IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Wawin v. Wawin, 2008 NSSC 316

Date: 20081030
Docket: SBWD 057623
Registry: Bridgewater

Between:

Rebecca Anne Wawin

Petitioner

and

Paul George Wawin

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: September 8 and October 3, 2008, in Bridgewater, Nova Scotia

Counsel: Rubin Dexter, Ll.B., on behalf of the Petitioner
Nancy Peers, Ll.B., on behalf of the Respondent

By the Court:

[1] On March 12, 2008 Rebecca Anne Wawin (now more commonly known as Rebecca Anne Rock and henceforth referred to as the "Petitioner") filed a Petition for Divorce. She requested a divorce based on living separate and apart for a period exceeding one year. The parties had ceased living together on July 1, 1996.

[2] In addition to a divorce the Petitioner seeks an order for joint custody of the parties' three remaining dependent children all of whom are now in full-time attendance at university. Particulars of the children are as follows:

(i) J.B.W., born April 11, 1986;
(ii) R.E.W., born January 1, 1988; and
(iii) R.N.W., born October 27, 1989

[3] The Petitioner seeks child support for the three children on an on-going basis and also retroactively. Although the petition does not specifically request payment of special or extraordinary expenses it does seek to enforce a Separation Agreement which provided for such payments.

[4] An Answer and Counter-Petition was filed on behalf of Paul George Wawin (henceforth referred to herein as the "Respondent") on April 16, 2008. He also advanced living separate and apart since July 1, 1996 as the ground for divorce.

[5] In addition to a divorce, the Respondent seeks sole custody of the children along with retroactive child support "...based upon split custody and shared custody arrangements since separation of all four of our children". The Respondent also asks for a division of assets in accordance with a Separation Agreement dated October 20, 1997.

BACKGROUND FACTS:

[6] The Petitioner and the Respondent were married at Dartmouth, Nova Scotia on the 7th day of May, 1977. Their union produced four children. In addition to the three children already mentioned, the couple have one other child born on March 19, 1982. He is no longer a dependent child as that term is defined in the *Divorce Act,* R.S.C. 1985, c. 3 (2nd Supp.) (as amended) (henceforth the "*Divorce Act*").

[7] The parties and their four children lived together as a family until July 1, 1996. After separation the Petitioner remained in the matrimonial home with the three youngest children. The Respondent moved out accompanied by the couple's eldest child.

[8] With the benefit of legal advice, the parties entered into a Separation Agreement (the "Agreement"). The Petitioner signed the Agreement on September 16, 1997 and the Respondent did likewise on October 20, 1997.

[9] The Agreement provided for joint custody of the four children while recognizing the Petitioner's primary care of the three youngest children and the

Respondent's primary care of the oldest. Each party was given "liberal access" to the child or children in the other party's care. In general, the Agreement reflected a mutual recognition of the importance of the role of each parent in raising the children.

[10] All other aspects of separation including child support, medical / dental / life insurance coverage and division of assets including pension benefits were dealt with in the Agreement. Both parties waived their respective right to spousal support.

[11] The relevant portions of the Agreement dealing with child support (redacted to protect the identify of the children)are as follows:

> **CHILD SUPPORT:**
>
> 14. (a) George and Rebecca agree that they both have a responsibility to support and maintain their four children. George will pay to Rebecca one-half of the costs of the extra-curricular activities for [redacted], [redacted] and [redacted], including sports, recreation, educational and other such expenses, and Rebecca will pay to George one-half of such expenses for [redacted]'s activities. George shall pay to Rebecca the sum of $300.00 per month for the maintenance of [redacted], [redacted] and [redacted], the first such payment to commence on the first day of the month following the execution of this Agreement, and to continue on the first day of each and every month thereafter, until they shall no longer be "children of the marriage" as defined by the Divorce Act or until further order of a Court of competent jurisdiction. It is confirmed that the amount of support was set according to the Child Support Guidelines for the Province of Nova Scotia. As of May 1, 1997, the parties intend that the Child Support Guidelines shall apply to child support. As the parties have joint custody of the children, child support has been determined by taking into account the responsibility of both parties to contribute to the needs of all of the children. Rebecca's obligation to support [redacted] has been set off against the amount payable by George for [redacted], [redacted] and [redacted]. There shall therefore be no child support payable by Rebecca for [redacted].
>
> (b) The parties acknowledge that George has, prior to the date of execution of this agreement, paid to Rebecca for the maintenance and support of the children, the sum of $500.00 per month from the first day of January, 1997, to and including the first day of April, 1997 ("the retroactive period"), for a total of $2,000.00. The parties hereby confirm that all of these periodic payments are deemed to have been paid pursuant to this Agreement and that the parties were separated from each other at the time the payments were made and have not reconciled. The parties confirm that these amounts represent maintenance pursuant to sections 56.1(3) and 60.1(3) of the Income tax Act with the intent that the payment shall be deductible to the husband and taxable by the wife.

[12] This split child care arrangement continued without change until July of 2002. After the Respondent returned from Prince Edward Island where he had been living for approximately two years, he ceased paying monthly child support. He did, however, continue to share the costs of extra-curricular activities. The parties exchanged receipts of what each had expended on purchases for the children. On occasion they met to review receipts and any differential was shared 50:50 as per their Agreement.

[13] According to the evidence of the Respondent he ceased paying monthly support after his return from Prince Edward Island because the children were living with him half time. He maintains that he reached a verbal agreement with the Petitioner. She denies the existence of any such agreement.

[14] The Respondent further stated that the equal sharing of extra-curricular expenses for the children ceased in July, 2007. When presented with his wife's list of receipts her total was found to be less than his. According to his calculations the Petitioner owed him $595.00. Not only did she not pay him the amount he said was owed but, according to the Respondent, she ceased making such claims altogether until this application was filed. The Petitioner suggests that she did not pursue payment sooner because she was intimidated by the Respondent and wanted to avoid possible argument or confrontation. She also stated that she was afraid the Respondent would follow through on his threat to take the children from her if she pursued payment.

[15] The Respondent's evidence was that the three younger children spent equal time with both parents after his return from Prince Edward Island. The eldest child continued to reside with him primarily until September 2007. Thereafter he moved out and lived independent of both parents. Also, according to the Respondent, his older daughter lived solely with him throughout 2005.

[16] Throughout the period after the Respondent returned to live in Nova Scotia it is apparent that both parents continued to contribute directly to the children. Both parents presented documentary evidence to back up their claims. They did not always agree on what was an appropriate expenditure but they, nonetheless, both contributed towards the cost of extra-curricular activities for their children. A great deal of what the Respondent spent was towards the acquisition and maintenance of motor vehicles which he purchased for the three oldest children. He indicated he provided the

children with automobiles to enable them to travel back and forth to work and also to attend university. Whether the money spent on automobiles could have been put to better use is an arguable point. Provided it did enable the children to find summer or part-time employment, I am satisfied that the money was not used unwisely. Indeed, the Petitioner must have felt there was some merit in buying vehicles for the children. She contributed $200.00 towards the purchase of one such vehicle although the Respondent testified that he had asked her to pay for 50% of the overall cost of $2,125.00.

ISSUES:

[17] The issues this Court must decide are:

(1) What amount of child support, if any, should the Respondent have to pay for the on-going maintenance and support of his three dependent children?

(2) In determining the quantum of on-going child support, should the Court impute income to the Respondent and, if so, how much?

(3) Should the Respondent be required to pay child support to the Petitioner retroactively for the entire period, or some lesser period, back to when monthly child support payments under the Separation Agreement ceased after June of 2002?

(4) Is either the Petitioner or the Respondent entitled to be compensated for 50% of any excess amount paid for special or extra-ordinary expenses on behalf of the children for the retroactive period back to July of 2007?

(5) What if any amount should the Respondent be required to contribute towards the cost of university education for his three dependent children?

[18] The Respondent in his Answer and Counter-Petition also sought custody of the three dependent children (the youngest will reach the age of majority on October 27, 2008). Considering their ages, I see no reason to alter the Separation Agreement that has existed since 1997 which gives the parties joint custody of their dependent children. Despite their current differences which are primarily related to monetary

issues, the Agreement seems to have worked quite well. The children seem to be well-adjusted. In terms of education they appear to be on the right track. Their parents ought to be, and no doubt are, proud of their accomplishments to date.

[19] Despite the age of the three dependent children, they are still considered "children of the marriage" under the *Divorce Act*. The definition of "child of the marriage" is found at s. 2(1)(a). It reads:

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> > (a) is under the age of majority and who has not withdrawn from their charge, or
> >
> > (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

[20] In the case of **Robertson** v. **Robertson**, [2007] N.S.J. No. 195, 2007NSSC128, 157 A.C.W.S. (3d) 376, Justice T.M. Forgeron of this Court stated at paragraphs 20 and 21, the following:

> [20] In **Lu v. Sun** [2005] N.S.J. No. 314, 2005 CarswellNS 338 (C.A.), leave to appeal to the Supreme Court of Canada refused at [2005] S.C.C.A. No. 454, 2005 CarswellNS 580 (S.C.C.), the Court of Appeal reviewed child support principles applicable to this case. The court stated that the non-custodial parent will be required to pay the table amount of support for a child, under the age of majority, who lives in a city other than where the custodial parent resides while attending university. However the non-custodial parent will benefit from a reduction in the university shelter costs to avoid double accounting for the shelter costs which are assumed in the table amount.
>
> [21] The court further stated that once a child becomes an adult, it is appropriate to reduce the table amount of support payable to the custodial parent for the time period when the adult child is not residing with the custodial parent on a full-time basis. In **Lu v. Sun**, supra, the court confirmed that one half of the table amount was appropriate in the factual situation presented and in recognition of the "ongoing costs" borne by the mother in maintaining the daughter's permanent home and in covering incidentals that she as the custodial parent must provide [para. 28].

[21] Since the youngest of the parties' three dependent children remains a minor until October 27, 2008, any child support payable for her until then should be in accordance with the **Federal Child Support Guidelines**, S.O.R./97-175 (henceforth the "**Guidelines**"). She is a student in full-time attendance at university and living away from home. Therefore, any payments ordered for her maintenance and support would ordinarily have to take this into consideration in determining what, if any, the payor parent must contribute towards university shelter costs so as to avoid double accounting. In the circumstances of this case I choose to treat all three children as adults for purposes of determining child support and contribution towards Section 7 (**Guidelines)** expenses. It will not benefit anyone to unduly complicate the calculations that must be made in this case. To my way of thinking, to order child support at the full rate based on the **Guidelines** for approximately two months only to give credit for a certain percentage of that amount when calculating university shelter costs, serves no meaningful purpose other than to perhaps demonstrate the courts proficiency in crunching numbers..... or not.

First Issue: What amount of child support, if any, should the Respondent have to pay for the on-going maintenance and support of his three dependent children?

[22] The Respondent has already commenced medical studies at the Medical University of the Americas on the Caribbean Island of Nevis. In order to pursue his life-long dream which he says he put off until the children were grown and more or less independent, he had to quit his job and close his private counselling and mediation practice that paid him anywhere between $60,000.00 and approximately $71,000.00 over the past five years. His latest T-4 for 2007 showed earnings from employment of $60,104.34. Over the past couple of years he was able to show losses from his private practice or, at most, very modest taxable income thanks to Canada Revenue Agency recognized business expenses associated with a home office and rather significant travel costs to and from Halifax to meet with clients. I will return to this later when deciding whether to impute income to the Respondent. For now I will deal with the issue of on-going child support.

[23] The Respondent put his home in Bridgewater up for sale when he left in May to attend medical school. Prior to his departure and, for approximately two months thereafter, the three dependent children continued to live in his house. By early July they had moved back with their mother and remained there until they left for university in September. The Respondent's house has not yet been sold but, when it

does, the net proceeds of sale are to be held in trust by the Respondent's lawyer pending further order of this Court for security for any child support obligations that might exist.

[24] The Respondent's program of studies will last 40 months. Assuming he will be successful, he intends to pursue a residency in psychiatry. This could take several more years to complete. In the meantime, the children, when not in attendance at university, will only have their mother's home to return to unless, of course, they choose to live independent of both parents. This remains to be seen. For now, should the children decide to return home on the week-ends or during university breaks (including Christmas, Spring Break and Summer holidays) they will live with the Petitioner. The Respondent needs the proceeds of sale of his house to help defray some of the costs of his own education. He has no intention of holding onto it. For all intents and purposes it is no longer available for the children's use.

[25] A number of decided cases including **Robertson** v. **Robertson**, *supra*, recognize the need to maintain adequate accommodations for dependent children who leave home to pursue education and who are expected to return home during and at the end of each school year. In such circumstances the normal **Guideline** amount is reduced by a certain percentage. The percentage reduction can vary but the rule-of-thumb seems to be 50%. (See **Lu** v. **Sun**, referred to in **Robertson**, *supra*).

[26] Taking into consideration what I said earlier about treating all three dependent children as if they were of the age of majority or older, I have concluded that the Respondent is responsible for the payment of on-going child support at 50% of the normal **Guideline** amount for three children (at an income which will have to be imputed) while they are attending university. The oldest of the three children should graduate next Spring. He will then no longer be considered a child of the marriage for support purposes. The remaining two dependent children should graduate in 2010 and 2012 respectively. The Respondent must pay child support for the months of May to August, 2009 inclusive at the full **Guideline** amount for two children. When the two remaining dependent children return to university in September of 2009, child support will be reduced to 50% of the normal **Guideline** amount until the Spring of 2010 when only the youngest child still remains a child of the marriage and, hence, dependent. Payments for her will continue based on the above formula until the anticipated month of her graduation of May of 2012. In order to determine the amount of monthly child support I must now turn my attention to the second issue which pertains to imputing income.

Second Issue: In determining the quantum of on-going child support, should the Court impute income to the Respondent and, if so, how much?

[27] In order to attend medical school the Respondent ceased his employment and closed his private counselling and mediation practice. Under Section 19 of the **Guidelines** the court "may impute such amount of income to a spouse as it considers appropriate in the circumstances", which circumstances include the following:

> **(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;**
>
> (b) the spouse is exempt from paying federal or provincial income tax;
>
> (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
>
> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
>
> **(e) the spouse's property is not reasonably utilized to generate income;**
>
> (f) the spouse has failed to provide income information when under a legal obligation to do so;
>
> **(g) the spouse unreasonably deducts expenses from income;**
>
> (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
>
> (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.
>
> [emphasis added]

[28] The Respondent's desire to pursue his life-long dream, although laudable, should not come at the expenses of his children's future. His obligation is their

current and future well-being. The prospect of one day seeing their father attain a medical degree and maybe even a specialty designation does little for them in the short term and perhaps not much in the long term. The Court must focus on what is in their best interests now and into the future. The Respondent knew full well that his ability to assist his children financially in the pursuit of their educational goals would be significantly curtailed by his decision. He put his own career objectives ahead of theirs.

[29] In the Nova Scotia Court of Appeal case of **Montgomery** v. **Montgomery** (2000), 182 N.S.R. (2d) 184, Pugsley, J.A., adopted the words of Cacchione, C.C.J. (as he then was) in the case of **Pishoir** v. **Levy**, [1990] N.S.J. No. 9 where he wrote:

> The evidence disclosed that the respondent's change in circumstance was self-induced. It was as a result of his wish to advance his career prospects. ... The situation the respondent found himself in was his own making and not unforeseen. In making plans for furthering his education the respondent should not have lost sight of his obligation to his son ... In allowing the application to vary the learned trial judge effectively made the appellant and her child underwriters for the respondent's career goals. He cast the appellant and her child in the role of short-term bankers for the respondent, in order to allow him to further his career plans. As such, the learned trial judge failed in his duty to ensure that the reasonable needs of the child were met.

[30] The burden of covering the education costs for the three dependent children will be placed squarely on the shoulders of the children and the Petitioner if the Court fails to impute income to the Respondent. The Respondent must have known the likely fallout of his decision. He should have factored this in when the decision was being made.

[31] The Court imputes income fo $70,000.00 per annum to the Respondent. This takes into consideration his 2007 income from employment of $60,104.34 and approximately $10,000.00 from his private counselling and mediation practice. Because he conducted his private practice mainly from his home, the Respondent was able to deduct a significant amount of his normal household and automobile expenses which significantly reduced his taxable income from this source. Sub-section (2) of Section 19 of the **Guidelines** states:

> (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

[32] When taking these expenses into consideration I conclude that $10,000.00 is a reasonable estimate of the Respondent's annual income from this source.

[33] At $70,000.00 imputed annual income the Respondent must pay $1,283.00 per month according to the **Guidelines**. I order this amount paid for the months of July and August, 2008. The three children had returned to their mother's home either at the end of June or very early in July. The Respondent had already left to begin his medical studies and for a time the three children remained behind in the house he had vacated and put up for sale. They eventually moved back to their mother's house where , as previously indicated, will be the only home left available for them when they periodically return home from university to visit or live during school breaks.

[34] For the normal eight-month university year the Respondent shall be responsible to pay 50% of the regular monthly amount for the support of the children. Until April 30, 2009 this amounts to $641.50 per month for the three dependent children. This is to be paid to the Petitioner through the Maintenance Enforcement Program administered by the Province of Nova Scotia.

[35] Beyond April 30, 2009 the Respondent shall be required to pay the full monthly amount to the Petitioner for two dependent children (the oldest of the three children should have graduated around that time and will no longer be dependent). At the imputed income of $70,000.00 the regular monthly amount is $983.00. Assuming the two remaining dependant children return to university on a full-time basis in September, 2009 the payments will once again be reduced to 50% of the regular **Guideline** amount. This scenario shall continue until the youngest child graduates, if all goes well, in the Spring of 2012.

<u>Third Issue:</u> Should the Respondent be required to pay child support to the Petitioner retroactively for the entire period, or some lesser period, back to when monthly child support payments under the Separation Agreement ceased after June of 2002?

[36] The parties had entered into a comprehensive Agreement after their separation in 1997. Both parties had the benefit of legal advice before signing. The Agreement reflected their respective financial situation at the time and adopted the **Guidelines** as the mechanism for setting child support. The parties lived up to their mutual commitments under the Agreement until the Respondent returned from living in Prince Edward Island in June of 2002. Thereafter, regular monthly child support ended. The Petitioner and the Respondent continued to make up 50% of any additional extra-curricular expenses incurred by the other until July of 2007. Thereafter, neither party sought to enforce this aspect of the Agreement. As well, neither of the parties provided or asked the opposite party to provide confirmation of income from time to time save for one occasion. In 1999 the Respondent sought to determine if it was better for him to apply for the Child Tax Credit for the children rather than the Petitioner. Although income information was requested from the Petitioner the Respondent claims never to have received any. The matter eventually was resolved through mediation.

[37] The leading case on retroactive child support is **<u>D.B.S.</u>** v. **<u>S.R.G.</u>**, [2006] 2 S.C.R. 231 (S.C.C.). Bastarache, J., writing for himself, McLachlin, C.J. LeBel and Deschamps, J.J. summarized his thoughts at paragraphs 131 - 135 as follows:

> 131 Child support has long been recognized as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to support their children in a way that is commensurate to their income. Combined with an evolving child support paradigm that moves away from a need-based approach, a child's right to increased support payments given a parental rise in income can be deduced.
>
> 132 In the context of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay them continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a

> retroactive award that enforces the unfulfilled obligations that have accrued over time.
>
> 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.

[38] I find that the parties abided by the terms of their original agreement until circumstances changed in June of 2002. I accept the Respondent's evidence that the dependent children spent roughly comparable time with each parent. On occasion one or other of the children spent more time with the Respondent than with the Petitioner.

[39] I further find that the Petitioner has not provided an adequate reason for not having sought to enforce the original terms of the Agreement earlier. Indeed, after finally commencing this Petition the three youngest children lived primarily with their father.

[40] There was no evidence to support the Petitioner's stated fear that the Respondent would take the children from her if she decided to pursue enforcement. It is clear that the children were allowed to decide for themselves where to live and I find they spent as much time with one parent as the other.

[41] When all is considered I am not prepared to order retroactive child support beyond what I have already decided for the period commencing July 1, 2008.

Fourth Issue: Is either the Petitioner or the Respondent entitled to be compensated for 50% of any excess amount paid for special or extra-ordinary expenses on behalf of the children for the retroactive period back to July of 2007?

[42] The Respondent's claim for a contribution from the Petitioner for the extra-ordinary expenses he incurred on behalf of the parties' eldest child is out of time. (See **D.S.B.** v. **S.R.G.**, *supra*, and **Selig** v. **Smith** (2008), 266 N.S.R. (2d) 102.

[43] I am satisfied that the provisions of the Agreement respecting the balancing of payments for extra-ordinary expenses for the three remaining dependent children was adequately followed. This is certainly the case until July of 2007. Thereafter neither party did anything to seek an accounting. They each incurred expenses of an extra-ordinary nature but they appear to have been content to absorb these costs without seeking contribution from the other. Each party provided receipts to show what they spent on the children. I find that the amount each party spent is roughly comparable.

[44] As such, there will be no order requiring either party to compensate the other for extra-ordinary expenses incurred on behalf of the three dependent children after July of 2007 up to the end of August, 2008.

Fifth Issue: What, if any, amount should the Respondent be required to contribute towards the cost of university education for his three dependent children?

[45] The three remaining dependent children are all in full-time attendance at university during the current academic year 2008/09. Historically the older children have all relied heavily on student loans to fund their post-secondary education. As a consequence the three older children have already incurred a considerable student loan repayment obligation. The youngest child has also had to apply for student loan assistance in order to commence her post-secondary education.

[46] Both parents have helped with some of the costs of the children's education to date. Their respective contributions notwithstanding it is the children who have had

to bear the brunt of the cost of their education to date. This will likely have to continue.

[47] The Petitioner for the most part has invested the Child Tax Benefits received for the children since separation with the exception of the period from January 1, 2001 to April, 2003. During this latter period she found it necessary to use the Child Tax Benefit to cover child-related expenses. She has attempted to make up for this by investing $35.00 every two weeks in an RESP account for each of the three dependent children after each child's eligibility for the Child Tax Benefit ceased. In the case of the oldest child she continued this practice until December, 2007 when, due to the child's age, the bank no longer permitted her to continue making such investments. She does, however, continue to make these investments for the two youngest children.

[48] The Petitioner also invested the sum of $2,000.00 in a Canada Savings Bond for each of the three dependent children in November, 1998. The bonds mature in November, 2008 and will pay out $2,700.00 for each child.

[49] Finally, in December 2000 the Petitioner opened an RESP account and invested $800.00 for each of the three children. As of June 30, 2008 the balance in this RESP account which also included the Child Tax Benefit contributions stood at $10,859.20. When added to the anticipated payout of the three Canada Savings Bonds in November, 2008 there is roughly $19,000.00 set aside to cover the remaining education costs for the three remaining dependent children.

[50] There are a number of decided cases dealing with parental obligations towards the cost of post-secondary education. (Reference **Selig** v. **Smith**, *supra*, **Robertson** v. **Robertson**, *supra*). In **Selig** v. **Smith**, Roscoe, J.A., referred first to the relevant provisions of the *Divorce Act* and the **Guidelines**. Section 2(1) of the *Divorce Act* states:

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> > (a) is under the age of majority and who has not withdrawn from their charge, or
> >
> > (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

[51] The **Guidelines** provide:

> Child the age of majority or over
>
> (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.
>
> Special or extraordinary expenses
>
> 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:
>
> ...
>
> (e) expenses for post-secondary education;
>
> ...

> Sharing of expense
>
> (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.

[52] Paragraphs 17 to 20 of Justice Roscoe's decision in **Selig** v. **Smith**, *supra*, is particularly germane to the issue that must be decided in the case that is before me. She writes:

> 17 The respondent concedes and I agree that the trial judge erred in deducting the contribution to be made by Ashley totally from the respondent's share. The proper order of the calculations would be to deduct the child's share from the total costs and apportion the remainder between the parents. If the calculations had been performed in the proper order the amount to apportion between the parents would have been $13,886.38, of which the respondent's 73.5% share would be $10,206. The overpayment therefore was only $85.
>
> 18 With respect to whether all of Ashley's income from employment and half of her student loans should have been included in her share of the educational expenses, it appears that in some cases judges do not include all of the child's employment income, and in other cases the availability of student loans is not considered unless the parents are unable to meet the total educational expenses. For example, in A.W.H. v. C.G.S., 2007 NSSC 181, Justice Beryl MacDonald, stated:
>
> > para. 15 Section 7(1) directs a court to examine the "reasonableness" of the child's educational expense "in relation to the means of the spouses and those of the child". I consider it therefore appropriate to look first at the amount of the expense inclusive of the child's living expenses, next at the means of the child to determine what he or she should contribute from sources other than debt instruments, and finally at the ability of the parents or a parent to contribute either in whole or in part to the remaining expense. In conducting this review I am mindful of the comment of Justice Rogers in R.J.C. v. R.J.J., [2006] B.C.J. No. 2150, 2006 BCSC 1422 (S.C.) at para. 20: ...
>
> 19 In Rebenchuk v. Rebenchuk, 2007 MBCA 22, after reviewing numerous cases on these points, Chief Justice Scott, wrote:

> para. 53 Most courts seem to accept that it is reasonable for a child to be able to obtain one degree with the support of a non-custodial parent, with entitlement to subsequent degrees being very much a fact-driven issue. There is no set pre-determined cut-off for support, although I have been unable to find a case that required support past the age of 26 or 27. I agree with the view that, ordinarily, student loans ought to be required only when the means of the child combined with the means of the parents leave a shortfall. It is to be remembered that student debt delays the cost of education. It is not a reduction. In his annotation to Mabey v. Mabey, 2005 NSCA 35 (CanLII), 2005 NSCA 35, 12 R.F.L. (6th) 403, Professor McLeod notes (at p. 407):
>
> > Most courts are reluctant to allow a payor to avoid child support by insisting the child maximize his or her contribution by student loans, since student loans are just cost deferrals. When the child is finished school, the loans must be paid.
>
> para. 54 Most courts assume a child will earn income during the summer and this is usually taken into account one way or another in determining the amount of the child's contribution. While the authorities are not consistent on the subject, I much prefer a simple requirement that adult children contribute a "reasonable amount" of their total earnings to their education rather than placing a more onerous burden upon them, leaving the precise determination to the exercise of the trial judge's discretion. [emphasis added]

20 However, there is no hard and fast rule that student loans should be the last resort. In other cases, for example, Everill v. Everill, [2005] N.S.J. No. 37, 2005 NSSF 8, and Houston v. Houston, [2007] N.S.J. No. 393, 2007 NSSC 277, the child was expected to contribute the full amount of any available student loans. Each case depends on its own particular facts and although the trend seems to be leaning towards determining the parents' ability to contribute before resorting to student loans, it cannot be said that it is an error in principle or a palpable and overriding error of fact in a case where the divorced parents' total income approximates $100,000 for a judge to assume that an adult child will be expected to borrow to finance post secondary education. The higher the parents' income, the less the student should be required to contribute. There is no exact right answer in these cases. So long as the amount ordered is reasonable in the circumstances, this court should be slow to intervene. Here the trial judge deducted one-half of the loans. If the trial judge had deducted one-quarter of the student loans or none of them, that would likely have been seen as reasonable as well. The same can be said of the income from

> employment of the student. There is a wide range of possibilities that fit within the reasonable standard. Given the highly deferential standard of review required in cases of child support for adult children, I am not persuaded that we should interfere with the decision under appeal.

[53] It is not realistic to think that these children could have achieved a university education without recourse to student loans. Even if their parents had remained together they would not have been able to cover the entire cost of a university degree for each of their children. They should be expected to help but student loans will, by necessity, be an integral part of the financing scheme required to get the children through university, just as it has been to date.

[54] The approximate annual cost of a university education for each of the three dependent children is $16,500.00. This is made up of the following:

ANNUAL COST OF UNIVERSITY EDUCATION	
Tuition, student fees, etc.	$ 6,800.00
Books and school supplies	$ 1,000.00
Accommodations	$ 4,400.00
Food and household supplies	$ 2,000.00
Recreation and entertainment	$ 1,750.00
Miscellaneous	$ 550.00
TOTAL	$ 16,500.00

[55] The two older children share a three-bedroom apartment with one other student. I have calculated their education costs over an eight-month period from September to April inclusive. They will have to sub-let the apartment during the Summer months to recover some of the cost associated with a 12-month lease unless, of course, they decide to remain in Halifax to work during the Summer. By then the oldest child should no longer be dependent on his parents. The Respondent will also be required to pay the full **Guideline** amount for the remaining two dependent children. A portion of this might have to be used to cover some of the cost of the apartment if it is not otherwise sub-let.

[56] The parties in their 1997 Agreement undertook with one another to equally share in the cost of the extra-curricular activities of the children "...including sports, recreation, educational and other such expenses". (See paragraph 14(a) of the Separation Agreement). Initially the Petitioner earned more income than the

Respondent but over time the difference became less and less. The Petitioner still earns more than the amount imputed to the Respondent but it amounts to no more than about $5,000.00 on an annual basis. Their Agreement calling for an equal sharing of the children's education expenses should be enforced subject of course to a consideration of their overall ability to pay.

[57] As stated by Justice Roscoe in **Selig** v. **Smith**, *supra*, at paragraph 20 "there is no hard and fast rule that student loans should be the last resort." Student loans are an economic necessity for this family. Considering all the circumstances, the three children will have to contribute 50% of the overall cost of their education with the remaining 50% to be shared equally by their parents. There are a total of seven years of university expenses left to be incurred – one for the oldest remaining dependent child, two for the next and four for the youngest who has just embarked on her university education. At the estimated $16,500.00 per year this amounts to $115,500.00. The responsibility of each parent amounts to $28,875.00 representing 25% of the overall amount.

[58] The remaining RESP's and the three Canadian Savings Bonds are for the benefit of the children and should be apportioned to them in an equitable fashion as the Petitioner, in her discretion, decides. The Petitioner used some of her own funds for these investments but she did this to make up for the use of the Child Tax Benefits in earlier years instead of investing it for the children as required by paragraph 22 of their Agreement. The Petitioner was also able to deduct some of the children's unused tuition credits to reduce her own taxable income. She shared some of the resulting refund with the children. As a result no portion of the remaining RESP's or the Canada Savings Bonds should be credited towards the Petitioner's current and future obligation to contribute towards the children's education costs. It all belongs to the children.

[59] The Respondent's estimated liability – $28,875.00 – is to be paid out of the proceeds of sale of his home in Bridgewater after payout of any existing mortgage, real estate commission, legal fees and other closing costs. The proportionate share that each dependent child is entitled to for the current 2008/2009 academic year can be paid from this fund as soon as possible after the home is sold. The remaining balance should be invested for the two youngest dependent children and used to help cover their future education costs as they are incurred. The exact mechanism for investing these funds will be left for the parties to decide. They might choose to involve the two dependent children in this discussion given their ages.

[60] I will not order the Petitioner to set aside a similar amount for the children. After all she is not selling off her assets and moving away. I am confident she will meet the obligations that I have set out for her just as she has always done, voluntarily, in the past.

FINAL DECISION:

[61] Having been satisfied that all jurisdictional requirements had been met and, based on the fact that the parties had lived separate and apart for a period of time exceeding one year and that there was no possibility of reconciliation, the Court granted the petition and counter-petition for a divorce pursuant to Section 8(1) of the *Divorce Act.*

[62] The parties previously settled all matters related to the division of their matrimonial assets and debts. This settlement is contained in a Separation Agreement signed by the Petitioner on September 16, 1997 and by the Respondent on October 20, 1997. The terms of this Agreement shall be incorporated into and form part of the Corollary Relief Judgment subject to any amendments or variations resulting from this decision.

[63] The Court exercised its discretion under Section 19 of the **Guidelines** to impute income to the Respondent in the amount of $70,000.00 per annum. Based on this level of income and in accordance with the **Guidelines** the Respondent is ordered to pay child support to the Petitioner for his three remaining dependent children in the amount of $1,283.00 /month for the months of July and August, 2008. Reflecting the fact that the three dependent children will be leaving home to attend university the Respondent, in addition to contributing to their education expenses, must pay monthly child support for the period from September, 2008 to and including April, 2009 at 50% of the regular monthly amount which comes to $641.50. Thereafter, the Respondent will pay child support for the two remaining dependent children at the full monthly amount until and including August, 2009. On the understanding that the two children will return to full-time attendance at university the monthly payments will again be reduced to 50% of the regular amount for two dependent children. This scenario will continue unless circumstances change sufficiently to warrant a variation by a Court of competent jurisdiction.

[64] The Petitioner's claim for retroactive child support is denied. Similarly the claim for retroactive extra-ordinary or special expenses made by each of the parties is also rejected.

[65] Both the Petitioner and the Respondent have an obligation to financially assist their three remaining dependent children to attain a university education. In the circumstances of this case the dependent children must also be expected to contribute towards the cost of their own education. In addition to earnings from Summer employment and possibly part-time work during the school year, the dependent children will have to rely on student loans to propel them down the road towards independence. They will have to cover 50% of the overall cost of their education less what remains invested for them in RESP's and Canada Savings Bonds. Based on the estimate of what will be required to pay for an undergraduate degree for each of the three remaining dependent children, the Petitioner and the Respondent will each be responsible to contribute $28,875.00. The Respondent's share will be paid from the proceeds of sale of his home in Bridgewater after the payout of any existing mortgage, real estate commission, legal and other reasonable closing costs.

[66] In addition, the Respondent's obligation to pay child support for the period from July 1, 2008 to and including August 31, 2009 which amounts to $11,630.00 shall be set aside from the proceeds of sale of his house and paid to Maintenance Enforcement. Maintenance Enforcement will then pay the Petitioner in accordance with this decision. I am not prepared to order any additional security for future child support payments. The Respondent knows what his legal obligations are. If he fails to meet those obligations he will be held accountable.

[67] Each party is to bear his or her own costs of this litigation

Justice Glen G. McDougall