

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Marshall v. Marshall, 2008 NSSC 11

Date: January 11, 2008

Docket: 1206-5230

Registry: Sydney, Nova Scotia

Between:

Loretta Marshall

Petitioner

v.

Darryl Marshall

Respondent

DECISION

Judge: The Honourable Justice Theresa Forgeron

Heard: October 19, 2006; March 27 & 28, 2007; Final submissions received on April 13, 2007.

Oral Decision: November 14, 2007

Written Decision: January 11, 2008

Counsel: Alan Stanwick, counsel for Ms. Marshall
Bill Burke, counsel for Mr. Marshall

By the Court:

I. Introduction

[1] Following a mid-length marriage, Lynn and Darryl Marshall separated on March 28, 2005. Mr. and Ms. Marshall were unable to resolve the financial issues which were confronting them after their separation. They didn't agree on the amount of income Mr. Marshall earned. They didn't agree on maintenance issues. They didn't agree on property division issues.

[2] The parties did, however, reach agreement on the parenting issues involving their two children - Adam who is fifteen and Eryn who is seven. Adam and Eryn continue to enjoy a loving relationship with each of their parents. The children live primarily with Ms. Marshall in the matrimonial home. They have access to Mr. Marshall who lives with his common-law partner, Ms. Janet MacNeil. Mr. and Ms. Marshall both reside in Glace Bay, N.S.

[3] Mr. Marshall is a journeyman mechanic who has been employed in that field in excess of twenty years. Mr. Marshall was the primary wage-earner during the marriage. He was self-employed from 2000 until 2006. Mr. Marshall now works for a business owned by his common-law partner. His income is reported to be \$26,000 a year.

[4] Ms. Marshall worked many casual and part time jobs throughout the marriage. She returned to school in 2004/2005 and trained as a continuing care assistant. She is currently employed on a casual, relief basis with New Waterford Homemakers. She earns \$14.75 per hour. She has little seniority.

[5] The trial was held on October 19, 2006, and on March 27 and 28, 2007. The court heard from eight witnesses: Lynn Marshall, Sandra Verrick, Adam Marshall, Karen Brann, Robert MacDonald, Blair Rogers, Darryl Marshall, and Janet MacNeil. Final submissions were received on April 13, 2007.

II. Preliminary Matters

[6] Before presenting the unresolved issues, there are two preliminary matters to be confirmed. First, the divorce is granted on the basis of a permanent break down in the marriage as evidenced by the separation of the parties in excess of one year.

All jurisdictional issues have been proven. There is no possibility of reconciliation.

[7] Second, the name change application of Ms. Marshall is granted such that her surname will be “Brann” effective upon the issuance of the certificate of divorce.

III. Issues

[8] The parties asked the court to determine eight unresolved issues which are listed as follows:

- a) What is the income of Mr. Marshall?
- b) What is the value/balance of the assets/ debts?
- c) What is the appropriate division?
- d) Should Ms. Marshall be granted an award for business contributions?
- e) What are the appropriate child support provisions?

- f) Should Mr. Marshall pay Ms. Marshall periodic spousal support?
- g) Should Mr. Marshall pay Ms. Marshall lump sum spousal support?
- h) Should a retroactive maintenance order be granted?

IV. Analysis

[9] What is the income of Mr. Marshall?

[10] Ms. Marshall seeks to impute an annual income to Mr. Marshall in the range of \$45,000 to \$65,000. Mr. Marshall, on the other hand, states that his income is \$26,000 per annum.

[11] Ms. Marshall's Position in Support of Imputation

[12] Ms. Marshall states that Mr. Marshall is either earning substantially more than \$26,000 per annum; or in the alternative, Mr. Marshall is intentionally reducing his income in an effort to circumvent the payment of a higher maintenance award. In support of her position, Ms. Marshall advanced several arguments which are enumerated as follows:

- a) Mr. Marshall is a skilled mechanic, who is well respected for the quality of his work. He earned significantly more income in 1998 and 1999 when he was employed with Breton Toyota than he purportedly does now;
- b) The business of Mr. Marshall's partner could not exist without Mr. Marshall. Ms. MacNeil has no experience as a mechanic. The business is advertised as Mr. Marshall's business. Mr. Marshall is the real owner of the business, despite the documentation which shows the contrary;
- c) Ms. MacNeil did not invest in the business when it was created. Mr. Marshall did. He transferred \$30,000 worth of tools and equipment to the business and received nothing in return, other than a non-interest bearing promissory note. No schedule of repayment is attached to the note. No security was provided. Further, Mr. Marshall did not charge the company for his client base, nor for the use of his name;
- d) Mr. Marshall's lifestyle suggests an income greater than \$26,000 per annum. He has traveled to Cuba, and took various vacations to Ontario, New Brunswick and PEI. He has acquired a new motor bike, valued at \$12,500. He drives a new truck, which despite being owned by the business, is used by Mr. Marshall for personal matters - including transporting the children for access. Although Ms. MacNeil may have paid for these extras, such have been to the benefit of Mr. Marshall and should be considered in the determination of his income;
- e) Mr. Marshall quit working at Breton Toyota as he knew he could make more money as a self-employed mechanic. Mr. Marshall worked for years in his own business. Much of his income was unreported to the government. Cash payments were common. Mr. Marshall stored the cash in various places throughout the home. Ms. Marshall and her mother testified to this; and
- f) Mr. Marshall intentionally lowered his reported income in the past in an effort to pay less child support. Mr. Marshall had an affair during the marriage from which a child was born. Mr. Marshall initially paid child support in excess of \$400 per month. This was later reduced to \$151 per month when Mr. Marshall's income tax returns showed a substantial reduction in income.

[13] *Mr. Marshall's Position Against Imputation*

[14] Mr. Marshall vehemently denies the allegations put forth by Ms. Marshall. He notes the following in response:

- a) He did not quit Breton Toyota. Mr. Marshall was laid off as evidenced in the separation slip. He did not reapply to Breton Toyota because Mr. Marshall found the work place stressful;
- b) Mr. Marshall accepted Ms. MacNeil's job offer because he would be guaranteed a consistent income and thus would be in a better position to pay regular child support;
- c) Ms. MacNeil invested in the business for reasons related to financial security. Ms. MacNeil and her husband have separated. Ms. MacNeil wants to have an asset pool from which she will be able to support herself and her children. Ms. MacNeil has sole and total control of the business. Although she currently works in the business, Ms. MacNeil does not draw any money from it;
- d) Ms. MacNeil and Mr. Marshall were high school, sweet hearts. Ms. MacNeil paid for trips and other expensive gifts out of love. These gifts were not given in lieu of a better income from the business. Ms. MacNeil can afford extravagant gifts because she earned \$160,000 in 2006 and she also receives significant child support. Ms. MacNeil's 2006 income was derived from a business which she owns with her separated spouse;
- e) Mr. Marshall never earned the income which Ms. Marshall alleges while he was self-employed. Although he was out in the garage most nights, he was socializing, for the most part, with friends from the neighborhood. Further, Mr. Marshall did not charge friends for vehicle repairs. Blair Rogers confirmed Mr. Marshall's evidence;

f) Mr. MacDonald is and was the book keeper of the business. He said that the business statements represented the true financial position of the company; and

g) Mr. Marshall did not have the cash in the house as suggested by Ms. Marshall and her mother. The lifestyle which he and Ms. Marshall enjoyed during the marriage was not a luxurious one. Rather, theirs was a family struggling to survive. Mr. Marshall noted that he and Ms. Marshall were behind in bills and that they also utilized the child tax credit to help defray the cost of living.

[15] *Decision on Imputation*

[16] Section 19 (1)(a) of the federal *Child Support Guidelines* provides this court with the authority to impute income to Mr. Marshall if I find that Mr. Marshall is underemployed. Section 19 (1)(d) of the *Guidelines* provides this court with the jurisdiction to impute income if I find that Mr. Marshall is diverting income. These sections state as follows:

Imputing income

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;

(d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

[17] The discretionary authority found in section 19 of the *Guidelines* must be exercised judicially in accordance with the rules of reason and justice - not arbitrarily. There must be a rational and solid evidentiary foundation in order to impute income in keeping with the case law which has developed. The burden of proof is upon Ms. Marshall and it is proof on the balance of probabilities: **Coadic v. Coadic** (2005),237N.S.R.(2d)362(SC).

[18] In reviewing the factors to be considered when a party has requested imputation, the court stated at paras 14 to 16 of **Coadic**:

[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-Robert v. Robert**, 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 **R.C. v. A.I.**, 2001 CarswellOnt 1143 (Sup. Ct.), 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.'"

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

a) Mr. Marshall earned \$44,101 while employed as a mechanic with Breton Toyota in 1998 and \$38,796 while employed for the greater portion of the year in 1999. He should not be earning less in 2007. If his income is actually \$26,000 as reported, he is clearly underemployed;

b) Mr. Marshall is being paid at a rate of \$12.50 per hour. The other employee, who is not trained, is paid at a rate of \$12.00 per hour. Mr. Marshall should be employed in a job where he earns a salary which is commensurate with his many years of experience and qualifications;

c) Mr. Marshall did not seek employment in a business which was at arms length. He did not search for more remunerative employment in keeping with his skills and experience. Saying that a job was stressful nine years ago is

insufficient. Eryn and Adam cannot be expected to bear the financial burden of Mr. Marshall's decision to limit his employment search. This is not acceptable;

d) I find that Mr. Marshall quit his employment with Breton Toyota so that he could open his own business. I make this finding despite the separation slip. I accept the evidence of Ms. Marshall where it conflicts with the evidence of Mr. Marshall. The fact that Mr. Marshall did not look for work with any other business, and did in fact open up his own business on a full-time basis, makes Ms. Marshall's explanation more plausible than that of Mr. Marshall;

e) I find that Mr. Marshall earned significantly more income than what he reported to the government when he was self-employed. I accept the evidence of Ms. Marshall and her mother where it conflicts with the evidence of Mr. Marshall. I reject the evidence of Mr. Marshall. He lacks credibility. I accept that many customers paid in cash and not all cash was accounted for in the books by Mr. Marshall. I accept that Mr. Marshall kept money in various locations within the home;

f) I find that Mr. MacDonald completed the financial statements based upon the materials and figures supplied by Mr. Marshall. Mr. MacDonald did not participate in any wrongdoing. I find that Mr. Marshall did not advise Mr. MacDonald of the many cash transactions which composed the greater portion of Mr. Marshall's business income. I find that had Mr. Marshall only earned the amount which he reported, that Mr. Marshall would have closed down his business and found work as an employee elsewhere;

g) I find that Mr. Marshall and Ms. MacNeil devised a scheme to reduce the amount of income available to Mr. Marshall for maintenance. There is overwhelming evidence to support this conclusion. Ms. MacNeil did not invest in the company which carries on the business which employs Mr. Marshall. Mr. Marshall did. He sold his tools and equipment for \$30,000 and only received a non-interest bearing note. The business operates under the name of Mr. Marshall, but he was not paid for his client base. He was given no shares and no control of the company. He is paid little. Mr. Marshall drives

the company truck and uses it for personal business. I find that the scheme concocted by Mr. Marshall and Ms. MacNeil was an attempt to hamper Ms. Marshall's efforts to gain appropriate maintenance from Mr. Marshall. I do not find either Mr. Marshall or Ms. MacNeil credible. In particular, I note that Mr. Marshall lied and failed to disclose all of his assets in the Statement of Property which he filed; and

h) The parties enjoyed a good standard of living with minimal debt, until just prior to separation. The parties did not have a sizeable mortgage. They had only one credit card with a modest outstanding balance. They had no lines of credit. They had no car loans. Their children were well-clothed and participated in extracurricular activities. They did not live lavishly, but they did enjoy a healthy lifestyle. I recognize that a few bills were outstanding at separation. This fact does not assist Mr. Marshall's argument because the bills were not that significant, and the bills were only built up as the marriage was breaking down. The motive for not paying the bills in a timely fashion is thus questionable.

[20] I have reviewed the evidence, legislation and case law. I have assigned the burden of proof to Ms. Marshall. I will impute income to Mr. Marshall as he is underemployed. I fix his income at \$50,000 per annum based upon what Mr. Marshall's income was while employed at Breton Toyota several years ago, and what I estimate his true, net income to be during the periods of self-employment. I recognize that there is little paper work from which to make an exact calculation of the true unreported income of Mr. Marshall during the years of self-employment. Mr. Marshall, however, should not be permitted to benefit from a situation which he created by his illegal actions of under reporting income.

[21] What is the value/balance of the assets / debts?

[22] The parties acquired various assets and debts over the course of their marriage, which I will now list and value. In **Lynk v. Lynk** 1989 CarswellNS 60 (CA), at para 16, the Nova Scotia Court of Appeal stated that assets should be valued at the date of the commencement of the action with the discretionary authority to vary that date at trial in accordance with the evidence. I have chosen to use the date of separation as the proper valuation date for the assets and debts, except where such is impossible given the lack of evidence. This is the date that the parties severed their relationship.

[23] Any moneys paid by Mr. Marshall on the mortgage and debt after separation will be considered appropriately in the retroactive maintenance question. Any assets sold and used by Ms. Marshall during the separation to meet everyday living expenses will also be considered in the retroactive maintenance claim.

[24] *Matrimonial Home*

[25] The parties agree that the matrimonial home is valued at \$75,000. The parties disagree as to whether notional disposition costs should be deducted from the equity in the home.

[26] I have reviewed the case law presented by Mr. Burke on behalf of Mr. Marshall. I have also reviewed the leading cases in this area, notably **Gomez-Morales v. Gomez-Morales** (1990), 100 N.S.R.(2d) 137 (CA), and **Prince v. Prince** [1997] N.S.J. 433 (CA). There is overwhelming authority that disposition costs should be deducted when establishing the equity in a home. I agree with the comments of Goodfellow J. in **Robski v. Robski** [1997] N.S.J. No. 444 (SC) when he stated that except in unusual cases, disposition costs should routinely be deducted from the value of a home for division purposes. I further find that there is a strong probability that disposition costs will be eventually incurred by Ms. Marshall when the children are no longer dependant. At that time, Ms. Marshall will likely sell the home as she will no longer require such a large residence.

[27] I therefore will reduce the value of the home by 6% for real estate commission [plus GST] and a further reduction of \$1500 [plus GST] for legal fees related to

migration and sale. Total disposition costs of \$6,840 will be deducted. The matrimonial home is thus valued at \$68,160 for division purposes.

[28] Household Contents

[29] There was no agreement reached as to the value of the household contents.

Ms. Marshall was unsure of the value and Mr. Marshall stated that the contents were worth \$15,000 in his Property Statement. I find that the contents were well-used.

Indeed, Mr. Marshall expressed concern over the negative impact that the family pets may have on the value of the home, and I infer, also on the contents. I do not accept that the market value of the well-used furniture, appliances and contents is anywhere near \$15,000. A realistic figure is closer to \$5,000.

[30] In addition, Mr. Marshall took a number of items from the home, including some food, sometimes without the knowledge or permission of Ms. Marshall. These were not valued.

[31] Vehicles

[32] There were three vehicles at separation. The 1996 van was sold by Ms. Marshall after separation for \$2,000. Ms. Marshall kept the proceeds. Mr. Marshall sold the 1987 truck for \$1,500. He kept the proceeds. I accept that the sale proceeds represent the value of these assets at separation.

[33] The third vehicle is a 1984 truck which is in mint condition. No valuation was placed on the vehicle. It is in Mr. Marshall's possession.

[34] RRSPs

[35] At separation, the parties had RRSPs of equal value held in each of their names. Ms. Marshall cashed her RRSPs post separation as she needed the money. Mr. Marshall's RRSPs remain in tact.

[36] Tools/Goodwill

[37] Mr. Marshall did not provide a value for his business. He sold his tools and equipment after separation to his common-law partner's company for \$30,000. He did not sell the goodwill, but does allow the company to operate under his name and use his client base. No value was assigned and I am unable to affix a value in light of the absence of evidence. I do acknowledge, however, that the goodwill would have a value in a non-arms length transaction. This asset will not be subject to division as it is exempt pursuant to s. 4 (1) (e) of the *Matrimonial Property Act*.

[38] *Debt*

[39] There was little long term debt at separation, although the parties were behind paying some of their everyday accounts. There was also a master card with a separation balance of about \$1,000 assumed by Ms. Marshall. There was a mortgage. At the date of separation, the mortgage balance was \$31,032.55.

[40] The everyday debts which were paid by Mr. Marshall post separation will be discussed under the retroactive maintenance claim.

[41] What is the appropriate division?

[42] Ms. Marshall seeks an unequal division of the assets in two respects. First, she seeks to exclude the value of the household contents from the equalization schedule. Second, Ms. Marshall wishes to postpone the equalization payment for the other assets until the youngest child attains the age of majority. Mr. Marshall seeks the immediate sale of the matrimonial home and an equal division of all of the assets and debts.

[43] Burden of Proof

[44] As Ms. Marshall is seeking an unequal division, she bears 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).

[45] In **Jenkins v. Jenkins**, supra, Richard J. reviewed the meaning of unfair and unconscionable as set out in s. 13 of the *Matrimonial Property Act* 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.

[46] *Household Contents*

[47] Ms. Marshall has met the heavy burden in respect of her claim for an unequal division of the household furniture, appliances and contents for the reasons stated by Goodfellow J. in **Clancey v. Clancey** 1990 CarswellNS 218 (SC). In **Clancey**, Goodfellow J. held that basic, functional furniture was required to raise children. In this case, there was no evidence of surplus furniture and little by way of duplication. Ms. Marshall requires the contents that are situate in the home to meet the reasonable needs of the children. There will be an unequal division of the contents in favour of Ms. Marshall pursuant to s. 13 (h) of *the Act* which refers to the needs of a child who

has not attained the age of majority. The value of the household contents retained by each party will not be included in the equalization schedule and each party will retain ownership of the furniture, appliances, and contents in his/her possession.

[48] Postponement of Equalization Payment

[49] Ms. Marshall has not met the heavy burden required to succeed in her request to postpone the equalization payment for twelve more years when Eryn will turn nineteen years old. The facts in this case do not support the extraordinary conditions necessary to prove that an equal division would be unfair or unconscionable. This is a mid-length marriage during which most assets were acquired through the joint efforts of both parties. There is no evidence that either party injected inheritance or other exempt assets into the matrimonial pot. Further, the needs of Adam and Eryn are not dissimilar to the needs of all children whose parents are undergoing a divorce. This is not the situation which was faced by the court in **MacLennan v. MacLennan** (2003), 212 N.S.R.(2d)116(CA).

[50] Sale of the Matrimonial Home

[51] Even though I ordered an equal division of the matrimonial assets, I will not order that the home be sold. Upon receipt of the equalization payment, Mr. Marshall will execute a deed in favour of Ms. Marshall so that she will become the sole owner of the home. The equalization payment, subject to the other credits stated in this decision, will be paid out in ninety days by certified bank draft or solicitor's trust cheque.

[52] Equalization

[53] The equal division of the assets will provide that each party will retain sole ownership of the RRSPs in his/her possession as of separation without further equalization to the other.

[54] The equal division of the assets will also provide for an equal sharing of the value of the third vehicle, the 1984 truck. Unless the parties agree otherwise in writing, I order Mr. Marshall to transfer the third vehicle to Ms. Marshall who will arrange to have the truck appraised and then sold for its fair market value. The

proceeds will be equally divided between the parties. I order the transfer to Ms. Marshall as I am concerned that Mr. Marshall will make cash deals to the detriment of Ms. Marshall if he were in charge of the sale.

[55] Mr. Marshall will retain the business assets which he owned at separation including the tools and equipment which he sold to Ms. MacNeil for \$30,000. These are not subject to division as they are exempt assets.

[56] The equalization of the other assets and debts will be as provided in the following schedule:

| <u>I. Asset</u> | <u>Value</u> | <u>Husband</u> | <u>Wife</u> |
|------------------------|---------------------|-----------------------|--------------------|
| Home | \$68,160 | | \$68,160 |
| Vehicles | \$ 3,500 | \$1,500 | \$ 2,000 |
| Total | \$71,660 | \$1,500 | \$70,160 |

| <u>II. Debt</u> | <u>Balance</u> | <u>Husband</u> | |
|------------------------|-----------------------|-----------------------|-----------------|
| Mortgage | \$31,033 | | \$31,033 |
| Credit card | \$ 1,000 | | \$ 1,000 |
| Total | \$32,033 | \$0 | \$32,033 |

| | |
|----------------------------|----------------------------------|
| III. Equity of Wife | $\$70,160 - \$32,033 = \$38,127$ |
| Equity of Husband | \$1,500 |

IV. Equalization Payment $\$38,127 - \$1,500 = \$36,627 / 2 = \$18,313.50$

[57] Ms. Marshall owes Mr. Marshall $\$18,313.50$ as an equalization payment, *subject* to Ms. Marshall's claim for business contribution, retroactive maintenance, and lump sum maintenance.

[58] Should Ms. Marshall be granted an award for business contributions?

[59] Ms. Marshall makes a claim for monetary relief, in the amount of \$10,000, for her contribution to Mr. Marshall's business. Mr. Marshall states that Ms. Marshall did not work for the business and is not entitled to any compensation. Mr. Marshall argues that any contribution made by Ms. Marshall was minimal.

[60] *Legislation and Law*

[61] Section 18 of the *Matrimonial Property Act* provides the court with the authority to respond to a business contribution claim. This section states as follows:

18 Where one spouse has contributed work, money or moneys worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order

(a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefor; or

(b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution, and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances. R.S., c. 275, s. 18.

[62] There are many cases in which the courts have considered a claim pursuant to section 18 of the *Act*. The outcomes in these cases are based upon the unique facts which were presented.

[63] Courts have denied claims for contribution for two reasons. First, where a spouse has already been paid for her/his contribution, then an award pursuant to section 18 is usually denied: **Rushton v. Rushton** (2006), 244 NSR (2d) 242 (SC) and **French v. French** (1997), 162 N.S.R.(2d) 104 (SC). Second, claims are also denied where the contribution has been minimal: **Crosby v. Crosby** (2002), 207 N.S.R.(2d)195(SC) and **Baggs v. Baggs** (1997), 161 N.S.R.(2d) 81 (SC). However, where the wife was

paid an insufficient amount for her work, a further award of \$15,000 was deemed appropriate: **Mason v. Mason** (1981) 47 N.S.R. (2d) 435 (CA).

[64] Some courts have preferred an unequal division as a method of achieving justice where there are business assets, rather than making an award pursuant to section 18 of the *Act*: **MacDonald v. MacDonald** (2007), 255 NSR (2d) 270 (SC); **Pelrine v. Pelrine** (2006), 251 N.S.R.(2d)29(SC); and **Todd v. Todd** (1995), 144 N.S.R.(2d) 340 (SC). The Court of Appeal appears to have acknowledged the impact that unequal division awards have upon sec. 18 claims. In **Sproule v. Sproule** (1986), 73 N.S.R. (2d) 131 (CA), the Court of Appeal affirmed a \$20,000 s. 18 claim to a wife for her extensive contributions to the business, given that an unequal division had also been awarded in the wife's favour.

[65] In other cases, a cash payment is provided to the non-owning spouse, the amount of which varies for the services provided. In **Lynk v. Lynk**, *supra*, the wife was awarded a one-third interest in the business because of the financial exposure she had accepted. In **MacDougall v. MacDougall** (2005), 231 N.S.R.(2d) 270 (SC), the wife was awarded \$10,000 for her contribution to the business. In **Reid v. Reid** (1989), 99 N.S.R. (2d) 207 (SC) the wife was awarded one-fourth of the value of the

fishing operation for her contribution which consisted of painting the boat, acquiring and transporting bait, and bookkeeping. In **Campbell v. Campbell** (1986), 74 N.S.R. (2d) 25 (SC), Nathanson, J., awarded the wife a 10% interest in the value of the business as she cosigned business loans.

[66] Decision on Business Contribution Claim

[67] I have reviewed the evidence, legislation and case law and the submissions of counsel. I have assigned the burden of proof to Ms. Marshall. This is the civil burden of proof on the balance of probabilities. Ms. Marshall has met the burden. I award Ms. Marshall \$7,000 for her contribution to the business for the following reasons:

- a) The business operated out of the garage which was matrimonial property. The business paid no rent to the Marshalls, although it did pay the power and phone bills. A business, such as Mr. Marshall's, would ordinarily be required to pay rent;
- b) I accept the evidence of Ms. Marshall that she took messages and assisted with customers from time -to-time and was not paid for her services; and
- c) When Mr. Marshall moved his business after separation, he left the garage in a deplorable condition. Ms. Marshall was required to clean up the garage which was the responsibility of the business.

[68] The \$7,000 award from the sole proprietorship of Mr. Marshall, which no longer exists on paper, will be deducted from the equalization payment which Ms. Marshall owes to Mr. Marshall.

[69] What are the appropriate child support provisions?

[70] Ms. Marshall seeks the table amount of child support for two children and this application is granted. Child support is set at a rate of \$715 per month commencing November 15, 2007 and continuing on the 15th day of every month thereafter until a court of competent jurisdiction determines otherwise. The usual payment and reporting provisions apply to this order.

[71] As no claim was presented for section 7 expenses, no award will be given. The evidence suggests that the section 7 expenses have been adequately resolved in an amicable manner by the parties in the past. Hopefully such will continue. If not, then an application can be made to the court.

[72] Mr. Marshall will also designate Ms. Marshall as the beneficiary of his life insurance as security for the maintenance obligation. Mr. Marshall will provide proof

that Ms. Marshall has been irrevocably designated. Mr. Marshall will furnish the insurance provider with the authorization to supply Ms. Marshall with details of the designation, and all particulars respecting the policy, including payment of the premiums, without the further authorization of Mr. Marshall.

[73] Should Mr. Marshall pay Ms. Marshall periodic spousal support?

[74] Ms. Marshall seeks periodic, spousal support. Mr. Marshall does not agree to pay spousal support. He contests entitlement, quantum, and duration.

[75] Section 15.2(1) of the *Divorce Act* provides the court with the jurisdiction to grant a spousal support order. Section 15.2 (1) states:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

[76] The factors which a court must consider are set out in s 15.2 (4) which states as follows:

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[77] The objectives to be considered in respect of a spousal support order are set out in section 15.2 (6) which provides:

15.2 (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

1997, c. 1, s. 2.

[78] *Periodic Spousal Support Decision*

[79] I have considered the legislation, the case law, and the evidence of the parties. I have assigned the burden of proof to Ms. Marshall which is the civil burden of proof on a balance of probabilities. I have considered the three foundational elements of spousal support as set out in **Bracklow v Bracklow** 1999 CarswellBC 532 (SCC). I have not considered any misconduct of the parties. I find that Ms. Marshall has proven her entitlement to spousal support. I make this finding for the following reasons:

- a) This is a mid-length marriage;
- b) Mr. Marshall was the primary wage earner throughout the marriage. Although Ms. Marshall has an extensive work history, her employment was usually casual and relief. She changed jobs frequently. Ms. Marshall's employment was secondary to her role as nurturer and homemaker;
- c) Mr. Marshall has solid, employment skills, and an ability to earn a decent wage if he so chooses. Ms. Marshall only graduated with a trade in June 2005. Although, she is employed in the field of her study, she is employed on a casual basis with little seniority. It will take her a number of years before she has the benefit of full time, permanent employment;
- d) Ms. Marshall is the spouse who is experiencing the most negative, financial consequences of the marriage breakdown. Ms. Marshall has the primary care of the two children and their associated expenses. Ms. Marshall does not share living expenses with another adult. Mr. Marshall is able to share expenses with his partner, who from all accounts is financially secure; and
- e) Mr. Marshall has an ability to earn \$50,000 per annum. At present, Ms. Marshall will likely have an annual salary of \$24,000. In 2005 and 2006, Ms. Marshall was unable to work a portion of the time due to stress associated with the break down of the marriage. Her income is greater in the summer when

permanent staff are on vacation and she can work more hours. Ms. Marshall will likely earn less than half of what Mr. Marshall earns.

[80] I have determined that Mr. Marshall will pay Ms. Marshall periodic, spousal support in the amount of \$200 per month. I have reached this sum based upon the evidence and after considering the legitimate expenses and needs of the parties as evidenced in their budgets, subject to meaningful and inevitable adjustments. I have also considered the child support obligations which Mr. Marshall has to the children of the marriage and to his other child for whom he pays \$151 per month. The spousal support payment is of course subject to section 17 of the *Divorce Act*. Further, pursuant to section 15.3 of the *Divorce Act*, I confirm that the amount of spousal support that I have ordered is less than it would otherwise be as priority has been assigned to child support.

[81] In making the spousal support determination, I have also considered the *Spousal Support Advisory Guidelines* although neither party referenced the *Guidelines* in their summations. The *Guidelines* do not suggest a maintenance payment at this time given Mr. Marshall's dual child support obligations. I have nonetheless determined that the *Guidelines* are not appropriate in this case because of Mr. Marshall's living arrangements. Mr. Marshall's shelter costs are less than those of a

single person because he shares these expenses with Ms. MacNeil. Mr. Marshall thus has an ability to pay spousal support. According to the Divorce Mate calculations, Mr. Marshall has a net disposable income of \$2166 per month after the payment of child support. Ms. Marshall has a net disposable income of \$3007 per month inclusive of the child support payment. Ms. Marshall is responsible for three people and Mr. Marshall is responsible for one. Spousal support of \$200 per month is more than appropriate in these circumstances.

[82] Each party is required to exchange his/her income tax return, with all attachments, and income tax assessment/reassessment on an annual basis on June 1st commencing on June 1 2008 with the 2007 income tax return.

[83] Should Mr. Marshall pay Ms. Marshall lump sum spousal support?

[84] The factors and objectives which I must consider in a lump sum spousal support claim are as stated in the previous issue. In addition, case law provides that before a lump sum award can be ordered, there must be a specific or an immediate need shown. Ms. Marshall claims lump sum support for a vehicle and for the oil tank which Mr.

Marshall paid for post separation. Mr. Marshall disputes the claims, and also states that he has no ability to pay in any event.

[85] I find that Ms. Marshall has met the burden upon her. She has proven on the balance of probabilities that she has an immediate or specific need. The oil tank was required for insurance purposes. Mr. Marshall has already paid for the oil tank in the amount of \$670. This was appropriate. If he had not, I would have ordered him to reimburse Ms. Marshall as lump sum maintenance.

[86] I further find that Ms. Marshall is in immediate need of a vehicle: **Gossen v. Gossen**, 2003 CarswellNS 121 (SC). She sold the van, and I accept her evidence, with the approval of Mr. Marshall for \$2,000. She could no longer afford the gas and upkeep associated with a large vehicle. I find that she was correct in her attempts to cut back on her expenses.

[87] I accept that Ms. Marshall purchased a good used vehicle following the sale of her van. However, because of her health, and her extreme financial difficulties, Ms. Marshall got behind in her vehicle payments. Her car was repossessed. Ms. Marshall currently drives a 1998 Chrysler Intrepid which her parents bought for \$2,000. Ms.

Marshall's parents have been exceedingly generous to Ms. Marshall and their grandchildren during the difficult, separation period. They have also supplied coal and financial assistance when Ms. Marshall has been drained of all income. I find that the 1998 Chrysler is not going to last long and it is not safe for the upcoming winter. Ms. Marshall requires a good vehicle for her work and for transporting the children.

[88] The requirement of a good, used, fuel-efficient car is a specific and an immediate need that will be met by Mr. Marshall paying Ms. Marshall a lump sum award of \$8,000 which will be deducted from the outstanding equalization payment.

[89] Should a retroactive maintenance order be granted?

[90] Ms. Marshall seeks a retroactive child and spousal support award to the date of separation. Mr. Marshall contests this application stating that he has paid many bills in lieu of support and that he does not have the ability to make a retroactive payment in any event.

[91] 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 [para 10] of the child, and not of the parent [para 113], and includes an examination of the child's standard of living [para 111]. 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 [para 115], although hardship factors are less significant if the non-custodial parent engaged in blameworthy conduct [para 116].

[92] I also have the jurisdiction to make a retroactive spousal support award:

Donald v. Donald, (1991), 103 N.S.R. (2d) 322 (CA) and **Lidstone v. Lidstone** (1993), 121 N.S.R. (2d) 213 (CA).

[93] In respect of the first factor to be balanced, I find that there were legitimate reasons for Ms. Marshall not pursuing a claim earlier given the legal costs involved and given her precarious health difficulties.

[94] In respect of the second factor, I find that there was no blameworthy conduct on the part of Mr. Marshall with the payment of bills and provisions to the children. Mr. Marshall voluntarily paid a number of bills during the separation. These included the following monthly payments: the mortgage of \$440, the home insurance account of \$65, and the water bill of \$30.

[95] In addition, Mr. Marshall paid the outstanding phone bill of \$507, the power bill until November 2005, the outstanding water bill of \$1,403 and also supplied the children with money for allowances and extracurricular activities. He supplied a bed for his son.

[96] Mr. Marshall did, however, engage in blameworthy conduct when he attempted to mask the true amount of his income.

[97] In respect of the third and fourth factors, I have considered the needs of the children and the financial circumstances of the parties. I am not prepared to grant a retroactive maintenance award because Mr. Marshall does not have an ability to pay. He does not have an ability to pay retroactive maintenance because of the awards

which I granted for lump sum maintenance and business contributions. Mr. Marshall cannot be stripped of all of his assets; this despite the needs of Ms. Marshall and the children during this time period.

[98] If I had not awarded lump sum maintenance or an award for business contribution, I would have ordered a comparable amount as retroactive maintenance as Mr. Marshall would then have an ability to pay. I note during a significant portion of the separation, Ms. Marshall's income was dangerously low because she was not able to work for health reasons. During the interim, retroactive period, Ms. Marshall would have required greater support from Mr. Marshall than \$200 a month. During this time period, Ms. Marshall liquidated some assets so she would have enough money to sustain the family. She also received gifts from her parents.

V. Conclusion

[99] In summary, I grant the following relief:

- a) a divorce;
- b) the change of name application of Ms. Marshall;
- c) the imputation of income to Mr. Marshall in the amount of \$50,000 per annum;

- d) an unequal division of the household contents such that each party will retain ownership of the contents presently held in his/her possession;
- e) an order confirming that Mr. Marshall will retain the business assets which he owned at separation including the tools and equipment which he sold post separation for \$30,000;

- f) an order confirming that each party will retain sole ownership of the RRSPs held in his/her name at separation without further equalization payment;

- g) an order confirming that unless the parties reach another agreement, the 1984 truck will be transferred to Ms. Marshall from Mr. Marshall within 30 days. Ms. Marshall will have the truck appraised and then sold for fair market value. The proceeds from the sale of the truck will be equally divided between the parties;

- h) an equal division of the balance of the matrimonial assets such that upon receipt of the equalization payment, Mr. Marshall will issue a deed releasing his interest in the matrimonial home to Ms. Marshall. The equalization payment of \$18,313.50 from Ms. Marshall to Mr. Marshall is reduced to \$3,313.50 after deducting the payment for business contributions of \$7,000 and the lump sum payment of \$8,000;

- i) a child support order in the amount of \$715 per month payable by Mr. Marshall commencing on November 15 and continuing on the 15 of each month;

- j) a spousal support order in the amount of \$200 payable by Mr. Marshall on the 28 of each month commencing November 28, 2007;

- k) an order requiring Mr. Marshall to designate Ms. Marshall as the irrevocable beneficiary on his life insurance policy to secure the

maintenance obligation and to provide an authorization to enable Ms. Marshall to communicate with the insurance company; and

l) an order providing for an annual disclosure of income particulars by each party to the other.

[100] If either party wishes to be heard on the issue of costs, written submissions are to be provided within 14 days. Mr. Stanwick is to draft the order. Thank-you.

Justice Theresa Forgeron