

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Giles v. Giles, 2010 NSSC 117

Date: 20100330

Docket: 1201-062609

Registry: Halifax

Between:

John Andrew Giles

Petitioner

v.

Tanya Lynn Giles

Respondent

Judge:

The Honourable Justice Mona M. Lynch

Heard:

March 23, 24 & 25, 2010, in Halifax, Nova Scotia

Counsel:

Graydon Lally, for the Petitioner

Thomas Singleton, for the Respondent

By the Court:

Background:

[1] The mother and father met in New Brunswick when the father was attending university. The father moved back to Nova Scotia where he commenced employment and the mother followed in 1997. The couple lived together and then were married on August 21, 1998. They have two children, a boy born on April 20, 1999 and a girl born March 1, 2001.

[2] The parties do not agree on the date of separation. There was trouble in the marriage in the Fall of 2007 and the father left the matrimonial home on March 9, 2008. The mother remained in the matrimonial home. The parenting arrangement since separation has been a shared parenting arrangement.

[3] The father petitioned for divorce on April 25, 2008. There were no interim proceedings or orders. The trial was heard on March 23, 24 and 25, 2010. The divorce was granted on March 23, 2010.

Divorce:

[4] On March 23, 2010 I found that all of the jurisdictional and procedural requirements have been met to grant a divorce under the **Divorce Act, R.S.1985, c.**

3. There has been a breakdown of the marriage in that the parties have been living separate and apart for at least one year and they were living separate and apart at the commencement of the proceeding. There is no possibility of reconciliation.

Issues:

- [5]
1. What parenting arrangement is in the children's best interest?
 2. What was the date of separation?
 3. How should the matrimonial assets and debts be divided?
 4. What is the father's income?
 5. What is the appropriate amount of ongoing child support?
 6. What is the appropriate amount of spousal support payable, if any?
 7. Should there be an award of retroactive child and spousal support?

Analysis:

What parenting arrangement is in the children's best interest?

[6] The parenting arrangement since separation has been that the children spend almost equal time with the mother and the father. The father is asking that this parenting arrangement continue. The father has child care through the after-school program for the days the children are with him.

[7] The mother is asking that she have primary care of the children and that the father have the children every other weekend and one overnight through the week every second week. The mother's plan would have the children in a new child-care arrangement while she works. The mother works three twelve-hour shifts a week.

[8] The mother says that shared custody is not working. She says that the children have been and are displaying troubling behaviour when they return from their father's care. She attributes the poor behaviour to spending time with their father. The mother also contends that the communication between the mother and father is so poor that the continuation of shared custody is not an option.

[9] The **Divorce Act**, 1985 requires that I take into consideration only the best interests of the children as determined by reference to the condition, means, needs and other circumstances of the children. I am not to consider the past conduct of the parents unless it is relevant to parenting and I am to give effect to the principle that children should have as much contact with each parent as is consistent with the best interests of the children. In **Young v. Young**, [1993] 4 S.C.R. 3 the Supreme Court of Canada said at paragraphs 16-18, regarding section 16 of the **Divorce Act**:

16 First, the "best interests of the child" test is the only test. The express wording of s. 16(8) of the Divorce Act requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.

17 Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.

18 Third, s. 16(10) provides that in making an order, the court shall give effect "to the principle that a child of the marriage should have as much contact

with each spouse as is consistent with the best interests of the child." This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent. Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature, which suggests that children benefit from continued access: Michael Rutter, *Maternal Deprivation Reassessed* (1981), Benians, "Preserving Parental Contact", in *Fostering Parental Contact* (1982).

Goodfellow, J. in **Foley v. Foley** (1993), 124 N.S.R. 198 (NSSC) (paragraphs 15-19) set out a list of factors to consider in determining what is in a child's best interest. Justice Goodfellow also noted that the court must consider all relevant factors, determine with whom the best interest of the child would most likely be achieved and that the weight to be attached to any factor would vary from case to case.

[10] In this case it is clear that both parents have been and would continue to provide a suitable physical environment for the children. The mother has continued to reside in the matrimonial home and the father has lived in the same home since March 9, 2008. The children are comfortable and accustomed to both homes.

[11] The mother has concerns about the father's disciplining of the children. She has indicated that the father has not followed through with her discipline for the children when they moved from her care to the father's care. The mother also pointed to occasions when the children have called her from the father's home upset and crying over something happening in the father's home. During the trial two telephone messages were played from the daughter calling the mother's home from the father's home. In both messages the daughter was upset. In one message she was upset because her brother had taken something belonging to her and the father and the son were arguing in the background. In the second, the daughter was extremely upset and screaming. The father indicated that the children call him from their mother's home when they are upset as well and that he tried to talk to the mother so that the children would not continue to play one parent against the other.

[12] The mother asked me to infer from the phone messages that the father used inappropriate discipline with the children. While the father may have raised his voice in the phone messages, I could not help thinking "Ye without sin cast the first stone". It is safe to say that most parents have raised their voices to their children and I do not find the father's behaviour on the recordings was

inappropriate or poor parenting. The parents need to communicate better around discipline.

[13] Both parents are appropriate role models for the children. The evidence shows that both parents are very involved with the children's lives. The mother alleges that the father has not been involved with the children's extracurricular activities. She contends that the father does not take the daughter to cheerleading. The father says that the mother makes arrangements with the daughter directly to take her to cheerleading and effectively cuts him out of that activity. This is another illustration of the communication problems between the parents.

[14] The mother also says the father has only once taken the son to a hockey tournament and on that occasion only agreed at the last minute to take the son. I am satisfied by the email from the father and the hotel room confirmation that the father did not wait until the last minute to take the son to the hockey tournament. I am satisfied by the evidence that the father is very involved in the children's extracurricular activities. Both parents complain that the other has not paid his or her fair share of the children's activities.

[15] The mother is concerned about comments made by the children such as everyone hates them and that they are fat. The mother attributes these negative comments and the negative behaviour of the children to the father's parenting. The evidence did not establish that these behaviours can be blamed on the father. I am not satisfied that the father keeps the children up too late at night. I am also not satisfied that the children's behaviour is concerning enough that the parenting arrangement needs to be changed. The school reports show the son had some behavioural issues in 2008 but they improved in 2009. The daughter's report cards were consistently good.

[16] The mother also expressed concern about an incident where the son phoned 911 from the arena and another where the daughter was out on the porch at the father's home when she arrived at the father's home. The parties have very different accounts of these two events and I am not satisfied the incidents show poor parenting by the father.

[17] The most disturbing aspect of the father's behaviour impacting on the children is the fact that he did not tell the mother that the children were covered under his new medical plan in the Fall of 2009. The mother paid for expenses that

were covered under the father's plan. I was also concerned about the father's attitude regarding contribution to a dental appliance for the son. Because he did not have direct communication with the dentist regarding the need for the appliance, the father refused to contribute to the cost of the appliance. These two incidents caused the court some concern.

[18] Both parents have made use of parenting support from their extended families. Both parents have shown a willingness to facilitate contact with the other parent over the last two years, however, the mother is now seeking to significantly limit the father's time with the children.

[19] The biggest concern the mother has with continuing the shared parenting arrangement is the poor communication between the parents. The mother points to cases such as **J.R.C. v. S.J.C.** (2010) NSSC 85 for the principle that shared parenting does not work when there is an inability to communicate and cooperate. There is no doubt that communication and cooperation are both necessary and desirable in a shared parenting arrangement.

[20] Despite the communication problems, the parents in this case have had what I find to be a successful shared parenting arrangement for over two years. The children have been living virtually half-time with each parent since the parents separated. The children are accustomed to the arrangement. The children are accustomed to spending half their time with each parent. The children have two homes. The children have two loving and caring parents. Any change in custody to place the children in the primary care of one parent would be a major disruption to the children's lives. While it is not perfect, I find it is the best parenting arrangement for the children and it is in the best interests of the children that the shared parenting arrangement continue. As the Supreme Court of Canada said in **Young** the principle of maximizing contact between parents and children is the only specific factor singled out by Parliament. The current arrangement maximizes the children's time with each parent.

[21] The parenting arrangement will continue as it has been for the last two years. Each parent must put aside their bad feelings regarding the other parent and put their children's needs first. They must work out a way to communicate effectively with the other parent. They must let the other parent know of anything that will

affect the children's well being and schedule as soon as they become aware. Until trust is re-established, the primary mode of communication should be email.

[22] The other parenting provisions are:

1. Each parent will make routine and emergency decisions for the children when the children are in their care. Major decisions will be made jointly.
2. The mother will have the children for March Break in even years and the father in odd years unless otherwise agreed.
3. The father will have the children in his care from noon on December 24 until 5:00 p.m. on December 25, in even years and the mother in odd years unless otherwise agreed.
4. The remaining Christmas vacation will be shared unless otherwise agreed by the parents.
5. The mother will have the children for Easter from Thursday at 5:00 p.m. until Saturday at noon and the father will have the children in his care from Saturday at noon until Monday at 5:00 in even years and the parenting time will be the reverse in odd years unless the parents agree otherwise.
6. Each parent will be entitled to two continuous weeks of summer vacation. The mother will choose her two weeks by May 1 in even years and the father will choose his two weeks by May 1 in odd years unless otherwise agreed by the parents.
7. The parents shall accommodate the children's attendance at any special family events so that the children fully participate in these events.
8. Each parent shall both spend time with the children on the children's birthdays unless otherwise agreed by the parents.

9. The children will spend time with the mother on the mother's birthday and Mother's Day and the children will spend time with the father on the father's birthday and Father's Day unless otherwise agreed.
10. Each parent shall inform the other parent if they are taking one or both children out of the province. The parent taking the children out of the province will provide as much notice as possible and will provide an itinerary showing dates, travel arrangements, accommodations and contact information. Each parent shall sign the necessary documentation and provide the children's passports to allow the children to accompany the other parent out of the country.
11. The parent who has care of the child will accompany the child to the child's extracurricular activities or make arrangements for the other parent to accompany the child. If the other parent is not available, the parent in whose care the child is will make alternate arrangements for the child to attend his or her extracurricular activity.
12. Each parent shall ensure that the children have free telephone communication with the other parent.

What was the date of separation?

[23] The parents do not agree on the date of separation. The father says it was in the Fall of 2007 when he had satisfied himself of the mother's infidelity. He says he remained in the home and the marital bed for the sake of the children. The mother says that she continued to hope that the marriage could be salvaged until the father moved out of the matrimonial home on March 9, 2008. Either date

would satisfy the breakdown of the marriage by separation of one year to obtain a divorce. However, it is clear that the parties did not separate their financial affairs until after March 9, 2008. The date of March 9, 2008 will be used as the date of separation for determining a division of assets and debts and for support.

How should the matrimonial assets and debts be divided?

[24] The **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 requires an equal division of matrimonial assets unless an equal division would be unfair or unconscionable and the parties agree that an equal division is appropriate in this case.

Household Furnishings and Personal Property:

[25] The parties have agreed that they are not asking for a division of assets which the other party received or inherited from family members. The father has agreed that the mother can keep the property that she listed in her affidavit. The

mother has agreed that the father can retrieve some items from his family that were left in the matrimonial home that are listed in his affidavit.

[26] There are other items on the father's list that the mother indicates he already took from the home, or of which the mother indicates she has no knowledge.

These items include an antique butter churn, a potato bin, camping equipment, a three-legged table, a childhood sled and a watch and ring which belonged to the father's grandfather. The three-legged table will not be recovered by the father as the mother discarded it.

[27] I do not accept the evidence of the mother regarding the remaining disputed items. It is clear that she has not made enough of an effort to locate the items requested by the father. The mother indicated that she had no knowledge of the childhood sled but the father was able to point to the sled in the photographs provided by the appraiser.

[28] The mother's behaviour around the appraisals of personal property is concerning. Her failure to cooperate required that the appraiser attend the matrimonial home on more than one occasion. I also have concerns about the

mother's credibility regarding the appraisals. The appraiser is a professional person with no vested interest in the proceeding. I accept the appraiser's testimony that the mother indicated she was not concerned that the appraiser had to return to her home on more than one occasion since the father was paying for the appraisal.

[29] While I have concerns about the father's credibility on other matters, I accept the father's evidence in relation to the disputed items. The items are not of significant value. In most cases the value is purely sentimental. The father was clearly emotional when he testified about his grandfather's watch and ring.

[30] The mother shall have until April 15, 2010 to provide the disputed items to the father. If the items are not provided to the father on or before that date, the father shall be entitled to attend at the matrimonial home before April 30, 2010 to look for the disputed items. The parties will agree on a neutral third party to accompany the father to the matrimonial home to look for the disputed items. The children shall not be present in the matrimonial home at this time. If, after April 30, 2010, the ring and watch have not been returned to the father, the mother shall pay the amount of \$500.00 to the father as compensation.

[31] With the exception of the disputed items, the personal property will remain as it is currently divided. The values used for the household furnishings and personal property will be the values provided by the appraiser. The parties shall share the cost of the appraisals on both the real and personal property.

[32] The mother shall make all family photographs and videos available to the father so that he can make copies.

Matrimonial Home:

[33] Both parties are asking that they be able to buy the other party's interest in the matrimonial home. Section 15 of the **Matrimonial Property Act** allows the court to order title in the matrimonial home transferred to the other spouse. As Justice O'Neil said in **Goodwin v. Goodwin**, 2009 NSSC 109 at paragraph 23:

When parties can't agree on one or the other purchasing the matrimonial home, the court frequently orders that it be sold. Absent compelling or persuasive reasons as to why one or the other should be ordered to transfer his interest to the other party, this is usually the case. A compelling reason should also exist to warrant exclusive possession of the home by one or the other.

The reasons in favour of the husband keeping the matrimonial home include that he has more financial ability to purchase and maintain the home and his parents live next door to the matrimonial home. The reasons in favour of the mother include that she has horses and the barn, pasture and other facilities are at the matrimonial home. Also, the mother has been living in the matrimonial home since separation. The mother has maintained the home for herself and the children and she has made changes to the contents of the home since separation. For the last two years the matrimonial home is the home where the children live when they are with their mother. The father is settled into the home he has lived in for the past two years. The mother testified that she has arranged for financial support from her family, both to purchase and maintain the matrimonial home.

[34] I find that the mother's claim is compelling as she has lived there since separation and the children are accustomed to spending time with their mother in that home. The mother shall have 30 days to arrange the financing and purchase the father's share of the matrimonial home. If the mother is unable to make the arrangements within the 30 days, the father will have the next 30 days to arrange financing and purchase the mother's share of the matrimonial home. At the end of

60 days, if neither party has purchased the matrimonial home from the other, the house shall be listed for sale and the parties will accept all reasonable offers.

[35] The equity in the matrimonial home to be divided is the agreed value of \$355,000.00 minus the amount currently owing on the mortgage and disposition costs.

RRSPs and Bank Accounts:

[36] The RRSPs will be divided by spousal rollover after accounting for any contributions made by either party after March 9, 2008.

[37] The balance of any joint bank accounts as of March 9, 2008 shall be divided equally.

Investment Account and Line of Credit:

[38] In November of 2007, the parties refinanced the matrimonial home and opened an investment account with CIBC Wood Gundy. The amount of \$67,726.63 was placed in that account. The mother did not withdraw any money from the investment account, however the father did. The father transferred money from the investment account to pay down the line of credit. The father also maxed out the line of credit by withdrawing \$26,506.50 on November 6, 2008; \$10,482.50 on June 9, 2009 and \$4,380.00 on November 9, 2009. The mother used the line of credit after separation to a total of \$5,860.00.

[39] The father's position is that he was paying the mortgage and other matrimonial debts by the line of credit starting in February 2009 after he was dismissed from his employment. Because the money he withdrew from both the investment account and line of credit were used for matrimonial purposes he is asking that the current balance of the investment account be divided and the current amount of the line of credit be shared. The mother's position is that she did not seek interim child support or spousal support from the time of separation because the father was paying the mortgage and other matrimonial debts. She says that the father continued to receive his regular salary from his former employer until August 2009 as part of the severance package he received. Also, she says that

he had started his company in March 2009 and was earning income from the company as well.

[40] The starting amount of child support would have been over \$1,000.00 a month. For reasons set out below, I find the mother is entitled to spousal support, as such spousal support would have been paid. Both parties paid section 7 expenses for the children from separation to trial. The expenses that were paid on the matrimonial home were not just paid for the mother and children, they were paid because the father was responsible for those debts. It is also not clear that all of the money taken from the line of credit was used to pay the matrimonial expenses.

[41] I accept the mother's position that she would have pursued interim spousal and child support if she had known that she was going to be losing money from the investment account and be responsible for the full amount of the line of credit. Therefore, the amount of \$67,726.63 will be divided from the investment account and the mother will be responsible for one-half of the amount owing on the line of credit on March 10, 2008 (\$16,988.56) plus the \$5,860.00 she withdrew after

separation. The father will be responsible for paying the remainder of the line of credit.

Automobiles:

[42] It was agreed that the mother would retain the automobile in her possession along with the loan. The value of the father's car at separation, \$3500.00, will be divided.

What is the father's income?

[43] The father's line 150 income in 2008 was \$119,081.86. This was income as an employee of a company. In January 2009 the father was dismissed from his employment. In lieu of notice he received 32 weeks of pay, which took him into August 2009. The father's T-4 from employment for 2009 shows income of \$73,038.52. Also in March 2009, the father started his own company providing planning and surveying services. The father is an engineer and surveyor. The father is the sole shareholder in the company. The father projects that he will be able to take a salary of \$6000.00 a month from the company or \$72,000.00 a year.

Because the company is new, the father is not sure whether he will take compensation from the company in the form of salary or dividends.

[44] The father is also a shareholder in his father's company. When the father left the matrimonial home he moved into a house owned by his father's company. There was a lease signed in 2008 which sets out rent for the home of \$1200.00 a month. The father has not paid that rent on a regular basis. For the year 2009 he paid a total of \$2400.00 in rent.

[45] The father's credibility was seriously damaged in relation to financial issues during cross-examination in relation to the lease between himself and his father's company. The lease, dated April 15, 2008 was attached to his affidavit. On cross-examination it was clearly established that the lease did not exist at the time of the father's first discovery in October 2008. The father was evasive, misleading and untruthful on this issue. Attaching the lease to his affidavit was a clear attempt to mislead both the mother and the court. The lease was created after October 2008 and backdated to April 15, 2008.

[46] The father occupied the entire house, including the basement, from March 9, 2008 onward for a purported rent of \$1200.00 a month. When the father started his company in March of 2009 he signed another lease with his father, purporting to rent out the basement of the house for \$1500.00 a month.

[47] The father's girlfriend does the bookkeeping for the company. The father pays her \$1000.00 for that service.

[48] The mother is asking that I impute income to the father. The **Federal Child Support Guidelines**, SOR 97/175, in sections 15-19 provide for determination of income for child support purposes. In the normal case the income is determined by using the sources of income that make up line 150 in a tax return. However, that is not always the case. Sections 18 and 19 provide:

Shareholder, director or officer

18. (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

Imputing income

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

(b) the spouse is exempt from paying federal or provincial income tax;

(c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

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

(e) the spouse's property is not reasonably utilized to generate income;

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

Reasonableness of expenses

(2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

Income could be imputed in the present case for a number of reasons, including salary, payments or benefits paid to persons with whom the corporation is not dealing at arms length. Also, the unreasonable deduction of expenses from income. The list in Section 19 is not exhaustive and income can be imputed for other reasons.

[49] The Nova Scotia Court of Appeal in **Wilcox v. Snow** 1999 NSCA 163 said at paragraph 22:

In the case of a self-employed businessman, like the respondent, there is very good reason why the Court must look beyond the bare tax return to determine the self-employed businessman's income for the purposes of the Guidelines. The net business income, for income tax purposes, of a self employed businessman, is not necessarily a true reflection of his income, for the purpose of determining his ability to pay child support. The tax department may permit the self employed businessman to make certain deductions from the gross income of the business in the calculation of his net business income for income tax purposes. However, in the determination of the income of that same self employed businessman, for the purpose of assessing his ability to pay child support, those same deductions may not be reasonable.

[50] In the present case I do not find the payment of rent either for the house or the basement to be reasonable expenses. I do not believe the father that these expenses are being paid or are expected to be paid. The rent is due to a company which the father both owns shares and is the Vice-President. The father's misleading, evasive and untruthful evidence regarding the lease and the payment of rent also leads to the conclusion that the rent is not being paid. It does not make sense that the father could rent the entire house, including the basement, for \$1200.00 a month and then signs a lease a year later to rent only the basement for another \$1500.00 a month. Both of those expenses will be added into the income that father has available to pay child support.

[51] The payment for accounting services to the father's girlfriend is not as clear. I have no evidence as to the fair market value of those services. I have no information as to how many hours a month the girlfriend works on the books. She is clearly qualified to perform this service and demand a fee. The amount is not exorbitant and I will not add it into the father's income.

[52] Because the father's company is new it is difficult to determine the amount of income that he will be derive. The company has only been in existence for a

year. The father's business is seasonal and dependant on the building season. I will accept the father's estimate of \$6000.00 a month in income from the company and I will attribute \$2700.00 more a month for the rent expenses. The father's income for support purposes is \$104,400.00.

What is the appropriate amount of ongoing child support?

[53] There is a shared parenting arrangement in this case. Section 9 of the

Guidelines reads:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

(a) the amounts set out in the applicable tables for each of the spouses;

(b) the increased costs of shared custody arrangements; and

(c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

According to the Supreme Court of Canada in **Contino v. Leonelli-Contino**, 2005

SCC 65 the starting point for a shared parenting arrangement is a simple set-off

between the table amounts payable by each parent. I have not been provided with

budgets for the children from each parent. Both parents indicate that they buy the

majority of the children's clothing and school supplies. The appropriate amount of ongoing child support in this case is a simple set off. The father's income is \$104,400.00 and the mother's income is \$37,360.00. The father would pay \$1398.00 a month and the mother would pay \$546.00. The father will pay the mother \$852.00 a month for child support beginning April 1, 2010.

[54] There are many extraordinary expenses for the children. These include childcare, hockey registration for the son, cheerleading for the daughter, swimming for both children, hot lunch program, school supplies and health care costs. These costs are to be shared by the parents with the father paying 74% and the mother paying 26% of the costs. The parent who pays the expense shall provide proof of the cost and proof of payment to the other parent, and the other parent shall pay his or her share within 30 days.

[55] There is currently an outstanding bill for eye examinations and glasses for the children. The father shall submit all outstanding health claims to his insurance provider and the parents shall proportionately share the remaining cost.

[56] The father shall also pay 74% of the net amount of the dental devices for the son. The father's refusal to pay for these expenses, because he was not consulted, is not acceptable. The father shall pay this amount within 30 days.

[57] The parents will exchange income tax returns and notices of assessment annually on or before June 1. The father shall also provide the income tax return for his company. Also, because of the uncertainty as to the income the father will derive from the company and the manner which he will be paid, the father will provide the mother with a copy of the financial statements for the company on a quarterly basis for the next two years showing revenue and expenses commencing July 1, 2010.

What is the appropriate amount of spousal support payable, if any?

[58] Section 15.2(4) and (6) of the **Divorce Act** requires that I consider the following factors and objectives when determining whether a person is entitled to spousal support:

Factors

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

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

Objectives of spousal support order

(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.

[59] Justice B. MacDonald in **Shurson v. Shurson**, 2008 NSSC 264 reviews

entitlement to spousal support beginning at paragraph 9:

[9] 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.

[10] 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) and s. 17(7)(1).

[11] 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.

[12] 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.

[13] 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 have 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.

[14] 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)

[60] In the present case the mother is entitled to spousal support on both a compensatory and non-compensatory basis. The father was the primary earner

during the marriage and the mother's career and work was secondary. The father testified that after the children were born it made more sense for the mother to stay at home as day-care for the children would cost as much as she earned. The mother has worked three twelve-hour shifts a week since 2003. This allowed her the flexibility to be available for the children. Because the father was the primary earner during the marriage the mother became dependant on the father's income to maintain a certain standard of living. This was not a short marriage. The roles assumed by the parties during the marriage have disadvantaged the mother's career and she will suffer hardship as a result of the marriage breakdown. The mother should work toward economic self-sufficiency within a reasonable period of time.

[61] The **Spousal Support Advisory Guidelines** provide a range of spousal support between \$727.00 and \$1412.00 a month. I will award spousal support in the amount of \$1000.00 a month commencing April 1, 2010.

Should there be an award of retroactive child and spousal support?

[62] When dealing with the investment account and line of credit above, I determined that the father was responsible to pay expenses from the date of

separation in lieu of retroactive child and spousal support. Therefore, there will be no award of retroactive child or spousal support.

Conclusion:

- [63] (a) The children will remain in the shared custody of the parents;
- (b) The date of separation is March 9, 2010;
- (c) The assets and debts shall be divided as set out above;
- (d) The father's income for support is \$104,400.00;
- (e) The father is to pay child support to the mother in the amount of \$852.00 a month commencing April 1, 2010. The extraordinary expenses are to shared proportionately, with the father paying 74% and the mother 26%;
- (f) The father shall pay the mother \$1000.00 a month in spousal support commencing April 1, 2010;
- (g) There will be no award of retroactive child or spousal support.

Lynch, J.S.C.