SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: S.L.K.v. M.M.H 2009 NSSC 319

Date: 20091029
Docket: 1201-062387
Registry: Halifax

Between: S.L.K.

Petitioner

v.

M.M.H.

Respondent

Judge:	The Honourable Justice Douglas C. Campbell
Heard:	September 14, 15,16 2009; October 6 & 7, 2009
Written Decision:	October 29, 2009
Counsel:	Jean Beeler, for the petitioner Yvonne LaHaye, for the respondent

By the Court:

1. This is a proceeding pursuant to the Divorce Act, R. S., 1985, c.3 (2nd supplement). I find that all procedural and jurisdictional matters have been properly addressed and that the grounds based on breakdown of the marriage have been proven. I find that the parties have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the preceding. Accordingly, the divorce judgment is hereby granted.

2. The petitioner is the female spouse and is hereafter referred to as "the wife". The respondent is the male spouse and is hereafter referred to as "the husband".

3. The parties began a common law relationship in late 1996 or early 1997 and were married on April 27, 1999. They separated on October 18, 2007 in the sense that they agreed that their marriage was over but the husband did not move out of the matrimonial home until December 15, 2007. The wife continues to reside in the former matrimonial home.

4. The wife had three children, two from her first marriage currently aged approximately 22 and 20 and one from a second marriage currently aged 16. The subject marriage is her third and there were no children born from that relationship. The husband had two children from his previous marriage currently aged 22 and 19 respectively. The wife had custody of her three children and they resided primarily with the couple during the time that the parties cohabited. The husband had access with his two children, generally speaking, every second weekend and on other occasions.

5. The husband is a partner in a firm of Chartered Accountants (hereinafter referred to as "his firm" or "the firm"). He became a Chartered Accountant in 1986 and a partner of

the firm in 1994. He is a managing partner of the firm.

6. The wife had been employed at the firm in an administrative role at the time that they began their relationship. It was determined that this was cause for some discomfort within the firm and she agreed to resign after which she took a position elsewhere. Soon thereafter, she worked part-time for a short period after which she resigned from the workforce and was at home assuming a number of parenting and domestic responsibilities for the balance of the relationship. She has recently taken employment transcribing legal matters after completing the appropriate course work for that occupation.

7. At the time that the relationship began, the husband resided in a condominium which he owned and the wife owned a duplex in which she lived. The parties began officially to live together in March of 1997 when they purchased their matrimonial home at Oxford Street in Halifax. They purchased a weekend home at Caribou Island in September 2002. In 2006, a house was purchased in Antigonish to provide a residence for their children who planned to attend St. Francis Xavier University.

8. The parties each own 25% of the shares of a company called “Clarkson Properties Ltd.” which in turn owns four rental properties in Halifax. The other shares are owned by another couple. The parties have agreed to retain ownership of the shares following the Corollary Relief Judgement in this divorce.

9. During the period of separation, the parties had an informal agreement whereby the husband paid the mortgage installment of $2,517 per month and an additional sum of $5,000 per month to the wife for her living expenses. At the end of each tax year, the parties entered a written separation agreement for the purpose of giving retroactive

income tax effect to those payments thereby entitling the husband to claim these amounts as spousal support for tax deduction purposes. The income tax obligation thereby created for the wife was reimbursed by the husband. Such an agreement has been made relating to all payments made to and including August 15, 2009. It is agreed that the Corollary Relief Judgement shall similarly apply retroactive income tax treatment for any payments made after that date and prior to the effective date of my prospective order for spousal support. The Corollary Relief Judgement shall provide for this.

i. **ISSUES:**

10. The issues to be decided are:

i. 1. Division of assets and debts;

2. Whether the husband stands in the place of a parent with respect to the wife's 16 year old daughter;

3. Quantity and duration of spousal support after August 15, 2009.

ii. **DIVISION OF ASSETS AND DEBTS**

11. There is agreement between the parties with respect to the evaluation, classification and allocation as between them regarding many of the assets and debts. These agreements will be reflected in comments below.

12. **Matrimonial Home:** The parties have agreed that the matrimonial home located at 1680 Oxford Street has a gross value of $690,000 and a value net of disposition costs and encumbrances of $187,515. The calculation of that net value is set out in the equalization chart attached to this decision. There is further agreement that this property will be transferred to the wife for her use absolutely on condition that she assumes the existing

encumbrances and does whatever is necessary to obtain a release of the husband's covenants with respect to the mortgage and the secured line of credit. If she cannot obtain a release, he asks that the matrimonial home be sold to achieve that end, with the net proceeds going to the wife.

13. It is the wife's intention to maintain ownership of the Matrimonial Home indefinitely and therefore the release of covenants would only be achieved by a refinancing or a successful negotiation with the lending institution. I have concluded that it is a reasonable position for the husband to expect such a release and that accordingly a time limit should be placed on that event happening. I direct that the wife shall have 45 days from the date of release of this decision within which to obtain confirmation by letter from the lending institution that either the refinancing is approved or that an agreement by the institution to provide a release has been achieved. In the event that the release is to be obtained by way of a refinancing, such refinancing shall be in place not later than 20 days from the date of the financing approval. In the event that arrangements to obtain the release have not been made within the above noted 45 day time frame or that the refinancing has not occurred within those 20 days, the parties shall immediately list the property for sale through a Multiple Listing agency and the wife shall make continued diligent efforts to sell the property. (There was agreement between the parties that the failure to obtain the release would result in the property being sold. The only disagreement related to the time frame for doing so). Notwithstanding the eventual issuance of a Corollary Relief Judgement, I hereby reserve the Court's jurisdiction to hear an application by either party for a further order dealing with the interpretation or administration of any issue arising out of the implementation of this paragraph. The

Corollary Relief Judgement shall make provision for this reservation.

14. In arriving at the above noted net value of the Matrimonial Home, I have accepted the values for the mortgage and secured Line of Credit as presented by counsel for the husband. At the time that the parties separated, the mortgage had a significantly higher balance and was being retired over a very short amortization period thereby requiring a very large monthly payment. The husband testified that he had, at a very early stage in the separation, requested that the wife consent to a re-amortization of the mortgage in order to reduce the payment until trial. She declined.

15. The secured Line of Credit had a feature which allowed the limit to be increased by the monthly amounts of principal repayment on the primary mortgage. As the husband made the monthly payment on the mortgage, he would borrow on the Line of Credit the same amount by which the principal on the mortgage was thereby paid down. In the result, the total debt between the two instruments remained the same throughout the course of the separation.

16. Counsel for the wife argues that because of this history and other reasons, part of the Line of Credit should not be considered as shareable. After reflecting on the total financial picture in the marriage and the lifestyle that had been established both before and after the separation, I have concluded that the above method of paying the mortgage as an alternative to extending the amortization as suggested by the husband was a reasonable thing to do for the benefit of the separated family and that accordingly the entire secured line of credit is a matrimonial debt and is therefore shareable.

17. The disposition costs presented by the husband and shown on the attached equalization chart are accepted because they represent highly probable and likely unavoidable costs of

realization of the equity in the property being assumed by the wife in the eventual sale of the property in the future.

18. **Cottage:** During the marriage, the parties acquired a cottage located at 27 Apple Lane in Pictou County. The parties have agreed that the property has a value of $267,000. There is further agreement with respect to the balance of the mortgage and the costs of disposition such that the property has a value net of those items of $113,964. The details of this calculation are set out in the equalization chart attached to this decision. The parties have agreed that the title to this property will be transferred to the husband and that he shall be responsible for the mortgage charged against the cottage. Accordingly, the net value of this asset is assigned to the husband in the equalization chart. The assigned disposition costs are appropriate for the same reason given above regarding the matrimonial home. I do not recall whether the wife is a party to the covenants of the mortgage on the cottage, but if she is I would direct that the husband will make diligent effort to have her released and I would reserve jurisdiction to deal with the matter if that cannot be achieved within a reasonable time.

19. **Household contents:** The parties have agreed to a physical division of the contents of the Matrimonial Home. The husband testified that they had also agreed with respect to the division of contents of the cottage. The wife seeks a further division of items at the cottage. In the absence of detailed lists of items valued by a professional appraiser, the court is not well-equipped to equalize the division of these kinds of items. While the husband takes the view that the current physical division of household contents is unequal in favour of the wife, he concedes that it may be treated as being equal to avoid the costs of attempting to prove otherwise. It is impossible for the court to determine

whether this equality has been achieved. I am left with the impression, based on viewing certain photographs and lists, that he may be right. In any event, I do not have sufficient evidence to reach any conclusion let alone the conclusion that I should assign additional items from the cottage to the wife. Therefore, there will be no further division of contents of either property and no further accounting in money by one spouse to the other with respect to these items.

20. **Rental Property:** When the children of each of the parties were approaching the age when they would be attending university, it appeared that there would be interest among several of them to attend St. Francis Xavier University in Antigonish. The husband therefore decided to purchase a rental property at Antigonish so that whichever of the parties' respective children should attend university there would have a residence along with rental income from other students to help defray the cost. At least one of each of the parties' children have taken that advantage.

21. The husband takes the view that he purchased this property as an investment and that it meets the definition of "business assets" in section (2) (a) of the Matrimonial Property Act, S.N.S.,1980,c.9 (hereinafter the "MPA") which states that that phrase means "real or personal property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose...". The use of the word "primarily" implies that when there are uses that both fit the above purposes but also fit other purposes, the asset will only be a "business" asset if one of the above functions is the primary purpose. I have concluded that the primary purpose was to assist the family by providing affordable accommodation for as many of the children of either of the parties who may attend university there. This is a family purpose. I do not doubt that an

additional purpose would be to provide an investment but I cannot conclude that investing was the primary purpose. Investment and an eventual return on it was part of the justification for assisting the children in this way. Most rental properties would be purchased primarily for investment or income production and would therefore be "business" assets but that is not the case here. I have therefore included this property in the equalization chart. It has a value net of selling costs and financing costs of $41,152 which is a value agreed to by both parties. There is agreement that it will be owned by the husband and accordingly the above value will be assigned to him. If the wife is on the covenants of the mortgage and the secured line of credit, the husband shall have those covenants released within a reasonable time and if he does not, I reserve jurisdiction to hear an application by the wife to deal with that failure and the Corollary Relief Judgement shall reflect that reservation.

22. **Motor Vehicles:** There are four motor vehicles involved. There is agreement as to value of three of the vehicles (including the debt in the case of one vehicle) and possession of all four, the details of which are found in the equalization chart. The fourth vehicle is a 1990 Mazda truck. The husband's evidence is that it does not operate and accordingly has no value. He testified that the wife can have the vehicle without accounting to him. This, I think, was designed to show his resolve that it has no value. I have concluded that it has no value and therefore it will not be included in the chart. There is agreement that the 2006 Audi is leased and that the lease has no value. Only the Volvo and the Ford are included in equalization chart.

23. **Life Insurance:** It has been agreed that each of the parties will be assigned their respective life insurance policies. The agreed cash surrender values therein have been

accordingly assigned to the parties in the equalization chart.

24. **Bank Accounts:** There are five bank accounts involved. There is agreement that one RBC checking account and the RBC checking account regarding the Antigonish property each have no positive balance. The equalization chart reflects the parties agreement as to the balance of the other RBC checking account and RBC savings account and that these have been assigned to the wife.

25. The fifth account is in the name of the husband and is referred to by the wife as the "The Husband's account". In the spreadsheet presented by the husband, it is referred to as the "private bank account". Its balance on October 18, 2007 was $12,827.49, that being the date when the parties agree that they became separated. Its value on December 15, 2007 which is when the husband moved out of the Matrimonial Home and established a separate residence was $1000. After careful consideration of the evidence, I am satisfied that the parties had not sufficiently separated their finances on October 18, 2007 for me to conclude that the valuation date for this asset is that date. Many of their expenses were commingled for the period when they were separated but living at the same residence. As a result, I am satisfied that for this particular asset, December 15, 2007 is the appropriate valuation date and accordingly it will be included in the equalization chart at $1000.

26. **GIC:** The wife owns a guaranteed investment certificate which has an agreed value of $108,885. It represents the proceeds of the much later sale of the home she owned at the time the parties began cohabitation along with the sum of $30,000 received in a tort settlement together with growth on that money. The parties agree that the tort settlement is not a matrimonial asset and as such the value to be shared is $78,885. To her credit, the wife did not put the court to the task of assessing whether or not these net monies should

be the subject of an unequal division to reflect the history of its acquisition under Sections 13(d) and (e) of the MPA. To some extent, she was motivated by a recognition that the husband had assisted in various ways with the property for the years that it was rented after the parties began to cohabit.

27. He paid the mortgage when the property was vacant and he covered shortages and repairs. Similarly, the husband should be applauded for declining to claim unequal division for pre- marital contributions to the matrimonial asset net worth, including the investment of a portion of his condo proceeds in the Matrimonial home.

28. This GIC will appear on the equalization chart at $78,885 and will be assigned to the wife.

29. **Cee Gee Financial - shares:** The parties have agreed that this asset has no net value because it is fully encumbered by debt in an amount of $292,500. Accordingly, it is shown at no value on the equalization chart.

30. **Clarkson Properties Ltd.:** The parties have agreed that each will continue to hold their shares in this company respectively and that the value is $132,500 each.

31. **RRSP Accounts:** The parties have agreed that their personal RRSP accounts would be maintained and have a value net of tax of $52,310 in the case of the husband and $27,767 in the case of the wife. There are additional RRSP accounts associated with the husband's retirement plans through his firm and these will be discussed below.

32. **Registered Educational Savings Plan:** The parties agree that the RESP has a value of $58,337. The wife has three children from previous marriages. The oldest did not attend university but has taken some post secondary training. The husband has two children from a previous marriage both of whom have attended university, not yet completed.

Throughout the course of the separation there was disagreement on how these funds could be used and eventually the financial institution was directed not to cash funds from this account without the signature of both spouses.

33. There is some disagreement on the facts. There is general agreement that the wife contributed approximately $11,000 to the fund from monies inherited by the oldest daughter. The rest of the contributions were made by the husband from income. He suggests that some money was taken out of the fund and given to the oldest daughter thereby constituting a partial return of her inheritance. The wife suggests that the balance in the account should be divided by applying three fifths to her and two fifths to husband to represent a prorating according to the number of children of each spouse. The husband gave his reasons in testimony as to why the money should be divided equally. While there is some logic to prorating the money according to the number of children of each spouse, there is no way to be sure about the proportion that each spouse would need because it is not certain as to how much further education each child will take in the future.

34. In addition, I should not ignore the fact that the husband has continued to provide accommodation at his expense for the wife’s son in Antigonish. For those reasons and in the interest of simplicity, I have decided to divide the RESP account equally between the parties. On the assumption that this account can be divided as to ownership at the financial institution involved, I will exclude this sum from the equalization chart and direct in the Corollary Relief Judgement that the parties shall execute whatever documentation is required to accommodate an equal division between them of this asset. In the event that physical division of the asset at the financial institution is not possible, I

direct that each party shall sign for withdrawals from the plan by the other spouse until 50% of the plan has been withdrawn by each of them.

35. **Husband's Retirement Plan:** The husband potentially has a contractual entitlement through his firm to a future income stream that is designed to provide him with retirement income. It is not a registered pension plan and as such is not subject to the regulations that govern such plans. There is no provision by which this plan can be divided between the spouses at the firm. An actuary, Jesse Gmeiner, provided an actuarial report expressing opinions with respect to its value. She testified that it was one of the most complicated valuations in which she has been involved in her career, which has been extensive.

36. There are various features of this plan that are relevant to the question of valuation. It is critical that it be valued so that it can be assigned to the husband and set off against other matrimonial assets because of the fact that it cannot be divided "at source" as can be done with pensions. There is agreement that it is a matrimonial asset. The issue is valuation.

37. One feature that makes this a relatively unique legal issue is that the plan is not vested until the husband reaches the age of 50 years. I want to clarify that my use of the term "vested" in this decision is a reference to the event that first entitles the husband to receive an income from the plan; that is, that he must stay with the firm until age 50.

38. The husband is currently 47 years of age. It follows that at both the date of separation and the date of trial, the plan had not yet vested. If the husband should leave the firm before the age of 50 years, he would be entitled to a lump sum of $31,865 less an actuarial cost of $853 for a net value of $31,012. This suggested value was calculated by an actuarial firm employed by the husband's accounting firm. Ms. Gmeiner, the actuary called by the

wife, agrees that that number properly represents his entitlement if the husband had left his partnership on the separation date. (Ms. Gmeiner refers to this valuation approach as the “literal termination approach” meaning that the assumption is to value his entitlement as if he actually was terminated on separation day.) She however provides a capitalized value of the future income stream on the assumption that he stays with the firm and retires at the mandatory retirement age of 58 years. She provided three amounts that arise from the adoption of various assumptions referred to below.

39. This vesting issue is something that rarely arises in the court in respect of registered pension plans because the pension legislation was amended a number of years ago to require that the period for the vesting of a pension cannot exceed two years. Accordingly, for most couples who come before the court for divorce, the pension has usually been in place for the required two years prior to the date of the separation or divorce. Further, registered pensions can be divided “at source” and therefore they are not usually set off against other matrimonial assets and for that reason do not need to be valued.

40. Another unusual feature of this plan is that it is not fully funded and that the portion for which there are sufficient funds has a unique quality. By the terms of the plan, the husband is required to make a contribution to two investments each year. The first is an RRSP purchased at the maximum Canada Revenue Agency allowed amount and the second is a non-registered investment account. Both accounts are owned by the husband or the wife but are committed to the firm for purposes of paying the annuity. The amount of the annual retirement annuity is determined by the Executive Committee of the firm and is subject to change by that committee. The evidence is that the annual annuity to which the husband would be entitled if he remains in the firm until mandatory retirement

at age 58 (which amount I hereafter and above refer to as an “annuity”, for lack of a better term), is $188,526 per year payable for life.

41. When the annuity becomes payable, the Executive Committee has access to the above-mentioned RRSP and non-registered investment accounts to fund whatever portion of the annuity that money will buy. Those funds are currently insufficient and expected always to be insufficient to support the full amount of the annuity. The shortfall is to be paid out of the firm’s net income each year. There is a “cap” of 10% of the firm’s annual profit that can be paid in any year to all of the retired partners. It is important therefore to note that it is only the shortfall that needs to be capitalized/valued because the RRSP and the non-registered account which fund a portion of the annuity is owned by the husband or the wife and will be divided equally with the wife by including it in the equalization chart and assigned to each of them.

42. Ms.Gmeiner’s approach to valuation was to assume that the husband will retire at the mandatory age of 58 and to further assume that the wife is entitled to a division of the value of that is yet to be vested annuity. She presented two values to reflect two different mortality tables. She explained that there are mortality tables that had been created many years ago that are to be followed by the members of the Association to which actuaries belong. She indicated that there is considerable opinion in the profession that those tables are out of date, and that a new set of mortality tables have been prepared to reflect modern mortality data but have not yet been adopted. She believes that the new tables create better values.

43. Using the old table and an interest rate of 5% increasing to 6%, the annuity would have a gross value before tax of $1,278,026. Using the yet-to- be- adopted table, the

corresponding value would be $1,345,359. From each of these amounts, she subtracts the value of the registered and non-registered accounts above noted which have an agreed value of $408,351. This reduction is necessary because those accounts are being assigned to the husband and the wife respectively on the equalization chart. (The reason why a portion of the RRSP account is being assigned to the wife is that the husband purchased a portion of the mandatory RRSP in the wife's name as a spousal RRSP and it is that amount which is assigned to her on the equalization chart). To fail to subtract these from the capitalized amount would cause these assets to be counted twice. With that adjustment and a 33% discount for the income tax (which rate was agreed by counsel) on these funds, the above values are $582,682 and $627,795 respectively.

44. The third value presented by Ms. Gmeiner used an interest rate much higher than normal to reflect the interest rate assumption made by the firm's actuary. It was done by Ms. Gmeiner to show how dramatically lower the value would be when a high interest rate is used and it was not her opinion that I should make use otherwise of that calculation.

45. It is suggested that one reason why I should not value the annuity by capitalizing the future annuity is that there are many uncertainties about whether it will ever become payable (the husband testified that the partners refer to it as the "hope plan" reflecting their recognition that they may never see the money) and at an uncertain amount because of at least the following possibilities:

i. a) that the husband may leave the firm before he reaches the age of 50 years;

b) that the executive committee may terminate or amend the plan;

c) that the firm wide 10% cap may reduce the amount;

d) that the firm could be destroyed by insolvency;

e) that the firm, although solvent, may become unable or unwilling to pay.

46. Relevant to the first of those uncertainties, is the husband's evidence that a senior partner in the firm was recently recruited to join another accounting firm and that that person has approached the husband in an attempt to persuade him to join him by changing firms.

47. Ms. Gmeiner conceded in her testimony that these uncertainties deserve attention in the valuation process. She suggested that her values could be reduced by a contingency discount to account for these uncertainties. She did not suggest a particular amount for the discount.

48. The capitalization approach used by Ms. Gmeiner answers the following question: What amount of money would have to be invested at separation date which, after earning the presumed interest rates, would produce a larger figure at retirement time sufficient to purchase an annuity equal to the future income stream that the husband will be entitled to receive. Ms. Gmeiner's report indicates that she used the "termination method" rather than the "retirement method". As I understand it, this means that she defined the future income stream as being that amount of annual income to which the husband would be entitled as if he terminated his employment on the separation day. The use of this method means that the wife is not participating in the future increases in that annuity that will come from those extra years of service between the date of separation and the date of retirement and from potential increases in earned income for his best years. I agree that the termination method is to be preferred over the retirement method because the latter would have the non-member spouse sharing in post-separation advances in the annuity because of the formula by which it is calculated which is based on years of service and

best years of income.

49. However, I have a concern about capitalizing the future annuity which has to do with whether or not there is an entitlement to seek its division on a capitalized basis on the facts of this particular case. During the period of the marriage and cohabitation, the husband had not earned the right to a future annuity from this plan. His only right was to receive a lump sum which was calculated as of separation date to be $31,012. Even now, he has no entitlement to a future annuity.

50. I have not been referred to any case law that deals with an annuity that has the features referred to above. The closest analogy that I can envision is a non-contributory registered pension plan which is not vested at the time of separation or trial. Such was the subject of the case of Nix v. Nix, (1987).11R.F.L.(3rd) 9 (Ont. S.C.). It was a defined benefits pension plan and as such was similar to the subject annuity given that it, too, is a function of a formula based on years of service and best income, as opposed to contributions. The employee had made no contributions to the plan. It had not vested as of the valuation date. The employee was entitled to no benefit whatsoever until vesting would have occurred. The court acknowledged the employee's interest in the pension plan as a contingent interest and therefore property but concluded that it had no value. The court stated that if the employee had contributed to the plan, the court would have valued the plan as the total of his contributions plus interest at the valuation date. In the subject case, even though there were no contributions to the top-up portion of the retirement plan, there is an entitlement to the lump sum mentioned above. Therefore, by extension, the above reasoning would cause me to value the annuity at that lump sum value.

51. An opposite result was given in the case of Ward v. Ward, (1988),13R.F.L.(3rd)259 (Ont.

H.C.J) However, in that case, the vesting was scheduled to occur approximately 7 months subsequent to the trial and there were no foreseeable contingencies that would interfere with its receipt. The value was assigned to be $4840 but it is not clear how that was calculated.

52. In the case of Lauzon v. Lauzon, (1992),42 R.F.L.(3rd) 438 (Ont SC), the husband had entitlement pursuant to a non-contributory pension plan which had not vested. If he had terminated his employment on the valuation date, he would have been entitled to a rollover of $2923 to his RRSP. That was the value used by the court on the theory that the "literal" termination of employment model should be followed.

53. The New Brunswick Court of Appeal in Aubie v. Aubie (1988), 91 N.B.R. (2d) 5, concluded that a non-vested, non-contributory pension plan was most likely not "property" and that if it was property it had no value to the employee until it had vested. That rationale, if followed, would lead to the use of the above noted lump sum of $31,012.

54. It is unfortunate that I must cite cases that are not recent. However, I suspect that the reason for their being a shortage of recent discussion in the cases of this topic is that it is extremely rare that a non-vested pension is the subject of a matrimonial property division case, nowadays. This is so because, by statute, the vesting period has been changed such that it cannot be longer than two years. It is further the case because most pensions are dealt with through credit splitting legislation and as a result valuation is irrelevant at trial in most cases.

55. Although the subject annuity has many features that are different from a pension plan, I have concluded that non-vested registered pension plans represent an analogy that is

virtually on “all fours”. In both cases, the member has no entitlement to an income stream on the relevant date and must survive a number of contingencies in order to become so entitled. It follows that it would be unfair and illogical to award an entitlement that is based on the capitalized value of a future annuity that was never available to the member prior to separation.

56. Section 4 (1)(g) of the MPA excludes from the definition of “matrimonial assets” real and personal property acquired after separation. It is a relatively easy task to apply that exclusion to a hard asset such as an after acquired vehicle. This asset is more elusive. However , it may be that the above subsection has some application here in the sense that what had been acquired prior to separation was a contractual right to the above noted lump sum. What had not yet been acquired but will be acquired after separation and divorce if the husband stays with the firm until his age 50, is a contractual entitlement to a future annuity. While both rights are embodied in the same contract, they are very different rights. It is my view that the right to the future annuity, if it is eventually acquired, is an asset that is acquired after separation and as such is excluded from the definition in the MPA of matrimonial assets and therefore is not subject to prima face division. It follows that the capitalization of that annuity does not represent a matrimonial asset. I will include the sum of $31,012 in the equalization chart.

57. If I had decided to use a capitalized value of the future annuity, I would have accepted Ms. Gmeiner’s opinion that the updated mortality tables present a more accurate determination of value. Her value, using that assumption is just under $628,000 after tax. In the spreadsheet presented by counsel for the wife in summation, that figure was assigned to the husband. Being a large number, it contributed greatly to the size of the

argued equalization payment from the husband to the wife of about $411,000. With respect, that presentation would not have been acceptable even if capitalization had been accepted for two reasons. First, it recognizes the value of the pension for the entire years of service and would need to be discounted to represent the portion earned during the period of cohabitation. In her report, Ms. Gmeiner measured the cohabitation period (including the common-law years) at 10.75 years. The husband had been in the plan for 23.17 years and therefore the cohabitation years reflect about 46% of the earned years. It follows that the capitalized value that should be subject to division is just under $289,000 being 46% of $628,000 (if capitalization had been acceptable).

58. In suggesting this approach, I am cognizant of the fact that the portion of the retirement plan that relates to premarital years of service is a matrimonial asset because Section 4 of the MPA requires that all assets acquired before or during the marriage are matrimonial. However, it would be appropriate to exclude the premarital years relying on Section 13(d) & (e) of the MPA which deal with the length of the marriage and the date and manner of acquisition. The history of that acquisition is that the wife had no part in accumulating those years of service or assisting the husband for those years and further that it was a relatively short marriage.

59. If premarital portions of pensions were to be divided with a first wife and then divided again with a second or third wife, the husband's ultimate remaining share would be substantially less than 50% if he shares a pension with more than one spouse for a number of the years of service. I make that comment as a general statement and not to suggest that that has happened to the husband in this case since I have no evidence of his settlement with his first wife. Also, there appears to be a practice both in the legal

profession and in the courts to divide the pension based on the cohabitation years' portion.

60. When dealing with the pre-marital value added to a registered pension plan, the court has struggled with the question of whether, because it is a matrimonial asset, the pre-marital portion should be divided or excluded. The conflict arises because if the plan is the subject of pension splitting legislation, those statutes require only the pension benefit earned during the marriage to be divided. As such, the pre-marital value is excluded by statute. The MPA, by contrast, includes the pre-marital portion by definition but may exclude it under Section 13(d) and (e) of the MPA.

61. It is my view that this conflict can be resolved based on statutory interpretation principles as well as by reference to section 13 (d) & (e) of the MPA. The pension splitting legislation is specific to the subject of pensions and the relevant section in it is specific to the subject of dividing pensions between spouses on marriage breakdown. By contrast, the MPA is general in that it deals with all property. Indeed, it does not even mention pensions. After 1981 when that statute was enacted, the caselaw held that pensions were not matrimonial assets. It was not until some ten years later that the Supreme Court of Canada reversed that thinking in Clark v. Clark cited below.

62. As a matter of statutory interpretation, when there are two provincial statutes that cover the same legal issue, the court should determine which statute applies. One principle is that the statute which is specific to the subject should prevail over the statute that is general. A second principle is that a recently passed statute should prevail over an earlier enactment on the theory that the legislature passed the recent statute knowing of the existence of the earlier one. Both of these principles would lead to the conclusion that

pension splitting should be done in accordance with the pension splitting legislation and not the MPA. That would suggest that the pre-marital value should be excluded.

63. While this retirement plan is not covered by any pension splitting legislation, the same logic that caused the legislature to divide only that portion of the pension that was earned during the marriage should apply to this retirement plan.

64. In summary, because of section 13 (d) & (e) of the MPA or because of the above noted analysis regarding statutory interpretation, I would have reduced the capitalized value to 46% if I was following a capitalization approach.

65. I should note in passing that the assigned value of $30,012 represents the lump sum achieved through the entire period of service. The analysis given above might have led me to reduce the lump sum to 46%. To his credit, the husband did not ask that to be done and included in his presented spreadsheet the full amount of the lump sum which I therefore adopted.

66. The second adjustment that would need to be made to the capitalized figure if I had accepted capitalization is a contingency discount to reflect the risks that the husband may never become entitled to any annuity or become entitled to a reduced annuity because of the various uncertainties, some of which were listed above. Had I been required to assign such a contingency discount, I would have done so with great difficulty because it would be such an arbitrary process.

67. At the one extreme, there is the possibility of the husband leaving the firm before age 50 and therefore become entitled to nothing except the lump sum. If I were to consider that to be a serious possibility, the contingency discount would be 100% such that the ultimate value would be nil (except for the lump sum entitlement of $30,012). There is

no way to measure the probability of that happening but it would be grossly unfair to the husband if I had accepted a capitalization without a 100% contingency discount if it should develop that he leaves the firm before age 50. Some of the other uncertainties are less likely. For example, the demise of the firm is not very likely but given the current economy and the demise of major accounting firms in other parts of the world, it is a serious concern.

68. Given that I have rejected the capitalization approach, it will not be necessary for me to assign a particular dollar amount to the contingency discount. Ms. Gmeiner agreed that a discount, however, might be appropriate. If I had been required to reduce the above figure of $289,000, it should come as no surprise that the discount would bring the capitalized value to a number not vastly different from the value of $30,012 that I have assigned using the separation date entitlement number.

69. In reaching the conclusion to reject capitalization value, I have not ignored the cases presented in the petitioner's brief which discuss the choices for valuing pensions as between the termination method and the retirement method. It is important to distinguish that these two methods are both capitalization approaches and as between them I would generally prefer the termination method. These are to be distinguished from the so called "literal termination method". The former uses the income stream entitlement that had been earned as if he terminated employment on the separation date and capitalizes that income stream so that the spouse does not share in future growth of that income stream from additional years service and raises in pay. The retirement method values his probable actual retirement income stream and capitalizes that larger figure and pro-rates it according to the years of cohabitation versus years of services. The literal termination

method which I am following measures his actual entitlement as if he had in fact left his employment on the separation date which in many cases is nil in a non-vested non-contributory pension but in this case is $30,012.

70. The cases in the petitioner's brief deal with vested pensions. It is the non-vested feature of this annuity that motivates me to value the pension using the "literal" termination method. I have also not ignored the practical reality that the inclusion of the pension of $627,795 as requested by the petitioner would result in an equalization payment, according to her summation through counsel, of $411,000. Even after correcting this for the married years' portion, the capitalized value of $289,000 is a large number. Given that the annuity cannot be divided at source, this calculation begs the question as to how the husband would raise the money. That dilemma reminds me of the practice of family law prior to the passage of pension splitting legislation when the courts tended to use contribution value because the capitalized value of the income stream often produced such a large number that the member had insufficient other matrimonial assets to meet it.

71. There is agreement with respect to the value, after-tax, of both the registered and non-registered funds that support this retirement plan. The Standard Life and non-registered funds are valued at $99,419. The Standard Life RRSP in the husband's name is worth $92,875 and the Standard Life plan in the wife's name is $34,418. These sums will be assigned to the parties respectively in the equalization chart.

72. **Partners Non- Registered Mutual Fund:** There is agreement that this fund is a matrimonial asset owned by the husband valued at $40,977. It is assigned in equalization chart to him.

73. **CMP-RBC Flow Through Shares:** The husband is the owner of certain flow through

shares (so-called) which are agreed to have an after-tax value of $150,948. However, this investment was purchased with borrowed money currently outstanding in the amount of $315,500. Therefore, this asset has a net negative value of $164,552. The husband contends that it is a matrimonial asset with negative value and the wife claims that it is not.

74. I am familiar with a number of cases in this court which have held that stocks and various other forms of financial investment portfolios are matrimonial assets. Those cases might support the notion that these flow through shares are matrimonial assets.

75. The Supreme Court of Canada in Clarke v. Clarke [1990] 2 S.C.R.795 analyzed the definition of business assets as that term is used in the MPA in the context of whether or not pensions are business assets. In concluding that pensions are not business assets, Justice Wilson stated at paragraph 42 that “it seems to me that business assets are assets which have as their purpose the generation of income in an entrepreneurial sense”. This reference to an “entrepreneurial sense” has been relied upon in a number of cases in this province.

76. After hearing the evidence of the parties, I was left with the distinct impression that the husband was very much an entrepreneur in terms of the family’s financial life. The Canadian Oxford Dictionary defines “entrepreneur “ as “a person who starts or organizes a commercial enterprise especially one involving financial risk”. In my view the term implies business decision-making and risk-taking. Here the investment was purchased entirely with borrowed money; it obviously involves risk since its value is substantially less than the balance of the Lines of Credit from which the purchase money came; it is a rather complicated form of investment; and, it required careful decision-making which

would need to employ sharp investment skills to determine, for example, how and when to convert the flow through shares to mutual funds. I am satisfied that there was significant entrepreneurial effort coming from the husband in regard to this asset. I therefore classify this asset as a business asset and I will exclude it from division.

77. **Miscellaneous debt:** There is agreement that the appraisal costs totalling $1,240 is a matrimonial debt. Since the Antigonish property has been determined to be a matrimonial asset the overdraft in the bank account for that property is also a matrimonial debt in the amount of $1,440. These amounts are assigned to the husband on equalization chart.

78. **RBC joint Line of Credit:** There is a line of credit which is tied to the parties joint bank account. Whenever the deposit account went into overdraft, the bank would transfer funds from the line of credit to cover. It was used for various family purposes including home renovations, significant dental work, cosmetic surgery and other family purposes. As indicated above, the family finances remained co-mingled to a significant extent after the separation date until the physical separation date in December 15, 2007. I am satisfied that it has a value of $50,000 appropriately assigned as matrimonial debt to the husband. I will not ask the wife to pay back the $2,000 that she charged to this account post-separation.

79. **Canada Revenue Agency:** The husband participated in a registered charitable organization called “Ideas Canada” for purposes of taking part in a tax saving scheme. The tax savings achieved by this arrangement amounted to significant sums. I am satisfied that the tax savings were spent for the benefit of the family. Subsequently, Canada Revenue Agency (CRA) reassessed the husband for deductions claimed under this scheme and as a result he owes $218,896 to CRA. The husband has filed a Notice of

Objection. A test case in the name of a fellow investor is before the Federal Court awaiting decision. There is a possibility that this will result in a reversal of the reassessment either after trial or appeal. In addition, the promoter of this tax scheme had received to the benefit of the investors a legal opinion from a Toronto law firm as to its tax deductibility. Accordingly, if the objection to CRA is unsuccessful, there is a possibility of collecting the loss from the law firm which gave the opinion. In summary, there are two possibilities that would result in this debt being extinguished.

80. The husband asks that I treat this as a matrimonial debt on the equalization chart (thereby making the wife responsible for 50% of it) with the proviso that in the event that the husband escapes repayment of it, he will then reimburse the wife for 50%. While I accept the fact that the debt is a matrimonial debt, I cannot conclude at this point in time that it will ever be payable. To accept the husband's suggestion is to force the wife to be his banker with respect to half of this problem until such time as it is resolved. There may be a fast resolution or it may take many years if, for example a lawsuit against the law firm becomes his only remedy. It does not seem fair to me to ask the wife to play that role. Instead, I will ignore this debt in the equalization chart and provide in the Corollary Relief Judgement that in the event that the debt is required to be paid after all remedies have been exhausted, the wife shall reimburse the husband for 50% of the amount due. To secure her obligation, I will direct that she sign a pledge agreement in which she pledges her shares in Clarkson Properties Ltd. in favour of the husband. In the event that the wife's obligation to repay the husband materializes, she may meet that obligation by transferring to the husband whatever number of shares in the above company it would take to equal that obligation based on the then value of those shares. I hereby reserve my

jurisdiction to deal with any problems that relate to the implementation of the rights or duties that arise out of this paragraph and I direct that such reservation of jurisdiction be included in the Corollary Relief Judgement.

81. **Aeroplan Points:** I accept the husband's evidence that the Aeroplan points were largely acquired through business trips and that they will be used or have already been used for the business purposes that he described by way of sponsorships.

82. **Summary:** Attached as Schedule "A" to this decision is the equalization chart referred to throughout these remarks. Based on that chart, I conclude that the respondent owes the petitioner $60,011.50 which shall be payable forthwith.

i. **PARENTAL STATUS** :

83. As was mentioned previously, the wife had custody of her three children during the time that the parties cohabited together. There is agreement that her two children from her first marriage did not meet the definition of "child of the marriage" in the Divorce Act, supra largely because of their degree of financial independence. However, the wife takes the view that the husband stands in the place of a parent with respect to her daughter, a child of her second marriage.

84. Subsection 2 (2) of the Divorce Act, supra elaborates on the definition of "child of the marriage" as being

a. "... a child of two spouses or former spouses includes;

b. (a) any child for whom they both stand in the place of parents; and

c. (b) any child of whom one is the parent and for whom the other stands in the place of a parent."

85. The subject daughter is 16 years of age and has not withdrawn from the charge of her

mother. The only question is whether the husband can be said to stand in the place of a parent. Both parties have cited the Supreme Court of Canada decision in Chartier v. Chartier [1999]1 S.C.R. 242 and my decision in Cook v. Cook [2000] N.S.R. 19. Those cases confirm that there are a number of factors to be taken into account and that every case has to be decided on its own facts.

86. There is disagreement with respect to a number of facts. There is some common ground regarding other facts.

87. Among the factors listed by counsel for the wife in asserting the claim are the following:

a. 1) the parties began the relationship when the daughter was only six months old and cohabitation commenced when she was 3 years old and therefore the husband has been in her life for most of it;

b. 2) she lived with the couple in the matrimonial home until the date of separation and thereafter with her mother;

c. 3) the father is said to have disciplined the child and provided her with spending money;

d. 4) he helped the child with schoolwork and computer problems;

e. 5) the couple along with her three children and his two children went on summer vacations together and had family memberships at a recreational club;

f. 6) he is said to have picked up the child from daycare and driven her to school;

g. 7) it is said that he included her along with the other children in special events with his extended family;

h. 8) the husband paid for most household and day-to-day expenses;

i. 9) the parties set up are a registered educational savings plan for the benefit of all

five children;

j. 10) he prepared a will which included all five children equally;

k. 11) the child never lived with the biological father;

l. 12) after the wife left the workplace in 2000, the child became largely dependent upon the husband financially except for child support from the biological father and certain modest income from time to time of the wife.

88. The husband advances the following factors to support his position that the child does not meet the definition given above:

a. 1) at no time during the period of cohabitation did the child use any surname other than that of the biological father and did not refer to the husband as “Dad “ or similar salutation;

b. 2) legal adoption of the child was never contemplated;

c. 3) the husband denies taking part in disciplining the child except to the extent of giving minor direction such as to pick up clothing etc.;

d. 4) he insists that his role was that of husband and not of father to her three children;

e. 5) the child’s biological father had a regular and frequent involvement in the child’s life both by way of access every second weekend and at other times and when discipline or other crisis required parental intervention;

f. 6) the biological father pays table amount of child support;

g. 7) the child shares major holidays with the biological father’s family and she is involved with his relatives;

h. 8) he states that the child has never used words of endearment toward him such

as “I love you”;

i. 9) he states that when the child would return to the matrimonial home from a weekend with the biological father, she would scream when she saw the husband and would run and hide in the early years;

j. 10) he testified that the child was extremely rude and belligerent toward him over most of the period of cohabitation;

k. 11) he denies any significant involvement in transporting the child or with respect to extracurricular activities or schoolwork;

l. 12) he recalls attending only one Christmas concert for the child;

m. 13) he recalls two major events one involving an allegation that the child had stalked a former friend and another case involving alleged shoplifting, both of which were dealt with by involving the biological father and not the husband;

n. 14) he insists that when the wife was out of town, the child would usually stay with a maternal relative rather than with him;

o. 15) there has been little post-separation contact between the child and the husband.

89. Counsel for the husband reminded me of my statement in Cook v. Cook, supra, to the following effect:

a. At paragraph 23 “... an affirmative finding attaches a financial obligation for support paid by the step-parent-an obligation that can represent significant quantities of money over many years and one which is ordinarily associated with having brought a child into the world or having legally adopted him or her. Financial responsibility to support other persons arises generally out of the

formation of a dependency relationship. It follows in my view that parental status should not be assigned automatically or from the mere willingness of the step-parent to share with children and to assist with their financial, emotional and physical needs. There must be a relatively clear assumption of responsibility shown by or inferred from the step-parent's actions over a sufficient period of time for that relationship to constitute a commitment. On the other hand, a child who has been made to be dependent upon the step-parent by actions of the adults in the definition of their relationship with each other and with the child should not be deprived of that support in appropriate circumstances".

b. And at paragraph 26 "in marriages or relationships involving children of a previous relationship, the adults and children will necessarily show signs of family life together. There will be a division of labor between the adults and, inevitably the stepparent will perform certain aspects of the role previously performed by the natural parent. This should be encouraged. Remarriage or other forms of second families should be encouraged; it is good for children that their custodial parent finds happiness in a new relationship. There must be a balance between addressing the needs of children that arise out of legitimate dependency relationships with a step-parent and a requirement that the step-parent must behave in unnaturally cold or parsimonious way toward the children in order to avoid the inference being drawn. In finding parental status, a court must take care not to penalize a step-parent for having behaved kindly or offering emotional, physical and financial assistance to the natural parent who would otherwise be raising children alone or with some assistance from a non-custodial natural

parent".

90. Having considered all of the evidence, it is difficult for me to identify an area of family life in which the husband could be said to be standing in the place of the biological father. In fact, having heard testimony from the biological father along with other evidence, it is very clear that he played an extensive parental role during the period of this couple's cohabitation. I appreciate that for a parental status finding, it is not necessary for there to have been a complete substitution or replacement of the biological father's role. However, the continued significant and frequent involvement by the biological father is a factor. That, along with others, can lead to the rejection of the finding.

91. All the factors listed above being offered by both of the parties are relevant. The attitude of the child is important. While the parties may not agree on the severity and frequency of the child's negative behavior toward the husband, there does seem to be common ground that she was disrespectful and rude to him frequently. That factor, by analogy, reminds me of that line of case law in which biological parents are relieved from the obligation to pay support when the child, usually an adolescent, refuses to have any kind of relationship with that parent. If that can be so in the case of assessing a natural parent's obligation to pay, it must be so in the case of a step-parent.

92. After careful consideration of the various competing arguments based on all of the evidence before the court, I have concluded that the husband does not stand in the place of a parent with respect to the subject child. It follows, that the child does not meet the definition of "child of the marriage" and therefore there shall be no child support payable.

i. SPOUSAL SUPPORT

93. The parties agree that the wife is entitled to spousal support but disagree as to quantum and duration. In summation, counsel for the wife suggested $9500 per month representing $2000 for income tax which would leave $7,500 toward her expenses. She suggests that any amount ordered should be for an indefinite period of time. Counsel for the husband suggested in her brief that the award should be 5,000 per month for a period of five more years recognizing that he has been paying tax-free spousal support for the previous two years. Although my notes are unclear, my recollection is that, in summation, counsel suggested a total of five years including the two years of separation.

94. At the time of the commencement of the parties' relationship the wife was employed at the husband's firm in an administrative capacity earning a modest salary. She did not have significant net worth. She testified that she had always worked outside the home. In 2000, with the husband's agreement, she left the workforce and took charge of certain domestic and parenting responsibilities. By letter, her doctor confirmed that she was significantly stressed as a result of the separation and that she was not in a position to work outside the home until recently.

95. The wife expressed a desire not to return to the type of work that she had previously been doing and as a result she took training in transcription work hoping to work in medical transcription. She has recently obtained part-time employment was a legal transcription service. A manager from the transcription service indicated that there is no shortage of work and that if she worked a 40 hour week she could earn in excess of $30,000 per year. She is also pursuing a possible job available through the RCMP which for a 20 hour week would pay her just under $21,000.

96. The husband has a substantial income, the main source of which is his net professional income from his firm. Using round numbers, during the last three years that income ranged from $668,000 to $763,000. It was not always that high. From the year 2000 to 2003 inclusive it ranged from $285,000 to $410,000. In addition to his net professional income, he had other sources that included dividends, capital gains and other investment incomes. For example, for his most recent tax year, being 2008, his total income disclosed in line 150 of his tax return was $854,000. He did not express an expectation that there would be any reversal of this level of income.

97. Since the release by the Supreme Court of Canada of the case of Bracklow v. Bracklow, [1999] 1 S.C.R. 420, courts have relied heavily on the three rationales for awarding spousal support; namely, compensation for disadvantages suffered from the marriage or its breakdown, the results of an express or implied contract to be maintained (contractual); and non-compensatory grounds. It is important to note that these concepts are not expressed in the Divorce Act, supra, but rather are the expression of rationales coined by the Court to explain and justify the grounds for making such an award.

98. Section 15.2 of the Divorce Act , supra, is the statutory section that is the mandatory direction to the trial judge in designing the award. It states:

    a. In making an interim or final order for spousal support, “the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including” the length of the cohabitation, the functions performed by each spouse and any order or agreement or arrangement having been made.

99. From these words it is clear that the long-standing test of balancing the payor’s ability to pay against the recipients need is still the governing rule. It is clear from the size of the

husband's income as noted above, that he will have the ability to pay what the wife seeks since her request represents only 15% of his net professional income and an even smaller percentage of his total income for 2008. Instead, the case turns on an analysis of the wife's reasonable needs. I am satisfied, and Counsel have agreed, that she has a legal entitlement. I could rationalize that entitlement on either of the three models of compensatory, contractual, or non-compensatory support.

100. The wife will take ownership of the matrimonial home as part of the asset division and, provided she can secure the release of the husband's covenants regarding the mortgage and secured line of credit, it is her plan to continue to live there indefinitely. This is a 17 room house with just under 5000 square feet of living space. Her only dependent is her 16-year-old daughter. To assist a friend, she has taken in a young girl as a border. She has no legal obligation to maintain space for that person. It does provide her with rental income of $750 per month from which she admits there would be some degree of profit.

101. The wife's budget dated September 3, 2009 indicates that the cost for mortgage, municipal taxes, fire insurance, heat, electricity, water, house repairs and maintenance, and security system are total of $4550 per month or $54,600 per year. This cost cannot be justified as a reasonable budget for housing the wife and her one child even if she can reduce the cost by re-amortizing the mortgage. The husband cannot be expected to respond to a budget by way of spousal support when it represents such an unnecessary and unreasonable plan. It is not my role to dictate to her whether or not she must sell the house unless the sale is needed to obtain the release of the husband's covenants on the financing. I will therefore decline from imposing my view that she should sell the house, but I will approach the task of quantifying her reasonable need for spousal support as if a

more cost-efficient housing arrangement is obtained for herself and her daughter.

102. The wife's expense budget was a total of $12,370 and does not recognize any of her income to offset some of those expenses. She has interest income of roughly $3600 per year, child support from her second husband of $4632 per year which, being tax-free, is the grossed up equivalent of at least $6000. She has been receiving 400 per month, being $4800 per year from their company, Clarkson Properties Ltd. and there was no evidence before me to suggest that it will be discontinued. She does continue to be a 25% owner of the company. She currently has income from the border. While I was not told how much of the $9000 per year would be profit, it may be safe to assume that it would be at least $6000. Even if she sells the house, I would assume that she could acquire a replacement property with sufficient space to continue with the border. Her employment income is not known with certainty but based on the availability of work, it would be conservative to assume that she could earn $20,000 per year and possibly close to double that number. The total of these minimum numbers is just under $41,000 per year or approximately $3400 per month.

103. During the period of separation of approximately 2 years, the wife received $5000 net of tax (because the husband paid her tax after filing a retroactive agreement each year). In addition, the husband paid the mortgage of $2517. She therefore had $7517 per month after tax. During that time frame, she did not incur any new debt and did not liquidate any of her capital. That indicates that, despite her much higher budget of expenses, she was able to live within those means. Since then she has added employment income and income from border.

104. The wife seeks an award of $9500 per month which her counsel says would leave her

$7500 after tax to spend. That is roughly equivalent to her after-tax money during the separation. Yet she will now need less because her employment income and income from the border have added to her cash flow. Her interest income was not used. The income from their company did not encompass the entire period of separation. I would therefore conclude that even while she continues in the matrimonial home she may need $7500 but a portion of that can come from her listed income sources. Therefore her need is less than $7500 by the amount of her other income.

105. I appreciate that even if she accepts my suggestion that she should sell the matrimonial home, it will take time to do so. For that reason, I will award spousal support at 2 levels. Commencing on November 15, 2009 and continuing on the 15th day of each month thereafter for a period of eight months, the husband shall pay to the way for spousal support to sum of $7500. Commencing with July 15, 2010 and continuing on the 15th day of each and every month thereafter, the husband shall pay to the wife sum of $5000 for a period of 52 months whereupon the spousal support shall terminate absolutely. This, along with the $30,000 to $40,000 that she can potentially earn, is an annual income of $90,000 to $100,000 compared to her previous income in the middle $30,000 range.

106. I am not prepared to credit the husband for the two years during which he has paid while the parties were separated as part of a 60 month directive. I am satisfied that the wife was not in position, from a medical point of view, to begin any effort at pursuing self-sufficiency until recently. Her obligation to make that effort starts now that she has substantially recovered from her medical difficulty. The effect of this decision is that the wife will have received a total of seven years of support for an 8.5 year marriage plus 2 years of cohabitation as a common-law couple.

107. One of the main factors that would justify the termination of spousal support is the short duration of the marriage. By including the common-law years, this relationship lasted 10.5 years. While that is not an exceedingly short marriage it is relatively short and not of sufficient length to justify an indefinite award.

108. While there would have been obvious disadvantages arising from the marriage and its breakdown some of these have been temporary and others are in the process of being remedied. For example, there is no question that the wife's health was negatively affected but this was addressed by the tax free support payments made and referred to above. I have also taken that fact into account in deciding to order a five year term that commences now rather than at separation. Her absence from the workforce has been another disadvantage and she indicates that she cannot easily go back to administrative work because the absence has caused her skill levels to be out of date. I do not fully agree. From the date of her withdrawal from the workforce until the time of her medical recovery following the separation, she was not gainfully employed for between eight and nine years. She is currently 46 years of age. I would have thought that with the passage of time she could have worked herself back to a good paying administrative job and the five years of substantial support will assist her greatly in doing so. She has chosen a different career path. I am not sure that it is the best choice since it does not occur to me that transcription service is likely to lead to an upwardly mobile career path. However, that is her decision to make.

109. In years prior to this relationship, she had a lifestyle that was vastly more modest than that enjoyed in this marriage. It is a third marriage. She entered the marriage with insignificant net worth and will leave the marriage with a net worth approaching

$600,000. This is a substantial economic advantage arising from the marriage that offsets all of the disadvantages and it justifies the termination.

110. In the result, this is a case for a terminal award. Considering all of the factors, five years plus the two years of separation is a reasonable duration.

111. Counsel advised me that the informal arrangement by which the husband paid the wife $5000 plus the mortgage installment of $2517 was honored for September and was intended to be honored for October. Assuming that to have been done, I will direct that the parties shall sign an agreement to give retroactive income tax effect to those monies paid in those two months subject to reimbursement to the wife of her tax payable on the same terms as previous agreements. On a prospective basis, my above-noted award will necessarily, by virtue of the Income Tax Act, be taxable to the wife and deductible to the husband. If counsel would prefer to include these two months of retroactivity in the Corollary Relief Judgement, I am prepared to issue it on that basis instead of a retroactive agreement.

i. **COSTS**

112. If either of the parties wishes to address the court on the matter of costs, my suggestion is that the Corollary Relief Judgement be drafted by counsel for the petitioner, consented to by counsel for the respondent and forwarded along with the Divorce Judgment to me to be issued with a provision in that judgment reserving the question of costs. In that way, the order can be taken out quickly and tax deductibility will not be an issue. If costs are sought by either side, I would ask the counsel seeking costs to arrange for a one half hour appearance on my docket for that purpose.

113. In the event that neither side seeks costs, I would ask that the Corollary Relief Judgement

specify that.

CAMPBELL, J.