IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Crane v. Crane, 2008 NSSC 33

Date: January 31, 2008
Docket: 1206-5051
Registry: Sydney, Nova Scotia

Between:

Geanne Crane

Petitioner

v.

Kelly Crane

Respondent

DECISION

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	October 10, 2006, January 17, January 18 and August 22, 2007; Final submissions received September 22, 2007.
Written Decision:	January 31, 2008
Counsel:	Mr. Alan Stanwick, counsel for Geanne Crane Mr. William Burke, counsel for Kelly Crane

By the Court:

I Introduction

[1] Following seven years of marriage, and the birth of one child, the parties separated. The marriage was destroyed by Mr. Crane's gambling. Mr. Crane gambled throughout most of the marriage. His gambling ruined the parties' finances. At the end of the marriage, the quantum of the parties' debts exceeded the value of their assets.

[2] Ms. Crane received little financial assistance from Mr. Crane during the marriage. She received nothing after the separation. Ms. Crane assumed the primary, financial responsibility for the parties' son, Roger. In addition, Ms. Crane was primarily responsible for the payment of the debt during the marriage. Ms. Crane consolidated the debt after separation and continues to service the debt without contribution from Mr. Crane.

[3] Further, Mr. Crane refused to pay child support until ordered to do so by the court. Mr. Crane cited access difficulties and a lack of income as reasons to justify his conduct.

[4] The trial was held on October 10, 2006, January 17 and 18, and August 22, 2007. Final submissions were received on September 22, 2007. Evidence was provided from the following witnesses: Geanne Crane, Robert MacLean, Cathy Delaney, Constable Crow, and Kelly Crane.

[5] During the trial, the only issue which was resolved concerned the ongoing quantum of child support. The parties agreed that maintenance for Roger will be based upon Mr. Crane's anticipated 2007 income of $53,200. All other issues were contested.

III Issues

[6] The court has been asked to determine the following unresolved issues:

a) What is the date of separation?

b) Is the student loan a debt which is subject to division?

c) Should an unequal division be granted?

d) Should a joint custody order issue?

e) What parenting plan is in the best interests of Roger?

f) What are the appropriate terms of the child support order?

g) Should income be imputed to Mr. Crane?

h) Should a retroactive maintenance award be granted?

IV Analysis

[7] What is the date of separation?

[8] The parties do not agree on the separation date. Establishing the date of separation is not only important for the purpose of determining a valid ground for divorce, but also impacts on property division and retroactive maintenance issues.

[9] *Mr. Crane's position*

[10] Mr. Crane states that the separation occurred on September 22, 2004 when the parties appeared at an interim hearing in the Supreme Court of Nova Scotia. On this date, Ms. Crane was granted interim

exclusive possession of the matrimonial home. Mr. Crane states that this court appearance confirmed that the marriage was over. Prior to this date, the parties lived together in the home, engaged in sexual activity, and had a family life, albeit an unhappy one at times.

[11] *Ms. Crane's Position*

[12] Ms. Crane placed the date of separation at May 2002 in the Petition for Divorce; December 2002 in the Application and Intake filed on August 1, 2003; and by at least January 1, 2003 in her final submissions. During the trial, Ms. Crane stated that by the spring of 2002, Mr. Crane stopped contributing to the family; the parties argued constantly about Mr. Crane's gambling and financial difficulties; Mr. Crane slept on the couch; there was little sexual activity; and, they had no joint social life. Ms. Crane states that she consistently asked Mr. Crane to move out of the home, but he refused to do so. She therefore filed an application for exclusive possession and child support on August 1, 2003. The application was not heard until September, 2004. Ms. Crane states that Mr. Crane vacated the home once he was ordered to do so by the court.

[13] *Decision on the Date of Separation*

[14] Section 8(2)(a) of the *Divorce Act* states that marriage breakdown is established if the spouses lived separate and apart for at least one year immediately before the determination of the divorce. Section 8(3)(a) of the *Divorce Act* states that intention is determinative of separation. Section 8(3)(b)(ii) of the *Divorce Act* states that separation is not interrupted or terminated by the resumption of cohabitation for a period not exceeding 90 days with reconciliation as its primary purpose.

[15] In **Dupere v. Dupere** (1974), 9 N.B.R. (2d) 554 (QB) as affirmed in 10 N.B.R.(2d)148(CA), the following factors were deemed relevant when determining the date of separation:

> 17 I think the following general statements can be extracted as representing the weight of judicial opinion:
> 18 (1) Great care must be exercised in considering the evidence and each case determined on its own circumstances.
> 19 (2) There can be a physical separation within a single dwelling unit.
> 20 (3) A case is not taken out of the statute just because a spouse remains in the same house for reasons of economic necessity.

> 21 (4) To meet the statute there must be both (a) physical separation and (b) a withdrawal by one or both spouses from the matrimonial obligation with the intent of destroying the matrimonial consortium.
> 22 (5) Cessation of sexual intercourse is not conclusive but is only one factor to be considered in determining the issue.
> 23 (6) There may be an atmosphere of severe incompatibility but remain one household and one home -- a distinction may be drawn between an unhappy household and a separated one.
> 24 The remarks of Denning L.J. (as he then was) in **Hopes v. Hopes** 1. , [1949] P. 227, [1948] 2 All E.R. 920, a desertion case, are also, I think, applicable by analogy. At pp. 235-36 he said:
>
> > It is most important to draw a clear line between desertion which is a ground for divorce, and gross neglect or chronic discord, which is not. That line is drawn at the point where the parties are living separate and apart. In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households, or, in other words, when they are no longer residing with one another or cohabiting with one another.

[16] In **French v. French** (1997),162 N.S.R.(2d) 104 (SC), Hood J. completed an extensive review of the law on the issue of separation date at paras 9 to 12 in which she states as follows:

> ¶ 9 In **McKenna v. McKenna** (1974), 10 N.S.R. (2d) 268 (C.A.), Chief Justice MacKeigan of the Court of Appeal referred to the following portion of the trial judge's decision as follows (p. 269):
>
> > On March 16, 1972 the petitioner moved out of the matrimonial home. There can be little doubt that while prior to this the parties were living under the one roof they were in effect living 'separate and apart' as these words are interpreted by the authorities.

¶ 10 Chief Justice MacKeigan quoted further, at page 269 from the decision of the trial judge where he referred to **J.B. v. A.W.B.** (1958), 13 D.L.R. (2d) 218 and the definition in that case of the words "living apart":

> These words refer not to a place but a state of things; not to a life apart in the physical sense, as exemplified by residence in separate structures, but rather to leading a life of withdrawal from the joint matrimonial relationship embraced in the term 'cohabitation'.

¶ 11 In **Woolgar v. Woolgar** (1995), 10 R.F.L. (4th) 309 (Nfld. S.C.), Justice Mercer concluded that the parties separated prior to the date on which the wife actually left the matrimonial home. Justice Mercer referred to the Nova Scotia Court of Appeal decision in McKenna, supra, and then said as follows at pages 312 and 313:

> My conclusion from the evidence is that the parties were living separate and apart under the same roof from at least April 30, 1992. There was no evidence of any meaningful relationship between the parties from that time except that household expenses were met from the joint bank account. There was no other relationship between the parties and each went his or her own way without regard for the other.

¶ 12 Similarly, in **Wood v. Wood** (1980), 6 Man. R. (2d) 36 (Q.B.), Justice Morse held at page 42 that:

> I do not view the criteria which courts have suggested be considered in determining whether a husband and wife are living separate and apart as conclusive so that if one or more of the suggested criteria exist, the parties must necessarily be said to be living together as man and wife. In my opinion, the actual circumstances of each case must be examined, and the parties may well be said to be living separate and apart even though some of the suggested criteria are present.

> In this case, the picture of the relationship between the parties which emerges for me is that of two persons merely sharing the same accommodation, each performing certain domestic services, eating certain meals together, contributing to the cost of the food they ate, and doing certain things together socially, but, in fact, living separate lives without any intention of resuming the matrimonial consortium.

[17] I have also reviewed the decisions of **T.H. v. W.H.** (2007), 250 N.S.R.(2d) 334 (SC); **J.E.M. v. L.G.M.** (2007), 252 N.S.R.(2d) 61 (SC); **Blue v. Blue**(2006), 249 N.S.R.(2d)330(SC); and **Gardner v. Gardner** (2005), 232 N.S.R. (2d) 68 (SC).

[18] I have determined that on a balance of probabilities the separation date is August 2003 as this is the date Ms. Crane made application to the court for maintenance and exclusive possession of the matrimonial home. The filing of this application is a clear sign that Ms. Crane had severed the marriage relationship and that she did not intend to resume the "matrimonial consortium." I find that by August 2003, Ms. Crane and Mr. Crane lead a "life of withdrawal from the joint matrimonial relationship." Ms. Crane made her intentions abundantly clear to Mr. Crane and the community by August 1, 2003.

[19] This date is also supported by the fact that Mr. Crane moved to Ontario for employment from September 2003 until May 2004. While in Ontario, Mr. Crane did not forward any money to Ms. Crane. The minimal financial contribution that Mr. Crane previously made to the family ended in September 2003. The failure to contribute financially to ones family is representative of the actions of a single, not a married individual. A spouse and father who is committed to the marital relationship would not behave in such a manner.

[20] Further, Mr. Crane established his own apartment in Ontario. He had the option of residing with a family member, but chose not to. Had separation not occurred, it is likely that Mr. Crane would have resided with another family member to cut back on expenses. Instead, Mr. Crane chose to live an independent life style.

[21] In addition, the relationship between Mr. and Ms. Crane had completely broken down by August 2003. They did not engage in joint social activities. Even the laundry was done separately. Mr. and Ms. Crane did not have positive or meaningful communication. By the time Mr.

Crane moved to Ontario, communication between the parties was marked with anger and accusations, and riddled with Mr. Crane's abuse.

[22] Although Mr. Crane did return to the matrimonial home for Christmas 2003, and then from May to September 2004, he did so without the approval of Ms. Crane. He slept on the couch. Ms. Crane slept in the bedroom. Mr. Crane refused to leave the matrimonial home until that option was no longer available by virtue of the court hearing in September 2004.

[23] Mr. Crane, nonetheless, did return to the matrimonial home from mid-December 2004 until March 2005 with the consent Ms. Crane. This was not an attempt at reconciliation. Ms. Crane was tending to her seriously ill mother who was in Halifax for the most part, while Mr. Crane cared for Roger in the home.

[24] In summary, I find that effective August 1, 2003, the parties lived separate and apart and there was no period of reconciliation after that point. There was an atmosphere of severe incompatibility between the parties because of the breakdown in their relationship. At no time after

August 1, 2003 did Ms. Crane have the intention of resuming cohabitation with Mr. Crane. At no time after August 1, 2003 did Mr. Crane and Ms. Crane operate as a married couple. Financial affairs were separate as of August 1, 2003. There is no credible evidence of any meaningful relationship between the parties after August 1, 2003.

[25] **Is the student loan a debt which is subject to division?**

[26] Ms. Crane has a substantial student loan, a significant portion of which was incurred during the marriage. Ms. Crane seeks to have the loan made subject to division between the parties. Mr. Crane objects.

[27] *Position of Ms. Crane*

[28] Ms. Crane indicates that the student loan was incurred for the benefit of the family prior to separation. Ms. Crane states that she returned to school because of the desperate shape of the family's finances. She noted that Mr. Crane was gambling. She could not rely upon Mr. Crane for financial support. She needed to improve her employment opportunities for the sake of Roger and the family. Further,

Ms. Crane said the loan was also used to pay the day to day living expenses of the family.

[29] *Position of Mr. Crane*

[30] Mr. Crane objects to the inclusion of the student loan as a divisible debt. Mr. Crane states that the student loan was incurred for the benefit of Ms. Crane, not the family. Ms. Crane is now a nurse and earns a sizeable salary. Ms. Crane does not share her salary with Mr. Crane. Mr. Crane should therefore not be liable for Ms. Crane's student loan. Further, Mr. Crane argues that he does not have the ability to pay the student loan in any event.

[31] *Decision on the Student Loan Debt*

[32] Although the term matrimonial debt is not found in the *Matrimonial Property Act*, case law supports the use of such terminology: **Jovcic v Jovcic** 2005CarswellNS 305 (SCFD); **Larue v. Larue** (2001), 195 N.S.R.

(2d) 336 (SCFD); and **Grant v. Grant** (2001), 192 N.S.R. (2d) 302 (SCFD)**.**

[33] The party who seeks to include a debt in the equalization schedule bears the burden of proof in two respects. First, the party must show that the debt was incurred for family or matrimonial purposes. Second, the party must show that the debt is capable of legal enforcement: **Jovcic v Jovcic,** supra; **Rossiter-Forrest v. Forrest** (1994), 129 N.S.R. (2d) 130 (SC); **Walker v. Walker** (1990), 92 N.S.R. (2d) 127 (TD); and **Abbott v. Abbott**, 2002CarswellNS 395 (SCFD)**.**

[34] In **Schaller v Schaller** 1993CarswellNS42 (CA) Roscoe J.A. held that a student loan which was incurred by the wife during the marriage was a matrimonial debt. Similarly in **Jovcic v Jovcic,** supra, Dellapinna J. determined that the portion of the student loan which was incurred prior to separation was a matrimonial debt. The post-separation portion of the student loan was not.

[35] At the time of marriage, Ms. Crane was employed at a drugstore. This drugstore later closed and Ms. Crane was left without a job. Ms. Crane decided to obtain a nursing degree. Ms. Crane received an annual $3,000 scholarship and she also obtained student loans. The loans were used to pay for the university expenses not covered by the scholarships, and to assist with the day to day living expenses of the Crane family.

[36] Ms. Crane began her university studies in September 2000 and graduated in May 2004. As separation occurred on August 1, 2003, Ms. Crane had already completed three years of the four year program. According to *Exhibit 6 ,* $19,200 in student loan money was acquired after the marriage, but before the parties' separation.

[37] I conclude that Ms. Crane has met the burden upon her. She has proven on a balance of probabilities that $19,200 in student loans is a matrimonial or family debt which is capable of legal enforcement. A substantial portion of these student loans were used to pay the day to day living expenses of the family. The family basically survived on the student loan money and the child tax credit. Mr. Crane contributed little to the

family and was also gambling. Ms. Crane's decision to attend university was prudent given the circumstances of the family.

[38] **Should an unequal division be granted?**

[39] Ms. Crane seeks an unequal division of the assets and an equal division of the debt. Mr. Crane seeks an equal division of the assets.

[40] *Position of Ms. Crane*

[41] Ms. Crane seeks an unequal division in her favour for several reasons, including the following:

a) Mr. Crane dissipated the assets by virtue of his gambling throughout the marriage;

b) Mr. Crane dissipated the assets by his failure to pay for any of the debts or the day to day expenses after the parties separated but while Mr. Crane remained in the home with Ms. Crane;

c) Mr. Crane dissipated the assets because he refused to cooperate with an early sale of the matrimonial home and only signed the listing agreement on the eve of trial in January 2007;

d) Mr. Crane incurred debt for gambling; and

e) The parties son, Roger requires the unequal division.

[42] *Position of Mr. Crane*

[43] Mr. Crane disputes the unequal division claim made by Ms. Crane and notes the following in response:

a) Although he gambled he did not always lose and some of the gambling losses were offset by the gambling wins;

b) He contributed what he could in light of the income that was available to him;

c) Although he initially disputed the early sale of the matrimonial home, there was no net loss to the parties as Ms. Crane managed to rent out the home after she vacated it to live with her partner;

d) Mr. Crane did cooperate with the sale of the home as soon as the tenant vacated the property;

e) Had he not been denied a meaningful relationship with Roger, he would have contributed to the payment of the debt and household expenses; and

f) He acquired the matrimonial home before the parties married and the home is registered in his name alone.

[44] *Decision on Unequal Division Claim*

[45] Ms. Crane seeks relief pursuant to s. 13(a), (b), (h), and (l) of the *Matrimonial Property Act* which state as follows:

> **Factors considered on division**
>
> 13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
>
> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
>
> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
>
> ...
>
> (h) the needs of a child who has not attained the age of majority;
>
> (l) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

[46] As Ms. Crane is seeking an unequal division, she carries the burden of proof. It is a heavy burden which requires proof of unfairness or unconscionability: **Harwood v. Thomas** (1981), 45 N.S.R. (2d) 414 (CA);

Ritcey v. Ritcey (2002), 206 N.S.R.(2d)75(SCFD); **Jenkins v. Jenkins** (1991), 107 N.S.R. (2d) 18 (TD); **Fisher v. Fisher** (1994), 131 N.S.R. (2d) 367 (CA); and **Jess v. Strong** (1998), 169 N.S.R.(2d)271(SC).

[47] In **Jenkins v. Jenkins**, supra, Richard J. reviewed the meaning of unfair and unconscionable at para 10:

> [10] I propose now to deal with the division of matrimonial assets in accordance with the law as set out in Donald, supra, while remaining mindful of the comments of MacDonald, J.A., in Nolet. To support a finding that a division is "unfair and unconscionable" it seems that there must be something more than mere inconvenience. The Random House Dictionary defines "unconscionable" variously as "unreasonable", "unscrupulous", "excessive" and "extortionate". These are strong words, and when coupled with the requirement that "strong evidence" must be produced to support an unequal division the burden upon the party requesting an unequal division of matrimonial assets is somewhat onerous.

[48] I have reviewed the evidence, case law and the submissions of the parties. I find that Ms. Crane has dislodged the heavy burden which is upon her; she has proven that an equal division would result in unfairness or unconscionability. In so finding, I rely upon sections 13(a)and (b). Mr. Crane unreasonably impoverished the matrimonial assets, and some of the debts and liabilities were incurred as a result of Mr. Crane’s excessive

gambling. I rely upon the decisions of **Keeler v. Keeler** (2000), 185 N.S.R.(2d) 389 (SC); **O'Quinn v O'Quinn** (1997), 165 N.S.R.(2d) 330 (SC); and **Ferris v Ferris** (2004), 225 N.S.R.(2d) 278 (SC).

[49] In reaching my decision, I find that Mr. Crane was not an accurate historian as it relates to gambling losses and the impact his gambling had on the family's finances. He minimized his losses . He minimized the amount of money he spent on gambling. He minimized the global impact that his gambling had on the overall welfare of the family.

[50] I find that Mr. Crane's gambling substantially impoverished the matrimonial assets and substantially increased the amount of the matrimonial debt. I accept the evidence of Ms. Crane where it conflicts with the evidence of Mr. Crane. The majority of the income (employment and EI) which Mr. Crane earned was funnelled into gambling. Mr. Crane's financial contribution to the welfare of the family was minimal.

[51] I further find that Mr. Crane took insurance proceeds (car and life) of approximately $3,500, and used this money for gambling without the knowledge or permission of Ms. Crane. In addition, he used a line of credit and credit cards to feed his gambling habit. Ms. Crane did not consent to these expenditures. She cut up the credit cards.

[52] Matrimonial property was depleted and debt was increased because of Mr. Crane's actions. Ms. Crane was almost exclusively responsible for the financial welfare of the family. It would be unfair or unconscionable to equally divide the meagre matrimonial assets in the circumstances.

[53] The parties owned few assets at separation. They had the matrimonial home which sold in June 2007 for $34,000. The amount being held in trust after payment of the mortgage, taxes, water, and other adjustments, which I find reasonable and appropriate, is $3,789.73.

[54] The mortgage payout at the time of sale was $24,580. The mortgage balance at separation was not provided, however Ms. Crane made all post-separation, mortgage payments of $335 per month for forty-

six months. I also recognize that the home was rented for a period of time after separation.

[55] Ms. Crane kept the household contents, which were not valued. Given the financial circumstances of the parties, it is probable that the contents had little value at the time of separation.

[56] Ms. Crane kept the 1993 motor vehicle which she sold for $100 in 2004. She also retained the 1990 truck which Mr. Crane drove during the marriage. The truck had been involved in two separate accidents. It was not repaired as Mr. Crane used the repair money for gambling. The truck was sold for $500.

[57] In addition to the mortgage and water arrears, the debt at separation consisted of the following:

a) $19,200 in student loans;

b) a loan with a balance of $951 in August 2004 (the separation balance not provided). This was the consolidation loan used to pay gambling debt and to purchase the truck; and

c) joint unpaid bills which had a balance of $4,116 in August 2004, (the separation balance was not provided).

[58] As indicated previously, Ms. Crane made all debt payments after the separation without contribution from Mr. Crane.

[59] The unequal division request of Ms. Crane is granted. Each party shall retain ownership of the assets in his/her possession. Further, Ms. Crane shall retain sole ownership of the net proceeds of the sale of the matrimonial home. The balance of the remaining debt in the amount of $24,267 shall be shared equally between the parties. Ms. Crane shall have judgement against Mr. Crane in the amount of $12,134 as she consolidated this debt in August 2004.

[60] Should a joint custody order issue?

[61] Mr. Crane seeks a joint custody order, although he does not contest, at this time, that Roger's primary residence will be with Ms. Crane. Mr. Crane states that a joint custody order is necessary to ensure that he will not be subjected to access difficulties as he has been in the past.

[62] Ms. Crane seeks an order for sole custody because of the conflict which exists. Ms. Crane states that Mr. Crane's conduct prevents meaningful communication between them. She states that Mr. Crane consistently makes demeaning and derogatory remarks to her, sometimes in the presence of Roger. She states that Mr. Crane has threatened her and her partner with physical violence. She notes that a peace bond issued in the past because of Mr. Crane's threatening conduct. She states that Mr. Crane is unreliable and irresponsible when it comes to access transfers. She states that Mr. Crane threatened to return Roger to an empty house.

[63] In the **MacKeigan v Reddick** 2007CarswellNS 454 (SC), the court reviewed the law on joint custody where conflict exits at para 33 which states:

> 33 Where parental relationships are rift with mistrust, disrespect, and poor communication, and where there is little hope that such a situation will change, joint custody is ordinarily not appropriate: **Roy v. Roy**, 2006 CarswellOnt 2898 (Ont. CA). This lack of effective communication, however, must be balanced against the realistic expectation, based upon the evidence, that communication between the parties will improve once the ligation has concluded. If there is a reasonable expectation that communication will improve despite the

differences, then joint custody may be ordered: **Godfrey-Smith v. Godfrey-Smith (**1997), 165 N.S.R. (2d) 245 (SC).

[64] I have reviewed the evidence, the submissions of the parties, the law and s.16 of the *Divorce Act*. I find that it is in the best interests of Roger that he be placed in the sole custody of Ms. Crane. I find that joint custody is not workable in the circumstances. I make this finding for the following reasons:

a) Mr. Crane is an angry, volatile man who lacks insight. Mr. Crane continues to blame Ms. Crane and fails to assume responsibility for his actions. He has not learned from the past. The court is not satisfied that Mr. Crane will change his conduct in the future without professional assistance;

b) Mr. Crane is unable to control his anger. His temper ignites when communicating with Ms. Crane. He allows his temper to flare in Roger's presence. This creates a most unhealthy environment;

c) Mr. Crane's anger also leads him to make poor parenting decisions. An example of this occurred when Mr. Crane refused to drop Roger off at the father of Ms. Crane's partner after the conclusion of access. He threatened to leave Roger alone at Ms. Crane's home. Ms. Crane was at work. The police were called;

d) Mr. Crane threatened Ms. Crane and her partner. He has shown no meaningful remorse;

e) Mr. Crane regularly subjects Ms. Crane to vulgar and demeaning taunts, including in Roger's presence. He left threatening and vile messages on Ms. Crane's answering

machine. I find that the taped message was made by Mr. Crane and I reject his evidence to the contrary;

f) The animosity which has developed is not litigation based. Although there were occasions when Ms. Crane acted inappropriately, for the most part, the communication difficulties which presented are due to Mr. Crane's bitterness and hostility;

g) Joint custody would only produce more conflict and more opportunities for argument. Roger has already been brought into the parental conflict and this is not in his best interests; and

h) Where there is a conflict, I accept the evidence of Ms. Crane over the evidence of Mr. Crane. He was not a credible witness.

[65] What parenting plan is in the best interests of Roger?

[66] It is in Roger's best interests to establish a parenting plan which requires minimal communication between the parties. Punctuality is an issue to be resolved as well.

[67] It is in Roger's best interests to have access with Mr. Crane which is free from conflict. Roger should not have to hear derogatory comments about his mother when access is being exercised. Roger should not be drawn into Mr. Crane's hostile world. Roger loves both of his parents and becomes confused and upset when he is embroiled in the parental conflict.

[68] The parenting plan also must take into account Mr. Crane's scholastic limitations as it affects Roger's homework assignments. Mr. Cranes states that he finds it difficult to supervise Roger's homework.

[69] **The parenting plan will provide as follows**:

1) Sole Custody: Geanne Crane will have sole custody of Roger James Crane born June 26, 1998. Geanne Crane does not have the authority to cancel access without court order, except in the event Roger is too ill to leave the home.

2) General Provisions:

a) Health and Educational Information: Geanne Crane and Kelly Crane will each have the right to communicate with all educational and healthcare professionals involved with Roger without the authorization of the other party.

b) Anger Management Counselling: Kelly Crane will participate in counselling for anger management, impulse control and to gain insight into his behaviours.

c) Relay of Information: Geanne Crane will keep Kelly Crane advised of important matters impacting on Roger's health, education and general welfare via e-mail communication on a bi-weekly basis after Kelly Crane has provided Geanne Crane, through counsel, with his e-mail address as well as any changes in his e-mail address as it arises.

d) Emergency Communication: In the event of an emergency, the party having care of Roger will contact the other party as soon as

possible in the circumstances and will advise the other party of the nature of the emergency.

e) Respectful Communication: The parties will not speak disrespectfully of the other in the presence of Roger or within the hearing distance of Roger. The parties will speak respectfully to each other when they communicate.

f) Supervision: Until Kelly Crane successfully completes anger management counselling, access will be supervised by one of the parents of Kelly Crane, or by such other person acceptable to Geanne Crane, or authorized by further court order in the event of disagreement. The supervisor must commit in writing to remove Roger Crane should Kelly Crane act out or should Kelly Crane subject Roger to disparaging remarks about Geanne Crane or her partner.

g) Review Date: The necessity of supervision will be reviewed by the court in six months. The review date will be scheduled for two hours and all witnesses shall file affidavits ten days before the hearing. This review date does not prevent either party from making an application earlier, or to deal with other matters, if circumstances require.

3) Regular Access Schedule: Kelly Crane will have access to Roger on every Friday at 4:00 pm. until Saturday at 4:00 p.m. Kelly Crane will be responsible for transporting Roger to and from access at the place designated by Geanne Crane via e-mail.

4) Special Occasions and Holidays: The regular schedule will be suspended on all special occasions and holidays as outlined in paragraphs 4 (a) to (g). Kelly Crane will be responsible for transporting Roger to and from access at the place designated by Geanne Crane via e-mail.

a) March Break: March break is deemed to be the period of time commencing Friday when school closes until Monday morning when school resumes classes. During March break, Kelly Crane will have access to Roger from Friday at 4:00 p.m. when school closes until Tuesday at 4:00 p.m. Roger will be in the care of Geanne Crane for

the balance of the March break. The parties will revert back to the regular schedule at the conclusion of the March break holiday.

b) Easter: Easter is deemed to be the period of time commencing Good Friday at 4:00 p.m. until Easter Monday at noon. Kelly Crane will have access to Roger on the Easter weekend of every odd numbered year. Geanne Crane will have Roger in her care on the Easter weekend of every even numbered year. The parties will revert back to the regular schedule at the conclusion of the Easter holiday.

c) July / August: Kelly Crane will have Roger in his care for seven consecutive days in July and seven consecutive days in August. Geanne Crane will have a period of fourteen consecutive days of summer vacation with Roger. Geanne Crane will advise Kelly Crane of the dates of the summer vacation which she will be exercising no later than June 1 of each year. Kelly Crane will thereafter advise Geanne Crane of the dates of his summer vacation no later than June 15 of each year. The parties will revert back to the regular schedule following the summer vacation which each party exercises.

d) Halloween: Halloween is deemed to be from 4:00 p.m. until 8:00 p.m. of every October 31st. Kelly Crane will have Roger in his care for Halloween on the even numbered years. Geanne Crane will have Roger in her care for Halloween on the odd numbered years. The parties will revert back to the regular schedule at the conclusion of Halloween.

e) Roger's Birthday: If one party is not scheduled to have Roger in his/her care for a portion of June 26, that party will be entitled to have Roger from 3:00 p.m. until 7:00 p.m.

f) Christmas: Christmas is deemed to cover the period from December 24 to December 27. Geanne Crane will have Roger in her care all day on December 24 until 3:00 p.m. on December 25. Kelly Crane will have Roger in his care from 3:00 p.m. on December 25 until 3:00 p.m. on December 27. The parties will revert back to the regular schedule at the conclusion of Christmas.

g) Ad hoc Special Family Events: The parties will use their best efforts to accommodate any special family reunion, wedding, anniversary, or event which is scheduled at a time when Roger is in the care of the other party. Advanced written notice will be provided to the other party to determine if the regular schedule can be altered to permit Roger's attendance at the special function. The parties will be as flexible as possible in such circumstances. If accommodation cannot be made, the other party will provide written reasons, via e-mail, to the party so requesting. The parties will revert back to the regular schedule at the conclusion of the ad hoc special family events.

[70] Should income be imputed to Mr. Crane?

[71] Ms. Crane seeks to impute an annual income of $30,000 to Mr. Crane for each of the four years between 2003 to 2006. Ms. Crane states that Mr. Crane was underemployed between 2003 to 2006. Ms. Crane is content to accept that Mr. Crane's income for 2007 is $53,200.

[72] Mr. Crane states that income should not be imputed to him. He states that any retroactive child support should be based upon the income which he actually earned as follows

2003	$16,574
2004	$14,633
2005	$ 8,385
2006	$ 3,666
2007	$53,200

[73] Section 19(1)(a) of the *Federal Child Support Guidelines* provides the court with the jurisdiction to impute income to Mr. Crane if I find that Mr. Crane is unemployed or underemployed. Section 19(1)(a) states:

> 19. (1) 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;

[74] In **Montgomery v Montgomery** 2000 NSCA 2 (CA), the Nova Scotia Court of Appeal reviewed s.19(1)(a) of the *Guidelines*. The Court of Appeal held that an intention to deprive the other spouse of child support need not be present in order to impute income.

[75] The discretionary authority found in s. 19 of the *Guidelines* must be exercised judicially in accordance with rules of reason and justice. The burden of proof lies with Ms. Crane and it is proof on a balance of probabilities. In **Coadic v Coadic** [2005] N.S.J. 415., the court reviewed

the factors to be considered when a party requests imputation at paras 14 to 17 :

> ¶ 14 In making my determination as to the amount of income to be attributed to Mr. Coadic, I am not restricted to the actual income which he earned or earns, rather I am permitted to review Mr. Coadic's income earning capacity having regard to his age, health, education, skills and employment history.
>
> ¶ 15 In **Saunders-Roberts v. Roberts,** [2002] N.W.T.J. No. 9, 2002 CarswellNWT 10 (S.C.) Richard J. stated at para. 25:
>
> > 25 When imputing income, it is an individual's earning capacity which must be considered, taking into account the individual's age, state of health, education, skills and employment history. In the circumstances of the respondent, in my view it would not be unreasonable to impute, at a minimum, one-half of the income that the respondent earned in 1995 and 1996, say $50,000. I note that the respondent's present income, according to his own evidence, is approximately $42,500.00.
>
> ¶ 16 In **C.R.) v. I.(A.)**, [2001] O.J. No. 1053, 2001 CarswellOnt 1143 (S.C.J.) Blishen J. reviewed the principle that income is based upon the amount of income which a parent could earn if working to his/her capacity and further adopted the factors to be applied when imputing income as proposed by Martinson J. in Hanson v. Hanson, [1999] B.C.J. No. 2532 (S.C.). Blishen J. stated at paras. 79 to 80:
>
> > 79 By imputing income, the court is able to give effect to the legal obligation on all parents to earn what they have the capacity to earn in order to meet their ongoing legal obligation to support their children. Therefore, it is important to consider not only the actual amount of income earned by a parent, but the amount of income they could earn if working to capacity (Van Gool v. Van Gool (1998), 166 D.L.R. (4th) 528).

80 In **Hanson v. Hanson**, [1999] B.C.J. No. 2532 Madam Justice Martinson of the British Columbia Supreme Court, outlined the principles which should be considered when determining capacity to earn an income as follows:

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (Van Gool at para. 30).

2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.

3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.

4. Persistence in unremunerative employment may entitle the court to impute income.

5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.

6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[76] I find that Ms. Crane has met the burden facing her. She has proven on a balance of probabilities that income should be imputed to Mr. Crane for child support purposes. I make this finding for the following reasons:

a) There was no evidence that Mr. Crane was unable to work for health reasons. The evidence confirms that Mr. Crane is able-bodied. Indeed his income in 2007 shows that Mr. Crane is capable of earning significant income if he so choses;

b) Mr. Crane testified that during some of the post-separation time period, he was primarily responsible for the care of a parent who was ill. He thus did not work. Caring for an ill parent does not take priority over the obligation to support one's child. Section 19 (1) (a) refers to the health needs of a spouse, not a parent;

c) Mr. Crane provided little evidence of having made significant and genuine efforts to find employment for the greater portion of the separation. I find that he did not. Mr. Crane's anger and bitterness was so intense that he avoided work. Mr. Crane acknowledged on more than one occasion that he refused to provide support because he felt that he was encountering access difficulties; and

d) If Mr. Crane genuinely was unable to find employment in the local area, he could have sought alternate employment in other areas of the country. Mr. Crane left the province in the past to find employment. From September 2003 until March of 2004, Mr. Crane worked in Ontario. Mr. Crane worked in Alberta for a portion of 2007.

[77] In order to determine the appropriate quantum of income to impute to Mr. Crane, I must look to the factors previously identified. Mr. Crane has

limited educational skills. Based upon the evidence before me, I impute income to Mr. Crane in the amount of $20,000 for the years 2003, 2004, 2005 and 2006. This amount is based upon Mr. Crane's work history, age, educational limitations, the ease at which Mr. Crane found employment in another province when he sought work, and Mr. Crane's income earning capacity. I accept the evidence that Mr. Crane earned $53,200.00 in 2007.

[78] **Should a retroactive child support order issue?**

[79] Ms. Crane seeks a retroactive child support order to the date of separation. Mr. Crane contests a retroactive award.

[80] The court must examine four factors when determining the issue of retroactivity: **S. (D.B.) v. G. (S.R.)**, 2006 SCC 37. The first factor concerns the reasonableness of the custodial parent's excuse for failing to make a timely application in the face of the nonpayment of child support or in the face of an insufficient payment of child support. The second factor relates to the conduct of the non-custodial parent. If the non-custodial parent engages in blameworthy conduct, then the issuance of a retroactive award

is usually appropriate. The third factor to be balanced focuses on the circumstances, past and present of the child, and not of the parent, and includes an examination of the child's standard of living. The fourth factor requires the court to examine the hardship which may accrue to the non-custodial parent as a result of the non-custodial parent's current financial circumstances and financial obligations, although hardship factors are less significant if the non-custodial parent engaged in blameworthy conduct.

[81] In respect of these factors, I make the following determinations:

a) Ms. Crane did not delay in making a court application for child support. She filed an application in August 2003. The application was not heard until September 22, 2004. The order flowing from that hearing adjourned the child support issue to allow Mr. Crane to obtain counsel. The child support determination was not heard until the divorce trial. Ms. Crane and Roger cannot be penalized because an early trial date was not secured;

b) Ms. Crane consistently requested child support from Mr. Crane. This did not produce results;

c) Mr. Crane engaged in blameworthy conduct. He withheld child support from Ms. Crane because he was dissatisfied with access and because he was angry and bitter;

d) Ms. Crane experienced financial difficulty which impacted on Roger. Ms. Crane was a struggling student and even after graduation, and despite a healthy salary, she continues to struggle financially because of the debt load;

e) The hardship which may accrue to Mr. Crane by being required to pay retroactive child support is less significant given his blameworthy conduct and cavalier attitude towards his legal obligation to Roger.

[82] I therefore grant a retroactive maintenance award to August 2003. Child support based upon $20,000 equates to an order of $161 per month. $6,601 is therefore outstanding for the years 2003 to 2006. Mr. Crane anticipated earning $53,200 for the year 2007. Child support of $463 per month is due from January 1, 2007 and continuing monthly thereafter until otherwise ordered by a court of competent jurisdiction. The retroactive award and any arrears are payable at a rate of $125 per month.

V. Conclusion

[83] The following relief is therefore granted:

a) A divorce based upon a one year separation given that all jurisdictional issues have been proven and a finding that there is no possibility of reconciliation has been entered;

b) An unequal division of the assets in favour of Ms. Crane such that Ms. Crane will be the sole owner of the net proceeds of the sale of the matrimonial home;

c) Judgement is entered against Mr. Crane in the amount of $12,134 which represents one-half of the debt;

d) An order imputing income to Mr. Crane for the years 2003 to 2006 in the amount of $20,000 per annum; and

e) A retroactive child support award of $6,601 together with an ongoing child support order based upon $463 per month effective January 1, 2007 and continuing on the first day of every month thereafter. The retroactive award and any arrears will be paid at a rate of $125 per month.

[84] If either party wishes to be heard on the issue of costs, submissions will be made within fourteen days. The response will be filed fourteen days after the cost application is made. Mr. Stanwick is to draft the orders. Thank you.

_____
Justice Theresa M. Forgeron