SUPREME COURT OF NOVA SCOTIA
Citation: MacKinnon v. MacKinnon, 2009 NSSC 278

Date: 20090917
Docket: 1205-002681
Registry: Pictou

Between:

Lawrence MacKinnon

Petitioner

v.

Melinda MacKinnon

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	October 6, 7, 8, 9 10, 2008 and January 12, 2009, in Pictou, Nova Scotia
Final Written Submissions:	March 10, 2009
Counsel:	Lloyd Berliner, for the Petitioner Katherine Briand, for the Respondent

By the Court:

[1] The Petitioner, Lawrence MacKinnon, seeks a divorce, custody of the two children of the marriage and child support. The Respondent, Melinda MacKinnon, seeks custody and child support. There have been interlocutory applications dealing with child support and with the relocation of the children from New Glasgow, Nova Scotia to Moncton, New Brunswick.

BACKGROUND

The parties

[2] The parties met in 2000 or early 2001, when the Respondent was married with a six-month old son, Josh, who was born in October 1999. The Petitioner was, and is, an optometrist, operating his practice in New Glasgow, with part-time offices in Antigonish and Porter's Lake. When the Respondent separated from her husband, the Petitioner invited her and Josh to stay with him. Initially, there was no romantic relationship, but after a period living under the same roof, the parties established a relationship, and the Respondent became pregnant. Their son Ben was born in June 2002. The parties were married on March 15, 2003, after living as common-law spouses since June 2001, and their daughter, Lauren, was born in May 2004. They separated in early 2007.

[3] The parties signed a marriage contract on March 10, 2003, some five days before they were married. The Petitioner had informed the Respondent that he wanted a prenuptial agreement, and had one prepared by counsel. The Respondent was advised against signing by her counsel, but she did so anyway. She testified that the Petitioner told her that if she did not sign the agreement, there would be no marriage. The validity of the marriage contract is not in question.

[4] The marriage contract, several provisions of which will be addressed in more detail below, provided, *inter alia*, that, in the event of divorce, the Respondent would not be entitled to spousal support. It also provided for the division of matrimonial property and stated that the Respondent would be entitled to occupy the matrimonial home for a defined period, depending on the number of children of the marriage. The contract also provided for the Petitioner to contribute to the Respondent's education costs. The marriage contract provided that the parties would keep their debts and liabilities separate.

[5] The Petitioner's optometry business is located on the first floor of a two-story building that he owns. He rents out the second floor. Beginning in 2003 the Respondent operated a stamping and scrapbooking business called "The Scrapbook Depot," which included a retail business and classes. They started to order inventory in May 2003 and the business opened in September. The business was located on the upper level of the Petitioner's building.

[6] It appears that the Petitioner made substantial investments in the Respondent's business. He claimed that he eventually invested approximately $150,000, some of it borrowed from the bank, without recovering any reimbursement. Many purchases for the business were made on the Petitioner's credit cards. He claimed that some purchases made prior to separation were billed to his credit card after separation.

[7] After separation, the Petitioner demanded rent from the Respondent for the use of the space in his building. It appears that the Petitioner agreed not to charge rent for April 2007, in lieu of child support. After that, it appears that his intention was to charge rent of $800.00 per month, plus HST, effective May 1. The Respondent rejected this arrangement in May 2007, and demanded the support payment for April. Counsel indicated in an e-mail that there would be no linkage between rent and child support. The Respondent relocated the business around May 28, 2007.

[8] The Respondent closed her business after Christmas 2007, selling most of her supplies and equipment to Jeanette Murphy for $9,100.00 in January 2008. The Petitioner claims that the amount recovered was unreasonable, alleging that the inventory valuation should have been higher. He alleges that substantial inventory was sold for cash and not recorded, with the Respondent retaining the proceeds. They did not do a count for inventory purposes. Instead, they valued the inventory by deducting the markup (which the Petitioner said was about 100 per

cent) from the sales figures. The Respondent's evidence was that there was about $30,000 in inventory in 2006, and $26,000 when the business was first offered for sale. The Respondent's 2007 tax return shows a closing inventory of $26,221.68. Noting that the entire business was sold shortly thereafter for $9,100.00, the Petitioner alleges that the Respondent sold off a considerable amount of stock and equipment for cash.

[9] The Respondent said the Petitioner told her not to do an inventory because it could be determined by calculating the purchase price percentage. She said her sister conducted an inventory for 2006, which was the first actual inventory to be done. The value of the inventory was substantially diminished at the time the business was sold.

ISSUES

[10] The issues for determination, as defined by the parties in post-trial submissions, are the following: (1) custody and access; (2) child support; (3) the Petitioner's obligations under various provisions of the marriage contract; and (4) the disposition of certain debt and financial obligations.

DIVORCE

[11] The Petitioner filed a Petition for Divorce on March 28, 2007. The respondent filed an Answer and Counter-Petition on April 10, 2007. The Petitioner filed an Amended Petition on April 10, 2007, in which he sought joint custody with primary residence to be with him. Both parties sought a divorce on the basis that they had been living separate and apart since February 2007, and would have been living separate and apart for at least one year immediately preceding the determination of the divorce. I am satisfied that this is the case, and the divorce is granted pursuant to s. 8(1) of the *Divorce Act*.

CUSTODY AND ACCESS

[12] On filing the petition for divorce, the Petitioner initially did not seek custody, only access. He amended the petition to seek custody because, in his view, the Respondent's care of the children became problematic. The Respondent says her evidence shows that she is more acquainted with the children and their interests and activities than the Petitioner is, and she notes that he did not originally object to her having primary care. She says there is no evidence that it would not be in the children's best interests to remain in her primary care.

[13] Isabel Whynacht was the children's caregiver while the parties were married. The evidence shows that Ms. Whynacht was very involved with the children during the parties' marriage, and that both parties relied on her for child care at that time. It is also clear that the Respondent continued to leave the

children in Ms. Whynacht's care at times after separation, and that the Petitioner continues to rely on Ms. Whynacht for child care.

[14] Custody is currently structured pursuant to Justice Hood's interim order of 2007. The parties currently have joint custody, with the Respondent having day-to-day care and control of the children while the Petitioner has access. In May 2008 the Petitioner sought an order preventing the Respondent from relocating the children to New Brunswick. MacLellan, J. declined to make such an order, in part because custody and access were to be dealt with at trial. MacLellan, J. noted that it would be open to the trial judge to require the Respondent to remain in Nova Scotia if she sought primary care.

[15] While the respondent has interim primary care of the children, this does not determine the result at trial. The trial judge is not bound by the interim order and has unfettered discretion to re-examine the facts: *R.G.N. v. M.J.N.*, [2003] N.S.J. No. 192 (C.A.), at paras. 15-16. The test to be applied in determining an appropriate disposition of custody and access is the "best interests of the child." Goodfellow, J. discussed several considerations relevant to this analysis in *Foley v. Foley*, [1993] N.S.J. No. 347 (S.C.), at paras. 16-20:

> ... [T]here has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:

1. Statutory direction *Divorce Act* 16(8) and 16(9), 17(5) and 17(6);

2. Physical environment:

3. Discipline;

4. Role model;

5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists-psychiatrists- etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child:

10. The physical and character development of the child by such things as participation in sports:

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child.

13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The Divorce Act s. 16(10) and s. 17(9);

15. The interim and long range plan for the welfare of the children.

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and

17. Any other relevant factors.

The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question.

With whom would the best interest and welfare of the child be most likely achieved?

The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

Nevertheless, some of the factors generally do not carry too much, if any, weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial

> contribution is to the welfare of that child, there would not likely be any real appreciation of such until long after the maturity of the child makes the question of custody [moot].
>
> On the other hand, underlying many of the other relevant factors is the parent making herself or, himself available to the child. The act of being there is often crucial to the development and welfare of the child.

[16] The parties agree that *Foley* states the relevant law. Several of the more relevant considerations in the present case include the following:

[17] *Availability.* The Petitioner says the Respondent did not make herself as available as she could have after separation, regularly leaving the children in the care of Ms. Whynacht before moving to New Brunswick. She confirmed in cross-examination that she would sometimes leave the children in Ms. Whynacht's care in order to spend time with her new boyfriend (now partner), usually on weekends. By contrast, the Petitioner says he has reduced his working time to a four-day week and brought on an associate. The Respondent is a full-time student, attending classes and doing school work when not in class, without (he says) an adequate child care support system.

[18] I am not persuaded that the evidence supports a conclusion that the Respondent, as a full-time student, is in a substantially worse position with respect to availability than the Petitioner, who works full-time or virtually full-time (albeit with the assistance of an associate) and runs his own business. Either party will be required to depend on third-party child care to some degree, whether it be Ms. Whynacht or a day care centre.

[19] *Extended family*. The Petitioner says the respondent has no extended family in Moncton, whereas he has a network of possible care providers in New Glasgow, including Ms. Whynacht, who he described as being "like a grandmother." The Respondent objects to continued reliance on Ms. Whynacht, complaining of her "smoking despite being repeatedly warned against it, recurrent lice infections ... and unsavoury and dangerous neighbours who frequent her premises," as well as the lack of the type of oversight to which a day care centre is subject.

[20] The Petitioner says the Respondent's complaints about Ms. Whynacht only arose after separation, and points out that she had no difficulty relying on her during the marriage and initially after separation. He denies that the children could have contracted lice in her home. He says the Respondent's "attempt to distance herself from Ms. Whynacht and create 'issues' was nothing more than an attempt to cast doubt on Ms. Whynacht's abilities to care for the children," and notes that even after raising the complaints, she left the children in Ms. Whynacht's care. I make no findings with respect to the Respondent's complaints, observing only that both parties have been satisfied to rely on Ms. Whynacht's child care in the past. Certainly, the Respondent did not raise any concern when they spent time with Ms. Whynacht on the weekends when he is exercising access, apart from the "lice" issue.

[21] The Petitioner argues that the children do not have a local “safety net” in Moncton if the Respondent becomes ill. If one (or more) of the children become ill, she will have to miss school. Their grandfather and most of their extended family, however, are in New Glasgow. The Respondent’s mother and sister live in Saint John. He claimed that the Respondent never had a close relationship with her mother; there was, however, evidence that the Respondent’s mother was of assistance when Josh was in hospital. The Respondent questions the Petitioner’s claim that he has more family support available, suggesting that while he has relatives in the area, the extent of their actual involvement with the children is unclear. I agree with the Respondent’s view that Ms. Whynacht is likely to be the most prominent third party to care for the children if the Petitioner has primary care.

[22] The Petitioner agreed that Josh is a stepbrother to Ben and Lauren. When they were living in New Glasgow they would frequently share a bedroom and even sometimes share a bed. After separation, he would sometimes take Josh at the same time he was taking the other children for the weekend. However he did not continue this practice. He claims that Josh is welcome in his home and that he is part of his life. The Petitioner said he has not consulted any counselor about the effect of a separation of the children upon Josh if he was granted primary care of the children of the marriage.

[23] *Discipline*. The Respondent makes various criticisms of the Petitioner’s care of the children. Among these are inadequate supervision, such as failing to see that

they do homework and failing to keep to their bedtime routine. He also claimed that she did not always pick the children up from school on time. The Petitioner suggested he was stricter, and that the children respected him and acted appropriately with him. He claimed that the children had the run of the house after separation, and referred to several incidents, such as a light fixture being pulled down and the bathroom being flooded, apparently while the respondent was watching television. I am somewhat skeptical as to whether these complaints reflect any large-scale indiscipline arising from the children living with their mother. I am satisfied on the evidence that the children are generally supervised in a responsible manner in both households, if not to a standard of perfection. A finding of strict discipline is not synonymous with good parenting.

[24] *The move to New Brunswick.* The Respondent is enrolled as a full-time student in a Licensed Practical Nursing Program in Moncton. The Petitioner takes the position that she should have waited for a position in a Practical Nursing course in Nova Scotia. He says her "decision to uproot the children and move to Moncton in 2008 with no connection to Moncton other than her new partner, was nothing other than an attempt to get out of New Glasgow."

[25] The Petitioner said the Respondent did not advise him until the late spring of 2008 that she was on a waiting list for the Practical Nursing course at the Nova Scotia Community College Stellarton campus. By that time she had already been accepted in Moncton. He says her decision to take her name off the Stellarton wait list "does not make sense," other than as a way to get out of New Glasgow. He

also says that it was only after becoming aware of his opposition to the move that she signed a lease in Moncton, prior to the hearing before Justice MacLellan in July 2008.

[26] The Petitioner maintains that as late as July 25, 2008, the Respondent, after having taken her name off the waitlist, could have reapplied and been admitted to the NSCC Practical Nursing course in Stellarton. According to an e-mail from the Director of Admissions, a person who received the waiting list letter that the Respondent received would have been offered a place in the Pictou section on June 3. There was no waiting list for the Pictou Practical Nursing section, and there were openings as late as July 23, 2008. I am not prepared to put much weight in an e-mail to counsel from the admissions director, regarding a theoretical situation described by the Petitioner's counsel, as evidence of the Respondent's state of mind when she decided to enroll in the New Brunswick course.

[27] The Petitioner says the Respondent's motive for moving to Moncton was to be closer to her partner. Noting the increased expenses of attending the program in Moncton, he says the decision "flies in the face of practicality and in the best interest of the children." He takes the position that signing the lease in Moncton, with the knowledge that he was challenging the move in court, and with the knowledge that the option existed to attend school in New Glasgow, indicates that she was attempting to establish a connection to Moncton and thereby make it more difficult for the court to deny her the right to move there with the children.

[28] As to the Petitioner's claim that her relocation with the children to Moncton was done for reasons that were not *bona fide*, the Respondent submits that the petitioner is in no position to make such a complaint after failing to pass on information regarding an opening in Pictou, which "might have precluded the respondent's relocation...." In other words, the Respondent says she did not know about the possibility of a place in Pictou until after she moved. She says she remained on a Nova Scotia waiting list for two months after being accepted in New Brunswick, indicating, she submits, that the relocation "was not precipitous or surreptitious, or designed solely to thwart access." In addition, she says, she waited until the school year was over to move, in order to give the children a chance to settle in before the new school year started.

[29] The Respondent denies that the motivation for her move to Moncton is to be closer to her partner, stating that at the time she made the decision, she had broken off the relationship. She acknowledged that at the time she accepted the Moncton placement her interest was in the advancement of her studies and of the children, not of the Petitioner.

[30] The Petitioner also submits that the move to Moncton has been upsetting for the children. He notes specifically the Respondent's comments respecting "the way Ben is feeling" in a e-mail of October 2007, which he points to as evidence that the Respondent recognized that Ben was unhappy that he was not seeing his father enough. He adds that "this resulted in more time with Mr. MacKinnon and Ben." There does not appear to be convincing evidence that the move to Moncton

has been especially traumatic for the children, or that the children are not doing well. I do not place any weight on the Petitioner's claim that Ben was planning to run away from home because of the move to Moncton.

[31] I am prepared to accept that the Respondent was not as forthright as she might have been in keeping the Petitioner informed of how she was proceeding with the move to Moncton. Her action in signing an agreement and paying a deposit prior to the hearing before Justice MacLellan was questionable. On the other hand, I am not convinced that the move was motivated entirely by a combination of a desire to be closer to her new partner and to alienate the children from their father. I do not believe it would be reasonable to insist that the Respondent wait in the hope of obtaining a place in a Nova Scotia Practical Nursing program when she had already been accepted into a program in New Brunswick.

[32] *Financial Contribution to the children*. The Petitioner says the Respondent's return to school has left her without an independent income source. Her rent and utility costs have increased, he says, which will affect her ability to provide financially for the children. He also submits that her spending patterns demonstrate that she is poor at budgeting and prefers to spend money on herself than on providing for the children's needs.

[33] The Petitioner questioned the Respondent's ability to handle money. He said he was paying child support as well as buying groceries for Ms. Whynacht,

while the respondent did not have enough money to attend to the children's needs. He claimed that on one occasion Ben went to school without lunch or lunch money. He claimed that the children arrived for visits inadequately dressed, and that he had to buy clothing, which remained at his home for use when they were there. He claimed that despite her complaints that she could not afford adequate footwear for Josh, she was buying unnecessary household items. As with the Petitioner's attacks on the Respondent's discipline of the children, I am not convinced that these incidents lead to any general conclusions about the Respondent's financial abilities.

[34] The Respondent takes the position that upgrading her education in a field in which there are jobs available will allow her to provide more stability and income for the children, a plan that the Petitioner acknowledges to be reasonable in the long term. He suggests, however, that she had sufficient funds available in 2007, after the separation, in order to "live comfortably in the short-term until the following year to take the course in Nova Scotia in the event that she did not get accepted in Nova Scotia in the fall of 2008." These resources include the six-month rent free occupation of the home under the marriage contract, income from her store, child support and the child tax credit. I am not convinced that it would be reasonable to require the Respondent to forego a position that was available – even if it was in New Brunswick – in the hope that a place in a Nova Scotia class would come available in the future.

[35] The Petitioner also maintains (as noted earlier) that she disposed of a considerable amount of inventory and equipment for cash before selling the business, and points to certain expenditures during the year 2007 as evidence that she had ample funds. The evidence is not specific enough for me to make specific findings about how the assets of the business were disposed of. Much of this evidence appears to be concerned with creating an image of the Respondent as a profligate spender, in 2007 at least. To that extent, it is of limited assistance in determining the best interests of the children at this time. I accept that the Respondent's intention to qualify for a profession in which she is likely to be able to find employment is in the children's best interests.

[36] *Interim and long-range plans for the welfare of the children*. The Petitioner alleges that the Respondent intends to remain in Moncton after completing her education and refuses to commit to returning to new Glasgow "even though she is aware that there are nursing jobs available in New Glasgow." He says the resulting separation between himself and the children would not be in their best interests. He suggests this would be a disruption that would only benefit the Respondent, while uprooting the children (citing *Cumpson v. Templeton*, [2005] O.J. No. 257 (Ont. S.C.J.), at para. 31). He says the Respondent's decision to move to Moncton "is not in keeping with the best interests of the children and was in essence a way for her to thwart the relationship between the children and Mr. MacKinnon." He also argues that, once the Respondent is working, she will require child care, since nursing is "generally shift work." While it may well be the Respondent's

preference to live in Moncton, I am not persuaded that she is motivated by an active desire to “thwart the relationship” between the children and their father.

[37] *The Petitioner’s parenting plan*. The Petitioner proposes that the children reside primarily with him in the matrimonial home, with regular access to the Respondent. This, he says, would keep the children in the same school, with their existing friends and would maintain the connection with Ms. Whynacht. He says there is family support available, unlike in Moncton, and that, being self-employed and having hired an associate, he could adjust his schedule if necessary. He suggested that the Respondent’s routine, as a student, would make it difficult for her to spend time with the children and would limit their ability to participate in after-school or summer activities. He said that if the children were in his care, the Respondent could visit them on weekends, staying with her father in New Glasgow and keeping them off the highway.

[38] If the Respondent is to have primary care, he requests that she be required to return to New Glasgow upon completion of her education in order to retain primary care, and that access transportation be directed to be split between the parties, with him picking the children up in Moncton and the Respondent picking them up from him. The Respondent says there is no basis to depart from the general rule that the access parent bears the cost of access, particularly where the impact of such an order on her lower income could be detrimental to her ability to meet the children’s day-to-day needs. The Petitioner says the Respondent’s

decision to move unnecessarily (in his view) supports a departure from the general rule in these circumstances.

[39] In the event that the Respondent has primary care of the children, the Petitioner would request access every second weekend, as well as every summer holiday, March break, Christmas holiday and long weekend.

[40] *The Respondent's position*. The Respondent alleges that the Petitioner has repeatedly put his own concerns ahead of the children's interests. She says he refused to pay child support until ordered to do so by the Court, and that even after being ordered, he refused to pay in full and she was forced to obtain execution orders. She accuses him of conducting a campaign of "financial harassment" (including threatening eviction of her business from his building) in order to force an agreement to reduce his child support obligations, leading to the loss of her business. She also criticizes his behaviour in removing certain furniture and the SUV from her property.

[41] While acknowledging that s. 16(9) of the *Divorce Act* generally prevents consideration of "past conduct" in custody determinations, there is an exception for past conduct that is relevant to parenting ability. The Respondent submits that the Petitioner's conduct demonstrates that he is "incapable of putting the children's needs and interest[s] ahead of his own." She says he did not, for instance, say with any certainty whether his present working arrangement will persist, nor did he have

any plan for how to proceed if his associate left. The Petitioner, not surprisingly, takes a different view.

[42] The Respondent maintains that the existing custody arrangement is the "most beneficial and child centred," and that she is the parent more willing to facilitate access. She submits that if the children remain in her primary care, the Court should not oblige the Petitioner by speculating on what will be required to accord with the best interests of the children when she finishes school. She says this would amount to a preemptive ruling on a variation application that should be heard once circumstances actually change. The Petitioner says it is no more than a condition being imposed on a mobility order.

[43] I am satisfied that the children's best interests are served by maintaining primary care with the Respondent, with significant access to the Petitioner. This is not a case where the decision as to which parent should have primary care is an easy or obvious one. While I recognize that I am not bound by the interim custody arrangements, I believe there is value in maintaining the essentials of the arrangement that has existed since separation. Among other things, I believe there is value in maintaining the children's connection with the Respondent's son Josh, with whom they have always lived.

[44] I am directing the Respondent to provide the Petitioner with the relevant school schedule, timing of Christmas or other concerts and other important events such as parent teacher meetings in sufficient time for the Petitioner to attend such

events. The Respondent shall also provide the Petitioner relevant information on the medical, dental, and educational status of the children on a timely basis and shall not undertake any major medical or dental procedures without prior consultation with the Petitioner.

[45] I am also prepared to order that the Petitioner exercise access every second weekend from Friday at 3 p.m. until Sunday at 4 p.m. The parties shall split the summer school holidays, Christmas, Easter and March break, with the Petitioner having the children on Father's Day and the Respondent having them on Mother's Day. Beginning in 2009, and in every odd year after that, the Petitioner shall have priority as to which holidays he will have access, and the Respondent will have priority in even-numbered years.

[46] I will not make any prospective order about what should happen with respect to custody when the Respondent finishes her Practical Nursing program. I will say only that it will be open to the court to revisit custody at that time, on application of a party.

CHILD SUPPORT

[47] The Petitioner's position is that if he receives primary care of the children, he will waive child support while the Respondent is in school. Should she subsequently be required to pay *Guidelines* support, he proposes that those amounts be placed in an education fund. Along with custody, the Respondent

seeks child support in accordance with the *Child Support Guidelines*, with s. 7 expenses to be shared proportionately.

[48] In the interim order, Hood, J. imputed to the Petitioner an income of $93,000 and ordered him to pay *Guidelines* child support of $1262 per month, commencing May 1, 2007. Hood, J. added that "any payments made by the Petitioner from the date of separation to May 10th , 2007 towards the Respondent's car loan and car insurance shall be deemed to be credited as child support." In later correspondence to clarify the parties' understanding of the order, Hood, J. indicated that the adjustment applied to payments between May 1 and May 10, which was the date of the interim order. The Petitioner was also required to pay child care costs of $30.00 per day for four days each week. The issue of child support prior to April 12, 2007, was left to be dealt with at a later date.

[49] The Petitioner's income tax returns indicate the following for the years 2004-2007, the last three years of the marriage and the year of separation:

2004	Gross business income (line 162)	$347,838.89
	Net business income (line 135)	$133,288.40
	Total income (line 150)	$137,573.08
2005	Gross business income (line 162)	$397,207.56
	Net business income (line 135)	$152,408.49
	Total income (line 150)	$155,672.72

2006	Gross business income (line 162)	$402,061.91
	Net business income (line 135)	$68,817.36
	Total income (line 150)	$69,758.77
2007	Gross business income (line 162)	$389,885.73
	Net business income (line 135)	$59,022.42
	Total income (line 150)	$66,439.65

[50] While his business revenues increased between 2004 and 2007, the Petitioner said the cost of upgrading equipment resulted in the decline in net income, particularly in 2006. While it appears that these business expenditures have reduced the Petitioner's income, the Respondent did not challenge their appropriateness at trial, and the Petitioner provided evidence as to the specifics of these expenditures.

[51] The Petitioner submits that his income for child support purposes should be determined on the basis of the income stated in his tax returns, by adding his income after business expenses and Capital Cost Allowance (CCA) for the real property related to his business, pursuant to s. 11 of Schedule III of the Federal *Child Support Guidelines*, which provides that CCA for property includes "the spouse's deduction for an allowable capital cost allowance with respect to real property." The amount of the real property CCA is 2,187.00. He says the remainder of the CCA arises from depreciation of equipment and personal property and is deductible from his income for child support purposes: *Rudachyk v.*

Rudachyk, [1999] S.J. No. 329 (Sask. C.A.), at paras. 17-19. In *Egan v. Egan*, 2002 BCCA 275, [2002] B.C.J. No. 896 (B.C.C.A.), Prowse, J.A., for the majority, said, at paras. 24-25:

> In this case, Mr. Egan relies on s. 11 of Schedule III of the *Guidelines* as support for his submission that CCA on business assets which are not "with respect to real property" should be treated as deductible from income, just as they are on an individual's income tax return. He submits that this is the only logical inference to be derived from s. 11. As noted above, that section provides that the spouse's deduction for "an allowable capital cost allowance with respect to real property" must be "included" in income, or effectively added back into the calculation of income, for Guidelines purposes. Mr. Egan submits that it follows, by necessary inference, that CCA claimed on property other than real property may not be "included" in income when determining the payor's income for Guidelines purposes.
>
> In my view, while it is clear that "an allowable capital cost allowance with respect to real property" must be included in income under the Guidelines, it does not follow that an allowable CCA with respect to personal property is necessarily deductible from income for Guidelines purposes. (In this regard, "allowable" means allowable under the Income Tax Act.) Rather, the absence of any reference in Schedule III to CCA relating to personal property permits the Court to assess the reasonableness of the deduction of these expenses pursuant to ss. 19(1)(g) and (2) of the Guidelines. Sections 19(1)(g) and (2) make it clear that the deduction is not automatically permitted for Guidelines purposes simply because it is permitted under the Income Tax Act. Rather, the court is entitled to look at the nature and extent of the deduction claimed to determine whether it is reasonable from a Guidelines, rather than an Income Tax Act, perspective. In many cases, it may well be that deductibility under the Income Tax Act and deductibility under the Guidelines will coincide

[52] In the absence of binding authority – and none was cited – I am inclined to follow the view set out in *Egan*. I note, however, that the Respondent did not offer any evidence or specific argument about why the CCA amounts should be varied, or why any of the Petitioner’s business deductions, about which he gave evidence,

should not be accepted as legitimate deductions from his income for child support purposes. She cites *Wilcox v. Snow*, 1999 NSCA 163, in support of the argument that income tax returns are only a starting point in the determination of income for child support purposes for self-employed payors. In that case the court said, at paras. 14 and 17:

> While s. 16 of the *Guidelines* provides that a spouse's annual income is determined using the sources of income set out under the heading "Total Income" in the T1 General Form issued by Revenue Canada, that reference is clearly subject to ss. 17 to 20 of the *Guidelines*, and is also subject to being adjusted "in accordance with Schedule III":
>
> > 16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by Revenue Canada and is adjusted in accordance with Schedule III.
> >
> > ....
>
> Further, ss. 17 to 20 of the Guidelines provide for cases where the Court may determine the spouse's income other than by reference, solely, to the spouse's income tax return. Section 19(1), for example, permits the Court to impute income to a spouse in circumstances where the spouse is intentionally under employed or unemployed (s. 19(1)(a)); where it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines (s. 19(1)(d)); where the spouse has failed to provide income information when under a legal obligation to do so (s. 19(1)(f)); where the spouse unreasonably deducts expenses from income (s. 19(1)(g)).

[53] It is not disputed that there has been variation in the Petitioner's income over the past several years. Subsection 17(1) of the *Child Support Guidelines* permits the court to consider the last three years of the payor's income:

> Pattern of income
>
> 17. (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[54] The Respondent questions the credibility of the Petitioner's representations concerning his income. She says he has not provided all the information required by s. 21 of the *Guidelines*, which requires a "spouse who is served with an application for a child support order and whose income information is necessary to determine the amount of the order" to submit various documents, including tax returns, notices of assessment and business statements for the previous three years. The Petitioner maintains that he has provided the necessary documentation. With respect to credibility, the Respondent cites *Lockhart v. Lockhart*, 2008 NSSC 271, where Warner, J. said, at para. 102:

> There are many tools for assessing credibility. First is the ability to consider inconsistencies and weaknesses in the witness's evidence, including internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses. Second is the ability to

> review independent evidence that confirms or contradicts the witness' testimony. Third is the ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in 1949 in *Faryna v. Chorny* it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior. Fourth, it is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it too should be done with caution. Fifth is a special consideration that must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence.

[55] In attacking the Petitioner's credibility, the Respondent claims that during the marriage his income was always well over $100,000, and that, despite his declining annual income post-separation, his lifestyle has not changed, despite the lack of evidence that he has gone into debt or disposed of assets. She says he incurred legal fees of $65,000 and paid child support of more than $25,000 between May 2007 and December 2008. The Petitioner maintains that the decrease in his income is attributable to renovations and purchasing equipment for his business, expenses whose validity and legitimacy has not been challenged. He says he has also experienced income loss on account of time off to attend court and travelling to see the children. He says his personal debt has increased since separation, while the debts attributable to the Respondent's business have decreased.

[56] The attack by the Respondent on the Petitioner's credibility is more in the nature of presumption and innuendo than a concrete basis to question his evidence respecting his income. It would be improper to ignore the evidence proffered by the Petitioner, particularly where the Respondent did not offer any evidence to the contrary.

[57] In view of the fluctuation in the Petitioner's annual income during the marriage, the Respondent submits that his income for child support purposes should be determined by application of s. 17(1) of the *Guidelines* to average his income for 2004, 2005 and 2006, giving an income for support purposes of $127,000, and Guidelines payments of $1656 per month.

[58] I do not believe that a basis has been shown to average the Petitioner's income; the Respondent has not established that such averaging would be "fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years," in view of the source of the fluctuation being the Petitioner's investment in his business. The Petitioner's income, based on his most recent tax return, is fixed at $66,439.00, plus $2,187.00, for a total of $68,626.00.

[59] The Respondent requests that section 7 expenses for child care costs be shared proportionately. Section 7 of the *Child Support Guidelines* provides, in part:

> 7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
>
> (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
>
> ....
>
> Sharing of expense
> (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.
>
> ....
>
> Universal child care benefit
> (4) In determining the amount of an expense referred to in subsection (1), the court shall not take into account any universal child care benefit or any eligibility to claim that benefit.

[60] The Respondent's income as declared in her income tax returns for the years of the marriage are of little assistance, given the change from running the scrapbooking business to becoming a student. Her post-separation and post-business income, as set out in her Statement of Financial Information, derives mainly from child support payments. As of October 2008, she was receiving child support of $1262.00 from the Petitioner and $349.00 from Josh's father.

[61] The Respondent was also receiving $700.00 per month for the sale of the business, although there was evidence that one check had cleared. According to the agreement with Ms. Murphy, the periodic payments would be finished on March 1, 2009. Ms. Murphy's own evidence was that sales had been uneven and she was hoping for an improvement.

[62] I am satisfied that it is appropriate to divide s. 7 expenses for child care in proportion to the parties' income. For the purposes of s. 7, I find that the Respondent has no income. The Petitioner will be required to pay child care expenses for day care for Lauren, in the amount actually paid by the Respondent, net of any subsidies, benefits or income tax deductions or credits relating to the expense, as per s. 7(3) of the *Guidelines*. He will similarly be required to pay school expenses for Ben in the amount of $300.00 per year, as set out in the Respondent's Statement of Financial Information.

Overpayment

[63] Regardless of the conclusion on custody, the Petitioner seeks credit for an alleged overpayment of child support, which he says arises from an incorrect imputing of income by Hood, J. at the interim hearing. He cites *Clancey v. Clancey,* [1989] N.S.J. No. 212 (S.C.A.D.), where Matthews, J.A. said:

> The purpose of an interim order for maintenance is "to provide a reasonably acceptable solution to a difficult problem until trial", see: *Sypher v. Sypher*

> (1986), 2 R.F.L. (3d) 413 (Ont. C.A.). At trial there should be ample opportunity for the parties to lead evidence and explore the issues in detail. A trial judge may well come to a conclusion different than that contained in the interim order: such order should not fetter or influence his award. This Court has said on previous occasions that appeals from such interim orders, which are discretionary in nature, should not be encouraged. An appeal court should not vary such an order unless it is clearly wrong or if serious or substantial injustice, material injury or very great prejudice would result if it did not.

[64] The Petitioner seeks to recover overpayments of $3810.00 (2007-2008) and $2664.00 (2008-2009) on account of payments arising from the imputed income between 2007 and 2009. The Respondent says the court has no jurisdiction to overturn Justice Hood's findings of fact, that being the role of the Court of Appeal. Whether or not such jurisdiction exists – and I am not convinced that it does – I am not prepared to change the findings of Hood, J. on imputing income. The Petitioner did not appeal the decision, and I do not believe it would be appropriate to change those findings at this stage.

[65] The Petitioner also claims an overpayment on the basis that the Respondent agreed to offset $500 (owing pursuant to the order of MacLellan, J.) against rent she was required to pay for the use of space in the Petitioner's building. He refers to her email of April 15, 2007, which he says demonstrates this agreement. In that message, she wrote, "I was told that you were ordered to pay $500.00 a month for now, if you would like we could use that as rent for the store so I do not have to move it...." I am not prepared to set off child support against the rental of commercial premises. The Petitioner was obliged to pay child support by

legislation and by the marriage contract, and it is an entitlement of the children, not the recipient parent.

[66] The Petitioner also says Hood, J. allowed credits for automobile and insurance payments, which he calculates at $5583. He previously sought to offset this amount against child support, but the Respondent required payment of the full table amount. This issue will be addressed below.

ISSUES UNDER THE MARRIAGE CONTRACT

Issues respecting the matrimonial home and its contents.

[67] The marriage contract provided that if the parties had one child, the Respondent could occupy the matrimonial home for up to three months after separation. This increased to six months if they had two children. As such, the Respondent paid no rent or other expenses for six months. At that point, the Petitioner insisted that she pay rent. The Respondent attempted to negotiate an extension, but the Petitioner took the position that if she was to remain in the home, she would have to meet all of the costs associated with its use. The Petitioner claimed that the Respondent vacated the matrimonial home on August 4, 2007, without notifying him. He says she concealed the date of her move so that she could remove items to which she was not entitled. He claims that the respondent removed more furniture and other household items than necessary, contrary to para. 6(1) of the marriage contract, which states:

> [I]n the event they separate after marriage, Ms. Burge may retain whatever motor vehicle she is using exclusively and take sufficient items of household furnishings and appliances as the parties agree are necessary to set up alternate accommodations for Ms. Burge and the children, if any.

[68] The Petitioner said he requested that the Respondent return certain items to him, but she did not do so, and in fact sold some items and retained the funds, as she said on cross-examination. He says she left him without beds for Ben and Lauren, and left the house in disarray. It is evident that she is unable to return the items she has given away or sold, as she no longer has them in her possession. The Petitioner seeks return of these items followed by an equal division, or a credit for the excess items that were removed and not returned. I do not propose to attempt to place a precise value on the items that the respondent may or may not have been authorized to remove. Any estimate of the value of the contents would be no more than speculation, in the absence of reliable evidence as to the condition and value of those items. I would allow the Petitioner a nominal amount of $100.00 on account of items that were removed.

No claim for spousal support.

[69] The marriage contract includes a waiver of any claim to spousal support. Paragraph 4(g) provides:

> (g) Mr. MacKinnon and Ms. Burge agree that neither of them shall pay, or seek any periodic or lump sum support to or on behalf of the other, now or in the future regardless of any change, whether radical or not, in either of their circumstances, whether or not the change was foreseeable or in any way causally related to the marriage and in consideration of the mutual promises contained in this Agreement they release any claim they now have or may have in the future for maintenance from each other based on any Statute of Canada or Statute of the Province of Nova Scotia or any provision of common law now in effect or coming into effect in the future.

[70] As a result, the Respondent does not seek spousal support. However, she does raise issues with respect to paras. 4(b) and 4(d) of the marriage contract, by which the parties agreed that the Petitioner would support the Respondent's pursuit of further education and training and would provide an investment fund in satisfaction of any claim the respondent might have for spousal support.

Investment contributions.

[71] Para. 4(d) of the marriage contract required the petitioner to "invest a specified sum of money in the respondent's name each year:

> (d) Mr. MacKinnon and Ms. Burge acknowledge and agree that they may decide to have one more child after their marriage to one another and the decision to have more children may affect Ms. Burge's ability to work full-time when the children are infants. Mr. MacKinnon agrees that after their marriage to one another, he will invest a specified sum of money in Ms. Burge's name each year, commencing on the first wedding anniversary, and continuing on subsequent anniversaries, and Ms. Burge agrees to accept the said sum in full satisfaction of

> any and all claims she may have, including but not limited to spousal support as a result of the breakdown of her marriage to Mr. MacKinnon. The schedule of investments shall be as follows:
>
> > (i) in the first three (3) years of marriage, the sum of $3,000.00 per annum; and
> >
> > (ii) in the next three (3) years of marriage, the sum of $6,000.00 per annum.

[72] In the first three years of the marriage, the Petitioner was required to invest $3000 per year in an investment account.

[73] The Petitioner maintains that he was not required to make the investment deposits, on account of his investment in the Respondent's business. According to the Petitioner, by the end of 2006 the Respondent had accrued charges of some $30,000 on his credit card that were attributable to her business. He said he informed the Respondent that certain credit card charges she incurred in the last quarter of 2006 were to "be considered the investment he was required to make in [the respondent's] name each year." He says the parties agreed in January 2007 that his payment of the credit card debt fulfilled his investment obligation.

[74] The Respondent's evidence was that she did not recall agreeing to this arrangement. She argues that any such amendment to the marriage contract must be signed and endorsed, pursuant to para. 9, in which the parties agreed:

> that if at any time during the continuation of this Agreement the parties shall deem it necessary or expedient to make any alteration in any article, clause, matter or thing herein contained, they may do so by an Agreement signed by them and endorsed on this Agreement and all such alterations shall be adhered to and have the same force and effect as if they had originally been embodied in and formed part of this Agreement.

[75] I note also para. 2(e), by which the parties agreed that the marriage contract "shall remain valid and enforceable in the event of a separation and subsequent reconciliation, and shall not be varied, unless amended by agreement between the parties." The Petitioner acknowledged that the contract was not formally amended, but says the investment in her business, which was in her name, constituted an investment "in her name" as contemplated by para. 4(d).

[76] I am satisfied on the basis of the wording of the marriage contract that the substitute methods suggested by the Petitioner are not what was contemplated by the specific requirement to "invest a specified sum" on specified dates. The petitioner has a duty to make the payments as required by the contract.

[77] Since the parties separated before the full final year of marriage had passed, the Petitioner says the amount should be prorated over 12 months, pursuant to para. 4(e), which provides:

> Mr. MacKinnon and Ms. Burge agree that if they separate before the full year of marriage has elapsed, that the amount payable for the year they separate according to paragraph 4(c) above shall be prorated over 12 months and 1/12th of the sum paid for each month elapsed of the year up to the month of separation.

[78] I take the reference to para. 4(c) to be a typographical error. As such, I am satisfied that the investment amount for the final year of the marriage should be prorated.

Education contributions.

[79] Para. 4(b) of the marriage contract provides:

> (b) Mr. MacKinnon and Ms. Burge acknowledge and agree that Mr. MacKinnon has from the outset of their relationship indicated that he wishes for Ms. Burge to work during their marriage and to keep her income for her own financial independence, and/or to contribute to the cost of any assets which they acquire together and hold title jointly. Ms. Burge has indicated she wishes to pursue educational upgrading and further education or training to enable her to obtain better than minimum wage employment. Mr. MacKinnon strongly encourages such efforts and agrees to contribute to the cost of such educational training and upgrading to the extent he is able and provided Ms. Burge is diligently pursuing her education and training and employment. Ms. Burge will also contribute to the cost of her education to the extent she is able. The parties' respective contributions to the educational costs shall be determined by the parties before the cost is incurred each semester.

[80] The Petitioner says he refused to provide a contribution as contemplated by para. 4(b) for several reasons. He says the Respondent's claim for post-separation educational support is subsumed in the investment contribution he made during the marriage pursuant to para. 4(d). I do not agree with this submission. He goes on to argue, however, that para. 4(b) was not intended to bind him after the end of the marriage. He also says he is unable to make such a contribution, due in large part

to debts relating to the Respondent's business. The Respondent claims that most of the Petitioner's debt is, in fact, related to his own business. Finally, the Petitioner says his contribution has not been determined "before the cost is incurred each semester" as required by para. 4(b). He says he understood that the respondent intended to enroll in the Nova Scotia Community College, rather than the New Brunswick Community College, and that the Nova Scotia program would have involved lower costs and less disruption for the children. The Respondent says the agreement contains no time limit. The Petitioner is effectively asking the Court to read in a time limit.

[81] I am satisfied that the Respondent did not consult with the Petitioner about her education expenses, as required by para. 4(b). I am also satisfied that the provision was not intended to bind the parties after the marriage ended; it is not reasonable to conclude that the parties intended an indefinite commitment by the Petitioner even after the marriage ended.

The Trailblazer SUV.

[82] Under the marriage contract the parties agreed, at para. 6(l):

> [I]n the event they separate after marriage, Ms. Burge may retain whatever motor vehicle she is using exclusively and take sufficient items of household furnishings and appliances as the parties agree are necessary to set up alternate accommodations for Ms. Burge and the children, if any.

[83] The parties agreed at para. 5 to "keep their debts and liabilities separate and each shall be responsible only for those debts and liabilities which are incurred in his or her name and shall indemnify the other in relation thereto," other than debts incurred jointly, for which they would be jointly and severally liable. Pursuant to para. 6(k) they agreed that if an item of property was intended to be jointly owned, shared and subject to division upon marriage breakdown, that such intention shall be evidenced by the fact that the said real property, investment or personal property is put in both of their names."

[84] The Trailblazer SUV in question was in the name of the Petitioner and was retained by the Respondent after separation. The Petitioner continued to pay the loan and insurance payments on the vehicle. He claims that the vehicle was never in the Respondent's exclusive use and possession. He submits that the word "exclusively" in s. 6(1) should be interpreted to mean "apart from all others; only; solely ... to the exclusion of all others; without admission of others to participation..." (*Black's Law Dictionary*); "held to the exclusion of all else" (*Concise Oxford English Dictionary*, 7th edn.); and "[s]ingle; sole ... also, singly devoted" (*Yarmouth (Town) v. Vaughne Realty Ltd.* (1988), 41 M.P.L.R. 41 at 52). He claims that the Trailblazer was not used solely by the respondent, but was used

by both parties. The Petitioner points to statements by the respondent in affidavits that he says conflict as to which party was paying for the vehicle, which was always registered in his name. Relying on s. 6(k) of the marriage contract, he says this indicates that it is his property.

[85] I am not convinced that the word “exclusively” can be read in the manner advocated by the Petitioner. If this were the case, it would suggest that during the marriage, neither spouse could ever use a vehicle that was “exclusively” used by the other spouse without creating a significant implication for property division under the marriage contract. This would be an absurd result, and would render para. 6(l) virtually meaningless. I am satisfied that for the provision to have any meaning, “exclusively” must be read essentially to mean “primarily” or “predominately.” I am satisfied that, notwithstanding that the Petitioner used the vehicle on occasion, the Respondent was the primary – or, for the purposes of para. 6(l), “exclusive” – user. The fact that she did, in fact, retain the vehicle upon separation supports this conclusion.

[86] In the interim order, Hood, J. stated that “any payments made by the Petitioner from the date of separation to May 10th , 2007 towards the Respondent’s car loan and car insurance shall be deemed to be credited as child support.” In later correspondence to clarify the parties’ understanding of the order, Hood, J. indicated that the adjustment applied to payments between May 1 and May 10, which was the date of the interim order. As has been noted, I am not bound by the

interim order. A good deal of the source of the dispute over the vehicle relates to exchanges between the parties after the interim order.

[87] The Petitioner refers to an e-mail message from the Respondent's counsel to his counsel dated June 1, 2007, indicating that the Respondent was agreeable to the Petitioner keeping up the payments and deducting that amount from child support, thereby saving her from trying to "refinance the truck loan in her own name while the financial picture is still unsettled." She added that he "does still owe the 500.00 from April," but that he could use part of that amount to pay June's car payment and add the balance to the usual support cheque. In October 2007, the Respondent's counsel gave notice that the Respondent would no longer agree to deduct the car expenses from child support, indicating that the car was in the Petitioner's name and the Respondent was not responsible for the debt.

[88] The Petitioner says the Respondent was aware that she did not have exclusive use of the vehicle, as evidenced by her agreement that he could deduct the payments and insurance from child support. She later withdrew her agreement to this arrangement. The Respondent returned the Trailblazer in May 2008, the Petitioner says, after obtaining judgment for the full amount of child support "contrary to the Agreement of June 1, 2007." The Petitioner claims a credit of $5583, being the amount of automobile and insurance payments he claims he was entitled to deduct from the child support payments that were collected under execution orders.

[89] I have considered the series of exchanges about the vehicle, which mostly took the form of e-mail messages. I have also considered the marriage contract, which was agreed by the parties to govern their affairs upon divorce or separation, and was never amended.

[90] The marriage contract provides no linkage between the Respondent's entitlement to "retain" a vehicle that she was using exclusively (pursuant to para. 6(l)) and the agreement to keep debts and liabilities separate (pursuant to para. 5). It was open to the parties, in drafting the agreement, to make specific provision for transfer of title to vehicles. I am satisfied that the Respondent was entitled to retain the vehicle on separation, and that the Petitioner remained responsible for debts and liabilities in his name, which included the payments and insurance on the vehicle.

Credit cards

[91] The Petitioner seeks payment by the Respondent of credit card charges of $5,500, which he said she spent on personal items and items that were charged after the cancellation of the credit cards. The Respondent says many of the credit card purchases were business-related and were made with the Petitioner's consent. She says these were purchases made prior to the separation, but which appeared on the account after separation. The Petitioner relies to a credit card statement dated June 13, 2007, some five months post-separation, which is in the Respondent's name but which he testified was from his account. In accordance with the marriage

contract, the Respondent is responsible for debts in her name. The Petitioner is entitled to recover the amount of the purchases shown on the statement, that being $4,941.83.

FINDINGS OF FACT

[92] For the sake of clarity, I will set out certain significant findings of fact that I have reached and relied upon above. I add that his is not an exhaustive list of every factual finding made in the course of the decision:

> (1) The Petitioner is an optometrist, operating his practice in New Glasgow, with part-time offices in Antigonish and Porter's Lake. The Respondent operated a business during the marriage, which she sold about a year after separation, and is now a full-time student in a Practical Nursing course in Moncton, NB. The parties were married on March 15, 2003, after living as common-law spouses since June 2001. They signed a marriage contract prior to marrying. They separated in early 2007.
>
> (2) There are two children of the marriage: Ben, born in June 2002, and Lauren, born in May 2004. The Respondent has an older son, Josh, born in October 1999. The children are step-siblings and have always lived together.
>
> (3) The Respondent started and operated a scrapbooking business with the encouragement of the Petitioner, who provided substantial investment in the business for which he does not seek reimbursement. The business was located in a building owned by the Petitioner. After separation, the Respondent relocated the business around May 28, 2007, after the parties were unable to agree to a rental arrangement. She closed and sold the business for $9,100.00 in late 2007.

(4) Isabel Whynacht was the children's caregiver while the parties were married. She was very involved with the children, and both parties relied on her for child care. The Respondent continued to leave the children in Ms. Whynacht's care at times after separation, and that the Petitioner continues to rely on her for child care. Regardless of which party has primary care, either party will be required to depend on third-party child care to some degree, whether it be Ms. Whynacht or a day care centre.

(5) The children are generally supervised in a responsible manner in both households.

(6) After being admitted to the Practical Nursing course in New Brunswick, the Respondent signed an agreement to enter into a lease in Moncton, and paid a deposit against the rental and damage deposit, prior to the hearing before Justice MacLellan in July 2008. After receiving admission to the New Brunswick program, she eventually removed her name from the waiting list for a similar program in Stellarton, NS. The respondent was not motivated by an active desire to "thwart the relationship" between the children and their father, although it was her preference to move to Moncton.

(7) The Petitioner's income for child support purposes is $68,626.00. The Respondent has no income for child support purposes.

(8) The marriage contract provided, *inter alia*, that, in the event of divorce, the Respondent would not be entitled to spousal support. It also provided for the division of matrimonial property and stated that the Respondent would be entitled to occupy the matrimonial home for a defined period, depending on the number of children of the marriage. The contract also provided for the Petitioner to contribute to the Respondent's education costs. The marriage contract provided that the parties would keep their debts and liabilities separate.

CONCLUSION

[93] Accordingly, I make the following dispositions:

(1) The divorce is granted pursuant to s. 8(1) of the *Divorce Act*.

(2) The parties shall have joint custody of the two children of the marriage, with primary care to be with Respondent and access, as described above, to the Petitioner; I am directing the Respondent to provide the Petitioner with the relevant school schedule, timing of Christmas or other concerts and other important events such as parent/teacher meetings in sufficient time for the Petitioner to attend such events. The Respondent shall also provide the Petitioner relevant information on the medical, dental, and educational status of the children on a timely basis and shall not undertake any major medical or dental procedures without prior consultation with the Petitioner.

(3) The Petitioner's income for child support purposes is $68,626.00. The Respondent has no income for child support purposes. Section 7 expenses shall be assumed by the Petitioner as described above;

(4) The interim findings of Hood, J. imputing income to the Petitioner are not interfered with.

(5) The Petitioner is entitled to a nominal amount of $100.00 on account of items that were removed from the matrimonial home without his knowledge.

(6) The Petitioner has a duty to make investment deposits in the Respondent's name as set out in paragraph 4(d) of the marriage contract.

(7) The Petitioner is not required to contribute to the Respondent's post-separation education expenses pursuant to paragraph 4(b) of the marriage contract.

(8) The Respondent is entitled to retain the Trailblazer SUV.

(9) The Respondent is required to pay the Petitioner the credit card debt of $4,941.83.

[94] Given the mixed results, no costs will be awarded.

J.