SUPREME COURT OF NOVA SCOTIA
Citation: Miller v. Miller, 2009 NSSC 294

Date: 20091015
Docket: SDD 056576
Registry: Digby

Between:

Joanne (Light) Miller

Petitioner

v.

Reginald Miller

Respondent

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	May 13, 2009 , in Digby, Nova Scotia
Final Written Submissions:	August 8, 2009
Written Decision:	October 15, 2009
Counsel:	Oliver Janson , for the Petitioner Donald Peverill, for the Respondent

By the Court:

INTRODUCTION

[1] Reginald Miller and Joanne Light met and began to cohabit in approximately 1991, when he was 41 and she was 39 years of age. Both had been previously married and divorced. Mr. Miller had two young children by his earlier relationship.

[2] The parties married on April 10, 1996 in Dartmouth, Nova Scotia and separated on or about September 4, 2003. There are no children of the relationship of Mr. Miller and Ms. Light.

[3] The couple lived a nomadic life, traveling, living and working in various parts of the world. They were residing in East Malaysia at the time of their separation, after which Ms. Light returned to Canada where she continues to make her home. Mr. Miller has re-partnered and is living and working in the Sultanate of Oman.

[4] Ms. Light initiated a court action in 2006 (SD 06-269371) seeking to sell a jointly owned building and land in Kings County, Nova Scotia. The property remains unsold. She petitioned for divorce in January of 2008. The petition included a request for a change of name, spousal support, relief under the **Matrimonial Property Act** R.S.N.S. 1989, c. 235, and costs.

[5] I granted the divorce and the change of name application after a hearing on May 21, 2008. The remaining issues were adjourned for the parties to adduce further evidence. Counsel filed written submissions following the hearing.

POSITION OF THE PETITIONER

[6] Ms. Light claims entitlement to spousal support on both compensatory and non compensatory grounds. She requests a periodic payment of $467 per month. In view of the potential difficulties in enforcing such an order against the respondent in Oman, she seeks that the payments be secured by the respondent's interest in the real property that is yet to be sold. In the alternative, she submits that the respondent's interest in the real property should be transferred to her, as a form of lump sum spousal support.

[7] The petitioner also seeks a division of certain assets declared by the respondent.

POSITION OF THE RESPONDENT

[8] The position of the respondent is that his income and that of the petitioner are approximately the same and that the petitioner is as self-sufficient on her income is he is on his.

[9] Further, he submits that the petitioner has the demonstrated ability and opportunity to earn substantial amounts of income if she is willing to relocate to areas where her skills are more in demand. The respondent's argument is that the petitioner, by generally confining her employment searches to New Brunswick and Nova Scotia, has limited her income generating potential. For this reason, he submits that he should not be responsible to provide monies to support what amounts to a lifestyle decision on the part of the petitioner.

[10] The respondent argues that the petitioner has unreasonably delayed in making a request for spousal support and that there is no basis on which to make a retroactive order for spousal support.

[11] He characterizes the petitioner's application as a disguised attempt to redistribute the matrimonial property on an unequal basis, without a basis to do so in law or in fact.

ISSUES:

1. Spousal Support
    (a) Is the petitioner entitled to spousal support?
    (b) If so, then should support be paid periodically, or by a lump sum?
    (c) Should an amount payable be secured by, or fulfilled by, the respondent's interest in the matrimonial property?
2. Should there be an order made pursuant to the **Matrimonial Property Act** for a division of assets?

SPOUSAL SUPPORT

Facts

Pre cohabitation (pre 1991)

[12] Ms. Light holds university degrees in Arts, and in Education with a Specialist's certificate in Fine Arts. She is also a certified teacher in English as a second language.

[13] Her employment history included work as a supply teacher, journalist, Arts Co-ordinator and part time librarian. She has never worked in Nova Scotia on a permanent teaching contract and has no pensionable earnings from such teaching as she did perform.

[14] When she met Mr. Miller, she was completing a series of contract positions with, among others, the then city of Halifax.

Life together (1991-2003)

[15] Mr. Miller was employed as a sales representative when the parties met. As result of a conviction for an alcohol-related driving offense, he lost his employment. In approximately 1994, the couple moved to an alcohol free community in northern Canada where they were employed as teachers for approximately a year.

[16] In 1995, they returned to Dartmouth but were unemployed. The couple then decided to move to South Korea where they were employed for a period of time in 1996 and 1997 to teach English as a second language. In 1997, they returned to Canada where they both obtained employment .

[17] In 1998, the couple moved to Brunei, together with Mr. Miller's daughter. The petitioner indicates that she did not think this was something she wanted to do but that she based her decision on what she perceived to be the needs and wants of her husband and of his children. She testified that before leaving for Brunei : " I had a full time job that I enjoyed and could have remained at indefinitely". She continued that, once they started moving, her career started to deteriorate.

[18] The couple stayed in Brunei until 2001. As result of Mr. Miller's daughter wanting to return to Canada and to accommodate her education, the parties moved back to Nova Scotia. They bought a house but only stayed in Canada 3 months, while working at a language institute. When their employer had financial problems, they returned to Brunei with Mr. Miller's son, but against Ms. Light's wishes. She wanted to live and work in Canada.

[19] Mr. Miller was successful in obtaining employment in Brunei, however, Ms. Light was restricted to private tutoring. She apparently had an incident with another teacher and had not been welcomed back to the Brunei school where she had previously been employed.

[20] In 2002, the parties relocated to Hong Kong, where Ms. Light was employed and earning $6500 per month on contract. Mr. Miller was similarly employed.

[21] In March of 2003, the parties left Hong Kong due to concerns about the spread of the SARS disease. They decided on Sri Aman, East Malaysia as their new home.

[22] Ms. Light travelled to France for 4 weeks to visit her stepdaughter, while en route to Canada for a holiday, and to visit with her mother. While in France she provided her stepdaughter with $1,500. She did not join her husband in Sri Aman until June.

[23] The petitioner did not like their new community in Sri Aman. Ms. Light found that her relationship with Mr. Miller had deteriorated and that he was “cold and uncommunicative”. Ms. Light wrote a letter to Mr. Miller during this time period in which she accepts some responsibility for the breakdown of the marriage. It shows her as conflicted, suggesting on the one hand that she did not want to leave him, but on the other that he was “... free to begin looking for a new relationship.”

[24] By September, the petitioner resolved to return to Canada and with $200 and a plane ticket she left her husband. Ms. Light retained hopes that she could convince her husband to return to Canada and that they could resume their life together.

[25] During the years of their cohabitation, Ms. Light supported her husband in his pursuit of a life and career in various parts of the world. When his children were with them, she acted as their step parent and some moves were made to accommodate Mr. Miller's relationship with his children or their needs.

[26] Ms. Light concedes that during the years they were together, the couple earned similar amounts of income, with some earning periods being more favorable to him and at others to her. They do not appear to have accumulated any significant assets or debt.

[27] From the outset of their relationship they lead an atypical married lifestyle. Neither seemed to have significant roots in their various employment contracts but were fortunate enough to find work as they moved around the world.

[28] Ms. Light suggests that her "career' started to deteriorate when they moved to Brunei on the second occasion. While it is evident that it was at that point in time that she decided she did not want to continue to live overseas, I do not accept the proposition that her employment prospects had changed significantly as a result of these moves.

[29] The evidence suggests that before cohabiting with Mr. Miller, the petitioner's employment history consisted of a series of contract positions that were generally related to her educational background and interests in education and the arts. It had also involved her working in different locations in Canada. Her overseas employment did not seem to be an impediment to her being able to obtain employment in Canada while they were in the country. As will be discussed, her employment since the separation is remarkably similar in nature to that which she enjoyed before meeting Mr. Miller.

Financial Circumstances of the Petitioner Post Separation (2003-2009)

[30] Upon her return to Canada, Ms. Light resided briefly with a relative in New Brunswick and then, with social assistance benefits for 2 months, was able to obtain her own apartment. Her employment and income history in the ensuing years follows.

2003

[31] In November 2003, Ms. Light entered into a one year contract to work at an Arts Center in New Brunswick.

[32] She declared a line 150 income for 2003 of $3,559 which clearly did not include monies earned in Hong Kong. I infer that these are monies earned in the last two months of 2003. Her taxable income (line 260) was $1,522.

2004

[33] Ms. Light continued to work at the Arts Centre until October, 2004. She then entered into a nine month contract as a researcher at the New Brunswick Museum.

[34] Her line 150 income for 2004 was $18,974. She declared various deductions leaving her with a taxable income of $8,643.

2005

[35] The petitioner's employment at the Museum ended in June 2005, and she received employment insurance benefits for the remainder of the year.

[36] Her income consisted of $17,983 in earnings and $8,533 in employment insurance benefits. She also reported RRSP income of $3,000. She reported a business loss of $10,405 leaving her with a line 150 income for the year of $19,111.

2006

[37] In January, 2006 the petitioner began working as a teacher at a school for handicapped children. Her line 150 income for this year was $17,870.

2007

[38] The petitioner's employment at the school continued until June of 2007, after which she was in receipt of employment insurance benefits.

[39] Her earnings in 2007 were $14,450 plus employment insurance benefits of $7,268, RRSP income of $2,450, and "other income" of $5,168. After accounting for a declared net business loss of $12,136 her line 150 income was $17,204.

2008

[40] The petitioner did not file her 2008 income tax return with the court. The evidence suggests that she was in receipt of employment insurance benefits of $1,220 per month for the first seven months of 2008 totaling $8,540. She worked on a contract as an English teacher in the United Arab Emirates receiving $13,000 on which she has not paid taxes.

[41] She taught a course on contract in Digby, Nova Scotia for six weeks earning $5,100. She also had income as a private tutor to 5 students in St. John, New Brunswick. She could not provide the amount of her income except to say that it was "$200 here and there" and that she had a business loss to declare. Her Statement of Financial Information dated in May 2008, declares an "income" of $500 per month as a loan from her mother. Her 2008 income then was not less than $27,000.00.

2009

[42] The petitioner testified that her gross income for the period from January to the date of hearing in May was $5,000**.** She acknowledged that in the week previous to the hearing she had interviewed for another position in the United Arab Emirates**.**

[43] She indicated that she was planning to go to British Columbia in July 2009 to seek a permanent teaching position.

Analysis

[44] Section 15.2 of the **Divorce Act** authorizes an order for spousal support:

> 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.
>
> ...

> (3) The court may make an order under subsection (1) ... for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

[45] The **Act** goes on to define the factors and objectives to be accounted for in determining the entitlement and quantum of spousal support:

> 15.2 (4) In making an order under subsection (1) ... 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.
>
> (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.

[46] The analysis involved in the application of these provisions has been summarized recently by B. MacDonald J. in *S. (T.L.) v. M. (D.J.)*, 2009 NSSC 79, at paras. 59-72:

> [59] The Supreme Court of Canada in *Moge v. Moge* (1992), 43 R.F.L. 345 (S.C.C.) and in *Bracklow v. Bracklow* [1999] 1 SCR 420 confirmed that all four objectives set out in s.15.2 (6) are to be considered in every case. No one objective has paramountcy. If any one objective is relevant upon the facts, a spouse is entitled to receive support.
>
> [60] In *Bracklow v. Bracklow, supra*, the Supreme Court analysed the statutory objectives and held that they create three rationales for spousal support:
>
> > 1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.
> >
> > 2. Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.
> >
> > 3. Contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligations to each other.

[61] These rationales take into account both the factors set out in s. 15.2 (4) and the objectives set out in s. 15.2 (6).

[62] The Supreme Court did recognize that many claims have elements of two or more of the stated rationales. It confirmed that analysis of all of the objectives and factors is required. Pigeonholing was to be avoided.

[63] In this decision I will not comment on the contractual objective because it is not a factor in the case before me.

[64] McLachlan, J. in *Bracklow, supra*, indicated that the basis for a spouse's support entitlement also affects the form, duration, and amount of any support awarded.

[65] Examples of circumstances that may lead to a decision that a spouse is entitled to compensatory support are:

> a) a spouse's education, career development or earning potential has been impeded as a result of the marriage because, for example:
>
> > - a spouse has withdrawn from the workforce, delays entry into the workforce, or otherwise defers pursuing a career or economic independence to provide care for children and/or a spouse;
> >
> > - a spouse's education or career development has been negatively affected by frequent moves to permit the other spouse to pursue these opportunities;
> >
> > - a spouse has an actual loss of seniority, promotion, training, or pension benefits resulting from an absence from the workforce for family reasons;

> b) a spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development.

[66] Non-compensatory support incorporates an analysis based upon need and ability to pay. If spouses have lived fully integrated lives, so that the marriage creates a pattern of dependence, the higher-income spouse is to be considered to have assumed financial responsibility for the lower-income spouse. In such cases a court may award support to reflect the pattern of dependence created by the marriage and to prevent hardship arising from marriage breakdown. L'Heureux-Dubé, J. wrote in *Moge v. Moge, supra,* at p. 390:

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin (1991), supra,* and *Linton v. Linton, supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. *As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson,* "*Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)*", supra, at pp. 174-75). (emphasis added)

[67] It is not clear from Justice L'Heureux-Dubé's, decision whether entitlement arising from a "pattern of dependence" is compensatory or non-compensatory. A pattern of dependence may create a compensatory claim because it can justify an entitlement even though a spouse has sufficient income to cover reasonable expenses and might be considered to be self-supporting. This often is described as the "lifestyle argument" - that the spouse should have a lifestyle upon separation somewhat similar to that enjoyed during marriage. (*Linton v. Linton* 1990 CarswellOnt 316 (Ont. C.A.) A lengthy marriage generally leads to a pooling of resources and an interdependency even when both parties are working. Usually the recipient spouse will never be able to earn sufficient income to independently provide the previous lifestyle. This would form the basis of a compensatory claim but does not necessarily entitle a spouse to lifetime spousal support. The essence of a compensatory claim is that eventually it may be paid out. This leads to a discussion about the quantum and duration of the claim.

[68] Once it is decided that a spouse is entitled to spousal support, the quantum (amount and duration) is to be determined by considering the length of the relationship, the goal of the support (is it compensatory, non-compensatory or both), the goal of self-sufficiency, and the condition, means, needs and other circumstances of each spouse. In considering the condition, means, needs and other circumstances of each spouse one may examine the division of matrimonial property and consider the extent to which that division has adequately compensated for the economic dislocation caused to a spouse flowing from the marriage and its breakdown and any continuing need the spouse may have for support arising from other factors and other objectives set forth in s. 15(2). (*Tedham v. Tedham* 2005 CarswellBC 2346 (B.C.C.A.)

[69] There will be cases when the analysis may indicate that the only way to adequately address the compensatory or non-compensatory claim is to continue support for significant periods of time possibly during the entire life of the recipient or payor. (*Rondeau v. Kerby*, 2004 CarswellNS 140 (N.S.C.A.). This most often will occur in respect to lengthy marriages where there is significant income disparity.

[70] Generally a non-compensatory claim in a short to mid-length marriage is satisfied when a spouse becomes self-supporting and, in such a case, neither the payor spouse's greater income nor the inability of a recipient spouse to replicate a previous lifestyle, is a factor entitling a spouse to continuing support. When spouses have not had a lengthy relationship and the only effect of the relationship, has been that a spouse has enjoyed a better lifestyle than he or she could afford alone, the duration of support will likely be for a period required to ease the recipient spouse's transition to economic independence. Self-sufficiency, however, is a relative concept. It constitutes something more than an ability to meet basic living expenses. It incorporates an ability to provide a reasonable standard of living from earned and other income exclusive of spousal support.

[71] ...

[72] Critical to a proper analysis of spousal support is what each party will have in his or her pocket to pay reasonable living expenses after paying or receiving child support and spousal support. Even if the spousal support guidelines are used to suggest various possible amounts of spousal support, what a person might actually retain must be examined in respect to what is required for that individual to pay for housing, heat, food, etc.

(*see also*, B. MacDonald J., in *L. (J.A.) v. L. (S.B.J.)*, 2009 NSSC 87, at paras. 5-18.)

[47] The respondent argues that the petitioner's application for spousal support is undermined by the delay in making an application until 2008, some 5 years post separation. He submits, alternatively, that there is no basis upon which to make a spousal support order that predates 2006 being the date on which the petitioner first indicated an intention to make application for support.

[48] I take the law as to these points to be:

> (1) A spousal support order may be made retroactive to the date of the parties'-separation. In addition, recent caselaw – principally a Supreme Court of Canada decision respecting retroactive child support – suggests that all maintenance under the **Divorce Act** may be made retroactive to a date prior to the filing of the petition for divorce.
>
> (2) A delay in seeking spousal support may disqualify the recipient from an entitlement to support for a period during which support was not sought, as the payor is taken to have structured their affairs according to "known obligations," so that it would be unfair to impose an additional retroactive burden. This does not appear to be a hard rule, however, and will be subject to the particular circumstances.

Retroactive spousal support

[49] The court's authority to make a retroactive award of spousal support was confirmed in *Donald v. Donald* (1991), 103 N.S.R. (2d) 322 (C.A.). (*paras. 34-40.*)

[50] The court revisited the issue in *Lidstone v. Lidstone* (1993), 121 N.S.R. (2d) 213, 1993 (C.A.). The Court of Appeal, *per* Clarke C.J.N.S., at para. 8, affirmed the trial judge's award of lump-sum retroactive spousal support. The Chief Justice said:

> The principle of retroactive support, where nothing was paid by the husband following separation, together with periodic support following the divorce, was determined by this court as permissible under s. 15 of the *Divorce Act* where the circumstances as found by the trial judge warrant such an order.

It was not clear when the petition for divorce was filed in *Lidstone*. The Court of Appeal approved of an award of spousal support retroactive to the date of separation.

[51] The cases on this point frequently set the date of separation as the relevant date for a retroactive order, without reference to the date the petition was filed.

[52] There are, however, authorities that at least implicitly recognize that a spousal support order can be made retroactive to a date prior to the filing of the petition. In *Reardon v. Smith* (1999), 180 N.S.R. (2d) 339 at para. 68, the Court of Appeal cited *Lidstone* as authority for the statement that "In certain circumstances, retroactive support can be awarded back to the date of separation," adding that "... it can also predate the commencement of proceedings." These comments appeared in the context of a consideration of child support.

[53] The authorities from the Court of Appeal, then, clearly permit spousal support retroactive to the date of separation "where the circumstances as found by the trial judge warrant such an order." Judging from *Reardon*, the court implicitly accepted that such an order can be retroactive to a date prior to the filing of the petition.

[54] More recently, the majority reasons in *S.(D.B.) v. G.(S.R.)*, 2006 SCC 37, appear to have brought further clarity to this issue, albeit in a child support context. In *S.(D.B.)*, Bastarache J. said:

> 91 Federal authority over child support orders can be directly traced to its jurisdiction over divorce. Parliament is only able to legislate child support to the extent it is necessarily ancillary to its power over divorce.... The question arises, therefore, as to whether a court acting pursuant to the federal *Divorce Act* has the jurisdiction to make a retroactive order for child support that predates the application for divorce.
>
> 92 The situations where retroactive support is sought can immediately be contrasted with those where prospective support is sought. In prospective cases, before an application for divorce is filed with the court, support should be sought under provincial law. This is because the federal power over child support only arises from the latter's relationship to an actual divorce and, before the divorce is granted, this jurisdiction does not arise. However, in retroactive cases, the matter is much simpler: in such cases, it is easy to know whether the divorce was ultimately granted. In practice, there is no difficulty ascertaining whether the federal jurisdiction had been triggered at the time of separation. Therefore, with the benefit of hindsight, a court properly seized of a child support dispute between divorced parents will have the jurisdiction to order retroactive support to be payable from a date preceding the application for divorce.
>
> 93 This position is consistent with the Alberta Court of Appeal's reasoning in *Hunt v. Smolis-Hunt* 2001 ABCA 229.... In that case, Berger and Wittmann JJ.A. agreed that a court would have jurisdiction to order retroactive support under the *Divorce Act* for a period pre-dating the petition for divorce; however, parents who did not wish to commence divorce proceedings would be left to apply under provincial law: para. 33. Payne and Payne [*Child Support Guidelines in Canada*, Toronto: Irwin Law, 2004] also seem to recognize this jurisdiction, stating that a court "will not ordinarily make an order retroactive to a date prior to the commencement of the divorce proceeding" (p. 392 (emphasis added)). The nuance in their phrase is important: simply because courts have the constitutional authority to make such a retroactive award under the *Divorce Act* does not imply that they should regularly do so...

[55] There is a line of authority suggesting that the principles of retroactivity are the same, or essentially the same, for child and spousal support. In *L. (J.A.)*, *supra*, B. MacDonald J. said, "There is recognition that a court does have discretion in awarding spousal or child support for a past period and the principles applied are those discussed in *S. (D.B.)* ... a Supreme Court of Canada case examining claims for retroactive child support." (para. 20). Similarly, in *S.(T.L.)*, *supra*, she stated that "a court does have discretion in awarding spousal or child support for a past period and the principles applied in such circumstances are not dissimilar to those described in *S.(D.B.)*...." (para. 78)

[56] In *Burchill v. Savoie*, 2008 NSSC 307 O'Neil J. considered whether retroactive spousal support should be ordered. Concluding that such an order would be harsh in the circumstances and that the respondent was unable to pay retroactive support, he added, at para. 77, that "The law on when retroactive support should be ordered is discussed *infra* ... in the context of child support arrears." He went on to factor "spousal support otherwise payable," for a period dating to before the petition for divorce was filed, into a lump sum award.

[57] It should be noted that the considerations relevant to a claim for retroactive support – once the court is satisfied that a retroactive order should be made – do not appear to differ in principle from those that go to an order for prospective spousal support. A court making a retroactive order is operating under section 15.2 of the *Divorce Act*. Thus, in *Lidstone*, *supra*, the Court of Appeal at para. 10 held that, in the context of a retroactive award of spousal support, "There was ample evidence upon which the trial judge exercised his discretion under s. 15 and made the awards designed to balance the economic disadvantages ... resulting from the marriage breakdown and the need to promote [the recipient's] rehabilitation and economic self-sufficiency." That said, developments in the intervening period will be taken into account.

[58] In effect, framing an order for retroactive spousal support involves making a determination as if the application had been made at the earlier date, while taking account of any relevant developments occurring in the meantime, and applying section 15.2 of the *Divorce Act* accordingly.

[59] I conclude that there is jurisdiction to consider a spousal support order in favor of the petitioner that is retroactive to September, 2003, being the date of separation of the parties.

Delay

[60] While there is no limitation period for making an application for support, a delay in doing so may nevertheless weaken a claim for support. In the *Divorce Act Manual*, at 15.12.03, author T.W. Hainsworth suggests that "where there has been a lengthy separation or a delay in applying for spousal support, the courts are more inclined to award support only if there is a clear connective link between the spouse's present need and the role adopted in the marriage...." Hainsworth adds that "The spouse claiming support, after a long delay, must also justify the reasons for the delay. If, in the meantime, the parties have been divorced and have gotten on with their lives, the court may restrict its discretion to cases involving only exceptional circumstances...."

[61] In *Lu v. Sun*, 2005 NSCA 112 Hamilton J.A., for the court, considered a recipient spouse's delay in seeking retroactive spousal support, which delay was

"more significant than it is for child support," due to "the special relationship between a child and his or her parents...." (at para. 81). As such, "A greater onus is placed on a recipient spouse to make timely application for increased spousal support, or at least to give concrete notice that increased spousal support is being sought, than is the case where retroactive child support is sought." (at para.82). The court accepted the general principle as stated by the Manitoba Court of Appeal in *Andries v Andries*, [1998] M.J. 196, at para. 28, that:

> ... a payor should not ordinarily be required to pay support for a period during which none was sought or for a period during which the amount was fixed by interim order or by agreement. Generally speaking, a payor structures his or her financial affairs on the basis of known obligations. In the usual course of things, it would be quite unfair to impose an additional burden retroactively.

[62] The issue "is one of fairness." *Sun* does not set down a hard rule that retroactive support will never be ordered where there has been a delay in requesting maintenance.

[63] In *Horne v. Horne*, 2007 NSSC 61, for instance, a delay in seeking spousal support was not relevant to the analysis in circumstances where the parties had "negotiated without success" and the wife "delayed the Amended Interim Application with the court in the hopes of a settlement on all issues." (paras. 8-9).

[64] A situation where the potential payor spouse had actual notice that the potential recipient intended to seek support, even if no application had been filed, might fall into the category of cases where retroactive maintenance would not be rejected simply due to delay.

[65] Having regard to these principles I am satisfied that the petitioner's delay in bringing forth an application for support is a relevant factor, but does not act as an automatic bar to the making of such an award.

Petitioner's Means

[66] I have concerns about the degree to which Ms. Light has been forthright in outlining her financial position to the court.

[67] The petitioner's testimony as to the sources and quantum of her income in the years 2008 and 2009, was, in my opinion, deliberately vague. She sought to minimize her income and her ability to obtain and maintain employment. Much of

the detail for the period May, 2008 to May, 2009 was elicited on cross-examination.

[68] She has earned income and from time to time has not declared that income for tax purposes.

[69] The petitioner provided evidence in an affidavit of January 9, 2008, that “I have lived on an average income of between $5,000 and $15,000 for five years”. This evidence is not accurate.

[70] At that point she had been separated for just over 4 years. Her line 150 income on declared monies in the years 2004-2007 was never less than $17,000 and she had declared business losses in those years totaling $22,000.

[71] The Schedules to the Returns which would show the basis of the business losses were not tendered in court, and so it is not possible to know what expenses were being claimed that would be relevant to the determination of the overall means and needs of the petitioner.

[72] For example, in her Statement of Financial Information dated May 2008, Ms. Light claimed an expense amount for taxis and public transportation. The evidence did not indicate whether those costs were incurred for a business or personal use. In the context of what I perceived to be her evasiveness as to her finances, it leaves open the question as to whether she is claiming this as a personal expense, while also reducing her line 150 income by claiming it as a business expense.

[73] In 2007, the Petitioner claimed Tuition Fees and an Education deduction amount totaling $5,099 for which there is no explanation in the evidence.

[74] She seems to be claiming slightly higher amounts for charitable donations than the Return would support. I question why she is making charitable donations when she alleges that she cannot afford housing and that she is going into debt.

[75] The petitioner has been consistently employed or in receipt of employment insurance benefits since the date of her separation, except for the two-month period immediately upon her return to Canada in 2003. These terms of employment are

consistent with what the evidence suggests was her work history throughout her adult life.

[76] The petitioner maintains that her relationship with Mr. Miller, and the subsequent marital breakdown, interrupted her ability to obtain a permanent teaching contract. The inference that the court has been asked to draw is that if she were able to be so employed then she would be able to draw a more significant income than she has been able to so far. The petitioner says that her emotional distress since the separation has further inhibited her ability to obtain such a position.

[77] There is no evidence to suggest that Ms. Light's career path would include a permanent teaching position. When she met Mr. Miller she was approximately 40 years of age and had only held temporary teaching positions. She was working for a municipality on contract when she met her husband, and not for a school board. The evidence does not support a conclusion that her foreign travels, or her relationship with Mr. Miller unfavorably impacted on her pursuit of a career that there is no evidence to suggest was forthcoming.

[78] It is clear that Ms. Light has the proven ability to seek out and obtain employment in her fields of expertise. She does not earn a substantial income, but the evidence demonstrates that she can earn very lucrative sums by teaching in foreign jurisdictions such as the U.A.E.

Petitioner's Needs

[79] The petitioner's needs are outlined in her Statement of Financial Information and affidavits. They are conflicting in some details.

[80] Ms. Light says that monies loaned to her by her mother to assist her in her shortfall are proven in Appendix D to Exhibit 4, an affidavit of March 13, 2009. That appendix consists of bank documents showing 61 ATM deposits or money orders that begin on August 11, 2003 (while Ms. Light was still in Sri Aman) with the last one dated March 11, 2008. They total almost $28,000. $5,500 of that amount was paid in February and March, 2008.

[81] The petitioner has also submitted an unsworn statement in letter form from Marion Light, her mother, which says that she paid for living accommodation for

the petitioner for the period December 2003 to December 2004, and in the total amount of $9,200. This amount is presumably included in Appendix D.

[82] Ms. Lights' Statement of Financial Information, dated in May 2008 states that she owes her mother $19,000 in loans incurred in the five years post separation, and that she is repaying her at the rate of $300 per month, while at the same time claiming to be receiving $500 per month "income" from her mother in the form of loans.

[83] While I am satisfied that the petitioner's mother has in fact provided her with financial assistance, it is not at all clear as to the exact amount of that assistance provided, nor the purposes for which it was expended.

[84] The petitioner claims a monthly payment of $450 for a credit card debt against a total owing of $4500. No explanation was offered as to when or why this debt was incurred.

[85] The Petitioner claims to make payments of $218 per month for an RRSP, $60 per month for charities, $50 per month for gifts, and $275 a month for health related expenditures.

[86] She seeks $561 per month for automobile and travel expenses, apparently for a vehicle she has yet to purchase. This is in addition to $100 for taxis and public transportation.

[87] Other expenses claimed for rent, utilities, food and necessaries are quite reasonable.

[88] Ms. Light says that she is homeless and cannot afford to pay rent, so stays with relatives and friends. Having regard to her income I question the suggestion that she is unable to afford some modest accommodations.

[89] Overall the petitioner claims that her monthly expenses exceed income by $1939, including an “average $400" per month for income taxes. It is difficult to reconcile her homelessness with her overall income and expenses, in particular her decisions to contribute to charities and to make RRSP contributions.

Summary of petitioner's financial circumstances

[90] The petitioner presents an unreliable and often conflicting financial picture making it extremely difficult to ascertain what her true needs are. Her income, particularly since 2006, should support a very modest lifestyle for a single person with no dependents. Yet she seems to be unable to manage without the material and financial support of friends and relatives. The evidence does not explain to my satisfaction the reason for this apparent gap between her means and her ability to sustain herself without assistance.

[91] I am satisfied that arising from the marital breakdown and separation the petitioner incurred relocation costs for her return to Canada including travel expenses. She also incurred expenses and resultant debt while she reestablished herself in the workforce and set up an apartment. It seems likely that in 2003 and 2004 she could have maintained a reasonable claim for spousal support, but she did not make one then.

[92] She presents herself as a person whose income generating potential has been inhibited by her marital breakdown. The evidence does not support that conclusion.

[93] I accept that the petitioner was very upset by the marital breakdown. The motivation of Ms. Light in pursuing this application may be relevant to the perspective she has as to her ability to earn an income and inability to meet her reasonable expenses.

[94] The evidence indicates that she improperly, and without his knowledge or consent, accessed Mr. Miller's private e-mail account from time to time after the separation. In 2005, she came across information which informed her of Mr. Miller's relationship with another woman. The petitioner formed the opinion that this relationship was ongoing and a cause for the marital breakdown in 2003. The evidence suggests that upon learning this information she was devastated by Mr. Miller's apparent deception and infidelity. This in turn contributed to her feelings of low self esteem and lack of self confidence.

[95] As a result, she began counseling in January of 2006 with Rose Raftus, a registered social worker. A letter from Ms. Raftus says that the goal of counseling was for Ms. Light "to leave her 'victim status' behind and move forward with her life". She observes that the petitioner has a low self esteem and sense of self worth; that she feels betrayed because she supported her husband and his children only to learn later that he was in a relationship with another woman.

[96] Within a few months of the beginning of counseling Ms. Light sought legal counsel and initiated a court application to sell the Kings County property the parties owned. In that application she mentioned her intention to seek spousal support.

[97] It was the discovery of the betrayal which triggered the petitioner to act in pursuit of financial compensation from the respondent. It does not appear to have been an issue raised before 2006, nor acted on until 2008.

[98] I acknowledge that her emotional upset following discovery of respondent's new partner may have contributed to her delay in bringing forward an application for support from 2006 to 2008. Her limited financial means may also have

influenced her in not pursuing the matter before 2008. However, these reasons do not explain her failure to pursue spousal support from 2003 to 2006.

Financial circumstances of the respondent

[99] The respondent did not attend the hearing. Evidence of Ms. Light indicates that during the time that the couple were together they earned approximately the same incomes, with the petitioner sometimes earning more, and sometimes less. Overall there was no substantial disparity in the monies brought into the household by the couple.

[100] I do not have evidence of the income of the respondent for the period of 2003-2006. There is no evidence that, at that time, the petitioner was seeking spousal support.

[101] The respondent has re-partnered and has been living in the Sultanate of Oman since at least 2006. I have been provided with an original copy of his contract of employment as an English instructor at the University of Nizwah where he has a basic salary of R. O. 555 and allowances bringing his total monthly

income to R. O. 950 which, as at the time of hearing, was estimated to be equivalent to $2350 per month or $28,200 per annum. Mr. Miller's statement of income indicates that he does not declare income in Canada and there is no evidence as to the tax liability associated with his income in Oman. Mr. Miller elected not to file a statement of expenses.

[102] The respondent's assets include an RRSP account valued at $4,000, a savings account in the amount of $3,000, his share of the Kings County property, and furniture left in Nova Scotia before separation.

Entitlement

[103] The parties were together for approximately 12 years, neither a long nor a short term relationship. They contributed approximately equally to the maintenance of the household and intermittently had one or the other of Mr. Miller's children in their care. Ms. Light contributed to their physical and material well being during these times.

[104] After their separation, Ms. Light incurred some short term economic disadvantages which were clearly associated with the breakdown of the marriage. Her mother assisted her, and it appears that she has, over the years, added to her financial obligations to her mother. It can be said that the petitioner started in a financial deficit after the separation, and has not been able to work her way out of it. It may very well be, that by virtue of her mother's love and support, there has been no pressure to resolve her debts more quickly.

[105] In time, however, the petitioner established herself in the workforce in a manner that is consistent with her employment history before and during the marriage. While her income is very modest, it is not significantly different from that of Mr. Miller. On the evidence adduced I have concluded that she is now self sufficient and that fairness would not support an order of periodic support payable by Mr. Miller to Ms. Light, in view of their respective means and her needs. As such I reject the argument that the petitioner is entitled to support on a compensatory basis.

[106] I am satisfied however that the petitioner is entitled to non compensatory spousal support that recognizes that at least some of her current economic

difficulties are a direct and continuing consequence of the marriage breakdown. In my view this is best addressed in the form of a lump sum award.

Lump-sum spousal support

[107] Lump sum spousal support generally requires the party seeking the lump sum to demonstrate a "specific immediate need." This is well established with respect to prospective orders. Several cases suggest, however, that a retroactive lump sum is not necessarily subject to this requirement.

[108] Generally, before a lump sum award can be ordered, then, there must be a "specific or immediate need" shown. Examples of such a need would include the need to pay for a vehicle or an essential household item, or expenses incurred in retraining.

[109] The author of the *Divorce Act Manual* sets out various circumstances that may justify a lump sum award of spousal support: a lump sum may serve as a "clean break" alternative to periodic payments; it may be a method of ensuring that payment is made where there is reason to be concerned about a risk of non-

payment; it may be a method of paying off debts, past expenses or to make up for past support deficiencies; it may be a way to pre-pay expenses; and it may be a method of compensation for roles adopted during the marriage or a way of easing the payee's transition to self-sufficiency. (section 15:22:03)

[110] The law on lump sum spousal support in Nova Scotia is substantially set out in *MacNeil v. MacNeil* (1994), 129 N.S.R. (2d) 284, where the Court of Appeal, at paragraph 20, accepted certain statements from *Hemming v. Hemming* (1983), 58 N.S.R. (2d) 65 (S.C.A.D.) as remaining valid:

> ... In *Hemming* ... Macdonald J.A., in delivering the judgment of this court, stated, at pp. 70-71:
>
> > In *Power on Divorce* ... the author states "... the purpose of a lump sum award, like that of an award of periodic sum, is to provide proper maintenance rather than an equitable division of assets". Prior to the enactment of the *Matrimonial Property Act* ... lump sums were given more for the latter purpose rather than the former. Chief Justice MacKeigan recognized this in his judgment in *Connelly v. Connelly* (1974), 9 N.S.R. (2d) 48, ... when he said (p. 56, N.S.R.):
> >
> > > Awards of lump sums for maintenance seem usually to be used as devices to ensure equitable division of matrimonial assets acquired during the marriage, even when the wife's only contribution has been to look after the home and children; on this issue relevant conduct seems to relate to the length of the marriage, the kind of assets and how they were acquired.

[111] He continued, at p. 71:

> It appears clear that lump sum maintenance is really only justified if there is a specific or immediate need for it -- generally found in the requirement of the wife to re-establish a home environment for herself and her children.

[112] He stated, at pp. 73-74:

> In my opinion the matter was brought into focus by Professor [McLeod] ... where, in an annotation to the report of *Stammler v. Stammler* contained in 11 R.F.L. (2d) he said (p. 84):
>
> > ... Taylor, J., in *Stammler* realistically appraised the problems with respect to the interaction of a family asset division and lump sum award; both were economic wealth distribution devices. In general where the economic wealth had been divided by a 'provincial' scheme it ought not to be re-assessed by a 'federal distribution' scheme. Although periodic payments may truly reflect the support needs of a spouse, it is only in exceptional cases, e.g., if the husband were attempting to abscond or avoid his obligation, that lump sums truly accomplish support ends.

[113] Whether the “immediate need” criterion applies to claims for retroactive lump sums is not clear. In *Leith v. Leith* (1999), 178 N.S.R. (2d) 160, Saunders J. (as he then was) denied a claim for lump-sum retroactive spousal support, giving the following reasons:

> ... In order to succeed the claimant must advance and establish a specific or immediate use, a provable and legitimate need, for which such an award is

> required (see generally *MacNeil v. MacNeil*....). The petitioner did not seek spousal support either at the time they separated, or at the time she filed her petition, or at the time she filed her statements of financial information and property. The subject was only first broached at the date assignment conference six months ago. Ms. Leith has failed to establish a specific or immediate need for the money. Her request does not meet the requirements for such an award in Nova Scotia. (para. 27)

[114] On the other hand, in *Pettigrew v. Pettigrew*, 2006 NSCA 98, the Court of Appeal affirmed an award of lump sum retroactive spousal support without reference to a specific "immediate need." Hamilton J.A., for the court, said:

> The judge found fault with Mr. Pettigrew's failure to make adequate and timely disclosure of his financial particulars and noted her "strong concerns that Mr. Pettigrew [was] not being forthright about investment income sources. . . ." She found that Mr. Pettigrew had the ability to pay support. She summarized her reasons for the lump sum retroactive award of spousal support thus:
>
> > Considering Mr. Pettigrew's ability to pay, the pattern of account deposits both pre and post separation, her economic dependency on same, her immediate efforts to address the issue of insufficient funds through written and oral requests, his reluctance to provide full financial particulars when requested and when he retained counsel, his failure to recognize any need for support beyond basics, her requirement to encroach on capital, the interim order only addressing the short term, I am satisfied these are appropriate circumstances to make an award of retroactive support.
>
> The judge took into account factors in regard to each of the parties including means, need, withholding information and inattentiveness to need in granting the lump sum retroactive award of spousal support that she did. The appellant has not satisfied me she erred in doing so. (paras. 30-31)

[115] Once again, in *Lidstone*, the Court of Appeal affirmed a lump sum award of retroactive spousal support without comment on the lump sum aspect of the award, and without specific reference to "immediate need." The trial judge had rejected a claim for a prospective lump sum on the basis that no "immediate or specific need" was established, but allowed a retroactive lump sum to reflect maintenance the husband should have paid after separation. The trial judge calculated the lump sum by setting a monthly amount for the relevant period.

[116] Similarly, Dellapinna J. awarded a retroactive lump sum in *Ritcey*, *supra*, without reference to a "specific immediate need". (para. 89)

[117] An immediate lump sum is sometimes used to subsume any retroactive spousal support that might be owing, without formally ordering retroactive support. In other cases, it is simply implied that a lump sum is the preferred method for making a retroactive payment.

[118] It appears, then, that there is no obstacle to ordering retroactive support to be paid as a lump sum, whether an "immediate need" is found or not. If an entitlement to retroactive support is established, it appears that the court *may* direct

that it be paid by a lump sum; whether it is appropriate to do so will depend on the circumstances.

Conclusion as to Spousal Support

[119] A variety of methods of calculating an amount of spousal support payable have been canvassed in argument by counsel. In my view of the facts and the law, it is apparent that upon her return to Canada in September of 2003 the petitioner was subject to significant economic hardship and that having regard to his pattern of income earning to that point, the respondent, had he been asked to do so, may very well have been directed to provide spousal support. But by her delay, the petitioner did not put the respondent on notice of her need. Further she worked her way to self sufficiency by the time that her application came on for hearing.

[120] Nevertheless, I find that the petitioner's ability to be self sufficient is impeded by her debt accumulation, a portion of which is attributable to the time subsequent to the marriage breakdown. I am not satisfied that Mr. Miller should be responsible to address the petitioner's financial problems in their entirety, since there are many unanswered questions about the petitioner's true state of financial

affairs. i.e., sources and amount of actual income, actual expenses, and reasons for the continuing escalation of her debt load where the evidence does not satisfy me that it is attributable to the marriage breakdown.

[121] I direct that the respondent will pay to the petitioner the sum of $ $6,000, intended to address that portion of her immediate need which in my view is reasonably attributed to the marriage breakdown.

[122] If, by the time of the sale of the Kings County property, the respondent has not paid the amount ordered, then it will be withheld from his share of the net proceeds of sale and instead paid to the petitioner in satisfaction of the spousal support order.

MATRIMONIAL PROPERTY ACT

Nova Scotia Furniture/ Possessions

[123] While the parties lived outside Canada they stored a quantity of their furniture and other possessions in Nova Scotia. After the separation, Ms. Light

sent some of the contents to Mr. Miller at a cost to her of $150. She retained the remaining possessions.

[124] Mr. Miller has placed a value of $10,000 upon these furnishings and other possessions, but Ms. Light disputes this, saying that they consisted of a few second hand pieces of furniture. She did not give a satisfactory response to why the parties would pay for extended storage costs for things of so little apparent value.

[125] I have not been given an inventory of the items nor evidence of value. I do not know what each party received. Notwithstanding that some evidence was put before me on these items, neither party seems to contest the division of these assets. I conclude that the evidence does not support an order for further division.

Furnishings and Possessions in East Malaysia

[126] Whatever possessions the parties had accumulated while living in Asia appear to have stayed with Mr. Miller when the petitioner returned to Canada in 2003. Again, I am left without an inventory of the items, any evidence of value or

particulars of what Ms. Light took with her, and what remained. The evidence does not satisfy me that an order for further division of these assets is warranted.

Real Property

[127] During the course of their marriage, the parties acquired real property located at 2472 Gospel Road, Arlington, Kings County, Nova Scotia. In a consent order issued by this court on December 11, 2006, Ms. Light was given leave to list the property for sale on terms set out in the order. The terms and conditions included that:

> (i) The property was to be sold for a price of no less than $45,000, unless there was further agreement of the parties or an order of the court;
>
> (ii) The net proceeds of the sale were to be divided equally as between the parties; and
>
> (iii) The signature of Mr. Miller was to be dispensed with in the subsequent conveyance of the property, if he was unwilling or unavailable to sign on sale.

[128] The building has since been destroyed by fire and was uninsured. The land remains unsold. Ms. Light has testified that she has consulted persons in the real

estate industry and that as of June 2008 the value was thought to be approximately $37,800. She has listed it recently for $47,000.

[129] There is no evidence to support an unequal division of the value of this asset as may be ordered pursuant to section13 of the **Matrimonial Property Act**.

[130] The only issue is whether the threshold sale amount of $45,000 set out in the 2006 Order of this court should be varied to reflect the diminishment of value caused by the loss of the building in the intervening time period since the order was made.

[131] The Respondent has suggested that he would accept a reduction to a threshold sale price of $40,000 with all other terms of the order to remain unaltered. I agree that this is a reasonable proposal. The value over the past year has been estimated as between $37,800 and $47,000. It provides more flexibility for Ms. Light to effect the sale without the further intervention, loss of time, or increased costs attributed to an application to court for permission to sell for that lesser amount.

[132] A new order will issue to reflect the variation of the terms of sale.

Savings

[133] Mr. Miller declared that he had $3,000 in a savings account in Malaysia as at the filing of his Statement of Property. His position is that these are monies obtained post separation and not available for division. The Petitioner says it should be divided equally, but that the Respondent should be credited with an amount of $1000 paid to her in 2004, leaving a balancing payment of $500 owed to her on account of these savings.

[134] The evidence does not establish that these funds were matrimonial property and so I decline to order division as requested by the petitioner.

RRSP

[135] The parties agree that the amounts held by each of them in their RRSP accounts should be treated as equal and that no further order of division is necessary.

Debts

[136] There is no evidence of debts incurred by either party that are identified as emanating from the time of their marriage.

Conclusion as to MPA Application

[137] The only matrimonial asset remaining to be divided is the anticipated net proceeds of the sale of real property owned by the parties. I direct that a new order be issued with the same form and content as the 2006 order, excepting that the threshold sale price to allow sale without consent of the respondent or further order of this court is to be varied to $40,000, instead of the $45,000 amount currently in place.

COSTS

[138] I will hear the parties on the issue of costs by written submission, or by oral submission if so requested.

J.