standard of living experienced by the children as they move from one household to the other".

[88] At the outset, Mr. McCrate's annual gross income is more than double Ms. McCrate's: Mr. McCrate's total income from all sources is $112,374.00, while Ms. McCrate's total income from all sources is $49,363.92 (of which $9,070.80 is tax-free).

[89] At this point, it is difficult to know how each parent's home will look. The matrimonial home has been sold. I don't know where either parent will live or what it will cost. I know that Mr. McCrate is retaining the couple's cottage, which has an above-ground pool and bunkhouse, so these facilities will be available to the girls when they are with him.

[90] Neither parent's Statement of Expenses provided much detail of their spending for the girls. Ms. McCrate identified approximately $530.00 in direct costs for the girls, in addition to their health and activity costs. These direct costs were for school supplies, gifts, cell phones, toiletries and clothing. Mr. McCrate said he was spending $110.00 each month on school supplies, allowances and extra-curricular activities. While Mr. McCrate didn't isolate the girls' costs, his Expense Statement showed that he was spending more than Ms. McCrate can afford to spend on groceries and clothing, and he is able to allocate $5,400.00 each year for holidays and entertainment, while Ms. McCrate budgets less than half that amount (approximately $2,040.00) for the same expenses.

[91] Through Mr. McCrate's testimony it became apparent that Ms. McCrate was assuming greater responsibility for the girls' costs: she took them to more appointments for haircuts and to the dentist, she was more active in purchasing them clothing. She took the lead in their extra-curricular activities.

[92] The set-off amount calculated pursuant to section 9(a) is $1,153.00. The set-off amount adequately compensates Ms. McCrate for the additional costs she has identified as a result of the shared custody arrangement and the direct parenting costs that she has and Mr. McCrate does not.

[93] The Statements of Expenses show Ms. McCrate's has a monthly deficit of over $2,000.00, while Mr. McCrate has a budgetary surplus.

[94] I return to Justice Bastarache's comments:

> (a) be especially concerned with the children's standard of living in each household and each parent's ability to manage the costs of maintaining the appropriate standard of living (at paragraph 68 in

> *Contino v. Leonelli-Contino*, 2005 SCC 63);
> (b) shared parenting may not result in any saving for a parent (at paragraph 54 of *Contino v. Leonelli-Contino*, 2005 SCC 63); and
> (c) "one of the overall objectives of the *Guidelines* is, to the extent possible, to avoid great disparities between households" (at paragraph 51 in *Contino v. Leonelli-Contino*, 2005 SCC 63).

[95] While the set-off amount compensates Ms. McCrate for the additional costs that she alone bears for the girls, it won't allow her to approximate the extras and environment available when they are with their father. Both parents must have the ability to provide a similar level of comfort to the girls. To ensure that each parent can afford the appropriate standard of living, I order that Mr. McCrate pay child support of $1,700.00 each month, beginning on July 1, 2015. This amount is all inclusive and includes Mr. McCrate's contribution to uninsured health costs and all other special or extraordinary costs.

Prospective spousal support

[96] Ms. McCrate is forty-seven. She was twenty-eight when she married and forty-five when the couple separated after sixteen years of cohabitation. She entered into a new relationship in the fall of 2014. The relationship is described as financially "neutral": her partner's financial contribution to groceries is offset by the increased utilities expense. The McCrate girls are in grades 7, 8 and 12. Ms. McCrate works as a school secretary for the school board during the school year and receives Employment Insurance benefits during the summer weeks when school is not in session. Until the spring of 2015, she also worked as lunch monitor. Ms. McCrate's Employment Insurance eligibility requires that she be available for work. Last summer she was interviewed for one job. She doesn't search for other full-time work, only for employment during the summer months.

[97] From the school board and Employment Insurance, Ms. McCrate's total annual income is approximately $40,300.00. Additionally, she receives approximately $4,200.00 from the Canada Child Tax Benefit and the HST Credit.

[98] As I've determined above, Ms. McCrate has additional annual tax-free income of $20,400.00 from child support. Her total income is $64,900.00 and, since almost forty percent of that is tax-free, she has the equivalent of almost $79,500.00 in taxable income. After the payment of child support, Mr. McCrate has taxable income of roughly $92,000.00.

[99] Mr. McCrate did not dispute his wife's entitlement to receive spousal support. He said that indefinite support was not warranted and suggested a total term of eight years was appropriate. Considering the support he paid pursuant to the Interim Separation Agreement, he proposed that spousal support end as of December 2021.

[100] Ms. McCrate said that her employment arrangement, working during the school year and staying home during the summer, enabled her to care for the children without requiring childcare. She is available during school breaks, but not on professional development days when the girls don't attend school. The couple's oldest daughter will complete Grade 12 in June 2016 and the younger two, aged fourteen and twelve, are in junior high school, so there would be little need for childcare. Neither parent indicates any expense for childcare in their Statement of Expenses, so I conclude that the girls receive no care: either when their mother is unavailable or when they stay at their father's home.

[101] Ms. McCrate seeks spousal support on both a compensatory and non-compensatory basis. Where non-compensatory support incorporates a needs/ability to pay analysis, it is redundant in these circumstances as no need remains following Mr. McCrate's payment of child support. Her compensatory claim remains where she has seconded her career to Mr. McCrate's.

[102] The objectives of an order for spousal support focus on identifying and relieving the economic consequences of the marriage for each partner, apportioning financial consequences of child care that aren't addressed through the payment of child support, and promoting each partner's economic self-sufficiency within a reasonable period of time. These objectives are stated in subsections 15.2(6) and 17(7) of the *Divorce Act*. No single objective is paramount. My attention is on the economic consequences of the marriage and child rearing.

[103] Ms. McCrate has identified the primary economic disadvantage arising from the marriage as her inability to amass retirement savings that will approximate her husband's. The spouses consented to the equal division of their respective pensions so I know that they are equally positioned now. I don't have evidence of the disparity that will exist on their retirement if each maintains his or her own current employment path. Mr. McCrate's pension is funded by a levy on cargo through the port, while Ms. McCrate contributes to a pension. In 2014, she contributed over $4,400.00 to her pension. Mr. McCrate's T4 slips indicate a pension adjustment of almost $10,750.00. Ms. McCrate's pension is funded at a lower level, and she must directly fund her pension.

[104] Ms. McCrate is healthy and able to work. She has employment skills. I am not persuaded that the children require her to work the restricted schedule she currently works, especially since they spend half their time with their father. The couple's youngest child should complete high school in June 2021.
[105] Recognizing that Ms. McCrate's retirement income is less generously funded than her husband's, and this is the focus of her argument for compensatory support, I order that Mr. McCrate pay her monthly spousal support of $550.00 commencing on January 1, 2016. Mr. McCrate can amply afford this amount, given that he overestimated many of the expenditures in his Statement of Expenses. Ms. McCrate's spousal support will terminate on July 1, 2023 when Ms. McCrate will be 55. She will have had ten years of spousal support and ample opportunity to improve her employment and retirement circumstances.

Adjustment to the Interim Separation Agreement

[106] In December 2013, the McCrates signed an Interim Separation Agreement. Pursuant to it, Mr. McCrate paid his wife $400.00 each week. This amount was allocated between child support ($270.47) and spousal support ($129.53). The Agreement specifically said that neither spouse was limited in seeking an adjustment to spousal support from December 2013.

[107] Interim support awards are typically made in the context of limited information and with the goal of maintaining a reasonable lifestyle pending the trial. Seldom is there the opportunity for a detailed analysis of the parties' circumstances at the interim stage. Almost thirty years ago in *Sypher* (1986), 2 R.F.L. (3d) 413 (ON C.A.) at page 413, Justice Zuber said that "interim orders are intended to cover a short period of time between the making of the order and trial." They provide, he said, "a reasonably acceptable solution to a difficult problem until trial." Our Court of Appeal endorsed this thinking in *Clancey* (1989), 91 N.S.R. (2d) 171 (A.D.) at paragraph 4, where Justice Matthews noted that "At trial there should be ample opportunity for the parties to lead evidence and explore the issues in detail. A trial judge may well come to a conclusion different than that contained in the interim order; such order should not fetter or influence his award." Those appellate courts envisioned that the detailed exploration of support at trial is for the purpose of determining prospective entitlement, quantum and duration. I do not believe, and have found no authority for, the proposition that I am required to review the adequacy of interim support.

[108] The McCrates signed their Interim Separation Agreement on December 22, 2013, almost five months after they separated. At the time each had independent

legal advice from senior counsel. Mr. McCrate had provided sworn Statements of Property, Income and Expenses. Ms. McCrate had provided the same, as well as a sworn Statement of Special or Extraordinary Expenses. There was ample information for the McCrates to determine an appropriate amount of interim support.

[109] I find there is no basis to review or adjust the spousal support paid pursuant to the Interim Separation Agreement.

Conclusion

[110] Ms. Rhodenizer shall draft the divorce and corollary relief orders. Written submissions on costs, if appropriate, are due on February 5, 2016.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia